

## EMPTY MANDATE OR OPPORTUNITY FOR INNOVATION? PRE-PETITION CREDIT COUNSELING AND POST-PETITION FINANCIAL MANAGEMENT EDUCATION

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It started out as a good idea: provide individuals in bankruptcy with the skills they need to restart their financial lives.<sup>1</sup> The premise was simple enough. Historically, our bankruptcy system enabled individual debtors to obtain a legal fresh start in the form of a discharge from most of their pre-petition indebtedness but, importantly, it omitted giving them the financial knowledge or insights to make better choices in the consumer financial markets after their cases were closed. The legal fresh start needed to be augmented with a financial fresh start in the form of financial literacy education.

From the get-go, in 1998, we knew that the implementation of this idea would not be easy. With almost two million people accessing the bankruptcy system annually, there had to be a high quality, low cost delivery system—one that did not take advantage of people when they were most vulnerable.<sup>2</sup> But, even more important than that, we were not sure the idea of financial literacy education for the over-indebted had merit; we did not know—empirically—whether consumer debtors would benefit from financial management instruction, particularly when they were already experiencing considerable stress. At that time, we had no way of knowing what would improve their knowledge, attitudes and behavior with respect

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<sup>1</sup> See generally KAREN GROSS, FAILURE AND FORGIVENESS (1997) (discussing moral and social justifications underlying contemporary bankruptcy law); NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT Appendix G-3.a. (1997), available at <http://govinfo.library.unt.edu/nbrc/reportcont.html> (examining benefit of including debtor education programs in amendments to Bankruptcy Code). Appendix G-3.a was prepared by Professor Karen Gross for inclusion in the Commission's Report following her submission to the Commission of a Preliminary Proposal on Debtor Education in February of 1997. *Id.* Professor Gross also testified before the House Subcommittee on Commercial and Administrative Law about the necessity of inclusion of debtor education programs in the Code. See generally *Testimony of Professor Karen Gross Regarding Debtor Education, Before the House Subcommittee on Commercial and Administrative Law*, (Mar. 12, 1998), 52 CONSUMER FIN. L.Q. REP. 180 (1998).

<sup>2</sup> In 2004, according the American Bankruptcy Institute there were about 1.6 million non-business bankruptcy petitions filed. The American Bankruptcy Institute's webpage, <http://www.abiworld.org>, and the United States Courts webpage, <http://www.uscourts.gov/bkprctstats/bankruptcystats.htm>, both provide extensive data on bankruptcy filings. In this article, we reference the number of persons accessing the bankruptcy system (nearly 2 million in 2004), rather than the number of actual petitions filed, because a good number of petitions are filed jointly by a husband and wife. As a result, counting each petition would undercount the total number of people accessing the bankruptcy system. See GROSS, FAILURE AND FORGIVENESS, *supra* note 1, at 76–77.

to money and spending. We knew that debtors were not a homogeneous group and, as a result, would have different educational needs. For example, we were sure that programmatic materials and their delivery needed to be in multiple languages. We also suspected that some debtors were seeking bankruptcy relief, not due to financial ignorance, but instead as a result of small business failure, divorce, job loss, burdensome healthcare expenses, and, thus, might not view themselves as requiring instruction in personal financial management.<sup>3</sup>

While we now know the answers to at least some of these questions and are convinced there is a place for post-petition debtor education, what emerged as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") is something radically different from what we had imagined and considered. First, BAPCPA requires that all individual debtors, subject to certain very limited exceptions,<sup>4</sup> obtain pre-bankruptcy counseling from an approved budget and credit counseling agency. Those seeking to be approved budget and credit counseling agencies need to comply with a series of statutory requirements contained in the new section 111 of the Bankruptcy Code.<sup>5</sup> If an individual debtor does not obtain a certificate from an approved budget and credit counseling agency, their case will be dismissed—unless there are no available approved providers within the judicial district, they fit within one of the narrow exceptions or they otherwise establish the presence of exigent circumstances.<sup>6</sup> The statute asserts that the counseling must be provided without regard to ability to pay,<sup>7</sup> although it is unclear how this (or any other statutory) mandate will be applied and funded.

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<sup>3</sup> To test out these issues, we set about conducting a pilot debtor education program in the Eastern District of New York. Susan Block-Lieb, Karen Gross & Richard L. Wiener, *Lessons from the Trenches: Debtor Education in Theory and Practice*, 7 FORDHAM J. CORP. & FIN. L. 503 (2002) [hereinafter *Lessons from the Trenches*] (providing description of pilot debtor program and underlying theories). About 18 months after commencement of the program, by September 2001, we had educated more than 600 consumers and had trained more than 140 debtor educators. Each step of the way, we studied our successes, noted our concerns and reported on our findings. Susan Block-Lieb, Corinne Baron-Donovan, Karen Gross & Richard Wiener, *The Coalition for Consumer Bankruptcy Debtor Education: A Report on its Pilot Program*, 21 BANKR. DEV. J. 233 (2004); Richard L. Wiener, Susan Block-Lieb, Karen Gross & Corinne Baron-Donovan, *Debtor Education, Financial Literacy, and Pending Bankruptcy Legislation*, 23 BEHAV. SCI. & L. 347 (2005).

<sup>4</sup> Disabled and incapacitated individuals may be excepted from the requirements, as may individuals in active military duty in a combat zone. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106, 119 Stat. 23, 37 (2005) [hereinafter BAPCPA] (to be codified at 11 U.S.C. § 109(h)); see also 2 COLLIER ON BANKRUPTCY ¶ 111.02 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005).

<sup>5</sup> The Executive Office of the United States Trustee ("EOUST"), the entity charged with administering this requirement, recently published an application form for those seeking to become certified as approved providers of pre-petition budget and credit counseling. These forms, and their appendices and instructions, are available at [http://www.usdoj.gov/ust/eo/bapcpa/credit\\_counseling.htm](http://www.usdoj.gov/ust/eo/bapcpa/credit_counseling.htm) [hereinafter Instructions].

<sup>6</sup> BAPCPA §§ 102, 106, 106(d) (to be codified at 11 U.S.C. §§ 109(h), 521, 707(a)(3)); see also 2 COLLIER ON BANKRUPTCY ¶ 111.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005) (stating there shall be publicly maintained list of said nonprofit budget counseling agencies).

<sup>7</sup> BAPCPA § 106 (to be codified at 11 U.S.C. § 111(c)).

In addition to this pre-filing counseling requirement, BAPCPA also requires all debtors seeking a discharge in a chapter 7 or 13 case to obtain post-filing financial management education from a provider approved by the Executive Office of the United States Trustee ("EOUST"), again, subject to certain very limited exceptions.<sup>8</sup> As with the pre-petition counseling requirement, the post-petition debtor education course and those seeking to be approved financial education providers must meet statutory requirements.<sup>9</sup> If chapter 7 and 13 debtors (other than those who fit within the limited exceptions) do not obtain a certificate evidencing completion of an approved course, their discharge will be denied.<sup>10</sup>

As with any programmatic offering, empirical assessment is key; otherwise there is no basis for determining success (assuming there is a shared understanding of what success should be). To that end, subsection (d) of section 111 requires that those providing post-filing debtor education must demonstrate that the education has been effective, suggesting the presence of some sort of empirical assessment. The Instructions for Approval as Providers of the Personal Financial Management Course ("PFM Instructions")<sup>11</sup> and the Instructions for Application for Approval as Nonprofit Budget and Credit Counseling Agency ("CC Instructions") (collectively, the "Instructions")<sup>12</sup> indicate that there must be some form of "student evaluation," a notoriously poor way of determining programmatic success.<sup>13</sup>

The primary empirical assessment provisions are housed in section 105 of BAPCPA.<sup>14</sup> This section, the importance of which has been underplayed in the discussions surrounding BAPCPA, requires the EOUST to study the effectiveness of post-filing personal financial management courses.<sup>15</sup> The statute directs the EOUST to run a pilot debtor education program in six beta sites across the country. There are several ironies involved in this study. First, the statute requires only that post-petition financial management courses be studied; it does not require data to be

<sup>8</sup> BAPCPA § 106 (to be codified at 11 U.S.C. § 111); *see* 2 COLLIER ON BANKRUPTCY ¶ 111.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005).

<sup>9</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106 119 Stat. 23, 39-41 (2005) (to be codified at 11 U.S.C. § 111); *see* 2 COLLIER ON BANKRUPTCY ¶ 111.02 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005). As with those hoping to become approved as budget and credit counseling providers, the EOUST published an application (with appendices) and accompanying instructions for those seeking to become approved debtor education course providers. *See* U.S. Dep't of Justice, [http://www.usdoj.gov/ust/eo/bapcpa/ccde/debtor\\_education.htm](http://www.usdoj.gov/ust/eo/bapcpa/ccde/debtor_education.htm).

<sup>10</sup> BAPCPA § 106 (to be codified at 11 U.S.C. § 111); *see* 2 COLLIER ON BANKRUPTCY ¶ 111.13 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005).

<sup>11</sup> *See* Instructions, *supra* note 5; *see also* BAPCPA § 106 (to be codified at 11 U.S.C. § 111(c)(3)).

<sup>12</sup> *See* Instructions, *supra* note 5; *see also* BAPCPA § 106 (to be codified at 11 U.S.C. § 111(d)).

<sup>13</sup> *See, e.g.,* John E. Jones, *Don't Smile About Smile Sheets*, May 18, 2005, <http://www.reliablesurveys.com/smilesheets.html> (analyzing industry's dislike of course evaluations, or, as they are known within industry, 'smile sheets' and providing possible alternative); *see also* <http://fie.engrng.pitt.edu/fie2003/papers/1089.pdf> (providing more complete approach to analysis involving course evaluation).

<sup>14</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 105, 119 Stat. 23, 35-36 (2005) (to be codified at 11 U.S.C. § 111).

<sup>15</sup> *Id.*

collected, retained or studied with respect to the pre-petition credit counseling mandate—a stunning omission. Second, the study of the post-filing educational courses does not commence until 270 days after BAPCPA was signed into law.<sup>16</sup> The requirements that individual debtors obtain credit counseling before filing and financial literacy education as a condition to discharge commence nearly three months before the study begins.<sup>17</sup> Thus, the pilot program and its empirical assessment commence *after* debtor education becomes mandatory; assessment of the pilot program follows within three months after the 18 month pilot program is completed. As a result, there will not be a report on the pilot debtor education project until two years after the mandatory program has become operational. Third, the pilot project is another unfunded mandate; lack of funding can only hinder the implementation and effectiveness of the study.

Without quality empirical assessment and a defined and shared sense of what is being assessed in the first instance, we are concerned. We are concerned that BAPCPA provides empty mandates, leaving existing and new industry actors opportunities for predatory practices. The statute itself provides little concrete direction on the important issues and too much detail on less significant issues.

In a perfect world it would be difficult for the EOUST to monitor the content and success of counseling and educational initiatives, but without adequate statutory guidance as to the goals of the mandates (in more than hortatory language) the task is virtually impossible to fulfill in any meaningful way. Instead, the statute directs the EOUST—in often exquisite detail—to monitor the procedure for approving providers; the statute and accompanying Instructions, focus on superficial details about the process for approving providers and the external characteristics that providers, their employees and their workspaces should display—and little else. We sympathize with the difficult tasks facing the EOUST in implementing the statutory directive, but one cannot back away from the need for clearly defined goals, either initially or as an ongoing matter.

In this essay, we lay out some of our fears about the absence of clear direction with respect to the goals of both the pre-filing credit counseling and the post-filing debtor education. We explain why we are concerned—both in terms of the players in the market and in the gaps within the statute. We also offer some recommendations that would assuage these concerns. Our hope is that the involvement of public and private actors will quell some of the issues we raise in this paper. However, without careful ongoing scrutiny of the providers of pre-petition counseling and post-petition debtor education, including the content of what they provide, it will be impossible to ensure that consumers receive unbiased,

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<sup>16</sup> *Id.* at § 105(b)(2) (to be codified at 11 U.S.C. § 111).

<sup>17</sup> As with most of the provisions of BAPCPA, the credit counseling and financial literacy mandates become effective 180 days after BAPCPA was signed into law, namely, October 17, 2005. BAPCPA § 1501(a).

low cost, high quality credit counseling and debtor education products and services. Only with careful scrutiny can the promise of these mandates be fully realized.<sup>18</sup>

# I. DELEGATION TO PRIVATE ACTORS, SOME ALREADY PROVEN TO BE PREDATORY

We start with a simple question: Why is everyone so concerned about the providers of pre-bankruptcy counseling? The answer rests in understanding the players in the credit counseling industry. BAPCPA delegates the implementation of the budget and credit counseling mandate to private (albeit non-profit) actors; while delegation may sound perfectly proper, it poses the potential for mischief since these private actors have a proven track record of manipulative marketing, conflicting loyalties and high fees. More problematically, BAPCPA provides little direction for the EOUST to follow in its efforts to monitor these private actors once they are approved. This is a key omission.

The statute similarly delegates implementation of mandatory debtor education to private actors, although importantly, to date, debtor educators have not been viewed with the same regulatory concerns. Lest one find comfort in this latter observation, many pre-bankruptcy credit counselors are seeking to provide post-filing debtor education.<sup>19</sup> Thus, the concerns about the pre-petition budget and credit counseling agencies are equally applicable to the mandate for debtor education, given how the marketplace appears to be reacting. This means that monitoring the providers of post-petition debtor education programming cannot be ignored.

The history of budget and credit counseling, as with most about the consumer finance industry, begins in earnest in the late 1960s.<sup>20</sup> As consumer credit became more widely available, credit counseling agencies emerged to assist debtors in developing budgets for paying down obligations. Credit counseling agencies

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<sup>18</sup> The Coalition for Consumer Bankruptcy Debtor Education commented to the EOUST and OMB on the post-filing debtor education requirements and PFM Instructions. Karen Gross & Susan Block-Lieb, *Comment Submission*, Aug. 12, 2005, [www.debtoeducation.org](http://www.debtoeducation.org) (follow link for "Observations on UST Forms").

<sup>19</sup> At present, the EOUST has released its initial list of approved credit counseling agencies on a state by state basis. See Coalition for Consumer Bankruptcy Debtor Education, [http://www.usdoj.gov/ust/ea/bapcpa/ccde/cc\\_approved.htm](http://www.usdoj.gov/ust/ea/bapcpa/ccde/cc_approved.htm). While a brief review of this list suggests that some of the providers are positioning themselves to provide post-filing financial management courses, the EOUST has not yet released its list of approved providers of financial management courses.

<sup>20</sup> See DEANNE LOONIN & TRAVIS PLUNKETT, CONSUMER FED'N OF AM. & NAT'L CONSUMER LAW CTR. INC., *CREDIT COUNSELING IN CRISIS: THE IMPACT ON CONSUMERS OF FUNDING CUTS, HIGHER FEES AND AGGRESSIVE NEW MARKET ENTRANTS* (2003), [www.consumerfed.org/pdfs/credit\\_counseling\\_report.pdf](http://www.consumerfed.org/pdfs/credit_counseling_report.pdf) [hereinafter LOONIN & PLUNKETT]; PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, *PROFITEERING IN A NON-PROFIT INDUSTRY: ABUSIVE PRACTICES IN CREDIT COUNSELING*, S. REP. NO. 109-55, at 4-5 (2005) [hereinafter GOVERNMENT AFFAIRS SENATE REPORT]; NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *DRAFT UNIFORM CONSUMER DEBT COUNSELING ACT* 1-6 (July 22-29, 2005), available at [www.law.upenn.edu/blj/ulc/UCDC/2005AMDraft.htm](http://www.law.upenn.edu/blj/ulc/UCDC/2005AMDraft.htm) [hereinafter REPORT ON DRAFT UNIFORM CONSUMER DEBT COUNSELING ACT].

organized as non-profit entities and provided a variety of services to consumers, ranging from debt management plans (through which agencies intermediated repayment agreements among consumer borrowers and their lenders), credit counseling, budget development, and financial literacy education. Some lenders viewed credit counseling agencies as "soft collection" mechanisms and, on this basis, provided funding. Their non-profit status assisted credit counseling agencies in raising funds from lenders because donations to non-profit agencies are tax deductible. Non-profit status also provided comfort to consumers, who might not have trusted budgeting advice coming directly from a credit card issuer, credit union or local bank; consumers often confused "non-profit" status for "public minded" focus.

Over time, some credit counseling agencies earned consumer advocates' criticism because they steered debtors into debt management plans through which some, but by no means all, of the debtor's creditors were repaid. Consumer advocates complained that less-than-full debt management plans ("DMPs") permitted debtors to dig out from only a portion of their debt, leaving other creditors unpaid and eager to enforce their state law collection rights against an unsuspecting debtor. These credit counseling agencies and their consumer finance industry patrons defended less-than-full repayment plans as justified by the fact that not all creditors had contributed to credit counseling agencies' overhead; consumers' payments to lenders should, it was argued, account for creditors' "fair share" of an agency's administrative costs, otherwise creditors who had not contributed to the non-profit agency would reap all the benefits and none of the expenses of a DMP.

More recently, the "fair share" debate has been over-shadowed by concerns about fundamental changes in the credit counseling industry. New participants have created a market for budget and credit counseling that looks to retain the tax and marketing benefits of their non-profit status but streamlines the "services" provided to their consumer clientele. Rather than provide consumers with a broad range of educational and counseling services, this new breed of credit counseling agency focuses nearly exclusively on steering borrowers into debt management plans in return for high fees.

A 2003 Report jointly published by the Consumer Federation of America ("CFA") and National Consumer Law Center ("NCLC") describes the marketplace for budget and credit counseling as an industry in turmoil during the past 15 years.<sup>21</sup> While historically credit counseling agencies received substantial funding from the consumer finance industry, in recent years many of these funding sources dried up. The NCLC/CFA Report explains this as the result of the emergence of a more aggressive counseling agency. It also reports a corresponding increase in consumer complaints about deceptive marketing, high pressure sales efforts, high fees and practices inconsistent with the best interests of their consumer customers.

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<sup>21</sup> See LOONIN & PLUNKETT, *supra* note 20, at 1–2.

The NCLC/CFA Report describes problems adversely affecting consumer who sought "representation" by these more aggressive counseling agencies. It identifies the following problems:

- **Deceptive and Misleading Practices.** Complaints and government investigations have focused on agencies that do not make consumers' payments on time, that deceptively claim that fees are voluntary, and that do not adequately disclose fees to potential clients . . . .<sup>22</sup>
- **Excessive Costs.** In an industry that rarely charged for counseling and other services a decade ago, most agencies now charge fees to set up a Debt Management Program (a debt consolidation plan known as a "DMP") and to maintain it on a monthly basis. Some agencies charge as much as a full month's consolidated payment—usually hundreds of dollars—simply to establish an account.<sup>23</sup>
- **Abuse of Non-Profit Status.** Some "non-profit" credit counseling agencies are increasingly performing like profit-making enterprises. Nearly every agency in the industry has non-profit, tax-exempt status. Nevertheless, some of these agencies function as virtual for-profit businesses, aggressively advertising and selling DMPs and a range of related services, maintaining close ties to for-profit firms, reaping high revenues and paying their executives salaries that are much higher than average for the non-profit sector. A survey of Internal Revenue Service (IRS) tax reports on non-profit organizations found numerous examples of lavish executive compensation and apparent windfall revenues. For example, American Consumer Credit Counseling reported paying its president in 2000 a salary of \$462,350 plus just over \$130,000 in benefits. In that same year, Cambridge Credit Counseling reported a net financial gain of about \$7.3 million. In short, some agencies may be in violation of IRS rules governing eligibility for tax-exempt status. Credit counseling organizations should not qualify as non-profit corporations under IRS rules if they are organized or operated to benefit individuals associated with the corporation or if

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<sup>22</sup> Press Release, Nat'l Consumer Law Ctr. Inc. & Consumer Fedn of Am., First-Ever Study of Credit Counseling Finds High Fees, Bad Advice and Other Abuses by New Breed of "Non-Profit" Agencies (April 9, 2003)[hereinafter NCLC/CFA Press Release], available at <http://www.consumerfed.org/releases2.cfm?filename=040903ccreport.txt>.

<sup>23</sup> *Id.*

they are not operated exclusively to accomplish charitable or educational purposes.<sup>24</sup>

- **No Options Other Than Debt Consolidation.** Traditional credit counseling agencies offered a range of services, including financial and budget counseling and community education, as well as DMPs. Newer agencies, in contrast, often funnel consumers only into DMPs, even if they will not benefit. Educational options, such as debt counseling, are disappearing fast.<sup>25</sup>

These are but some of the problems identified in the report.

Complaints about the credit counseling industry come from a broad range of sources, not limited to the CFA and NCLC. For example, the Better Business Bureau reported in 2002 that complaints about credit counseling agencies nationwide had increased to 1,480, up from 261 in 1998.<sup>26</sup> The Federal Trade Commission ("FTC") brought high profile complaints against several of the most egregious industry actors.<sup>27</sup> These lawsuits ultimately resulted in closing down a few of the most offensive credit counseling providers.<sup>28</sup> But the FTC has no jurisdiction to pierce through or revoke a credit counseling agency's non-profit status; that issue resides squarely within the jurisdiction of the Internal Revenue Service.

Consumers and consumer advocates also complained to the Internal Revenue Service, questioning why the IRS had not more vigorously investigated the continued non-profit status of the most predatory of these actors.<sup>29</sup> As a result, the IRS scrutinized the non-profit status of a number of credit counseling agencies and revoked several agencies' non-profit charters,<sup>30</sup> but this effort was viewed by many

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 5 n.6.

<sup>27</sup> Press Release, Fed. Trade Comm'n, FTC Targets Major Do Not Call Registry Violator Peddling Bogus Debt Management Services (July 29, 2004), available at [www.ftc.gov/opa/2004/07/dmfs.htm](http://www.ftc.gov/opa/2004/07/dmfs.htm).

<sup>28</sup> Press Release, Fed. Trade Comm'n, Debt Services Operations Settle FTC Charges (March 30, 2005), available at [www.ftc.gov/opa/2005/03/creditcounsel.htm](http://www.ftc.gov/opa/2005/03/creditcounsel.htm).

<sup>29</sup> The complaint was not that credit counseling agencies should never receive non-profit status, but only that those agencies that did not provide credit counseling, financial literacy education or other community services should not be so certified. The complaint was that the most predatory agencies, which existed to steer consumers into DMPs whether or not they were viable, were clearly not entitled to the tax or other benefits inuring to non-profit status. The distinction is an important one because some agencies have always provided financial literacy education in the context of credit counseling.

<sup>30</sup> See Debra Cowen & Debra Kowecki, *Credit Counseling Organizations*, 2004 EO CPE Text, available at <http://www.irs.gov/pub/irs-tege/eotpic04.pdf>; Fact Sheet, Internal Revenue Service, IRS Takes Steps to Ensure Credit Counseling Organizations Comply with Requirements for Tax Exempt Status (Oct. 2003), available at <http://www.irs.gov/newsroom/article/0,,id=114575,00.html> (articulating concerns of IRS regarding non-profit status of counseling agencies and announcing intention of investigating existing qualified organizations).



as too little and too late.<sup>31</sup> Thousands of counseling agencies enjoy non-profit status; the burden of investigating each non-profit counseling agency caused the IRS to move slowly in its investigations. Since the IRS ramped up its investigation of the credit counseling industry, some non-profit credit counseling agencies began (and in some cases recommenced) providing financial literacy education to their clients to demonstrate their entitlement to non-profit status. However, this resurgence of programs raises concerns of the quality of the education that debtors would be receiving if the programs are created simply to preserve tax status.

These complaints seemed to jumpstart federal interest in the issue. Both the IRS and FTC stepped up both their regulatory oversight of credit counseling agencies<sup>32</sup> and the educational materials provided by these agencies to consumers.<sup>33</sup> But consumer advocacy groups continued to complain that these efforts, while laudatory, were still insufficient to regulate an industry in grave need of oversight.<sup>34</sup> Critics argued that FTC and IRS investigations, while important, scrutinized only a handful of actors, leaving other predatory counseling agencies free to ply their trade.<sup>35</sup> They also noted that state regulation of credit counseling agencies varied substantially from state to state, suffering in the most protective states from a lack of funding and in the least protective states from a lack of interest in taking on well-heeled industry actors.<sup>36</sup> Efforts have been made to bring needed uniformity to this area of the law. But while the National Conference of Commissioners on Uniform State Laws ("NCCUSL") recently promulgated its Uniform Consumer Debt Counseling Act,<sup>37</sup> it remains to be seen whether states will adopt its provisions.

Congress got involved in this debate. The Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs ("Government Affairs Subcommittee") held hearings,<sup>38</sup> in which it heard

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<sup>31</sup> DEANNE LOONIN, NAT'L CONSUMER LAW CTR. INC., CREDIT COUNSELING IN CRISIS UPDATE: POOR COMPLIANCE AND WEAK ENFORCEMENT UNDERMINE LAWS GOVERNING CREDIT COUNSELING AGENCIES (Nov. 2004), [www.consumerlaw.org/initiatives/credit\\_counseling/content/cc\\_enforcement.pdf](http://www.consumerlaw.org/initiatives/credit_counseling/content/cc_enforcement.pdf).

<sup>32</sup> Press Release, Internal Revenue Service, IRS, FTC and State Regulators Urge Care When Seeking Help from Credit Counseling Organizations (Oct. 14, 2003), *available at* [www.ftc.gov/opa/2003/10/ftcirs.htm](http://www.ftc.gov/opa/2003/10/ftcirs.htm).

<sup>33</sup> For example, the FTC website contains several consumer alerts on the topic of credit counseling and credit repair. *See, e.g., For People on Debt Management Plans: A Must-Do List*, FTC FACTS FOR CONSUMERS, March 2005, <http://www.ftc.gov/bcp/online/pubs/credit/debt.pdf>; *Knee Deep in Debt*, FTC FACTS FOR CONSUMERS, Nov. 2003, <http://www.ftc.gov/bcp/online/pubs/credit/kneedeep.pdf>; *see also* [www.irs.gov](http://www.irs.gov) (providing continually updated information).

<sup>34</sup> *See, e.g.,* LOONIN, *supra* note 31, at 5–11.

<sup>35</sup> *Id.* at 10–11.

<sup>36</sup> *See id.* at 8, 11 (finding six of eight states in survey had not rejected applications for licensure or registration, demonstrating poor enforcement record attributable to scant resources).

<sup>37</sup> *See* REPORT ON DRAFT UNIFORM CONSUMER DEBT COUNSELING ACT, *supra* note 20, at 3.

<sup>38</sup> *See Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling: Hearing Before the S. Subcomm. on Investigations*, 108th Cong. (2004) [hereinafter *Government Affairs Hearings*]. The House Committee on Ways and Means also held hearings on the tax exempt sector, including members of the American Association of Debt Management, the Association of Independent Consumer Credit Counseling Agencies and others testified. *See An Overview of the Tax-Exempt Sector, Hearing Before the H. Comm. on Ways and Means*, 109th Cong. (April 20, 2005).

testimony from, not only industry representatives,<sup>39</sup> but also from the IRS,<sup>40</sup> the FTC,<sup>41</sup> and consumers harmed by predatory counseling agencies.<sup>42</sup> On April 13, 2005, the Government Affairs Subcommittee issued a report strongly criticizing the industry and calling for increased scrutiny by the IRS, the FTC, state regulatory actors and consumer gadflies.<sup>43</sup>

And then what happened? With the Orwellian irony we find typical of BAPCPA, four days after the Subcommittee issued a Report concluding that "[c]learly, something is wrong with the credit counseling industry"<sup>44</sup> Congress rewarded that industry by mandating that every consumer debtor accessing the bankruptcy system receive budget and credit counseling from budget and credit counseling agencies who are certified by the EOUST as "approved providers."<sup>45</sup> Compounding the situation, the EOUST recently promulgated Instructions virtually requiring "approved providers" of budget and credit counseling to be certified by one of several professional associations in the credit counseling industry.<sup>46</sup>

While it might appear to be wise for the EOUST to view the certification by these professional associations as important to its decision to approve an agency as a provider of pre-filing credit counseling, certification alone is not the sine qua non of excellence. The many professional associations are by no means indistinguishable. One of these associations has represented industry actors since the industry emerged. Another was newly chartered in the last several years and, because it is so new, has only a very limited track record.<sup>47</sup> Agencies approved by the professional associations are also known to be quite variable; some are excellent, but others are not. And while some of these associations mandate that their members follow codes of conduct that have been viewed favorably by consumer advocates as likely to curb predatory practices in the industry, not all do

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<sup>39</sup> See Government Affairs Hearings, *supra* note 38, at 32, 34–65 (testimony from corporate officers from AmeriDebt, Inc., Cambridge Credit Counseling Corp., American Financial solutions, FamilyMeans Consumer Credit counseling Service, Debtworks, Inc., The Ballenger Group LLC, and Amerix Corporation).

<sup>40</sup> See *id.* at 78 (testimony of The Hon. Mark W. Everson, Commissioner, Internal Revenue Service, Washington, D.C.) (outlining enforcement priorities for IRS in combating "corrosive activity by corporations, high-income individual taxpayers, and other contributors to the tax gap . . .").

<sup>41</sup> See *id.* at 81 (testimony of The Hon. Thomas B. Leary, Commissioner, Federal Trade Commission, Washington, D.C.) (noting efforts on part of IRS, state regulatory and FTC in educating consumers to spot fraud within credit counseling industry).

<sup>42</sup> See *id.* at 12 (testimony of Raymond Schuck, victim, Cambridge Credit Counseling, Inc., Lima, Ohio) (describing dealings with and misplaced trust in Cambridge Credit Counseling).

<sup>43</sup> See GOVERNMENT AFFAIRS SENATE REPORT, *supra* note 20, at 1 (detailing investigation of credit counseling agencies and relationship between those agencies and for-profit service providers).

<sup>44</sup> *Id.* at 4.

<sup>45</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106(e)(1), 119 Stat. 23, 39–41 (2005) (to be codified at 11 U.S.C. § 111).

<sup>46</sup> BAPCPA § 106 (to be codified at 11 U.S.C. § 111); see also *supra* text accompanying note 5.

<sup>47</sup> The new kid on the block is the Association of Independent Consumer Credit Counseling Agencies ("AICCCA"). See AICCCA, <http://www.aiccca.org/> (providing background information of association's goals, membership opportunities and information for consumers such as links to "Code of Practice" and "standards & Best Practices" information).

so; these codes of conduct vary widely in quality and strictness. Moreover, nothing requires agencies to join the most stringent of these professional associations. Like any self-regulatory regime, this one depends on moral suasion and non-legal sanctions; but unlike the New York Stock Exchange, to name a particularly successful self-regulating association, the professional associations purporting to self-regulate credit counseling agencies are a Balkanized lot with little leverage to require members' compliance. In addition, nothing would preclude these professional associations from changing their codes of conduct. In short, the EOUST's reliance on professional organizations as a substitute for their own assessment of providers' counseling and other practices provides little comfort that approved providers will comply with the professional organizations' existing code of conduct.

Debtor educators (a smaller cadre of people to be sure) have a very different, and far less troubled, history.<sup>48</sup> First, unlike credit counseling, there is virtually no state regulation of those who provide financial literacy education. Second, the providers have tended to divide themselves into different segments, depending on whether they are providing financial education to children or adults.<sup>49</sup> For example, the Jump\$tart Coalition is largely geared to educating children about financial literacy, as is the National Council on Economic Education.<sup>50</sup> Community organizations, banks, credit unions and cooperative extension programs provide financial literacy education to adult audiences; in some instances, the education is targeted for a specific group of adults—such as education as a precursor to home ownership.<sup>51</sup> Some organizations, such as Operation Hope, have created programming for both adults and children. Third, unlike the credit counseling industry, financial literacy providers do not enjoy access to certification from professional associations, although the American Financial Counseling and Planning Education ("AFCPE") certifies financial counselors, as well as cooperative extension and military counselors and university-based financial literacy programming.<sup>52</sup> More recently, some states and the federal government have

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<sup>48</sup> See Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANK. INST. L. REV. 557, 579–81 (2001) (discussing leading education programs under chapter 13); *Lessons from the Trenches*, *supra* note 3, at 509–13 (explaining details of Pilot Project).

<sup>49</sup> For example, Shriver Poverty Law Center has been overseeing an adult financial literacy program known as Financial Links for Low Income People ("FLLIP") offered through Cooperative Extensions programs in Illinois. This program, unlike others, has been evaluated empirically.

<sup>50</sup> Both Jump\$tart and the National Council on Economic Education ("NCEE") have helpful websites. See Jump\$tart, <http://www.jumpstart.org>; NCEE, <http://www.ncee.net>.

<sup>51</sup> For example, Neighborhood Reinvestment Corporation ("NRC"), a national nonprofit organization created by Congress to provide financial support, technical assistance, and training for community-based revitalization efforts, provides this sort of targeted financial education. See NRC, <http://www.nw.org>.

<sup>52</sup> The AFCPE "is a non-profit professional organization created to promote the education and training of the professional in financial management." AFCPE, <http://www.afcpe.org> (follow certification link). It offers three certifications: Accredited Financial Counselor, Certified Housing Counselor, and Accredited Credit Counselor. See *id.*

become aficionados of financial management education. This interest led the Treasury Department to establish an Office of Financial Education,<sup>53</sup> and various states to set up task forces, committees and specialized offices addressing the need for financial literacy programming.<sup>54</sup>

Within the bankruptcy arena itself, a smattering of financial literacy programming has been offered to consumer debtors.<sup>55</sup> Some chapter 13 trustees, including those participating in a trustee-initiative known as the Trustee Education Network ("TEN"), have offered financial literacy education to their chapter 13 debtors.<sup>56</sup> Occasionally, chapter 7 trustees have also provided financial literacy education to their debtors. A handful of private attorneys offer financial management programs to their clients as a service. VISA created an educational program for consumer debtors that it marketed to trustees.<sup>57</sup>

Moreover, the Coalition for Consumer Bankruptcy Debtor Education, the non-profit entity with which both of us are affiliated, has offered financial literacy education to debtors in the Southern and Eastern Districts of New York since 2001.<sup>58</sup> And while the efficacy of the education has been questioned in some instances, there has been little concern about "consumer rip-off" or predatory practices.<sup>59</sup>

But the bona fides of debtor educators may be beside the point. As noted earlier, if the market reacts to the twin mandates in BAPCPA in the way that industry participants predict, many entities seeking EOUST approval as providers

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<sup>53</sup> In its website, the Department of Treasury describes the new Office of Financial Education as follows:

The Office works to promote access to the financial education tools that can help all Americans make wiser choices in all areas of personal financial management, with a special emphasis on saving, credit management, home ownership and retirement planning. The Office also coordinates the efforts of the Financial Literacy and Education Commission, a group chaired by the Secretary of Treasury and composed of representatives from 20 federal departments, agencies and commissions, which works to improve financial literacy and education for people throughout the United States.

Office of Domestic Finance, <http://www.treas.gov/offices/domestic-finance/financial-institution/fin-education/>.

<sup>54</sup> For example, the State of Pennsylvania has established a new financial literacy initiative. See Press Release, Governor, Commonwealth of Pa., Governor Rendell Creates Working-Families Task Force, Financial Education Office (June 3, 2004), available at <http://www.governor.state.pa.us/governor/cwp/view.asp?a=1115&q=437461>.

<sup>55</sup> See Braucher, *supra* note 48, at 557–60 (providing background on proposal to require debtor education in chapter 13 bankruptcy).

<sup>56</sup> See TEN, [http://www.nactt.com/trustee\\_education/](http://www.nactt.com/trustee_education/).

<sup>57</sup> VISA refers to this initiative as its Practical Money Skills for Life program, which it offers free to educators and others. See Practical Money Skills for Life Program, <http://www.practicalmoneyskills.com/english/index.php>.

<sup>58</sup> See *supra* note 3 and accompanying text.

<sup>59</sup> See, e.g., A. Mechele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit Focused Debtor Education May Not Work*, 32 LOY. L.A. L. REV. 945, 952–62 (1999) (questioning efficacy of debtor education programs due to structural and pragmatic limitations).

of post-petition debtor education will not come from the group of established debtor educators. Many credit counseling providers say they will seek approval, not only as providers of pre-bankruptcy credit counseling, but also as providers of post-petition debtor education. And why not? Americans love one-stop shopping. There are obvious economies of scale to a single approved provider offering both mandatory services to consumer debtors. And adding financial literacy courses to the services provided by a credit counseling agency bolsters arguments that the agency should receive (or retain) its non-profit status—a requirement for being approved by the EOUST as a provider of credit counseling. Thus, concerns about some credit counseling agencies' past predatory practices are only multiplied since these agencies may provide both counseling and debtor education.

We recognize and appreciate that there are some quality credit counseling agencies that currently provide very beneficial services. And we also assume that the EOUST (as well as the FTC, the IRS and various state regulators) will do all it can to prevent predatory credit counseling agencies from continuing to do business. However, from a consumer's perspective, it is difficult—if not impossible—to distinguish the good providers from less scrupulous ones. Even the EOUST is careful to distance itself from the conclusion that all approved agencies will provide "quality" counseling and debtor education.<sup>60</sup>

So what is a consumer to do? Given the difficulty of sorting the good from the bad and in light of a less than illustrious history, we fear that the price and content of both credit counseling and debtor education may be set by a few predatory actors who look to profit on the backs of consumer debtors on the eve of bankruptcy. And, in the absence of monitoring that is ongoing and transparent to interested third parties, there will be little opportunity to insure that consumer debtors get quality, unbiased, low cost counseling and education.

## II. THE DEVIL IS IN THE FAILURE TO DEFINE GOALS AND TAKE ON THE ISSUE OF QUALITY

In concept, both credit counseling and debtor education provide novel approaches for addressing and possibly preventing consumers' financial distress. Neither is a bad idea. We support both, in concept.

The problem is that BAPCPA fails explicitly to define the goals of either mandate. The statute is vague as to the content, indeed, the very goals, of both the pre- and post-filing requirements. As such, it is unclear what is intended to occur in these sessions. Criteria for approval of providers, while important to be sure, is not enough. These criteria are like decorative packaging. BAPCPA gives consumers

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<sup>60</sup> See Instructions, *supra* note 5, at section 15 to Appendix A (requiring any advertisement by approved providers to state they are "[A]pproved to issue certificates in compliance with the Bankruptcy Code. Approval does not endorse or assure the quality of an Agency's services . . . ."); Instructions, *supra* note 5, at section 10 to Appendix C (PFM Instructions).

an elegantly wrapped box of opportunities (complete with ribbons and ornaments), but there is little actually in the box itself, and no way to insure that it will be filled with content that is unbiased, thoughtful and low cost.

With the pre-petition credit counseling mandate, it is unclear what the counseling session should accomplish.<sup>61</sup> Newly amended section 109 of the Bankruptcy Code indicates only that a credit counseling session should "outline the opportunities for available credit counseling" and should address "related budget analysis," an "analysis of . . . financial condition, factors that caused such financial condition, and how such client can develop a plan . . . without incurring negative amortization of debt[.]"<sup>62</sup> Section 4.1 of the Instructions provides that an approved agency must "include consideration of *all* alternatives to resolve a client's credit problems . . . ."<sup>63</sup>

Despite these words, which on their face might be described as both detailed and goal oriented, the statute does not answer important questions: Is the goal of credit counseling to determine whether the debtor should enter into a debt management plan? If so, should a debt management plan address all the debtor's obligations, or only those obligations that the credit counseling agency views as "most important"—keeping in mind that some budget and credit counseling agencies have been criticized in the past for steering debtors toward repayment only of those creditors who provide financial assistance to the agency? Should the counseling session alert the debtor to the differences between a debt repayment plan outside of bankruptcy and a debt repayment plan under chapter 13? If so, does it follow that credit counseling will cross the line into the realm of practicing law, a service that every state permits only lawyers to provide?<sup>64</sup> Must debtors be advised as to all debt management alternatives, including those that are clearly unscrupulous or fraught with risk such as debt settlement plans, debt forgiveness programs and credit repair? Must debtors be apprised of all or at least some of the other debt management strategies, including specialized programs for dealing with student

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<sup>61</sup> See Richard L. Stehl, *The Failings of the Consumer Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998*, 7 AM. BANKR. INST. L. REV. 133, 147 (1999) (indicating consumer credit provisions "contain only scant specifications as to the exercises that credit counselors must undertake with their clients in order to satisfy the proposed statutory prerequisite").

<sup>62</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106(a), 119 Stat. 23, 37–38 (2005) (to be codified at 11 U.S.C. § 109 (h)). Although the statute refers to this mandate as a "briefing," the instructions published by the EOUST suggest that the average counseling session should last 90 minutes. *Id.* at 37; see also Instructions, *supra* note 5, at section 4.1.

<sup>63</sup> Instructions, *supra* note 5, at section 4.1.

<sup>64</sup> For counseling agencies who are not § 501(c)(3) non-profit corporations, any advice about whether to file for bankruptcy renders them "debt relief agencies" under BAPCPA and, thus, subject to a panoply of new regulatory obligations. See BAPCPA §§ 211(1) (to be codified at 11 U.S.C. § 101(12A)) (striking paragraph (12A)), 226(a)(3) (to be codified at 11 U.S.C. § 101(12A)) (defining debt relief agency), 227 (to be codified at 11 U.S.C. § 526) (setting forth restrictions on debt relief agencies), 228 (to be codified at U.S.C. § 527) (requiring specified disclosures to be made by debt relief agencies), 229 (to be codified at 11 U.S.C. § 528) (setting forth specific requirements for debt relief agencies).

indebtedness or healthcare debt? No doubt, there are other questions, but the point is that the statute does not provide answers to any of these basic issues, notwithstanding the seemingly detailed statutory requirements set forth in sections 109 and 111.

As to post-petition debtor education, the statute requires providers to have materials and teaching methodologies "designed to assist debtors in understanding personal financial management and that are consistent with stated objectives directly related to the goals of such instructional course."<sup>65</sup> The PFM Instructions require that debtor education courses address four substantive units: budget development, money management, wise use of credit, and consumer information.<sup>66</sup> Even with this detail, there is no definition of the goals of a course on personal financial management; identification of these goals—in essence the heart of the enterprise—is left to private providers.

On basic issues, the statute is silent: Should the course be designed to discourage the use of credit and to signal to debtors that they are overspenders and that overspending is deviant? Or should the course, instead, presume that debtors will, of necessity, re-enter the market for consumer credit after emerging from bankruptcy and endeavor to give them the tools for making wise and thoughtful credit decisions? Should the course encourage debtors to adopt specific practices, by promoting asset building or saving, for example, or should it be content rich but value neutral? Can and should the courses steer debtors into certain products and certain choices, or should the courses, instead, offer alternative approaches and encourage debtors to exercise their own best judgment as to what is in their personal best interest? Are the goals for each type of debtor the same, or can an approved provider offer different courses with different goals for different debtor audiences?

Ironically, despite the absence of detail on what really matters, there is an overabundance of specificity on other issues related to counseling and debtor education. The statute and the PFM Instructions address the need for trained personnel and adequate physical facilities in which the course will be offered. For example:

- Section 111(d)(1)(C) provides that, with respect to approved courses, there must at a minimum be "adequate facilities situated in reasonably convenient locations at which such instructional course is offered."<sup>67</sup>
- Section 5.1 of the PFM Instructions provides that facilities used by debtors must comply with "all applicable laws and regulations, including, but not limited to, the Americans with Disabilities Act

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<sup>65</sup> BAPCPA § 106(e)(1) (to be codified at 11 U.S.C. § 111(d)(1)(B)).

<sup>66</sup> See Instructions, *supra* note 5, at section 4.2 (PFM Instructions) (establishing four substantive requirements for debt education courses).

<sup>67</sup> BAPCPA § 106(e) (to be codified at 11 U.S.C. § 111(d)(1)(C)).

Accessibility Guidelines, and all federal, state, and local fire, health, safety, and occupancy laws, codes, rules and regulations.<sup>68</sup>

- An Appendix to the PFM Instructions sets forth a non-exhaustive list of elements to determine whether a facility is adequate. It asks whether the location of the course is close to public transportation, defined as a location within ½ mile of a bus stop or reasonable distance from public transportation if available in that area. The form also goes on to ask whether there is convenient parking, including parking for the physically challenged.<sup>69</sup>

There are equally detailed directions about pre-petition credit counseling providers. For example:

- Section 111(c)(1)(C) provides that the approved agency must provide for "safekeeping and payment of client funds, including an annual audit of the trust accounts and appropriate employee bonding[.]"<sup>70</sup>
- The CC Instructions contain three pages of detail on bonding,<sup>71</sup> which now permit offsets for state bonding requirements and the elimination of a formal audit and the use of a year-end financial statement. The complexity is sufficient that the EOUST provides examples of how to calculate the needed bond.<sup>72</sup>
- Section 6.4 of the CC Instructions requires agencies that offer DMPs to provide a surety bond in an amount equal to the greater of 5 percent of the Agency's prior year's disbursements from trust accounts, or \$5,000. In an apparently separate bonding mandate, the CC Instructions require the posting of an employee bond in the same amount.<sup>73</sup>
- In the new updated instructions, the bond can be replaced by other substitutes—cash, securities, insurance or letters of credit, assuming these are acceptable under applicable state law. For

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<sup>68</sup> Instructions, *supra* note 5, at section 5.1(PFM Instructions) (establishing elements for determining whether debtor education facility is adequate).

<sup>69</sup> *See id.*

<sup>70</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106, 119 Stat. 23, 39 (2005) (to be codified at 11 U.S.C. § 111(c)(1)(C)).

<sup>71</sup> *See supra* note 5 and accompanying text. After the CC Instructions were first promulgated, the EOUST reissued directions pertaining to the bonding requirement, presumably in reaction to industry complaints. EOUST, <http://www.usdoj.gov/ust/bapcpa/ccde/docs/BondingRequirements.pdf> (listing and discussing changes).

<sup>72</sup> *See supra* note 5 and accompanying text.

<sup>73</sup> *Id.*



agencies whose work will cross state lines, the calculation of the bond is even more complex.<sup>74</sup>

What is striking is the presence of detail (and perhaps too much detail also) on some issues and the absence of detail on the issues that count.<sup>75</sup>

### III. WHAT CAN AND SHOULD BE DONE

We have some concrete suggestions for how to deal with the identified issues. While these recommendations are neither a cure-all nor are a complete list of all of our ideas for improving the counseling and education process, they should provide some guidance in making the statutory mandates more meaningful. We appreciate that the effective date for BAPCPA was October 17, 2005. We also appreciate that BAPCPA is the law; none of our suggestions require statutory amendment, a notion likely fall on deaf ears. We do not, in this essay at least, recommend deleting or undermining the pre-bankruptcy or post-filing mandates. That is not the spirit in which we make these suggestions. Whether or not we agree with the new requirements, the time for that debate has passed—at least for now. What matters is insuring that the mandates are implemented and monitored in a way that maximizes their benefits for the millions of debtors who will be required to pay for them.

Our recommendations are as follows:

- The EOUST should monitor and administer the credit counseling and debtor education initiatives transparently and with the goal of providing public access to its deliberations. This would begin by making public the names and applications of those seeking to be approved budget and credit counselors or providers of financial management courses. Moreover, section 111 contemplates renewal of applications and removal if needed. These names and applications should also be publicly available. Otherwise, there will be no basis for interested third parties to assess the basis upon which providers are being initially approved and subsequently either re-approved or removed for the list. Without publicly available information, it will be difficult to ferret out bad actors, hard to police ongoing activities and impossible to determine if there has been discriminatory treatment.
- Quality matters in the provision of credit counseling and debtor education. The EOUST should not back away from the question of

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<sup>74</sup> *Id.*

<sup>75</sup> See Karen Gross, Katherine Heidt & Lois Lupica, *Legislative Messaging and Bankruptcy Law*, U. PITT L. REV. (forthcoming 2006).

content.<sup>76</sup> It should develop codes of conduct to identify best practices for both credit counseling and financial literacy education, achieved through an extensive conversation among the many participants in these fields including the professional organizations, the consumer advocates, governmental officials and others. These codes of conduct should also identify and prohibit predatory practices, such as steering consumer debtors to DMPs they clearly cannot afford. The EOUST should require all approved providers to comply with the codes of conduct it develops. Although, at present, the EOUST seems comfortable relying on industry self-regulation in the context of both counseling and education, we view this sort of blind faith in a troubled industry as misguided. Some states carefully regulate credit counselors; some professional associations require their members to follow a code of conduct identifying best practices. Despite these efforts, the EOUST should provide uniformity. There needs to be a basis for harmonizing these requirements so that consumer debtors obtain the same quality of counseling and education no matter where they live and file for bankruptcy. A well-crafted set of best practices—regardless of the professional organization to which one belongs—is the safest approach for protecting consumers. Developing that set of best practices would be a good next step for the EOUST, rather than relying so heavily on the certification of the existing professional organizations.

- As the EOUST proceeds beyond implementation of the counseling and education programs, it must do more than work on approving providers. The EOUST should monitor the quality of the content of the advice given and information provided in counseling sessions and debtor education courses. This might require the EOUST to monitor Internet briefings and telephone counseling sessions, to sit in on in-person counseling and attend debtor education classes (or at least a random sample of these) in a way that protects the privacy of the debtors in attendance.<sup>77</sup> And those doing the monitoring need some sort of criteria to assess that which they see and hear. Although the statute is silent on these

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<sup>76</sup> See *supra* note 5 and accompanying text.

<sup>77</sup> See Acknowledgement, Agreements, and Declarations in Support of Application for Approval as a NonProfit Budget and Credit Counseling Service Appendix A [hereinafter Appendix A], available at <http://www.usdoj.gov/ust/eo/bapcpa/ccde/docs/BCCApplicationAppendixA.pdf>. Section 5 of Appendix A to the CC Instructions and Section 4 of Appendix C to the PFM Instructions require applicants for provider status to agree that they "will make all records relating to the Agency's compliance with 11 U.S.C. § 111 available to the United States Trustee upon request and cooperate with the United State Trustee for any scheduled or non-scheduled on-site visits and customer service audits." *Id.*

criteria, we offer several suggestions: The EOUST should observe to determine that the information provided to consumer is unbiased. They need to assess the accuracy of the information imparted. They should determine if providers are marketing products other than the mandated services.<sup>78</sup> They should make inquiries into how and in what circumstances debtors receive recommendations to enter into DMPs and at what price.<sup>79</sup> They need to see whether consumers are being well-treated, respected and not subjected to discriminatory treatment. They need to determine whether consumers are getting value for their money.

- Consumers should be entitled to obtain sufficient information to distinguish among providers, other than simply on the basis of the price they are being charged for the mandatory services. We understand that the EOUST may impose a price ceiling for credit counseling and financial management courses. While we applaud that effort, we are also concerned that price not be the only factor regulated by the EOUST. If price is the only basis for comparison among approved providers, consumer debtors will shop for these services in the same way they shop for T-shirts, station wagons and canned peas: they'll go with the provider who charges the lowest fee. While price is important, content matters.
- Without access to information about the content of the credit counseling and debtor education services available to them, consumers will have no real basis for distinguishing between the counselor who offers services for \$50 and the one who offers services for \$48—even if one steers consumers into DMPs they can't afford and the other carefully explains all alternatives. The same is true for the financial management courses. Unless the EOUST requires approved providers to disclose to consumer more about themselves than simply the price they charge, consumer

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<sup>78</sup> See *id.* § 7. Section 7 of Appendix A to the CC Instructions requires providers to agree that "[n]o Agency owner, employee, officer, insider or related party counselor or member of the board of trustees, directors, or any other corporate governing body will receive any commissions, incentives, bonuses, or benefits (monetary or non-monetary) of any kind based on the outcome of the counseling session." See also *id.* at § 9. The Appendix also asks prospective approved providers to agree that they "will not engage in any conduct or transaction that generates or creates the appearance of generating a private benefit for any individual group." *Id.* at § 3. None of these directives prohibit cross-marketing of products.

<sup>79</sup> See *id.* § 10. Section 10 of Appendix A to the CC Instructions requires applicants to agree that "[a]ny fee, contributions, or payment received for counseling services will be reasonable in amount . . . ." But it says about any DMP that the credit counseling agency might suggest as appropriate to a consumer client, other than providers should "provide adequate credit counseling" that assesses "how such client can develop a plan to respond to the problems without incurring negative amortization of debt," and that they should "not exclude any creditor from a debt management plan because the creditor declines to make a 'fair share' contribution to the Agency." *Id.* at §§ 8, 11.

choice will be thwarted except in the most superficial of ways (advertising, website pop-ups, word of mouth).

- How could consumers be availed of this information? Consider the possibility of the EOUST providing not just a list of approved providers, but a chart of what the providers provide plus additional data to would help consumers decide among providers and services. Consider a chart that provided information about the percentage of pre-petition credit counseling agencies' clients who successfully completed DMPs, the percentage of consumers offered such plans and the average dollar amounts paid to creditors, plus an indicator as to whether all creditors participated in plans or only selected creditors. Similar charts exist in the health care arena—in New York and other states, Medicaid and other health care providers disclose a number of factors to assist clients in choosing from an array of insurance options. Healthcare providers are compared and contrasted based on the percentage of their patient base who received immunizations in a timely fashion, the percentage of pregnant women who receive pre-natal care, the timeliness of services provided—the list continues. One can imagine a similar chart that consumer debtors and their advocates could consult to determine what approved providers are actually providing.
- There is another level at which price comparisons are unregulated. While the EOUST has signaled its intent to cap the base price at which mandated services are offered, providers are not precluded from charging consumers for other "add-on" services.<sup>80</sup> In addition to written materials, ongoing programming and the like, counseling agencies that place debtors into DMPs will not have the price of that service (either the initial set-up fee or the ongoing monthly maintenance fee) capped. This opens the door to huge predatory practices. Presently, too many predatory counseling agencies charge exorbitantly high fees for DMPs that can't possibly work, and don't disclose these costs honestly to their consumer clients. Credit counseling providers should be required to disclose, not only the fee for the 90 minute session mandated by BAPCPA, but also the fees associated with entering into any DMP that might appropriately be recommended.
- There must be increased empirical study—assessing in particular the effects of credit counseling. As previously noted, there are detailed provisions with respect to the study of debtor financial management courses. There are no equivalent provisions

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<sup>80</sup> See Instructions, *supra* note 5, and accompanying text.

with respect to credit counseling, despite the fact that it is this very industry that has been the subject of numerous inquiries regarding less than scrupulous behavior. Mandating counseling for some two million people annually without studying the effect of this programming is wasting effort. How can the programming be improved and the providers monitored if there are no studies of what is being done?

- It is also critical to insure sufficient appropriations for the pilot debtor education program required by section 105 of BAPCPA. Without funding, the statutorily prescribed empirical assessment of the pilot debtor education programming will be weak. Studies do not come cheap; but failing to study the mandate may, in the long run, prove to be a much more expensive alternative.

#### CONCLUSION

As a nation, we have long objected to bait and switch in the consumer protection arena. We have long been concerned with unfair and deceptive practices that harm individuals. We have a lengthy history of caring about products fulfilling promises. Why are we willing to disregard these basic consumer protections as applied to credit counseling and debtor education?

It is not too late to ensure that consumer debtors get what they pay for in the context of both pre-bankruptcy counseling and post-filing debtor education and pay reasonable fees for the services provided to them. The concerns expressed here and the recommendations proffered are needed steps to move from an empty mandate to one filled with promise. To be sure, that movement requires money, data and focus. But, without it, all we give debtors is a nicely wrapped box without content. And an empty box is an empty promise.