DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

FINAL AGENCY ACTION
CASE NO. 2012-1

Review of Decision to Remove *Forbes & Newhard Credit Solutions, Inc.*, Agency No. 13138, From the List of Approved Non-profit Budget and Credit Counseling Agencies

Forbes & Newhard Credit Solutions, Inc. (the "Agency") seeks review of a December 30, 2011, decision removing it from the United States Trustee Program's list of approved non-profit budget and credit counseling agencies ("credit counseling agencies"). Based upon the record before me, I affirm. Additionally, pursuant to 28 C.F.R. §§ 58.17(i) and 58.27(i), I modify the decision to remove the Agency from the list of approved providers of personal financial management instructional courses ("debtor education providers").

I. Course of this Proceeding

A. Procedural Posture

On December 30, 2011, the United States Trustee Program ("Program") removed the Agency from the approved list of non-profit budget and credit counseling agencies ("Notice of Removal"). The Program based its decision on information first discovered in 2010 during a routine oversight review indicating at least one of the Agency's founders and principals received significant financial benefits from Agency monies and engaged in dishonest or deceitful conduct when asked about these expenditures.

On January 19, 2012, the Agency timely requested a review of the Notice of Removal pursuant to 28 C.F.R. § 58.17(g) ("Request for Review"). On February 14, 2012, the Program asked the Agency to provide supplemental information addressing why, based on the facts and legal analysis in the Notice of Removal, it should not also be removed from the approved list of providers of personal financial management instructional courses ("February 2012 Letter"). On March 22, 2012, the Agency submitted its response ("Supplemental Response").

Accordingly, the administrative record in this matter consists of: (1) the Notice of Removal and attached exhibits; (2) documents and records on file with the Program related to the status of the Agency as a credit counseling agency and debtor education provider; (3) the Request for Review and attached exhibits; (4) the Program's February 2012 letter to the Agency and related

email correspondence;[1/] (5) the Agency's Supplemental Response and attached exhibits; and (6) the Agency's publicly available corporate filings with the state of Missouri.

B. Quality of Service Review and Notice of Removal

Since January 15, 2009, the Agency, a non-profit corporation created in Missouri in 2008, has served as an approved credit counseling agency. It has served as an approved debtor education provider since August 11, 2009. The Agency provides in-person and telephonic credit counseling in sixty-one judicial districts[2/] and provides in-person and telephonic debtor education in sixty-two judicial districts.[3/]

Periodically, the Program supervises approved credit counseling agencies and debtor education providers through a process called a quality of service review ("QSR"). Through this routine oversight review, the Program conducts an on-site audit to confirm that an agency continues to provide the meaningful and effective services required by the Bankruptcy Code and applicable regulations. See 11 U.S.C. § 111; 28 C.F.R. §§ 58.15 et seq. On September 27, 2010, the Program provided advance notice to the Agency that it would conduct a QSR, including an on-site visit in November 2010 ("QSR Notice"). In accordance with standard practice, the Program, through the QSR notice, asked the Agency to produce various documents before and during the on-site visit and to respond to various questions. On March 3, 2011, after reviewing and analyzing information obtained during the QSR, the Program issued its initial findings letter ("Initial Findings Letter"), questioning numerous payments to Agency officers and employees, as well as unapproved changes to the debtor education course. Initial Findings Letter at 5-8, 10-12. The Agency provided three separate formal responses with supporting documentation that resolved many issues the Program identified. See Agency letter and attachments dated March 25, 2011

[1/] These emails include Agency email to Executive Office for United States Trustees ("EOUST") on February 23, 2012; EOUST email to Agency on February 28, 2012; EOUST email to Agency on May 2, 2012; Agency email to EOUST on May 3, 2012; Agency email to EOUST on June 1, 2012; and EOUST email to Agency on June 7, 2012.

[2/] The sixty-one judicial districts in which the Agency is approved to provide credit counseling include all judicial districts in: Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, Oklahoma, Pennsylvania, Puerto Rico, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin.

[3/] The sixty-two judicial districts in which the Agency is approved to provide debtor education include all judicial districts in: Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Puerto Rico, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin.

("First QSR Response"); Agency letter and attachments dated April 1, 2011 ("Second QSR Response"); and Agency letter and attachments dated June 13, 2011 ("Third QSR Response").

However, the Agency's responses did not resolve all significant issues. Consequently, on December 30, 2011, the Program removed the Agency from the list of approved credit counselors because it found:

1. The Agency violated applicable regulations requiring the avoidance of a private benefit (28 C.F.R. § 58.15(d)(5)); maintenance of an independent board (28 C.F.R. § 58.15(d)(3)(ii)); and preservation of non-profit organization status (11 U.S.C. § 111(a)(1) and 28 C.F.R. § 58.15(d)(1));

2. The Agency changed the curriculum and method of delivery of its personal financial management instructional course without the Program's prior approval, as required by 28 C.F.R. § 58.26(i)(2)(iii); and

3. Agency principals engaged in dishonest or deceitful conduct, as prohibited by 28 C.F.R. § 58.17(f)(4) and 28 C.F.R. § 58.27(f)(2).

Notice of Removal at 12-17.

The Program did not remove the Agency from the list of approved debtor education providers. Id. at 17.

C. Request for Review

The Agency currently seeks review of the removal decision for three reasons.

First, the Agency contends that information obtained during the QSR showing financial misconduct or transactions generating a private benefit was misleading or due to bookkeeper error. Request for Review at 2-4, 9-10. The Agency also asserts that it has remedied numerous deficiencies discovered during the Program's QSR, including the ability of Agency officers and employees to direct payments and disbursements to third parties. Id. at 3.

Second, the Agency contends that it notified the Program of changes to the method of delivery of debtor education by informing the Program about its DVD, and, thus, it did not believe it needed further approval to deliver the DVD's contents via YouTube. Id. at 4-5.

Finally, the Agency denies that its principals engaged in dishonest or deceitful conduct and asserts it has rectified various deficiencies that led to any appearance of such conduct. Id. at 10-11. The Agency contends that such errors do not constitute sufficient grounds for removal. Id.

D. Supplemental Response

In its Supplemental Response, the Agency asserts it would be arbitrary and capricious for the Program to modify the decision now to remove it from the list of approved debtor education providers. First, the Agency argues that it was told its fitness as a debtor education provider was not under review. Supplemental Response at 1. Second, the Agency argues that the Program has conducted no formal review of its fitness as a debtor education provider and removal, therefore, would be premature. Id. at 1. Finally, the Agency argues that removal from the list of debtor education providers would violate the Program's rules and procedures. Id. at 1.

II. Standard of Review

In reviewing this matter, I must consider two factors:

1. Does the record support the decision to remove?

2. Does the decision to remove constitute an appropriate exercise of discretion?

See 28 C.F.R. §§ 58.17(i); 58.27(i) (specifying scope of the Director's review). I may "adopt, modify, or reject the . . . removal decision." Id.

III. Analysis

A. Duties of the United States Trustee Program

With the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress requires debtors to receive credit counseling before filing for bankruptcy relief, and to obtain financial education before receiving a discharge of their debts in bankruptcy. Pub. L. No. 109-8, 119 Stat. 23, 36-42 (2005). To accomplish these goals, Congress charged the Program with responsibility for approving non-profit budget and credit counseling agencies and instructional courses concerning personal financial management after the Program has "thoroughly reviewed" the qualifications and services provided. 11 U.S.C. § 111(b)(1). An agency seeking approval must provide all information the Program requests during its review. 11 U.S.C. § 111(b)(1).

1. Criteria and Standards for Adequate Credit Counseling

The Program, by statute, shall approve as credit counseling agencies only non-profit agencies that demonstrate they will provide qualified counselors, maintain and protect client funds, provide adequate counseling to clients regarding their credit problems, and deal responsibly and effectively with all matters relating to the quality, effectiveness, and financial security of their services. 11 U.S.C. § 111(c)(1); see also 28 C.F.R. §§ 58.15-58.17 (regulations governing approval of non-profit budget and credit counseling agencies). At a minimum, an approved non-profit agency must have a board of directors, the majority of whom are not employed by the

agency and do not "directly or indirectly" benefit financially from the outcome of the counseling services the agency provides. 11 U.S.C. § 111(c)(2)(A).

2. Criteria and Standards for Financial Management Education

Also by statute, the Program shall approve an instructional course on personal financial management only if the course is presented through adequately trained and experienced personnel, learning materials, and teaching methods that educate debtors and meet educational goals; the course provides effective education in adequate facilities or through the Internet, if appropriate; and the provider prepares and retains reasonable records. 11 U.S.C. § 111(d); see also 28 C.F.R. §§ 58.25-58.27 (regulations governing approval of providers of personal financial management instructional courses).

B. Failure to Avoid Conferring a Private Benefit on Individuals Related to the Agency and to Maintain an Independent Board.

In its Notice of Removal, the Program determined that the Agency had conferred a substantial financial benefit on its founders and principals, [redacted] and [redacted]. Notice of Removal at 2-5, 12-14. Additionally, the Program concluded that the Agency had failed to maintain an independent board of directors, as mandated by statute.[4/] Notice of Removal at 6, 14. I will address each of these issues in turn.

1. Generation of a Substantial Private Benefit for its Founders and Officers.

The Program concluded that the Agency should be removed from the list of approved credit counselors because the Agency's books and records showed that its monies had been used to generate a substantial private benefit to officers and directors, particularly [redacted]. Notice of Removal at 13-14. During the QSR, the Program identified Agency financial records showing more than $600,000 in questionable expenses, including:

- $215,000 in checks disbursed to unknown parties;
- Payments to various credit cards belonging to [redacted], [redacted], and other individuals and entities;
- Wire transfers totaling $176,420 to an individual located in Chicago, Illinois, named [redacted] that were listed on the Agency's balance sheet as "Outside Contract Services" with no written agreement or contract provided;

[4/] The Program also found that the expenditure of significant funds for the private benefit of Agency officers and directors constituted a breach of fiduciary duty under applicable Missouri law. Notice of Removal at 13-14. Because I find that removal was appropriate under the first two prongs of the analysis, I do not need to reach this state law issue.

- A $4,000 payment to a Missouri early learning center attended by the [redacted] two minor children;
- Cash withdrawals from a casino ATM; and
- Various retail purchases to companies such as The Gap, Lerner Stores, and Foot Locker.

Notice of Removal at 3-4.

After careful review of additional information the Agency produced at the Program's request, the Program concluded that, between December 2009 and October 2010, the Agency had disbursed at least $117,000 directly or indirectly to [redacted] or [redacted] Notice of Removal at 3-4, 13.

The Agency does not dispute that Agency monies were disbursed inappropriately to benefit [redacted] and [redacted]. Request for Review at 3, 7. The Agency attributes financial improprieties to bookkeeper error.[5/] Id. at 3. It also contends that [redacted] has reimbursed the Agency in the amount of $17,550, thereby remedying any concerns. Id.

Given the extent of Agency records that the Program identified as showing improper direct or indirect disbursements to [redacted], it remains unclear from a review of the record whether the Agency has, in fact, been reimbursed, and whether such reimbursements are complete or adequate. During the QSR, the Agency produced a copy of a check dated March 31, 2011, payable from [redacted] to the Agency in the amount of $17,550. See Check No. 1155, attached to Notice of Removal as Exhibit D, Part 7. However, the Agency has not provided bank statements or other documents showing that the check has been negotiated and the monies returned to an Agency bank account. Thus, it is not clear whether this check was ever tendered. More significantly, the Agency has not provided any itemization verifying that only $17,550 was disbursed improperly.

Nor does the record contain any evidence showing that the Agency is seeking reimbursement of improperly disbursed funds from other sources. For example, various Agency bank statements in the record evidence routine, sizable payments to credit cards held by [redacted] [redacted][6/] See Miscellaneous Bank Statements for Agency's M&I Account attached to Notice of

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[5/] Notably, the record shows that, at [redacted] request, and after explaining that she "was satisfied that this company was professional, competent and thorough," the Agency's board unanimously voted to hire the bookkeeper on whom it places responsibility for errors. See Minutes of Annual Meeting of Board of Directors held on March 9, 2009, at 1, produced in response to QSR Notice, Appendix A, Question 2.

[6/] The record also shows Agency disbursements on behalf of a credit card held by [redacted] [redacted] in the name of DSR Homes, LLC, a business entity the Agency claims has "ceased operations and terminated all banking relationships." See Miscellaneous Credit Card

Removal as Exhibit A, Parts 1, 2, and 3; see also Notice of Removal at 3. However, there is no evidence in the record showing that [redacted] who serves as the Agency's Treasurer, has identified, itemized, and returned any payments that may have been improper. Additionally, there is no evidence in the record showing the Agency has sought or is seeking reimbursement from [redacted] for $176,000 paid for services the Agency contends were not satisfactorily or completely rendered. See Attachment B.5.a.[7/] to Second QSR Response.

Considering the magnitude of questionable disbursements the Program identified during the QSR and cited in the Notice of Removal, and the Agency's failure to explain how it calculated $17,550 as the amount inappropriately disbursed on behalf of [redacted], the record supports the Agency's removal on this ground. Consequently, I find the record supports the Program's determination to remove the Agency from the list of approved credit counseling agencies and constitutes an appropriate exercise of discretion.

2. Failure to Maintain an Independent Board

The Program also removed the Agency from the list of approved credit counselors for failure to maintain an independent board of directors. Notice of Removal at 14. In reaching this conclusion, the Program relied upon the Agency's 2010 filing with the state of Missouri, identifying [redacted] and [redacted] as the members of the Agency's board of directors. Id.

In response, the Agency contends that its corporate filings with the state of Missouri were erroneous, but have since been amended to identify the correct board members. Request for Review at 6. The Agency further argues that, as of June 2011, [redacted] has resigned from all positions with the Agency except to act as a credit counselor, thereby remedying any concerns relating to the independence of the Agency's board of directors. Id. at 10.

The Bankruptcy Code requires the Program to review thoroughly the qualifications of an entity seeking approval to provide credit counseling services. 11 U.S.C. § 111(b)(1). It also requires applicants to provide all information that the Program requests to facilitate this review. Id. The Program must determine that an applicant fully satisfies the applicable standards in the statute and its implementing regulations, including the requirement that an agency demonstrate that it has a board of directors, the majority of whom are not employed by the agency and will not

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Statements, including Statement for American Express Business Gold Card issued to DSR Homes LLC [redacted] dated February 9, 2011, attached to Notice of Removal as Exhibit D, Part 6; Second QSR Response at 3. See also Notice of Removal at 2. The Agency does not dispute, nor does the record make clear, why [redacted] continued to use a credit card in the name of a business entity that is no longer operational. Request for Review at 2, 6.

[7/] In January and February 2011, the Agency's board determined that [redacted] was billing the Agency for "services that were not being performed." In addition, the Board discovered that certain actions and unauthorized representations by [redacted] were greatly increasing the Agency's overhead." See Attachment B.5.a. to Second QSR Response.

directly or indirectly benefit financially from the outcome of the counseling services the agency provides. 11 U.S.C. § 111(c)(2)(A)(i) and (ii).

The Agency has not provided information establishing the composition of the board during the relevant time frame. The Agency also has not established whether [redacted] resignation from the board has become effective. According to [redacted] written statement, her resignation is to become "effective as soon as a replacement is named." See Resignation Statement dated March 14, 2011, attached to Notice of Removal as Exhibit D, Part 2. However, the Agency's publicly available corporate filings with the Missouri Secretary of State show that, as of April 24, 2012, the Agency had yet to file amended reports identifying the newly appointed board of directors or showing that [redacted] had been replaced on the board. See Official Web Site for Missouri's Secretary of State, www.sos.mo.gov/BusinessEntity.

The record is clear that the Agency did not correct its erroneous corporate filings until after the Program questioned the composition of its board of directors. See Statement of Correction for a General Business or Nonprofit Corporation filed with Missouri's Secretary of State on March 24, 2011, attached to Notice of Removal as Exhibit D, Part 2. The record and publicly available filings also show that, until March 24, 2011, [redacted] as the Agency's President, signed official corporate documents under penalty of perjury. See Official Web Site for Missouri's Secretary of State, www.sos.mo.gov/BusinessEntity. The record further shows that [redacted] received a Juris Doctorate from the Thomas M. Cooley Law School in Lansing, Michigan, in 2003. See Resume attached to original Application for Approval as Non-profit Budget and Credit Counseling Agency dated August 13, 2008. Given her educational background and her resultant understanding of the consequences of providing a false oath, [redacted] either did not take the due care required before signing incorrect corporate documents or the corporate documents were correct when she signed them. Whatever the circumstances, these filings evince a troubling and recurring pattern and practice of internal Agency mismanagement and support the Program's conclusion that the Agency failed to maintain an independent board. The Agency's contention that it has addressed the Program's concerns through [redacted] post hoc resignation is unpersuasive.[8/]

Based on the entire record and the Agency's failure to provide persuasive arguments or evidence showing otherwise, despite multiple opportunities to do so, I conclude that the record supports the Program's decision to remove the Agency from the list of approved credit counseling agencies and constitutes an appropriate exercise of discretion.

[8/] The record also indicates that the Agency failed to follow its own internal financial management and conflict of interest policies. See Response to QSR Notice, Appendix B, Question 12; "Conflict of Interest Policy of Forbes & Newhard Credit Solutions, Inc."; and "Cash Management and Internal Controls Policy."

C. Changes to the Method of Delivery of Debtor Education Without Prior Approval.

The Program also determined in the Notice of Removal that the Agency changed the method of delivery of its personal financial management instructional course without prior approval. Notice of Removal at 5-6. Specifically, the Program found that, rather than delivering the course by DVD, as the Program had approved, the Agency posted its debtor education course on YouTube. Id. The Program found that a debtor could fast-forward through the YouTube materials in less than nine minutes. Id. at 6.

In response, the Agency contends it did not believe it needed Program approval to change the delivery method of the debtor education course because the YouTube posting was identical to the content of its approved DVD. Request for Review at 4-5, 10. While acknowledging that the YouTube course could be fast-forwarded to completion, the Agency asserts that it created certain safeguards to prevent this, such as debtor-generated certifications pledging that the full amount of time was dedicated to viewing the course. Id. at 5. These arguments notwithstanding, the Agency concedes that it did not have prior approval to change the delivery method of its debtor education course. Id.

Section 111 of the Bankruptcy Code articulates the standards that debtor education providers must meet before the Program can approve a proposed debtor education course. At a minimum, the course must be taught by trained personnel using sufficient learning materials and methodologies through adequate in-person or Internet facilities for a reasonable fee. 11 U.S.C. § 111(d). The statute further requires the debtor education provider to keep and maintain records to permit the Program to evaluate course effectiveness. 11 U.S.C. § 111(d)(1)(D). The implementing regulations provide additional, detailed guidance about the type of debtor education instruction that will receive Program approval. Specifically, the course must address the development of a budget, money management, "wise use of credit," and other consumer financial protection issues. 28 C.F.R. § 58.25(f). Providers must ensure that the instructional course, even if offered via the Internet or telephone, is conducted for a minimum of two hours. 28 C.F.R. § 58.25(g)(1)(ii). The regulations are clear that the Program must approve the substance of the instructional course and materials and the method of delivery in advance. 28 C.F.R. § 58.26(i)(2)(iii).

Importantly, the Agency concedes that the Program did not approve the delivery of its debtor education course via YouTube. Request for Review at 5. Moreover, the Agency's explanation that it requires debtors to generate their own certificate testifying that they spent a minimum of two hours reviewing the debtor education course fails to provide the safeguards contemplated by the Bankruptcy Code. The goal of this instruction is to ensure that debtors are educated about the money-management tools they will need to manage their finances post-bankruptcy. For the Agency to rely upon a debtor's certification that the full course had been viewed on YouTube misapprehends the importance of and reasons for debtor education and elevates form over substance.

Consequently, I find that the record supports the Program's determination that the Agency changed its method of delivery of debtor education without prior approval. The Program's decision to remove the Agency from the list of approved credit counseling agencies on this ground constitutes an appropriate exercise of discretion. Moreover, based on this ground and the entire record, I additionally modify the Program's decision to also remove the Agency from the list of approved debtor education providers.

D. Agency Principals Engaged in Dishonest or Deceitful Conduct

The Program also removed the Agency from the list of approved credit counselors for dishonest or deceitful conduct. Notice of Removal at 15-17. The Program cited information obtained during the QSR showing significant, unexplained payments to several individuals, and also numerous handwritten marks made by [redacted] that obscured critical information on bank statements the Agency produced. Id. at 9-10, 13, 15-17.

In response, the Agency concedes that it "may have been guilty of errors in judgment." Request for Review at 11. However, it asserts that there was no intent to deceive because the financial deficiencies identified by the Program resulted from bookkeeper error. Id. at 3. To the extent records implicate the Agency directly, the Agency states that "[a]ny errors that occurred were a result of mistakes in distinguishing personal and business expenses" when entries were transferred from a ledger to a spreadsheet. Id. at 7. The Agency also contends that all monies improperly disbursed have been repaid. Id. at 3. Finally, because [redacted] allegedly has resigned as President and from the Agency's board of directors and now acts solely as a counselor, the Agency contends that any management improprieties have been resolved. Id. at 10.

As previously discussed, the record does not show that [redacted] and [redacted] have repaid to the Agency all disbursements through which they may have profited directly or indirectly. See supra Section III.B.1.

More importantly, however, the record demonstrates a lack of Agency candor in responding to Program questions throughout the QSR and removal process. The Program identified more than 400 instances of handwritten comments from [redacted] on bank statements the Agency produced. Notice of Removal at 15. Whether the comments are characterized as notations, as the Agency asserts, or redactions, as the Program concluded during the QSR, it is plain from a review of the record that, in many instances, the handwritten comments obscure key information on the bank statements describing the questioned payments.[9/] See Agency's M&I Bank Statements, attached as Exhibit A, Parts 1, 2, and 3, to Notice of Removal. A review of these bank statements shows that [redacted] generally used a thick marker to write directly over the relevant information, rather than making her notes in the margins of the line items. Id. Many of the handwritten comments on the bank statements claim that payments were

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[9/] Notably, the Agency's contention that the numerous financial improprieties the Program identified resulted from bookkeeper error appears inconsistent with the number and extent of [redacted]' comments on the Agency's bank statements, which suggest a close awareness of the Agency's financial records.

for "business expenses/office supplies." Id. However, the receipts that the Agency has provided do not appear to correlate precisely to the disbursements on the Agency bank statements. Compare Receipts (Exhibit B to Request for Review) with Bank Statements (Exhibit A to Notice of Removal).

A review of the Agency's bank statements also reveals that it is difficult in many instances, due to the marker that [redacted] used, to ascertain the recipient of Agency monies and the numbers of the credit cards involved. See Agency's M&I Bank Statements, attached as Exhibit A, Parts 1, 2, and 3, to Notice of Removal. The bank statements do show, however, significant and repeated payments to credit cards held by [redacted] and [redacted] individually, or in the name of business entities that they alone control.[10/] Id. Again, the Agency has not itemized these payments or produced receipts relating to many of these payments. Thus, the Agency has not proffered persuasive arguments or records showing that the thousands of dollars in payments made by the Agency to credit cards held by [redacted] constituted legitimate Agency expenses.

Furthermore, the record supports that the Agency evinced a lack of candor about its relationship with [redacted] an individual residing in Chicago, Illinois, to whom the Agency paid $176,000, purportedly without any written contract. Request for Review at 8, 10-11. During the QSR, the Program requested all information regarding these payments, which the Agency classified on its balance sheet as "Outside Contract Services." Initial Findings Letter at 7. Based on the balance sheet, these appeared to be payments made pursuant to a contract. Id. The Agency subsequently denied that any contracts existed and never provided any evidence of a written agreement between it and [redacted] See Agency Response to QSR Notice, Appendix A, Question 5. The Agency eventually produced wire transfer payment records and a copy of a 2010 1099-Misc Form showing that it had paid more than $176,000 to [redacted] in 2010. See Wire Transfer Records, attached to Notice of Removal as Exhibit E; 2010 1099-Misc Form, attached to Notice of Removal as Exhibit D, Part 7.

Given the magnitude of the payments to [redacted], the Agency's assertion that no written agreement existed seems somewhat implausible. Regardless, even if true, the relationship raises concerns about the propriety and quality of the Agency's internal financial controls. The record shows that the Agency's financial records evidencing the wire transfers to [redacted] are inconsistent, as the payments are variously described as either consultant or headhunter fees. See Exhibit E to Notice of Removal. Thus, the inconsistent descriptions and the reference on the balance sheet to "Contract Services," together with the Agency's lack of clarity explaining the nature of substantial expenditures, substantiate a finding of a lack of candor. See, e.g., 28 C.F.R. §§ 58.15(h)(2), 58.25(k)(3)(ii) (regulations prohibiting approved credit counseling agencies and debtor education providers from receiving referral fees).

[10/] For instance, one Agency bank statement shows that nine payments totaling $1,600 were made on August 30, 2010, to various accounts and credit cards. See Exhibit A, Part 2, to Notice of Removal. [redacted] marked these disbursements as business expenses or office supplies. However, the accounts that can be identified appear to belong to either [redacted] or [redacted] individually. A review of the entire record indicates that this is not an isolated incident.

The record supports the Program's determination that the Agency's records contain extensive evidence of "concealments [that] go to the heart of [the Agency's] fitness as a government-approved credit counseling agency and debtor education provider . . . [and] do not reflect sporadic, isolated instances of financial carelessness or inadvertence." Notice of Removal at 16-17. The decision to remove the Agency as an approved credit counseling agency on this ground constitutes an appropriate exercise of discretion. Moreover, the apposite regulations provide that an agency can be removed from the approved lists of credit counseling agencies and debtor education providers when the "agency (board of directors, officer, manager, employee, counselor or agent) has engaged in conduct that is dishonest, deceitful, fraudulent, or criminal in nature." 28 C.F.R. §§ 58.17(f)(4) (governing credit counseling agencies), 58.27(f)(2) (governing debtor education providers). I, therefore, modify the decision pursuant to 28 C.F.R. § 58.27(i) to remove the Agency from the list of approved debtor education providers on this basis.

E. Additional Arguments

In February 2012, I asked the Agency to provide information explaining why, based upon the facts and analysis in the Notice of Removal, it should not also be removed from the list of approved debtor education providers. The Agency submitted its Supplemental Response which was received on March 22, 2012.[11/]

In the Supplemental Response, the Agency did not submit any new documents or other evidence to be considered. Instead, it relies on three arguments. First, the Agency argues that to remove it from the list of approved debtor education providers now would be arbitrary and capricious because it did not receive adequate notice that its debtor education services would be evaluated. Supplemental Response at 1. Second, the Agency argues that it cannot be removed from the list of debtor education providers until the Program conducts a formal review similar to the QSR. Id. Finally, the Agency argues that to remove it from the list of approved debtor education providers would violate unspecified Program rules and procedures. Id. I will address each of these arguments in turn.

First, the Agency's argument that it was not notified that its fitness as a debtor education provider was under consideration is not supported by the record. As is the case with credit counseling agencies, the governing regulations provide that an agency may be removed from the list of approved debtor education providers if any principal has engaged in dishonest or deceitful conduct. 28 C.F.R. §§ 58.17(f)(4), 58.27(f)(2). In March 2011, in the Initial Findings Letter, the Program notified the Agency of its concerns about the change in the method of delivery of debtor education, about significant financial benefits generated for officers and directors, and about the Agency's apparent failure to maintain an independent board. Initial Findings Letter at 4-8, 10-12. The Program carefully outlined in the Initial Findings Letter the facts that gave rise to these concerns and cited all applicable law, including regulations governing debtor education providers. Id. The Agency provided three formal responses and voluminous attachments to this letter on

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[11/] Due to a delivery error, I did not receive the Supplemental Response until March 22, 2012, although it was due on March 20. Because this error was the courier service's fault, the Supplemental Response has been treated as timely.

March 25, 2011, as its First QSR Response; on April 1, 2011, as its Second QSR Response; and on June 13, 2011, as its Third QSR Response.

Following its review of those materials, the Program issued its Notice of Removal, in which it again discussed the significant financial benefits [redacted] and [redacted] appeared to have received, and identified issues or records suggesting deceitful and dishonest conduct. Notice of Removal at 2-5, 12-14. The Program also reiterated its concerns about the unapproved change to the method of delivery of debtor education. Id. at 14. As in the Initial Findings Letter, the Program throughout the Notice of Removal explicitly referred to the regulations governing debtor education providers, as well as those governing credit counseling agencies. Notice of Removal at 15-17. Therefore, the record shows that the Agency was on notice at all times about the facts supporting the Program's concerns and that the basis for removal as a credit counseling agency also could warrant removal from the approved list of debtor education providers.

The record also demonstrates that the Agency has had ample opportunity to respond to the Program's concerns about the unapproved changes to delivery of the debtor education course and concerns about its problematic financial conduct. After receipt of the Initial Findings Letter, the Agency submitted its First QSR Response, Second QSR Response, and Third QSR Response in March, April, and June 2011. After the Program issued its Notice of Removal, the Agency provided a formal reply through its Request for Review, attaching several hundred pages of exhibits. Finally, through its Supplemental Response, the Agency received an additional opportunity to "provide additional information to explain why, based upon the facts set forth on pages 2-10 and 12-17 and on the analysis contained on pages 10-17 of the Notice of Removal . . . the Agency should not also be removed from the list of approved providers of personal financial management instructional courses." February 2012 Letter at 1. In this – its fifth opportunity to respond – the Agency submitted only a two-page reply, despite receiving all additional time it had requested to craft its response. In short, the record demonstrates that the Agency was given sufficient and adequate notice of the Program's concerns about its fitness as a provider of debtor education and at least five separate opportunities to address those concerns.[12/]

Second, the facts and the applicable law do not support the Agency's argument that it cannot be removed from the approved debtor education provider list until the Program conducts a formal review similar to the QSR. The plain language of the regulations governing review of an administrative decision permit the Director to "adopt, modify, or reject the denial or removal decision." 28 C.F.R. §§ 58.17(i), 58.27(I). After review of the entire record and applicable law, I conclude that the original Notice of Removal should be modified to include the removal of the Agency from the list of approved debtor education providers.

[12/] To the extent that the Agency suggests in its Supplemental Response that the doctrines of laches or estoppel bar further action, those affirmative defenses are not available against the federal government. See, e.g., Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 514, 124 S. Ct. 983, 1016 (2004) (Kennedy, J., dissenting) (United States is not barred by laches in enforcing public rights); Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 60-61, 104 S. Ct. 2218, 2224 (1984) (nor is the United States barred by estoppel).

Finally, the Agency argues that removal from the list of approved debtor education providers would violate Program rules and procedures. Supplemental Response at 1. The Agency does not specify which rules and procedures would be violated, nor does it refute that the applicable statute and regulations clearly permit the Director to adopt, modify, or reject the removal decision.

The Program takes seriously its statutory obligation to approve only, after a thorough review, those individuals or entities that can educate debtors in accordance with Bankruptcy Code requirements. See 11 U.S.C. § 111. The decision to remove the Agency from the approved list of debtor education providers comports with the Program's mandate to ensure compliance with the Bankruptcy Code and the overall integrity of the bankruptcy system.[13/]

Based upon the entire record, I conclude that removal of the Agency from the lists of approved credit counseling agencies and debtor education providers is substantially supported in fact and in law, constitutes an appropriate exercise of discretion, and is not arbitrary and capricious.

V. Conclusion

Based upon my review of the entire record herein, and pursuant to 28 C.F.R. § 58.17(i), I adopt and affirm the decision to remove the Agency from the list of approved credit counseling agencies for the Agency's failure to meet the requirements of 11 U.S.C. § 111(c)(1) and (c)(2), and 28 C.F.R. § 58.15. In addition, pursuant to 28 C.F.R. § 58.27(i), I modify the decision in order to remove the Agency from the list of approved debtor education providers for the Agency's failure to meet the requirements of 11 U.S.C. § 111(d) and 28 C.F.R. § 58.27(f). This decision, as modified, is fully supported by the record and constitutes an appropriate exercise of discretion.

This decision constitutes final agency action in this matter.

Dated: 06/20/2012

/s/ Clifford J. White III
Clifford J. White III
Director

[13/] The United States Trustee Program's Mission Statement provides as follows:

> The United States Trustee Program's mission is to promote integrity and efficiency in the nation's bankruptcy system by enforcing bankruptcy laws, providing oversight of private trustees, and maintaining operational excellence.