

**DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES**

FINAL AGENCY ACTION

**APPLICATION FOR APPROVAL AS A NONPROFIT BUDGET AND
CREDIT COUNSELING AGENCY, AGENCY NO. 08064
APPLICATION NO. 0209-CC-00782R**

REVIEW OF DECISION TO PARTIALLY DENY APPROVED STATUS

Consumer Financial Education Foundation of America, Inc. (the "Applicant") seeks review of a September 17, 2010, decision partially denying its application for approval as a nonprofit budget and credit counseling agency. Based upon the record, I affirm.

I. Course of this Proceeding

In February 2009, the Applicant submitted its annual re-application for approval as a nonprofit budget and credit counseling agency (the "Application"). On March 11, 2009, based upon findings made during a December 2008 quality service review by the Credit Counseling and Debtor Education Unit of the Executive Office for United States Trustees ("EOUST"), the Applicant was removed from the approved list of nonprofit budget and credit counseling agencies ("Notice of Removal").

On March 26, 2009, the Applicant timely requested a review of the Notice of Removal pursuant to 28 C.F.R. § 58.17(g) ("Initial Request for Review"). On April 24, 2009, with the Applicant's agreement, EOUST stayed the Notice of Removal and held the Initial Request for Review in abeyance to provide the parties with an opportunity to resolve issues identified during the quality service review and avoid the need for removal.

In February 2010, during the course of those discussions, the Applicant supplemented its February 2009 Application with additional information (the "Supplement").

On September 17, 2010, following more than a year of discussions that failed to result in full agreement, EOUST reinstated the Notice of Removal and issued a decision partially denying the Applicant's February 2009 Application and February 2010 Supplement to the Application (the "Reinstatement"). The Reinstatement denied approved status only as to a portion of the Applicant's internet counseling services, known as the "Attorney Fast Track Process." *Id.* at 2.

On October 5, 2010, the Applicant timely requested review of the partial denial of approved status pursuant to 28 C.F.R. § 58.17(g) ("Request for Review"). On November 30, 2010, pursuant to 28 C.F.R. § 58.17(h), EOUST submitted a response ("Response") to the Request for Review. On March 28, 2011, pursuant to 28 C.F.R. § 58.17(h), the Applicant submitted a Reply to the Response ("Reply").

II. The Notice of Removal, Reinstatement, and Partial Denial Decision

Prior to the Notice of Removal, the Applicant was approved to provide credit counseling by telephone, by telephone/internet, and by internet in all judicial districts except Nevada, Oregon, Alabama, and North Carolina. Notice of Removal at 2. However, EOUST's December 2008 Quality Service Review determined that the Applicant had also been offering, without EOUST's knowledge and approval, an abridged Internet counseling process known as the "Attorney Fast Track Process" ("Fast Track Process"). Reinstatement at 2.

Under the Fast Track Process, the Applicant permitted debtors' attorneys to submit client identity documents, income verification documents, and completed bankruptcy schedules D, E, F, I, and J to the Applicant. Id. Upon receipt of this information, and without first providing any substantive counseling to the attorneys' clients, the Applicant issued and delivered a certificate of credit counseling to the attorneys. Id.

Subsequent to the Notice of Removal, EOUST and the Applicant attempted to reach agreement on an expedited internet counseling process compliant with the requirements of 11 U.S.C. §111(c). Id. On September 24, 2009, the Applicant submitted a proposed revised Fast Track Process to EOUST. Under the proposed revised process, attorneys would submit client identity documents, income verification, and completed bankruptcy schedules D, E, F, I, and J to the Applicant on behalf of their clients and, upon receipt of the documents, the Applicant would direct counsel to have their clients call a toll-free telephone number and speak to a counselor. Id.

According to the Reinstatement, the Applicant's "Telephone Protocol for Fast Track Clients" specified that counselors would request identity and attorney information, inquire as to whether the client had read the disclosures and needs a certificate, and ask five questions concerning the client's employment, income status, and the reason for counseling. Id. Upon completion of the call, the client's document file would be transferred to a credit counselor to prepare and transmit a plan to the client by mail, e-mail or facsimile. Id. at 3. Subsequently, the Applicant would issue a certificate of credit counseling. Id.

The Reinstatement denied Applicant's approved status with respect to the Fast Track Process for three main reasons:

1. The Fast Track Process does not provide substantive credit counseling, but merely gathers the client's financial information, contrary to the requirements of 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. § 58.15(f)(1). Id.
2. The Fast Track Process telephone protocol does not ensure that a client receives interactive credit counseling, in contravention of 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. § 58.15(f)(1). Id. at 3-4.

3. The Fast Track Process does not ensure that a client actually receives counseling before receiving a certificate of completion of counseling, in contravention of 28 C.F.R. § 58.15(f)(3)(ii).

III. The Request for Review

The Applicant seeks review of the partial denial decision on two main grounds.

First, the Applicant argues that, at the time EOUST issued the Reinstatement, all matters between EOUST and the Applicant with respect to the Fast Track Process had been resolved, and that EOUST acted arbitrarily and capriciously in refusing to withdraw its Notice of Removal and dismiss the Initial Request for Review. Request for Review at 1-8.

Second, the Applicant argues that the Reinstatement was a denial of equal protection and due process and contrary to and inconsistent with EOUST authority. Request for Review at 8-15.

IV. Standard of Review

In conducting this review, I must consider two factors:

1. Is the decision supported by the record?
2. Does the decision constitute an appropriate exercise of discretion?

See 28 C.F.R. § 58.17(i).

V. Analysis

A. Duties of the United States Trustee

United States Trustees approve a nonprofit budget and credit counseling agency after having “thoroughly reviewed” the qualifications of the agency and the services the agency will offer. 11 U.S.C. § 111(b)(1). United States Trustees may require an agency seeking approval to provide information as part of its review. *Id.* United States Trustees shall only approve an agency that demonstrates it will provide qualified counselors, maintain provisions for the safekeeping and payment of client funds, provide adequate counseling with respect to client credit problems, and deal responsibly and effectively with other matters relating to the quality, effectiveness, and financial security of services provided. 11 U.S.C. § 111(c)(1).

B. Criteria and Standards for Adequate Credit Counseling

Adequate counseling concerning client credit problems must include “an analysis of such client’s current financial condition, factors that caused such financial condition, and how such client can develop a plan to respond to the problems without incurring negative amortization of debt.” 11 U.S.C. § 111(c)(2)(E).

The governing regulations require an agency and its credit counselors to provide adequate briefings, budget analysis, and credit counseling services to clients that are 60 to 90 minutes in duration and must (1) address how to resolve a client's credit problems; (2) analyze a client's current financial condition; (3) discuss the factors that caused the current financial condition; and (4) assist in developing a plan to respond to the client's problems without incurring negative amortization of debt. 28 C.F.R. § 58.15(f)(1).

To the extent that an agency offers Internet credit counseling services, the agency "must, in addition to all other requirements, demonstrate sufficient experience and proficiency in designing and providing such services over the . . . Internet, including verification procedures to identify the person receiving the counseling services and to ensure that counseling services are properly completed" before issuance of a certificate of counseling. 28 C.F.R. § 58.15(f)(3)(ii).

C. Bases for Partial Denial

1. Failure to Provide Substantive Credit Counseling.

EOUST declined to approve the Applicant's Fast Track Process on the grounds that it does not provide substantive counseling via the Internet, but instead uses the Internet as a mere conduit to transmit documents to the Applicant, contrary to the requirements of 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. § 58.15(f)(1). Reinstatement at 2.

Rather than providing a substantive response to this deficiency, the Applicant contends that EOUST did not consider modifications to the Fast Track Process set forth in its February 2010 Supplement to its February 2009 application. Request for Review at 10, 14.

In response, EOUST contends that the February 2010 Supplement to the Application not only was reviewed but also informed its partial denial decision. Response at 6-7, n.4. EOUST notes that it did not reinstate the Notice of Removal in its entirety, but, in light of changes set forth in a July 16, 2009, Letter and Draft Agreement (Request for Review at Exs. 9-10), disapproved the Application only as to the Applicant's proposed Fast Track Process. Response at 3.

The record supports the EOUST's argument, showing that EOUST specifically did not re-articulate all of the grounds for the original Notice of Removal in the September 17, 2010, Reinstatement. See Request for Review at Ex. 1, 1-17; and see Reinstatement at 1-6. The record lends credence to EOUST's contention that it considered the Applicant's proposed modifications to its counseling services, including modifications to the Fast Track Process, in reaching its September 17, 2010, determination.

The Applicant next argues that because EOUST agreed to test the February 2010 version of the Fast Track Process it, therefore, approved the revised process, and that EOUST's approval rendered the partial denial decision arbitrary and capricious. Request for Review at 4-6. According to the Applicant, all issues with respect to the Fast Track Process were resolved with submission of the February 2010 version, and EOUST's agreement to test the process indicated its

approval. Request for Review at 7; Ex. 24. The Applicant contends that its modified Fast Track Process was “acceptable to EOUST” because “it would have made no sense . . . to test the process to ensure that the actual procedure complied with the procedure described in the application.” Request for Review at 7.

The argument that all issues concerning the Fast Track Process had been resolved merely because EOUST agreed to test the modified version is not compelling, nor does it find support in the record. Indeed, although stating that it “reasonably assumed” that its modified Fast Track Process would be approved pending the completion of testing, the Applicant explicitly acknowledges that “there was no formal agreement between EOUST and the Applicant as to the resolution of the Appeal[.]” *Id.* Given this acknowledgment, it is difficult to understand the Applicant’s contention that the lack of approval of the Fast Track Process constituted arbitrary and capricious action by EOUST. *Id.* at 9.

The Applicant does not point to any communication from EOUST indicating a promise of approval contemporaneously with testing. To the contrary, the Applicant quotes communications from EOUST to the Applicant explicitly stating that the Fast Track Process could only be offered once it was approved. *See, e.g.*, Request for Review at 6 and Ex. 21 (“Your client can offer the fast track process once we approve it.”). The record also contains examples of numerous occasions on which EOUST, from February 2010 through April 2010, sought clarification and further understanding of how to use the modified Fast Track Process and when and how the required counseling took place. *See, e.g.*, Request for Review at Exs. 23, 24, 27.

From a substantive standpoint, the Applicant fails, through either argument or evidence, to demonstrate that either its February 2009 or February 2010 Fast Track Process procedures provide credit counseling over the Internet, the primary deficiency cited in the Reinstatement.

Instead, the record shows that the Applicant’s February 2010 version of the Fast Track Process provides a client with two options.^{1/} Under the first option, the client’s attorney completes

^{1/} In its February 2010 Supplement, the Applicant describes the Fast Track Procedure as follows:

The “Fast Track” procedure was developed by [the Applicant] to assist clients that [sic] were facing emergency problems such as home foreclosure, vehicle repossession, garnishment or bank account seizure where normal credit counseling could not assist them and duplication of our forms and bankruptcy forms would be detrimental to the client’s situation.

There are two “Fast Track” methods, the first is where the client reads and signs the first three documents of “The Process” and then his/her/their attorney completes the bankruptcy schedules and sends us copies along with the picture ID and social security card via facsimile or e-mail. Intake personnel monitor the facsimile transmissions and the website for incoming information and create an electronic file in the “pending applications” folder. Upon receipt of all the information, the intake staff moves the file to “waiting for AP” folder where the credit counselor examines the information in the file and contact is made with the client to discuss their financial problems, assist in the preparation of a budget, and outline opportunities to assist them. When the counselor completes the counseling and creates an action plan, the file is moved to the “waiting on certificate” file where intake creates the certificate, issues it to the client and/or their attorney by mail, e-mail or facsimile and archives the file.

bankruptcy schedules and transmits them, along with the client's identification materials, via the Internet, facsimile, or email after the client has read and signed hard copy documents describing the process; a counselor, pending receipt of information and payment, makes contact with a client via email or telephone; and the final certificate is issued to the client and/or their attorney via hard copy mail, email, or facsimile. Request for Review at Ex. 20. Under the second option, the client's attorney, rather than the client, completes the application online rather than on paper. Id.

According to EOUST, "the portion of the [Fast Track Process] that takes place by internet does not contain any counseling but merely constitutes a means of gathering the client's financial information." Reinstatement at 3. Under 28 C.F.R. § 58.15(f)(1), a credit counseling session lasts 60 to 90 minutes and must contain four elements (counseling opportunities outline, financial condition analysis, discussion of factors leading to condition, and assistance in developing a non-negative debt amortization plan). According to EOUST, under the described process, the client does not receive any of the required substantive information via the Internet. Reinstatement at 3. "Until the client contacts the counselor, no aspect of the [Fast Track Process] can be considered 'counseling,' and the use of the internet to transmit completed bankruptcy schedules does not transform the process into 'internet counseling.'" Id.

Based upon the Applicant's own description of the February 2010 version of the Fast Track Process and the Applicant's failure to provide persuasive arguments or records showing otherwise, I find that the record supports EOUST's determination that "[b]ecause counseling does not begin until the client contacts [the Applicant] by telephone, and because no portion of the substantive counseling takes place by internet, the [Fast Track Process] may not be approved as a form of internet counseling." Reinstatement at 3. EOUST's decision to deny approved status to the Fast Track Process for failure to meet the requirements of 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. § 58.15(f)(1) was, therefore, an appropriate exercise of discretion.

2. The Telephone Protocol for the Fast Track Process Does Not Ensure that a Client Will Receive Interactive Counseling.

The Reinstatement also found that the Fast Track Process telephone protocol does not ensure that a counselor will interact with a client to analyze the client's financial situation or assist in developing a counseling plan in compliance with the requirements of 28 C.F.R. § 58.15(f)(1). Reinstatement at 3-4. Specifically, the Reinstatement asserts that the telephone protocol permits a counselor to transmit a counseling plan to a client by mail, facsimile, or email to a client's attorney instead of to the client, without requiring that the counselor discuss the contents of the counseling plan with the client before obtaining a counseling certificate. Id.

The second method for "Fast Track" is the same as above, except the client's attorney completes the application on line rather than on paper.

See Request for Review at Ex. 20, p. 3.

The Applicant does not, in its Request for Review, directly address the identified shortcomings of the Fast Track Process telephone protocol. However, the Applicant does acknowledge the regulatory requirement that counseling sessions last 60 to 90 minutes. Request for Review at 11. Rather than presenting an argument that its Fast Track Process complies with that requirement, the Applicant asserts:

The Interim Rule was promulgated in July of 2006, before the 2007 economic collapse that has forced so many consumers into bankruptcy. While many prospective Bankruptcy [sic] petitioners would likely benefit from a 60 to 90 minute discussion regarding the alternatives to bankruptcy, a discussion of alternatives to bankruptcy may not be beneficial to victims of the economic collapse who are on the brink of losing their homes.

Request for Review at 11, n.4.

This assertion lends credence to the Reinstatement's conclusion that the Fast Track Process telephone protocol does not ensure adequate counseling with respect to counseling time requirements. In fact, it would appear that the Applicant is trying to justify apparent shortcomings in adhering to statutory and regulatory obligations given the dire economic situation of would-be clients. According to its February 2010 description of the modified Fast Track Process, the Fast Track Process is designed to "assist clients . . . facing emergency problems such as a home foreclosure, vehicle repossession, garnishment or bank account seizure. . . ." Request for Review at Ex. 20.

Congress, in legislating credit counseling requirements, was very clear that "debtors . . . receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences . . ." H.R. Rep. 109-31, pt. 1 at 2 (2005). This language suggests that those in the most dire economic straits, such as the would-be clients that the Fast Track Process expressly targets, are the ones who are most in need of meaningful, instructive, and interactive credit counseling. The Applicant's assertion is therefore troubling as it implies an attempt to justify lack of compliance with legislatively mandated credit counseling requirements.

A review of the record lends support to the Reinstatement's finding of a deficient Fast Track Process telephone protocol, which the Applicant fails to controvert. In response to an inquiry from EOUST seeking clarification about the design and presentation of the Fast Track Process telephone protocol, the Applicant explained:

the counselor contacts the client by email rather than by telephone concerning any questions the counselor has about the application, and if none, prepares the budget analysis and plan, emailing a copy of the plan to the client and asking whether the client had questions about the plan and if so, answering the questions.

Request for Review at Ex. 17 at Discussion Point 5.

Also, in the February 2010 description of the Fast Track Process, the Applicant provided a slightly modified version to the extent that contact with a client could be made by telephone as well as email:

[T]he credit counselor examines the information in the file and contact is made via email or telephone with the client to discuss their financial problems, assist in the preparation of a budget and outline opportunities to assist them . . . the counselor completes the counseling and creates an action plan

Request for Review at Ex. 20.

By the Applicant's own description, there is no assurance under either the 2009 or the 2010 version of the Fast Track Process that credit counseling will take place for the required amount of time or provide interactive engagement between credit counselor and client to address the client's credit problems, financial conditions, causes of the financial condition, and a way to develop a counseling plan. Instead, it appears that a counseling plan is never discussed or explained to the client unless the client initiates contact to ask questions or request an explanation.

In light of these facts, I find that EOUST's determination that the Fast Track Process "does not require the counselor to discuss the content of th[e] counseling plan with the client" is supported by the record. Reinstatement at 3. Denial of approved status as to the Fast Track Process for failure to meet the requirements of 28 C.F.R. § 58.15(f)(1) was, therefore, an appropriate exercise of EOUST's discretion.

3. The Fast Track Process Does Not Ensure that a Client will Actually Receive Counseling Before Receiving a Certificate of Completion of Counseling.

To the extent that an agency offers Internet credit counseling services, the agency "must, in addition to all other requirements, demonstrate sufficient experience and proficiency in designing and providing such services over the . . . Internet," including a demonstration of verification procedures sufficient to identify the person receiving the counseling services and to ensure that counseling services are "properly completed" before a counseling certificate issues. 28 C.F.R. § 58.15(f)(3)(ii).

The Reinstatement cites the Applicant's failure to ensure that counseling services are properly completed before issuing a counseling certificate. Reinstatement at 4. In particular, it finds deficient a process in which the attorney for a client receives the counseling plan rather than the client. Though EOUST did not conclude that it was always the case that a client's attorney received the counseling plan rather than the client, it cited three cases in which clients received certificates of counseling from the Applicant without having completed credit counseling. *Id.* at 4; *Id.* at 4, n.2.

The Applicant does not deny that certificates of credit counseling were improperly issued in those three cases. Rather, the Applicant states that in a "typical month" it provides credit

counseling to more than 3,000 clients. Request for Review at 12. It also concedes that “there are occasional lapses” in its procedures and “[the Applicant] is operated by humans who occasionally make mistakes.” Id. The Applicant contends that, on the date the Reinstatement was issued, it had already resolved the issue of the prematurely delivered certificate of counseling delivered in one of the cases cited. Id. The Applicant does not specifically address the other two cases.

A review of the record lends support to the Reinstatement’s conclusion, underscored by findings during the December 2008 quality service review, that the Fast Track Process protocol makes it possible for a client to receive a counseling certificate before the completion of counseling, notwithstanding any retroactive corrections the Applicant may attempt to make. The February 2010 description provides that after a credit counselor creates a counseling plan, the Applicant will issue a counseling certificate to the client “and/or” their attorney by mail, email, or facsimile. Request for Review at Ex. 20. There is no provision that a counselor discuss the counseling plan with the client prior to the distribution of the counseling certificate. Id.

Though the Applicant acknowledges prior shortcomings in enforcing proper credit counseling procedures, the Applicant does not actually provide a substantive response to the deficiency noted in the Reinstatement. Instead, the Applicant raises three main arguments. First, the Applicant contends that the “only rational explanation” for the partial denial on the basis of prematurely delivered certificates of credit counseling is “inexplicable bias” against the Applicant. Request for Review at 12. Second, the Applicant argues that the EOUST official who conducted the December 2008 quality service review and issued the Reinstatement acted as a “rogue cop, disregarding truth.” Id. Finally, the Applicant contends that it is “illogical and arbitrary” for EOUST to have concluded negotiations with a partial denial of approved status as to the Fast Track Process after more than a year of negotiations. Id.

The Applicant’s first two contentions lack merit. The record more than amply supports the legitimacy of the concerns raised by the EOUST’s December 2008 quality service review, see, e.g., Reinstatement at 4 (citing four bankruptcy cases, unrebutted by the Applicant, in which clients stated at their section 341 meetings that they failed to receive credit counseling from the Applicant prior to the issuance of their certificates: In re [redacted] Case No. [redacted] (Bankr. M.D. Tenn. 2010); In re [redacted], Case No. [redacted] (Bankr. M.D. Tenn. 2009); In re [redacted] Case No. [redacted] (Bankr. M.D. Tenn. 2009); In re [redacted], Case No. [redacted] (Bankr. M.D. Tenn. 2009)).

Additionally, as set forth in the Response, in the case of In re [redacted], Case No. [redacted] [redacted] (Bankr. M.D. Fla. 2010), the United States Trustee moved on October 24, 2010, for the examination of Clark & Washington, P.C., pursuant to 11 U.S.C. § 329, in connection with an effort to obtain disgorgement of fees from Clark & Washington due to improper conduct in obtaining credit counseling certificates from the Applicant. As set forth in the motion, attached as Exhibit I to the Response, in previous examinations, a principal of Clark & Washington admitted that the law firm obtained counseling certificates for their clients from the Applicant absent actual counseling of their clients. Response at Ex. I, p. 7, ¶¶ 30-34. The Applicant concedes that the Fast Track Protocol “was apparently not followed by C & W’s Tampa clients prior to August 2010,” and attempts to minimize the impact of this record evidence by stating that the “alleged problem”

was limited to only one of several offices of a large law firm with offices in three states. Reply at 3.

The claim of “inexplicable bias” also lacks merit because the Applicant, as a previously approved credit counseling agency, was on notice that quality service reviews of its procedures and operations were to be expected. As EOUST points out, Response at 2, EOUST conducted the December 2008 quality service review of the Applicant pursuant to 28 C.F.R. § 58.15(h)(2)(i), which requires that an approved agency make all records relating to its compliance with 11 U.S.C. § 111 available to the EOUST upon request, and cooperate with EOUST during any “scheduled or unscheduled on-site visits and customer service audits[.]” 28 C.F.R. § 58.15(h)(2)(i). In addition, the Applicant, as part of its annual application for approval, executed Appendix A to the application, and expressly consented to such quality service reviews. Response at Ex. A, ¶ 4 (“[The Applicant] will make all records relating to [the Applicant’s] compliance with 11 U.S.C. § 111 available to the United States Trustee upon request and cooperate with the United States Trustee for any scheduled or unscheduled on-site visits and customer service audits.”).

Accordingly, in conducting a quality service review, EOUST was exercising regulatory oversight obligations authorized by applicable regulations and demonstrably known to the Applicant. Against this backdrop, the Applicant’s accusation that EOUST engaged in “rogue” behavior appears unwarranted. It also lacks support in the record, which contains examples of only professional communication between EOUST and the Applicant. See Initial Request for Review at Ex. 1A (Handwritten Request for Documents from Wendy S. Tien to [redacted] (Dec. 2008)); Request for Review at Ex. 9 (Letter from Wendy S. Tien to [redacted] Esq. (July 16, 2009)); Request for Review at Ex. 1 (Notice of Removal from Wendy S. Tien to [redacted] (March 11, 2009)).

With respect to the argument that EOUST was “illogical and arbitrary” in concluding that negotiations had failed and denying approved status with respect to the Fast Track Process, the record strongly supports EOUST’s determination that consensual negotiations had not yielded an agreement. The record shows that EOUST proposed a Draft Agreement to the Applicant in July 2009. Reinstatement at Ex. A at 4-6. The Draft Agreement proposed certain credit counseling provisions to ensure that clients or their counsel would not prematurely receive a counseling certificate. Id. The Applicant argues that the issuance of the Reinstatement was contrary to logic because a “simple additional safeguard” could have improved its procedures. Request for Review at 12. However, the record shows that the Applicant was resistant to many of the changes proposed in the Draft Agreement, in part, because it was concerned about having to contact a client more than once to discuss a credit counseling plan. See, e.g., Request for Review at Ex. 19. The Applicant also proposed its own counter draft agreement, to which EOUST did not agree, again because of reservations about its credit counseling provisions. Request for Review at Ex. 15.

That EOUST engaged in more than a year of negotiations with the Applicant indicates a good faith willingness on its part, despite administrative cost and expense from an agency perspective, to reach a consensual resolution. It is not clear how the Applicant could have expected negotiations to continue indefinitely, especially in the face of its resistance to certain proposed changes EOUST deemed necessary to ameliorate the Fast Track Process. Moreover, the

Reinstatement was not a wholesale reiteration of the Notice of Removal, but instead denied approved status only as to the Fast Track Process, thereby allowing the Applicant to continue operating its existing and previously-approved telephone and Internet counseling services, demonstrating EOUST's acknowledgment and recognition of the changes the Applicant made to improve its procedures during negotiations, rather than illogical or arbitrary action. Response at 3.

Based upon the Applicant's own description of the Fast Track Process and the Applicant's concessions with regard to shortcomings in its procedures to prevent the premature distribution of counseling certificates in certain cases, I find that the record supports EOUST's determination that the Fast Track Process fails to comply with requirements of 28 C.F.R. § 58.15(f)(1) and impermissibly "lends itself to exploitation by permitting [the Applicant] to provide a certificate of counseling to counsel without first providing substantive counseling to the client" Reinstatement at 3. The EOUST properly exercised its discretion in denying approved status to the Fast Track Process on grounds of this deficiency.

C. Additional Arguments

1. The Decision to Disallow the Fast Track Process is a Denial of Equal Protection and Due Process.

In addition to the above, the Applicant argues that the terms of the Reinstatement deny due process by prohibiting clients who have their attorneys fill out their financial information forms from obtaining telephone counseling. The Applicant argues that pro se clients who fill out the forms themselves do not have that same prohibition. Request for Review at 13.

EOUST, in its Response, argues that a "rational basis" review applies to the Applicant's constitutional arguments because neither the use of online forms rather than bankruptcy forms nor the representation by bankruptcy counsel infringe upon a fundamental right or discriminate against a suspect class. Response at 7-10. EOUST further contends that the terms of the Reinstatement are rationally related to a legitimate government purpose - to ensure compliance with applicable credit counseling requirements. Response at 9.

EOUST addresses the Applicant's equal protection claim by stating that it does not draw a distinction between clients represented by attorneys and pro se clients because both may contact the Applicant by telephone or Internet and receive counseling via previously approved procedures that do not involve the Fast Track Process. Response at 9.

A review of the terms of the Reinstatement lends support to EOUST's contention that the equal protection clause is not implicated. The Reinstatement provides that the Applicant is not permitted to promote the Fast Track Process to attorneys or potential clients or otherwise use it in any manner. Reinstatement at 5. The Reinstatement also provides that the Applicant is permitted to continue providing previously approved Internet counseling that does not involve the Fast Track Process. Id.

In short, the Applicant misconstrues the prohibition on the use of the Fast Track Process as a determination “that clients who seek the counsel of bankruptcy lawyers should be treated differently than those who fill out forms themselves.” Request for Review at 13. In fact, there is no difference in treatment between clients represented by counsel and pro se clients in the unconstitutional manner the Applicant alleges - neither clients represented by attorneys nor clients proceeding pro se may utilize the Fast Track Process. Reinstatement at p. 5.

With respect to its due process claims, the Applicant contends that EOUST’s apparent failure to consider its February 2010 modified version of the Fast Track Process, as discussed above, and its delay in approving its February 2009 Application and February 2010 Supplement constituted a violation of due process because it was left under a cloud of regulatory uncertainty. Request for Review at 14.

A review of the record, which shows that the Applicant consented to negotiations with EOUST on the condition of its Initial Request for Review being held in abeyance, see Request for Review at Ex. 3, belies the Applicant’s contention. The Applicant’s argument, therefore, appears somewhat disingenuous and fails to persuade.

Based upon the record and the argument, I conclude that there is no merit to the Applicant’s equal protection and due process claims.

2. EOUST’s Actions are Contrary To and Inconsistent with its Authority.

Finally, the Applicant also argues that EOUST’s determination that it is prohibited from utilizing bankruptcy forms as its sole means to collect financial information from debtors is contrary to and inconsistent with EOUST’s authority and demonstrates arbitrary and capricious conduct. Request for Review at 9 and 13. Specifically, the Applicant contends that Congress did not provide EOUST with the authority to determine what forms credit counseling agencies may use to collect clients’ financial data. Id. at 13.

EOUST argues that the prohibition on the use of bankruptcy schedules was necessary to ensure that clients received adequate credit counseling and complied with statutory and regulatory credit counseling requirements outlined in 11 U.S.C. § 109(h) and 28 C.F.R. § 58.15. Response at 9. EOUST states that because bankruptcy schedules are generally completed by attorneys, this acts as a barrier, preventing clients from participating in the counseling process, especially because a client’s attorney can forward the bankruptcy schedules without client participation, as EOUST discovered to be the case during the December 2008 quality service review. Response at 3. Moreover, because the use of bankruptcy schedules completed and transmitted to the Applicant was “so prone to exploitation, and [had] been used so many times to circumvent the counseling requirement,” EOUST argues that it acted reasonably in concluding that the Applicant could not be permitted to allow bankruptcy counsel to submit completed forms in lieu of requiring clients to fill out relevant counseling forms. Response at 5-6.

A review of applicable statutory guidelines governing credit counseling makes clear that EOUST may only provide an approval where an agency demonstrates, in pertinent part, that it will provide adequate counseling with respect to client credit counseling. 11 U.S.C. § 111(c)(2)(E).

The record, discussed above, demonstrates that EOUST identified cases where clients did not receive adequate counseling because their attorneys had completed their bankruptcy schedules for them and the clients received counseling certificates before counseling was complete. Reinstatement at 4. The Applicant also acknowledged lapses in its procedures in this regard. Request for Review at 12. Indeed, a review of the record overwhelmingly supports EOUST's determination that a prohibition on the use of bankruptcy schedules in the Applicant's case was reasonable and advisable.

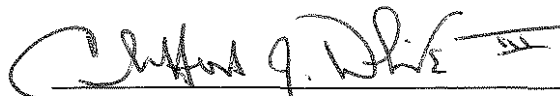
Based upon a review of the record, EOUST appropriately exercised its discretion in its Reinstatement directive that the Applicant's clients use non-bankruptcy forms to help ensure the provision of adequate counseling services, in keeping with its agency mandate to ensure compliance with the Bankruptcy Code and the overall integrity of the bankruptcy system.^{2/}

VI. Conclusion

Based upon my review of the record, I affirm the partial denial of the Application under 11 U.S.C. § 111(c)(1), for the failure of the Applicant to satisfy the substantive counseling requirements of 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. § 58.15(f)(1), and the requirement to ensure that counseling is properly completed pursuant to 28 C.F.R. § 58.15(f)(3)(ii). The partial denial of the Application as to the Fast Track Process is supported by the record and is an appropriate exercise of EOUST's discretion.

This decision constitutes final agency action in this matter.

Dated: 4.26.11



Clifford J. White III

Director

Executive Office for United States Trustees

^{2/} The United States Trustee Program's detailed Mission Statement provides as follows:

The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. It works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases.