

**NATIONAL BANKRUPTCY CONFERENCE**  
*A Voluntary Organization Composed of Persons Interested in the  
Improvement of the Bankruptcy Code and Its Administration*

February 14, 2005

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Mr. Peter G. McCabe  
Secretary  
Administrative Office of the U.S. Courts  
One Columbus Circle, NE  
Washington, DC 20544

**Re: Proposed Amendments to Bankruptcy Rule 4002**

Dear Mr. McCabe:

The National Bankruptcy Conference ("NBC") appreciates the opportunity to comment on proposed amendments to Rule 4002 of the Federal Rules of Bankruptcy Procedure. The NBC is a voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration. A brief description of the NBC is attached.

Full and accurate disclosure is paramount in the bankruptcy system. Bankruptcy law appropriately contains tools that impose steep consequences on debtors who understate assets or income, and those tools should be used where necessary. The NBC supports reasonable proposals to preserve the integrity of the bankruptcy system by giving trustees the tools for document production when the circumstances of the case so require. However, the NBC is concerned that several details of the proposed rule are inconsistent with the Bankruptcy Code and substantive bankruptcy law. In addition, although it might be appropriate to amend the rules to facilitate production of extra documents in certain cases, the NBC believes that the proposed rule as drafted will impose costs that far outweigh its benefits. Finally, the NBC is concerned that the rule is insufficiently protective of privacy interests.

First, the rule amendment seems to give parties rights that they do not have under substantive bankruptcy law. Specifically, this involves a question of the power of the United States Trustee or bankruptcy administrator to instruct debtors on what to do. The introductory language of the amendment says, "unless the trustee, the U.S. trustee, or the bankruptcy administrator instructs otherwise." At the very least, this introductory phrase appears to vest discretion in the case trustee, the U.S. trustee, and the bankruptcy administrator to instruct individual debtors to do something different than bringing the identified documents to the meeting of creditors. However, trustees do not have the power under the Bankruptcy Code to instruct debtors to do anything, at least if "instruct" is

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interpreted to mean "direct" or "order." As parties in a case, they may request that the debtor take certain acts, but if a debtor objects, only a court can order the debtor to act. U.S. trustees, who have the power to "preside at" the meeting of creditors may have somewhat greater authority in setting the procedures, but they too have little, if any, power to order the debtor to do anything.

The structure of the rule - - "unless the trustee . . . instructs otherwise" -- also raises the possibility that the case trustee or the U.S. trustee will seek to instruct individual debtors to make the documents available to the trustee before the meeting of creditors. This could result in a preliminary stage of document discovery in every consumer bankruptcy case in a district if the case trustee or U.S. trustee so instructs. Yet, given that the vast majority of consumer bankruptcy cases involve modest income families with minimal assets, this additional discovery phase may yield little for creditors, even if minor schedule errors are found.

This same clause also creates the possibility that the details of debtors' document production obligations will vary depending on which trustee is assigned to the case and how that trustee interprets this clause. A trustee might read the rule as permitting him or her to develop different instructions with respect to when and where debtors must produce the new documents. Or, trustees may read the rule as giving them the right to instruct debtors to bring additional documents not mentioned in the rule.

With respect to the heart of the rule, heightened and widespread document production, the NBC is concerned that the costs will outweigh the benefits. Documentary evidence may be more difficult to produce or more voluminous than one might expect. For example, the rule requires evidence of current income, such as the most recent pay stub. A recent pay stub makes sense with respect to a wage earner, but not with respect to a retiree living on social security and retirement funds. For a small proprietor, the evidence may be a small mountain of business records. In addition, some of the documents required by the rule, such as the bank statement showing the balance on the date of filing, will not have existed prior to the case being filed. This means that debtor's counsel will have to give the debtor a list of the things to search for in anticipation of the meeting of creditors. Debtor's counsel then will have to consult with the debtor after the debtor's search to prepare the written statements when documents do not exist or are not in the debtor's possession. To be on the safe side, debtor's counsel will have to arrange an additional meeting with the debtor in advance of the meeting of creditors to look over the documents gathered by the debtor to comply with the proposed new rule. Amendments to the Schedules and Statement of Affairs may be necessary in advance of the meeting of creditors when

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documentation gathered by the debtor is not precisely consistent with information given by the debtor at the time of preparation of the Schedules and Statement of Affairs. Alternatively, to ensure consistency, debtor's counsel may defer filing such schedules and statements in every case until the documents are available, which will result in less information for creditors and trustees early in the case. All of this will substantially raise the cost of debtor representation, while producing little of benefit for creditors.

The proposed requirements also are likely to increase the cost of the trustee system. Assuming that trustees do not instruct otherwise, debtors will show up at the meeting of creditors with income tax returns and bank account information in hand. The trustee may try to incorporate the new information into her questioning at the meeting of creditors, although she may be hard pressed to make meaningful comparison of these documents and the previously filed schedules and statement. This may lengthen meetings without accomplishing substantially more. In addition, if the trustee cannot process the information at the meeting of creditors, the panel trustees may feel compelled to re-review cases after the meeting of creditors on the basis of the new and potentially lengthy documents, even though the vast majority of cases will be no-asset cases and produce no distributions to creditors. To the extent that this leads to increased trustee fees, calls for increased bankruptcy filing fees will soon follow, which may make bankruptcy inaccessible to the families most needy and least likely to abuse the system.

Some types of cases warrant production of additional documents to verify financial information, but the proposed rule is both underinclusive and overinclusive. Some people intent on concealing income or assets may be proprietors who work "under the table," operating on a pure cash basis. If these debtors are intent on concealing income from their attorneys and the court (as well as the IRS) the proposed rule will do nothing to expose them. On the other hand, by imposing this rule on each and every individual debtor, massive amounts of documents will be collected with minimal results. It is possible that the rule will expose some assets that exceed the applicable property exemption, but, given the financial profile of most consumer bankruptcy filers, those assets are likely to be of nominal value. This means that the cost of liquidating the assets would be insufficient to produce significant distributions for creditors after compensating the trustee. The NBC agrees with longstanding bankruptcy policy that administration of nominal assets that produces no meaningful benefit for creditors is not desirable.

The Committee seems to have anticipated some other important problems that may arise, such as debtors who do not possess the required documents and

the privacy of information contained in the documents. Yet, it has done so largely in the Committee Note rather than in the proposed rule itself. For example, the Committee Note's statement that "The rule does not require that the debtor create documents or obtain documents from third parties. . ." may not be sufficient. In addition, text in the Committee note also suggests this information is available only to the case trustee.<sup>1</sup> Yet, assuming the trustee can process the information quickly, she presumably will use it to ask questions in the presence of creditors. This raises the odd specter of a case trustee questioning the debtor from documents that no one else is allowed to see with respect to "private information that should not be disseminated" (as stated in the Committee Note). This will happen in the unsupervised context of a meeting of creditors typically presided over by the person holding the documents—the case trustee. The questions asked by the trustee may reveal precisely the information that is to be protected. The debtor will have difficulty preventing public dissemination of otherwise protected, privileged, or just plain "private" information handed to the trustee pursuant to the mandate of this new rule. Even if one believes that bankruptcy filers have voluntarily foregone some privacy protection by filing, the information in the records may relate to a minor child of the debtor or a non-debtor spouse who may not have consented to expose their personal affairs to public view. Again, however, even this limited and incomplete protection comes only from the Committee Note. No provision of the actual proposed rule (or of any other rule or statute that comes immediately to mind) imposes this quasi-confidentiality on the materials produced for the trustee.

Finally, and fundamentally, the substance of the proposed rule arguably reverses principles upon which bankruptcy procedure has been based. The NBC believes that bankruptcy is based on the presumption of the "honest debtor." Bankruptcy filers submit papers under penalty of perjury. They make a multitude of representations and disclosures about their finances. Requiring back-up documentation of all of them is simply not possible. Although filers do make mistakes on petitions, the likelihood of widespread concealment of valuable assets and income is unlikely. Research on bankruptcy filers that relies on sources other

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<sup>1</sup> Specifically, it says "the materials would not be made available to any party in interest at the § 341 meeting of creditors." The Committee Note states that only the "trustee" — presumably as opposed to the United States trustee -- will be allowed to review the pay stubs, the income tax returns, and the account statements made available by the debtor. The Note says that creditors will not be allowed to review these documents at the meeting of creditors but must proceed under Bankruptcy Rule 2004 to get their own information. It is unclear whether creditors can get these documents by discovery from the trustee. In essence, the proposed rule seems to create a new class of discovery materials in bankruptcy cases that must be produced only to the trustee.

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than petition and schedule data reinforces our belief that the vast majority of bankrupt families have extremely modest income and assets. These filers already are given considerably more scrutiny than taxpayers who file returns on a "declaration" basis, even though far less money is at stake for the government in the bankruptcy system.

For these reasons, the National Bankruptcy Conference opposes proposed Rule 4002(b)(2). However, if the Committee determines to proceed with proposed Rule 4002(b)(2), the Conference urges the Committee to revise the proposed Rule to 1) limit further any documents that must be produced; 2) make more clear that debtors are not required to obtain documents they do not already possess; 3) clarify that neither the trustee nor United States trustee has the power to order the debtor to take actions; and 4) give better privacy protection to confidential information.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald S. Bernstein". The signature is written in a cursive style with a large, prominent initial "D".

Donald S. Bernstein  
Chair