

## 2005-2007 COMMITTEE NOTE

**A. Overview**

Among the changes introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was a set of interlocking provisions defining “current monthly income” and establishing a means test to determine whether relief under Chapter 7 should be presumed abusive. Current monthly income (“CMI”) is defined in § 101(10A) of the Code, and the means test is set out in § 707(b)(2). These provisions have a variety of applications. In Chapter 7, if the debtor’s CMI exceeds a defined level the debtor is subject to the means test, and § 707(b)(2)(C) specifically requires debtors to file a statement of CMI and calculations to determine the applicability of the means test presumption. In Chapters 11 and 13, CMI provides the starting point for determining the disposable income that debtors may be required to pay to unsecured creditors. Moreover, Chapter 13 debtors with CMI above defined median income levels are required by § 1325(b)(3) to use the deductions from income prescribed by the means test in order to determine what part of their income is “disposable,” and pursuant to § 1325(b)(4), the level of CMI determines the “applicable commitment period” over which projected disposable income must be paid to unsecured creditors.

To provide for the reporting and calculation of CMI and for the completion of the means test where required, three separate official forms have been created—one for Chapter 7, one for Chapter 11, and one for Chapter 13. This note first describes the calculation of CMI that is common to all three of the forms, next describes the means test deductions set out in the Chapter 7 and 13 forms, and finally addresses particular issues that are unique to each of the separate forms.

**B. Calculation of CMI**

Although Chapters 7, 11, and 13 use CMI for different purposes, the basic computation is the same in each. As defined in § 101(10A), CMI is the monthly average of certain income that the debtor (and in a joint case, the debtor’s spouse) received in the six calendar months before the bankruptcy filing. The definition includes in this average (1) income from all sources, whether or not taxable, and (2) any amount paid by an entity other than the debtor (or the debtor’s spouse in a joint case) on a regular basis for the household expenses of the debtor, the debtor’s dependents, and (in a joint case) the debtor’s spouse if not otherwise a dependent. At the same time, the definition excludes from the averaged income “benefits received under the Social Security Act” and certain payments to victims of terrorism, war crimes, and crimes against humanity.

Each of the three forms provides for reporting income items constituting CMI. The items are reported in a set of entry lines—Part II of the form for Chapter 7 and Part I of the forms for Chapter 11 and Chapter 13—that include separate columns for reporting income of the debtor and of the debtor’s spouse. The first of these entry lines includes a set of instructions and check boxes indicating when the “debtor’s spouse” column must be completed. The instructions also direct the required averaging of reported income.

The subsequent entry lines for income reporting specify several common types of income and are followed by a “catch-all” line for other income. The entry lines address (a) gross wages; (b) business income; (c) rental income; (d) interest, dividends, and royalties; (e) pension and retirement income; (f) regular payments of the household expenses of the debtor or the debtor’s dependents; (g) unemployment compensation, and (h) all other forms of income (the “catch-all” line).

Gross wages (before taxes) are required to be entered. However, consistent with usage in the Internal Revenue Manual and the American Community Survey of the Census Bureau, business and rental income are defined as gross receipts less ordinary and necessary expenses.

Unemployment compensation is given special treatment. Because the federal government provides funding for state unemployment compensation under the Social Security Act, there may be a dispute about whether unemployment compensation is a “benefit received under the Social Security Act.” The forms take no position on the merits of this argument, but give debtors the option of reporting unemployment compensation separately from the CMI calculation. This separate reporting allows parties in interest to determine the materiality of an exclusion of unemployment compensation and to challenge it.

Alimony and child support are also given special treatment. Child support is not generally considered “income” to the recipient. See 26 U.S.C. § 71(c). Thus, child support is only part of CMI if it is paid on a regular basis for the household expenses of the debtor or the debtor’s dependents. On the other hand, alimony and other forms of spousal support are considered income to the recipient, and thus are within CMI regardless of the regularity and use of the payments. To address this distinction, the instruction in the entry line for regular payments of household expenses directs that the entry include regular child support payments used for household expenses of the debtor or the debtor’s dependents, and the instruction for the “catch-all” line directs inclusion of all spousal support payments that are not otherwise reported as spousal income.

The forms provide for totaling the income reporting lines.

### **C. The means test: deductions from current monthly income**

The means test operates by deducting from CMI defined allowances for living expenses and payment of secured and priority debt, leaving disposable income presumptively available to pay unsecured non-priority debt. These deductions from CMI are set out in the Code at § 707(b)(2)(A)(ii)-(iv). The forms for Chapter 7 and Chapter 13 have similar sections (Parts V and IV, respectively) for calculating these deductions. The calculations are divided into subparts reflecting three different kinds of allowed deductions.

#### **1. Deductions under IRS standards**

Subpart A deals with deductions from CMI, set out in § 707(b)(2)(A)(ii), for “the debtor’s applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides.” The forms provide entry lines for each of the specified expense deductions under the IRS standards, and instructions on the entry lines identify the website of the U.S. Trustee Program, where the relevant IRS allowances can be found. As with all of the deductions in § 707(b)(2)(A)(ii), deductions under the IRS standards are subject to the proviso that they not include “any payments for debts.”

*National Standards.* The IRS National Standards provide a single allowance for food, clothing, household supplies, personal care, and miscellany, depending on household size, which can be entered directly from a table supplied by the IRS. There is also a National Standard for out-of-pocket health care expenses, which provides two different per-person allowances, depending on age group: the allowance for persons 65 or older is greater than the allowance for those under 65. Accordingly, the forms direct debtors to compute the National Standard allowance for health care by first multiplying each of the two age-group allowances by the number of household members within that age group and then adding subtotals for the two age groups to obtain the total allowance.

*Local Standards.* The IRS Local Standards provide one set of deductions for housing and utilities and another set for transportation expenses, with different amounts for different areas of the country, depending on the size of the debtor’s household and the number of the debtor’s vehicles. Each of the amounts specified in the Local Standards are treated by the IRS as a cap on actual expenses, but because § 707(b)(2)(A)(ii) provides for deductions in the “amounts specified under the . . . Local Standards,” the forms treat these amounts as allowed deductions.

The Local Standards for housing and utilities, as published by the IRS for its internal purposes, present single amounts covering all housing expenses; however, for bankruptcy purposes, the IRS has provided the Executive Office for United States Trustees with information allowing a division of these amounts into a non-mortgage component and a mortgage/rent component. The non-mortgage component covers a variety of expenses involved in maintaining a residence, such as utilities, repairs and maintenance. The mortgage/rent component covers the cost of acquiring the residence. The forms take no position on the question of whether the debtor must actually be making payments on a home in order to claim a mortgage/rent allowance. For homeowners with mortgages, the mortgage/rent allowance involves debt payment, since the cost of a mortgage is the basis for the allowance. Accordingly, the forms require debtors to deduct from the mortgage/rent allowance their average monthly mortgage payment, up to the full amount of the IRS mortgage/rent allowance, and instruct debtors that this average monthly payment is the one reported on the separate line of the forms for deductions of secured debt under § 707(b)(2)(a)(iii). The forms allow debtors to challenge the appropriateness of this method of computing the Local Standards allowance for housing and utilities and to claim any additional housing allowance to which they contend they are entitled, but the forms require specification of the basis for such a contention.

The IRS issues Local Standards for transportation in two components for its internal purposes as well as for bankruptcy: one component covers vehicle operation/public transportation expense and the other ownership/lease expense. The amount of the vehicle operation/public transportation allowance depends on the number of vehicles the debtor operates; debtors who do not operate vehicles are given a public transportation allowance, regardless of whether they actually use public transportation. It is not clear whether the public transportation allowance may also be claimed by debtors who do make use of public transportation but also operate vehicles. The forms permit debtors to claim both a public transportation and vehicle operating allowance, but take no position as to whether it is appropriate to claim both allowances. No debt payment is involved in the vehicle operation/public transportation component of the Local Standards for transportation.

The ownership/lease component, on the other hand, may involve debt payment. Accordingly, the forms require debtors to reduce the allowance for ownership/lease expense by the average monthly loan payment amount (principal and interest), up to the full amount of the IRS ownership/lease expense amount. This average payment is as reported on the separate line of the forms for deductions of secured debt under § 707(b)(2)(a)(iii). The forms take no position on the question of whether the debtor must actually be making payments on a vehicle in order to claim the ownership/lease allowance.

*Other Necessary Expenses.* The IRS does not set out specific dollar allowances for “Other Necessary Expenses.” Rather, it specifies a number of categories for such expenses, and describes the nature of the expenses that may be deducted in each of these categories. Section 707(b)(2)(a)(ii) allows a deduction for the debtor’s actual expenses in these specified categories, subject to its requirement that payment of debt not be included. Several of the IRS categories deal with debt repayment and so are not included in the forms. Several other categories deal with expense items that are more expansively addressed by specific statutory allowances. Subpart A sets out the remaining categories of “Other Necessary Expenses” in individual entry lines. Instructions in these entry lines reflect limitations imposed by the IRS and the need to avoid inclusion of items deducted elsewhere on the forms.

Subpart A concludes with a subtotal of the deductions allowed under the IRS standards.

## **2. Additional statutory expense deductions**

In addition to the expense deductions allowed under the IRS standards, the means test makes provision—in subclauses (I), (II), (IV), and (V) of § 707(b)(2)(A)(ii)—for six special expense deductions. Each of these additional expense items is set out on a separate entry line in Subpart B, introduced by an instruction that tracks the statutory language and provides that there should not be double counting of any expense already included in the IRS deductions.

One of these special expense deductions presents a problem of statutory construction. Section 707(b)(2)(A)(ii)(I), after directing the calculation of the debtor's monthly expenses under the IRS standards, states, "Such expenses shall include reasonably necessary health insurance, disability insurance, and health saving account expenses . . . ." There is no express statutory limitation to expenses actually incurred by the debtor, and so the provision appears to allow a reasonable "monthly expense" deduction for health and disability insurance or a health savings account even if the debtor does not make such payments, similar to the way in which the National Standards give an allowance for food, clothing and personal care expenses without regard to the debtor's actual expenditures. However, the statutory language might also be read as providing that the debtor's "Other Necessary Expenses" should include reasonable insurance and health savings account payments. Since "Other Necessary Expenses" are limited to actual expenditures, such a limitation could be implied here. The forms deal with this ambiguity by allowing the debtor to claim a deduction for reasonable insurance and health savings account expenses even if not made, but also require a statement of the amount actually expended in these categories, thus allowing a challenge by any party who believes that only actual expenditures are properly deductible.

Contributions to tax-exempt charities provide another statutory expense deduction. Section 707(b)(1) provides that in considering whether a Chapter 7 filing is an abuse, the court may not take into consideration "whether a debtor . . . continues to make [tax-exempt] charitable contributions." Section 1325(b)(2)(A)(ii) expressly allows a deduction from CMI for such contributions that are "reasonably necessary" (up to 15% of the debtor's gross income), and the Religious Liberty and Charitable Donation Clarification Act of 2005 added language to § 1325(b)(3) to provide the same deduction for above-median income debtors whose disposable income is determined using means test deductions. Accordingly, Subpart B of both the Chapter 7 and Chapter 13 forms includes an entry line for charitable contributions, employing the different statutory deductions allowed in each context.

The Subpart B concludes with a subtotal of the additional statutory expense deductions.

### **3. Deductions for payment of debt**

Subpart C deals with the means test's deductions from CMI for payment of secured and priority debt, as well as a deduction for administrative fees that would be incurred if the debtor paid debts through a Chapter 13 plan.

In accord with § 707(b)(2)(A)(iii), the deduction for secured debt is divided into two entry lines—one for payments that are contractually due during the 60 months following the bankruptcy filing, the other for amounts needed to retain necessary collateral securing debts in default. In each situation, the instructions for the entry lines require dividing the total payment amount by 60, as the statute directs. The forms recognize another ambiguity in this connection: "payments contractually due" might either be understood as limited to payments of principal and interest (payable to secured creditor) or, in the context of a

mortgage with an escrow, might be understood as including payments of property taxes and insurance (ultimately paid to taxing bodies and insurers, but initially payable to the mortgagee). The forms require the debtor to specify whether the amount deducted includes taxes and insurance, allowing a party in interest to inquire into the deduction and raise an objection.

Priority debt, deductible pursuant to § 707(b)(2)(A)(iv), is treated on a single entry line, also requiring division by 60. The instruction for this line makes clear that only past due priority debt—not anticipated debts—should be included. Thus, future support or tax obligations, and future fees that might be payable to a Chapter 13 debtor’s attorney, are not included.

The defined deduction for the expenses of administering a Chapter 13 plan is allowed by § 707(b)(2)(A)(ii)(III) only for debtors eligible for Chapter 13. The forms treat this deduction in an entry line requiring the eligible debtor to state the amount of the prospective Chapter 13 plan payment and multiply that payment amount by the percentage fee established for the debtor’s district by the Executive Office for United States Trustees. The forms refer debtors to the website of the U.S. Trustee Program to obtain this percentage fee.

The subpart concludes with a subtotal of debt payment deductions.

#### **4. Total deductions**

Finally, the forms direct that the subtotals from Subparts A, B, and C be added together to arrive at the total of allowed deductions from CMI under the means test.

#### **5. Additional claimed deductions**

The forms do not provide for means test deductions from CMI for expenses in categories that are not specifically identified as “Other Necessary Expenses” in the Internal Revenue Manual. However, debtors may wish to claim expenses that do not fall within the categories listed as “Other Necessary Expenses” in the forms. Part VII of the Chapter 7 form and Part VI of the Chapter 13 form provide for such expenses to be identified and totaled. Although expenses listed in these sections are not deducted from CMI for purposes of the means test calculation, the listing provides a basis for debtors to assert that these expenses should be deducted from CMI under § 707(b)(2)(A)(ii)(I), and that the results of the forms’ calculation should therefore be modified.

### **D. The chapter-specific forms**

#### **1. Chapter 7**

The Chapter 7 form has several unique aspects. The form includes, in the upper right corner of the first page, a check box directing the debtor to state whether or not the calculations required by the form result in a presumption of abuse. The debtor is not bound by

this statement and may argue, in response to a motion brought under § 707(b)(1), that there should be no presumption despite the calculations required by the form. The check box is intended to give clerks of court a conspicuous indication of the cases for which they are required to provide notice of a presumption of abuse pursuant to § 342(d).

Part I implements the provision of § 707(b)(2)(D) that excludes certain disabled veterans from all means testing, making it unnecessary to compute the CMI of such veterans. Debtors who declare under penalty of perjury that they are disabled veterans within the statutory definition are directed to verify their declaration in Part VII, to check the “no presumption” box at the beginning of the form, and to disregard the remaining parts of the form.

Part I also provides an exclusion for debtors who do not have primarily consumer debts. These debtors are not subject to any of the provisions of § 707(b)—including the requirement of § 707(b)(2)(C) for filing a CMI statement—since § 707(b) applies, by its terms, only to “an individual debtor . . . whose debts are primarily consumer debts.” However, a debtor may be found to have asserted non-consumer status incorrectly. Unless such a debtor has filed the CMI form within the 45 days after filing the case, the case could be subject to automatic dismissal under § 521(i). To avoid this possibility, debtors asserting principally non-consumer status may complete the appropriate portions of Part I, claim an exclusion from the balance of the form, and promptly file the form. If it is subsequently determined that the debtor does have primarily consumer debts, the form will have been filed within the deadline established by § 521(i), and can be amended to include the necessary CMI and means test information.

Part II computes CMI for purposes of the safe harbor of § 707(b)(7). Section 707(b)(7) prohibits a motion to dismiss based on the means test’s presumption of abuse if the debtor’s annualized CMI does not exceed a defined median state income. For this purpose, the statute directs that CMI of the debtor’s spouse be combined with the debtor’s CMI even if the debtor’s spouse is not a joint debtor, unless the debtor declares under penalty of perjury that the spouses are legally separated or living separately other than for purposes of evading the means test. Accordingly, the calculation of CMI in Part II directs a computation of the CMI of the debtor’s spouse not only in joint cases, but also in cases of married debtors who do not make the specified declaration, and the CMI of both spouses in these cases is combined for purposes of determining standing under § 707(b)(7).

Part III compares the debtor’s CMI to the applicable state median income for purposes of § 707(b)(7). It then directs debtors whose income does not exceed the applicable median to verify the form, to check the “no presumption” box at the beginning of the form, and not to complete the remaining parts of the form. Debtors whose CMI does exceed the applicable state median are required to complete the remaining parts of the form.

Part IV adjusts the CMI of a married debtor, not filing jointly, whose spouse’s CMI was combined with the debtor’s in Part II. The means test itself does not charge a married debtor in a non-joint case with the income of the non-filing spouse, but only with

payments regularly made by that spouse for the household expenses of the debtor or the debtor's dependents, as provided in the definition of CMI in § 101(10A). Accordingly, Part IV calls for the combined CMI of Part II to be reduced by the amount of the non-filing spouse's income that was not regularly paid for the household expenses of the debtor or the debtor's dependents. The form requires that the alternative uses of the spouse's income be specified.

Part V of the form provides for a calculation of the means test's deductions from the debtor's CMI, as described above in § C.

Part VI provides for a determination of whether the debtor's CMI, less the allowed deductions, gives rise to a presumption of abuse under § 707(b)(2)(A). Depending on the outcome of this determination, the debtor is directed to check the appropriate box at the beginning of the form and to sign the verification in Part VIII. Part VII allows the debtor to claim additional deductions, as discussed above in § C.5.

## **2. Chapter 11**

The Chapter 11 form is the simplest of the three, since the means-test deductions of § 707(b)(2) are not employed in determining the extent of an individual Chapter 11 debtor's disposable income. Section 1129(a)(15) requires payments of disposable income "as defined in section 1325(b)(2)," and that paragraph allows calculation of disposable income under judicially-determined standards, rather than pursuant to the means test deductions, specified for higher income Chapter 13 debtors by § 1325(b)(3). However, § 1325(b)(2) does require that CMI be used as the starting point in the judicial determination of disposable income, and so the Chapter 11 form requires this calculation (in Part I of the form), as described above, together with a verification (in Part II).

## **3. Chapter 13**

Like the Chapter 7 form, the form for Chapter 13 debtors contains a number of special provisions. The upper right corner of the first page includes check boxes requiring the debtor to state whether, under the calculations required by the statement, the applicable commitment period under § 1325(b)(4) is three years or five years and whether § 1325(b)(3) requires the means-test deductions to be used in determining the debtor's disposable income. The check box is intended to inform standing trustees and other interested parties about these items, but does not prevent the debtor from arguing that the calculations required by the form do not accurately reflect the debtor's disposable income.

Part I is a report of income to be used for determining CMI. In the absence of full payment of allowed unsecured claims, § 1325(b)(4) imposes a five-year applicable commitment period—rather than a three-year period—if the debtor's annualized CMI is not less than a defined median state income. For this purpose, as under § 707(b)(7), § 1325(b)(4) requires that the CMI of the debtor's spouse be combined with the debtor's CMI, but, unlike § 707(b)(7), no exception is made for spouses who are legally separated



or living separately. Accordingly, the report of income in Part I directs a combined reporting of the income of both spouses in all cases of married debtors.

Part II computes the applicable commitment period by annualizing the income calculated in Part I and comparing it to the applicable state median. The form allows debtors to contend that the income of a non-filing spouse should not be treated as CMI and permits debtors to claim a deduction for any income of a non-filing spouse to the extent that this income was not regularly paid for the household expenses of the debtor or the debtor's dependents (with the alternative uses specified). The debtor is directed to check the appropriate box at the beginning of the form, stating the applicable commitment period. The check box does not prevent a debtor from proposing an applicable commitment period of less than three or five years in conjunction with a plan that pays all allowed unsecured claims in full.

Part III compares the debtor's CMI to the applicable state median, allowing a determination of whether the means-test deductions must be used, pursuant to § 1325(b)(3), in calculating disposable income. For this purpose, since § 1325(b)(3) does not provide for including the income of the debtor's spouse, the form directs a deduction of the income of a non-filing spouse that was not contributed to the household expenses of the debtor or the debtor's dependents. Again, the debtor is directed to check the appropriate box at the beginning of the form, indicating whether the means test deductions are applicable. If so, the debtor is directed to complete the remainder of the form. If not, the debtor is directed to complete the verification in Part VII but not complete the other parts of the form.

Part IV provides for calculation of the means-test deductions provided in § 707(b)(2), described above in § C, as incorporated by § 1325(b)(3) for debtors with CMI above the applicable state median.

Part V provides for four adjustments required by special provisions affecting disposable income in Chapter 13. First, § 1325(b)(2) itself excludes from the CMI used in determining disposable income certain "child support payments, foster care payments, [and] disability payments for a dependent child." Because payments of this kind are included in the definition of CMI in § 101(10A), a line entry for deduction of these payments is provided. Second, a line entry is provided for deduction of contributions by the debtor to certain retirement plans, listed in § 541(b)(7)(B), since that provision states that such contributions "shall not constitute disposable income, as defined in section 1325(b)." Third, the same line entry also allows a deduction from disposable income for payments on loans from retirement accounts that are excepted from the automatic stay by § 362(b)(19), since § 1322(f) provides that for a "loan described in section 362(b)(19) . . . any amounts required to repay such loan shall not constitute 'disposable income' under section 1325." Finally, § 1325(b)(3) requires that deductions from income for above-median income debtors be determined not only in accordance with the means test deductions, set out in subparagraph (A) of § 707(b)(2), but also in accordance with subparagraph (B), which sets out the grounds for rebutting a presumption of abuse based on a demonstration of additional expenses justified by special circumstances. Part V includes an entry line for such additional expenses, with a warning that the debtor will be required (as provided by

§ 707(b)(2)(B)) to document the expenses and provide a detailed explanation of the special circumstances that make them reasonable and necessary.

The Chapter 13 form does not provide a deduction from disposable income for the Chapter 13 debtor's anticipated attorney fees. No specific statutory allowance for such a deduction exists, and none appears necessary. Section 1325(b)(1)(B) requires that disposable income contributed to a Chapter 13 plan be used to pay "unsecured creditors." A debtor's attorney who has not taken a security interest in the debtor's property is an unsecured creditor who may be paid from disposable income.

Part VI allows the debtor to declare expenses not allowed under the form without deducting them from CMI, as described above in § C.5.