

**Department of Justice
Executive Office for United States Trustees**

**Final Agency Action
Case No. 2014-4**

**Review of Denial of March 27, 2014 Application
by *Phoenix Financial, Inc.*, Agency No. 17609,
Seeking Approval as a Nonprofit Budget
and Credit Counseling Agency**

Phoenix Financial, Inc. (“Phoenix Financial”) seeks review of an August 28, 2014, decision to deny its application seeking inclusion on the list of nonprofit budget and credit counseling agencies (“credit counseling agency” or “agency”) approved by the United States Trustee Program (“USTP”). Based upon the record, I affirm the USTP’s decision.

I. Course of this Proceeding

On March 27, 2014, Phoenix Financial submitted Application No. 0314-CC-01587RW (“Application”) to the USTP, seeking approval to provide nonprofit budget and credit counseling (“credit counseling”) via the Internet in 84 judicial districts under the jurisdiction of the USTP. ARR¹ 1, 7-21.

By letter dated August 28, 2014, the USTP denied Phoenix Financial’s Application (“Notice of Denial” or “Notice”). ARR 1-61. On September 18, 2014, the USTP received an undated letter from Phoenix Financial requesting the Director’s review of the Notice of Denial pursuant to 28 C.F.R. § 58.24(j) (“Request for Review”). ARR 62-63; *see also* ARR 64. On October 22, 2014, pursuant to 28 C.F.R. § 58.24(k), the USTP timely submitted a response (“Response”) to the Request for Review.² ARR 64-243.

Accordingly, the administrative record in this matter consists of: (1) the USTP’s Notice of Denial and attached exhibits; (2) Phoenix Financial’s Request for Review; and (3) the USTP’s Response and attached exhibits.

II. Notice of Denial

The USTP denied the Application on the grounds that it failed to establish to the satisfaction of the United States Trustee that Phoenix Financial met the requirements for credit counseling agencies set forth in 11 U.S.C. § 111(a)-(c) and 28 C.F.R. §§ 58.12–58.24. ARR 1. *See* 28 C.F.R. § 58.19(a).

The Notice specifies two general reasons for denial of the Application. First, the Notice concludes that Phoenix Financial did not demonstrate that it would provide adequate credit

¹ ARR refers to the administrative review record pertaining to this matter.

² The Director granted the EOUST an extension to submit the Response until October 23, 2014.

counseling to clients. ARR 2-5. Second, the Notice concludes that Phoenix Financial did not demonstrate sufficient experience and proficiency in providing credit counseling services via the Internet. ARR 5-6.³

III. Request for Review

In its Request for Review, Phoenix Financial contends that its Internet credit counseling provides adequate counseling to clients and that the USTP should conduct an audit of its website after March 27, 2014, to confirm its compliance. ARR 62-63.

IV. Factual Background

Phoenix Financial submitted its Application on March 27, 2014. ARR 1, 7-21. After several contacts between Phoenix Financial and the USTP, *see* ARR 73, the USTP reviewed Phoenix Financial's online counseling materials and tested its website on July 14, 2014. ARR 2, 73. The USTP also printed every page of the online portion of Phoenix Financial's credit counseling materials on July 21, 2014. ARR 74, 221-243.⁴

Phoenix Financial's website requires a client to enter his or her income, expense, and debt information. ARR 38-44. Based on this information, the website generates a limited analysis of the financial information entered by the client, which consists of a debt-to-income ratio and a "Budget Analysis." ARR 45-46. This analysis compares the client's reported expenditures, as a percentage of income, in various categories to "target value[s]" for these expenses. ARR 46. The website then provides some general information including "Credit Tips," a discussion of certain financial hardships that may cause people to file for bankruptcy relief, information pertaining to professionals who may be of assistance during financial hardships, and a brief description of three options that may be available to individuals experiencing financial hardship. ARR 47-58. A screen then indicates that the Internet portion of the credit counseling course has concluded and states that "[a] representative will contact you shortly via email regarding final course completion requirements." ARR 59.

Phoenix Financial proposed to satisfy the requirement that the client receiving Internet counseling services engage in interaction with a counselor by communicating with the client by electronic mail ("email"). ARR 3, 200. Phoenix Financial provided the USTP with template emails that exemplify the interactions that Phoenix Financial expects to occur between its counselors and clients during this portion of the counseling. ARR 60-61. These templates address two possible scenarios involving a potential client's financial condition – high amounts of credit card debt and miscellaneous high spending for groceries, entertainment, and travel. *Id.*

³ As part of this discussion, the Notice asserts that Phoenix Financial fails to provide the required disclosures to clients. ARR 5. Phoenix Financial's Request for Review takes issue with this assertion, noting that it provides the required disclosures on its website. ARR 62. Screenshots of Phoenix Financial's credit counseling website reflect that there is a hyperlink that states "[r]ead full Disclosures" near the bottom of the registration page, above the "Submit" navigation tool. ARR 35. The USTP's Response does not address this issue. ARR 64-69. Accordingly, I will not consider the adequacy of Phoenix Financial's disclosures as a basis for denial of the Application.

⁴ ARR 221-243 contain the same information as ARR 37-59 and will not be further referenced herein.

Each email begins by stating, “Hello ‘Client,’ Phoenix financial, appreciates your efforts in bettering your situation. It is our goal to help you in the most effective way we can. A few more questions and we can conclude your course.” ARR 60. In the template that addresses high amounts of credit card debt, the counselor is to request the client to verify total net income and confirm total credit card debt and the number of cards the client possesses. *Id.* In the template that addresses miscellaneous high spending, the counselor is to ask the client to verify net monthly income and the amount the client spends on groceries and gas. *Id.* Phoenix Financial proposes to send follow-up emails that provide the client with generic information pertaining to managing debt or reducing spending. ARR 60-61.⁵

Consistent with standard operating procedures, the USTP tested Phoenix Financial’s credit counseling services by attempting to complete the online counseling process without inputting any information. ARR 67, 71, 73. Rather than informing the USTP that the values

⁵ A client who reports high credit card balances is to receive the following correspondence from a counselor:

“Client”, thank you again. Our counselors [sic] know first hand how difficult this process can be. Based on the information you provided your revolving accounts “credit cards” have become increasing [sic] difficult to manage. A couple of viable options is [sic] paying off the credit card balances with the higher interest rates first. Focusing on those particular accounts [sic] will save you more money long term. Or consolidating your cards into a home equity line of credit. A home equity line of credit normally has a significantly lower interest rate. “client” [sic] do you have any questions or areas we can help you with?

ARR 60. The follow-up email for a client who reports high expenditures for living expenses will contain this language:

“Client”, thank you again. Our counselors [sic] know first hand how difficult this process can be. Based on the information you provided we have a few suggestions to assist you. These tips won’t create an overnight miracle in your life. However, you might save from 10% to 20% off your transportation costs by following my advice. Maybe more, maybe less. Whatever you save, it will add up over time.

- 1-Shop around for gas;
- 2-Carpool whenever possible.
- 3-Maintain proper tire inflation,
- 4-Use maps whenever going to unknown locations.

In regards to groceries.

- 1. First, Track Your Expenses** You can’t save money if you don’t know how much you’re spending to begin with.
 - 2. Grow Your Own** Obviously this is the way to achieve the most savings. Make a garden this year. Next year make a bigger garden.
 - 3. Cook** Without question, you can cook your own food more cheaply than you can hire someone to cook it for you.
- Use Discount Grocery Stores** Preferably the type that buys surplus lots from bigger chains. We save a small fortune every year by shopping at a local discount grocery. These are just a few suggestions. Hopefully they are useful [sic]. If you have any questions please feel free to contact us. Thanks again.

ARR 61.

entered were incomplete, Phoenix Financial allowed the USTP to complete the online counseling. ARR 2, 38-59, 73.

V. Statutory Framework

With the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Congress required debtors to certify that they have obtained credit counseling before filing for bankruptcy relief. Pub. L. No. 109-8, 119 Stat. 23, 36-42 (2005). At the same time, Congress charged the USTP with responsibility for ensuring that debtors receive adequate credit counseling by establishing a list of approved service providers after a thorough review of each applicant’s qualifications and services. 11 U.S.C. § 111(b)(1).

The BAPCPA directs that the USTP shall only approve a credit counseling agency that demonstrates, among other things, that it will provide “adequate counseling with respect to client credit problems.” 11 U.S.C. § 111(c)(1). It further requires a credit counseling agency to provide “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).

Consistent with the BAPCPA, the USTP’s regulations require a credit counseling agency to establish, to the satisfaction of the United States Trustee, that the agency, at the time of approval, (1) satisfies every requirement of the regulations and (2) provides adequate counseling to its clients. 28 C.F.R. § 58.19(a). The USTP’s regulations further require a credit counseling agency to provide a written analysis of the client’s current financial condition that includes: (1) a budget analysis; (2) consideration of all alternatives to resolve the client’s credit problems; (3) a discussion of the factors that caused the current financial condition; and (4) identification of all methods by which the client can develop a plan to respond to the client’s problems without incurring negative amortization of debt. *See* 28 C.F.R. §§ 58.19(a)(2) (requiring “adequate counseling”); 58.12(b)(3) (defining “adequate counseling”); 58.12(b)(12) (defining “counseling services”).

The USTP’s regulations also require an agency that offers any component of credit counseling services by the Internet method of delivery to use only counselors who “demonstrate sufficient experience and proficiency in providing such counseling services by [that] method[] . . . including proficiency in employing verification procedures to ensure the person receiving the counseling services is the client, and to determine whether the client has completely received counseling services.” 28 C.F.R. § 58.20(f)(3). To the extent that an agency offers Internet credit counseling services, “counseling is not complete until the client has engaged in interaction with a counselor . . . following the automated portion of the counseling session.” 28 C.F.R. § 58.22(a). An agency shall “not provide any client diminished counseling services because the client receives any portion of those counseling services by telephone or Internet.” 28 C.F.R. § 58.20(h)(1).

The USTP’s regulations require credit counseling agencies providing counseling via the Internet to confirm the client’s identity by “[o]btaining one or more unique personal identifiers from the client and assigning an individual access code, user ID, or password at the time of

enrollment[,] and . . . [r]equiring the client to provide the appropriate access code, user ID, or password, and also one or more of the unique personal identifiers during the course of delivery of the counseling services.” 28 C.F.R. § 58.20(h)(2).

VI. Standard of Review

In reviewing this matter, I must consider two factors:

1. Does the record support the decision to deny Phoenix Financial’s Application?
2. Does the decision to deny Phoenix Financial’s Application constitute an appropriate exercise of discretion?⁶

VII. Analysis

As set forth more fully below, I conclude that the record supports the USTP’s decision to deny Phoenix Financial’s Application. I further conclude that this denial was an appropriate exercise of the USTP’s discretion.

A. The record supports the USTP’s conclusion that the credit counseling proposed by Phoenix Financial is inadequate.

I find that the record supports the USTP’s conclusion that Phoenix Financial fails to provide clients with “adequate counseling” as required under 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. §§ 58.12(b)(3), 58.12(b)(12), and 58.19(a)(2).

At a fundamental level, I find that credit counseling cannot be adequate when, as here, it can be completed without the entry of any substantive information. Phoenix Financial claims that its online counseling portion will provide an adequate analysis of a client’s financial condition if “workable information” is entered, “not just a bunch of zeroes.” ARR 62-63. I disagree that the USTP must enter “workable information” to test the adequacy of credit counseling. The USTP is cognizant of the fact that an Internet credit counseling service that may grant a certificate of completion to a client who fails to enter values in any field, or enters a value of zero for each of the fields, is prone to exploitation by clients seeking to obtain a certificate while avoiding the statutorily required credit counseling. ARR 67, 71. Due to this potential for easy exploitation, the USTP will not allow a credit counseling service to offer Internet counseling to clients that may be completed without entering positive financial data in essential fields such as income, assets, debts, and housing, utility, transportation, and food expenses, unless the client provides additional confirmation that the entry is accurate.⁷ ARR 67.

⁶ See 28 C.F.R. § 58.24(m) (specifying scope of the Director’s review).

⁷ The USTP has indicated that it may be reasonable in certain circumstances for a client to enter a value of zero, such as in the instance of an unemployed client with no income, a client who is homeless or living with relatives or friends, or a client with no assets. ARR 67 n.4. However, a credit counseling agency must confirm the accuracy of this information by soliciting an explanation from the client. *Id.*

In addition, I find that the record supports the USTP's conclusion that Phoenix Financial does not provide adequate counseling because it (1) does not discuss the factors that caused the client's current financial condition, (2) does not provide adequate assistance to the client in developing a plan to respond to the client's financial problems, and (3) does not reduce its analysis to a writing provided to the client. *See* ARR 65. I agree with the USTP that, to be considered adequate for the purposes of the statute and the USTP's regulations, a credit counseling agency must provide the client personalized counseling that takes into account the client's specific circumstances. *See* ARR 2.

1. The record supports the USTP's conclusion that Phoenix Financial does not provide adequate counseling because it does not analyze the factors that caused the client's current financial condition.

A credit counseling agency must analyze the factors that caused the client's current financial condition. 11 U.S.C. § 111(c)(2)(E), 28 C.F.R. § 58.12(b)(12)(i). Phoenix Financial's credit counseling fails to do this. At no point during the online credit counseling or during the mandatory interaction does Phoenix Financial address the specific reasons for the client's current financial condition. ARR 34-61. Rather, Phoenix Financial's credit counseling course materials contain a brief discussion of a few of the reasons why people *might* file for bankruptcy relief. The website informs clients that "90% of the time people file for 3 reasons," which Phoenix Financial indicates are job loss, divorce, and medical bills. ARR 52. Thus, while Phoenix Financial offers its clients some statistical information about factors that may be associated with their financial distress, to attribute a particular client's current financial condition to these factors without soliciting additional information is mere conjecture.⁸ I find that Phoenix Financial does not analyze the factors that caused the client's current financial condition and that Phoenix Financial, therefore, has not demonstrated compliance with 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. § 58.12(b)(12)(i).

2. The record supports the USTP's conclusion that Phoenix Financial did not adequately discuss all methods by which the client can develop a plan to respond to the client's financial problems without incurring negative amortization of debt.

A credit counseling agency must analyze all methods by which the client can develop a plan to respond to the client's financial problems without incurring negative amortization of debt. 11 U.S.C. § 111(c)(2)(E), 28 C.F.R. § 58.12(b)(12)(i). Phoenix Financial's credit counseling services do not provide a client-specific analysis of this nature. Phoenix Financial claims that it offers three potential plans in the online counseling portion of the course and "an unlimited amount of plans" in the email portion, and that its suggestions involving long term

⁸ Phoenix Financial states that without an audit with workable information, the only option is to calculate possible scenarios, and that had such an audit been done, the USTP would have found that it discusses in depth the reason the client is in financial distress. ARR 62. However, this is not what occurred during the USTP's valid testing process, and I cannot base my decision on what Phoenix Financial represents would have occurred had the testing been conducted differently.

goals and prudence with credit would be an applicable plan in many circumstances. ARR 62.⁹ However, this approach does not satisfy the requirement of 28 C.F.R. § 58.12(b)(12) that counseling services must provide each client with an analysis of *that client's* current financial condition. Moreover, the template emails that Phoenix Financial provided to the USTP reveal that Phoenix Financial's proposed interactions with clients during interactive counseling consist of generic materials addressing high amounts of credit card debt and high levels of spending. ARR 60-61. These emails are not specific to the individual client's current financial condition and, therefore, do not satisfy the explicit requirements of 28 C.F.R. § 58.12(b)(12). I find that Phoenix Financial does not adequately discuss all methods by which the client can develop a plan to respond to the client's financial problems without incurring negative amortization of debt and that Phoenix Financial, therefore, has not demonstrated compliance with 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. § 58.12(b)(12)(i).

3. The record supports the USTP's conclusion that Phoenix Financial did not supply an adequate written analysis to the client.

A credit counseling agency must provide a written analysis to the client that includes (1) a budget analysis, (2) consideration of all alternatives to resolve a client's credit problems, (3) a discussion of the factors that caused such financial condition, and (4) identification of all methods by which the client can develop a plan to respond to the financial problems without incurring negative amortization of debt. 28 C.F.R. § 58.12(b)(12)(i). Phoenix Financial does not specifically dispute that it fails to provide such information. *See* ARR 62-63. While Phoenix Financial provides some written materials to clients in a piecemeal manner during the delivery of credit counseling services, I find that the information it provides to clients does not constitute an analysis sufficient to meet the requirements of 28 C.F.R. § 58.12(b)(12)(i).

B. The record supports the USTP's conclusion that Phoenix Financial did not demonstrate compliance with requirements associated with delivering credit counseling services via the Internet.

1. The record supports the conclusion that Phoenix Financial failed to employ appropriate identity verification procedures.

BAPCPA requires that a credit counseling agency "demonstrate adequate experience and background in providing credit counseling." 11 U.S.C. § 111(c)(2)(G). USTP regulations require agencies providing counseling services by Internet to employ only counselors with enough experience and proficiency with Internet credit counseling to appropriately employ

⁹ Notably absent from Phoenix Financial's credit counseling materials is any solicitation of clients' asset information. ARR 2, 34-61. Phoenix Financial asserts in its Request for Review that had the USTP performed an audit it "would have found that our counselor would have asked about assets to offset and potentially pay off any outstanding debts. Motorcycles, ATV's, boats, jewelry, trailers, and gun collection are just a few we ask for." ARR 63. If this is the case, Phoenix Financial failed to adequately demonstrate it to the USTP during the testing process.

“verification procedures to ensure the person receiving the counseling services is the client” 28 C.F.R. § 58.20(f)(3). The agency must confirm the identity of the client before such client receives counseling services by Internet by:

- (i) Obtaining one or more unique personal identifiers from the client and assigning an individual access code, user ID, or password at the time of enrollment; **and**
- (ii) Requiring the client to provide the appropriate access code, user ID, or password, and also one or more of the unique personal identifiers during the course of delivery of the counseling services.

28 C.F.R. § 58.20(h)(2)(emphasis supplied).

In its Application, Phoenix Financial indicated “NC” (meaning “no change” since the most recent application) in section 4.6 pertaining to Internet counseling.¹⁰ ARR 17. Review of the previous application reveals that Phoenix Financial intends to verify the identity of the person receiving the counseling by confirming the last four digits of the client’s Social Security number. ARR 28. However, the last four digits of a client’s Social Security number do not constitute a unique personal identifier, as required by 28 C.F.R. § 58.20(h)(2). Additionally, Phoenix Financial does not propose to assign an individual access code, user ID, or password to the client during enrollment as required by the USTP’s regulations. *Id.*

Phoenix Financial argues in the Request for Review that it requests additional personal information from clients, including the client’s full name, address, email address, and telephone number. ARR 62. This argument misses the point. In addition to the information Phoenix Financial collects during registration, the regulation requires that it assign an individual access code, user ID, or password at the time of enrollment, and require the client to provide that identity verification information, and one or more unique personal identifiers, during the course of delivery of the counseling services. 28 C.F.R. § 58.20(h)(2).

Phoenix Financial fails to demonstrate that it satisfies its client identity verification obligations, and has not disputed that it does not require the client to provide the appropriate identity verification information and one or more unique personal identifiers during the delivery of counseling services. I therefore find that the record supports the USTP’s conclusion that Phoenix Financial has failed to demonstrate that it possesses adequate experience and proficiency in providing credit counseling services by the Internet method of delivery. 11 U.S.C. § 111(c)(2)(G); 28 C.F.R. § 58.20(f)(3), (h)(2).

2. The record supports the USTP’s conclusion that Phoenix Financial does not ensure that the client completely received counseling services.

The USTP’s regulations require credit counseling agencies to use counselors who demonstrate their proficiency to determine that the client has completely received credit

¹⁰ Phoenix Financial submitted its original application seeking approval to provide credit counseling in November 2013, but withdrew the application on March 5, 2014. ARR 22-31, 71-73, 191.

counseling. 28 C.F.R. § 58.20(f)(3). Because the materials Phoenix Financial supplied to the USTP do not demonstrate that it will provide a meaningful, client-specific analysis, I find that the record supports the USTP's conclusion that Phoenix Financial has not demonstrated compliance with this requirement.

3. The record supports the USTP's conclusion that Phoenix Financial's Internet model results in diminished counseling services.

A credit counseling agency may not provide "diminished counseling services" via the Internet as compared with in-person counseling services. 28 C.F.R § 58.20(h)(1). To the extent that Phoenix Financial's Internet counseling services fail to provide clients with "adequate counseling" as required under 11 U.S.C. § 111(c)(2)(E) and 28 C.F.R. §§ 58.12(b)(3), 58.12(b)(12), and 58.19(a)(2), I find that it offers diminished counseling services vis-à-vis in-person counseling. As discussed above, Phoenix Financial's Internet counseling services are insufficient because the credit counseling program does not provide each client with a written analysis of that particular client's current financial condition, nor does it offer an adequate analysis of the factors that caused the client's financial condition, or a plan to respond to the client's specific financial problems. 28 C.F.R. § 58.12(b)(12). Collectively, the online and mandatory interaction counseling services delivered by Phoenix Financial provide clients with primarily generalized information that fails sufficiently to analyze and address a client's actual unique financial condition. Thus, I find that the record supports the USTP's conclusion that Phoenix Financial's Internet counseling program constitutes diminished counseling services. 28 C.F.R § 58.20(h)(1).

VIII. CONCLUSION

Based upon my review of the record, and for all of the foregoing reasons, I affirm the USTP's decision to deny Phoenix Financial's Application to be included on the list of approved nonprofit budget and credit counseling agencies.

This decision constitutes final agency action in this matter.

Dated: 3/27/15



Clifford J. White III
Director
Executive Office for United States Trustees