Proposed Chapter 13 Form Plan

General Comments:
The proposal of a form chapter 13 plan raises a number of concerns. A fundamental principle of chapter 13 is that it is a voluntary proceeding. It is the debtor, not the court or trustee, who is to file a plan under section 1321. Section 1322(b)(11) allows the debtor to include in the plan any appropriate provision not prohibited by title 11.

Whether NACBA can support a national chapter 13 plan depends upon whether the plan permits debtors to freely exercise their right to make substantive changes to the plan that are consistent with the Bankruptcy Code.

If a form plan is adopted, the advisory committee note should make clear that the terms of such plan are not presumptively "better" or more valid than other plan terms that do not contravene the Code. The debtor should face no burden in proposing nonstandard terms other than to show that those terms are consistent with title 11.

In particular, non-standard terms should not be rejected by a court because the court believes that they are not "necessary" or that the terms in the form plan are "better" in some respect, as a few courts have done with local form plans. If the nonstandard term does exactly the same thing as the standard term, it makes sense to require the standard term. But such a requirement should not in anyway limit a debtor's right to propose something that is substantively different. While there is some value in having a form that permits courts and creditors to find certain types of provisions in a certain place and that contains uniform language for common provisions, those goals can be achieved without restricting a debtor's freedom to craft other plan terms, as long as those terms are consistent with the Code.1

The variety of case situations that might call for non-standard terms is too vast to catalogue. A past example, now unnecessary due to the promulgation of amended rules, was the inclusion of language requiring mortgage creditors to give certain notices during the case and assisting in the effectuation of mortgage cures in chapter 13.

Specific Plan Provisions
Part 2.3 The language about tax refunds is objectionable for a number of reasons: First, it suggests, giving only two options, that these may be the only options for a debtor, excluding the option of not turning over tax refunds. In fact, there are many

cases where debtors should not have to turn over tax refunds. Debtors who must compute their disposable income on Form 22C should have already accounted for tax refunds if they accurately report their actual tax liability on line 16. To require turnover of tax refunds would constitute double-counting, and compel payment of more than the Code requires. At the other end of the income scale, lower income debtors rely on tax refunds for basic necessities, whether it is catching up on accrued postpetition utility bills or annual clothes purchases for their children, so the refunds do not constitute disposable income available for plan payments.

Second, an open-ended requirement that debtors turn over tax refunds throughout the plan matches unknown future changes in income with unknown changes in expenses. The debtor should not be required to turn over tax refunds without knowing what they will be, or what the debtor's expenses three, four or even five years after the petition will be. The more appropriate way to deal with such variable numbers is through the plan modification process.

Third, the language about furnishing tax returns to the trustee is ambiguous, misleading, impracticable, and inconsistent with the Code. It first of all does not make clear whether it applies only to debtors who have committed to turning over their tax refunds. More importantly, it appears to presume that there is an obligation to turn over tax returns in every case. To the contrary, the Code has a specific provision addressing this issue. Section 521(e)(2) requires the debtor to provide a tax return (to the court, not the trustee) only if it has been requested in the specific case by the United States trustee or any party in interest. Lastly, many debtors must seek extensions of time to file their tax returns, and they will have nothing to provide to the trustee on April 20.

The entire section concerning tax refunds should be deleted. Where appropriate, they can be added by the debtor under "Other sources of funding".

Part 3.1 – There is no need to list the monthly plan payment for each secured claim on which a default is being cured. In many cases, it may be impossible to know this amount, because there is litigation about the amount of fees and charges included in the proof of claim. The amount of monthly payments may also change if the plan provides for a the plan payments to the secured creditor to begin after attorney's fees or some other obligation to be paid first or concurrently has been paid off, because of a change in the debtor's monthly mortgage payment, or for some other reason. At best, the estimated total amount of the arrearage is known. For confirmation purposes, if the plan proposes to pay that arrearage within a reasonable period of time and otherwise provides sufficient direction to the trustee regarding the order of payments to various creditors, the amounts of monthly payments are not needed.

The language about stay relief in this provision is also problematic. When relief from the stay is granted to a creditor, the debtor may not desire that payments to that creditor cease. The debtor may wish to continue paying in hopes of effectuating a cure before the creditor can foreclose on the collateral. In addition, or alternatively, the debtor may wish to pay other creditors secured by the same collateral. A form plan should not presume to make these choices for the debtor.
Part 3.2 – As discussed above in relation to Rule 3012, NACBA sees no reason governmental creditors should be excluded from this provision. We also have the same objection as in Part 3.1 to the requirement to list the monthly payment to the creditor, which may vary and at best can only be estimated. The plan may provide for a valuation proceeding to occur after confirmation. There is no requirement that it occur before the plan is confirmed.

Significantly, the form does not seem to have any place where preconfirmation adequate protection payments to a secured creditor are to be credited toward the allowed secured claim. The plan may also provide for postconfirmation adequate protection payments while attorney's fees are being paid, as many courts have allowed, and the form plan does not easily accommodate that arrangement.

The title and wording of this provision are misleading and underinclusive. They suggest the provision is only for secured claims on which the debtor seeks a court valuation of the collateral. But there is no other provision for payments to secured creditors under section 1325(a)(5) that do not involve valuation of collateral, cure of defaults, or claims governed by the "hanging paragraph" at the end of section 1325(a). For example, a debtor may propose to pay an allowed secured claim according to the contract terms if it has a very low interest rate. Part 3.2 should be modified to include all other secured claims provided for by the plan.

The two boxes concerning the debtor's eligibility for a discharge should be deleted from this section. They are apparently intended to be informational, to the extent some courts think it relevant to treatment of secured claims, but that information has already been provided in the petition.

Part 3.3
The plan should make clear that the debtor is not required to deal with "910" claims governed by the paragraph at the end of section 1325(a) under this paragraph. The debtor may choose to deal with such claims under paragraph 3.1, so the last paragraph before the listing of creditors should say something like "Except as provided in Part 3.1". In addition, NACBA has the same objections to the requirement that monthly payments be listed in this paragraph as in paragraphs 3.1 and 3.2.

Part 3.4
NACBA supports the ability to avoid liens under section 522(f) though a plan provision.

However, the form plan should not dictate how the unavoided portion of the lien should be treated in the plan, as the last sentence of Part 3.4 does. The debtor may choose not to provide for the remaining allowed secured claim, or to cure and maintain payments rather than pay it in full. So the portions of this part dealing with how the claim is to be treated should include the qualifier "unless otherwise provided in this plan."
As with claim valuation, the Code does not require lien avoidance to occur before confirmation. The plan may provide that lien avoidance by motion will occur after confirmation, and a form plan should be flexible enough to accommodate this possibility.

Part 4.4 – As with secured claims, and for the same reasons, the monthly payments on priority claims should not be required to be listed. They often cannot be known at the time of confirmation. A plan may be confirmed on the basis that it provides sufficient funding to pay priority claims in full without knowing the monthly payments at the time of confirmation. Such payments also may not begin until after other claims, such as secured claims, are paid, so it may be hard to determine when such payments would begin. Indeed, there is no need to list priority creditors that will be paid in full, since they are already listed in the schedules.

Part 4.5 – The title of this part is under-inclusive. Section 507(a)(1)(B) includes domestic support obligations owed to a governmental unit whether or not they were assigned. The words "or owed" should be inserted after "assigned".

Part 6 – This part should not create a default that all unassumed leases and executory contracts are rejected. It also should allow the debtor to neither assume nor reject a lease, since many courts have recognized "ride-through" in that situation. And if the debtor does assume the lease, the plan must provide for prompt cure of defaults in addition to current installments. This part should simply list 1) any executory contracts or lease that are rejected and 2) any executory contracts that are assumed, with the treatment to be given to assumed contracts or leases.

Part 7.1
This section should not dictate that secured claims be paid second in the order of payments, and should simply allow the debtor to propose any order of payments permitted by the Code. This may include paying administrative expenses such as attorney's fees before other claims, as dictated by section 1326(b)(1); paying domestic support obligations before secured claims; making adequate protection payments on secured claims; making payments to cure a default on an assumed unexpired lease; or many other possibilities.

Exhibit A
Lines c and e should more closely track the statutory language.

Line c should read: Amount of exemption debtor could claim if there were no liens on the property
Line e should read: Value the debtor's interest in the property would have in the absence of any liens.