New Bankruptcy Forms: 22C-1 AND 22C-2

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On December 1, 2014, the Official Bankruptcy Form 22C (or B22C) will be replaced by two separate forms, Form 22C-1 and Form 22C-2. The new forms do not involve major changes—anyone familiar with the current form will recognize most of what appears on the new versions—but the forms do have a new look and involve some material changes.

General Matters

The most immediately apparent changes are stylistic revisions under the Forms Modernization Project, designed to make the forms more user-friendly (especially for unrepresented filers) and more readable.[1] The format is similar to the new forms for Schedules I and J which went into effect in December 2013. As practitioners familiar with these new forms know, one notable side effect of the modernization effort is to increase form length.

The new forms do counteract the lengthening trend to some degree by splitting the current Form 22C into two different forms, with the second form completed only by above-median-income debtors. Form 22C-1 must be completed by all debtors. It contains the calculations in Parts I, II, and III of the existing Form 22C—the calculations of average monthly income and current monthly income and the determinations of whether the debtor is above or below the state's median income for purposes of § 1325(b)(4) (the applicable commitment period) and § 1325(b)(3) (determination of "amounts reasonably necessary to be expended"). Only debtors that are above the median income under § 1325(b)(3) must complete Form 22C-2. The existing Form 22C is functionally similar, instructing below-median-income debtors not to complete Parts IV, V, and VI. The approach under the new forms should eliminate the pages of blank forms that accompany the majority of filings under the existing form.

Changes to Reflect Supreme Court Decisions

The new forms include revisions to reflect two Supreme Court decisions. The first revision is straightforward. In *Ransom v. FIA Card Services, N.A.*, the Supreme Court held that a "debtor who does not make loan or lease payments may not take the car-ownership deduction."[2] The new Forms finally catch up to this ruling, adding a specific prohibition to the instructions for the vehicle ownership standard (at Line 13 of the B22C-2):

> 13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

The new forms also include a more interesting revision designed to accommodate the holding in *Hamilton v. Lanning*. In that case, the Court held that "when a bankruptcy court calculates a debtor's projected disposable income, the Court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." [3] The new form addresses this holding by

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[1] *See* U.S. Courts, *First Revamped Bankruptcy Forms Out for Public Comment*, at http://news.uscourts.gov/first-revamped-bankruptcy-forms-out-public-comment.

[2] *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 131 S. Ct. 716, 721, 178 L. Ed. 2d 603 (2011).

[3] *Hamilton v. Lanning*, 560 U.S. 505, 524, 130 S. Ct. 2464, 2478, 177 L. Ed. 2d 23 (2010).

adding new lines at the end of Form 22C-2 that provide space to list known or virtually certain changes in income or expenses:

Part 3: **Change in Income or Expenses**

46. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 22C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
☐ 22C–1 ☐ 22C–2	____	____________________	__________	☐ Increase ☐ Decrease	$__________
☐ 22C–1 ☐ 22C–2	____	____________________	__________	☐ Increase ☐ Decrease	$__________
☐ 22C–1 ☐ 22C–2	____	____________________	__________	☐ Increase ☐ Decrease	$__________
☐ 22C–1 ☐ 22C–2	____	____________________	__________	☐ Increase ☐ Decrease	$__________

This revision is consistent with the clear majority approach in the reported decisions,[4] which holds that the statutory formula in §§ 707(b) and 1325(b) applies even when circumstances have changed. The references to specific line items and the requirement to identify the reason for the change clearly imply that a change in circumstances does not automatically shift the entire projected disposable income analysis to a debtor's actual income and expenses on Schedules I and J. To the extent it remains, the pure "I and J" approach to above-median-income cases will be more difficult to sustain since the new forms provide an official method for presenting *Lanning*-like adjustments.

Functionally, the lines for reporting changes in circumstances may present some minor challenges. First, the new form lists the changes after the calculation of monthly "disposable income," but it does not follow up with a calculation of *projected* monthly disposable income. Though completing the calculation is a matter of basic addition and subtraction, the omission is odd. The Supreme Court's decision in *Lanning* confirmed that the ultimate determination under § 1325(b) depends on "*projected* disposable income." Why the new form continues to calculate only "disposable income" is not clear when it collects the information necessary to calculate the projected number.

The answer may be based in practical considerations. The new lines for reporting changes in circumstances apply to both Form 22C-1 and Form 22C-2. Check boxes allow a debtor to indicate whether each listed change is a change to the Form 22C-1 (the income side) or to Form 22C-2 (the expense side). And a second set of boxes allows the debtor to indicate whether the change is an increase or a decrease. The result ensures a concise and clear form, but it does mean that calculating the projected number requires an algorithm—whether each number in the new lines represents an increase or a decrease to the disposable income depends on the check boxes. It also means that the instructions for calculating the projected number would probably be somewhat complicated. The same factors that would make the

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[4] *See* James Davis-Smith, *A Consensus Emerges on the Projected Disposable Income Test Under Lanning: Modified "Disposable Income," Not Actual Ability to Pay*, NORTON BANKR. L. ADVISER, September 2011.

instructions difficult complicate any automation of the review of the new forms. Extracting the data from these lines requires a person or a computer to follow a process to determine whether the number should be added to or subtracted from the monthly disposable income.

One other potential area of confusion: When a debtor reports a change anticipated to occur at a future date, the "amount of change" the debtor reports most likely will not be the amount of the change to the *average* monthly disposable income; it will just be the amount of the change that will occur in the future. Because this future change will not apply over all 60 months, calculating the projected monthly disposable income in this situation will require more than just addition and subtraction. Suppose, for example, that a debtor's employer currently pays the full cost of a debtor's health insurance but will stop subsidizing it in ten months and the debtor, therefore, projects that he will have insurance expenses of $300 per month beginning in month 11. The debtor is likely to list an "amount of change" of $300 and list a "date of change" as the beginning of month 11. The effect of this change on the 60-month disposable income calculation is not $300 per month, because the change does not apply over all 60 months; it applies for only 50 months, so the change to the *monthly* disposable income is only $250 ($300 times 50 and divided by 60).

<u>Taxes</u>

The new Form 22C-2 also wades into the murky area of accounting for income tax refunds. The current form takes a fairly hands-off approach, simply instructing debtors to list the amount that they "actually incur." This instruction certainly implies—and courts have generally concluded[5]—that the deduction for taxes should account for any anticipated refund, but it does not state so expressly, and it provides no guidance for arriving at the estimate of the actual tax expense.

The new form provides additional instructions. It expressly authorizes debtors to estimate taxes based on withholding, but it requires the debtors that do so to also reduce the amount by any anticipated tax refund:

> 16. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. $______
>
> Do not include real estate, sales, or use taxes.

Though this instruction is little more than a clarification of the existing instructions, it does remove some of the cover debtors may have had under the current form to just "estimate" taxes by calculating the average withholding (an approach that might have some legitimacy in jurisdictions that treat post-petition tax refunds as disposable income[6]). The instructions now clearly preclude that approach.

The approach the new form adopts is the simplest to administer and it is likely to be relatively accurate in cases without significant changes in circumstances from the prior tax year. Unfortunately, it is not very helpful in the not-uncommon event that a debtor has experienced some changes or disruptions in income prepetition; in those cases, the prior year's tax refund may provide only marginal evidence regarding future tax refunds and determining the expected refund may not be much easier than determining the expected tax expense. The new form does not require debtors to provide any detail

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[5] *See In re Melander*, 506 B.R. 855, 868 n.12 (Bankr. D. Minn. 2014) (compiling cases).

[6] *Cf. In re Balcerowski*, 353 B.R. 581, 588 n.4 (Bankr. E.D. Wis. 2006) (describing similar consideration raised by the trustee).

regarding their estimation of taxes, so this item is likely to remain something of a black box in the calculation.

Household Size and Number of People Used in Determining Expenses

The new Form 22C provides greater clarity regarding the possible distinction between (1) the household size used to determine whether a debtor is above or below the applicable median income and (2) the number of people used for purposes of determining the applicable IRS Standards. In most instances, both measures yield the same result. But different statutory language governs the two numbers, so the new forms require debtors to specify two separate numbers.

The new forms instruct debtors to report household size on Line 16 of the new Form 22C-1 as follows, in essentially the same manner they report it on Line 16 of the current Form 22C:

> 16. **Calculate the median family income that applies to you.** Follow these steps:
>
> 16a. Fill in the state in which you live. ________
>
> 16b. Fill in the number of people in your household. ________

The term "household" derives from §§ 1322(d) and 1325(b). Both of these subsections compare the debtor's annualized current monthly income to the median income for a family of the same size as the debtor's "household."

The new Form 22C-2, however, also requires debtors to separately specify the number of people used in determining the deductions from income:

> 5. **The number of people used in determining your deductions from income**
>
> Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

The "number of dependents" in this line derives from § 707(b) (made applicable to above-median-income chapter 13 cases by § 1325(b)(3)). Section 707(b)(2)(A)(I) specifies the means test expense deduction for the IRS Standards and indicates that a debtor is entitled to claim the applicable IRS Standards and other expenses "for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case."

A number of cases consider the proper method of determining one or both of these numbers. The cases, however, sometimes fail to distinguish clearly between the two numbers.[7] And some basis exists for making that distinction. The "household" size applies in the context of Census data regarding "median family income."[8] This connection has led some courts to adopt a so-called "heads-on-beds" approach based on the Census Bureau's definition of "household": "all of the people, related and unrelated, who occupy a housing unit."[9] The number of people for purposes of determining expenses, on the other hand, applies in the context of IRS data. In applying its Standards, the IRS generally determines

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[7] *See, e.g.*, *Johnson v. Zimmer (In re Johnson)*, 686 F.3d 224, 230 (4th Cir. 2012) (noting the parties' contention that the dispositive issue in their case concerned the number of dependents for the expense determination but holding that the only issue on appeal was the issue decided by the bankruptcy court: the household size for purposes of determining whether the debtor was above the applicable median income), *cert. denied*, 133 S. Ct. 846 (2013)

[8] Sections 101(39A) defines "median family income" by reference to Census data.

[9] *Id*. at 235-36 (quoting *In re Ellringer*, 370 B.R. 905, 911 (Bankr. D. Minn. 2007)).

family size by reference to the number of people allowed as exemptions on the person's most recent tax return.[10]

The current Form 22C already acknowledges the possible distinction between the household size and the number of people for purposes of determining expenses. The instructions for the lines stating the IRS Standards do not refer debtors back to the household size number. Instead, they instruct the debtor to fill in the IRS Standards for the "applicable number of persons" and state: "The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support." The new Form 22C-2 carries over this same instruction. The change, therefore, should not affect the calculation of disposable income. It should only alter the presentation of the information by requiring debtors to specify the number used to determine the applicable Standards. The revision, however, may also heighten awareness of the potential distinction and, in the rare cases in which a debtor actually claims two different numbers, it should make the debtor's intent more clear.

Telecommunications

The new Form 22C-2 updates the instructions regarding the deduction of additional telecommunications expenses. The instructions in the current form include internet service among the permissible 'other necessary expenses':

37	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service - such as pagers, call waiting, caller id, special long distance, or internet service-to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$ **0.00**

IRS guidelines adopted in 2011, however, brought home internet service within the Local Standard for Housing and Utilities, making the expense unavailable as an additional expense.[11] The new Form 22C-2, therefore, specifically instructs debtors not to include expenses for home internet service:

23.	**Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. Do not include payments for basic home telephone, internet or cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Form 22C-1, or any amount you previously deducted.	+ $_______

Unresolved Issues and New Issues

The most surprising unresolved issue is the reporting of business income. The new Form 22C-1 maintains the same format as the existing Form 22C, instructing debtors to report net business income. Numerous courts, however, including a Bankruptcy Appellate Panel, have found this approach inconsistent with the statutory text.[12] Jurisdictions that follow this line of cases will continue to be stuck forcing business expenses onto another line of Form 22C-2. The new forms even remove the line that one

[10] Internal Revenue Service, *National Standards: Food, Clothing and Other Items* ("Generally, the total number of persons allowed for National Standards should be the same as those allowed as exemptions on the taxpayer's most recent year income tax return."), http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/National-Standards-Food-Clothing-and-Other-Items.

[11] *See* Official Form 22 Committee Note, *available at* http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms/BankruptcyFormsPendingChanges.aspx

[12] *See, e.g., Drummond v. Wiegand (In re Wiegand)*, 386 B.R. 238 (B.A.P. 9th Cir. 2008).

court suggested debtors use as an alternative[13]—the line for "Other Expenses" (Line 60 of the current Form 22C).[14]

The new forms also do nothing to improve the reporting of retirement-related expenses. As in the current Form 22C, the new Form 22C-2 splits the reporting of retirement contributions into two lines in two different parts of the form. Mandatory contributions appear on Line 17 of the new Form 22C-2 (Line 31 of the existing Form 22C) and voluntary contributions appear on Line 41 (Line 55 of Form 22C). Admittedly, this fragmentation occurs because the forms are organized around statutory provisions, and the two deductions derive from different Code sections.[15] But the new forms also maintain the current approach of lumping retirement loan payments in with voluntary retirement contributions and these two deductions also derive from different statutory provisions.[16] Some courts perceive a material distinction between them, concluding that the Code permits chapter 13 debtors to deduct retirement loan payments, but not voluntary retirement loan contributions, in calculating disposable income.[17] Many courts, moreover, conclude that "projecting" disposable income requires accounting for the anticipated completion of retirement loan payments during the plan.[18]

<u>Secured Debt Expenses Associated with IRS Standards</u>

The new forms also effect a minor reorganization of the reporting of secured debt expenses. The current form instructs debtors to list secured debt expenses on Line 47:

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[13] *In re Arnold*, 376 B.R. 652, 655 (Bankr. M.D. Tenn. 2007) ("These [business] expenses do not have a specific line item on Official Form 22C but may be deducted in the 'Other Expenses' category in Part VI of the form.").

[14] Official Form 22 Committee Note ("Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. . . . Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.").

[15] Part 1 of the new Form 22C-2 (like Part IV of the current Form 22C) provides for the deductions allowed under 11 U.S.C. § 707(b)(2)(A) and (B). The deduction for mandatory retirement contributions appears in this part because it represents an allowable other expense under the IRS framework and is, therefore, an allowable deduction under 11 U.S.C. § 707(b)(2)(A). The deductions for voluntary contributions and for retirement loan payments appear derive from other Code sections, *see* 11 U.S.C. §§ 541(b)(7), 1322(f), and, therefore, appear in the part of forms that provides for additional deductions—Part 2 of the new Form 22C-2 (Part V of Form 22C).

[16] *See* 11 U.S.C. § 541(b)(7) (stating that specified retirement contributions "shall not constitute disposable income"); 11 U.S.C. § 1322(f) (stating that "any amounts required to repay [a retirement loans] shall not constitute 'disposable income' under section 1325).

[17] *See, e.g.*, *Seafort v. Burden (In re Seafort)*, 669 F.3d 662, 669-71, 674 n.7 (6th Cir. 2012).

[18] *See, e.g.*, *In re Afko*, 501 B.R. 202, 206 (Bankr. S.D.N.Y. 2013).

47	**Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 47.	$

	Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?
a.			$	☐ yes ☐ no
b.			$	☐ yes ☐ no
c.			$	☐ yes ☐ no
			Total: Add Lines a, b, and c	

But debtors need these numbers to complete prior lines on the form (Lines 25B, 27A, and 27B). Line 25B, for example, lists the IRS Standard for mortgage or rent expense. Because the actual mortgage payments appear as an expense on Line 47, the existing form instructs debtors to reduce the Standard amount by the amounts of the secured debt payments[19]:

25B	**Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. **Do not enter an amount less than zero.**	$

a.	IRS Housing and Utilities Standards; mortgage/rent expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	$
c.	Net mortgage/rental expense	Subtract Line b from Line a.

(Lines 27A and 27B implement a similar process for the vehicle loan expense standard and the vehicle loan payments.) This structure requires debtors to jump back and forth in completing the form. The new Form 22C-2 reverses the order. It instructs debtors to provide the details regarding secured debt payments associated with IRS Standards on the lines that list the Standards and then carry over the numbers when listing the secured debt expenses. In the new Form 22C-2, Line 9 states the mortgage and rent standard and the associated secured debt payments as follows:

[19] This structure implements the statutory language of § 707(b)(2)(A)(ii)(I), which provides for the deduction of IRS Standard amounts but also specifies that the amounts under clause "shall not include any payments for debts." The new forms, like the existing form, only instruct debtors to reduce the Standard by the *future* debt payments, not the arrearage amounts.

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. $________

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	**Average monthly payment**
____________________	$________
____________________	$________
____________________	+ $________

9b. Total average monthly payment .... $________ **Copy line 9b here➔** – $________ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.

Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this number is less than $0, enter $0. $________ **Copy 9c here➔** $________

Line 33 lists the secured debt payments, and simply carries over the total from Line 9b (and the similar totals for vehicle ownership expenses):

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Average monthly payment

Mortgages on your home

33a. Copy line 9b here ....➔ $________

Loans on your first two vehicles

33b. Copy line 13b here. ....➔ $________

33c. Copy line 13e here. ....➔ $________

	Name of each creditor for other secured debt	**Identify property that secures the debt**	**Does payment include taxes or insurance?**	
33d.	____________	____________	❑No ❑Yes	$________
33e.	____________	____________	❑No ❑Yes	$________
33f.	____________	____________	❑No ❑Yes	+ $________

33g. Total average monthly payment. Add lines 33a through 33f. .... $________ **Copy total here➔** $______

This structure scatters the detail regarding the secured debt payments in a few different places on the form, but it permits debtors to complete the form in order. It also has the benefit of establishing designated lines for the secured debt payments associated with the IRS Standards, which simplifies both the input and the review of these data (especially electronic input and review).

One odd detail, however, is that the new form omits the check boxes that would indicate whether the home mortgage payment includes taxes or insurance (though it retains the check boxes for other secured debts). The reason for this omission is unclear, as the information seems relevant. For bankruptcy purposes, the United States Trustee provides a division of the IRS Housing and Utilities Standard into a mortgage and rent portion and an insurance and operating expense portion. The purpose of this division seems to be to ensure that debtors are able to deduct the full non-mortgage standard amounts even when their mortgage payments exceed the mortgage standard. (Without this division, a principal and interest payment that exceeded the mortgage portion of the housing standard would reduce the non-mortgage portion as well.) But when a debtor lists a mortgage payment that includes escrow items as a secured debt expense, the debtor arguably obtains duplicative deductions for the insurance and tax expenses—not only the standard amounts included in the insurance and operating expense standard but also the escrow included in the amount the mortgage payment exceeds the mortgage standard.

For example, suppose a debtor has a mortgage with principal and interest payments of $1100 and escrow expenses that average $400. Suppose that the applicable mortgage standard for this debtor is $1000 and the applicable non-mortgage standard is $500. With a non-escrowed loan, this debtor's housing deductions would total $1600: $500 for the non-mortgage standard, $0 for the mortgage standard (reduced by the secured debt payment) and $1100 for the mortgage principal and interest payment. With an escrowed loan, on the other hand, this debtor might claim housing deductions totaling $2000: $500 for the non-mortgage standard, $0 for the mortgage standard, and $1500 for the mortgage payment ($400 of which represents expenses for items included in the non-mortgage standard).