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FOR DISCUSSION ONLY

UNIFORM CONSUMER DEBT COUNSELING ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

March 21, 2005

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

DRAFTING COMMITTEE ON UNIFORM CONSUMER DEBT COUNSELING ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Uniform Consumer Debt Counseling Act consists of the following individuals:

WILLIAM C. HILLMAN, U.S. Bankruptcy Court, Room 1101, 10 Causeway St., Boston, MA 02222, *Chair*

BORIS AUERBACH, 332 Ardon Ln., Wyoming, OH 45215, *Enactment Plan Coordinator*

ROBERT G. BAILEY, University of Missouri-Columbia, School of Law, 217 Hulston Hall, Columbia, MO 65211

MARION W. BENFIELD, JR., 10 Overlook Circle, New Braunfels, TX 78132

MICHAEL A. FERRY, 200 N. Broadway, Suite 950, St. Louis, MO 63102

BENNY L. KASS, 1050 17th St. NW, Suite 1100, Washington, DC 20036

MORRIS W. MACEY, 600 Marquis II, 285 Peachtree Center Ave. NE, Atlanta, GA 30303

MERRILL MOORES, 7932 Wickfield Ct., Indianapolis, IN 46256

NEAL OSSEN, 21 Oak St., Suite 201, Hartford, CT 06106

HIROSHI SAKAI, 3773 Diamond Head Circle, Honolulu, HI 96815

STEPHEN C. TAYLOR, D.C. Department of Insurance, Securities & Banking, 810 1st St. NE, Suite 701, Washington, DC 20002

MICHAEL M. GREENFIELD, Washington University School of Law, Campus Box 1120, One Brookings Dr., St. Louis, MO 63130, *Reporter*

EX OFFICIO

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Rd., Room 3056, Norman, OK 73019, *President*

JOANNE B. HUELSMAN, 235 W. Broadway, Suite 210, Waukesha, WI 53186*, Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

CARLA STONE WITZEL, 233 E. Redwood St., Baltimore, MD 21202, *American Bar Association Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, Tuscaloosa, AL 35487-0382, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

CONSUMER DEBT COUNSELING ACT

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UNIFORM CONSUMER DEBT COUNSELING ACT

Prefatory Note

The consumer credit counseling industry arose as a means of assisting individuals to pay their credit card debt without resorting to bankruptcy and a means of enabling creditors to collect debt that otherwise would be discharged in bankruptcy. Through the 1980s the industry was financially supported almost entirely by creditors, which returned to the industry approximately 15% of the money they received through the efforts of the industry. Over the last decade, however, the industry has changed significantly. Responding to the dramatic increase in credit card debt, a new generation of credit counseling agencies arose. Reports of abuses by counseling agencies and injury to consumers appeared with increasing frequency in numerous media outlets. A report of two prominent consumer organizations (Consumer Federation of America and the National Consumer Law Center) has documented the situation. The problems include

- deception concerning the nature of, the need for, and the cost of debt-management plans to help consumers deal with burgeoning debt;
- excessive cost to consumers; and
- self-dealing and other conduct by agencies to evade the ban on private inurement that appears in the Internal Revenue Code requirements for tax-exempt status.

These problems are compounded by a drastic reduction in support for the industry by its traditional benefactors, the issuers of credit cards. This has led counseling agencies to impose on consumers an increasing share of the cost of their operations.

In January 2003 the Executive Committee of the Conference authorized the appointment of a drafting committee to develop a uniform law that would address the problems that have developed and enable the states to take a common approach to regulation of the counseling industry. A uniform approach is particularly important because the great majority of agencies operate in multiple states and would otherwise be subject to multiple and sometimes conflicting requirements.

The Drafting Committee first met in Chicago in November 2003 and considered a discussion draft. Committee members reacted to numerous aspects of that draft but the Committee did not take formal votes on any of its provisions. The Committee met again in March 2004. At the Annual Meeting of the Conference in August 2004, the drafting committee received numerous comments on the draft, and many of them are reflected in this draft. Others are identified in the Preliminary Comments. In addition, the Committee of the Whole adopted two sense-of-the-house resolutions: the scope of the Act should encompass debt-settlement companies as well as credit-counseling agencies; and the Act should be drafted in such a way that each state may decide whether to permit for-profit entities to provide credit-counseling and debt-settlement services. This draft reflects those decisions.

The Drafting Committee met again in October 2004 and January 2005, and this draft reflects the decisions and discussions at those meetings.

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Legislative Note: *The state must make the basic policy decision whether to permit for-profit entities to engage in the debt settlement business or the credit counseling business. The state may decide to permit for-profit entities to provide some, but not all, forms of debt-management services. For example, it may permit for-profit debt-settlement companies, but require all credit-counseling agencies to be nonprofit entities. The decisions concerning for-profit/nonprofit status are implemented by virtue of the presence or absence of specified provisions in sections 6(b)(6), 7(d), 8(4), and 10(c).*

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Debt-Management Services Act.

Preliminary Comment

In view of the decision to include debt settlement companies within the scope of the Act, this section adopts a new name for the Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Administrator" means the [ ].

(2) "Affiliate":

(A) with respect to an individual, means:

(i) the spouse of the individual;

(ii) a sibling of the individual or the spouse of the sibling;

(iii) an individual or the spouse of the individual who is a lineal ancestor or lineal descendant of the individual or the individual's spouse;

(iv) an aunt, uncle, great-aunt, great-uncle, first-cousin, second-cousin, niece, nephew, grand-niece, or grand-nephew, whether related by the whole or the half blood, adoption, or step relationship, or the spouse of any of them; or

(v) any other individual occupying the residence of the individual;

and

(B) with respect to an entity, means:

(i) a person that directly or indirectly controls, is controlled by, or is under common control with the entity;

(ii) an officer of, or an individual performing similar functions with respect to, the entity;

(iii) a director of, or an individual performing similar functions with respect to, the entity;

(iv) subject to Section 29(f), a person that receives or received more than $25,000 in either the current year or the preceding year from the entity or a person that owns more than ten percent of, or an individual who is employed by or is a director of, a person that receives or received more than $25,000 in either the current year or the preceding year;

(v) an officer or director of, or an individual performing similar functions with respect to, a person described in subparagraph (B)(i);

(vi) the spouse of, or an individual occupying the residence of, an individual described in subparagraph (B)(i) through (v); or

(vii) an individual who has the relationship specified in subparagraph (A)(iv) to an individual or the spouse of an individual described in subparagraph (B)(i) through (v).

(3) “Agreement” means an agreement between a provider and an individual for the performance of debt-management services.

(4) “Bank” means a person engaged in the business of banking, whether a savings

bank, savings and loan association, credit union, or trust company.

(5) “Business address” means the physical location of a person, including the name and number of a street.

(6) “Certified counselor” means an individual certified by:

(A) an independent, nationally recognized certification organization that authenticates the competence of individuals providing education and assistance to other individuals in connection with debt-management services; or

(B) a training program or certification organization approved by the administrator.

(7) “Concessions” means assent to repayment of a debt on terms other than the terms of the original contract between an individual and a creditor. It includes a reduction in:

(A) finance charges;

(B) late payment, default, or delinquency charges; or

(C) the principal amount of a debt.

(8) “Day” means calendar day.

(9) “Debt-management services” means services as an intermediary between an individual and one or more creditors of the individual for the purpose of obtaining concessions.

(10) “Employee”, when used in connection with “provider”, means an individual who furnishes services related to debt-management services, whether or not paid by the provider that receives the benefit of the individual’s services.

(11) “Entity” means a person other than an individual.

(12) “Person” means an individual, corporation, business trust, estate, trust,

partnership, limited liability company, association, joint venture, or any other legal or commercial entity. The term does not include a public corporation, government, or governmental subdivision, agency, or instrumentality.

(13) "Plan" means a program or strategy in which a provider furnishes debt-management services to an individual and which includes a schedule of payments to be made by or on behalf of the individual and used to pay debts owed by the individual.

(14) "Provider" means a person, regardless of the person's location, that provides debt-management services.

(15) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(16) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

(17) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(18) "Trust account" means an account held by a provider or its designee that is:

(A) established in an insured bank chartered by a state or the United States;

(B) separate from the other accounts of the provider or its designee;

(C) designated as a trust account or other account designated to indicate that the money in the account is not the money of the provider, its designee, or the officers, employees, or agents of either; and

(D) used to hold money of one or more individuals for disbursement to creditors of the individuals.

Legislative Note: *In paragraph (1) insert the name of the agency or entity that will be charged with enforcement of this Act. States must decide whether to create a new administrative agency or charge an existing entity with enforcement of this Act. If the latter, states must decide which existing entity to select. Logical choices include the attorney general or other entity charged with consumer protection generally (under a little-FTC act or similar statute) or the entity charged with regulation of consumer credit or financial institutions. It may be necessary or desirable to amend that entity's organic statute to refer specifically to this Act.*

Preliminary Comment

Paragraph (2) (affiliate): The Style Committee suggests that a term with two definitions should appear only once in the list of definitions. Hence, former paragraphs (2) and (3) have been combined. The term "affiliate" is used at three places in the Act: as a disclosure item in the application for registration (section 8); as a tool to ensure the independence of an agency's board of directors (section 10(d)); and as a limit on an agency's ability to engage in self-dealing (section 26(e)). The Act does not impose obligations on affiliates that are not also officers or directors, nor does any provision impose liability on them.

The definition in paragraph (2) is drawn from UCC § 9-102(a), but it includes more relatives in the definition. The definition in Article 9 is limited to relatives who live in the individual's home. This excludes such close relatives as nieces and first cousins unless they live in the individual's home. The language in subsection (2)(A)(iv) includes those relatives regardless of where they live.

Paragraph (2)(A)(v) reverts to the approach of Article 9 and uses the phrase, "occupying the residence of" rather than "residing with."

The definition in paragraph (2)(B) also is drawn from the definition of "person related to" in UCC § 9-102(a), but adds subparagraph (iv). Subparagraph (iv) has been modified to declare that a person that receives more than $25,000 from a provider is an affiliate of that provider. The cross reference to section 29(f) is to the provision directing the administrator to adjust dollar amounts. Subparagraph (iv) also stipulates that an owner or director of the recipient is an affiliate. Since the purpose of defining "affiliate" is to require independent boards of directors and prevent self-dealing, the level of ownership necessary to constitute "affiliate" should be relatively low. The figure ten percent has been in the last several drafts and is about to become final if no one objects. The same is true of the figure, $25,000. Under subparagraph (iv) a person is not an affiliate until the person of which it is an owner, employee, or director has received $25,001 in the relevant period.

The definition of “affiliate” does not include the employees of a provider. Does it suffice that officers are included in “affiliate,” or does the Committee want to expand the definition further?

Paragraph (3) (agreement): This definition does not incorporate any requirement of “written” or “record.” An oral agreement is within this definition. Requirements of form appear in sections 17-19.

Paragraph (4) (bank): This definition is from UCC Revised Article 1 (§ 1-201(b)(4)).

Paragraph (5) (business address): This definition is new. Section 18(b) requires a provider that operates via electronic communication to disclose its business address. This definition makes it clear that this means the place where the provider conducts business and not a post-office box or private-service mail drop.

Former paragraph (6)(debt-management plan) has been deleted. At the October 2004 meeting the Committee decided to define “debt-management plan” broadly, without reference to the payment mechanism or to the kind of concessions the provider seeks to obtain for the individual. Thus the definition includes what are often called debt-settlement programs. The definition of debt-management plan has been replaced by new paragraph (12), which defines “plan” to encompass what the previous draft called “debt-management plan.”

Paragraph (7) (concessions): This provision is new. It eliminates the need to comment on the word “concessions” when that word appears later in the Act. A question in connection with the definition is whether the bracketed language is desirable. With the bracketed language, the definition includes, e.g., an extension of time to pay with no reduction in the amount of principal or fees. Should this accommodation be within the definition, or should “concessions” be limited to agreements to modify the amount to be paid? The word “concessions” appears in sections 2(9), 17(d) and (f), 19(a), and 23(c). It usually is used in the phrase “concessions consisting of a reduction in finance charges or late payment, default, or delinquency charges.”

For purposes of this Act, finance charges and other fees retain their original character even if a creditor adds them to the principal amount of debt, whether or not the creditor thereafter calculates finance charges and fees on the increased amount. Similarly, the principal amount of debt is the original principal, unaffected by a creditor’s addition of finance charges or other fees.

Paragraph (9) (debt-management services): At the October 2004 meeting, the Committee decided to expand the definition to encompass the activity of entities that act as an intermediary between an individual and the individual’s creditors, for the purpose of changing the terms of the original contract between the individual and those creditors. That is, there is no requirement that the individual's funds flow through the provider. The definition includes credit-counseling agencies and debt-settlement companies even if they do not have control over the individual's funds, as when they are in an account managed by the individual or a third party.

The definition encompasses persons that provide one-time assistance to an individual who has accumulated money and wants help negotiating with one or more of his or her creditors. This assistance is within the definition, and if the person provides this assistance to more than three individuals per year, the person must register and comply with the Act. Note that the assistance need not entail use of a "plan," as defined in paragraph (12).

The definition includes credit-counseling agencies even if the concessions offered by creditors are not subject to negotiation. It does not, however, encompass a creditor that compromises a claim with its debtor because the creditor is not operating as an intermediary. The definition does not encompass entities that provide only educational or counseling services concerning management of personal finance.

At the January 2005 meeting, the Committee decided to incorporate into the definition of debt-management services a requirement that the provider receive compensation. The purpose of this decision is to exempt from the Act such persons as social workers who help clients pay their bills. Instead of dealing with this in the definition of "debt-management services," however, the draft revises section 4 to exempt persons who receive no compensation for the debt-management services they provide to individuals.

Former paragraph (9) (debt-management-services provider) has been deleted. The relevant definition now appears in paragraph (14) (provider).

Former paragraph (10) (debt-settlement services) has been deleted. The definition of "debt-management services" encompasses the former definition of "debt-settlement services."

Paragraph (10) (employee): The purpose of this definition is to prevent evasion of the Act by resort to outsourcing the services necessary for running a debt-management business. The phrase "related to debt-management services" is critical, because it has the effect of excluding from the definition, e.g., an individual who makes emergency repairs to the agency's plumbing system. "Services related to debt-management services" would include such things as marketing, customer service, education, counseling, interaction with creditors, processing of payments by individuals, and any other services provided by the agency to the individual.

The definition encompasses all persons who provide the specified services, regardless of who signs the paycheck and regardless of whether the employee works on-site at the provider's place of business or elsewhere (e.g., the individual's home or the site of an entity to which the provider has outsourced the services).

Paragraph (12) (person): This definition conforms to the Conference's standard definition. The definition encompasses for-profit, not-for-profit, and tax-exempt entities. A "public corporation" is a corporation that is authorized to exercise governmental functions. It is not a "publicly traded" corporation.

Paragraph (13) (plan): At the October 2004 meeting, observers representing debt-settlement companies informed the Committee that they do not form plans. Instead, they provide programs. The new definition of "plan" is designed to encompass both what now are typically called "debt-management plans" and the "programs" established by debt-settlement companies. This enables the operative provisions of the Act to use the term "plan" to apply to both types of providers. To be a plan, the program or strategy need not encompass all the debts of the individual. E.g., debt-management plans by traditional credit-counseling agencies have not typically included secured debt or debts owed utilities. No provision of this Act requires that a provider deal with all the creditors of an individual to whom it provides debt-management services.

The definition requires a schedule of payments. As used here, "payments" includes the deposit or transfer of money into a checking or savings account. The definition requires that the payments be used to pay debts of the individual. This encompasses (a) full payment of some of the individual's debts; (b) full payment of all of the individual's debts; (c) partial payment of some of the individual's debts; and (d) partial payment of all of the individual's debts. Each of these possibilities suffices to bring the program or strategy within the definition of "plan."

Paragraph (14) (provider): This definition replaces former paragraph (9) (debt-management-services provider), thereby enabling reference throughout the Act to "provider," rather than its more cumbersome predecessor. Previous drafts incorporated a "more than three individuals" element in the definition of "provider." The purpose of this was to exclude from the scope of this Act persons who informally assist their friends or relatives by, for example, accessing the individual's checking account to pay the individual's bills. This objective now is accomplished by virtue of section 4, which exempts from the Act providers who receive no compensation for their debt-management services from the individual who receives those services.

The definition does not include an entity that merely offers to provide debt-management services; the entity must provide those services to more than three individuals. Once an entity is within the definition, however, its advertising and other sales practices are subject to the rules of the Act.

The definition encompasses both a non-resident entity that serves individuals in this state and a resident entity that serves individuals in other states. Under section 3, however, the Act does not apply to resident or non-resident entities that serve only non-resident individuals, even if their method of solicitation (e.g., via the Internet) reaches individuals in this state.

Paragraph (15) (record): This definition appears in UCC Revised Article 1 (§1-201(b)(31)).

Paragraph (16) (sign): This is the Conference's current definition.

SECTION 3. APPLICABILITY OF ACT. This [act] applies to a provider that enters into an agreement with an individual whom it should reasonably know is residing in this state at the time of the agreement[, unless at the time of the agreement the provider has not, in the current or immediately preceding calendar year, entered agreements with at least two individuals whom it reasonably should have known to reside in this state at the time of the agreements]. This [act] does not apply to an agreement with an individual who the provider has no reason to know resides in this state at the time of the agreement.

Preliminary Comment

At the January 2005 meeting, the Committee adopted the proposition that a provider should not have to comply with the law of multiple jurisdictions with respect to its services to any one individual. Hence this section has been narrowed. It no longer provides that a provider located in this state must comply with the Act if it serves only individuals residing in other states. It no longer provides that the Act applies to a provider that merely solicits residents of this state. Instead, it now applies to transactions in which a provider enters an agreement with an individual whom it reasonably should know resides in the state at the time of the agreement. The objective of the section is to limit applicability of the Act to those providers that enter agreements with persons residing in this state. The definition of "provider" makes it clear that a provider is subject to this Act even if the provider has no physical presence in this state. Section 5 (Registration) has been revised to require registration if the person provides debt-management services to an individual "whom it reasonably should know resides in this state." The more-than-three-customers requirement no longer appears in the Act. If the Committee wants to retain a de-minimus exception, for the provider that inadvertently forms an agreement with a resident of the enacting state, the bracketed language could be added.

The section speaks of "provider" rather than "person." But the section does not limit applicability of the Act to just those persons. For example, section 30 gives the administrator the authority to proceed against "a violator or a person who has caused a violation," "an officer, director, or employee of a violator," and a person who "knowingly authorizes, directs, or aids in the violation of a final order." Section 3 should not be interpreted to place these persons beyond the reach of the Act.

Section 19(a)(3) requires the agreement between a provider and an individual to state the individual's address. If the individual supplies an address outside this state, the provider may have no reason to know that the individual is residing in this state at the time of the agreement.

Under the revised scheme, the Act applies to agreements with individuals who are residing in this state on a non-permanent basis, such as a member of the armed services, an individual occupying a vacation home in this state, a student, an individual who has lost his or her home and temporarily resides with a relative in this state. It does not apply to an agreement with an individual who moves to this state after formation of the agreement or to an agreement with an individual who resides in another state but who comes to this state to meet with a provider.

If the Committee wants the Act to apply to a transaction with an individual who travels to this state to seek the services of a provider, the section could refer to an individual who is "present in this state" instead of "residing in this state." The reference to "time of the agreement" would mean that the provider must comply with the Act with respect to that individual. But it would also mean that if a resident of this state goes to another state to obtain debt-management services, the provider need not comply with this Act as to that transaction. The problem of regulation by multiple jurisdictions remains, because another state may apply its law to transactions with persons whom the provider should reasonably know to be residents of that state, even if the individual travels to another state to form the agreement. The provider then would have to comply with the law of both states. Does the Committee wish to make this change?

This Act uses the term "individual" rather than "consumer." The purpose of this usage is to enlarge the usual meaning of that term (viz., one who acquires goods or services for personal, family, or household purposes) to encompass individuals who have incurred personal debt for business purposes, including farming.

Subject to the limitations stated in this section, the intention is for the Act to have as expansive a reach as is constitutionally permissible. Common criteria for determining whether there is a sufficient jurisdictional nexus for an Internet-based business include the business' targeting a specific jurisdiction and the presence of a customer of a business in the jurisdiction. Some observers have objected that the Act ought not apply to providers located in other states and that it is unconstitutional for a statute to provide otherwise. A cursory review of legislation reveals that statutes regulating debt-management services often apply to non-resident providers that do business with residents of the state. E.g., Connecticut (Ct. Gen. Stat. § 36a-656(a)); Illinois (205 Ill. Comp. Stat. Ann. § 665/2); Maryland (Md. Fin. Inst. Code Ann. § 12-924(D)); Michigan (Mich. Comp. Laws § 451.412(j)); New York (N.Y. Gen. Bus. Law § 455(1)); and Virginia (Va. Code Ann. § 6.1-363.3)). In addition, the U.S. District Court for the District of Kansas has upheld the constitutionality of applying the Kansas statute to a Massachusetts agency.

Cambridge Credit Counseling Corp. v. Foulston, 303 F. Supp. 2d 1188 (D. Kan. 2003).

SECTION 4. EXEMPT PERSONS.

(a) This [act] does not apply to a provider that receives no compensation for debt-management services from or on behalf of the individuals to whom it provides the services.

(b) This [act] does not apply to the following providers or their employees when the provider or its employee is engaged in the regular course of its business or profession:

(1) a judicial officer, a person acting under a court order, or an assignee for the benefit of creditors;

(2) a bank and its affiliates, as defined in Section 2(2)(B)(i), if the affiliate is subject to regulation by a federal or state banking regulatory authority;

(3) a title insurer, escrow services company, or other person that provides bill-paying services if the provision of debt-management services is incidental to the bill-paying services;

(4) an attorney licensed by this state to practice law, if the provision of debt-management services is incidental to the attorney's practice; [or]

(5) an accountant licensed by this state, if the provision of debt-management services is incidental to the accountant's practice[; or

(6) a person licensed under Section [ ] as a [money transmitter]].

Legislative Note: *In paragraph (6) insert the citation to any statute requiring money transmitters to be licensed, conform the parenthetical to the terminology of that statute, and delete the parentheses. If there is no such statute, the brackets in paragraph (4) and the bracketed language in paragraphs (5) and (6) should be omitted.*

Preliminary Comment

Subsection (a): This provision is new. It implements the decision of the Committee at the January 2005 meeting, to exempt those, e.g., social workers, who provide debt-management services at no cost as part of their overall services to clients. It also exempts individuals who assist family members or friends if they do not receive compensation for helping their relatives or friends to manage their money.

Subsection (b): This provision has been modified to exempt certain providers, instead of certain "persons." If the person is not a provider, the Act does not require registration or regulate conduct. Hence, the only persons who need an exemption are those that otherwise would be regulated as providers. Conversely, a person that causes a provider to violate the Act or an administrative order should not be exempt even if the person is not a provider.

Except for bill-paying services, attorneys, and accountants, the exemption applies even if debt-management services constitute a majority of the entity's business. Most of the exempt entities are extensively regulated by the state or federal government (paragraphs (1), (2), (4), (5), (6)).

The exemption for banks in subsection (2) extends to subsidiaries of banks, but only if the subsidiary is subject to regulation by a federal or state banking regulatory authority.

A debate arose at the Annual Meeting concerning whether attorneys should be exempt. Attorneys are governed by a code of conduct and elaborate disciplinary structure. On the other hand, this structure is not always effective to protect clients. A law firm operating as a provider in New York and Vermont recently inflicted substantial injury on indebted consumers. As originally enacted, the federal Fair Debt Collection Practices Act contained an exemption for lawyers. When it became clear that some attorneys were abusing this exemption, Congress amended the Act to remove the exemption altogether. The sentiment of the Committee at the October 2004 meeting was to exempt attorneys only if debt-management services are incidental to the attorneys' overall practice. The Committee reconsidered this position at the January 2005 meeting and decided to adhere to it.

The Committee also decided that the exemption should be limited to attorneys and accountants who are licensed in this state.

The exemption extends to attorneys, accountants, and bill-paying services only if debt-management services are "incidental to" the regular course of the person's business or profession. If the person is held out as providing debt-management services, then debt-management services are not incidental. Beyond that, the test is flexible, looking to such matters as the amount of time devoted to providing debt-management services and the amount and percentage of revenues derived from debt-management services. The more isolated the provision of those services, the more likely it is that they are incidental. The more frequent the provision of those services, the more likely it is that they are not incidental. The administrator by rule may establish bright-line standards for determining “incidental to.”

The definition of “debt-management services” speaks of “acting as an intermediary between an individual and one or more creditors.” With this language in place, a creditor acting on its own behalf is not acting as an intermediary. The definition also speaks of acting as an intermediary “for the stated purpose of obtaining concessions.” This excludes from the definition an entity that collects debts owed to an affiliate if the stated purpose is collection of the debt and not obtaining concessions from the creditor on behalf of the individual.

Paragraph (3) exempts entities that provide bill-paying services if negotiation of the terms of payment is incidental to the services generally provided by the entity. Examples of exempt entities include mortgage loan servicers, athletes’ agents, artists’ agents, financial planners, executors of estates, and personal representatives of decedents. These entities are exempt so long as negotiation of payment the amount to be paid individual creditors is incidental to their overall services.

SECTION 5. REGISTRATION REQUIREMENT.

(a) Except as otherwise provided in subsection (b), a provider may not provide debt-management services [to an individual whom it reasonably should know resides in this state when it agrees to provide the services,] unless the provider is registered under this [act]. A registration is valid for one year.

(b) If a provider is registered under this [act], the registration requirement of subsection (a) does not apply to the officers, employees, or agents of the provider.

(c) The administrator shall maintain and publicize the names of all registered providers.

Preliminary Comment

Subsection (a) requires providers to register under this Act. Under section 3 this requirement extends to providers located in other states, if they serve individuals who reside in this state. The requirement applies to “providers,” not “persons,” thereby incorporating the more-than-three-individuals requirement in the definition of “provider” in section 2(13). That definition also contains the limitation that the provider have reason to know the individuals reside in this state. Nevertheless, it is necessary to repeat the residency requirement in this section, or else a provider that did, but no longer does, serve residents of this state would have to register.

Former subsection (b) required annual renewal of registration. This provision has been relocated to section 12.

Subsection (c): The objective of this subsection is to enable individuals and creditors to ascertain whether a given provider is registered. Posting on the Internet web site of the administrator (or other appropriate official site) is the preferred method, because the information is instantaneously and continuously available. To “maintain” the list, the administrator must update it regularly. [The Style Committee objected to “make public, which appeared in the previous draft.” Does “publicize” preserve the intended meaning?]

SECTION 6. APPLICATION FOR REGISTRATION: FORM, FEE, AND ACCOMPANYING DOCUMENTS.

(a) An application for registration must be in a form prescribed by the administrator.

(b) Subject to Section 29(f), an application for registration must be accompanied by:

(1) the fee established by the administrator;

(2) the bond or other assurance required by Section 14;

(3) identification of all trust accounts required by Section 22;

(4) evidence of insurance against the risks of dishonesty, fraud, theft, and other malfeasance or misconduct on the part of an employee or agent of the applicant in the amount of $250,000, payable to the applicant, the customers of the applicant, and this state, as their interests may appear, and not subject to cancellation by the applicant without the approval of the administrator; [and]

(5) proof of compliance with Section [ ][; and

(6) evidence of tax-exempt status applicable to the applicant under the Internal Revenue Code, 26 U.S.C. Section 1 et seq.[, as amended.]]

Legislative Notes: *In subsection (b)(5), insert the citation to the statute specifying the prerequisites for an entity to do business in this state. If the state has no such statute, substitute the following for subsection (b)(5):*

(5) a record consenting to the jurisdiction of this state containing:

(A) the name, address, and other contact information of its registered agent in this state for purposes of service of process; or

(B) the appointment of the [administrator or other state official] as agent of the provider for purposes of service of process.

If the state wishes to permit for-profit entities to provide all forms of debt-management services, the bracketed language containing all of subsection (b)(6) should be deleted. If the state wishes to limit debt-management services to non-profit entities, the brackets should be deleted. If the state wishes to permit for-profit debt-settlement companies but not for-profit credit-counseling agencies, subsection (6) should state: "if the applicant's plans contemplate that creditors will provide concessions in the form of reduced finance charges or fees for late payment, default, or delinquency, evidence of tax-exempt status applicable to the applicant under the Internal Revenue Code, 42 U.S.C. Section 1 et seq.[, as amended.]"

In states in which the constitution does not permit the phrase, "as amended," when federal statutes are incorporated into state law, the phrase should be deleted in subsection (b)(6).

Preliminary Comment

The Style Committee observed that section 6 of the previous draft was very long and suggested either leaving the details to the administrator's rulemaking authority or breaking it into several sections. Because the Drafting Committee has been comfortable with specifying the requirements in the statute, this draft pursues the latter alternative. The contents of former section 6 now appear in sections 6, 7, and 8, and the sections that follow have been renumbered.

Subsection (a): "Form" encompasses format, and the administrator by rule may permit all or part of the application to be submitted electronically.

Subsections (b)(2) and (3) refer to items "required by" other sections. If those other sections do not require the item as to a particular applicant, then the application need not contain proof of the item.

Subsection (b)(4) requires insurance in the amount of $250,000 against the risk of employee misconduct, including theft of funds from the trust account. It is not common under existing state law to require both this kind of insurance and also a bond of the type required by section 14. The two requirements, however, protect against different risks. The insurance required by this section protects against the risk of employee dishonesty. Ordinarily, the beneficiary of such insurance would be the provider. This paragraph expands the beneficiaries to include the state and the customers of the provider, and this draft requires that the insurance not be subject to cancellation without the approval of the administrator. The insurance overlaps the bond required by section 14, but the bond covers more risks, viz., violation of any provision of the Act.

The purpose of subsection (b)(5) is to facilitate subjecting a non-resident business to the jurisdiction of this state. If the applicant is a resident, so that the statute referenced in this subsection does not apply to it, the applicant complies with this subsection by indicating that fact. If existing statutes leave doubt about the mechanism for serving process on the provider and the state has chosen not to enact the language suggested in the Legislative Note, the administrator can promulgate a rule requiring the applicant to appoint a state official as the provider's agent for purposes of service of process.

SECTION 7. APPLICATION FOR REGISTRATION: REQUIRED INFORMATION.

(a) An application for registration must be signed under oath and include [, as applicable]:

(1) the applicant's name, principal business address and telephone number, all other business addresses in this state, electronic mail addresses, and Internet web site addresses;

(2) all names under which the applicant conducts business;

(3) the address of each location in this state at which the applicant will provide debt-management services or a statement that the applicant will have no such location;

(4) the name and home address of each officer or director of the applicant and each person that owns more than ten percent of the applicant;

(5) identification of every jurisdiction in which, during the five years immediately preceding the application:

(A) the applicant or any of its officers or directors has been licensed or registered to provide debt-management services; or

(B) individuals have resided when they received debt-management services from the applicant;

(6) a statement describing, to the extent it is known or should be known, any material civil or criminal judgment or litigation and any material administrative or enforcement action by a government agency in any jurisdiction against the applicant, or any of its officers, directors, or owners, or any person with authority to access the trust account required by Section 22;

(7) the applicant's financial statements, audited by an accountant licensed to conduct audits, for each of the two years immediately preceding the application or for each year or lesser period of its existence if it has not been in operation for the two years preceding the application;

(8) evidence of accreditation by an independent, nationally recognized accrediting organization or an accrediting organization approved by the administrator;

(9) evidence that, within 12 months after their initial employment, each of the applicant's counselors is a certified counselor;

(10) a description of the three most commonly used educational programs that the applicant provides or intends to provide to individuals who reside in this state and copies of any materials used or to be used in those programs;

(11) a description of the applicant's financial analysis and initial budget plan, including any form or electronic model, used to evaluate the financial condition of individuals;

(12) a copy of each current form of agreement that the applicant will use with individuals who reside in this state;

(13) the current schedule or schedules of fees and charges that the applicant will use with individuals who reside in this state;

(14) at the applicant's expense, the results of a criminal-records check, including fingerprints, conducted within the immediately preceding 12 months, on every officer and on every employee or agent of the applicant who is authorized to have access to the trust account required by Section 22 or, if an applicant has submitted this information to another state, a copy of the report from the criminal-records check conducted for that state; and

(15) any other information that the administrator reasonably requires.

(b) An applicant or registered provider shall notify the administrator within ten days after a change in the information specified in subsection (a)(1), (3), (6), (12), or (13) or Section 6(b)(4)[or (6)].

Preliminary Comment

Subsection (a): At the October 2004 meeting, the Committee decided that paragraph (1) should require disclosure only of business addresses in this state. Other than the principal business address, it is not necessary for the applicant to list business addresses outside this state.

Paragraph (3) contemplates disclosure of the address of all facilities like call centers and back-office operations, that are part of the provider's operations. It does not, however, require disclosure of the addresses of employees who work from home. If the applicant has no physical presence in this state, that must be disclosed.

Paragraph (5) (identification of states in which the applicant has done business or has been registered or licensed to provide debt-management services) has been restored, to enable the administrator to investigate the applicant and to coordinate enforcement efforts with administrators in other states.

Paragraph (6) requires disclosure of material judicial and administrative proceedings in any jurisdiction against the officers, directors, owners (whether or not they are authorized to access the trust account containing customers' funds), and against any other persons who may be authorized to access the trust account. The administrator by rule can elaborate on what proceedings are material. This paragraph does not impose any disclosure requirement with respect to proceedings of which the applicant is reasonably unaware. The paragraph has been rewritten to eliminate redundant verbiage, and the phrase "after reasonable investigation" has been removed at the suggestion of the Style Committee. The concept "should be known" encompasses facts that a reasonable investigation would have revealed.

Paragraph (7): At the January 2005 meeting, the Committee decided to require audited financial statements of all applicants. This is consistent with many existing statutes, which require an applicant to supply audited financial statements.

Paragraph (8): At the January 2005 meeting, the Committee decided to require that providers be accredited. This requirement reinforces regulation by the administrator and subjects providers to periodic review to ensure that they meet the standards of the accrediting agency.

Paragraph (9): To obtain registration, a provider must employ counselors who are certified within 12 months of their initial employment. This requirement applies only to employees who act as counselors and educators. It does not apply to such other employees as customer service representatives. Section 17 prohibits a plan unless a certified counselor has done specified things. The reason for requiring an applicant to produce evidence that its counselors are certified is to assure the administrator that the provider will be able to comply with section 17.

Paragraph (10): As used in this paragraph, "programs" encompasses both a course of instruction, which may be entirely oral, and computer software.

Paragraph (12): An agency, whether located in this state or elsewhere, need supply only the documents that it will use with residents of this state. Section 29(b)(1) empowers the administrator to investigate the activities in another jurisdiction of a provider that is located in or doing business in this state. Under that section the administrator may obtain documents used in other jurisdictions.

Paragraph (13): As with paragraph (12), an applicant, whether located in this state or elsewhere, need supply only the schedules of fees and charges for residents of this state. For purposes of this paragraph, "fees and charges" includes all costs, however denominated (e.g., "voluntary contribution"), to be paid by customers of the applicant. This information will enable the administrator to monitor the industry's practices in the state. It should assist the administrator in determining whether an individual agency is gouging individuals, as well as whether to encourage the legislature to raise the fee cap when the passage of time or changed circumstances make it too low.

Paragraphs (12) and (13) require information that is current as of the time of the application. An applicant is free to modify the forms or the fees without prior approval, unless the administrator adopts a rule to the contrary. Subsection (b) of this section requires the provider to notify the administrator within ten days of any changes in specified information required by this section, including the information required by paragraphs (12) and (13).

Paragraph (14): In some jurisdictions the mechanics and procedures for obtaining fingerprints are quite burdensome. This paragraph attempts to reduce the burden by permitting an applicant that has gone through this process in one state to use the results of the process for a period of 12 months in other states, too. The 12-month limitation applies to the criminal-records check, not the time of submission to the other state. The criminal-records check must include a check of fingerprints, but the fingerprints need not have been obtained during the 12-month period.

Former paragraph (16) in the Annual Meeting Draft, which required an applicant to provide an irrevocable consent giving the administrator access to the trust account, has been deleted. In its place is new subsection 29(b)(4), empowering the administrator to obtain the funds, as well as all books and records, from the bank holding the trust account.

Paragraph (15): The administrator may require additional information either by rulemaking procedure applicable to all applicants or by specific request in response to a specific application. A Committee member has suggested that the paragraph should specify a standard other than reasonableness to guide the administrator's decision to request additional information. If the Committee agrees, the paragraph could state, "any other information that the administrator reasonably requires in order to exercise the administrator's duties under section 10(b)." Section 10(b) specifies the grounds for denying registration (including a finding that the general fitness of the applicant is not such as to warrant belief that the applicant will comply with the Act).

Subsection (b): The cross-referenced sections require disclosure of the name of the applicant, the addresses at which it operates, enforcement action against the applicant in another state, the applicant's fee schedule and standard forms, evidence of insurance against employee misconduct, and, if required for registration, evidence of tax-exempt status. Subsection (b) requires prompt notification of any change in this information, and since it applies to the "applicant or registered provider," this requirement of notification applies both before and after the administrator has issued a certificate of registration. Notification of change in other required information is governed by section 12 (Renewal of Registration), which requires notification at the time of renewal of registration.

SECTION 8. APPLICATION FOR REGISTRATION: DISCLOSURE OF INFORMATION ABOUT AFFILIATES. An application for registration must include:

(1) the names of employers of each director during the ten years immediately preceding the application;

(2) a description of any ownership interest equal to or greater than ten percent by an officer, director, owner, or employee of the applicant in any affiliate of the applicant or in any other entity that provides products or services to the applicant or any individual relating to the applicant's debt-management services;

(3) a statement of the compensation of the applicant's five most highly compensated employees for each of the three years immediately preceding the application; and

[(4) if the applicant has obtained tax-exempt status under the Internal Revenue Code, 26 U.S.C. Section 1, et seq.[, as amended]:]

(A) evidence of the tax-exempt status; and

(B) the identity of each director who is an affiliate, as defined in Section 2(A) or (B)(i), (ii), (iv), (v), (vi), or (vii), of the applicant.

Legislative Note: *If the state permits only nonprofit entities to provide debt-management services, the bracketed language in paragraph (4) should be deleted and subparagraphs (A) and (B) should be renumbered as paragraphs (4) and (5). If the state permits for-profit entities to provide any form of debt-management services, the brackets should be deleted. If the brackets are deleted, then in states in which the constitution does not permit the phrase, "as amended," when federal statutes are incorporated into state law, the phrase should be deleted.*

Preliminary Comment

This section contains disclosures designed to enable the administrator to enforce the requirement of an independent board of directors and the restrictions on self-dealing. At the

January 2005 meeting, the Committee decided to require these disclosures of all applicants, not just nonprofits.

SECTION 9. APPLICATION FOR REGISTRATION: PUBLIC INFORMATION.

Except for the information required by Section 7(a)(7) and (14) and the addresses required by Section 7(a)(4), the administrator shall make the information in an application for registration available to the public.

Preliminary Comment

This section preserves the confidentiality of home addresses, financial statements, and the report on the criminal-records check. While this section prohibits the administrator from disclosing the specified information, it has no effect on the use of judicial process in connection with civil or criminal litigation.

At the January 2005 meeting, it was suggested that open-records laws might obviate the need for this section. A cursory survey reveals that some of those laws (e.g., Pennsylvania) may not cover information submitted to an administrative agency, as opposed to information generated by an agency. Further, at least some state laws (e.g., Maryland) apparently would not preserve the confidentiality of financial statements.

SECTION 10. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL.

(a) Except as otherwise provided in subsections (b) and (c), the administrator shall issue a certificate of registration to a person that complies with Sections 6 through 8.

(b) The administrator may deny registration if:

(1) the application is not accompanied by the fee established by the administrator;

(2) the application contains information that is materially erroneous or incomplete;

(3) an officer, director, or owner of the applicant has ever been convicted

of a crime, or suffered a civil judgment, involving dishonesty or the violation of state or federal securities laws;

(4) the applicant or any of its officers, directors, or owners has ever defaulted in the payment of money collected for others; or

(5) the administrator finds that the financial responsibility, experience, character, or general fitness of the applicant or its officers, directors, owners, employees, or agents does not warrant the belief that the business will be operated in compliance with this [act].

(c) [With respect to nonprofit applicants, the] [The] administrator shall deny registration if the board of directors is not independent of the applicant's officers, employees, and agents.

(d) Subject to Section 29(f), a board of directors is not independent for purposes of subsection (c) if more than one-fourth of its members:

(1) are affiliates of the applicant, as defined in Section 2(2)(A) or (B)(i), (ii), (iv), (v), (vi), or (vii); or

(2) after the date ten years before first becoming a director of the applicant, were employed by or directors of a person [, other than a public utility company,] that receives or received from the applicant more than $25,000 in either the current year or the preceding year.

Legislative Note: *If the state limits registration to non-profit entities, the first bracketed language in subsection (c) should be deleted. If the state permits for-profit entities to provide any kind of debt-management services, the brackets should be deleted, and the second bracketed language should be deleted.*

Preliminary Comment

Subsection (b): Some conduct justifies a lifetime ban from the debt-management-services industry. Examples include some of the conduct described in paragraphs (3) and (4). Other conduct can be readily corrected, e.g., paragraphs (1) and (2). The introductory language of the subsection (administrator "may" deny) gives the administrator discretion to consider the importance of various items of adverse information about an applicant, such as the precise nature and timing of past criminal conduct. Paragraph (5) gives the administrator discretion to consider other relevant information, such as the fact of and reasons for any suspension or revocation of the applicant's right to provide debt-management services in another state.

In the previous draft, paragraphs (3) and (4) included employees in the list of persons whose conduct justifies the denial of registration. Because providers may have hundreds of employees, most of whom are not in control of the provider, the Committee decided to remove that category of persons from the list. It remains a basis for action under paragraph (5), however, because the administrator should have the discretion to deny registration if, e.g., a pattern of hiring raises doubts about the likelihood that the applicant will operate the business in compliance with the Act. Unless the administrator by rule requires otherwise, paragraph (5) does not require an applicant to disclose the convictions or adverse judgments of its employees. Section 7(a)(6) requires these disclosures, but only with respect to the applicant's officers, directors, owners, and those employees who have access to the trust account.

Subsection (c) replaces former section 8(b)(6). It requires that the board of directors of a nonprofit provider be independent of the management of the agency and independent of the creditors for whom the agency is, in a sense, acting as collection agent. If the board of directors is not independent, the administrator must deny registration. Under former section 8(b)(6), denial of registration was discretionary.

Subsection (d): Since the definition of "affiliate" includes directors (section 2(2)(B)(iii)), paragraph (1) omits this subparagraph of the definition of affiliates for purposes of determining the independence of the board. Paragraph (2) specifies a period beginning ten years before a person first becomes a director. It specifies a starting point for the period but no ending point. This means that if a person meets the employment/director test of paragraph (2) while the person is on the applicant's board of directors, the person is not independent, even if more than ten years have elapsed since the person first became a member of the applicant's board.

At the January 2005 meeting, the Committee questioned whether an employee of a utility company that receives more than $25,000 from an applicant should count against the one-fourth of directors who may be insiders. In response, the bracketed language has been added to paragraph (2). An alternative approach would be to add at the end of the sentence, "for goods, services, or facilities provided to the applicant," so that a board would not be independent if more than one-fourth of its members were affiliates of the applicant or were employed by (or directors of) a person that received more than $25,000 for goods, services, or facilities provided to the applicant. This approach, however, would confer independent status on employees or directors of banks and all other creditors of the provider's customers. This goes too far, and it conflicts with the rules of the IRS for determining independent status.

The question for the Committee is whether to retain the bracketed language, creating an exemption for one particular kind of creditor. Whatever the benefits of good counsel by a utility insider, creating the exception opens the possibility that a provider might include several utility insiders, so that an outright majority of its board are employed by banks and utility companies. The provider would not necessarily be able to get away with this, because the administrator could challenge it by denying registration under subsection (b)(5). But it does not seem wise to create the possibility in the first place. Should the bracketed language be retained or deleted?

SECTION 11. CERTIFICATE OF REGISTRATION: TIMING.

(a) The administrator shall approve or deny an initial registration within 120 days after an application is filed. In connection with a request pursuant to Section 7(a)(15) for additional information, the administrator may extend the 120-day period, for not more than 60 days. Within seven days after denying an application, the administrator, in a record, shall inform the applicant of the reasons for the denial.

(b) If the administrator denies an application for registration or does not act on an application within the time prescribed in subsection (a), the applicant may appeal and request a hearing pursuant to Section [insert the citation to the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure, and conform the number in brackets to the period specified in that Act] if it does so before the expiration of [30] days after the earlier of:

(1) receipt of a notice of denial; or

(2) expiration of the period prescribed in subsection (a).

Preliminary Comment

Subsection (a) requires the administrator to act on an application in an expeditious manner. If the administrator needs additional information, the administrator may extend the period, but only for a limited time. Four approaches are possible for dealing with the administrator's failure to act on an application within the specified time. The first approach is to treat the failure to act promptly as an approval of the application. This remedy operates to the detriment of the public, and the Committee rejected it at the October 2004 meeting.

The second approach is the converse of deeming the application approved: the application is deemed to be denied, and the applicant may exercise its right of appeal under subsection (b). This is the cleanest of the alternatives.

The third approach is to authorize a judicial appeal if the application is denied or if the administrator fails to act in a timely manner.

The fourth approach is to leave the entire matter to be handled by judicial procedure, such as mandamus.

At the January 2005 meeting, the Committee opted for the second approach, but it then responded positively to an observer's suggestion that an applicant not be saddled with a "denial" that it would have to disclose to other states, simply because the administrator failed to act as directed by the legislature. This response suggests that the Committee's real preference is for the third approach, and this draft takes that approach. Under the draft, an applicant's failure to appeal within the specified 30-day period presumably would bar any appeal at a later time. Should reference to a deadline be deleted? If retained, the phrase, "period prescribed in subsection (a)," includes any extension of the time under subsection (a).

SECTION 12. RENEWAL OF REGISTRATION.

(a) A provider must renew its registration every year.

(b) An application for renewal of registration must be in a form prescribed by the administrator. It must:

(1) be filed no fewer than 30 and no more than 60 days before the registration expires;

(2) be accompanied by the fee established by the administrator and the bond or other assurance required by Section 14;

(3) be signed under oath;

(4) contain the matter required for initial registration by Section 7(a)(8) and (9) and a financial statement, audited by an accountant licensed to conduct audits, for the applicant's fiscal year immediately preceding the application;

(5) disclose any changes in the information contained in the applicant's application for registration or its immediately previous application for renewal, as applicable;

(6) supply evidence of insurance against risks of dishonesty, fraud, theft, and other malfeasance or misconduct on the part of an employee or agent of the provider, in an amount equal to the highest daily balance in the trust account required by Section 22 during the six-month period immediately preceding the application, payable to the applicant, the individuals who have agreements with the applicant, and this state, as their interests may appear, and not subject to cancellation by the applicant without the approval of the adminstrator;

(7) disclose the total amount of money received by it or its designees pursuant to plans during the preceding 12 months from or on behalf of individuals who reside in this state and the total amount of money distributed to creditors of those individuals during that period;

(8) disclose, to the best of the applicant's knowledge, the total amount of money accumulated pursuant to plans during the preceding 12 months by or on behalf of individuals who reside in this state and with whom it has agreements; and

(9) provide any other information that the administrator reasonably requires.

(c) Except for the information required by Section 7(a)(7) and (14) and the addresses required by Section 7(a)(4), the administrator shall make the information in an application for renewal of registration available to the public.

(d) If a registered provider files a timely application for renewal of registration, the registration remains effective until the administrator, in a record, notifies the applicant of a denial and states the reasons for the denial.

(e) If the administrator denies an application for renewal of registration, the applicant, within 30 days after receiving notice of the denial, may appeal and request a hearing pursuant to Section [insert the citation to the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure]. Subject to Section 31(b), until the appeal process is final, the applicant may continue to provide debt-management services. Thereafter, subject to the administrator's order and Section 31(c), the applicant shall continue to provide debt-management services to individuals with whom it has agreements until, with the approval of the administrator, it transfers them to another registered provider or returns their money that is under its control.

Preliminary Comment

Subsection (a): The renewal requirement has been relocated here from its former location in section 5.

Subsection (b): The cross-referenced provisions in paragraph (4) require proof of accreditation and counselor certification.

In paragraph (6) this draft adds the requirement that the provider may not cancel the insurance without the permission of the administrator.

Paragraphs (7) and (8) require disclosure of amounts paid or accumulated by individuals with whom the applicant has agreements. These amounts determine the size of the bonds required by section 12. Paragraph (7) refers to providers and their agents that receive and distribute the individual's money. Paragraph (8) applies to providers that do not take possession of those funds. Some providers may require the individual to provide periodic copies of bank statements. Others may not and therefore may not know the amount accumulated by all of the customers.

Paragraph (9) authorizes the administrator to require additional information from an applicant. This refers both to information required by rule and information requested in response to the information in an application. This authorizes the administrator to exercise the rulemaking authority to articulate indicia of success and require the applicant to disclose these indicia in its application for renewal.

Subsection (c): The home addresses, financial statements, and criminal-records check, as disclosed in an application for registration or in an application for renewal, remain exempt from public disclosure.

Subsection (d): The grounds for denial of an application to renew registration appear in section 31. At the January 2005 meeting, the committee decided to remove the 30-day time limit for the administrator's approval or denial of an application for renewal of registration. If the provider files a timely application, the registration remains effective until the administrator denies it. If the provider fails to file a timely application, the provider ceases to be registered (section 5(a)) and is no longer authorized to provide debt-management services to individuals who reside in this state. The denial of an application for renewal triggers the right of appeal under subsection (c). During the 30 days following a denial, the provider may continue to provide debt-management services. If the provider does not file an appeal, then the appeals process becomes final, and the last sentence of subsection (e) applies. Is it necessary (or desirable) for subsection (d) to contain a provision similar to the last sentence of subsection (e).

Subsection (e): When a provider's registration ends, section 5(a) prohibits it from providing debt-management services. An abrupt end to the provider's activity, however, may adversely affect its customers who are in the middle of a plan. Consequently, this subsection compels the entity to continue providing services to existing customers until the administrator authorizes it to cease.

SECTION 13. REGISTRATION IN ANOTHER STATE. If a provider holds a license or certificate of registration in another state authorizing it to provide debt-management services, the provider may submit a copy of that license or certificate and the application for it in lieu of an application in the form prescribed by Sections 6(a) and 7(c) or Section 12(a). The administrator shall accept the application and the certificate from the other state as an application for registration or for renewal of registration, as appropriate, in this state if:

(1) the application in the other state contains information substantially similar to or more comprehensive than that required in an application submitted in this state; and

(2) the applicant, under oath, certifies that the information contained in the application is current, or, to the extent it is not current, supplements the application to make the information current.

Preliminary Comment

This section provides for reciprocal use of applications in states that have adopted this Act. It simplifies registration in states that have substantially similar laws, thereby easing the burden placed on providers that operate in multiple states. This benefit is available, however, only if the law of the other state is substantially similar to this Act. As a practical matter, a provider can comfortably rely on this section only if the other state has also adopted this Act. Some states may use a system of licensing rather than registering. This section permits use of a license and application for license.

SECTION 14. BOND REQUIREMENT.

(a) Except as otherwise provided in Section 15, a provider shall file a surety bond with the administrator.

(b) The surety bond must be in effect during the period of registration and for two years after a provider ceases providing debt-management services to individuals in this state.

(c) A surety bond must run to the state for the benefit of the state and individuals who reside in this state and obtain debt-management services from the provider.

(d) Subject to Section 29(f), a surety bond must:

(1) be in an amount equal to $100,000 or twice the average daily balance in the trust account required by Section 22 during the six months immediately preceding the date of the application for registration or renewal of registration, whichever is greater, or in an amount

that the administrator determines is warranted by the financial condition and business experience of the provider, the history of the provider in providing debt-management services, the risk to individuals, and any other factor the administrator considers appropriate;

(2) be issued by a bonding, surety, or insurance company that is authorized to do business in this state; and

(3) be conditioned upon the noncompliance of the provider or its agents with this [act].

(e) If the principal amount of a surety bond is reduced by payment of a claim or a judgment, the provider shall immediately notify the administrator of that fact and, within [30] days after notice by the administrator, shall file a new or additional surety bond in an amount set by the administrator. The amount of the new or additional bond must be at least the amount of the bond immediately before payment of the claim or judgment. If for any reason a surety terminates a bond, the provider shall immediately file a new surety bond in the same amount as the amount of the terminated bond.

(f) The administrator or an individual may obtain satisfaction out of the surety bond or other security procured pursuant to this section or Section 15 if

(1) the administrator assesses costs under Section 29(b)(2), issues a final order under Section 30(a)(2), or recovers a final judgment under Section 30(a)(5) or (d); or

(2) an individual recovers a final judgment pursuant to Section 32(a), (b), (c), or (d)(1) or (3).

(g) If claims against the security exceed the amount of the security, the surety or other stakeholder may petition the administrator to determine the order and amount in which the claims are paid.

Preliminary Comment

Subsection (a): The requirement of a bond applies to all providers, including those that are not required to establish trust accounts.

Subsection (b): The bond is a source of payment of injuries caused by a provider's failure to comply with this Act. It is conceivable that the administrator or an individual would not commence litigation until after a provider ceases providing services in this state. This subsection preserves the availability of the bond for two years after the year in which the provider's registration ends. Legislation in some states contains comparable provisions. E.g., 2004 Kan. Sess. Laws 22 (§4(c))(2 years after the end of registration); Md. Fin. Inst. Code Ann. § 12-914(b)(3)(2 years after the provider ceases to be licensed). In others, it either requires the bond to be continuously in force, run concurrently with the period of registration, or does not address the duration of the bond.

Subsection (c): The bond runs in favor of the state for the benefit of the state and for the benefit of the customers of the provider. Thus, it is available to compensate the administrator for its enforcement costs. The bond also runs directly in favor of customers who are injured by a provider's noncompliance with the Act. The subsection has been substantially revised to reflect the changes in section 3 (Application to Nonresident Providers), narrowing the applicability of the Act to providers that serve individuals residing in this state.

Subsection (d): For those providers that do not receive payments for distribution to creditors, and therefore are not required by section 22 to establish a trust account, the bond requirement is $100,000. For others, the bond requirement is the greater of $100,000 or two times the average daily balance in the trust account. The amount of the bond would depend on the amount received from individuals and the frequency of the provider's payment to the creditors. A provider that receives payments of $1.5 million per year, or $30,000 per week, and pays creditors twice a week, would have an average daily balance of approximately $11,000. Its bond requirement would be $100,000. A provider that receives payments of $130 million per year, or $2.5 million per week, and pays creditors twice a week, would have an average daily balance of approximately $900,000. Its bond requirement would be $1.8 million. This alternative gives the provider an incentive to make payments to creditors on a daily basis. The administrator is free to set the bond requirement for a particular provider at a different amount.

A newly registered provider may have no trust account experience with respect to residents of this state. The bond for this provider is $100,000 unless, in light of the factors enumerated in this subsection, the administrator determines some other amount is warranted.

The bond requirement under existing legislation varies widely. Many of the statutes were enacted decades ago and have not been amended in this respect. These statutes often require bonds of modest amounts, $10-25,000. The more recently enacted or revised legislation sets the bond at much higher amounts, often to be set by the administrator in light of specified factors. E.g., Connecticut ($40,000 or 2 times the highest monthly amount paid by Connecticut residents); Illinois ($25,000 or the amount of disbursements during the preceding year); Kansas ($25,000-1,000,000); Maine ($50,000); Maryland ($10,000-350,000); Michigan ($35,000-100,000); New York (minimum of $250,000); Vermont (minimum of $50,000); Virginia ($25,000-350,000). This draft sets the amount of the bond at $100,000 but authorizes the administrator to adjust it in either direction. This flexibility may be especially important with respect to true non-profit credit-counseling agencies.

The amount $100,000 has appeared in the last several drafts, but the Committee has not considered whether that is the appropriate number. There is an overlap between the insurance required by sections 6 and 12 and the bond required by this section. Both protect against wrongful appropriation of the money in the trust account. Only the bond, however, protects against other loss that the customers of a provider might suffer. In view of the expense and difficulty of obtaining bonds, it might be rational to disconnect the amount of the bond from the size of the trust account and view the bond primarily as a source of compensation to individuals who sue a provider. That leaves the insurance policy as the source of compensation if a provider misappropriates the money in a trust account. If the Committee takes this approach, subsection (d)(1) could reduce the amount of the bond and omit any reference to size of the trust account, e.g.:

> (1) be in an amount equal to $50,000, or in an amount that the administrator determines is warranted by the financial condition and business experience of the provider, the history of the provider in providing debt-management services, the risk to individuals, and any other factor the administrator considers appropriate.

Paragraph (3) requires that the bond be conditioned upon noncompliance with the Act. Nothing is payable until the administrator or an individual obtains a judicial determination that the provider has failed to comply (or the administrator assesses costs under section 29(b)(2). In a typical case the surety would be joined as a party defendant.

Former subsection (e) permitted a credit against the amount of the bond required by this section in the amount of bonds required by other states. With the narrowing of section 3, this subsection has become superfluous, and it has been deleted.

Former subsection (f) set the amount of the bond for a newly registered provider. Further reflection reveals that subsection (d) adequately covers this situation.

Subsection (f) (formerly subsection (i)): Section 29(b)(2) empowers the administrator to charge a provider for the costs of an investigation of the provider. Section 30 empowers the administrator to seek restitution for injured individuals and recover its costs of an enforcement action. Under subsection (f) the bond or other security required by this section is a source for payment of this restitution. Section 32 authorizes private rights of action. The bond or other security is a source of payment of actual damages, damages for overcharges, the [$1,000] minimum damages, and costs and attorney's fees. It is not available to satisfy criminal penalties under section 27, civil penalties under section 30, or punitive damages under section 32. Does the Drafting Committee concur?

Subsection (g): This newly added subsection permits the administrator to determine the order in which the security should be applied to satisfy claims, in order to make payment of claims equitable. But it may deprive individuals who uncovered wrongdoing and acted first from recovering full compensation for their injuries. At the expense of the diligent consumer, the provision may enhance the position of the individual who files a copycat action. On the other hand, the Style Committee observes that, as drafted, the surety apparently has the discretion to pay the claims in any order it chooses. Should the administrator be directed to determine priority and, if so, on what basis?

Section 32(h) requires the administrator to assist an individual in enforcing a judgment against the bond or other security if the individual has given notice of the litigation to the administrator within 60 days of initiating it.

SECTION 15. BOND REQUIREMENT: SUBSTITUTE. In lieu of the surety bond required by Section 14, a provider may deliver to the administrator any of the following, in the amount required by Section 14(d), and, except as otherwise provided in paragraph (2)(A), payable or available to the state and to individuals who have agreements with the provider as their interests may appear if the provider does not comply with this [act]:

(1) a certificate of insurance issued by an insurance company rated at least A by a nationally recognized rating organization, with no deductible; or

(2) subject to the approval of the administrator:

(A) an irrevocable letter of credit, issued or confirmed by a bank approved by the administrator, payable upon presentation of a certificate by the administrator; or

(B) bonds or other obligations of the United States or guaranteed by the United States or bonds or other obligations of this state or a political subdivision of this state, to be deposited and maintained with a bank approved by the administrator for this purpose.

Preliminary Comment

Formerly subsection (h) of section 12 (now section 14), this section has been reorganized to reduce repetitive language, with no change in substance. It provides an alternative to posting a bond. It authorizes the provider to procure insurance or, subject to the administrator's approval, a letter of credit or debt instruments. The requirement of approval by the administrator extends to both the securities deposited and the terms of the account into which they are deposited, to ensure that they are available to pay claims of injured individuals. The administrator by rule can develop the mechanics for liquidating the securities and paying the proceeds to injured individuals.

Prior drafts authorized insurance with a deductible no greater than 10 percent of the face amount of the policy. If the bond requirement for a particular provider were $1 million, this would permit a deductible of $100,000. The burden of a deductible should not fall on the injured individual, and this draft eliminates the deductible.

Paragraph (2)(A) requires the administrator's approval. This approval extends to the identity of the bank and to the form of the letter of credit. The paragraph requires that the letter of credit be payable upon presentation of a certificate by the administrator, and the administrator may determine the nature of that certificate. For example, the administrator may require that the issuer of the letter of credit will pay in the amount stipulated in the certificate as the amount of a judgment obtained by an individual or the amount stipulated in the certificate as costs assessed under section 29(b)(2). Section 32(h) requires the administrator to assist an individual with a judgment if the individual has given notice of the litigation to the administrator within 60 days of initiating it.

SECTION 16. CUSTOMER SERVICE. A provider shall maintain a telephone system, staffed at a level that reasonably permits an individual to speak to a counselor or customer service representative, as appropriate, during ordinary business hours.

Preliminary Comment

Some inquiries require counseling services or assistance in dealing with creditors; others concern administrative matters such as confirmation of receipt of a payment, communication that a payment for a particular month will be late or in a different amount than scheduled, etc. The provider must provide sufficient staffing to meet the reasonably expectable demand for both kinds of requests. Even if a provider desires to operate exclusively by electronic interaction with individuals, it must comply with this subsection. See section 18(c) and accompanying Comment.

This subsection contemplates responses to telephonic requests by existing customers. The staffing required by this subsection therefore is in addition to whatever staffing the provider might have for soliciting or responding to potential customers.

Section 18 permits a provider to comply with sections 17, 19, and 25 by means of electronic communication. Section 16 makes no exception for this provider. Even if a provider desires to operate exclusively via electronic communication, it must comply with this section.

SECTION 17. PREREQUISITES FOR PROVIDING DEBT-MANAGEMENT SERVICES.

(a) A provider shall act in good faith in all matters under this [act]. "Good faith" means honesty in fact and the observance of reasonable standards of fair dealing.

(b) Before providing debt-management services to an individual, a provider shall give the individual an itemized list of goods and services and the charges for each. The list must be clear and conspicuous, in a record the individual may keep whether or not the individual assents to an agreement, and describe:

(1) the goods and services the provider offers:

(A) free of additional charge, if the individual enters into an agreement;

(B) for a charge, if the individual does not enter into an agreement; and

(C) for a charge, if the individual enters into an agreement, using the following terminology, as applicable, and format:

Set-up fee	[dollar amount of fee]
Monthly service fee	[dollar amount of fee or method of determining amount]

Settlement fee [dollar amount of fee or method of determining amount]

{Goods and services in addition to those provided in connection with a plan:

[item] [dollar amount or method of determining amount]

[item] [dollar amount or method of determining amount]; and

(2) the goods or services the provider offers for a charge that are not offered as a part of debt-management services}.

(c) A provider may not furnish debt-management services to an individual unless the provider, through the services of a certified counselor:

(1) provides the individual with reasonable education about the management of personal finance;

(2) has prepared a financial analysis and a plan for the individual;

(3) has made a determination, based on its analysis of the information provided by the individual and otherwise available to it, that the plan is suitable for the individual and the individual will be able to meet the payment obligations under the plan; and

(4) believes that each creditor of the individual listed as a participating creditor in the plan will accept payment of the individual's debts as provided in the plan.

(d) Before an individual assents to an agreement, a provider shall provide the individual with:

(1) a copy of the analysis and plan required by subsection (c)(2) in a record that identifies the provider and that the individual may keep whether or not the individual assents to the agreement; and

(2) with respect to all creditors identified by the individual or otherwise

known by the provider to be creditors of the individual:

(A) a list of creditors that the provider expects to participate in the plan and grant concessions;

(B) a list of creditors that the provider expects participate in the plan but not grant concessions; and

(C) a list of creditors that the provider expects not to participate in the plan or as to which the provider has no reason to know.

(e) Before an individual assents to an agreement to engage in a plan, a provider shall disclose in a record that contains nothing else and that the individual may keep whether or not the individual assents to the agreement the following information:

(1) plans are not suitable for all individuals, and the individual may ask the provider about other ways, including bankruptcy, to deal with indebtedness;

(2) establishment of a plan may adversely affect the individual's credit rating or credit scores;

(3) nonpayment of debt may lead creditors to undertake collection activity, including litigation;

(4) unless it is not true, the provider may receive compensation from the creditors of the individual; and

(5) unless the individual is insolvent, if a creditor settles for less than the full amount of the debt, the plan will result in the creation of taxable income to the individual, even though the individual does not receive any money.

(f) If a plan contemplates concessions by creditors in the form of reduced finance charges or fees for late payment, default, or delinquency, a provider may comply with subsection (e) by providing the following disclosure:

> IMPORTANT INFORMATION FOR YOU TO CONSIDER
>
> (1) Debt-management plans are not suitable for all individuals, and you may ask us to provide information about bankruptcy and other ways to deal with indebtedness.
>
> (2) Establishment of a debt-management plan may hurt your credit rating or credit scores.
>
> (3) [unless it is not true] We may receive compensation for our services from some or all of your creditors.

(g) If a plan contemplates that creditors will settle debts for less than the full principal amount of debt owed, a provider may comply with subsection (e) by providing the following disclosure:

> IMPORTANT INFORMATION FOR YOU TO CONSIDER
>
> (1) Our program is not suitable for all individuals, and you may ask us to provide information about bankruptcy and other ways to deal with indebtedness.
>
> (2) Nonpayment of your debts pursuant to our program is likely to hurt your credit rating or credit scores and may lead your creditors to undertake activity, including litigation, to collect the debts.
>
> (3) Unless you are insolvent, our program will result in the creation of taxable income to you, even though you will not actually receive any money.

Preliminary Comment

At the January 2005 meeting, the Committee decided to include a provision imposing on providers an obligation to act in good faith. It appears as subsection (a), along with a definition adapted from the UCC. Subsections (c) and (d) have been revised accordingly, eliminating the reference to good faith, as have other sections throughout the Act.

Subsection (b): The disclosure of charges must contain the dollar amounts or the method of determining the dollar amounts, e.g., "$5 per month for each creditor that participates in the plan" or "five percent of the amount of debt that a creditor writes off." At the January 2005 meeting, the Committee decided to include a standardized disclosure, specifying the terminology and format to be used. It appears in this subsection.

Braces have been placed on part of subsection (b) to flag an issue for the Committee. The bracketed language contemplates that a provider may charge for goods and services provided in connection with a plan. Section 26(b)(7), however, prohibits a provider from charging for any matter not directly related to debt-management services; and section 23(a) prohibits charges (other than for set-up, monthly service, and settlement) for providing debt-management services. At a minimum, paragraph (b)(2) must be deleted. And unless there are legitimate charges for goods or services in connection with a plan, the rest of the bracketed language should be deleted. Are there?

Subsection (c): Many debt-settlement companies do not currently see education as part of their mission. At the October 2004 meeting, the Committee decided to mandate education for all providers. Paragraph (1) implements this decision.

The education may consist of an individual session with a counselor (which may also include the analysis required by paragraph (2)), a group class, or an electronic educational program. The education must be substantially more than an explanation of the benefits of a plan. It must begin but need not be completed before commencement of a plan, since a course of education may take months to complete. Education for financial literacy is receiving increased attention, and several entities are attempting to define standards for effectiveness. As these attempts come to fruition, the administrator may exercise rulemaking power under section 29(e) to establish minimum standards for the education.

Paragraph (3) of the prior version of this subsection required a provider to make a reasonable determination that the plan is necessary to avoid financial hardship or bankruptcy. As a result of decisions at the October 2004 and January 2005 meetings, this draft drops any reference to reasonableness, financial hardship, or bankruptcy, instead requiring only that the provider believe that the plan is suitable for the individual. For providers that assist an individual to repay in full, this requires a determination that the individual has sufficient income to permit payment to creditors after payment of living expenses, but not so much income that concessions from creditors are not necessary. For providers that assist an individual to settle debts for less than full payment, the suitability requirement means at a minimum that the individual does not have the ability to satisfy creditors out of current income within a reasonable time.

Paragraph (4) of a prior version required a provider to make a good faith, reasonable determination that the individual can make the required payments and that creditors will participate in the plan. This requirement is feasible for credit-counseling agencies but perhaps not for debt-settlement companies. Therefore, the paragraph no longer requires that the provider reasonably believe that each creditor will participate. Subsection (a), however, requires the provider to act in good faith, which entails honesty and the observance of reasonable standards of fair dealing. If a provider knows that a particular creditor will not participate, the provider cannot in good faith believe that the creditor will participate, and therefore cannot satisfy this paragraph if that creditor is included in the plan.

The requirement in paragraph (4) that the provider believe that the creditors will accept the plan does not mandate communication with the creditors before an agreement is formed. The provider's past experiences with the creditors may be a sufficient basis for the provider's good faith belief.

Subsection (d): Since secured creditors are creditors, paragraph (2) requires the provider to include secured creditors in the two lists, as appropriate. Taken together, the two lists must include all the creditors whose existence the provider knows or has reason to know.

Subsections (e)-(g): Subsection (e) requires providers to give a warning to individuals before they commit to a plan. Subsections (f) and (g) provide safe-harbor language for the provider to use. Use of the exact language in these subsections constitutes compliance with subsection (e). If the provider uses other language, the disclosure is subject to review to determine if it adequately discloses the required information.

SECTION 18. COMMUNICATION BY ELECTRONIC MEANS.

(a) A provider may comply with Section 17, 19, or 25 via the Internet or other electronic means if the provider obtains the individual's consent in the manner provided by Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001(c)(1) [,as amended], and:

(1) with respect to the requirements of Section 17(c), a certified counselor has reviewed and approved the education required by Section 17(c)(1) and the computer program

or application used to create the financial analysis and the plan required by Section 17(c)(2);

(2) the individual is advised of the availability of assistance by telephone or in person and is afforded the opportunity for discussion of the financial analysis and the initial plan with a certified counselor;

(3) the disclosures and materials required by Sections 17, 19, and 25 are presented in such a way that the individual may retain them electronically and print them;

(4) with respect to disclosure via an Internet web site of the information required by Section 17(e), the disclosure appears on one or more screens that:

(A) contain no other information; and

(B) the individual must see before proceeding to assent to formation of a plan;

(5) the provider:

(A) at the time of providing an electronic version of the materials and agreement required by Sections 17(d) and (e), 19, and 25, informs the individual that upon electronic, telephonic, or written request, it will send the individual a written copy of the materials; and

(B) if requested, before the expiration of 90 days after a plan is completed or terminated, to send a written copy of the materials, sends them at no charge within three business days of the request, except that the provider need not comply with a request more than one time per calendar month or if it reasonably believes the request is made for purposes of harassment. If requested thereafter, the provider shall send a written copy of the materials but may impose a reasonable charge.

(b) A provider that complies with Section 17 pursuant to this section shall disclose on the home page of its Internet web site or on a page that is clearly and conspicuously connected to the home page by a link that clearly reveals its contents:

(1) its name and all names under which it does business;

(2) its principal business address and telephone number; and

(3) the names of its principal officers.

(c) A provider that forms plans with individuals on its Internet web site shall respond to electronically communicated requests for assistance within a reasonable time during ordinary business hours.

(d)(1) In this subsection, "Act" means the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended.]

(2) Subject to paragraph (3), if an individual who has consented in the manner provided by Section 101 of the Act withdraws the consent as provided in the Act, a provider may terminate its agreement with the individual.

(3) If a provider wishes to terminate an agreement pursuant to this subsection, it shall notify the individual that it will terminate the agreement unless the individual, within 30 days of receiving the notification, consents in the manner provided in Section 101(c) of the Act. If the individual consents, the provider may terminate the agreement only as permitted by Section 19(a)(5)(F).

Legislative Note: *In states in which the constitution does not permit the phrase "as amended," the phrase should be deleted in subsections (a) and (d).*

Preliminary Comment

Subsection (a) permits electronic delivery of the information required by section 17, and it permits electronic formation of agreements. Under paragraph (2), if counseling in person is not readily available in reasonable proximity to the individual's residence, the provider must offer counseling or other assistance by telephone. An alternative approach would permit agencies to operate entirely by electronic communication, in which event paragraph (2) would be revised to require the agency to disclose that it operates entirely by electronic communication, that some other agencies provide personal contact, and that if the individual wants personal contact he or she should seek out one of those other agencies. Section 16 (Customer Service) would also need revision. Does the Committee wish to adopt this alternative?

Paragraph (3) does not require a provider to verify that the individual has an operable printer; it merely requires that the material be presented in a printable format.

To meet the objectives of the physical delivery contemplated by section 17, electronic delivery must satisfy certain requirements of form, such as appearing on a screen that contains no other information.

Section 25 requires periodic reports and this section has been drafted to permit the provider to make these reports electronically.

Even if a plan is formed over the Internet, the individual should be able to have a hard copy of the agreement with the provider. Paragraph (3) requires that the agreement and other specified materials must be presented in a printable format. Paragraph (5) requires the provider to send a written copy if the individual requests it. The provider may not limit the medium by which the individual requests a copy. The previous draft of paragraph (5) limited the time within which the individual must make a request. Since the information is readily accessible to the provider, the availability of written versions should not be limited to requests made in that short time frame. In that case, however, the provider needs protection against requests made for the purpose of harassment and against the difficulty of complying once the records are in remote storage. The current draft eliminates the time limits but protects the provider against harassment and stale requests. An example of harassment might be a request for a copy of a periodic report three years after the period covered by the report. The subsection does not establish a bright-line rule, however, and in a particular case the individual might indeed have a legitimate need for an old report.

If the Committee wants to retain the short time limits for requesting a written copy, a revised version of the previous draft would read:

(5) (A) at the time of providing an electronic version of the materials required by Sections 17(d) and (e) and 25, the provider informs the individual that upon electronic, telephonic, or written request within the next 30 days, the provider will send the individual a written copy of the materials at no charge;

(B) at the time of providing an electronic version of the agreement required by Section 19, the provider informs the individual that upon electronic, telephonic, or written request within the next 90 days, the provider will send the individual a written copy of the agreement at no charge; and

(C) if requested to send a written copy of the materials or agreement, the provider sends them at no charge within three business days of the request.

Subsection (b): An agency might do business under numerous names. Subsection (b) requires disclosure of all those names, along with the provider's principal location and officers, but it permits the provider to disclose this information via a link to another page of the website. The link must reveal its contents, e.g., "For the address and other information about [name of provider], click here."

Subsection (c): A provider that operates exclusively via its web site must comply with section 16 (maintain an adequate telephone system). Having invited electronic communication, however, it also must respond within a reasonable time to requests that are transmitted electronically. The choice between electronic and telephonic media is left to the individual.

SECTION 19. FORM AND CONTENTS OF AGREEMENT.

(a) An agreement must:

(1) be in a record;

(2) be dated and signed by the provider and the individual;

(3) include the name of the individual and the address where the individual resides;

(4) include the name, address, and telephone number of the provider;

(5) disclose:

(A) the services to be provided;

(B) the amount or method of determining the amount of all fees, individually itemized, to be paid by the individual;

(C) the schedule of payments to be made by or on behalf of the individual, including the amount of each payment, the date on which each payment is due, and an estimate of the date of the final payment;

(D) if a plan provides for regular periodic payments to creditors:

(i) each creditor of the individual to which payment will be made, the amount owed to each creditor, and any concessions the provider reasonably believes each creditor will offer; and

(ii) the schedule of expected payments to each creditor, including the amount of each payment and the date on which it will be made;

(E) each creditor that the provider believes will not participate in the plan and to which the provider will not be directing payment;

(F) that the provider may terminate the agreement for good cause, upon return of unexpended money of the individual;

(G) that the individual may contact the administrator with any questions or complaints regarding the provider; and

(H) the address, telephone number, and Internet address or web site of the administrator; and

(6) be delivered to the individual immediately upon formation of the agreement.

(b) For purposes of subsection (a)(6), delivery of an electronic record occurs when it is made available in a format in which the individual may retrieve, save, and print it.

(c) If the administrator supplies the provider with any of the information required under subsection (a)(5)(H), the provider complies with that requirement only by disclosing the information supplied by the administrator.

(d) An agreement must provide that:

(1) the individual has a right to terminate the agreement at any time, without penalty or obligation, by giving the provider written or electronic notice, in which event:

(A) the provider will refund all unexpended money that the provider has received from or on behalf of the individual for the reduction or satisfaction of the individual's debt; and

(B) with respect to an agreement that contemplates that creditors will settle debts for less than the full principal amount of debt owed, if the individual terminates the agreement before the expiration of 180 days after the individual assents in a record to the agreement, the provider will return to the individual within five business days all fees and charges, other than settlement fees, that it has received from the individual;

(2) the individual authorizes any bank in which the provider has established a trust account to disclose to the administrator any financial records relating to the trust account; and

(3) the provider will notify the individual within five days after learning of a creditor's decision to reject or withdraw from a plan and that this notice will include:

(A) the identity of the creditor; and

(B) the right of the individual to modify or terminate the agreement.

(e) An agreement may confer on a provider a power of attorney to settle a debt of an individual for no more than 50 percent of the amount of the debt at the time of the agreement. An agreement may not confer on a provider a power of attorney to settle a debt for more than 50 percent of that amount, but may confer a power of attorney to negotiate with creditors of the individual on behalf of the individual. An agreement must provide that the provider will obtain the consent of the individual after a creditor has assented to a settlement for more than 50 percent of that amount.

(f) An agreement may not:

(1) provide for application of the law of any jurisdiction other than the United States and this state;

(2) except as permitted by Section 2 of the Federal Arbitration Act, 9 U.S.C. Section 2, [as amended,] contain a provision that modifies or limits otherwise available forums or procedural rights, including the right to trial by jury, that are generally available to the individual under law other than this [act];

(3) contain a provision that restricts the individual's remedies under this [act] or law other than this [act]; or

(4) contain a provision that:

(A) limits or releases the liability of any person for not performing the agreement or for violating this [act]; or

(B) indemnifies any person for liability arising under the agreement or this [act].

(g) All rights and obligations specified in subsection (d) exist even if not provided in the agreement. A provision in an agreement that violates subsection (d), (e), or (f) is void.

(h) An individual may cancel an agreement before midnight of the third business day after the individual assents to it, unless the agreement fails to comply with this section or Section 26, in which event the individual may cancel the agreement until the expiration of 30 days after the individual assents to it. To exercise the right to cancel, the individual must give written or electronic notice to the provider. Notice by mail is given when mailed.

(i) An agreement must be accompanied by a form that has the heading "Notice of Cancellation" and contains in bold face type:

Notice of Cancellation

You may cancel this agreement, without any penalty or obligation, at any time before midnight of the third business day that begins the day after you agree to it by electronic communication or by signing it.

To cancel this agreement during this period, send an e-mail to <u>(e-mail address of the provider)</u> or mail or deliver a signed, dated copy of this notice, or any other written notice to <u>(name of provider)</u> at <u>(address)</u> before midnight on <u>(date)</u>. If you cancel this agreement within the 3-day period, we will refund all money you already have paid us.

You also may terminate this agreement at any later time, but we may not refund fees you have paid us.

I hereby cancel this contract,

<u>(date) ,</u>

<u>(individual's signature)</u> .

(j) In the event of a personal emergency, an individual may waive the right to cancel. To waive the right, the individual must send or deliver a signed, dated statement in his or her own words describing the circumstances that necessitate a waiver. The waiver must explicitly waive the right to cancel. A waiver by means of a written or electronic standard-form document is void.

Legislative Note: *In subsection (f)(2), if the constitution does not permit use of the phrase, "as amended," when federal statutes are incorporated into state law, the phrase should be deleted.*

Preliminary Comment

Subsection (a): Paragraph (3) has been refined to coordinate better with the revision of section 3 (Applicability of Act).

Paragraph (5)(C): As in section 2(13) (defining "plan"), the word "payments" includes deposits, that is, payment to a bank account of the individual. The date of the last payment depends on the creditors' concessions and the amount of the monthly payment by the individual, each of which may change during the course of the plan. It also depends on the timeliness of payment by the individual. None of this can be known in advance. Therefore, paragraph (5)(C) requires a good faith estimate of the date of the final payment.

In the previous draft, paragraph (D) applied to both credit-counseling agencies and debt-settlement companies. In this draft it applies only to the former and has been combined with former paragraph (E) into one paragraph. Former paragraph (F), which required debt-settlement companies to disclose the amounts and dates of payment to creditors, has been deleted.

Paragraph (5)(E): As with section 17(d)(2) (pre-agreement disclosure of creditor participation), identification of nonparticipating creditors includes secured creditors but refers only to creditors that the individual has disclosed to the provider or that the provider otherwise actually knows to be a creditor of the individual. Subparagraph (E) does not require the provider to make any disclosures with respect to creditors of which it is unaware.

Paragraph (5)(F): The good cause for termination by a provider pursuant to this paragraph does not encompass a desire to escape the fee structure to which the provider may have committed. Rather, it contemplates such things as the individual's failure to make monthly payments or to cooperate with the provider. The standard of good cause may vary depending on whether the provider is a credit-counseling agency or a debt-settlement company, because the adverse consequences to the individual in the event of termination may be different.

Paragraph (5)(H): Compliance with this paragraph will mean that a provider that serves individuals in multiple states may have to have a different form for each state. Computerization of the standard document may minimize the difficulty of complying with this disclosure requirement.

Paragraph (6) requires immediate delivery of the record to the individual. If the record is electronic, delivery occurs when the provider makes it available in retrievable and printable form.

Subsection (d): Current practice by many credit-counseling agencies is to permit termination at any time; they do not even purport to bind the individual to a contract. The draft mandates this right of termination for all providers. If the individual has an unlimited right of termination, it is questionable whether there is a contract at all. The requirement of notice may supply sufficient obligation to support a contract, but even if it does not, there is no reason why the industry, and regulation of the industry, cannot operate on the basis of agreements that are not enforceable under the common law of contracts. This Act provides the authorization for the industry, as well as the regulation of it.

For all providers, subsection (d) requires return of any unexpended money intended for payment to creditors. For debt-settlement companies, it requires refund of a set-up fee and all monthly service fees if the termination occurs within the first six months. But it does not require refund of any settlement fee. Does the Committee concur with this exception?

For a termination to be effective under subsection (d)(1), the individual must give written or electronic notice.

Subsection (e) replaces former subsection (c)(4). It permits the agreement to give the provider a power of attorney to settle debts for 50 cents on the dollar. But the percentage is calculated with respect to the amount of debt a the inception of the plan, not the amount of debt at the time of settlement. For settlements less favorable than that, the provider must secure the assent of the individual and must do so after the creditor has assented to a settlement. This affords the individual an opportunity to review the terms of the settlement before it becomes final.

Subsection (f): This subsection seeks to preserve the individual's common law and statutory rights against the unilateral decision of a provider to remove or restrict them. Thus an agency may not evade this Act by adopting the law of another jurisdiction. Nor may an agency contract for a distant forum or the surrender of rights or remedies under other law, including the right to proceed by way of a class action when appropriate. A statute designed to protect individuals should not permit the deprivation of important procedural and jurisdictional rights by means of a unilateral decision by the other party.

Subsections (h) through (j) derive from section 125 of the Truth-in-Lending Act, 15 U.S.C. § 1635. Subsection (g) confers a right of cancellation for three days after an agreement that complies with sections 19 and 26. Section 19 specifies the form and contents of the agreement, and section 26 lists prohibited conduct. Some of the prohibited conduct might be manifest in an agreement, in which event the agreement would not comply with section 26. The October 2004 Meeting Draft provided that if the provider failed to comply with section 19 or section 26, the right of cancellation never expired. This draft provides that if the agreement fails to comply with either of those sections, the individual has 30 days in which to cancel. Failure to comply with section 19 includes putting the incorrect date in the notice required by subsection (i). If the individual cancels, subsection (i) calls for forfeiture of all amounts paid, even those amounts already paid over to creditors. The purpose of this remedy is to provide an additional incentive for providers to comply with sections 19 and 26. If the agreement complies with sections 19 and 26 but the provider fails to honor the individual's attempt to cancel, section 32(f) provides a similar remedy (recovery of all amounts paid or deposited by the individual). If the right to cancel has expired, the individual still has the right to terminate under subsection (d).

SECTION 20. REQUIRED LANGUAGE. If a provider communicates with an individual primarily in a language other than English, the disclosures and documents required by this [act] must be in the other language.

Preliminary Comment

At the Annual Meeting several commissioners objected that the mandatory nature of this provision is too onerous. Salespersons, they said, often use a combination of English and any one of hundreds of foreign languages to accommodate their customers. It is not reasonable to require the employer to have documents in every language that its employees and customers speak. An alternate version of this section might provide:

> If a provider communicates with an individual [primarily] in a language other than English, the provider must comply with one of the following:
>
> (a) all disclosures and documents required by this [act] must be in that other language; or
>
> (b) the provider must explain in that other language the meaning of every provision in every disclosure and document required by this [act].

At the October 2004 meeting, the Committee decided to leave the section in its present form. If the provider communicates primarily in a foreign language, it must provide documents and disclosures in that language. If the provider is not willing to do this, then it must communicate primarily in English. This places the burden on the individual to bring a translator along or assume the risk of not understanding any disclosures or documents that are beyond the individual's English-language skills.

SECTION 21. VOIDABLE AGREEMENTS.

(a) An agreement between an individual and a provider that is not registered under this [act] when the agreement is formed is voidable by the individual.

(b) With respect to an agreement that an individual voids pursuant to this section, a provider that violates Section 5 does not have a claim against the individual for breach of contract and does not have a claim in restitution.

Preliminary Comment

Subsection (a): Agreements by a provider that is not properly registered under section 5 are voidable.

Former subsection (b) contained the remedy for subsection (a)(the provider must return to the individual all money paid or deposited by the individual [which it has not already distributed to creditors]). This provision now appears as section 32(a).

Current subsection (b) clarifies that the provider has no claim whatsoever against the individual. The individual's right to terminate the agreement would foreclose a claim for future loss, and this section is intended to make it clear that the provider has no claims with respect to any benefits conferred on the individual in the past.

SECTION 22. TRUST ACCOUNT.

(a) All money paid to a provider or its designee by or on behalf of an individual pursuant to a plan is held in trust. Within two business days after receipt, the provider or designee shall deposit the money in a trust account established for the benefit of individuals.

(b) Money in a trust account is not property of a provider or designee that establishes the account. A trust account established pursuant to this section is not available to creditors of the provider or designee, other than an individual from whom or on whose behalf the provider or designee has received money, to the extent that the money has not been disbursed to creditors of the individual.

(c) A provider shall:

(1) maintain separate records of account for each individual to whom the provider is furnishing debt-management services;

(2) disburse money paid by or on behalf of the individual to creditors of the individual as disclosed in the agreement, except that:

(A) the provider may delay payment to the extent that a payment by the individual is not final; and

(B) if a plan provides for regular periodic payments to creditors, the disbursement must comply with the due dates established by each creditor; and

(3) promptly correct any payments that are not made or that are misdirected as a result of an error by the provider or other person in control of the trust account and reimburse the individual for any costs or fees imposed by a creditor as a result of the failure to pay or misdirection.

(d) A person may not commingle money in a trust account established for the benefit of individuals with money of a person other than those individuals.

(e) A provider shall reconcile a trust account at least once a month. The reconciliation must compare the cash balance in the account with the sum of the balances in each individual’s account. If the provider has more than one trust account, each trust account must be individually reconciled.

(f) A trust account must at all times have a cash balance equal to the sum of the balances of each individual’s account.

(g) In the event, or reasonable suspicion, of embezzlement or other similar disbursement from a trust account, the provider shall, immediately upon discovery, notify the administrator by telephone, facsimile, electronic mail, or other method approved by the administrator. Unless the administrator by rule provides otherwise, within five days thereafter, the provider shall give notice describing the remedial action taken or to be taken.

(h) If an individual terminates an agreement or it becomes reasonably apparent to a provider that a plan has failed, the provider shall promptly refund to the individual all money paid by or on behalf of the individual which has not been paid to creditors, less fees that are payable to the provider under Section 23.

(i) Before relocating a trust account from one bank to another, a provider shall inform the administrator of the name, address, and telephone number of the new bank. As soon as practicable, the provider shall inform the administrator of the account number of the trust account and subaccounts at the new bank.

Preliminary Comment

This section requires that persons that receive money for disbursement to creditors establish trust accounts. Some providers receive the money directly. Others use third parties for the purpose of receiving the funds and managing the accounts. Under either model, the provider is a fiduciary and must establish a trust account. If the provider does not receive money for that purpose, but instead leaves the individual in control of that money, this section does not require a trust account. The Committee must decide how to deal with money in accounts that are owned by an individual but accessible to a provider by means of the power to initiate a debit transfer. A first step toward dealing with this appears in section 26(a)(4).

Subsection (a): For providers at brick and mortar locations, it would be feasible to require the trust account to be located in this state. For providers that operate (via the Internet or telephone) nationally out of an office not located in this state, it may be unduly burdensome to require a trust account in each state in which the provider operates. Some existing state statutes, however, do just that. This section permits the agency to deposit money of residents of this state into a trust account located in another state and containing the money of individuals who reside in other states.

Subsection (b): As a person with a claim against a provider, the individual is a "creditor." Nevertheless, the individual should have access to the trust account, but only to the extent the provider has received money from or on behalf of the individual and has not distributed it to creditors. Without this limitation, the individual's compensation out of the trust account would come at the expense of other individuals whose money comprises the trust account. Compensation of the individual for other loss or damage will have to come from assets of the provider or the bond or other assurance required by section 14. Because the money does not belong to the provider, the trust account may not bear interest for the benefit of the provider.

The language of subsection (b) finesses the question of the process by which the individual may access the trust account. This Act leaves that question to other law, but as a creditor of the provider, the individual has whatever rights creditors generally have. In addition, the individual may be the beneficiary of action by the administrator under sections 29-30.

Subsection (c) imposes obligations on the provider. If the provider uses a third party to administer the trust account, the provider may delegate these obligations to the third party. The provider, however, is responsible for performance of the obligations and is liable if they are not performed.

The subsection contemplates that the agreement may establish a date by which the individual must remit to the provider and a date by which the provider must remit to the creditors. The previous draft limited paragraph (2) to credit-counseling agencies. This draft requires both kinds of providers to disburse in accordance with the agreement. Section 19(a)(5) requires the provider to disclose the services to be provided, and these services include disbursement to creditors. Subparagraph (A) reflects the use of payment systems other than checks. Subparagraph (B) applies to credit-counseling agencies and requires that the agreement—and the provider's performance—must conform to the due dates established by the creditors. It is expected that, if necessary or desirable, the provider will secure the creditors' assent to modify the original due dates to maximize the feasibility of the plan.

Subsection (f): Section 31(b) provides that failure to maintain the amount is cause for summary suspension of registration.

As directed by the Committee, subsection (g) has been revised to narrow the situations in which a provider must notify the administrator that a trust account is out of balance.

Subsection (h): A prior draft contained a numerical test of failure. The current draft replaces that test with the vague standard, "reasonably apparent." Once it becomes clear that a debt-settlement plan will not work, the provider must refund the individual's money. The subsection could be omitted, since the individual may terminate the agreement at any time, in which event the provider must return all unspent money. But if the individual is not aware of the need to give record notice of the desire to terminate, the provider might simply retain the individual's money.

Presumably these funds are in the trust account, but the obligation under this subsection exists even if they are not.

The subsection also requires prompt refund of payments when an individual terminates the account.

Subsection (i): This subsection requires the provider to notify the administrator of the numbers of subaccounts. If the account number enables the administrator to ascertain the subaccounts, then identification of subaccounts should be deleted from this subsection: (1) the number of them will be very large; (2) the Act will be in the apparently anomalous position of requiring identification of just the account number when a provider submits an application for registration (or renewal of registration) but requiring identification of subaccounts when a provider changes banks.

SECTION 23. FEES: MONETARY LIMITS.

Reporter's Note: *At the October 2004 meeting, the Committee began considering the desirability of fee caps. Committee members and observers alike expressed wildly disparate views, from the need for specific and low fee caps (because one of the biggest problems in credit counseling and debt settlement is exorbitant costs to consumers) to the view that there should be no fee caps at all (because the costs of doing business vary from state to state and because the operation of the market will produce appropriate fees). The Committee directed the reporter to generate several alternative versions of a section that addresses limitations on fees.*

To place the draft in context, a brief explanation of the current state of regulation of fees may be helpful. In many states the statutes enacted in the 1950s and 1960s banning the business of debt-adjusting or debt-prorating are still in effect. In some of these states there is no fee cap, and no need for a fee cap, because anyone engaged in the business is committing in a crime. In some of these states, there is an exemption for non-profits, and there may no fee limit because the legislature had in mind true non-profit institutions that would serve the public interest. Some of the 1950s-era statutes have fee limits. Of the more recently enacted or revised statutes, fee caps are very common. Most of them apply to debt settlement as well as credit counseling.

In the states with fee caps, there is provision for one or more of the following kinds of fees: set-up, monthly service, and settlement. The cap on set-up fees ranges from $25 to $75, with $50 being the most common cap. The monthly fee ranges from $3 per creditor to 15% of the total debt in a plan/program. The 15% figure dates from the 1950s-era legislation and is the most commonly used figure. In states that permit debt settlement, the 15% figure often applies. Some states, however, have a lower limit, sometimes stated as a percentage of the payment to the *creditor (3%, 6-7%, 10%) or as a dollar amount ($20-25). One state, which does not permit for-profits, sets fees by regulation; several (including some that permit for-profits) limit the fee to an amount that does not exceed the provider's bona fide expenses; and one (NY) specifies that fees must be fair and reasonable. The prevailing regulatory scheme is either a prohibition of the business of credit counseling or debt settlement or a cap on the fees that those in the business may charge.*

The January 2005 draft contained three alternatives. One directed the administrator to set fee caps. Another contained a soft fee cap ("fair and reasonable") and relied on disclosure. The third placed fee caps in the statute. At the January 2005 meeting, the Committee opted for the third alternative, placing numerical fee caps in the statute itself. The Committee also decided to permit a set-up fee, a monthly service fee, and, with respect to debt-settlement companies, a settlement fee. The Committee also decided that the settlement fee represents a debt-settlement company's aggregate compensation and that the set-up and monthly service fees are advances against the settlement fee. Hence, the set-up and monthly service fees are to be credited against the settlement fee when each debt is settled. This draft attempts to implement these decisions.

(a) A provider may not impose a fee or other charge on an individual or receive money from or on behalf of an individual for debt-management services except as permitted by this section.

(b) A provider may not impose charges or receive payment for debt-management services until the provider and the individual have executed an agreement that complies with Sections 19 and 26.

(c) Subject to Section 29(f):

(1) if an individual assents to an agreement that contemplates concessions by creditors in the form of reduced finance charge or fees for late payment, default, or delinquency, the provider:

(A) may not charge a fee for education, counseling, or the like;

(B) may charge a fee not exceeding $50 for consultation, obtaining a credit report, setting up an account, and the like; and

(C) subject to Sections 19(d) and 29(f), may charge a monthly service fee, not to exceed ten dollars times the number of creditors in a plan, except that the service fee in a month may not exceed $50;

(2) If an individual assents to a plan that contemplates that creditors will settle debts for less than the full principal amount of debt owed, a provider:

(A) may not charge a fee for education, counseling, or the like;

(B) subject to Section 19(d), may charge a fee for consultation, obtaining a credit report, setting up an account, and the like, in an amount not exceeding the lesser of $400 and four percent of the debt in the plan at the inception of the plan; and

(C) subject to Sections 19(d) and 29(f), may charge a monthly service fee, not to exceed ten dollars times the number of creditors in a plan, except that the service fee in a month may not exceed $50;

(3) if an individual does not assent to an agreement, a provider may receive for its education and counseling services a fee not exceeding $100 or, with the approval of the administrator, a fee not exceeding $500.

(d) Except as otherwise provided in subsection (c), if a plan contemplates that creditors will settle an individual's debts for less than the full principal amount of the debt, compensation for services in connection with settling a debt may not exceed, with respect to each debt, the amount determined by paragraph (1) less the amount determined by paragraph (2):

(1) 30 percent of the excess of the amount of the debt when the individual assents to the plan over the amount paid the creditor pursuant to the plan;

(2) to the extent it has not been credited against an earlier settlement fee:

(A) the fee charged pursuant to subsection (c)(2)(B); and

(B) the aggregate of fees charged pursuant to subsection (c)(2)(C).

(e) Subject to Section 29(f), if a payment by an individual under this [act] is dishonored, a provider may impose a reasonable charge on the individual, not to exceed $25.

Preliminary Comment

Subsection (a): Since this section does not authorize fees for such matters as preparing a financial analysis, preparing a budget, or terminating an agreement, the prohibition in this subsection means that providers may not impose a charge for them.

Subsection (b): In addition to specifying some of the contents of an agreement, section 19 requires immediate delivery of the record containing the agreement. If the record is a writing, this subsection prohibits a provider from collecting any money before the individual receives a copy of it. If the record is electronic, the provider may impose a fee if otherwise permitted by this section, as soon as it delivers the record, which occurs when it makes the record available in retrievable and printable form.

Subsection (c): In paragraph (2)(B) the cross reference is to the provision that requires repayment of all fees if an individual terminates an agreement within the first six months.

In a previous draft, subsection (d) required a provider to credit any set-up fee against the accruing monthly service fees. This provision has been deleted and replaced by subsection (d), which requires debt settlement companies to credit against the settlement fee all set-up and monthly fees. Intuition suggests that the credit should be allocated proportionately against each settlement fee when that fee is levied. Reflection, however, reveals that this intuition is not sound. The idea underlying the requirement of the credit is that the settlement fee represents the real fee. The other fees are permitted because the provider needs cash flow pending receipt of that fee. They are advances against settlement fees. Hence, it is appropriate to apply the credit against the first settlement fee. This approach accommodates the provider's need for cash flow pending the first settlement and provides a simple way to effectuate the credit mechanism. The complexity of the intuitive approach—allocating the credit proportionately to each debt—is extreme. It would require subsection (e) to provide:

> Except as otherwise provided in subsections (c) and (d), if a plan contemplates that creditors will settle an individual's debts for less than the full principal amount of the debt, compensation for services in connection with settling a debt may not exceed, with respect to each debt, the amount determined by paragraph (1) less the amounts determined by paragraphs (2) and (3):
>
> (1) 30 percent of the excess of the amount of the debt when the individual

assents to the plan over the amount paid the creditor pursuant to the plan;

(2) the charge under subsections (c)(2) multiplied by a fraction in which the numerator is the debt when the individual assents to the plan and the denominator is the total of debts in the plan at that time;

(3) each of the charges under subsection (d) multiplied by a fraction in which the numerator is the debt when the individual assents to the plan and the denominator is the total of debts in the plan when the charge is assessed.

Calculation of this credit on an accurate basis as each debt is settled is quite cumbersome. To illustrate, consider the following scenario, represented in the table that follows this narrative: an individual has five creditors in a plan, with debt aggregating $30,000 at the inception of the plan. Some of the creditors to whom these debts are owed continue accruing finance charges and late fees; some do not. The individual makes monthly deposits of $750. The provider imposes the maximum set-up and monthly fees. From time-to-time the provider is able to achieve settlement of the debts, and the terms of settlement are the stated percentage of the debt at the time of settlement. At the time of each settlement, the provider collects a settlement fee, which is 30% of that portion of the debt at the inception of the plan which is saved (i.e. the debt at time of inception less the amount paid pursuant to the settlement). As each debt is settled, there is a credit against the settlement fee. The set-up fee is 4% of the total debt ($30,000), or $1,200, but not more than $400. Hence the credit is a fraction of $400 equal to the initial debt of a creditor divided by the total debt at the inception of the plan.

The credit of the monthly fee is much more complicated. It is determined by creating a fraction consisting of the amount of a debt at the inception of a plan divided by the total amount of original debt still in the plan at any given point in time and multiplying that fraction times the aggregate amount of monthly fees since the last settlement, and adding that product to the proportionate amount of monthly fees already accrued.

The following tables illustrate how the set-up fee and the monthly fees are credited against the settlement fee. In the first scenario, the creditors accept varying percentages of the debt in full satisfaction of the debt. These percentages may not be representative of the results obtained by many providers. Several debt settlement companies have informed the reporter that their average settlement is approximately 40 percent of the debt. Hence, a second scenario is presented, identical to the first, except that each debt is settled for 40 percent.

Assumptions:

Monthly payments of $750
Set-up fee: 4% of total debt ($30,000), but capped at $400
Monthly fee: $10 x number of unpaid creditors in the plan
Creditors settle at different times for different percentages

Debt #	Debt at time of plan	Months to settle-ment	Aggregate amount paid by individual	Monthly fee	Debt at time of settle-ment	Terms of settle-ment	Amount paid	Settlement fee (30% of savings, based on debt at inception)	Credit for set-up fee debt/30 x $400	Credit for monthly fee	Total Credit
1	$6,000	6	$4,500	6 x $50	$7,000	40%	$2,800	$960	(6/30) $80.00	$60.00	$140.00
2	$5,000	11	$8,250	5 x $40	$5,000	65%	$3,250	$525	(5/30) 66.67	$91.67	$158.34
3	$8,000	20	$15,000	9 x $30	$11,000	50%	$5,500	$750	(8/30) $106.67	$260.35	$367.02
4	$7,000	26	$19,500	6 x $20	$8,500	50%	$4,250	$825	(7/30) $93.33	$304.16	$397.49
5	$4,000	30	$22,500	4 x $10	$4,800	70%	$3,360	$192	(4/30) $53.33	$213.81	$267.14
	$30,000			$930	$36,300		$19,160	$3,252	$400.00	$929.99	$1,329.99

Calculation of Credit for Monthly Fees

Debt #	Formula	Amount
1	6/30 ($300)	$60.00
2	5/30 ($300) + 5/24 ($200)	$91.67
3	8/30 ($300) + 8/24 ($200) + 8/19 ($270)	$260.35
4	7/30 ($300) + 7/24 ($200) + 7/19 ($270) + 7/11 ($120)	$304.16
5	4/30 ($300) + 4/24 ($200) + 4/19 ($270) + 4/11 ($120) +4/4 ($40)	$213.81
		$929.99

Assumptions:

Monthly payments of $750

Set-up fee: 4% of total debt ($30,000), but capped at $400

Monthly fee: $10 x number of unpaid creditors in the plan

Creditors settle at different times, but each settles for the same percentage (40%)

Calculation of Credit for Monthly Fees

Debt #	Debt at time of plan	Months to settle-ment	Aggregate amount paid by individual	Monthly fee	Debt at time of settle-ment	Terms of settle-ment	Amount paid	Settlement fee (30% of savings, based on debt at inception)	Credit for set-up fee debt/30 x $400	Credit for monthly fee	Total Credit
1	$6,000	6	$4,500	6 x $50	$7,000	40%	$2,800	$960	(6/30) $80.00	$60.00	$140.00
2	$5,000	10	$7,500	4 x $40	$5,000	40%	$2,000	$900	(5/30) $66.67	$83.33	$150.00
3	$8,000	17	$12,750	7 x $30	$11,000	40%	$4,400	$1,080	(8/30) $106.67	$221.75	$328.42
4	$7,000	23	$17,270	6 x $20	$8,500	40%	$3,360	$1,092	(7/30) $93.33	$270.40	$363.73
5	$4,000	26	$19,500	3 x $10	$4,800	40%	$1,920	$624	(4/30) $53.33	$184.52	$237.85
	$30,000			$820	$36,300		$14,480	$4,596	$400.00	$820.00	$1,220.00

Calculation of Credit for Monthly Fees

Debt #	Formula	Amount
1	6/30 ($300)	$60.00
2	5/30 ($300) + 5/24 ($160)	$83.33
3	8/30 ($300) + 8/24 ($160) + 8/19 ($210)	$221.75
4	7/30 ($300) + 7/24 ($160) + 7/19 ($210) + 7/11 ($120)	$270.40
5	4/30 ($300) + 4/24 ($160) + 4/19 ($210) + 4/11 ($120) +4/4 ($30)	$184.52
		$820.00

Undoubtedly, one could write a computer program to calculate the amount of the credit, so it would not impose an undue burden on the provider. But it would not be feasible for the individual to verify that the proper amount had been credited. Hence this approach is too cumbersome. In contrast, it is a relatively simple matter to calculate the credit under the version of subsection (e) that appears in the draft. Using the facts in the first table, for example, the first settlement fee is $960, which would be reduced by the $400 set-up fee and the $300 in monthly fees. At the time of the second settlement, the $525 settlement fee would be reduced by the $200 in monthly fees that had accrued since the first settlement. Subsequent settlement fees would be reduced by $270, $120, and $40, respectively. This approach it is simpler than either of the others, and it is capable of reasonable verification by the individual (or the individual's attorney or other professional advisor).

Still another approach would be to credit the pro rata portion of the set-up fee at the time a debt is settled, but defer the credit of the monthly fee. Under this approach, the provider would credit the sum of all monthly fees against the settlement fee on the debt that is settled last. Using the example in the table above, the provider would not be entitled to receive any portion of the last settlement fee and, in fact, would have to write the individual a check for $791.33 ($192-$53.33-$930). This approach has several serious problems:

- It tempts a provider not to make any payment to the individual unless the individual has the acuity to demand it;
- It provides a disincentive to negotiate a settlement with the individual's creditors once the provider concludes that the settlement fees will be consumed by the credit for set-up and monthly fees;
- It seems impossible to draft;
- It creates the need to consider, when an individual terminates a plan before all debts are paid, whether the reimbursement to the individual should encompass
    - (a) that portion of the set-up fee that had not already been credited against settlement fees;
    - (b) that portion of the monthly fees attributable to debts that had been settled;
    - (c) that portion of the monthly fees attributable to debts that have not been settled.

SECTION 24. FEES: OTHER LIMITS.

(a) A provider may not solicit a voluntary contribution from an individual or any other person for any service provided to the individual. A provider may accept voluntary contributions from an individual but, until 30 days after completion or termination of a plan, the aggregate amount of money received from or on behalf of the individual may not exceed the total amount the provider is authorized to charge the individual under Section 23.

(b) If an individual who has entered into an agreement does not make payments required by the agreement for 60 days, a provider may terminate the agreement.

(c) If a provider or an individual terminates an agreement, the provider shall immediately return to the individual:

(1) any money of the individual remaining in its possession or in a trust account; and

(2) any portion of the set-up fee and monthly service fees received pursuant to Section 23(c)(2) which have not been credited against settlement fees.

(d) If a provider imposes a fee or other charge or receives money or other payments not authorized by subsection (a) or Section 23, except as a result of an unintentional error made in good faith notwithstanding the maintenance of procedures reasonably designed to prevent the error, the individual may void the agreement and recover as provided in Section 32.

(e) If, as a result of an unintentional error made in good faith notwithstanding the maintenance of procedures reasonably designed to prevent the error, a provider receives money not authorized by subsection (a) or Section 23, the provider shall return the money to the individual no later than two business days after learning of the error.

Preliminary Comment

Subsection (a): A common abuse by allegedly non-profit credit-counseling agencies has been deceiving or coercing consumers into making allegedly voluntary contributions to the agency. Subsection (a) seeks to end this practice. The provision has been revised (a) to prohibit the solicitation of contributions as well as the requiring of contributions, and (b) to apply to for-profit entities in those states that choose to permit them. Section 23(a) precludes a provider from receiving a “voluntary” payment in addition to or in excess of the amounts stipulated in section 23. The separate prohibition in this section is included in order to leave no doubt that the current practice of many providers is unlawful.

Neither section 23 nor this section prohibits the solicitation or receipt of charitable contributions by social service agencies or other entities that provide services in addition to debt-management services. Section 23 puts the prohibition in terms of “receiv[ing] money ... for debt-management services,” and this section puts the prohibition in terms of “solicit[ing] a voluntary contribution ... for any service provided to the individual.” The administrator and the courts have the power to prevent evasion of this subsection.

Former subsection (b): The first sentence of this subsection prohibited a provider from requiring purchase of counseling or educational services or materials or supplies. It was redundant of section 23(a), which bans charges except as permitted by section 23. The second sentence of the subsection authorized a counseling agency to impose charges for education or counseling services to individuals who do not enter agreements. This subject is now covered in section 23(c)(3). Hence, the entire subsection has been deleted.

Subsection (b): In the context of credit-counseling agencies, if the provider is acting in conformity with the Act, there will be no money in the trust account. This provision addresses the provider that has not distributed the money to creditors as required by section 22(c)(2). Perhaps more importantly, it requires a debt-settlement company in possession of an individual’s money to return it.

Subsection (c): Upon termination, whether by the provider or the individual, the provider must immediately return the individual’s money. This does not require refund of money properly held as payment of fees. But subsection (2) requires a debt settlement company to refund all set-up fees and monthly service fees that have not already, in effect, been refunded as a credit against settlement fees for debts already settled.

Subsection (d): If a provider overcharges, the individual has the option of voiding the agreement. The portion of subsection (d) that, in a previous draft, dealt with the consequences of a provider’s imposition or receipt of excess charges, has been relocated to section 32(b)-(c) (Private Enforcement).

Subsection (e): The standard “unintentional error made in good faith notwithstanding the maintenance of procedures reasonably designed to prevent the error” derives from the federal Truth-in-Lending Act Section 130(c), 15 U.S.C. Section 1640(c). To promote consistency in the law of consumer protection, courts should interpret the phrase in this Act in a manner consistent with the federal interpretations of the federal statute.

SECTION 25. PERIODIC REPORTS AND RETENTION OF RECORDS.

(a) A provider shall provide the accounting required by subsection (b):

(1) upon rescission or termination of an agreement; and

(2) before rescission or termination of any agreement:

(A) at least once each month; and

(B) within five business days after a request by an individual, except that the provider need not comply with more than one request in any calendar month.

(b) A provider, in a record, shall provide each individual for whom it has established a plan an accounting of the following information, as applicable:

(1) the amount of money received from the individual since the last report;

(2) the amounts and dates of disbursement made on the individual's behalf, or by the individual upon the direction of the provider, since the last report to each creditor listed in the plan;

(3) the amounts deducted from the amount received from the individual;

(4) the amount held in reserve; and

(5) if, since the last report, a creditor has agreed to accept as payment in full an amount less than the principal amount of the debt owed by the individual:

(A) the total amount and terms of the settlement;

(B) the amount of the debt when the individual assented to the plan;

(C) the amount of the debt when the creditor agreed to the settlement; and

(D) calculation of a settlement fee.

(c) A provider shall maintain records for each individual for whom it provides debt-management services for five years after the final payment made by the individual and produce them to the individual within a reasonable time after a request for them. The provider may use electronic or other means of storage of the records.

Preliminary Comment

Subsection (a): An individual is entitled to regular communication of the status of his or her account. This subsection requires providers to give accountings on a monthly basis. This adopts for all the current practice of many providers to give a monthly accounting.

Subsection (b): If any of "the amounts" required by a paragraph in this subsection is zero, the provider need not include any disclosure with respect to that paragraph. If a provider requires the individual to establish an account with a bank or other third party from which the individual is to disburse money to creditors and the provider does not know the date on which the individual made a payment, the provider complies by stating the date on which it directed the individual to make payment.

If a plan contemplates concessions consisting of reduction in finance charges or late payment, default, or delinquency fees, section 22(c)(2) requires distribution of all the money each month. With respect to individuals in these plans, accumulating reserves is not permitted. For plans that contemplate settlement for less than the full amount or principal owed a creditor, the provider or its designee may accumulate money from month to month.

Paragraph (5) applies primarily to debt-settlement companies. If no creditor has agreed to settlement terms during a reporting period, the subsection does not require the provider to make any disclosure. Hence, the subsection ordinarily would not apply to plans operated by credit-counseling agencies, because creditors receive the full principal amount of the debt owed them and do not "agree" to accept any particular amount as payment in full.

Subsection (c): The period of retention should be tied to the statute of limitations in section 34, perhaps one year longer than the statute, so as to afford a reasonable time for the discovery process to unfold. For private actions, the statute of limitations is two years. For public enforcement, it is four years. Hence, this subsection requires retention of records for five years.

SECTION 26. PROHIBITED ACTS AND PRACTICES.

(a) A provider may not:

(1) misappropriate or misapply money in a trust account;

(2) settle a debt on behalf of an individual for more than 50 percent of the amount of a debt owed a creditor at the time of an agreement, unless the individual assents to the settlement after the creditor has assented;

(3) take a power of attorney that authorizes it to settle a debt, unless the power of attorney expressly limits the provider's authority to settling debts for no more than 50 percent of the amount of the debt owed a creditor when the individual assents to a plan;

(4) initiate a transfer from an individual's account at a bank or with another person unless the transfer is:

(A) a return of money to the individual; or

(B) properly authorized by the agreement and this [act] and for:

(i) payment to one or more creditors pursuant to a plan; or

(ii) payment of a fee;

(5) offer a gift, bonus, premium, reward, or other compensation to an individual for executing an agreement;

(6) offer, pay, or give a gift, bonus, premium, reward, or other compensation to a person for referring a prospective customer, unless neither the provider nor the person making the referral communicates to the prospective customer the identity of the source of the referral;

(7) receive a bonus, commission, or other benefit for referring an individual to a person;

(8) structure a plan in a manner that would result in a negative

amortization of any of an individual's debts, unless a creditor that is owed a negatively amortizing debt agrees to refund or waive the finance charge upon payment of the principal amount of the debt;

(9) compensate its employees on the basis of a formula that incorporates the number of individuals the employee induces to enter into agreements;

(10) take a confession of judgment or power of attorney to confess judgment against an individual or appear on the individual's behalf in a judicial proceeding;

(11) settle a debt or lead an individual to believe that a payment to a creditr is in settlement of a debt to the creditor unless, at the time of settlement, [the provider receives from the creditor and gives to the individual a certification] [the individual receives a certification by the creditor] that the payment is in full settlement of the debt;

(12) make a representation that:

(A) the provider will furnish money to pay bills or prevent attachments;

(B) payment of a certain amount will permit satisfaction of a certain amount or range of indebtedness; or

(C) participation in a plan will or may prevent litigation, garnishment, attachment, repossession, foreclosure, eviction, or loss of employment;

(13) misrepresent that it is authorized or competent to furnish legal advice or perform legal services;

(14) represent that it is a not-for-profit or tax-exempt entity unless it has received certification of that status from the Internal Revenue Service; or

(15) employ an unfair, unconscionable, or deceptive act or practice, including the knowing omission of any material information.

(b) With respect to an individual to whom a provider furnishes debt-management services, the provider may not, directly or indirectly:

(1) purchase a debt or obligation of the individual;

(2) receive from or on behalf of the individual:

(A) a promissory note or other negotiable instrument other than a check or a demand draft; or

(B) a post-dated check or demand draft;

(3) lend money or provide credit to the individual;

(4) obtain a mortgage or other security interest;

(5) disclose the identity or identifying information of the individual or the identity of the individual's creditors, except to:

(A) the administrator, upon proper demand; or

(B) a creditor of the individual, to the extent necessary to secure te cooperation of the creditor in a plan;

(6) except as otherwise provided in Section 23(d), provide the individual less than the full benefit of a compromise of a debt arranged by the provider;

(7) charge for or provide credit insurance, other insurance, coupons for goods or services, membership in a club, access to computers or the Internet, or any other matter not directly related to debt-management services or education concerning personal finance; or

(8) furnish legal advice or perform legal services, unless the person

furnishing that advice or those services is licensed to practice law.

(c) This [act] does not authorize any person to engage in the practice of law.

(d) A provider may not receive compensation, directly or indirectly, for advising, arranging, or assisting an individual in connection with obtaining an extension of credit or other service from a lender or service provider.

(e) A provider may not purchase goods, services, or facilities from a person if an employee or affiliate of the provider owns more than ten percent of the person, or an employee or affiliate of the provider is an employee or affiliate of the provider of the goods, services, or facilities, unless the supplier of the goods, services, or facilities:

(1) supplies the goods, services, or facilities generally; and

(2) supplies them to the provider at a cost no greater than the cost generally charged to other persons by the supplier of the goods, services, or facilities.

(f) This [act] does not prohibit an assignment of wages by an individual to a provider to the extent permitted by law other than this [act].

Legislative Note: *In lieu of subsection (a)(15), the state may wish to amend its general deceptive practices statute to clarify that that statute applies to providers of debt-management services as defined in this Act.*

In states in which the constitution does not permit use of the phrase "as amended" in subsection (g), the phrase should be deleted.

Preliminary Comment

At the November 2003 meeting there was some discussion of whether the Act should state that counseling agencies are fiduciaries. An agency undoubtedly is a fiduciary with respect to management and disbursement of the trust account, even without any express statement to that effect in the Act. The Drafting Committee postponed consideration of whether there should be a broader statement regarding an agency's fiduciary status and, if so, exactly what that status entails.

General principles of the law of fiduciaries include such statements as "One who stands in a fiduciary relationship to another has a duty not to profit at the expense of the other" and "A fiduciary has a duty to act for the benefit of the other as to matters within the scope of the relationship." Several provisions in the Act serve to promote these principles.

(1) Section 20 limits the extent to which a provider may profit at the expense of a customer.
(2) Section 23 prohibits
- misappropriation of trust funds
- unauthorized debiting of a customer's bank account
- revealing confidential information about a customer
- deception of the customer
- referral fees
- self-dealing via affiliates.

At the January 2005 meeting, the Committee decided not to add a provision generally declaring that a provider is a fiduciary of the individual with whom it forms agreements. A provider continues to have fiduciary obligations to the endividuals in some aspects of their relationship. Examples of those aspects are listed in the preceding paragraph. There may be others.

Subsection (a): Two new paragraphs (paragraphs (2)-(3)) have been added, to limit the extent to which a debt-settlement company may settle a debt without the individual's contemporaneous assent. They prohibit the use of a power of attorney to authorize the provider to settle debts on whatever terms the provider deems desirable, or an any terms other than those specified in paragraph (2). A power of attorney may authorize the provider to settle debts for 50 percent or less of the amount of the debt at the time the individual assented to the plan. For settlements less favorable to the individual than that, a power of attorney is prohibited and ineffectual. These paragraphs supplement section 19(e), which imposes similar limits on the terms that a provider may include in an agreement.

Paragraph (4): Credit-counseling agencies typically have access to their customers' checking accounts, for the purpose of withdrawing money to pay the customers' creditors and to pay the agency its monthly fee. Similarly, debt-settlement companies may have their customers establish accounts with banks or other persons for the purpose of accumulating money until it is paid to creditors, and the company typically initiates transfers out of these accounts to pay monthly service fees and/or settlement fees, as well as to pay creditors. This paragraph prohibits providers from initiating transfers that are not properly authorized by the agreement and the Act. Section 23 limits the amount of the fees.

Paragraph (6): The November 2003 draft prohibited referral fees altogether. The Annual

Meeting and September 2004 drafts prohibited them unless the referring party provides screening services to determine if the prospective customer is a good candidate for the educational or other services of the provider. Those drafts permitted compensation only for the screening services and not for the bare referral. The fact remains, however, that whether the screening function is done by a creditor in-house or is outsourced, it is a subset of the creditor's collection costs. The creditors' direct support of the credit-counseling industry has declined over the last decade. At the October 2004 meeting, the Committee voted to prohibit the provider from permitting the creditor to pass this indirect cost on to it. At the January 2005 meeting, the Committee adhered to this decision.

Payment of referral fees may be an efficient way to attract business and achieve economies of scale. But it has the potential to drive up the provider's cost of doing business, which is reflected in the prices charged to individuals. In addition, there is a risk of deception. If a creditor, for example, refers an individual to a particular provider, the individual is likely to perceive this as an endorsement by a creditor that is seeking to help the individual. In fact, the referral may be driven by identification of which provider is willing to pay the highest price for the referrals.

The prohibition against paying referral fees does not preclude payment for sales leads or lists of prospective customers, if the provider does not reveal the identity of the person that supplied the list. The vice here is misleading the individual into believing that an entity with which the individual has a relationship (viz., one of the individual's creditors) is disinterestedly recommending that the individual seek the services of the provider. Hence, neither the provider nor the creditor (or other person supplying the individual's name to the provider) may reveal to the individual that the creditor (or other person) is in any way connected to the reason the provider is communicating with the individual. If the source of the list is identified to the individual by either the provider or the source, the sales lead becomes a referral, and the provider may not pay for it. The language of paragraph (6) has been revised to incorporate this qualification.

Paragraph (7): This provision is the converse of paragraph (6). Its purpose is to reduce or eliminate the economic incentive for an agency to refer individuals to persons who provide loans, goods, services, facilities, or other products of any kind. The protection of financially stressed, vulnerable consumers justifies discouraging a provider from recommending products provided by others. At the October 2004 meeting, it was suggested that this paragraph not prohibit a provider from including on its web site a link to the web site of an entity providing other services or products and receiving payment based on the number of times individuals hit that link. The assertion was that this is a form of advertising. No change to permit this has been made in the text or the comment of this draft, because the practice is indistinguishable from payment for referrals. Placing a link on the provider's web site necessarily amounts to an endorsement of or referral to the owner of the linked web site. It should not matter whether the referral is by electronic link or verbal recommendation. The provider is free, of course, to place the link on its web site, so long as it does not receive compensation from the owner/sponsor of the other web site. This distinguishes disinterested advice from referrals motivated by the provider's self-interest.

At the January 2005 meeting, the Committee directed that language similar to the new language in paragraph (6) be added to paragraph (7) as well. That change has not been made in this draft: the objection to compensating providers for referrals to other entities rests on a somewhat different basis than the objection to compensating other entities for referrals to providers. In the former situation, a major part of the objection is exposing the financially stressed, vulnerable consumer to offers of questionable value at the instance of a provider that may be motivated only by the payment for the referral. This is in addition to the potential deception implicit in the individual's knowledge that a provider made the referral in the individual's best interest, is secondary. If the Committee disagrees and still thinks that paragraph (7) should be limited in a manner similar to paragraph (6), then the paragraph needs to be refined. A referral may take at least two different forms: (a) the provider may recommend to the individual that the individual acquire goods, services, etc., from a third party; or (b) the provider may supply the third party with information about the individual. The paragraph would have to address each of these separately. With respect to the latter situation, the paragraph could incorporate language similar to the language in subsection (a)(6)("unless neither the provider nor the recipient communicates to the individual that the provider is the source of the referral.") With respect to the former situation—referral by the provider directly to the individual—this approach makes no sense. If the Committee wants to adhere to its direction to the reporter, an exception necessary for referrals by the provider directly to the individual calls into question whether the paragraph should remain in the Act at all.

Paragraph (8): At the November 2003 meeting an observer noted that at least one creditor engages in a practice that might, depending on the annual percentage rate and the amount of the monthly payment, result in negative amortization. This creditor, however, forgives or refunds the accrued finance charge if the individual completes the plan. Apparently, this is true even if the individual ends his or her relationship with the counseling agency and self-administers the plan. If the individual does not self-administer it to completion, the negative amortization remains. Given the high rate of non-completion of plans, the Drafting Committee may wish to consider whether it is appropriate to encourage this creditor's practices by allowing plans to include debts that involve negative amortization. The Virginia statute deals with this general problem by prohibiting a plan that, at the conclusion of the plan, would result in negative amortization. This approach would not prohibit the practice of the creditor in question. The Committee has yet to consider whether negative amortization should be permitted. Now is the time.

Paragraph (11): If a plan contemplates settlement of a debt for less than the full principal amount of the debt, the provider should not pay the creditor unless it receives formal acknowledgment from the creditor that the debt is satisfied. The prior version of this paragraph sought to accomplish that by barring a misrepresentation. This draft supplements the misrepresentation approach by adding a prohibition against settling a debt unless the provider delivers a certification from the creditor. It retains the prohibition against misleading the individual. To violate the paragraph, a misrepresentation does not have to be express. If a settlement contemplates that a creditor will be accepting installment payments, the provider must make it clear to the individual that the initial installment(s) do not settle the debt. Two alternative phrasings are presented: one requires the provider to obtain and deliver the creditor's certification; the other contemplates that the creditor's certification come either directly from the creditor or indirectly, through the provider. Which is preferable?

Paragraph (12): This paragraph formerly appeared as subsection (b)(5). It has been relocated to this subsection to leave no doubt that it applies to advertising. Subparagraph (B) and (C) prohibit certain representations that sometimes are used to entice individuals to sign up for plans. They are prohibited here even when they are true because they too often are untrue.

Paragraph (15): This paragraph prohibits false or misleading representations whether or not the provider knows of the deception. In accord with existing statutes prohibiting unfair or deceptive acts or practices, the risk of falsity or deception is on the person that makes an express statement. On the other hand, the paragraph prohibits omissions only if the omitted facts are material and are known to the provider. The prohibition applies to all stages of a transaction between a provider and an individual, including a provider's attempt to collect a debt owed to it or to another person.

Subsection (b): Paragraph (4) has been expanded to ban security interests altogether. A provider may not take a security interest in property of an individual to whom it furnishes debt-management services or in the property of a family member of other person.

Paragraph (5)(B) and (C) prohibit certain representations that sometimes are used to entice individuals to sign up for plans. They are prohibited here even when they are true because they too often are untrue.

Paragraph (5): So long as the provider strips out the individual's identifying information, it is free to disclose information for purposes of academic research or construction of a scoring system. If the identifying information is present, however, this paragraph prohibits disclosure of any of the information, except as permitted by the two specified exceptions. The only permissible purpose for a disclosure to a creditor of the individual is to secure its cooperation.

Paragraph (6): The cross-referenced section permits debt-settlement companies to receive a portion of the forgiven debt. Other entities are not permitted to receive any portion of any forgiven debt.

Paragraph (7): This paragraph is intended to prohibit the sale to individuals of insurance and other products that in other contexts have been the cause of large expense for largely worthless products as a means of evading statutory regulation. The catch-all at the end of the paragraph is intended to thwart the exercise of ingenuity in generating new ideas to evade the limits imposed by the Act. The administrator may adopt rules specifying items that fall into the catch-all.

Paragraph (8): Subsection (a)(13) prohibits misrepresentations that an agency is authorized or competent to provide legal services. This paragraph prohibits performing those services, unless the person is a licensed attorney. A provider does not violate this subsection if the person providing legal services is licensed in a state, even if not this state. It may, however, violate other law that prohibits the unauthorized practice of law.

Subsection (c): The language that formerly appeared at the end of subsection (b)(9) has been moved into a separate subsection. The Style Committee believes it should be deleted altogether and addressed in a comment.

Subsection (d): This paragraph prohibits a provider from receiving compensation for performing specified services for a third party. At the January 2005 meeting, the Committee decided to broaden the prohibition, making it applicable regardless of the presence or absence of any connection between the third party (or persons related to the third party) and the provider (or persons related to the provider).

This subsection supplements subsection (a)(6) (prohibiting referral fees). It is broader, in that it attempts to prevent evasions of subsection (a)(6) through the ruse of performing services for the lender or service provider.

Subsection (e): This subsection prohibits insider transactions unless the transactions are bona fide market transactions. The purpose of the subsection is to prohibit the use of a provider to channel money to related entities. Tax-exempt providers may do this in an attempt to evade restrictions on those with tax-exempt status. For-profit providers may do this in order to establish a high cost of doing business, which they then might use to persuade the legislature to increase the permissible fees and charges.

Former subsections (f) and (g) prohibited deception, oppression, unfairness, and unconscionability in connection with a provider’s debt collection activity. The prohibition is redundant of subsection (a)(15) (prohibiting unfair, unconscionable, or deceptive conduct) and, at the suggestion of the Style Committee, has been deleted.

SECTION 27. ADVERTISING; PUBLIC EDUCATION.

(a) Advertising for debt-management services, in any medium, must disclose in an easily comprehensible manner the information specified in Section 17(e)(2) and (3).

(b) The administrator may provide public education concerning personal finance and may assess a fee on providers [based on the amount of money the provider spent on advertising in the preceding calendar year]. The administrator shall set the fee in such a way as to offset the cost of the public education.

Preliminary Comment

Subsection (a): This subsection seeks to counteract the deception and pressure often exercised by providers that engage in extensive advertising. In the October 2004 meeting draft, the cross reference was to the provisions requiring disclosure of the success rate of the agency's plans; the likely impact on the individual's credit report; that plans are not suitable for all individuals; and that other alternatives for dealing with indebtedness are available. To ease the disclosure burden, in this draft the cross reference is to just the provisions requiring disclosure of the likely impact on credit rating and the likelihood of collection efforts. To prevent the disclosures from becoming as incomprehensible as the Truth-in-Lending Act disclosures on TV and radio, this draft requires that the information be disclosed "in an easily comprehensible manner." The Official Comment could clarify that this refers to type size in print and TV ads and to speed of delivery in TV and radio ads. At the Annual Meeting a commissioner suggested as an alternative that the administrator's web site contain appropriate disclosures.

Subsection (b): This subsection seeks to expand the amount of public education concerning management of personal finance. As originally drafted, it imposed an obligation to provide public education on any provider that spent more money on advertising than on public education. It would have been a lightening rod for objections, may have raised constitutional issues, and might have required defining "public education" in such a way as to preclude self-serving infomercials that promote debt-management plans and underemphasize education. In addition, at the Annual Meeting a commissioner observed that a provider could evade the spirit of the requirement by placing the required advertising in a medium or at a time that would reach a different audience than its primary advertising reaches. It could, for example, direct its public education to a population that it knows does not need the education or that the provider does not seek to serve. The current draft makes public education a function of the administrator, leaves it to the discretion of the administrator, and authorizes the administrator to shift the costs of the effort to registered providers. The administrator may determine the fee structure in any reasonable manner, including fees based on the provider's revenues or the number of individuals who have agreements with the provider. Alternatively, if the Committee prefers the bracketed language, the fee is based on the provider's advertising expenditures.

If the Committee adopts this approach, the provision could appear here or in section 29 (Powers of Administrator).

SECTION 28. CRIMINAL PENALTY. [Subject to Section 29(f), upon] [Upon] conviction, a person that knowingly and willfully {violates this [act] or a rule or order issued under this [act]} {violates Section 5, 14, 19, 22, 23(a), or 26 of this [act] or a rule or order issued to implement any of those sections} must be fined not more than [$1,000] for the first violation and not more than [$5,000] or imprisoned not more than [five] years, or both, for each subsequent violation.

Preliminary Comment

At the Annual Meeting a commissioner suggested that if this section remains, it ought to specify the level of the crime (or leave that to each state) and not specify the sanction, since the general criminal law specifies the sanctions. Another commissioner suggested that not all violations of the Act merit criminal sanctions and this section should be narrowed accordingly. A third commissioner suggested eliminating the section altogether and relying on the general criminal statutes. A fourth commissioner sent a message pointing out a problem that may arise in a prosecutor's ability to charge a person with a crime under this section as it existed in the 2004 Annual Meeting Draft. He passed on the comments of a deputy attorney general in his state:

> Here are the general virtues I believe will improve statutes that include criminal sanctions:
> (1) A statute that creates a crime should include a title that clearly and concisely describes the proscribed behavior (murder in the first degree, kidnapping, robbery, etc., not "penalties");
> (2) A clear and logical recitation of as few elements as are necessary to clearly define the proscribed behavior (not 127 pages of a complex chapter followed by "any person who violates this chapter shall be guilty of a misdemeanor");
> (3) A penalty section that simply states the category of crime without giving details as to the sentence (for example, "kidnapping is a class A felony," not "any person who violates this section shall be punished as follows"-- sentencing details should be addressed in other sections or chapters that deal exclusively with sentencing and that set forth penalties to be applied to all crimes of a given category); and
> (4) Each crime should be set forth in a single statutory section that defines a single crime and categorizes the crime in a single category such as "misdemeanor" or "class B felony," etc....
>
> A treatise could be written on this subject, but following the above principles and following the general principles of good legislative drafting will promote the creation of criminal prohibitions that are simple to understand and stated in such a way that the prosecution and defense of these crimes will focus more on a determination of the facts and less on the semantics of the statutory section alleged to have been violated.

Complexity is the enemy of justice when society seeks to define criminal behavior.

At the October 2004 meeting, a member of the Committee suggested the Uniform Securities Act as a model. The current draft of this section is modeled on section 508 of that act. It criminalizes all violations of the Act and all violations of the administrator's rules and orders. A more limited approach would be to adopt the language in the second set of braces, thereby criminalizing only the violation of the specified sections of the Act (sections 5 (registration requirement), 14 (bond requirement), 19 (form and contents of agreement), 22 (trust account requirement), 23(a) (fee limits), and 26 (prohibited acts and practices)). This would be somewhat, though not totally, responsive to the views quoted above.

As now drafted, there is no requirement that only the administrator may initiate a criminal prosecution. Any law enforcement official with the general authority to initiate criminal prosecutions may initiate a prosecution for violation of this Act. Nor does this section in any way preclude prosecution under any other law of this state.

The Committee must decide: (1) whether the Act should contain criminal sanctions; (2) the sections for which violation should carry criminal sanctions; and (3) whether the amount of the monetary fine should be subject to annual adjustment under section 29.

The Style Committee observes that suspension or revocation of registration requires violation of a material requirement, but that this section imposes criminal liability for violation of any requirement. It suggests that this section also contain a requirement of materiality. Unlike the provision on suspension or revocation, this section requires a violation to be knowing and willful. If there is such a thing as a knowing and willful violation of a non-material requirement in the enumerated sections, prosecution is unlikely. And the addition of a materiality element creates a hurdle for a prosecutor even in cases where there is little doubt about materiality. Nevertheless, the Committee may wish to consider the suggestion.

SECTION 29. POWERS OF ADMINISTRATOR.

(a) The administrator may act on its own initiative or in response to complaints and may receive complaints, take action to obtain voluntary compliance with this [act], refer cases to the [attorney general] for prosecution, and seek or provide remedies as provided in this [act].

(b) The administrator may:

(1) investigate and examine, in this state or elsewhere, by subpoena or

otherwise, the activities, books, accounts, and records of a person that provides or offers to provide debt-management services to determine compliance with this [act];

(2) charge the person the reasonable expenses necessarily incurred to conduct the examination;

(3) require or permit a person to file a statement under oath as to all the facts and circumstances of a matter to be investigated; and

(4) obtain ex parte from a court of competent jurisdiction an order authorizing seizure from a bank at which a trust account required by Section 22 is maintained all money, books, records, accounts, and other property of the provider that is in the control of the bank and relates to individuals who reside in this state.

(c) The administrator may adopt rules to carry out the requirements [and further the purposes] of this [act][in accordance with Section [insert the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure]]. The rules may contain classifications, adjustments, and exceptions to effectuate the purposes of this [act], prevent circumvention of the [act], or facilitate compliance with this [act].

(d) The administrator may enter into cooperative arrangements with any other federal or state agency having authority over providers and may exchange with any of those agencies information about a provider, including information obtained during an examination of the provider.

(e) ALTERNATIVE 1: The administrator, by rule, shall establish reasonable fees for processing an application for registration or renewal of a registration in the amount reasonably necessary for administering this [act].

ALTERNATIVE 2: Subject to subsection (f), the fee for processing an application for registration is [$1,000]. The administrator, by rule, shall establish reasonable fees for processing an application for renewal of a registration in the amount reasonably necessary for administering this [act]. The fee [may/must] be based on the average amount of debt, [{during the six calendar months} {on the last day of each of the six calendar months}] immediately preceding the application for renewal, in the applicant's plans for individuals who reside in this state.

ALTERNATIVE 3: Subject to subsection (f), the fee for processing an application for registration is [$1,000]. The fee for renewal of registration is the applicant's proportionate share of all costs and expenses reasonably incurred in administration of this [act], as estimated by the administrator for the following fiscal year, and any deficit actually incurred in, or anticipated for, the fiscal year in which the application for renewal is made. The proportionate share is the proportion that the [{aggregate debt in the applicant's plans for individuals residing in this state bears to the aggregate debt in the plans of all registered providers for individuals residing in this state} {applicant's gross income, as shown in its audited financial statement, bears to the gross income, as shown in their audited financial statements, of all registered providers}]. Upon renewing an applicant's registration, the administrator shall inform the provider of the amount of the fee. The provider shall pay the fee within [30] days. If the provider does not pay the fee within [30] days, the administrator may [{proceed against the applicant's surety bond} {suspend the applicant's registration} {impose a penalty in the amount of twice the fee}].

(f) The administrator, by rule, shall adopt dollar amounts in lieu of those specified in Sections 2, 6, 10, 14, 23, [28], 30, and 32 to reflect inflation, as measured by the United States Bureau of Labor Statistics Consumer Price Index for All Urban Consumers, or other index adopted by rule by the administrator. The administrator shall adopt a base year and shall adjust the dollar amounts, effective on July 1 of each year, if the change in the index from the base year, as of December 31 of the preceding year, is at least ten percent; but the dollar amount shall be rounded to the nearest $100, except that the amounts in Section 23 shall be rounded to the nearest $1.

(g) The administrator shall notify registered providers of a change in dollar amounts pursuant to subsection (f) and make that information available to the public.

Legislative Note: *Subsection (a): If the administrator is the attorney general, the penultimate clause ("refer cases to the [attorney general]") should be deleted. If the state wishes the prosecution to be handled by some other official the name of that official should be substituted for "attorney general."*

Subsection (c): If the APA (or other applicable statute) authorizes the entity charged with administration of this Act to adopt rules, the bracketed phrase at the end of the first sentence of subsection (c) (beginning "in accordance with") should be deleted.

Preliminary Comment

Former subsection (a) (directing the administrator to determine whether to approve applications for registration) has been deleted. According to the Style Committee, section 10 renders it superfluous.

Subsection (b): At the Annual Meeting a commissioner suggested establishing a limit on the amount of expenses that could be charged to the provider, specifically, limiting liability for investigative charges to those instances in which the administrator concludes that the provider has violated the Act. At the October 2004 meeting the Committee was disinclined to impose this limitation, and the draft remains unchanged in that respect.

A prior draft of subsection (a) provided that failure to comply with what is now subsection (b)(3) was grounds for a cease and desist order, but it was not clear what the person is to cease and desist from. In this draft the failure to comply with subsection (b)(3) is grounds for suspension of registration, and the provision has been moved to section 31(a)(4).

Paragraph (4) permits the administrator to recover money and other property from the bank holding the trust account. The previous draft did not say anything about the procedure for doing this. The Style Committee raised a question about the constitutionality of section 31(c), which permits the administrator to seize property from a provider. Both this paragraph and section 31(c) have been revised to ease this concern. An alternative approach might be to revert to the language of the previous draft (viz., silence with respect to procedure) and use the comments to point out that the statute does not address the procedures to be used and that any process used by the administrator must meet constitutional standards.

Subsection (c): The administrator has broad powers to adopt rules to implement and further the purposes of this Act. In exercising this power, however, the administrator should be mindful of section 38, which exhorts those enforcing the Act to promote uniformity among the enacting states.

The Style Committee wants to delete the bracketed phrase, "and further the purposes" of the Act. Is this acceptable to the Committee?

Subsection (e): This draft presents three alternative versions for setting registration fees. Alternative (1) appeared in the previous draft. The section or the comment could articulate that the criterion for setting "reasonable" fees is the amount necessary to defray the costs of administering the Act, not just the costs of the registration process.

Alternative (2) repeats the substance of Alternative (1), but goes on to specify that the criterion for setting the fee is the average amount of debt in the plans being managed by the applicant. It poses alternative methods of calculating the average amount. Instead of looking to the average amount of debt, the statute could specify the provider's revenues as the basis. See Alternate (3).

Alternative (3) builds on Alternative (2). It bases the fee on the size of the applicant's business relative to the aggregate business of registered providers. The California statute (Cal. Fin. Code § 12214(b)) adopts this approach. If the Committee selects this alternative, the last two sentences (obligation to pay the fee and consequences of failure to pay it) could be moved to other sections of the Act (although, if the final version of this section presents two or three alternatives for selection by each state, perhaps those sentences ought to be remain here).

Subsection (e) might also provide, "The administrator may retain for the use of the administrator the aggregate of fees, reimbursement of examination expenses, and any other payment made to the administrator pursuant to this [act] and may carry forward any balance of money from a fiscal year to be expended for the administration and enforcement of the [act] in the following fiscal year." The Maryland statute contains a more elaborate version. The Oregon statute provides that fees of the type referred to here stay with the administrator, but that all civil penalties of the type received by the administrator pursuant to section 30 shall be credited to the general money of the state treasury.) Does the Drafting Committee wish to include anything along these lines, perhaps on an optional basis for states that wish to include it?

Subsection (f): The administrator must adjust annually all dollar amounts that appear in the Act. Those amounts are found in the following sections:

Section 2(3)(D): threshold for becoming an affiliate ($25,000)
Section 6(b)(4): employee theft insurance ($250,000)
Section 10(c)(2): independence of board of directors ($25,000)
Section 14(d): bond ($100,000)
Section 23(c)(2), (d), (e)(2): fee caps
Section 23(g): NSF fee ($25)
Section 28: criminal penalty ($1,000/$5,000)
Section 29(f): application fee ($1,000)
Section 30(a), (b): civil penalty ($10,000)
Section 32(c): minimum damages ($5,000)
Section 32(d): punitive damages ($10,000)

SECTION 30. ADMINISTRATIVE REMEDIES.

(a) The administrator may enforce this [act] and rules adopted under this [act] by:

(1) ordering a violator or an officer, director, or employee of a violator to cease and desist from the violation and any similar violations;

(2) ordering a violator or a person who has caused a violation to take affirmative action to correct the violation, including the restitution of money or property to a person aggrieved by a violation;

(3) subject to Section 29(f), imposing on a violator or a person who has caused a violation a civil penalty not exceeding [$5,000] for each violation;

(4) commencing a civil action to:

(A) enforce an order; or

(B) obtain restitution or an injunction or other equitable relief, or both; and

(5) intervening in an action brought under Section 32.

(b) Subject to Section 29(f), if a person violates or knowingly authorizes, directs, or aids in the violation of a final order issued under subsection (a)(1) or (2), the administrator may impose a civil penalty not exceeding [$10,000] for each violation.

(c) The administrator may maintain an action to enforce this [act] in any [county].

(d) The administrator may recover the reasonable costs of enforcing the [act] under subsections (a) through (c), including attorney's fees based on the hours reasonably expended and the hourly rates for attorneys of comparable experience in the community.

(e) In determining the amount of a civil penalty to impose under subsection (a) or (b), the administrator shall consider the seriousness of the violation, the good faith of the violator, the violator's previous violations, the deleterious effect of the violation on the public, the net worth of the violator, and any other factor the administrator considers relevant to the determination of the civil penalty.

Preliminary Comment

The Style Committee suggests that this section merely adopt by reference the powers of the administrator in the administrator's organic statute. That is a reasonable suggestion, but it assumes that administration of this Act will be placed with a person that has broad powers. In any event, subsections (a)(3), (a)(5), and (b) are not universal and would still be necessary.

Subsection (a): At the October 2004 meeting the Committee decided to permit the administrator to proceed without specifying the need for notice and an opportunity for a hearing. This permits the incorporation of former subsection (b) into subsection (a). The administrator's power and procedure is governed by the state's administrative procedure act.

Subsection (a) has been revised also to permit the administrator to proceed against those officers, directors, or employees who are responsible for a provider's violation of the Act.

Former paragraph (4) authorized the administrator to revoke, suspend, or deny renewal of registration under section [31]. The Style Committee suggests that the paragraph is unnecessary and, if it be referenced at all, the reference should be in a comment. It has been deleted.

Paragraph (4) authorizes the administrator to commence civil actions. Hence, the administrator may proceed either by administrative proceeding under subsection (a)(1)-(3) or by civil action under subsection (a)(4). Section 29(b) authorizes the administrator to refer cases to the attorney general for prosecution. The Drafting Committee needs to decide whether to place all enforcement in the hands of the administrator, split it between the administrator and the attorney general, or let the states choose which model to use.

Subsection (d), authorizing recovery of expenses by the administrator, is new. Does the Committee concur?

Reporter's Note: *Former section 31 (violation of unfair or deceptive practices statute) has been relocated. It now appears as section 33, and former sections 32 and 33 have been renumbered.*

SECTION 31. SUSPENSION, REVOCATION, OR NON-RENEWAL OF REGISTRATION.

(a) The administrator may suspend, revoke, or deny renewal of a provider's registration [, or may petition a court to suspend or revoke a provider's registration,] if [the administrator concludes that]:

(1) a fact or condition exists that, if it had existed when the registrant applied for registration, would have been ground for denying registration;

(2) the provider has violated a [material] provision of this [act] or a rule or order of the administrator under this [act];

(3) the provider is insolvent;

(4) the provider or an employee or affiliate of the provider has refused to permit the administrator to make an examination authorized by this [act], has failed to comply with Section 29(b)(3) within 15 days after request, or has made a material misrepresentation or omission in complying with Section 29(b)(3); or

(5) the provider has not responded within a reasonable time and in an appropriate manner to communications from the administrator.

(b) If a provider does not comply with Section 22(f) or if the administrator otherwise finds that the public health, safety, or welfare requires emergency action, the administrator may order a summary suspension effective on the date specified in the order.

(c) If the administrator suspends, revokes, or denies renewal of the registration of a provider, the administrator may obtain ex parte from a court of competent jurisdiction an order authorizing seizure of any records and assets of the provider which are located in this state.

Preliminary Comment

Subsection (a): The Committee did not discuss this section at the October 2004 or January 2005 meetings. Presumably, however, if the Act does not specify the need for notice and hearing in section 30, it need not specify it here either. Hence, the change in this subsection. Should the bracketed phrase be deleted as well? At the Annual meeting a commissioner suggested that this section be restructured. As now drafted, the administrator may take the specified actions. The suggestion is that the administrator not have the power to suspend or revoke a registration and that this section merely specify the grounds on which the administrator could ask a court to take that action. Does the Committee wish to pursue this suggestion? The bracketed language takes a step in this direction, but leaves a parallel power in the administrator to act on its own.

In paragraph (2) the word “material” has been newly bracketed, for potential deletion. The administrator is unlikely to take action because of a trivial violation, and inclusion of “material” creates a litigation handle for an offending provider. Should the word be retained or deleted?

Subsection (b): Section 22(f) deals with failure to maintain a trust account in an amount equal to the sum of the balances in each individual’s escrow account. Since subsection (a) does not specify the need for prior notice and opportunity for a hearing, the requirement in this subsection for a post-suspension hearing has been deleted.

Subsection (c): The Style Committee questions the constitutionality of the original version of this subsection, which permitted the administrator to seize assets. As revised, the draft now authorizes the administrator to obtain a judicial seizure on an ex parte basis. (See the Preliminary Comment to section 29(b).)

SECTION 32. PRIVATE ENFORCEMENT.

(a) If an individual voids an agreement pursuant to Section 21(a), the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement [except for amounts paid to creditors], together with recovery under subsection (d)(2) and (3).

(b) If an individual voids an agreement pursuant to Section 24(d), the individual may recover in a civil action [three times the amount of the unauthorized fees, charges, money, or payments] [the total of all amounts paid or deposited by or on behalf of the individual pursuant to the agreement], together with recovery under subsection (d)(2) and (3).

(c) If a provider does not comply with Section 24(e), an individual may recover in a civil action two times the unauthorized money, together with recovery under subsection (d)(2) and (3).

(d) An individual who is injured by a violation of this [act] other than Section 6, 7, 8, or 12 or by a violation of a rule adopted by the administrator under this [act] other than a rule adopted to implement Section 6, 7, 8, or 12 may recover in a civil action:

(1) subject to subsection (e), compensatory damages, including damages for noneconomic injury, or, subject to Section 29(f), for violation of Sections 17, 18, 19, 20, [22,] 23, 24, 25, or 26, the greater of compensatory damages, including damages for noneconomic injury, or $[5,000];

(2) subject to subsections (e) and (f), punitive damages; and

(3) the costs of the action, including reasonable attorney's fees based on

the amount of time involved.

(e) In a class action:

(1) except for violation of Section 26(a)(4), the minimum damages provided in subsection (d)(1) do not apply; and

(2) subject to Section 29(f), punitive damages may not exceed [$10,000] per class member.

(f) In determining the amount of punitive damages under subsection (d) or (e), the court shall consider the seriousness of the violation, the good faith of the violator, the violator's previous violations, the deleterious effect of the violation on the public, the net worth of the violator, and any other factor the court considers relevant to the determination of the damages.

(g) In addition to the remedy available under subsection (d), if a provider does not give effect to an individual's rights under Section 19(h), the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement.

(h) If, within 60 days after filing an action under subsections (a), (b), (c), (d), or (e), an individual notifies the administrator of the action, the administrator shall assist the individual in enforcing a judgment against the bond or other security that is required under Section 14.

(i) An individual's action, except a class action, takes precedence over a previous or subsequent action by the administrator with respect to the claim of the individual. An individual's class action takes precedence over a subsequent action by the administrator with respect to claims common to both actions, but the administrator may intervene in the class action. An administrator's action on behalf of a class of individuals takes precedence over an individual's subsequent class action with respect to claims common to both actions. Whenever an action takes precedence over another action under this subsection, the non-precedent action may be stayed to the extent appropriate while the precedent action is pending and may be dismissed if the precedent action is dismissed with prejudice or results in a final judgment granting or denying the claim.

Preliminary Comment

This section specifies the private remedies for an individual who has been injured by a violation of this Act. More than one subsection may apply to a particular violation, and the individual may recover under any of them, so long as there is not double recovery for the violation.

Subsections (a), (b), and (c) have been relocated from sections 21 (Voidable Agreements) and 24 (Fees: Other Limits), pursuant to the Committee's decision to locate all remedies provisions in one section.

Subsection (a) : Section 21(a) makes an agreement voidable if the provider is not properly registered under this Act. Under this subsection the individual may recover all money paid by the individual[, except for amounts passed on to creditors]. This sanction is to disgorge all money that the provider otherwise would have earned for its services.

Subsection (b): Section 24(d) permits an individual to void an agreement if a provider exceeds the fee caps. The Committee must decide whether, when an individual elects to void the agreement, the individual should be able to recover three times the overcharge or the more deterrence-oriented remedy of returning all money received from the individual, including the money that was paid over to the creditors. For an overcharge, forfeiture of all amounts received may be too draconian. A similar question is presented under subsection (a), where the remedy, although draconian, may nevertheless be appropriate.

As the draft now stands, the treble damages remedy is available only if the individual voids the agreement. If the individual does not void the agreement, recovery is under subsection (d)(1) (actual damages but not less than $5,000). Should the treble damages remedy be available to an individual who does not void the agreement?

Subsection (c): Section 24(e) requires a provider that has unintentionally exceeded the fee caps to return the excess charges within two days after learning of the overcharge. If the provider fails to do so, this subsection provides for recovery of twice the overcharge.

Subsection (d): “Compensatory damage” in paragraph (1), which includes recovery for noneconomic injury, encompasses emotional distress, humiliation, aggravation, etc.

The minimum damages provision applies only to the specified violations (prerequisites for a plan, electronic communication, form and contents of an agreement, failure to use foreign language documents, trust account, fee caps, other limitations on fees, periodic reports, and prohibited acts and practices). For violation of other sections, including failure to register and failure to provide customer service, the aggrieved individual may recover actual damages, punitive damages, or both. The administrator also may enforce these other sections. Does the Committee concur with this dichotomy? Is it necessary to provide the exception for sections 6-8 and 12 (dealing with the application requirements): could an individual ever sustain actual damages as a result of a provider’s violation of those sections?

“Costs of the action” in paragraph (3) encompasses filing fees, jury fees, expert witness fees, and everything else that may be taxed as costs against the losing party.

Subsection (e): An aggrieved individual may proceed by class action if the prerequisites for class actions under the rules of civil procedure are satisfied. The minimum damages provision does not apply unless the provider violates section 26(a)(4), which prohibits a provider from initiating a transfer of an individual’s money unless the transfer is authorized by the Act and the agreement.

Subsection (g) is new. It implements the remedy implicit in section 19(h) when an individual exercises the right to rescind: section 19(a)(6) requires a provider to deliver to the individual, immediately upon formation, a copy of an agreement that complies with sections 19 and 26. If the provider complies with this obligation, the individual has only three days to rescind. Upon rescission, the provider must refund all money paid by the individual. The provider can protect itself against any out-of-pocket loss by keeping any such money until the three-day period has expired, in which event this subsection imposes no loss on the provider. If, however, the provider fails to deliver a proper copy of the agreement, the rescission period is 30 days, in which event rescission may very well occur after the provider has disbursed funds to creditors. In this scenario, the remedy in this subsection results in an out-of-pocket loss to the provider. It thus provides an additional incentive for the provider to conform to the requirements of sections 19 and 26.

Subsection (h) is new. Without creating an obstacle to private enforcement, it provides an incentive for an individual to inform the administrator of alleged violations of the Act.

At the Annual Meeting a commissioner suggested adding a provision to resolve possible conflicts between public and private enforcement actions. Subsection (i) is drawn almost verbatim from UCCC § 6.113.

SECTION 33. VIOLATION OF UNFAIR OR DECEPTIVE PRACTICES STATUTE. If an act or practice of a provider violates both this [act] and [insert reference to the statute(s) dealing with deceptive acts and practices in consumer transactions], an individual may not recover under both for the same act or practice.

Preliminary Comment

The prior version of this section stated that a violation of this Act constitutes a violation of the deceptive practices statute. The current version acknowledges that conduct that violates this Act also may violate that other statute. The section prohibits recovery under multiple statutes for the same conduct. The aggrieved individual may seek relief under either statute.

SECTION 34. STATUTE OF LIMITATIONS.

(a) An action or proceeding brought pursuant to Section 30(a) or (b) must be commenced within four years after the conduct that is the basis of the administrator's complaint.

(b) An action brought pursuant to Section 32 must be commenced within two years after the latest of:

(1) the individual's last transmission of money to a provider;

(2) an individual's last transmission of money to a creditor at the direction of a provider;

(3) a provider's last disbursement to creditors;

(4) a provider's last accounting to the individual pursuant to Section 25(a);

(5) the date on which the individual discovered or reasonably should have discovered the facts giving rise to the individual's claim; or

(6) termination of actions or proceedings by the administrator with respect

to a violation of the [act].

(c) The period prescribed in subsection (b)(5) is tolled during any period during which the provider or, if different, the defendant has materially and willfully misrepresented information required by this [act] to be disclosed to the individual if the information so misrepresented is material to the establishment of the liability of the defendant under this [act].

Preliminary Comment

Subsection (a): The four-year limit applies to administrative and judicial proceedings under section 30(a). It also applies to actions under section 30(b), as to which the actionable conduct relates to violation of the final order, not the conduct that gave rise to the final order.

The Drafting Committee must decide upon the appropriate triggers to start the statute of limitations. Presumably the trigger should not be simply the date of the violation, because if the violation appears in the documents, the statute may have run before the individual completes the plan. Under the Uniform Consumer Sales Practices Act (§ 11), triggers are violation of the Act, last payment by the individual, or termination of proceedings by the administrator.

At the October 2004 meeting, the Committee seemed to concur with the triggers in the draft. This draft contains an additional trigger, drawn from the Uniform Consumer Sales Practices Act (termination of proceedings by the administrator). There was some sentiment at the October meeting that four years was appropriate for actions by the administrator, but too long for private actions. In this draft the limitations period for private enforcement is two years.

Subsection (c): The language of this subsection is from H.R. 3331, a bill to regulate providers. The Style Committee has observed that it is ambiguous and will always require judicial action to implement.

[**SECTION 35. SEVERABILITY**. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] that can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

SECTION 36. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND

NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

Reporter's Note: *Former Section 37 (Relation to Law of Other States) provided relief to providers that are located in this state but serving individuals in another state and therefore subject also to the law of the other state. With the revision of Section 3 to limit the applicability of the Act to providers that serve individuals residing in this state, this section has been deleted.*

SECTION 37. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 38. EFFECTIVE DATE. This [act] takes effect on [**_________**].

SECTION 39. REPEAL. The following laws are repealed:

Legislative Note: *Insert the citation to any existing legislation regulating consumer credit counseling, debt settlement, debt adjustment, debt prorating, or the like.*

SECTION 40. TRANSITIONAL PROVISIONS; APPLICATION TO EXISTING TRANSACTIONS.

(a) Transactions entered into before this [act] takes effect and the rights, duties, and interests resulting from them may be completed, terminated, or enforced as required or permitted by a law amended, repealed, or modified by this [act] as though the amendment, repeal, or modification had not occurred.

(b) If a provider that is [lawfully] furnishing debt-management services to individuals residing in this state when this [act] takes effect applies for registration under this [act] before the expiration of three calendar months after the effective date of this [act], the provider may continue to provide debt-management services to individuals who reside in this state until the earlier of:

(1) denial of registration under Section 11; or

(2) expiration of [the 120-day period, as it may be extended, specified in Section 11] [18 months after the effective date of this [act]].

Preliminary Comment

Subsection (a): "Law" includes statutes, administrative rules, and judicial decisions. This subsection permits a provider to continue operating under prior law as to transactions in process when the Act becomes effective. It may be burdensome for a provider to comply with prior law for some of its customers and with this Act for others of its customers. Hence, the language of this subsection, "may be," permits a provider to comply with this Act even with respect to transactions entered before this Act takes effect.

For subsection (a) to save a transaction in process when the Act takes effect, the transaction must have been permitted by prior law. If prior law prohibits a transaction, nothing in this subsection validates it. Query whether this is wise: if a transaction violates prior law, does the Committee wish to permit a provider to continue to service existing customers? It would be a hardship to the customers if the provider abruptly ceased activity, and permitting the provider to continue, if conditioned on prompt registration, might serve as an incentive to register under the Act.

Subsection (b): This newly added provision permits a provider to continue performing existing agreements, even if in violation of prior law, if the provider applies for registration in a timely manner. It also permits a provider that is providing debt-management services lawfully under prior law to serve new customers if it applies for registration in a timely manner. If the Committee concurs, the remaining question is the period of time during which the unregistered provider may continue operating:

- until denial of its application for registration;
- until expiration of the time period specified in section 11;
- or, because of the likelihood of delay during the first years of the Act, until a fixed, but longer, time.