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FOR DISCUSSION ONLY

CONSUMER DEBT COUNSELING ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For Drafting Committee Meeting March 12-14, 2004

WITH PREFATORY AND REPORTER'S NOTES

DRAFTING COMMITTEE ON CONSUMER DEBT COUNSELING ACT

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, 244 N. College Ave., Indianapolis, IN 46202
NEAL OSSEN, 21 Oak St., Suite 201, Hartford, CT 06106
HIROSHI SAKAI, 3773 Diamond Head Circle, Honolulu, HI 96815
STEPHEN C. TAYLOR, Dept. Of Banking and Financial Institutions, 1400 L St. NW, Suite 400, Washington, DC 20005
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 Road, Norman, OK 73019, *President*
JOANNE B. HUELSMAN, 235 W. Broadway, Suite 210, Waukesha, WI 53187*, Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

AMY W. BIZAR, GE Consumer Finance-Americas, Stamford, CT 06927, *American Bar Association Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, Tuscaloosa, AL 35487-0382, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

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

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UNIFORM CONSUMER DEBT COUNSELING ACT

Prefatory Note

The consumer credit counseling industry arose as a means of assisting consumers 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 federal tax code requirements for nonprofit 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. This draft attempts to reflect the discussion and incorporate the suggestions made at the November meeting. The overall organization of that draft is largely unchanged but several subsections have been moved about, and there is much language that did not appear in the prior draft.

There are two new sections, neither of which has been considered or authorized by the Committee. They are included here for the purpose of stimulating discussion. See § 17 (imposing duties on certain creditors that receive payments from a debt management services provider) and § 27 (subordinating this Act to legislation in other states regulating debt management services providers). In addition, there are two alternative versions of §§ 5-6 (requirements for registration of a debt management services provider).]

CONSUMER DEBT COUNSELING ACT

SECTION 1. SHORT TITLE. This [act] is known as and may be cited as the "Uniform Consumer Debt Counseling Act."

SECTION 2. DEFINITIONS. As used in this [act], unless the context requires otherwise, the following terms have the following meanings:

(a) "Administrator" means the [director of consumer credit regulation][director of financial institutions][attorney general].

Legislative Note: 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 entities charged with consumer protection generally (under a little-FTC act or similar statute), regulation of consumer credit, or regulation of financial institutions. It may be necessary or desirable to amend that entity's organic statute to refer specifically to this Act.

(b) "Affiliate," with respect to an individual, means

(1) the spouse of the individual;

(2) a brother, brother-in-law, sister, or sister-in-law of the individual;

(3) an ancestor or lineal descendant of the individual or the individual's spouse; or

(4) any other individual related to the individual within the third degree of consanguinity or affinity.

(c) "Affiliate," with respect to an organization, means:

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

(2) an officer or director of, or a person performing similar functions with respect to, the organization;

(3) a person that has more than a [one-percent] ownership interest in, is employed by, or is a director of a person that receives [non-trivial amounts of payment][more than $25,000 in either the current year or the preceding year] from the organization;

(4) an officer or director of, or a person performing similar functions with respect to, a person described in paragraph (1);

(5) the spouse of an individual described in paragraph (1), (2), (3), or (4); or

(6) an individual who is related to an individual described in paragraph (1), (2), (3), or (4) within the third degree of consanguinity or affinity.

Reporter's Note: This definition is drawn from the definitions of "person related to" in UCC Article 9, § 9-102(a)(62)-63), but adds paragraph (3) and 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. The language in subsections (b)(4) and (c)(5) includes those relatives. Consanguinity denotes a relationship in which the persons share a common ancestor. Affinity denotes a relationship in which the persons are related by marriage.

(c) "Certified counselor" means an individual certified by an independent, nationally recognized certification organization or by a training program approved by the Administrator.

(d) "Consumer" means an individual [whose debts were incurred primarily for personal, family, or household purposes. It does not include persons whose debts were incurred primarily for business, commercial, or agricultural purposes].

Reporter's Note: Without the bracketed language, this definition is the broadest possible. Section 3 addresses the question whether the residence of the consumer should affect the applicability of the Act. The issue presented by the bracketed language is whether farmers and

sole proprietors should be excluded from the protection of the Act. The apparent consensus at the November meeting was that the Act should apply to the small business owner, but the matter was not resolved.

(e) "Debt management plan" means a plan under which a consumer will pay each of the unsecured creditors specified in the plan [substantially] the entire principal amount of debt that the consumer owes to it.

(f) "Debt management services" means the receiving of money or anything of value from or on behalf of a consumer for the purpose of paying it to one or more creditors of the consumer in full or partial payment of the consumer's obligations. The term includes "debt settlement services" even if the provider of the debt settlement service does not have [physical] control of the consumer's funds.

Reporter's Note: Under this definition those who provide only counseling or education services are outside the scope of this Act. To the extent the Committee's focus is deceptive pricing, excessive cost, and mismanagement of consumers' funds, this exclusion may be appropriate. But if another million consumers—viz., those planning to file bankruptcy petitions—are funneled into the arms of counseling agencies, perhaps the Committee should consider whether the exclusion is appropriate. Potential areas of concern might include excessive pricing of services and use of an education-only agency to channel consumers to an agency that establishes debt management plans or extends credit.

The second sentence is designed to bring within the definition those entities that leave direct control of the consumer's funds with the consumer, who then is expected to make payments as directed by the entity. Is any adjective for control necessary? If so, should it be "direct" rather than "physical"? Would it be preferable to speak in terms of "possession" of the funds?

(g) "Debt management services agreement" means an agreement between a debt management services provider and a consumer for the performance of debt management services.

Reporter's Note: This definition does not incorporate any requirement of "written" or "record." An oral agreement is within this definition. Requirements of form appear in §§ 8-9.

(h) "Debt management services provider" means a person that, in the current

calendar year or in the immediately preceding calendar year, has provided or offered to provide debt management services to more than [three] consumers.

Reporter's Note: The purpose of limiting the definition to persons that provide or offer to provide debt management services to more than [three] consumers is to exclude from the scope of this Act persons who informally assist their friends or relatives by, for example, accessing the consumer's checking account to pay the consumer's bills. An entity that advertises in any way will necessarily offer to provide those services to more than three consumers.

The November draft referred to "a consumer located in this State or elsewhere." The italicized phrase was intended to make it clear that the definition applies to both a nonresident agency that solicits consumers in this state and a resident agency that solicits consumers in other states. The phrase, however, literally is superfluous, so it has been dropped. The point can be made in the Comment. Conversely, under the provision on scope (§ 3), the Act does not apply to nonresident agencies that solicit and contract with only nonresident consumers.

(i) "Debt settlement services" means the acting or negotiating on behalf of a consumer with one or more creditors of the consumer for the purpose of obtaining forgiveness of a portion of the debt owed by the consumer to the creditor.

Reporter's Note: Some concern was expressed at the November meeting that the definition might encompass traditional counseling agencies, which deal with credit card debt in which accrued and unpaid finance charge becomes part of the debt. If the card issuers' concessions include waiving this portion of the debt, an agency offering a DMP would be within the definition in this section. It appears, however, that the finance charge concessions are prospective only.

Should "forgiveness of a portion of the debt" be changed to "forgiveness of some or all of the debt"?

(j) "Employee" includes an individual who provides services at any location of a debt management services provider.

Reporter's Note: The purpose of this definition is to prevent evasion of the Act by resort to outsourcing the services necessary for running a debt management services business. The definition is overbroad, however, because it encompasses, e.g., an individual who makes emergency repairs to the agency's plumbing system.

(k) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or

commercial entity, whether operated on a for-profit or not-for-profit basis. The term does not include a public corporation, government, or governmental subdivision, agency, or instrumentality.

Reporter's Note: This definition has been revised to conform (except for the last clause in the first sentence, referring to profit or non-profit status) to the Conference's standard definition.

(l) "Spouse" includes a domestic partner.

(m) "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;

(n) "Trust account" means an account that is all of the following:

(1) established in a federally insured financial institution;

(2) separate from the debt management services provider's operating account;

(3) designated as a "trust account" or other appropriate designation indicating that the funds in the account are not the funds of the debt management services provider or its officers, employees, or agents; and

(4) used to hold funds transferred to the debt management services provider[, including the proceeds of any asset transferred to the debt management services provider,] for disbursement to creditors of consumers.

Reporter's Note: Subsection (4) is drafted broadly, to encompass funds that are paid by others on behalf of or for the benefit of a consumer. The bracketed language picks up funds that are the proceeds of any kind of asset that is transferred to the debt management services provider. The intent of including this latter clause is to make it clear that the account is within the definition even if its source was something other than money (e.g., securities or a CD). Is the bracketed language necessary?

SECTION 3. SCOPE. This act applies to a debt management services provider if:

(a) it, its employees, or its agents are located in this state; or

(b)(1) by any means, including electronic communication, it solicits consumers located in this state; or

(2) it forms an agreement with a consumer [whom it should reasonably know to be] located or resident in this state.

Reporter's Note: Under this provision the Act would not apply to a debt management services provider that is not located in this state and that does not solicit or contract with consumers in this state. It would not apply to a consumer who forms an agreement with the debt management services provider in another state later and moves to this state. The bracketed language in subsection (b)(2) presents the question whether the Act should apply to a resident of this state who forms an agreement with a debt management services provider while temporarily in that other state, if the debt management services provider has no notice that the consumer resides in this state.

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. Subsection (b)(1) should not encompass a provider whose web site is accessible by residents of this state if the provider declines to do business with residents of this state. Should the text be refined to clarify this or will a Comment suffice?

SECTION 4. EXEMPT ENTITIES. This [act] does not apply to any of the following persons, or their employees, when the person or its employee is engaged in the regular course of its business or profession and the provision of debt management services or debt settlement services is incidental to that business or profession:

(a) an attorney at law;

(b) an escrow agent;

(c) a judicial officer or a person acting under a court order;

(d) a person to whom the consumer is indebted if the person does not act or negotiate on behalf of the consumer with any other creditor of the consumer for the purpose of obtaining any debt forgiveness for the consumer;

(e) a person to the extent the person provides bill-paying services and does not communicate, other than by payment, with a payee concerning the amount of any payment; or

(f) a person licensed under Section ____ as a [money transmitter].[;

(g) a certified public accountant; or

(h) a federally insured financial institution.]

Reporter's Note: The exemption for employees applies only if providing debt management services is incidental to their employment. If an employee's primary responsibilities entail providing debt management services, then the employee must be registered. As a practical matter, this will entail registration by the employer, because the registration process is too burdensome for an ordinary employee.

Subsection (b) contemplates an escrow agent in a real estate transaction, in which the primary purpose is to reduce the credit risk of both buyer and seller. The exemption applies to any entity that serves this role, including, among others, a title insurer or a bank.

Subsection (d) exempts a creditor that negotiates or receives settlement of a debt a consumer owes it.

Subsection (e) is an attempt to exempt bill-paying services provided by a [non-bank] entity that does not otherwise provide debt management services.

Some states exempt title insurers, mortgage loan servicers, business liquidators; ME exempts only attorneys and supervised financial institutions. The November draft exempted banks and CPA's, but no justification for exempting those entities was discussed. They are bracketed in this draft, and unless justifications for the exemptions exist, they should be deleted. If the exemption for banks remains, the definition could draw on the definition of "bank" in UCC § 1-201(b)(4): "'Bank' means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company." By using the word "includes," however, the UCC definition is drafted in an expansive fashion. The intent of this section is to limit the exempt entities. Therefore, the bracketed language does not incorporate the UCC definition.

Legislative Note: In subsection (f) insert the citation to any statute regulating the business of those entities that transmit funds on behalf of consumers. If there is no such statute, the

subsection should be omitted.

SECTION 5. REGISTRATION. [VERSION A]

Reporter's Note: There are at least three models for a registration requirement: (a) registration based on bare-bones information; (b) registration based on detailed information, with or without the power of the state to deny registration; (c) licensing based upon an examination of the applicant. Each of these models may be found in existing legislation governing debt management services providers. The Athlete's Agents Act, suggested as a model for us at the November meeting, follows the second model. Accordingly, Version A of §§ 5-6 in this draft pursues that approach. Following § 6 of Version A there appears an alternate version [Version B] of §§ 5-6, adopting a streamlined registration requirement.

(a) Except as otherwise limited by Section 3 (scope of the [act]), a person, whether or not located in this state, may not provide debt management services to consumers unless the person is registered with the Administrator. Registration [expires on December 31 of the year in which the registration occurs] [shall be valid for one year].

Reporter's Note: The registration requirement is subject to the provision on scope; hence, the cross reference to § 3. Is the cross reference necessary?

The Committee must decide whether to have rolling dates for expiration of registration or a fixed date for expiration of all registrations every year. At the November meeting some industry participants that operate on a multi-state basis expressed a preference for a fixed date, citing the burden on an agency to meet different dates in numerous states. Against this burden, the Committee should weigh the possible burden on the state to approve within a relatively short period (such as 30 days) the renewal of registration of potentially hundreds of agencies.

(b) A debt management services provider must renew its registration every year. The application for renewal must be filed [by December 1 of each year for the following year and expires on December 31 of that following year] [no more than sixty and no fewer than 30 days before the registration expires].

(c) An application for registration or renewal of registration must be in a form prescribed by the Administrator. It must be accompanied by all of the following:

(1) fees to be established by [the Administrator] [this [act]];

(2) the surety bond required in Section 7 ;

(3) identification of the trust account required in Section 12 ; and

(4) consent to the jurisdiction of this state with either:

(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 as agent of the debt management services provider for purposes of service of process.

(d) The Administrator shall issue a certificate of registration to a person that complies with subsection (c) and with Section 6 .

(e) The Administrator [may/shall] refuse to issue a certificate of registration if:

(1) the application is not accompanied by the applicable fees;

(2) the application contains erroneous or incomplete information; or

(3) another state has revoked or suspended the applicant's authorization to engage in the business of providing debt management services;

(4) an employee, officer, director, owner, has ever been convicted of a crime involving violation of state or federal securities laws, moral turpitude or fraudulent or dishonest actions (NY), including forgery, embezzlement, obtaining money under false pretenses, larceny, extortion, or any similar offense (MI); or

(5) the debt management services provider or any of its officers, directors, or owners has defaulted in the payment of money collected for others, including the discharge of debts through bankruptcy;

(6) the Administrator finds that the financial responsibility, experience,

character, or general fitness of the applicant or its officers, directors, employees, or agents is not such as to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of this [act].

(7) the applicant's board of directors is not independent of the applicant's officers, employees, and agents. A board of directors is not independent if more than one-third of its members

(A) are affiliates of the applicant; or

(B) within [ten] years of first becoming a director of the applicant,

were employed by or directors of a person that receives [non-trivial amounts of payment] [more than $25,000 in either the current year or the preceding year] from the applicant.

Reporter's Note: This section appeared as § 6(c) in the November meeting draft. It has been substantially revised, in an attempt to require that the board of directors 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.

(f) The Administrator shall approve or deny an initial registration within sixty days after the date on which the complete application, including all required documents and payments, is filed. The Administrator may for good cause extend the sixty-day period. If the Administrator fails to act on the application before the expiration of the period, the application shall be deemed approved, and the Administrator shall issue a certificate of registration. Within seven days of a denial of an application, the Administrator shall inform the applicant of the reasons for the denial.

Reporter's Note: The requirement of written notification, which appeared in the November draft, has been dropped from this subsection and also the next subsection.

(g) The Administrator shall approve or deny a renewal of registration within thirty days after the date on which the complete application for renewal, including all required

documents and payments, is filed. The Administrator may for good cause extend the thirty-day period, but the registration shall remain effective until the end of the extension or the date of denial, whichever occurs first. [Within seven days of a denial of a renewal of registration, the Administrator shall inform the debt management services provider of the reasons for the denial.]

Reporter's Note: The bracketed sentence in subsection (h) might instead state: "A denial of renewal of registration shall include the reasons for the denial."

(h) If the Administrator refuses to issue or renew an applicant's registration, the applicant may within thirty days after receiving notice of the refusal, appeal from the denial and may request a hearing, pursuant to Section ____.

Legislative Note: States should insert the citation to the Administrative Procedure Act or other statute governing administrative procedure.

(i) If a person is registered under this [act], the officers and employees of the person need not be separately registered.

(j) At least semiannually the Administrator shall publicize, on its Internet web site or otherwise, the names of all persons currently registered as debt management services providers under this [act]. If this information is not available on that web site, the Administrator shall make the information available immediately upon request by any person.

Reporter's Note: The objective of subsection (j) is to enable consumers and creditors to ascertain whether a given debt management services provider is registered. Posting on a web site is the preferred method, because the information is instantaneously and continuously available. Other publication, e.g., in a newspaper, is much less effective. Therefore, the Administrator must promptly supply the information on request. This will be especially important if the Committee adopts § 17 (limiting creditors to dealing only with registered agencies). The requirement of "immediate" response by the Administrator is intended to induce compliance by means of posting on a web site.

SECTION 6. APPLICATION FOR REGISTRATION. [VERSION A]

(a) An application for registration shall be signed under penalty of perjury and include all of the following information, as applicable:

(1) the applicant's name, business address, telephone number, electronic mail address, and Internet web site address;

(2) the name of every entity in which the applicant conducts business;

(3) the address of each location in the state at which the applicant will provide debt management services;

(4) the name and address of each [owner,] officer, director, and principal of the applicant;

Reporter's Note: At the November meeting, it was observed that non-profit organizations do not have owners. The introductory language in subsection (a) says "as applicable." We could leave "owner" in subsection (a)(4), knowing that it would impose no requirement if the agency has no owners, but requiring the disclosure if any counseling agency were so organized as to have owners. Similarly, if an agency has no office in this state, subsection (a)(3) does not require disclosure.

(5) a description of the ownership interest of any officer, director, agent, or employee of the applicant in any affiliate of the applicant or in any other business entity that provides services to the applicant or any consumer relating to the applicant's debt management services business;

(6) identification of every state in which:

(A) the applicant or any of its officers or directors has ever engaged in the business of providing debt management services; or

(B) the applicant is registered or licensed to provide debt management services;

(7) identification of every state that has denied, suspended, or revoked the

registration or license of:

(A) the applicant or any of its officers or directors; or

(B) any person with respect to whom the applicant or any of its officers or directors was an affiliate at the time of the denial, revocation, or suspension.

(8) the number of debt management plans the applicant undertook in each of the three calendar years immediately preceding the year of the application and, with respect to each year, the number of those plans that terminated within the first [nine] months [of the plan] [following the consumer's first monthly payment under a plan] and the number of those plans that terminated before they were completed;

Reporter's Note: The November draft required disclosure of the success/failure rate during the scheduled life of a plan. Industry participants at the November meeting explained that after a certain point in the life of a typical plan, it is common for consumers to self-administer their plans. The purpose of a disclosure requirement concerning the success/failure rate of a counseling agency is to provide some indication of the extent to which an agency is channeling into DMP's consumers for whom there is no realistic hope of success. This draft requires the applicant to disclose to the Administrator the failure rate during the first [nine] months of a plan and the failure rate during the life of the plan.

(9) a statement describing any [pending] judgment, tax lien, [material] litigation, or any administrative action by a government agency against the applicant;

Reporter's Note: Is the bracketed language necessary? appropriate?

(10) the applicant's federal employer identification number;

(11) the salaries [compensation] of the applicant's [five] most highly compensated employees for each of the three years immediately preceding the application;

Reporter's Note: The November draft drew on the New Jersey statute, which requires an auditor's certification that the applicant's salaries and expenses are comparable to the salaries and expenses of others in the business. Any such certification would have to account for the differences in size of operations of counseling agencies. In any event, certification has proven infeasible in New Jersey. This draft asks for disclosure of information that must be supplied in the applicant's federal tax form. This information, along with the information required in the

next subsection may enable the Administrator to determine if further inquiry is necessary.

(12) the applicant's ratio of expenses to income for each of the three years immediately preceding the application;

Reporter's Note: For purposes of this requirement, the applicant's income should not include funds paid into the trust account that are forwarded to creditors.

(13) evidence of non-profit status under § 501(c) of the Internal Revenue Code;

Reporter's Note: At the November meeting the Committee briefly considered whether the Act should continue the current restriction that credit counseling agencies be not-for-profit organizations. Reasons for dropping the restriction include the following:

- *the profit motive stimulates innovation;*
- *providers of other consumer services are for-profit organizations;*
- *restriction to not-for-profits triggers the need to address attempts to evade the IRS rules.*

Reasons for continuing the restriction include the following:

- *it emphasizes the educational function, enhances the likelihood that those providing counseling services will have an altruistic motive, and reinforces the rationale for limiting fees charged consumers;*
- *setting fee caps at appropriate levels will make it impossible to generate profits;*
- *consumers seeking the services of a counseling agency are emotionally distraught and vulnerable.*

The constitutionality of the restriction has been raised, but that probably is not a serious problem. The courts have recognized that the Equal Protection Clause applies to commercial activity, but the Supreme Court has held that commercial legislation need only meet the lowest level of the Constitutional test, viz., a "plausible policy reason for the classification." Fitzgerald v. Racing Association of Central Iowa, 539 U.S. 103 (2003). This legislation meets that test. Policy reasons for the restriction include

- *elimination of price gouging by removing the profit incentive;*
- *elimination of deception by removing the profit incentive to do whatever is available to increase revenues;*
- *foreclosing the abuses by for-profit pro raters that led in the 1950s to the current ban.*

In addition, there is a history of limiting particular economic activity to not-for-profits.

For a long time the common law embraced a doctrine that prohibited the corporate practice of medicine. Under this doctrine it was unlawful to operate hospitals on a for-profit basis. Though this common law doctrine is long gone, it illustrates a historic tolerance for restricting activity to charitable enterprises.

(14) evidence of [any] accreditation by [a nationally recognized accrediting organization] [ISO or COA].

Reporter's Note: This subsection presents two questions: (a) whether accreditation should be required; and (b) if so, whether the Act should specify the accrediting organizations, either as exclusive or by way of example.

(15) evidence that all of the applicant's counselors are certified [within 12 months of their initial employment;

Reporter's Note: Under this section certification of counselors is a requirement for registration. The Committee has not decided whether this should be so. The ISO standard for accreditation of credit counseling agencies requires that counselors be certified "by a qualified independent authority, as identified by AICCCA or the NFCC."

(16) a detailed description of the applicant's corporate structure;

(17) evidence of general liability or fidelity insurance, in an amount equal to the average monthly balance in the trust account required by Section 12, that insures against dishonesty, fraud, theft, or other malfeasance or misconduct on the part of an employee or other agent of the applicant;

(18) a copy of the three most commonly used education programs that the applicant provides to consumers;

Reporter's Note: The November draft required descriptions of all education programs. Industry representatives observed that an agency may have programs that look good but that are not actually used. This draft requires a copy of the most commonly used programs, so that the Administrator has some information necessary to determine whether to make further inquiry.

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

consumers;

Reporter's Note: The purpose of this requirement is to alert the Administrator to the need to examine the services to be provided by the counseling agency. But an acceptable response to this requirement may be so general and vague as to provide no meaningful information to the Administrator. If there is no way to sharpen this requirement, perhaps it should be dropped.

(20) a copy of each debt management services agreement that the applicant will use in this state or with residents of this state;

Reporter's Note: An agency located elsewhere need supply only the documents that it will use with residents of this state. An agency located in this state, however, may use different forms for consumers who reside in other states. This subsection requires the agency to file a copy of each with its application. If a form used in another state violates a provision of this Act, new § 27 determines whether the violation is actionable.

(21) the applicant's schedule or schedules of fees and charges imposed on consumers;

Reporter's Note: 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 consumers, 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.

(22) at the applicant's expense, finger prints and the results of a criminal background check on every:

(A) officer; and

(B) employee or agent of the applicant who has access to the trust account required by Section 12. The Administrator shall preserve the confidentiality of the information required by this subparagraph, except that the information shall be subject to legal process in connection with public or private enforcement of this [act];

Reporter's Note: This draft reduces the categories of individuals who must provide fingerprints and adds a requirement of disclosure of criminal background investigations of these individuals. Is the list of person to be investigated now too limited: who else should be on the list?

(23) an irrevocable consent signed by the applicant and the financial

institution at which the trust account required by Section 12 is maintained, as follows:

(A) If the trust account is located at a financial institution located in this State, the consent shall provide that in the event the Administrator in connection with enforcement of the [act] pursuant to Section 19 so demands, the financial institution will turn over to the Administrator all funds, books, records, accounts, and other property of the applicant in its control;

(B) If the trust account is at a financial institution located elsewhere, the consent shall provide that in the event the Administrator, in connection with the enforcement of the [act] pursuant to Section 19 so demands, the financial institution will turn over all funds deposited by or on behalf of consumers who reside in this State and copies of all books, records, and accounts relating to those consumers;

(24) the volume of debt management services provided in the state during the preceding twelve months; and

(25) any other information that the Administrator [by rule] reasonably requires.

Reporter's Note: If the bracketed language would prevent the Administrator from inquiring about information in an application, it should not be added. The authority given the Administrator by § 19(e) to promulgate rules encompasses rules requiring an applicant to provide additional information. Unless the Committee wants to deny the Administrator the power to require an applicant to supplement information in an application, the bracketed language should be dropped.

(b) A person who has submitted an application for, and holds a certificate of, either registration or renewal of registration as a debt management services provider in another state may submit a copy of that application and certificate in lieu of submitting an application in the form prescribed pursuant to subsection (a). The Administrator shall accept the application

and the certificate from the other state as an application for registration or renewal of registration, respectively, in this state if the application to the other state:

(1) was submitted in the other state within six months next preceding the submission of the application in this state and

(A) the applicant certifies that the information contained in the application is current; or

(B) the applicant provides the current information;

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

(3) was signed by the applicant under penalty of perjury.

Reporter's Note: This subsection is drawn from the Athlete's Agent Act. Paraphrasing a Comment to that Act, the subsection provides for reciprocal use of applications in states that have adopted this Act. The need for a debt management services provider to comply with substantially different application procedures in multiple jurisdictions is eliminated. This is intended to ease the burden placed on debt management services providers that operate in multiple states. Paragraph (2) makes that benefit available to the debt management services provider, however, only if the law of the other state is substantially similar to this Act. As a practical matter, a debt management services provider can comfortably rely on this exemption only if the other state has also adopted this Act.

(c) If at any time the information specified in Section 5(c)(4) or in paragraphs (1), (3), (7), or (13) of subsection (a) changes, the applicant or registered debt management services provider shall notify the Administrator of the change within ten days of the change.

Reporter's Note: These provisions require disclosure of the name of the applicant's registered agent, the name of the applicant, the addresses at which it operates, suspension or revocation of permission to do business in other states, and tax-exempt status. Subsection (c) requires immediate notification of any change in this information. Notification of change in other required information is governed by the next section, which requires notification at the time of renewal of registration.

(d) An application for renewal of registration shall be signed under penalty of

perjury, shall contain the matter required for initial registration by paragraphs (14), (15), (17), and (24) of subsection (a), and shall disclose conspicuously any changes in the information contained in the application or the applicant's immediately prior application for renewal, along with any other information that the Administrator by rule requires.

Reporter's Note: The specified provisions require disclosure of proof of agency accreditation, counselor certification, liability insurance, and volume of business during the preceding year.

(e) Except for the criminal history information specified in subsection (a)(21), the Administrator shall make available to the public the information in an application for registration or renewal of registration.

Reporter's Note: Version B of §§ 5-6 appears on pages 18-22 . Section 7 starts on page 22 .

SECTION 5. REGISTRATION. [VERSION B]

Reporter's Note: Subsections (a)-(c) and (j)-(k) of Version A also appear in Version B. However, since Version B abandons any requirement of issuance of a certificate of registration, subsections (d), (g), (h), and (i) are omitted. Subsections (e)-(f), on grounds for refusal of registration are relocated to § 22, which deals with revocation or suspension of registration.

(a) Except as otherwise limited by Section 3 (scope of the [act]), a person, whether or not located in this state, may not provide debt management services to consumers unless the person is registered with the Administrator. Registration [expires on December 31 of the year in which the registration occurs] [shall be valid for one year].

(b) A debt management services provider must renew its registration every year. The application for renewal must be filed [by December 1 of each year for the following year and expires on December 31 of that following year] [no more than sixty and no fewer than 30 days before the registration expires].

Reporter's Note: A streamlined registration process might omit any requirement of renewal of registration, permitting the initial registration to remain effective until challenged by the

Administrator or withdrawn by the agency. Under that approach, subsection (b) would be omitted.

(c) An application for registration or renewal of registration must be in a form prescribed by the Administrator. It must be accompanied by all of the following:

(1) fees to be established by [the Administrator] [this [act]];

(2) the surety bond required in Section 7;

(3) identification of the trust account required in Section 12; and

(4) consent to the jurisdiction of this state with either:

(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 as agent of the debt management services provider for purposes of service of process.

(d) If a person is registered under this [act], the officers and employees of the person need not be separately registered.

(e) At least semiannually the Administrator shall publicize, on its Internet web site or otherwise, the names of all persons currently registered as debt management services providers under this [act]. If this information is not available on that web site, the Administrator shall make the information available immediately upon request by any person.

SECTION 6. APPLICATION FOR REGISTRATION. [VERSION B]

Reporter's Note: The required information under Version B can be as extensive or as limited as the Committee desires. The most bare-bones version would simply require sufficient identifying information so that the Administrator could pursue further inquiry if any troublesome conduct comes to his or her attention. An intermediate approach would require disclosure of information that by itself might inspire the Administrator to investigate on his or her own initiative even in the absence of complaints. And a fuller approach could impose all the requirements found in

Version A, to facilitate the Administrator's oversight function. This Version B adopts the intermediate approach.

In subsection (a) it omits paragraphs

2 (other names under which the applicant operates),
8 (disclosure of administrative or judicial action by another state,
9 (the applicant's EIN),
10 (compensation information),
11 (expense-to-income ratio),
15 (description of corporate structure),
17 (copy of educational programs),
18 (description of financial analysis and budget planning process), and
20 (results of criminal background check).

In addition, it modifies subsubsections

4 (to require identification only of the officers and not other principals),
6 (to require identification only of states in which the applicant's license has been revoked or suspended and not states in which it has done business, and
13 (to require evidence of accreditation only if the Committee decides that accreditation should be a requirement for doing business).
Version B also omits subsection (b) (permitting compliance by submitting a certificate of registration issued by another state. Further, if the requirement of renewal of registration is dropped from § 5(b), then subsection (d) of this section (requiring information upon renewal of registration) would be omitted.

(a) An application for registration shall be signed under penalty of perjury and include all of the following information, as applicable:

(1) the applicant's name, business address, telephone number, electronic mail address, and Internet web site address;

(2) the address of each location in the state at which the applicant will provide debt management services;

(3) the name and address of each officer of the applicant;

(4) a description of the ownership interest of any officer, director, agent, or employee of the applicant in any affiliate of the applicant or in any other business entity that

provides services to the applicant or any consumer relating to the applicant's debt management services business;

(5) identification of every state that has revoked or suspended the registration or license of:

(A) the applicant or any of its officers or directors; or

(B) any person with whom the applicant or any of its officers or directors was an affiliate at the time of the revocation or suspension;

(6) the number of debt management plans the applicant undertook in each of the three calendar years immediately preceding the year of the application and, with respect to each year, the number of those plans that terminated within the first [nine] months [of the plan] [following the consumer's first monthly payment under a plan] and the number of those plans that terminated before they were completed;

(7) evidence of non-profit status under § 501(c) of the Internal Revenue Code;

(8) evidence of accreditation by [a nationally recognized accrediting organization] [ISO or COA].

Reporter's Note: This subsection assumes that accreditation should be required; as with Version A, it presents the question whether the Act should specify the accrediting organizations, either as exclusive or by way of example. If accreditation is not a requirement of registration, this subsection could be omitted.

(9) evidence that all of the applicant's counselors are certified [within 12 months of their initial employment].

Reporter's Note: This subsection assumes that certification of counselors should be required. If it is not, this subsection could be omitted.

(10) evidence of general liability or fidelity insurance, in an amount equal

to the average monthly balance in the trust account required by Section 12, that insures against dishonesty, fraud, theft, or other malfeasance or misconduct on the part of an employee or other agent of the applicant;

(11) a copy of each debt management services agreement that the applicant will use in this state or with residents of this state;

(12) the applicant's schedule or schedules of fees and charges imposed on consumers;

(13) an irrevocable consent signed by the applicant and the financial institution at which the trust account required by Section 12 is maintained, as follows:

(A) If the trust account is located at a financial institution located in this state, the consent shall provide that in the event the Administrator in connection with enforcement of the [act] pursuant to Section 19, so demands, the financial institution will turn over to the Administrator all funds, books, records, accounts, and other property of the applicant in its control;

(B) If the trust account is at a financial institution located elsewhere, the consent shall provide that in the event the Administrator, in connection with the enforcement of the [act] pursuant to Section 19 so demands, the financial institution will turn over all funds deposited by or on behalf of consumers who reside in this state and copies of all books, records, and accounts relating to those consumers;

(14) the volume of debt management services provided in this state during the preceding twelve months; and

(15) any other information that the Administrator [by rule] reasonably requires.

(b) If at any time the information specified in Section 5(c)(4) or in paragraphs (1), (2), (5), or (7) of subsection (a) changes, the applicant or registered debt management services provider shall notify the Administrator of the change within ten days of the change.

Reporter's Note: These provisions require disclosure of the name of the applicant's registered agent, the name of the applicant, the addresses at which it operates, suspension or revocation of permission to do business in other states, and tax-exempt status. Subsection (b) requires immediate notification of any change in this information. Notification of change in other required information is governed by the next section, which requires notification at the time of renewal of registration.

(c) An application for renewal of registration shall be signed under penalty of perjury, shall contain the matter required for initial registration by paragraphs (8), (9), (10), and (14) of subsection (a), and shall disclose conspicuously any changes in the information contained in the application or the applicant's immediately prior application for renewal, along with any other information that the Administrator by rule requires.

Reporter's Note: The specified provisions require disclosure of proof of agency accreditation, counselor certification, liability insurance, and volume of business during the preceding year.

(d) The Administrator shall make available to the public the information in an application for registration or renewal of registration.

SECTION 7. BOND.

(a) Every debt management services provider shall file a surety bond with the Administrator.

(b) The bond shall run concurrently with the period of registration.

(c)(1) If the principal place of business of the debt management services provider is located in this state, the bond shall run to the state for the benefit of any [consumer/person/customer of the provider].

(2) If the principal place of business of the debt management services provider is not located in this state, the bond shall run to the state for the benefit of any [consumer/person] who resides in this state.

Reporter's Note: As now drafted the bond runs in favor of consumers who reside in other states if the debt management services provider is based in this state. If the debt management services provider has no presence in this state other than its agreements with consumers who live in this state, then the benefits of the bond are limited to residents. This subjects the domestic agency to the bond requirements of this state and also the other state in which its customers reside. Is this acceptable to the Committee?

(d) The surety bond shall be:

(1) in an amount equal to the average size of the trust account required by Section 12, but not less than $25,000 and not more than $1,000,000, as set by the Administrator;

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

(3) conditioned so that the debt management services provider and its agents shall comply with all state and federal law.

(e) In setting the amount of the surety bond, the Administrator shall consider the financial condition and business experience of the debt management services provider, the past [conduct/record] of the debt management services provider in providing debt management services in this state or elsewhere, the projected volume of debt management services provided in the state and to be provided in this state, the potential loss to consumers, and any other factor the Administrator considers appropriate.

(f) If the principal amount of a surety bond is reduced by payment of a claim or a judgment, the debt management services provider shall file a new or additional surety bond in an

amount set by the Administrator, which amount shall be at least the amount of the bond immediately before payment of the claim or judgment.

(g) A penalty under Section 18, a final order under Section 20 or a judgment pursuant to Section 22 may be paid and collected from the proceeds of the surety bond required pursuant to this section.

(h) In lieu of the bond required by this section, the debt management services provider may:

(1) file a certificate of insurance in the amount determined by the Administrator pursuant to subsections (d) and (e), issued by an insurance company rated at least [A] by a nationally recognized rating organization, with a deductible of no more than ten percent of the face amount of the policy coverage and loss payable to customers of the provider, that insures against the risks of:

(A) misappropriation of the trust account and other dishonesty;

(B) violation of the [act] or any other state or federal law; and

(C) uncollectability of judgments;

Reporter's Note: "Law" as used in paragraph (1)(B) encompasses statutes, administrative regulations, and judicial decisions. The inspiration for this subsection is a Georgia statute.

(2) provide an irrevocable letter of credit in the amount determined by the Administrator pursuant to subsections (d) and (e), for the benefit of the customers of the provider, issued by a financial institution approved by the Administrator and covering the risks specified in paragraph (1); or

(3) subject to the approval of the Administrator, deposit and maintain with a financial institution approved by the Administrator for this purpose bonds or other

obligations of the United States or guaranteed by the United States or bonds or other obligations of the state or a political subdivision of the state, in the amount determined by the Administrator pursuant to subsections (d) and (e), designated as available to the Administrator for the benefit of customers of the provider and covering the risks specified in paragraph (1).

Reporter's Note: As an alternative to posting a bond, subsection (h) authorizes the debt management services provider to procure insurance or, subject to the Administrator's approval, 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 consumers. The Administrator by regulation can develop the mechanics for liquidating the securities and paying the proceeds to injured consumers.

Reporter's Note on Section 8: In the November 2003 draft, § 8 contemplated that the debt management services provider would provide an education program and prepare a tentative debt management plan before contracting for the consumer's enrollment in the plan. Section 9 of that draft required the debt management services provider to obtain the creditors' commitment to participate in the plan before finalizing the plan and securing the consumer's assent. Industry representatives at that meeting informed the Committee that some creditors do not respond promptly, or at all, to proposals for DMP's. The Committee may wish to expand the scope of this Act to require recipients of a proposed DMP to respond in a timely fashion (see § 17(c)). Pending a decision to take that step, this draft drops the requirement in the prior draft that the debt management services provider secure the creditor's assent before securing the consumer's assent to a plan.

In the November draft the provisions dealing with electronic communication were part of § 8. In this draft they have been moved to a separate section, new § 9.

SECTION 8. PREREQUISITES FOR ESTABLISHING A DEBT MANAGEMENT PLAN.

(a) Before providing debt management services to a consumer, a debt management services provider shall provide the consumer a list of services and the charges for each, describing:

(1) those services that the provider offers:

(A) free of charge if the consumer enters into a debt management services agreement; and

(B) for a charge if the consumer does not enter into a debt management services agreement; and

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

Reporter's Notes: This appeared in § 13 in the November draft.

(b) No person [other than a debt settlement services provider] shall provide debt management services for a consumer unless the person, through the services of a certified counselor:

(1) has provided the consumer with a consumer education program that contains information about managing [household/personal] finances;

(2) has prepared a financial analysis and a debt management plan for the consumer's debts;

(3) before the consumer has signed any commitment to engage in a debt management plan, has provided:

(A) a copy of the analysis and plan to the consumer in a form the consumer may keep; and

(B) for all creditors identified by the consumer, a list of the creditors that the person reasonably expects to participate in the plan and a list of the creditors, including secured creditors, that the person reasonably expects not to participate; and

(4) before the consumer has signed any commitment to engage in a debt

management plan, has disclosed, in a document that contains nothing else:

(A) that debt management plans are not suitable for all consumers and that the consumer may request information about other ways, including bankruptcy, to deal with indebtedness;

(B) with respect to all the debt management plans that commenced within the immediately preceding three calendar years, the percentage of debt management plans that terminated [within the first [nine] months following the consumer's first payment under a plan] [before completion of the plan];

(C) that the person receives compensation from some or all of the consumer's creditors for its services in [collecting] [receiving and disbursing] amounts owed to those creditors; and

(D) if the debt management services provider is acting as a debt settlement services provider, that nonpayment of the consumer's debt pursuant to the plan of the debt settlement services provider is likely to have an adverse impact on the consumer's credit report and may lead creditors to undertake collection activity, including litigation.

Reporter's Note: If the Act requires debt settlement services providers to provide counseling services, the brackets at the very beginning of this section would be removed.

The Committee must decide whether it wants to specify the contents of the financial analysis required by subparagraph (B). The Michigan Debt Management Act, Mich. Comp. L. §451.422, lists the data that the budget analysis must contain. That list includes, inter alia, the amount and source of all income; gross income per pay period; net income per pay period; the number of exemptions on the Federal Form 1040; the monthly housing payment (including any taxes); the type and amount of all other fixed periodic obligations; the type and amount of food, clothing, vehicle, and all other living expenses, a list of creditors participating; and the periodic amount available for payment toward a debt management plan.

Subsection (a)(1) requires an educational program. That program may consist of an individual session with a counselor (which may also include the analysis required by subsection (a)(2)), a group class, or an electronic educational program.

(c) except as otherwise provided in Section 9(b), has provided the consumer with a completed copy, signed by the person, of an agreement that complies with Sections 10 and 15;

(d) has a reasonable expectation, based on the information provided by the consumer, that the consumer will be able to make the payments that the debt management plan calls for the consumer to make;

(e) has a reasonable expectation, based on the person's past experience, that each creditor of the consumer that is listed as a participating creditor in the debt management plan will accept payment of the consumer's debts as provided in the plan; and

(f) maintains a telephone system, staffed at a level that reasonably permits a consumer to access a counselor or customer service representative, as appropriate, during ordinary business hours.

Reporter's Note: Some inquiries require counseling services; others concern administrative matters such as receipt of a consumer payment, communication that a consumer's payment for a particular month will be late or in a different amount than scheduled, etc. The debt management services provider must provide sufficient staffing to meet the reasonably expectable demand. A debt management services provider that operates by attracting consumers to its web site must comply with this subsection. See § 9(d) and accompanying Reporter's Note.

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

SECTION 9. COMMUNICATION BY ELECTRONIC MEANS.

(a) A debt management services provider may provide the materials required under section (8)(b)(1) via the Internet or other electronic means if:

(1) the consumer is informed of and consents to receiving the materials in

this way;

(2) a certified counselor has reviewed and approved the educational program required by subsection (a)(1) and the computer program or application required by subsection (a)(2) to be used to create the financial analysis and the debt management services plan;

(3) the consumer is advised of the availability of counseling by telephone or in person and is afforded the opportunity for counseling and for discussion of the financial analysis and the initial debt management services plan with a certified counselor;

Reporter's Note: Under subsection (a)(3) if counseling in person is not readily available in reasonable proximity to the consumer's residence, the debt management services provider must offer counseling by telephone. An alternative approach would permit agencies to operate entirely by electronic communication, in which event subsection (a)(3) should 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 consumer wants personal contact he or she should seek out one of those other agencies.

(4) the materials are presented in such a way that the consumer can print them;

(5) the debt management services provider informs the consumer that upon electronic, telephonic, or written request, the person will send the consumer a written copy of the materials required by section 8(b)(1)(C); and

(6) with respect to the disclosure required by section 8(b)(1)(D) via an Internet web site:

(A) the disclosure appears on a separate screen that:

(i) contains no other information; and

(ii) the consumer must see before proceeding to assent to formation of a debt management plan; and

(B) the debt management services provider informs the consumer that, upon electronic, telephonic, or written request it will send the consumer a written copy.

Reporter's Note: To meet the objectives of physical delivery, electronic delivery must satisfy certain requirements of form, such as appearing on a screen that contains no other information. In subparagraph (B) the provider may not limit the medium the consumer may use to request a written copy.

(b) If the information required by subsection 8(b) is delivered electronically, a person may comply with section 8(c) by delivering the copy electronically, provided that the person sends the consumer a written copy within 14 calendar days.

Reporter's Note: Even if a debt management plan is formed over the Internet, the consumer should have a hard copy of the agreement with the debt management services provider. This subsection requires the provider to mail one. Alternatives would be to require the provider to mail one only if the consumer so requests or to require the provider to make it available electronically in a form that the consumer may print out.

(c) A person that complies with any part of this section by means of electronic communication via its Internet web site must disclose on the home page of that web site:

(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.

(d) A person that forms debt management plans with consumers on its Internet web site must respond to electronically communicated requests for counseling and customer service inquiries within a reasonable time during ordinary business hours.

Reporter's Note: The debt management services provider that operates exclusively via its web site must comply with subsection 8(f) (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 of media is left to the consumer. An alternative approach that the Committee may wish to consider is to permit agencies to operate entirely by electronic communication, informing potential customers that if they want personal contact, they should look elsewhere.

SECTION 10. CONTENTS OF WRITTEN AGREEMENT.

Reporter's Note: This section has been reorganized, according to the following scheme: subsection (a) addresses the form of the agreement; subsection (b) states the mandatory disclosures; subsection (c) states the mandatory terms of the agreement; subsection (d) states the prohibited terms; subsections (e) and (f) implement some of the other subsections.

(a) Every debt management services agreement shall:

(1) be dated and signed by the debt management services provider and the consumer; and

(2) include the name and address of the consumer and the name, address, and telephone number of the debt management services provider.

(b) Every debt management services agreement shall disclose:

(1) the services to be provided;

(2) all fees, individually itemized, to be paid by the consumer;

(3) that the debt management services provider may not require a voluntary contribution from the consumer for any service provided to the consumer;

(4) the name and address of the financial institution in which funds of the consumer will be held pending disbursement to the consumer's creditors;

Reporter's Note: This disclosure may not be necessary, especially if the application for registration is open for public inspection. If the provision remains, it will need to be revised to reflect that the provider may change banks during the course of a plan.

(5) the schedule of payments to be made by the consumer, including the amount of each payment, the date on which each payment is due, a good faith estimate of the date of the last payment, and an itemization of each payment showing how much will be retained by the debt management services provider for its services and how much will be distributed to the consumer's creditors;

Reporter's Note: The Comments to this section might state:

If the plan calls for monthly payments of a constant amount, it suffices if the schedule states, "m payments of $n on the p day of each month, commencing on q and a final payment of $r on s," where x is the number of payments, y is the dollar amount of each payment, p is the day of the month, q is the date of the first payment, r is the dollar amount of the last payment, and s is the date of the last payment.

The date of the last payment depends on the creditors' concessions and the amount of payments by the consumer, each of which may change during the course of the plan. It also depends on the timeliness of payment by the consumer. None of this can be known in advance. Therefore, subsection (b)(5) requires a good faith estimate of the date of the final payment.

(6) each creditor of the consumer to which payment will be made, the amount owed to each creditor, the concessions the debt management services provider actually and reasonably expects each creditor to offer, and the schedule of payments to each creditor, including the amount and date on which each payment will be made;

(7) each creditor, including each secured creditor, that is not participating in the debt management plan and to which the debt management services provider will not be directing funds;

Reporter's Note: As with section 8(a)(3)(B) (pre-agreement disclosures), identification of nonparticipating creditors refers only to creditors that the consumer has disclosed to the debt management services provider. This subparagraph does not require the provider to make any disclosures with respect to creditors of which it is unaware.

(8) that the debt management services provider may receive compensation from the consumer's creditors for the benefits it provides to the creditors;

Reporter's Note: The New York statute requires disclosure of the amount of that compensation, but adds that nothing in the section shall require a debt management services provider to share this compensation with the consumer. It may not be possible for the provider to disclose this amount prospectively.

(9) that establishment of a debt management plan may adversely impact the consumer's credit rating and credit scores;

(10) that the consumer may contact the Administrator with any questions or complaints regarding the debt management services provider; and

(11) the address, telephone number, and Internet address or web site of the Administrator. If the Administrator supplies the debt management services provider with any of this information, the provider complies with this subsection only by disclosing the information supplied by the Administrator.

Reporter's Note: An industry representative objected to this requirement because it means that a provider that serves consumers in 50 states will have to have 50 different forms. Still, this is important information for the consumer to have. Perhaps the computerization of the standard document will minimize the difficulty of complying with this disclosure requirement. Alternatively, this disclosure could be added to the disclosures required under § 8(a)(4)(failure rate, creditors as source of agency income, etc.). The risk is that the consumer is less likely to retain that piece of paper than to retain the debt management services agreement.

(c) Every debt management services agreement shall provide that:

(1) the consumer has a right to terminate the agreement at any time, without penalty or obligation, by giving the debt management services provider written or electronic notice;

Reporter's Note: The November 2003 draft contained both a 3-day right of rescission and an unlimited right of termination. If there is a right of termination, there probably is no need for a 3-day right of rescission. Current practice by many counseling agencies is to permit termination at any time; they do not even purport to bind the consumer to a contract. The Committee must decide whether to mandate this practice for all agencies. Note that if the consumer 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. 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 can provide the authority for the industry, as well as the regulation of it.

With respect to any requirement of notice of termination, what should be the consequence of the consumer's failure to give notice? Unless it gives the debt management services provider some right it would otherwise not have, the imposition of a notice requirement may be unwise: it may mislead the consumer into continuing with a debt management plan even after he or she no longer wants it. On the other hand, perhaps the requirement is desirable simply as a matter of bringing closure to the transaction.

(2) the consumer who terminates is entitled to a refund of all unexpended funds that the consumer has paid to the debt management services provider for the reduction of the consumer's debt;

(3) [by executing the agreement,] the consumer authorizes any financial institution in which the debt management services provider has established a trust account to disclose to the Administrator any financial records relating to that trust account;

(4) the consumer may modify the debt management services agreement if at any time:

(A) fewer than 51%, in number or in dollar amount, of the consumer's creditors agree to receive payments from the debt management services provider; or

(B) a creditor that is listed as participating in the debt management plan withdraws from participation in the debt management plan; and

(5) the debt management services provider will notify the consumer [immediately upon/within five days of] learning of a creditor's decision to withdraw from a debt management plan and that this notice will include:

(A) the identity of the creditor; and

(B) the right of the consumer to modify or terminate the debt management services agreement.

(d) A debt management services agreement shall not:

(1) provide for payments by the consumer for longer than [60] months [or other period established by rule of the Administrator];

(2) provide that the law of any state other than this state shall apply;

(3) contain any provision that modifies or limits otherwise available

forums or procedural rights that are necessary or useful to the consumer in the enforcement of the consumer's rights under this [act] or other law;

(4) contain any provision that restricts the consumer's remedies under this [act] or other law;

(5) contain any provision that:

(A) limits or releases the liability of the debt management services provider or its employees, officers, or directors for:

(i) failing to perform the debt management services agreement; or

(ii) violating this [act]; or

(B) indemnifies the debt management services provider, its employees, officers, or directors for any liability arising:

(i) under this [act]; or

(ii) out of performance of the debt management services agreement.

Reporter's Note: Subsection (d) seeks to preserve the consumer's common law and statutory rights against the unilateral decision of a debt management services provider to remove or restrict them. Thus an agency may not evade this Act by adopting the law of another state. 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. Subsection (d)(3) bars provisions requiring resolution of dispute by arbitration. This provision may be preempted by federal law, but would be effective if the Federal Arbitration Act is revised to exempt consumer transactions. In any event, the prohibition on banning class actions removes much of the incentive for arbitration clauses.

(e) The rights and obligations specified in subsection (c) shall exist even if the debt management services provider has not complied with the requirements of that subsection.

[(f) Every debt management services agreement shall be accompanied by a form,

in duplicate, that has the heading "Notice of Termination" and contains in bold face type the following:

> You may cancel this agreement, without any penalty or obligation, at any time before midnight of the third day that begins the day after you sign it. [In addition, you may terminate this agreement at any time after that, but that termination will not take effect until 30 days after you notify (name of debt management services provider)].
>
> To cancel this contract before it takes effect, send an e-mail or send or deliver a signed, dated copy of this notice, or any other written notice to (name of debt management services provider) at (address) before midnight on (date). To terminate this agreement at any later time, you may send an e-mail or use this notice or any other written notice.
>
> I hereby cancel this contract,
>
> [date] ,
>
> [consumer's signature] .]

Reporter's Note: The November draft contained both a 3-day right of rescission and a right of termination This draft contains just the latter. If the Committee opts for a right of termination rather than a 3-day right of rescission, this subsection probably is unnecessary.

SECTION 11. VOID AGREEMENTS.

(a) A debt management services agreement between a consumer and a person that is not properly registered under this [act] shall be void.

(b) All amounts paid by a consumer under a void agreement shall be recoverable, together with costs and reasonable attorney's fees.

(c) A debt management services provider shall have no claim against a consumer for breach of contract and shall have no claim in restitution with respect to an agreement that is void under this section.

Reporter's Note: The Consumer Federation/NCLC report recommends that the contract be void if it violates any requirement of the proposed statute. This section does not go that far. It limits voidness to agreements by a debt management services provider that is not properly registered under § 5. On the other hand, if a provider is not properly registered, it must return to the consumer all funds paid by the consumer, even those passed on to creditors. This is a windfall to the consumer and a penalty to the provider. It is included for its deterrent effect. Subsection (c) clarifies that the provider has no claim against the consumer. The consumer's right to terminate 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 consumer in the past.

SECTION 12. TRUST ACCOUNTS.

(a) Within two business days of receipt, a debt management services provider shall deposit in a trust account established for the benefit of consumers all funds paid by or on behalf of a consumer for disbursement to the consumer's creditors.

Reporter's Note: For debt management services 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 funds of residents of this state into a trust account located in another state and containing the funds of consumers who reside in other states.

(b) Any trust account established pursuant to this section [must not be] [is not] available to creditors of the debt management services provider, except that a consumer from whom, or on whose behalf, the debt management services provider has received funds shall have access to the trust account to the extent that those funds deposited by or on behalf of the consumer have not been distributed to creditors of the consumer.

Reporter's Note: As a person with a claim against a debt management services provider, the

consumer is a "creditor." Nevertheless, the consumer should have access to the trust account, but only to the extent the debt management services provider has received the consumer's funds and has not distributed them to creditors. Without this limitation, the consumer's compensation out of the trust account will come at the expense of other consumers whose funds comprise the trust account. Compensation of the consumer for other loss or damage will have to come from (other) assets of the debt management services provider or the bond required by § 7.

(c) The debt management services provider shall:

(1) maintain separate records of account for each consumer to whom the provider is providing debt management services;

(2) disburse any funds paid by or on behalf of a consumer to creditors of the consumer as disclosed in the debt management services agreement, but in any event in compliance with the due date in the contract between the consumer and each creditor;

(3) promptly correct any payments that are not made or that are misdirected as a result of an error by the debt management services provider and reimburse the consumer for any costs or fees imposed by a creditor as a result of the misdirection.

(d) A debt management services provider shall not commingle the funds in any trust account established for the benefit of consumers with any operating funds of the provider.

Reporter's Note: Existing legislation in Maryland and Maine prohibits commingling a trust account with an operating account. Isn't it more precise to prohibit the commingling of funds in those accounts than to prohibit the commingling of accounts?

(e) The debt management services provider shall reconcile the trust account not less than once a month. The reconciliation shall ascertain the actual cash balance in the account and compare it to the sum of the escrow balances in each consumer's account. If the debt management services provider has more than one trust account, each trust account must be individually scheduled and reconciled.

(f) Each trust account shall at all times have an actual cash balance equal to or

greater than the sum of the escrow balances of each consumer's account, and failure to maintain that amount is cause for a summary suspension of registration under Section 22(c).

(g) If a trust account fails to contain sufficient funds to cover the aggregate consumer balances, the debt management services provider shall immediately upon discovery notify the Administrator by telephone, facsimile, electronic mail, or other method approved by the Administrator. The debt management services provider shall also provide written notice including a description of the remedial action taken.

Reporter's Note: The November draft contained the following provision:

> *(h) If the trust account containing funds paid by or on behalf of consumers who are residents of this State is maintained in a financial institution located outside the State, the debt management services provider shall furnish a bond or irrevocable letter of credit in an amount equal to or exceeding 100% of the average amount of deposits that are allocable to those consumers and are held in the trust account from month to month. This requirement is in addition to the debt management services provider's obligation under Section 7. (derived from Mich. Comp. L. §§ 451.415(1)(c), 451.425(5)).*

This matter is now addressed in § 6(a)(22), which requires the agency and its bank to provide an irrevocable consent to give the Administrator access to the trust account under certain circumstances. This is derived from the California statute.

(h) Before changing the financial institution at which the trust account is located, a debt management services provider shall deliver to the Administrator the consent required by Section 6(a)(22) for registration.

Reporter's Note: This provision refers to consent by the agency and the bank giving the Administrator access to the account in connection with enforcement of the Act.

SECTION 13. LIMITATION ON FEES.

(a) With respect to the provision of debt management services, a debt management services provider may not impose any fees or other charges on a consumer, or

receive any payment from a consumer or other person on behalf of a consumer except as allowed under this section.

(b) Except as otherwise provided in subsections (c) and (m), a person providing debt management services to a consumer may not impose charges or receive payment for debt management services until it and the consumer have executed a debt management services agreement.

Reporter's Note: The phrase "for debt management services" means that a debt management services provider can impose charges for education or counseling. The Committee must decide whether this should be permitted.

(c) A person providing debt management services to a consumer may charge a fee not exceeding $[50] for consultation, education, setting up an account, or the like. The cost of any credit report must be paid from this fee. The fee permitted by this subsection must be deducted from the monthly maintenance fee under a debt management services agreement by a credit against the monthly fee in one or more of the first six months after inception of the agreement.

Reporter's Note: In MI, NE, and WA, the limit is $25. The introductory phrasing, "person providing ..." is intended to limit the cap to transactions that culminate in a debt management plan. If the consumer does not enter a plan, the agency would be free to charge whatever it wants for its education or counseling services. See the Reporter's Note to subsection (e).

(d) A debt management services provider other than a debt settlement services provider may charge a monthly maintenance fee not exceeding the lesser of [6%] of the monthly payment by or on behalf of the consumer or $[8] for each creditor of a consumer that is listed in the debt management services agreement between the debt management services provider and the consumer, except that the total monthly maintenance fee may not exceed $[40].

Reporter's Note: Using the numbers in brackets, the $40 limit would apply if either the number if creditors exceeds four or the monthly payment exceeds $666.

Some states cap the fees at a percentage of the monthly payment by the consumer without regard to the number of creditors. (15% is common in statutes regulating debt pro-raters, the forbears of debt settlement service providers.) Others, e.g., CA, use a combination of a percentage and a fixed cap. WA prohibits imposition of a fee with respect to payments to utility companies or landlords. The ISO standard for accreditation caps the set-up fee at $75 and the monthly fee at $50.

Providers of debt settlement services typically charge a percentage of the forgiven debt, as much as 25%, in addition to large front-end fees and perhaps monthly charges. The cap imposed by this section is much lower, but does not apply to those entities. Subsection (f) establishes the cap for debt settlement services providers.

(e) Except as otherwise provided in subsection (c), a debt settlement services provider may not charge or receive any compensation until the settlement of a consumer's debt with a creditor.

(f) The amount of compensation of a debt settlement services provider may not exceed the lesser of [$600] or [15%] of the amount of debt that the creditor forgives. This limitation on compensation shall apply with respect to each debt included in the debt management services agreement.

Reporter's Note: Subsection (c) permits the debt settlement services provider to receive the set-up fee. Subsection (d) does not authorize a debt settlement services provider to charge a monthly fee, so the ban of subsection (a) applies. So under subsections (a)-(d), a debt settlement services provider may charge the set-up fee but not any monthly fee. In a sense, then, subsection (e) is superfluous; it makes this ban on monthly fees clear, but perhaps the matter should be addressed in a Comment. Subsection (f) permits compensation of up to [$600] (or [15% of $4000] of debt forgiveness) at the time the consumer's debt to a creditor is settled. The Committee needs to decide whether this approach and these limits are appropriate. Perhaps debt settlement services providers should be subject to the same caps as other debt management services providers.

(g) Except as otherwise provided in subsection (c) and subject to subsection (j), a person providing debt management services to a consumer may not charge a fee to:

(1) prepare a financial analysis or an initial budget plan for the consumer;

(2) counsel the consumer about debt management;

(3) provide the consumer with the consumer education program required

by Section 8(a) ; or

(4) terminate a debt management services agreement.

Reporter's Note: The OR statute permits a charge for "education classes" if (1) the classes and the fees are approved by the Administrator or (2) the classes are required by federal or state law, the provider is certified under that law as an approved provider of the classes, and the Administrator approves the fee. If the bankruptcy bill is enacted, any federal law authorizing specific charges for the education required by the bill would be likely to preempt any provision in this Act that caps fees for the services required by that bill. If the federal law authorizes charges by resort to a standard such as "reasonable," a limit in state law might be viewed as defining "reasonable" and not preempted. Does the Committee want to address the maximum fee to be charged for education or counseling services? As currently drafted, this section bans charges for education of counseling only if the consumer enters a debt management plan. Subsection (i) authorizes charges if the consumer does not enter a plan.

(h) A debt management services provider may not require a voluntary contribution from a consumer or any other person for any service provided to the consumer. A debt management services provider may accept voluntary contributions from a consumer but, until thirty days after completion or termination of a debt management plan, the aggregate amount of money received from the consumer, or on behalf of the consumer, may not exceed the total amount the debt management services provider is authorized to charge the consumer under subsections (c) and (d).

Reporter's Note: Subsections (a), (c), and (d) preclude a debt management services provider from requiring a "voluntary" payment. The separate prohibition in this subsection is included in order to leave no doubt that the current practice of many debt management services providers is unlawful. The point presumably could be made in a Comment to one of the other subsections instead of being included in the text of the statute. The limitation on voluntary contributions is designed to prevent evasions of the basic prohibition.

(i) A debt management services provider may not, as a condition of entering into a debt management services agreement, require a consumer to purchase [for a fee] a counseling session, an educational program, or materials and supplies. The provider may, however, impose reasonable charges to the consumer for counseling sessions, educational programs, or supplies if

the consumer does not enter into a debt management services agreement.

Reporter's Note: This subsection authorizes a counseling agency to impose charges for education or counseling services. Any charge must be reasonable. This form of fee cap may be preferable to a fixed dollar amount, but it invites litigation by a disgruntled customer. The Committee must decide whether the Act should limit the fee, and if so, by which approach.

Is the bracketed language redundant?

(j) Notwithstanding subsections (c), (d), and (h), a debt management services provider shall not deny services to a consumer whom it determines cannot pay the provider's usual fee. The provider shall reduce its fee to the extent necessary to enable the consumer to acquire its services.

Reporter's Note: This is the current practice of most counseling agencies and is a requirement for qualification as a § 501(c)(3) entity. The Committee should decide whether it should be given a statutory basis under state law, too. An industry Observer at the November meeting pointed to the risk of adverse selection since virtually all consumers seeking debt management services are financially stressed. The ISO standards for accreditation, however, require that there "be objective evidence of conformance to demonstrate ... the consumer credit counseling agency stands ready to serve all clients who seek service regardless of ... a client's ability to pay ...."

(k) If a payment by a consumer under this section is dishonored, the debt management services provider may impose a reasonable charge on the consumer, not to exceed the amount allowable for dishonored checks or other instruments by Section ___.

Legislative Note: Insert the citation of the statute specifying the maximum charge a payee may impose for a dishonored check.

(l) If a consumer fails to make payments for a period of sixty days, the agreement shall be deemed terminated. The debt management services provider shall immediately return to the consumer any funds of the consumer remaining in its possession or in the trust account.

Reporter's Note: In the context of a debt management plan, if the debt management services provider is acting pursuant to the Act, there will be no funds in the trust account. This provision addresses the provider that has not distributed the funds to creditors as required by §12(c)(2). Perhaps more importantly, it requires the provider of debt settlement services to return the consumer's funds.

At the November meeting industry representatives questioned the need for a provision permitting the consumer to reinstate a debt management services agreement after missing payment for two months. This draft revises the subsection to provide closure to the relationship if the consumer stops paying the agency. The Committee should consider which of these approaches, if either, should appear in the Act. Drawing on the Michigan law, the last draft provided as follows:

> *If a consumer fails to make a payment within 60 days after it is due under a debt management services agreement, the contract is considered canceled by the consumer. In the event of cancellation in this manner, the consumer may, no later than 75 days after the payment was due, file a letter of continuation of the contract. If the consumer does not file a continuation, any funds of the consumer remaining in the trust account shall immediately be returned to the consumer. All the following apply to a letter of continuation:*
>
> *(1) a consumer may file only one letter of continuation for any contract;*
>
> *(2) a letter of continuation must contain a detailed explanation of the reason or reasons for the missed payment or payments;*
>
> *(3) a contract for which a letter of continuation is filed remains in effect and is subject to cancellation for any subsequent failure to make a payment; and*
>
> *(4) the debt management services agreement shall clearly provide for one letter of continuation.*

(m) If a debt management services provider imposes any fee or other charge or receives any funds or other payments not authorized by this section, except as a result of an unintentional and bona fide error notwithstanding the maintenance of procedures reasonably designed to prevent the error:

(1) The debt management services agreement shall be void; and

(2) The debt management services provider [shall immediately return the amount of the unauthorized fees, charges, funds, or payments to the consumer] [shall return to the consumer all amounts received from or on behalf of the consumer].

Reporter's Note: The Committee has two decisions to make here: (a) whether, if the debt management services provider charges excessive fees, the agreement should be void; and (b) if it is void, whether the sanction should be return of the excessive amount or the more deterrence-oriented remedy of returning all funds received from the consumer, including those that were

paid over to the creditors. A similar question is presented under § 11(b)(void agreements).

(n) If as a result of an unintentional and bona fide error, notwithstanding the maintenance of procedures reasonably designed to prevent the error, a debt management services provider receives any funds not authorized by this section, the provider shall return those funds to the consumer no later than two days after receiving them.

(o) The Administrator shall [have the power to] adjust the dollar amounts specified in this section to reflect inflation and changes in the cost-of-living index.

Reporter's Note: The Committee must decide whether there should be adjustment of dollar amounts and, if so, whether adjustments should be mandatory or optional.

SECTION 14. PERIODIC REPORTS AND RETENTION OF RECORDS.

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

(1) at least once each calendar quarter;

(2) upon [rescission or] termination of the debt management services agreement; and

(3) within [five] business days after a request by a consumer.

Reporter's Note: Some debt management services providers provide accountings on a monthly basis. Nothing in this section is intended to discourage this practice.

(b) A debt management services provider shall provide each consumer for whom it has established a debt management plan a written accounting of the following information, as applicable:

(1) the amount of funds received from the consumer since the last report;

(2) the amounts and dates of disbursement made on the consumer's

behalf, or by the consumer upon the direction of the debt management services provider, to each creditor listed in the debt management plan since the last report;

(3) any amount deducted from amounts received from the consumer;

(4) any amount held in reserve; and

(5) the total amount any creditor has agreed to accept as payment in full on any debt owed by the consumer.

Reporter's Note: Subsection (2) has been revised to pick up those agencies, typically providers of debt settlement services, that have the consumer establish a savings account rather than sending payment to be placed in an escrow account.

Subsection (5) also applies to debt settlement agencies. If no creditor has agreed to settlement terms during a reporting period, the subsection does not require the agency to make any disclosure. Hence, the subsection ordinarily would not apply to agencies operating a debt management plan, in which creditors receive the full principal amount of the debt owed them.

(c) A debt management services provider shall maintain books and records for each consumer for whom it provides debt management services for six years following the last payment made by the consumer. The debt management services provider may use electronic or other means of storage, so long as the books and records are readily retrievable.

SECTION 15. PROHIBITED ACTS AND PRACTICES.

Reporter's Note: Most states that regulate credit counseling agencies have a list of prohibited practices. The prohibited practices fall into several categories:

(1) to implement the policy that a debt management services provider should assist the consumer in dealing with his or her creditors but not become a creditor itself or have an adversary relationship with the consumer (subsections 1-5);

(2) to implement the objective of improving, not worsening, the consumer's economic situation (subsection 6);

(3) to prevent deception (subsections 7-11);

(4) to promote the debt management services provider's duty of loyalty to the consumer (subsections 12-18); and

(5) to prevent unfairness or abuse (subsections 19-21).

At the November 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 Committee should consider whether there should be a broader statement regarding the agency's fiduciary status and, if so, exactly what fiduciary status entails. If the Committee decides to include a fiduciary obligation, this section might be an appropriate place to locate it.

(a) A debt management services provider may not:

(1) misappropriate or misapply funds in any trust account;

(2) purchase any debt or obligation of a consumer;

(3) receive or charge any fee [or compensation] in the form of a promissory note or other negotiable instrument other than a check or a demand draft;

Reporter's Note: At the November meeting an Observer suggested narrowing "draft" to "demand draft," Under UCC §3-104 a draft is an unconditional order directing a third party to pay money to the person presenting the draft (or to the order of that person). Narrowing the exception has the effect of permitting a debt management services provider to receive a draft payable on demand, but not a draft directing payment on a future date. The rationale for banning promissory notes would seem to apply to drafts that are to be paid in the future. This draft therefore incorporates the suggestion and permits the use only of demand drafts.

Is the bracketed language desirable?

(4) lend money or provide credit to a consumer;

(5) obtain a mortgage or other security interest in property owned by a consumer;

Reporter's Note: The November draft contained a prohibition against operating as a collection agency, as defined in federal and state law. Those definitions, however, contain an exception for credit counseling agencies. E.g., 15 U.S.C. § 1692a(6)(E). Hence, the prohibition is deleted. But a new subsection has been added to prohibit the offensive behavior that the debt collection statutes prohibit. See subsection (d) infra.

(6) structure a debt management plan in a manner that would result in a negative amortization of any of the consumer'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;

Reporter's Note: At the November 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 consumer completes the debt management plan. Apparently, this is true even if the consumer ends his or her relationship with the counseling agency and self-administers the plan. If the consumer does not self-administer it to completion, the negative amortization remains. Given the high rate of non-completion of plans, the Committee should consider whether it is appropriate to encourage this creditor's practices by allowing plans to include debts that involve negative amortization. A proposed 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.

(7) make any false, misleading, or deceptive representations or knowingly omit any material information in connection with the advertisement, offer, sale, or performance of any service;

Reporter's Note: This subsection prohibits false, etc., representations whether or not the provider knows of the falsity, etc. In accord with existing UDAP statutes, the risk of falsity or deception is on the person that makes an express statement. On the other hand, it prohibits omissions only if the omitted facts are material and are known to the provider.

(8) employ any false, misleading, deceptive, or unfair act or practice;

Reporter's Note: Alternate articulations found in some statutes include: "employ any scheme, device, or artifice to defraud"; "engage in any act, practice, or course of business that would operate as a fraud or deceit upon any person."

Viewed appropriately, the prohibition in this paragraph is so broad and comprehensive as to include the prohibition in the preceding paragraph. The two provisions could be combined into one paragraph or could be left separate. A combined form might read:

> *"employ any unfair or deceptive act or practice, including the knowing omission of any material information [in connection with the advertising, offer, sale, or performance of any service]."*

This version could be located at the end of subsection (a), with the word "other" inserted ("employ any other unfair or deceptive act ....") or it could appear at the beginning of paragraphs (6)-(20). Under this latter approach, subsection (a) would contain current paragraphs (1)-(5) (perhaps under the rubric of fiduciary obligation); a new subsection (b) would state the broad prohibition of unfair or deceptive conduct and then enumerate current paragraphs (6)-(20) as specific examples. Current subsections (b)-(e) would be renumbered (c)-(f).

(9) offer an incentive, including a gift, bonus, premium, reward, or other compensation, to a consumer for executing a debt management services agreement;

(10) make any representation that:

(A) the debt management services provider will provide funds 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 debt management plan will or may prevent litigation, garnishment, attachment, repossession, foreclosure, eviction, or loss of employment;

Reporter's Note: Subparagraphs (B)-(C) prohibit certain representations that are used to entice consumers to sign up for debt management and debt settlement plans. They are prohibited here even when they are true because they too often are untrue.

(11) represent that it is authorized or competent to furnish legal advice or perform legal services;

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

(A) the Administrator, upon proper demand; or

(B) a creditor of the consumer, and then only to the extent necessary to secure the cooperation of the creditor in the debt management plan;

Reporter's Note: So long as the debt management services provider strips out the consumer's

identifying information, it is free to disclose information for purposes of academic research or construction of a scoring system.

(13) offer, pay, or give any [substantial] gift, bonus, premium, reward, or other compensation to a person for referring a prospective customer, except to the extent the payment is reasonable and represents only compensation for the service of determining whether the services of the debt management services provider are suitable for the consumer;

Reporter's Note: The November draft prohibited referral fees altogether. The current draft prohibits 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 debt management services provider. The phrase "to the extent that" is intended to permit 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 counseling industry has declined over the last decade. The Committee should decide whether to prohibit the creditor from passing this indirect cost on to the debt management services provider.

(14) receive any bonus, commission, or other consideration for referring any consumer to any person for any reason;

Reporter's Note: This provision is the converse of subsection (13). Its purpose is to reduce or eliminate the economic incentive for an agency to refer consumers to persons who provide loans or other products.

The November draft prohibited the agency from receiving "any cash, fee, gift, bonus, premium, reward, or other compensation from a person other than the consumer or person on the consumer's behalf in connection with the debt management services provider's business of providing debt management services." The former version went too far, in that it would bar a counseling agency from receiving "fair-share" funds from creditors. Additionally, it would not achieve its objective because it applies "in connection with the ... business of providing debt management services," but "debt management services" is defined to mean receiving money from the consumer and distributing it to creditors. Thus the prior version might permit the agency to receive referral fees with respect to consumers who do not sign up for a debt management plan. The current version avoids these problems.

(15) except as otherwise provided for debt settlement services providers in Section 13(f), fail to provide to the consumer the full benefit of any compromise of a debt arranged by the provider;

Reporter's Note: The cross reference permits debt settlement agencies to receive [25%] of the forgiven debt. Other agencies would not be permitted to receive any portion of any forgiven debt. The drafting may need further attention: by arranging for the compromise of "one or more debts," an agency could bring itself within the definition of debt settlement services provider and thus be authorized by § 13(f) to receive up to [25%] of the forgiven debt. Of course, the agency would then be subject to all other sections applicable to debt settlement services providers.

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

Reporter's Note: This subsection is intended to prohibit the sale to consumers 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. Are there other evasions that should specifically be mentioned, or does the catch-all at the end of the paragraph suffice?

(17) compromise any debts of a consumer in connection with a debt management plan unless the provider has obtained the prior written [or electronically communicated] approval of the consumer, and the compromise benefits the consumer;

Reporter's Note: This subsection contemplates that during the course of a debt management plan, which is defined § 2(e) as contemplating full payment of all creditors, it may become possible to settle a particular debt for less than full payment. Is this subsection necessary or desirable? If so, further attention will need to be given the definition of debt settlement services provider. See the Reporter's Note to paragraph (15).

(18) compensate its employees on the basis of any formula that incorporates the number of consumers the employee induces to form a debt management services agreement;

(19) take a confession of judgment or power of attorney to confess judgment against a consumer or appear as the consumer in a judicial proceeding; or

(20) furnish legal advice or perform legal services of any kind, including the preparation of or advice concerning a release of attachment or garnishment, stipulation,

affidavit for exemption, compromise agreement or other legal or court document.

Reporter's Note: Subsection (11) prohibits representations that an agency is authorized or competent to provide legal services. This subsection prohibits performing those services. The unauthorized practice of law is prohibited by other law, and this subsection makes it a violation of this Act, too.

(b) Notwithstanding any other provision of law, a debt management services provider may not, directly or indirectly, collect any fee for referring, advising, procuring, arranging, or assisting a consumer in obtaining any extension of credit or other consumer service from a lender or service provider if the debt management services provider, or any owner, officer, director, principal, employee, or affiliate of it has an ownership interest greater than [one] percent in the lender or service provider or if any owner, officer, director, principal, or affiliate is a partner, director, officer, employee, or affiliate of the lender or service provider.

Reporter's Note: This subsection overlaps subsection (a)(14)(prohibiting referral fees), but is not limited to referral fees. It is narrower than subsection (a)(14) in that it only applies if there is a particular relationship between the agency and the other person.

Are all the verbs ("referring, advising, procuring, arranging, or assisting") necessary?

The prohibition is drawn from the Maryland statute, but the Maryland statute only bans the practice if the debt management services provider fails to disclose the relationship. If self-dealing is offensive, disclosure is not a sufficient response.

Under this draft the ban applies if an employee of the agency has an ownership interest in the third party, but not if the employee is a director, officer, or employee of the third party. Is this narrowing appropriate? On the other hand, the ban applies if an affiliate (defined in § 2(b)) is an affiliate of the third party. Is this too broad?

(c)(1) Except as otherwise provided in paragraph (2) of this subsection, a debt management services provider may not purchase goods, services, or facilities from any person if:

(A) any owner, officer, director, principal, employee, or affiliate of the debt management services provider has an ownership interest greater than [one] percent in that person, or

(B) any owner, officer, director, principal, or affiliate of the debt management services provider is an owner, partner, director, officer, employee, or affiliate of the provider of those goods, services, or facilities.

(2) Nothing in this subsection shall prohibit a debt management services provider from purchasing legal, accounting, or banking services [or other services approved by the Administrator upon request by the provider] from a member of its board of directors, provided that those services are provided at a cost less than the cost generally charged by the provider of those services to other persons.

Reporter's Note: The purpose of this subsection is to prohibit the use of a counseling agency to channel funds to related entities. Subsection (2) recognizes that members of an agency's board of directors may provide services for free or on a reduced-fee basis. To the extent this practice benefits the agency more than obtaining the services elsewhere would benefit it, the practice seems unobjectionable. Limiting the nature of the services to those specified permits the Administrator to prevent attempted evasions of the limit.

The bracketed language contemplates that an agency petition the Administrator, not that the Administrator may promulgate a rule with respect to a particular kind of service. Otherwise, a provider of the service authorized by rule might provide that service just to the agency and at an above-market rate. This may be too much fine-tuning to appear in the statute, and may impose an undue burden on the Administrator, especially if the Administrator is called upon to respond to multiple requests from dozens or hundreds of agencies nationwide. An alternate approach would leave it to the Administrator to deal with evasions of this sort. Under this approach subsection (2) would state:

> *"Nothing in this subsection shall prohibit a debt management services provider from purchasing legal, accounting, banking, or other services [approved by the Administrator] from a member of its board of directors, provided that the provider of those services provides those services generally and provides them to the debt management services provider at a cost less than the cost generally charged by the provider of those services to other persons."*

Another question is whether the exception should be limited to services provided by members of the board. Should an agency be able to purchase services from other insiders, so long as it is at a below-market rate? The risk, of course, is re-opening the door to private inurement.

(d)(1) A debt management services provider may not, in connection with collecting debts owed it or another person:

(A) use any false, deceptive, or misleading representation or means;

(B) engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person; or

(C) use unfair or unconscionable means.

(2) In applying the provisions of subsection (1), the Administrator and the courts shall be guided by interpretations given to sections 806, 807, and 808 of the Federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692d-1692f).

Reporter's Note: The language of subparagraphs (A)-(C) is drawn verbatim from the Federal statute. To eliminate some of the vagueness of the terms in these provisions, the courts are directed to look to the interpretations given the Federal statute. This follows the approach of statutes in more than 20 states, which direct their courts, in applying the state's unfair or deceptive acts or practices statutes, to be guided by the federal courts' interpretation of section 5 of the FTC Act.

(e) Nothing in this [act] shall be construed as prohibiting an assignment of wages by a consumer to a debt management services provider, to the extent permitted by law other than this [act].

SECTION 16. ADVERTISING; MANDATORY PUBLIC EDUCATION.

Reporter's Note: Subsection (a) seeks to counteract the deception and pressure often exercised by debt management services providers that engage in extensive advertising. Subsection (b) seeks to expand the amount of public education concerning management of personal finances.

(a) All advertising, regardless of medium, must disclose the information specified in Section 8(b)(4) .

Reporter's Note: The cross reference is to the provision requiring disclosure of the success rate of the agency's DMP's; that DMP's are not suitable for all consumers; that other alternatives for dealing with indebtedness are available; and, if applicable, that nonpayment of debt pursuant to a debt settlement plan is likely to have an adverse impact on the consumer's credit

report.

(b) In every calendar year every debt management services provider shall spend on personal finance public education that contains no self promotion an amount of money equal to the amount it spends on advertising via television, radio, or the Internet, including e-mail.

(1) For purposes of this subsection, self promotion does not include mentioning the name of the debt management services provider as the provider of the education at the beginning or the end, or both, of the education.

(2) If the debt management services provider is identified, the education program must clearly and conspicuously disclose the information specified in section 8(b)(4) .

SECTION 17. DUTIES OF CREDITORS.

Reporter's Note: The Committee has not considered or discussed whether this Act should impose any duties on creditors that receive payments from a debt management services provider. This section is presented in order to stimulate discussion of the issue.

The credit counseling industry is largely a creation of the credit card industry. The expansion of credit card debt in the last two decades is at least partially a result of the promotional activities of those credit card issuers. Arguably, at the least, creditors have responsibility for dealing with the problems in the counseling industry that led to the creation of this reform effort. Creditors are assuming some responsibility on their own, as they revise the manner in which they compensate the agencies for the benefits the agencies provide them. But it may be appropriate to impose some legal obligations on the creditors, too. This section illustrates several ways in which this might be done.

Caveat: Credit card issuers that are federally chartered banks or subsidiaries of those banks probably would not be subject to these restrictions. The same is probably true of state-chartered banks and their subsidiaries. Nevertheless, it may still be appropriate for the state to assert its view of the proper public policy with respect to these matters. It might even influence the rules adopted by the federal regulators.

(a)(1) For purposes of this section only, "consumer" means a consumer who resides in this state;

(2) For purposes of this section only, "creditor" means a creditor that extends credit to consumers pursuant to an "open end credit plan," as defined in the Federal Truth-in-Lending Act §103(a)(*i*), 15 U.S.C. § 1602(a)(*i*); and

(3) For purposes of subsections (c), (d), (e), and (f) only, "debt management services provider" means a debt management services provider that is registered in this state.

Reporter's Note: The reference in subsection (a)(2) is to "open end credit plan" because the Truth-in-Lending statute uses that term. The FRB's implementing regulation, known as Regulation Z, defines and uses the term "open-end credit." In interpreting the definition in this section, the intent is that the courts will interpret "open-end credit plan" in accordance with the interpretation given the term by Regulation Z, the Board's Official Commentary, and judicial decisions.

(b) A creditor may not accept a proposed debt management plan from a debt management services provider unless the debt management services provider is registered under Section 5 .

(c) A creditor that receives a proposal for a debt management services plan on behalf of a consumer from a debt management services provider shall respond to that proposal within 30 days of receiving it.

(d) A creditor that receives payment on a consumer's behalf from a debt management services provider shall permit the [consumer/provider] to alter the date of the month on which payment is due.

(e) A creditor may not increase the cost of credit or make other changes in terms adverse to the consumer, in whole or in part because the consumer has entered a debt management plan with a debt management services provider.

(f) A creditor that receives funds on behalf of consumers from debt management

services providers [other than debt settlement services providers] shall compensate those debt management services providers. The creditor may allocate the payments among those providers in whatever way it elects, so long as the aggregate payments to all those providers is at least [10%] of the aggregate amounts received from them.

(g) A creditor may not, directly or indirectly, impose a fee, commission, or other charge on a debt management services provider for referring consumers to the provider.

Reporter's Note: The Reporter's Note to § 15(a)(13) raises the issue whether agencies should be permitted to pay for screening services. This subsection (g) presumes that the answer is "no," and complements that section by barring the creditor from charging for screening services.

(h) A creditor that receives more than [one million] dollars in a calendar year from debt management services providers shall, pursuant to a rule promulgated by the Administrator, pay the Administrator [$10,000] to support the administration of this [act].

SECTION 18. CRIMINAL PENALTY. Any person who knowingly and willfully violates any provision of this [act] is guilty of a [felony] and on conviction is subject to a fine not exceeding [$1,000] for the first violation and not exceeding [$5,000] for each subsequent violation or imprisonment not exceeding [five] years, or both.

SECTION 19. POWERS OF ADMINISTRATOR.

(a) The Administrator shall determine whether to approve the application for registration and the renewal of registration of debt management services providers.

Reporter's Note: If the streamlined registration process in Alternative B is adopted for §§ 5-6, this subsection would be omitted.

(b) The Administrator may:

(1) investigate the activities of persons subject to this [act] to determine compliance with it, including examination of the books, accounts, and records of any debt management services provider;

(2) charge to the debt management services provider the reasonable expenses necessarily incurred to conduct the examination; and

(3) require or permit any person to file a statement under oath and otherwise subject to the penalties of perjury, as to all the facts and circumstances of the matter to be investigated.

(c) Failure to comply with subsection (b)(3) within 15 days after request shall be the basis for issuance of a cease and desist order.

(d) The Administrator may receive and act on complaints, take action to obtain voluntary compliance with this [act], and refer cases to the Attorney General for prosecution.

(e) The Administrator may adopt rules and regulations to carry out the requirements of this [act] in accordance with Section ____.

Legislative Note: Citation to the state's Administrative Procedure Act should be inserted here.

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

(g) The Administrator may appropriate for the use of the Administrator the aggregate of fees, examination expense reimbursement, and any other payment made to the Administrator pursuant to this [act] and may carry forward any balance of funds from a fiscal year to be expended for the same purpose in the following fiscal year.

Reporter's Note: See MD §12-905 for 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 received by the Administrator pursuant to section 20 shall be paid to the state treasury and credited to the general funds, and then be available for general governmental expenses.

SECTION 20. ADMINISTRATIVE REMEDIES.

(a) The Administrator may enforce the provisions of this [act] and regulations adopted hereunder by:

(1) ordering the violator to cease and desist from the violation and any similar violations;

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

(3) imposing a civil penalty not exceeding [$1,000] for each violation;

(4) revoking, suspending, or denying renewal of the debt management services provider's registration in accordance with Section 22; and

(5) commencing a civil action to obtain restitution, an injunction or other equitable relief, or both.

Reporter's Note: The OR statute provides that the consumer may initiate proceedings before the Administrator, who is empowered to award the consumer damages, which may be recovered by resort to the debt management services provider's bond. Does the Committee want to establish this adjudicatory function for the Administrator in this Act?

(b) An order issued under this section may apply to an agent or employee of a debt management services provider.

(c) If any person violates or knowingly authorizes, directs, or aids in the violation of a final order issued under subsection (a)(1) or (a)(2), the Administrator may impose a civil penalty not exceeding [$10,000] for each violation [from which the violator failed to cease and

desist or for which the violator failed to take corrective affirmative action].

Reporter's Note: Is the bracketed language at the end of the subsection superfluous?

(d) The Administrator may file a petition in any [county] seeking enforcement of an order issued under this section.

(e) In determining the amount of a civil penalty to be imposed under subsection (a) or (c), the Administrator shall consider the seriousness of the violation, the good faith of the violator, the violator's history of previous violations, the deleterious effect of the violation on the public, the assets of the violator, and any other factors the Administrator deems relevant to the determination of the civil penalty.

SECTION 21. VIOLATION OF UNFAIR PRACTICES STATUTE. A violation of this [act] constitutes [an unfair or deceptive act or practice] in violation of Section _____.

Legislative Note: Insert the citation to the state's little-FTC or deceptive practices act.

This entire Act could be appended to and be a part of that act. Depending on the provisions of that other act, this would permit deletion of § 18 (criminal penalty), § 19(b)-(e) (investigatory power, referral to the attorney general, rule-making power), and much of § 20 (administrative remedies).

SECTION 22. SUSPENSION, REVOCATION, OR NON-RENEWAL OF REGISTRATION.

(a) After notice and hearing, the administrator may suspend, revoke, or deny renewal of a debt management services provider's registration if the Administrator finds that any of the conditions of subsection (b) is met.

(b) The grounds for suspension, revocation, or denial of renewal or registration are any of the following:

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

(2) the debt management services provider has violated a material provision of this [act] or rule or order of the Administrator under this Act;

(3) the debt management services provider is insolvent;

(4) the debt management services provider has refused to permit the Administrator to make an examination authorized by this Act; or

(5) the debt management services provider has failed to respond within a reasonable time and in an appropriate manner to communications from the Administrator;

Reporter's Note: If the Committee adopts the streamlined registration procedure in Alternative B of §§ 5-6, there should be some additional grounds for suspension, etc., viz., those matters that are grounds for denial of registration under the registration procedure in Alternative A of those sections. Subsection (b) of this section would continue as follows:

(6) another state has revoked or suspended the registration or license of the debt management services provider;

(7) an employee, officer, director, owner, has ever been convicted of a crime involving violation of state or federal securities laws, moral turpitude or fraudulent or dishonest actions (NY), including forgery, embezzlement, obtaining money under false pretenses, larceny, extortion, or any similar offense (MI);

(8) the debt management services provider or any of its officers, directors, or owners has defaulted in the payment of money collected for others, including the discharge of debts through bankruptcy;

(9) the application for registration was not accompanied by the applicable fees or contains erroneous or incomplete information;

(10) the Administrator finds that the financial responsibility, experience, character, or general fitness of the applicant or its officers, directors, employees, or agents is not such as to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of this [act]; or

(11) the board of directors of the debt management services provider is not independent of the provider's officers, employees, and agents. A board of directors is not independent if

more than one-third of its members

(A) are affiliates of the provider; or

(B) within [ten] years of first becoming a director of the applicant, were employed by or directors of a person that receives non-trivial amounts of payment from the provider.

(c) If the debt management services provider fails to comply with Section 12(f) or if the Administrator otherwise finds that the public health, safety, or welfare requires emergency action, summary suspension may be ordered effective on the date specified in the order. A hearing shall occur promptly thereafter.

Reporter's Note: Section 12(f) deals with failure to maintain a trust account in an amount at least equal to the sum of the balances in each consumer's escrow account.

(d) If the Administrator suspends[,] or revokes [, or denies renewal of] the registration of a debt management services provider, the Administrator shall be empowered to seize whatever records and assets of the provider are located in this state. This power is in addition to the powers of the Administrator under the consent required by Section 6(a)(23).

Reporter's Note: Section 6(a)(23) requires the agency to provide an irrevocable consent by the bank holding the trust account to enable the Administrator to access to the account.

SECTION 23. PRIVATE ENFORCEMENT.

(a) In addition to any other remedies provided in this [act], a consumer who is injured by a violation of this [act], a rule promulgated by the Administrator under this [act], or by any unfair, unconscionable, or deceptive act or practice shall have a right to recover:

(1) actual damages or $[1,000], whichever is greater;

(2) subject to subsection (c), punitive damages; and

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

the amount of time involved.

(b) The consumer may proceed by individual action or by class action. In a class action:

(1) the minimum damages provision of subsection (a)(1) shall not apply; and

(2) punitive damages may not exceed [$10,000] per class member.

(c) In determining the amount of punitive damages under subsection (a)(2) or (b)(2), the court shall consider the seriousness of the violation, the good faith of the violator, the violator's history of previous violations, the deleterious effect of the violation on the public, the assets of the violator, and any other factors the court deems relevant to the determination of the damages.

SECTION 24. STATUTE OF LIMITATIONS.

(a) An action brought pursuant to this [act] shall be commenced within [four] years from the later of:

(1) the consumer's last transmission of funds to the debt management services provider;

(2) the debt management services provider's last disbursement to the creditors;

(3) the debt management services provider's last accounting to the consumer pursuant to Section 14(a)(1)-(2) ; and

(4) the date on which the consumer discovered or reasonably should have discovered the facts giving rise to the consumer's claim.

Reporter's Note: What are the appropriate triggers to start the statute of limitations? Presumably it should not be simply the date of the violation, because if the violation appears in the documents, the statute may have run before the consumer completes the debt management plan. Under the Uniform Consumer Sales Practices Act (§ 11), triggers are violation of the Act, last payment by the consumer, or termination of proceedings by the Administrator.

(b) The period prescribed in subsection (a)(4) shall be tolled during any period during which the defendant has materially and willfully misrepresented any information required by this [act] to be disclosed to a consumer and the information so misrepresented is material to the establishment of the liability of the defendant under this [act].

Reporter's Note: The language of subsection (b) is from H.R. 3331, a bill to regulate debt management services providers.

SECTION 25. 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 of 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 26. 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)).

SECTION 27. RELATION TO LAW OF OTHER STATES.

(a) If compliance with any provision of this [act] by a debt management services provider located in this state would constitute a violation in another state of a statute that regulates debt management services providers, the debt management services provider need not comply with the provisions of this [act] with respect to its operations in that other state.

(b) Failure to comply with a provision of this [act] pursuant to subsection (a) is not :

(1) a violation of this [act]; or

(2) grounds for denial or[,] suspension[, or revocation] of a license under this [act].

Reporter's Note: This section addresses the situation of an agency that is subject to inconsistent requirements in two states. It accommodates only agencies that are physically located in this state. A domestic agency must comply with this Act with respect to consumers in this state. It must comply with this Act also with respect to consumers in other states, except to the extent that compliance with the law of those other states would put it in violation of this Act, to which extent it may ignore this Act. Agencies located in other states would have to comply with the requirements of this Act even if that puts them in violation of the law of the state in which they are located. The section thus in all cases gives priority to the state in which the affected consumers reside.

SECTION 28. 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 29. EFFECTIVE DATE. This [act] takes effect on [_____].

SECTION 30. REPEAL. The following sections are repealed:

Legislative Note: Insert the citation to any existing legislation regulating debt management services.

SECTION 31. TRANSITIONAL PROVISIONS; APPLICATION TO EXISTING RELATIONSHIPS. Transactions validly 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 any law amended, repealed, or modified by this [act] as though the amendment, repeal, or modification had not occurred.

Reporter's Note: As elsewhere, in this section "law" includes statutes, administrative regulations, and judicial decisions.