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FOR DISCUSSION ONLY

UNIFORM CONSUMER DEBT COUNSELING ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

September 20, 2004

UNIFORM CONSUMER DEBT COUNSELING ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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Prefatory Note

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

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

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

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

The Drafting Committee first met in Chicago in November 2003 and considered a discussion draft. Committee members reacted to numerous aspects of that draft but the Committee did not take formal votes on any of its provisions. The Committee met again in March 2004. This draft reflects the deliberations and tentative decisions of the Committee at that meeting with respect to sections 1-21. At the Annual Meeting of the Conference in August 2004, the drafting committee received numerous comments on the draft, and many of them are reflected in this draft. Others are identified in the Preliminary Comments. In addition, the Committee of the Whole adopted two sense-of-the-house resolutions: the Act should be drafted so as to apply to both for-profit and not-for-profit entities; and the scope of the Act should encompass debt settlement companies as well as debt management entities. This draft reflects those decisions.

Several provisions have been revised to conform to federal and state law governing electronic communication. Further revision is contemplated.

UNIFORM CONSUMER DEBT COUNSELING ACT

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

Preliminary Comments

In view of the decision to include debt settlement companies within the scope of the Act, the Act needs a new title, e.g., Uniform Debt Management and Debt Settlement Services Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Administrator" means the _____.

(2) "Affiliate," with respect to an individual, means:

(A) the spouse of the individual;

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

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

(D) [any other individual related to the individual within the third degree of consanguinity or affinity] [a parent, grandparent, aunt or uncle, great-aunt or –uncle, first- or second-cousin, sibling, child, niece or nephew, grand-niece or –nephew, whether related by the whole or the half blood, adoption, or step relationship, and includes the spouse of any of them]; or

(E) any other person residing with the individual.

(3) "Affiliate," with respect to an entity, means:

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

(B) an officer of, or a person performing similar functions with respect to, the entity;

(C) a director of, or a person performing similar functions with respect to the entity;

(D) a person that has more than a ten-percent ownership interest in, is employed by, or is a director of a person that receives or received more than $25,000 in either the current year or the preceding year from the entity;

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

(F) the spouse of or an individual residing with an individual described in paragraph (A), (B), (C), (D), or (E); or

(G) an individual who is related to an individual or the spouse of an individual described in paragraph (A), (B), (C), (D) or (E) within the third degree of consanguinity or affinity.

(4) "Certified counselor" means an individual certified by [an independent, nationally recognized certification organization][a certification provider that is not affiliated with the employer of the counselor and that authenticates the competence of counselors providing education and assistance to individuals in connection with debt management services] or by a training program approved by the administrator.

(5) "Day" means calendar day.

(6) "Debt-management plan" means [a plan under which money will be paid by or on behalf of an individual {through a debt-management-services provider} to obtain from one

or more creditors of the individual concessions consisting of reduced interest or delinquency fees][a plan under which a debt-management-services provider will provide debt-management services to an individual].

(7) "Debt-management services" means:

(A) receiving money or anything of value from or on behalf of an individual for the purpose of distributing it to one or more creditors of the individual in full or partial payment of the individual's obligations; or

(B) debt-settlement services, even if the provider of the debt-settlement services never has possession of the individual's money.

(8) "Debt-management-services agreement" means an agreement between a debt-management-services provider and an individual for the performance of debt-management services.

(9) "Debt-management-services provider" means a person that, in the current calendar year or in the immediately preceding calendar year, has provided debt-management services to more than three individuals.

(10) "Debt-settlement services" means acting or negotiating on behalf of an individual with one or more creditors of the individual for the purpose of securing the creditor's assent to receiving in full satisfaction of the debt owed to it an amount less than the full principal of the debt [in fewer than four installments].

(11) "Employee" means an individual who provides services related to debt-management services whether or not paid by the debt-management-services provider that receives the benefit of the individual's services.

(12) "Entity" means a person other than an individual;

(13) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity. The term does not include a public corporation, government, or governmental subdivision, agency, or instrumentality.

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

(15) "Signed" includes the use of any electronic symbol or process executed or adopted with present intention to identify the person and adopt or accept a record.

(16) "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.

(17) "Trust account" means an account held by a debt-management-services provider that is:

(A) established in a state- or federally [chartered,] insured bank;

(B) separate from the debt-management-services provider's other accounts;

(C) designated as a "trust account" or other designation indicating that the money in the account is not the money of the debt-management-services provider or its officers, employees, or agents; and

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

Legislative Note: In paragraph (1) insert the name of the agency or entity that will be charged with enforcement of this Act. States must decide whether to create a new administrative agency or charge an existing entity with enforcement of this Act. If the latter, states must decide which existing entity to select. Logical choices include the attorney general or other entity charged with consumer protection generally (under a little-FTC act or similar statute), 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.

Preliminary Comments

Paragraphs (2)-(3)(affiliate): The term "affiliate" is used at three places in the Act: as a disclosure item in the application for registration (§ 6(c)(5), (7), (8)) ; as a tool to ensure the independence of an agency's board of directors (§ 8(b)(6), (c)) ; and as a limit on an agency's ability to engage in self-dealing (§ 23(b)-(c)) .

The definitions of "affiliate" have not yet been considered by the Drafting Committee. The definition in paragraph (2) is drawn from § 9-102(a), but it includes more relatives in the definition. The definition in Article 9 is limited to relatives who live in the individual's home. This excludes such close relatives as nieces and first cousins unless they live in the individual's home. The language in subsections (2)(D) and (3)(G) includes those relatives regardless of where they live. Consanguinity denotes a relationship in which the persons share a common ancestor. Affinity denotes a relationship in which the persons are related by marriage. Subsection 2(E) is new, to avoid the need to define "spouse." Paragraph (E) is broader than the former definition of spouse, because it does not require that the person be living with the individual "as if married."

At the Annual Meeting a commissioner objected to the use of "consanguinity" and suggested we look to the Uniform Adoption Act, which lists the specific relatives. The second bracketed language takes that approach. If the Committee adopts this approach, paragraph (B) (sibling) is redundant.

If the word "consanguinity" remains in the Act, I would contemplate a Comment along the following lines:

> Consanguinity is the relation of persons with a common ancestor. Affinity is the relation that results from marriage. To determine if one person is within the third degree of consanguinity or affinity of another, construct a family tree to the extent necessary to show both persons. Starting with either person, the other is within the third degree if it takes no more than three steps, either vertically or horizontally, on the tree to reach that person. It includes parent, grandparent, great-grandparent, sibling, first cousin, aunt, uncle, great-aunt, great-uncle, child, grandchild, great-grandchild, niece, or nephew of an individual, whether related to the individual by the whole or the half blood or adoption.

Another commissioner suggested that there ought not be two definitions of the same word

(viz., "affiliate") and that the Act use "relative" instead. This is feasible but would mean either that the later sections that use "affiliate" would instead use "affiliate or relative." Or the definition of "affiliate" would be revised to include "relative." The Committee on Style did not object to the double definition of "affiliate," and it is a practice drawn from UCC Article 9. What is the Committee's pleasure?

The definition in paragraph (3) also is drawn from the definition of "person related to" in UCC § 9-102(a), but adds paragraph (C). The Committee will need to consider whether ten percent is the appropriate level of ownership to make one an affiliate and whether the threshold for directors should be stated in terms of a specific dollar amount (and what that amount should be) or in terms of a vague standard such as receipt of "non-trivial amounts of payment." Under paragraph (3)(C) a person is not an affiliate until after the person of which it is an owner, employee, or director has received $25,001 in the relevant period.

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

Paragraph (4): The language in the second set of brackets is drawn from the recently enacted Virginia statute (§6.1-363.7(5)).

Paragraph (6)(debt-management plan): In the context of this definition, "reduced" interest or fees encompasses the complete waiver or elimination of them. The phrase "through a debt-management-services provider" has been bracketed to raise the question whether it should be deleted: should the Act anticipate a debt-management services industry in which the provider negotiates a plan and the consumer pays the creditors directly? If so, paragraph (7) should also be modified accordingly. The second bracketed clause is offered as an alternative to the first. It would pull debt settlement plans into the definition of "debt management plan." This might simplify the Act by not having to define "debt settlement plans" and in subsequent sections not having to refer to both types of plans.

Paragraph (7)(debt-management services): At the March 2004 meeting, the sense of the Drafting Committee was that the definition should encompass those who provide only rehabilitation or counseling services and perhaps even those who only provide education about personal finance. This so broadens the definition that the Act would apply to colleges and even elementary schools that provide instruction on personal finance. The Drafting Committee still needs to decide the extent to which it desires the Act to go beyond regulating those who receive or direct the individual's money for distribution to creditors. Pending that decision, the definition does not encompass those entities that provide only educational or counseling services concerning management of personal finance.

If the definition of debt-management plan is revised to delete the phrase "through a debt-management-services provider," the definition of debt-management services needs to be revised, too. For example:

"Debt-management services" means acting as an intermediary between an individual and one or more creditors of the individual for the purpose of obtaining concessions, such as reduction of interest or principal, in the terms of payment. [The term includes debt-settlement services.]"

This definition encompasses debt-settlement agencies, which are separately defined in paragraph 10, whether they receive periodic payments from the individual or instead have the individual establish an account for the accumulation of money to be paid to creditors at the agency's direction. The definition does not encompass a creditor that compromises a claim with its debtor. Although the creditor may receive money from an individual, it is not for the purpose of "distributing" that money to a creditor.

Paragraph (8)(debt-management-services agreement): This definition does not incorporate any requirement of "written" or "record." An oral agreement is within this definition. Requirements of form appear in Sections 14-16.

Paragraph (9)(debt-management-services provider): The purpose of limiting the definition to persons that provide or offer to provide debt-management services to more than three individuals is to exclude from the scope of this Act persons who informally assist their friends or relatives by, for example, accessing the individual's checking account to pay the individual's bills. A person is not subject to the constraints placed on debt-management-service providers until it has provided or offered to provide debt-management services to the fourth individual. Thereafter, the person must comply with this Act. The definition no longer includes an entity that merely offers to provide debt-management services; the entity must provide those services to more than three individuals. Once an entity is within the definition, however, its advertising and other sales practices are subject to the rules of the Act.

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

Paragraph (10)(debt-settlement services): Some concern was expressed at the November 2003 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. For the most part, the concessions offered by card issuers are prospective, so that the items as to which the issuers make concessions never become part of the principal of the debt. If a creditor's concessions consist of a waiver of accrued finance charge or delinquency charges, that should not be viewed as waiver of any part of the principal of the debt for purposes of the definitions in the Act.

As a further precaution, the definition also uses the number of payments to the creditor as a criterion. The current practice of debt-settlement agencies is to make one payment to the

creditor in full satisfaction of the debt. The number in the definition, however, whould be set at a level to prevent agencies from making a slight change in their model in order to avoid being categorized as debt-settlement-services provider. Is four the optimal number? One possibility is to delete the bracketed phrase altogether. This has the advantage of accommodating a change in the model adopted by debt-settlement-service providers. It has the disadvantage, however, of allowing a debt-management-services provider that is not also a debt-settlement-services provider to bring itself within the definition of debt-settlement-services provider merely by negotiating the reduction of principal with one creditor.

Paragraph (11)(employee): The purpose of this definition is to prevent evasion of the Act by resort to outsourcing the services necessary for running a debt-management-services business. The phrase "related to debt-management services" is critical, because it has the effect of excluding from the definition, e.g., an individual who makes emergency repairs to the agency's plumbing system. "Services related to debt-management services" would include such things as marketing, customer service, education, counseling, interaction with creditors, processing of payments by individuals, and any other services provided by the agency to the individual.

The paragraph has been revised to state a definition ("means" rather than "includes") and broadened to encompass all persons who provide the specified services, regardless of who signs the paycheck and regardless of whether the employee works on-site at the provider's place of business or elsewhere (e.g., the individual's home or the site of an entity to which the provider has outsourced the services).

Paragraph (13)(person): This definition conforms to the Conference's standard definition. The definition encompasses for-profit, not-for-profit, and tax-exempt entities.

Paragraph (14)(record): This definition appears in UCC Revised Article 1 (§1-201(b)(31)).

Paragraph (15): This paragraph formerly defined "spouse." It now defines "signed," the definition of which is drawn from UCC §§ 1-201(b)(37) and 9-102(a)(7), and UETA § 2(8).

SECTION 3. APPLICATION: RESIDENTS AND NON-RESIDENTS. This [act] applies to a person if:

(1) it, its employees, or its agents are located in this state [when it provides debt-management services];

(2) by any means, including electronic communication, it solicits individuals

located in this state to purchase debt-management services; or

(3) it enters into a debt-management-services agreement with an individual whom it should reasonably know to be located in or a resident of in this state.

Preliminary Comments

Under this provision the Act does not apply to: (1) a debt-management-services provider that is not located in this state and that does not solicit or contract with individuals in this state; (2) a provider whose web site is accessible by residents of this state if the provider declines to do business with residents of this state, in which event the provider is not soliciting individuals located in this state; (3) an individual who forms an agreement with a debt-management-services provider in another state and later moves to this state; or (4) a resident of this state who forms an agreement with a debt-management-services provider located in another state while the individual temporarily is in that other state, if the debt-management-services provider has no notice that the individual resides in this state.

At the Annual Meeting a commissioner suggested that paragraph (1) needs to specify a time. Does the Committee agree?

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

Subject to the limitations stated in this section, the intention is for the Act to have as expansive a reach as is constitutionally permissible. Common criteria for determining whether there is a sufficient jurisdictional nexus for an Internet-based business include the business' targeting a specific jurisdiction and the presence of a customer of a business in the jurisdiction.

SECTION 4. EXEMPT PERSONS. This [act] does not apply to the following persons, or their employees, when the person or its employee is engaged in the regular course of its business or profession:

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

(2) a title insurer, escrow services company, or other person that provides bill-

paying services and does not negotiate with a payee concerning the terms of payment;

[or]

(3) a state- or federally chartered, insured bank;

(4) a person licensed under Section ____ as a (money transmitter)];

(5) an attorney at law who is licensed by this state if the provision of debt management services is incidental to the attorney's practice; or

(6) an accountant licensed by this state if the provison of debt-management services is incidental to the accountant's practice.

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

Preliminary Comments

In the March 2004 draft, the exemption in this section applied to the enumerated persons only when providing debt-management services is incidental to the regular course of the business or profession of the person and its employees. In this draft, except for attorneys and accountants, the exemption applies even if debt management services constitute a majority of the entity's business. Most of the exempt entities are extensively regulated by the state or federal government (paragraphs (1), (3), (5), (6)). Paragraph (2) (bill payers) contains the built-in protection of not negotiating the terms of payment.

A debate arose at the Annual Meeting concerning whether attorneys shold be exempt. Attorneys are governed by a code of conduct and elaborate disciplinary structure. On the other hand, this structure is not always effective to protect clients. A law firm operating as a debt-management-services provider in New York and Vermont recently inflicted substantial injury on indebted consumers. As originally enacted, the federal Fair Debt Collection Practices Act contained an exemption for lawyers. When it became clear that some attorneys were abusing this exemption, Congress amended the Act to remove the exemption altogether. The Committee must decide whether to exempt attorneys (and others). Note that the definition of debt-settlement services (securing creditor's assent to accepting partial payment in full satisfaction) encompasses common conduct of attorneys.

An earlier version of this section exempted a creditor that negotiates or receives settlement of a debt an individual owes it. The definition of "debt-management services" has

been revised to incorporate the requirement that the provider receive money for the purpose of "distributing" it to one or more creditors. A creditor that receives payment from an individual does not "distribute" that payment to itself. Hence, it is no longer necessary for an exemption for creditors to appear in this section.

Paragraph (2) exempts bill-paying services provided by an entity that does not negotiate the terms of payment. Additional examples include mortgage loan servicers, some athletes' agents or artists' agents, and financial planners. These entities are exempt so long as they do not negotiate payment amounts with the individual creditors.

Some states exempt title insurers, mortgage loan servicers, or business liquidators. Others, e.g., Maine, exempt only attorneys and supervised financial institutions.

Executors and personal representatives of decedents should not be subject to the Act. Is a specific exemption necessary, e.g., "an executor or other person administering the estate of a decedent"? Current legislation is silent.

SECTION 5. REGISTRATION.

Preliminary Comments

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 at the November 2003 meeting, follows the second approach. At the March 2004 meeting, the Drafting Committee concurred.

(a) Except as otherwise provided in subsection (c), a person may not provide debt-management services to more than three individuals per year unless the person is registered under this [act]. Registration is valid for one year.

(b) A debt-management-services provider must renew its registration every year.

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

(d) The administrator shall maintain and make public the names of all persons

registered as debt-management-services providers under this [act].

Preliminary Comments

Subsection (a) requires persons providing debt-management services to be registered under this Act. Under Section 3 this requirement extends to debt-management-services providers located in other states, if they serve individuals who reside in this state.

Subsection (d): The objective of this subsection is to enable individuals and creditors to ascertain whether a given debt-management-services provider is registered. Posting on the Internet web site of the administrator (or other appropriate official site) is the preferred method, because the information is instantaneously and continuously available. To "maintain" the list, the administrator must regularly update it.

SECTION 6. APPLICATION FOR REGISTRATION: FORM AND CONTENTS.

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

(b) An application for registration must be accompanied by:

(1) the fee established by the administrator;

(2) the bond or other assurance required by Section 12 ;

(3) identification of all trust accounts required by Section 19 ; and

(4) evidence of insurance against the risks of dishonesty, fraud, theft, or other malfeasance or misconduct on the part of an employee or agent of the applicant in the amount of [$250,000];

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

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

(B) the appointment of the [administrator] as agent of the debt-

management-services provider for purposes of service of process.

(c) An application for registration must be signed under oath and include:

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

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

(3) the address of each location in this state at which the applicant will provide debt-management services, unless the applicant will have no such location, in which event it shall disclose that fact;

(4) the name and home address of each officer or director of the applicant and each person that has an ownership interest greater than ten percent of the applicant;

(5) with respect to each of the three calendar years immediately preceding the year of the application:

(A) the number of individuals who entered a debt-management plan or a debt-settlement plan and made at least one payment in that year; and

(B) the number of those individuals who either completed the plan or who are still making payments pursuant to the plan;

(C) the ratio of the number in subparagraph (B) to the number in subparagraph (A);

(6) a statement describing any civil or criminal judgment, tax lien, or litigation, and a statement describing any administrative or enforcement action by a government agency in any state [jurisdiction] against the applicant or against any of its officers, directors,

owners, [or] employees[, or affiliates];

[(7) the applicant's federal employer identification number and every state identification number for each state in which the applicant has a state identification number;]

(8) the applicant's audited financial statements for each of the two years immediately preceding the application or for each year of its existence if it has not been in operation for the two years preceding the application, unless the applicant does not have audited financial statements, in which event, unaudited financial statements;

(9) evidence of any accreditation by a nationally recognized accrediting organization approved by the administrator;

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

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

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

(13) a copy of each form of debt-management-services agreement that the applicant will use;

(14) the applicant's schedule or schedules of fees and charges that individuals will incur;

(15) at the applicant's expense, the results of a criminal records check,

including fingerprints, on every officer and on every employee or agent of the applicant who is authorized to have access to the trust account required by Section 19 or, if an applicant has submitted this information to another state, a copy of the report from the background check conducted for that state;

(16) an irrevocable consent signed by the applicant and the bank at which the trust account required by Section 19 is to be maintained, providing that if the administrator in connection with enforcement of this [act] pursuant to Section 26 so demands, the bank will turn over to the administrator all money, books, records, accounts, and other property of the applicant in its control; and

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

(d) If the applicant is organized as a non-profit entity under Section _____ or has obtained tax-exempt status under Section 501(c) of the Internal Revenue Code, 42 U.S.C. § 501(c), as amended, the application also must include:

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

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

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

(4) evidence of tax-exempt status under Section 501(c) of the Internal

Revenue Code;]

(5) a detailed description of the applicant's legal structure.

(e) The applicant or registered debt-management-services provider shall notify the administrator within 10 days after a change in its name, principal business address, principal telephone number, or the information specified in subsections (b)(4) or (5) or (c)(1), (3), or (6), or (d)(4).

Legislative Note: In subsection (b) the state may wish to name its secretary of state or other official as the agent for service of process.

Preliminary Comments

Subsection (a): The administrator by rule may require or permit all or part of the application to be submitted electronically.

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

Subsection (c): Paragraph (1) requires disclosure of all business addresses. As now drafted, it requires this information of agencies located in other states, as well as agencies located in the state of enactment. For agencies headquartered in this state, it may (or may not) make sense to require disclosure of all business addresses in other states. It makes less sense to require an agency headquartered elsewhere to disclose all its business addresses in all states in which it operates. What is the Drafting Committee's pleasure?

Paragraph (3) contemplates disclosure of the address of places like call centers and back-office operations, but not the addresses of employees who work from home. If the applicant has no physical presence in this state, that must be disclosed.

Former paragraphs (6)-(7) (identification of states in which the applicant has done business during the preceding five years and states in which the applicant has ever been registered or licensed to provide debt-management services) have been deleted in an effort to reduce the length of the application. Does the Drafting Committee concur?

Former paragraph (8) (disclosure of states that have taken enforcement action against the applicant) has been incorporated into new paragraph (7).

Paragraph (5) (formerly paragraph (9)): This draft reverts to require disclosure of the success/failure rate during the scheduled life of a plan or during a portion of the plan. Industry participants explained that after a certain point in the life of a typical plan, it is common for individuals 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 individuals for whom there is no realistic hope of success. A second purpose is to provide a basis for comparing one provider with another. The prior draft required the applicant to disclose the extent to which an agency's debt-management plans actually are enabling individuals to reduce their debt, as follows:

> with respect to each of the second through fifth calendar years immediately preceding the year of the application:
>
> (A) for all individuals who entered debt-management plans and made at least one payment to the applicant that year, the aggregate debt in those plans;
>
> (B) the aggregate distribution to creditors of those individuals from the aggregate payments made by those individuals since the inception of their plans; and
>
> (C) the ratio of the number in subparagraph (B) to the number in subparagraph (A);
>
> Some agencies enroll individuals in plans only when the agency receives the individual's first payment. Others establish the plan in advance of the first payment. To provide similar treatment to the agencies without regard to which of these models they follow, the calculations required by this alternative focus on plans in which the individual makes a payment. But the phrase "at least one payment" in subparagraph (A) includes a set-up or other fee, as well as a payment of money that is to be distributed to creditors.
>
> Some individuals may enter a plan in December of one year and make their first payment in January of the following year. In making the calculation required by this alternative, the agency may treat the plan and the payment as occurring in the same year and may select either of the two years (but not both) for that purpose. If the individual enrolls in a plan but never makes any payment to the agency, the agency should exclude that individual's debt from its calculations.

The Committee must decide whether to require disclosure of these statistics, disclosure of the success/failure rate, or neither.

Paragraph (7) (former paragraph (11)) has been bracked for possible deletion: of what use is this information to the administrator?

Paragraph (8) (former paragraph 13) (audited financial statements): There are two problems with the former version of this requirement. First, an applicant may not have been in business for two years. Second, the applicant may not be in the practice of obtaining audits of its financial statements. Does the draft address these situations appropriately?

Paragraph (9) (former paragraph (15)): At the March 2004 meeting the Drafting Committee tentatively decided to abandon any requirement that a debt-management-services provider be accredited. Hence this paragraph merely requires the agency to inform the administrator whether it is accredited. This information may assist the administrator in determining whether further investigation is warranted. If this decision is reversed, and it should be, paragraphs (9) and (10) can be combined.

Paragraph (10) (former paragraph (16)): To obtain registration, a debt-management-services provider must employ counselors who are certified within 12 months of their initial employment. This requirement applies only to employees who act as counselors and educators. It does not apply to such other employees as customer service representatives. Section 14 prohibits a debt-management or debt-settlement plan unless a certified counselor has done specified things. In one sense paragraph (10) may not be necessary. But it may be desirable to require the applicant to assure the administrator that it will be able to comply with section 14, i.e. that its employees are qualified.

Paragraph (11) (former paragraph (19)): As used in this paragraph, "programs" encompasses both a course of instruction, which may be entirely oral, and computer software.

Paragraph (13) former paragraph (21)): 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 individuals 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, Section 34 determines whether the violation is actionable.

Paragraph 14) (former paragraph (22)): As with paragraph (13), an agency located elsewhere need supply only the schedules of fees and charges for residents of this state. An agency located in this state must supply the schedules used for residents of other states, too. This information will enable the administrator to monitor the industry's practices in the state. It should assist the administrator in determining whether an individual agency is gouging individuals, as well as whether to encourage the legislature to raise the fee cap when the passage of time or changed circumstances make it too low.

Paragraph (15) (former paragraph (23)): In some jurisdictions the mechanics and procedures for obtaining fingerprints are quite burdensome. This paragraph attempts to reduce the burden by permitting an applicant that has gone through this process in one state to use the results of the process in this state, too.

Paragraph (16) (former paragraph (24)): In the draft for the March 2004 meeting, this paragraph had two parts, one addressing accounts at a bank located in this state and one addressing accounts at a bank located in another state. If an administrator from any state seizes even a portion of the money and records, that seizure would effectively freeze the entire operation of the debt-management-services provider. Consequently, the Drafting Committee

decided to collapse the two parts into one. In response to the requirements of this paragraph, it is likely that a bank would provide its irrevocable consent only if the account contains the money of individuals from a single state. This would mean that a debt-management-services provider would have to establish a separate trust account for each state whose residents it serves. The Drafting Committee may wish to consider this further.

Paragraph (17) (former paragraph (25)): The administrator may require additional information either by rulemaking procedure or by specific request in response to an application.

Subsection (d) is new. It reflects the decision to authorize for-profit entities. Some of the required disclosures for non-profits in the prior draft may not be appropriate disclosures for for-profit entities. Subsection (d) collects several paragraphs from the prior draft to specify additional disclosures for non-profits.

Subsection (e): The cross-referenced sections require disclosure of the name of the applicant's registered agent, the name of the applicant, the addresses at which it operates, enforcement action against the applicant in another state, and tax-exempt status. Subsection (d) requires immediate notification of any change in this information, and even though the subsection speaks of an "application," this requirement of notification applies both before and after the administrator has issued a certificate of registration. Notification of change in other required information is governed by Section 10, which requires notification at the time of renewal of registration.

At the Annual Meeting a commissioner suggested that subsection (e) should include references to other subsections, specifically former subsection (c)(18), referring to evidence of insurance against employee misconduct. This requirement has been moved to Section 5. Should this or any other paragraph in Section 6(c) be referenced in subsection (e)?

SECTION 7. APPLICATION FOR REGISTRATION: PUBLIC INFORMATION.

(a) Except as otherwise provided in this section, the administrator shall make available to the public the information in an application for registration.

(b) The administrator shall preserve the confidentiality of the information required by Section 6(c)(4), (8), and (15), except that the information required by Section 6(c)(15) is subject to legal process in connection with public or private enforcement of this [act].

Preliminary Comments

This preserves the confidentiality of home addresses, financial statements, and, except in litigation, the report on the criminal records check. Public disclosure of some information, e.g., financial statements, may undermine the competitiveness of the applicant. Is there other information that should be shielded from public disclosure, e.g., the information required by paragraphs (12)-(14)?

SECTION 8. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL.

(a) Except as otherwise provided in subsection (b), the administrator shall issue a certificate of registration to a person that complies with Section __6__ .

(b) The administrator [may][shall] deny registration if:

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

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

(3) an officer, director, owner, or employee of the applicant has ever been convicted of a crime or suffered a civil judgment involving violation of state or federal securities laws, moral turpitude, or dishonesty;

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

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

(6) with respect to non-profit or tax-exempt applicants, the board of

directors is not independent of the applicant's officers, employees, and agents.

(c) A board of directors is not independent under subsection (b)(6) if more than [one-fourth][one-third] of its members:

(1) are affiliates of the applicant as defined in the paragraphs of Section 2 other than paragraph (3)(C); or

(2) within [10] years after first becoming a director of the applicant, were employed by or directors of a person that receives or received from the applicant more than [$25,000] in either the current year or the preceding year.

Preliminary Comments

Some conduct justifies a lifetime ban from the debt-management-services industry. Examples appear in paragraphs (3) and (4). Other conduct can be readily corrected, e.g., paragraphs (1)-(2) and perhaps (6). Paragraph (5) gives the administrator discretion to consider the importance of various items of adverse information about an applicant, such as the fact of and reasons for any suspension or revocation of the applicant's right to provide debt-management services in another state. Paragraph (6) requires 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. Since the definition of "affiliate" includes directors, subsection (c)(1) excludes that portion of the definition. If the applicant has no board of directors, subsection (6) is inoperative. The Committee should consider whether it wants to impose the independent-board requirement on for-profit entities. If it does, then we must consider what requirements are appropriate for other forms of business organizations, e.g., LLC and LP.

At the Annual Meeting a commissioner disagreed with the first two sentences of this comment. He suggested that denial of registration be discretionary with the administrator, who should be able to consider mitigating circumstances in deciding whether to issue a registration certificate to an applicant that, e.g., employs a person convicted of fraud in the distant past. The Committee must decide whether the proper verb in subsection (b) is "may" or "shall."

SECTION 9. CERTIFICATE OF REGISTRATION: TIMING.

(a) The administrator shall approve or deny an initial registration within [60] days after an application [satisfying the requirements of Section 6] is filed. The administrator may

extend the [60]-day period [for up to {60} days]. [If the administrator does not act on the application before the expiration of the period, the application is approved, and the administrator shall issue a certificate of registration.] Within seven days after denying an application, the administrator, in a record, shall inform the applicant of the reasons for the denial.

(b) If the administrator denies an applicant's application for registration, the applicant, within 30 days after receiving notice of the denial, may appeal and request a hearing pursuant to Section ____.

Legislative Note: In subsection (b) insert the citation to the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure.

Preliminary Comments

At the Annual Meeting a commissioner suggested that the administrator's power to extend the consideration period should not be unbounded. Does the Committee agree?

Another commissioner commented on subsection (a) as follows: "Subsection (a) requires action by the administrator only if an application 'satisfies the requirements of Section 6.' This suggests that no action is required if some of the information required by Section 6 is not included or is incomplete. The bracketed material then provides for a default approval. Questions will necessarily arise as to whether an application not acted upon is approved, depending upon the sufficiency of the information. Perhaps the phrase 'satisfying the requirements of Section 6' should be deleted. I don't think an automatic default approval should be allowed." In other words, the automatic approval language is a mechanism for enforcing the administrator's duty to act on an application, but it enforces that duty at the expense of the public if the application does not meet the standards for registration. Should the bracketed sentence be deleted?

SECTION 10. RENEWAL OF REGISTRATION.

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

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

(2) be accompanied by the fee established by the administrator and the bond or other assurance required by Section 12;

(3) be signed under oath;

(4) contain the matter required for initial registration by Section 6(c)(5), (9), and (10) and a financial statement of the kind required by Section 6(c)(8) for the applicant's fiscal year immediately preceding the application;

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

(6) supply evidence of insurance against risks of dishonesty, fraud, theft, or other malfeasance or misconduct on the part of an employee or agent of the provider, in an amount equal to the highest daily balance in the trust account required by Section 19 during the six-month period immediately preceding the application;

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

(8) provide any other information that the administrator [by rule] requires.

(b) Except for the information specified in Section 7(b), the administrator shall make available to the public the information in an application for renewal of registration.

(c) The administrator shall approve or deny an application for renewal of registration within [30] days after receiving it. The administrator may extend the [30]-day period, but the registration remains effective until the administrator, by record, notifies the applicant of a denial and states in the record the reasons for the denial.

(d) If the administrator denies an applicant's application for renewal of registration, the applicant, within 30 days after receiving notice of the denial, may appeal and request a hearing pursuant to Section ____. Subject to Section 29(c), the applicant may [must] continue serving its existing customers until, with the approval of the administrator, it transfers them to another registered debt-management-services provider.

Legislative Note: In subsection (d) insert the citation to the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure.

Preliminary Comments

Subsection (a): The cross-referenced provisions in paragraph (4) require disclosure of the ratio of individual payments to individual debt, proof of agency accreditation, and proof of counselor certification. Does the Committee want to impose a requirement that, once registered, providers must obtain audited financial statements? In paragraph (8) the brackets have been added, to suggest deletion of the phrase. Section 6(c)(17) permits the administrator to require an applicant to supply additional information. This paragraph should be parallel.

Subsection (b): The information required by Section 6(c)(4) and (15) (home addresses and criminal records check) as disclosed in the application for registration or in an application for renewal remains exempt from public disclosure.

Subsection (c): The grounds for denial of an application to renew registration appear in Section 29. The number "30" is bracketed pending the Drafting Committee's decision concerning the appropriate number. In this draft the period starts running upon receipt of an application, not receipt of a proper application. The latter date might never occur, in which event the registration would remain effective forever. Does the Committee concur with this change?

Subsection (d): The Drafting Committee has identified but not yet considered the issue presented by the second sentence of this subsection, dealing with the aftermath of a denial of renewal of registration.

SECTION 11. REGISTRATION IN ANOTHER STATE. A person that 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 an application in the form prescribed by Section 6(a) and (c). The administrator shall accept the application and the certificate from the other state as an application for registration or for renewal of registration, as appropriate, in this state if the application to the other state:

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

(2) was submitted to the other state within the six months immediately preceding the submission of the application to this state and the applicant, under oath:

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

(B) provides current information.

Preliminary Comments

This section 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 (1) 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 section only if the other state has also adopted this Act. Under paragraph (2) the application must have been submitted to the other state within the last six months. Since subparagraphs (A) and (B) require the information to be accurate when the application is submitted to this state, however, the rationale for the six-month requirement is not clear. The Committee may wish to consider abandoning it.

SECTION 12. BOND.

(a) Except as otherwise provided in subsection (h), every debt-management-services provider shall file a surety bond with the administrator.

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

(c) If the principal place of business of a debt-management-services provider is:

(1) located in this state, a surety bond must run to the customers of the provider and to the state for the benefit of the state and the customers of the provider, wherever located; or

(2) not located in this state, a surety bond must run to the customers of the provider who reside in this state and to the state for the benefit of the state and the customers of the provider who reside in this state.

(d) Except as otherwise provided in subsection (f), a surety bond must:

(1) be in an amount equal to the larger of [$100,000] and [the sum of amounts deposited in the trust account required by Section 19 on each of the 180 days immediately preceding the date of application for registration or renewal of registration, divided by six] [three times the average daily balance n the trust account required by Section 19 during the six months immediately preceding the date of the application for registration or renewal of registration];

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

(3) have payment conditioned upon the noncompliance of the debt-management-services provider [or its agents] with this [act].

(e) If a debt-management-services provider whose principal place of business is located in this state provides a surety bond to comply with the law of another state with respect to individuals who reside in that state, the amount of the bond required under this section is reduced by the amount of that bond, and the bond filed pursuant to this section must not run for the

benefit of persons in that state, provided, however, that the amount of the bond shall not be reduced to less than an amount equal to the sum of the amounts received from residents of this state and deposited in the trust account required by Section 19 on each of the 180 days immediately preceding the date of the application for registration or renewal of registration, divided by six.

(f) For an initial registration of a debt-management-services provider that has not provided debt-management services in this state, the amount of the surety bond must be determined by the administrator, based on the administrator's consideration of the financial condition and business experience of the debt-management-services provider, the history of the debt-management-services provider in providing debt-management services, the potential loss to individuals, any other factor the administrator considers appropriate, and, for providers that are required by Section 19 to maintain a trust account, an estimate of the amounts to be deposited in the trust account during the twelfth month after registration.

(g) If the principal amount of a surety bond is reduced by payment of a claim or a judgment, the debt-management-services provider, within [30] days after notice by the administrator, shall file a new or additional surety bond in an amount set by the administrator, which amount must be at least the amount of the bond immediately before payment of the claim or judgment.

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

(1) file a certificate of insurance in the amount required by subsections (d) through (f), issued by an insurance company rated at least [A] by a nationally recognized rating

organization, with a deductible of no more than 10 percent of the face amount of the policy coverage and, as provided in subsection (i), loss payable to the state and to customers of the provider as their interests may appear, as provided in subsection (c), if the provider does not comply with this [act];

(2) provide an irrevocable letter of credit, issued or confirmed by a financial institution approved by the administrator, in the amount and form determined by the administrator pursuant to subsections (d) through (f) and payable, as provided in subsection (i), to the state and to customers of the provider as their interests may appear, as provided in subsection (c), if the provider does not comply with this [act]; 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 this state or a political subdivision of this state, in the amount determined by the administrator pursuant to subsections (d) through (f), designated as available, as provided in subsection (i), to the state and to customers of the provider as their interests may appear, as provided in subsection (c), if the provider does not comply with this [act].

(i) The administrator that recovers a final order under Section 27(a)(2) or (5) and any person who recovers a final judgment pursuant to Section 30(a)(1) or (3) or (b) may obtain satisfaction of the order or judgment out of the surety bond, insurance, letter of credit, or other security required pursuant to this section.

Preliminary Comments

Subsection (a): The requirement of a bond apples to all debt-management-services

providers, including those that provide debt-settlement services.

Subsection (c): The bond runs in favor of the state for the benefit of the state and the provider's customers. Thus, it is available to compensate the administrator for its enforcement costs. The bond also runs directly in favor of customers who are injured by a provider's noncompliance with the Act. As now drafted the bond runs in favor of individuals 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 individuals who live in this state, then the benefits of the bond are limited to the administrator and residents of this state. This subjects the domestic agency to the bond requirements of this state and also the other states in which its customers reside. But see subsection (e).

Subsection (d): For those providers, including debt-settlement-services providers, that do not receive payments for distribution to creditors, and therefore are not required by Section 19 to establish a trust account, the minimum bond requirement is [$100,000]. For others, the subsection presents the Committee with a choice.

In the first, the amount of the bond approximates the average monthly amount of money that is deposited into the trust account. This may be an impossible hurdle for most providers. For example, a provider that processes payments of $120 million per year would have to post a bond of $10 million. This alternative in effect sets the bond at 16.6% of the sum of the amounts deposited during a 180-day period. A variation would be to set the bond at a lower percentage (e.g., 3%) of the amounts deposited during that period.

The second alternative sets the bond at three times (or other multiple of) the average daily balance in the trust account. The amount of the bond would depend on the amount received from individuals and the frequency of the provider's payment to the creditors. A provider that receives payments of $120 million per year, or $2.5 million per week, and pays creditors twice a week, would have an average daily balance of approximately $750,000. Its bond requirement would be $2.25 million. This alternative gives the provider an incentive to make payments to creditor on a daily basis.

In subparagraph (3), is the phrase "or its agents" necessary?

Subsection (e): This subsection provides reciprocity, to give the debt-management-services provider some relief from having to provide duplicative bonds. In no event, however, does the bond amount fall below the average monthly deposits by residents of this state.

Subsection (f): Special provision is made for a newly registered provider that does not have the trust account experience contemplated by subsection (d) for fixing the amount of the bond. This special provision does not apply to debt-settlement-services providers as to whom the bond is not determined by the size of any trust account.

Subsection (h): 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, a letter of credit or debt instruments. The requirement of approval by the administrator extends to both the securities deposited and the terms of the account into which they are deposited, to ensure that they are available to pay claims of injured individuals. The administrator by rule can develop the mechanics for liquidating the securities and paying the proceeds to injured individuals.

Subsection (i): Section 27 empowers the administrator to seek restitution for injured individuals. Under subsection (i) the bond or other security required by this section is a source for payment of this restitution. Section 30 authorizes private rights of action. The bond or other security is a source of payment of actual damages, the $1,000 minimum damages, and costs and attorney's fees. It is not available to satisfy criminal penalties under Section 24, civil penalties under Section 27, or punitive damages under Section 30. Does the Drafting Committee concur?

SECTION 13. CUSTOMER SERVICE. A debt-management-services provider must maintain a telephone system, staffed at a level that reasonably permits an individual to speak to a counselor or customer service representative, as appropriate, during ordinary business hours.

Preliminary Comments

Some inquiries require counseling services; others concern administrative matters such as confirmation of receipt of a payment, communication that a payment for a particular month will be late or in a different amount than scheduled, etc. The debt-management-services provider must provide sufficient staffing to meet the reasonably expectable demand for both kinds of requests. Even if a debt-management-services provider desires to operate exclusively by electronic interaction with individuals, it must comply with this subsection. See Section 15(c) 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.

The standard "level that reasonably permits an individual to speak to a counselor …" is vague. Is this satisfactory?

SECTION 14. PREREQUISITES FOR PROVIDING DEBT-MANAGEMENT SERVICES.

(a) Before providing debt-management services to an individual, a person shall provide the individual a list, in a record, of services and the charges for each, describing:

(1) those goods and services the person offers:

(A) free of charge, if the individual enters into a debt-management-services agreement;

(B) for a charge, if the individual enters into a debt-management plan; and

(C) for a charge, if the individual does not enter into a debt-management-services agreement; and

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

(b) A person may not offer or provide a debt-management plan or a debt-settlement plan to an individual unless the person, through the services of a certified counselor:

(1) provides the individual with education concerning personal finance or counseling about the management of personal finance;

(2) has prepared a financial analysis and a plan for payment of the individual's debts;

(3) has made a good faith, reasonable determination that the plan is necessary for the individual to avoid serious financial hardship or the need to file for relief under the United States Bankruptcy Code, 11 U.S.C. § 101 et seq.; and

(4) has made a good faith, reasonable determination based on its analysis of the information provided by the individual and otherwise available to it that:

(A) the individual will be able to make the payments that the plan calls for the individual to make; and

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

(c) Before an individual [assents to a proposal][signs an agreement] to engage in a debt-management plan or a debt-settlement plan, a debt-management-services provider shall provide the individual with:

(1) a copy of the analysis and plan required by subsection (b)(2) in a form the individual may keep whether or not the individual [assents to the proposal][signs the agreement]; and

(2) with respect to all creditors identified by the individual or otherwise known by the provider to be creditors of the individual, a list of all creditors that the provider reasonably expects to accept the payment proposed in the plan and a list of all creditors that the person reasonably expects not to grant concessions.

(d) Before an individual [assents to a proposal][signs an agreement] to engage in a debt-management plan, a debt-management-services provider shall disclose, in a record that contains nothing else, the following:

IMPORTANT INFORMATION FOR YOU TO CONSIDER

(1) Debt-management plans are not suitable for all individuals and you may ask us to provide information about bankruptcy and other ways to deal with indebtedness;

(2) Establishment of a debt-management plan may adversely affect your

credit rating or credit scores;

(3) • In [the third calendar year preceding the current year], [number] individuals entered a debt management plan with us. Of those individuals, [number], or [percent], have completed the plan or are still making payments under it.

• In [the second calendar year preceding the current year], [number] individuals entered a debt-management plan with us. Of those individual, [number], or [percent], have completed the plan or are still making payments under it.

• In [calendar year immediately preceding the current year], [number] or [percent], have completed the plan or are still making payments under it; and

(4) [unless it is not true,] We may receive compensation for our services from some or all of your creditors.

(e) Before an individual [assents to a proposal][signs an agreement] to engage in a debt-settlement plan, a debt-management-services provider shall disclose, in a record that contains nothing else, the following:

IMPORTANT INFORMATION FOR YOU TO CONSIDER

(1) Debt-settlement plans are not suitable for all individuals and you may ask us to provide information about bankruptcy and other ways to deal with indebtedness;

(2) • In [the third calendar year preceding the current year], [number]

individuals entered a debt settlement plan with us. Of those individuals, [number], or [percent], have completed the plan or are still making payments under it.

• In [the second calendar year preceding the current year], [number] individuals entered a debt-settlement plan with us. Of those individuals, [number], or [percent], have completed the plan or are still making payments under it.

• In [calendar year immediately preceding the current year], [number] individuals entered a debt-settlement plan with us. Of those individuals, [number], or [percent], have completed the plan or are still making payments under it;

(3) Nonpayment of your debt pursuant to the plan is likely to have an adverse effect on your credit report and may lead creditors to undertake activity, including litigation, to collect their debts; and

(4) Unless you are insolvent, a debt settlement plan will result in the creation of taxable income to you even though you will not receive any money.

Preliminary Comments

Subsection (b): Paragraph (1) requires education or counseling by debt-settlement-services providers as well as by debt-management-services providers. Debt settlement-services providers do not currently see education as part of their mission. Does the Committee wish to mandate education for them?

The education or counseling may consist of an individual session with a counselor (which may also include the analysis required by paragraph (2)), a group class, or an electronic educational program. The education and counseling must be substantially more than an explanation of the benefits of a debt-management plan or a debt-settlement plan. It need not be completed before commencement of a plan, since a course of education or counseling may take months to complete. Under Section 26(e) the administrator has the power to establish minimum

standards for the education and counseling.

Paragraphs (3)-(4) require the provider to make good faith, reasonable determinations. The standards "good faith" and "reasonable" are vague, and this creates a risk that a disgruntled consumer, with the benefit of hindsight, might allege that the provider failed to meet these standards. Does the Committee wish to address this matter, either by reconsidering the standards (e.g., deleting "reasonable") or by making violation of these paragraphs actionable only by the administrator?

Paragraph (4) requires the provider to make a reasonable determination that the creditors will accept the plan. This does not mandate communication with the creditors before a debt-management-services agreement is formed; the provider's past experiences with the creditors may be a sufficient basis for the reasonable belief.

Subsection (c): Since secured creditors are creditors, paragraph (2) requires the provider to include secured creditors in the two lists, as appropriate.

Subsections (d)-(e): These subsections require providers of debt-management plans to give a warning to individuals before they commit to a debt-management plan or a debt-settlement plan. The format has been changed to specify the exact language that the provider must use.

SECTION 15. COMMUNICATION BY ELECTRONIC MEANS.

(a) A debt-management-services provider may comply with Section 14 or 16 via the Internet or other electronic means if the provider obtains the individual's consent in the manner provided by Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001(c)(1)), as amended, and:

(1) with respect to the requirements of Section 14(b), a certified counselor has reviewed and approved the education required by subsection 14(b)(1) and the computer program or application used to create the financial analysis and the debt-management plan required by subsection 14(b)(2);

(2) the individual 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 plan with a certified counselor;

(3) the materials are presented in such a way that the individual can retain them electronically and print them;

(4) the provider informs the individual that upon electronic, telephonic, or written request, the provider will send the individual a written copy of the materials required by Section 14(c) at no charge;

(5) with respect to disclosure via an Internet web site of the information required by Section 14(d) and (e):

(A) the disclosure appears on one or more screens that:

(i) contain no other information; and

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

(B) the provider informs the individual that, upon electronic, telephonic, or written request it will send the individual a written version of the disclosures at no charge; and

(6) [within {3} days, the provider sends the individual, at no charge, a signed, written copy of the agreement required by Sections 16 and 23] [the provider informs the individual that upon electronic, telephonic, or written request, it will send the individual a written copy of the agreement required by Sections 16 and 23].

(b) A debt-management-services provider that pursuant to this section complies with Section 14 by means of electronic communication via its Internet web site shall 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.

(c) A debt-management-services provider that forms debt-management plans or debt-settlement plans with individuals on its Internet web site shall respond to electronically communicated requests for counseling or customer service within a reasonable time during ordinary business hours.

Legislative Note: In states in which the phrase "as amended" in subsection (a) is not permitted by the constitution, the phrase should be deleted.

Preliminary Comments

Subsection (a) permits electronic delivery of the information required by Section 14 and electronic formation of debt-management-services agreements. Under paragraph (2), if counseling in person is not readily available in reasonable proximity to the individual'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 paragraph (2) would be revised to require the agency to disclose that it operates entirely by electronic communication, that some other agencies provide personal contact, and that if the individual wants personal contact he or she should seek out one of those other agencies.

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

To meet the objectives of physical delivery, electronic delivery must satisfy certain requirements of form, such as appearing on a screen that contains no other information. Paragraph (5)(B) prohibits the provider from limiting the medium the individual may use to request a written copy.

Even if a debt-management plan is formed over the Internet, the individual should have a hard copy of the agreement with the debt-management-services provider. Paragraph (3) requires that the agreement must be presented in a printable format. Paragraph (6) poses two versions of an additional requirement: automatic mailing of a written copy or mailing a copy if the individual requests. These requirements still must be checked against E-Sign and UETA.

Subsection (b): An agency might do business under numerous names. Should the statute

permit the agency to provide this information via a link to another page of the website? The same question exists with respect to the names of its principal officers.

Subsection (c): The debt-management-services provider that operates exclusively via its web site must comply with Section 13 (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 individual.

At the Annual Meeting several commissioners complained of the complexity and repetitiveness of this and other sections. Does the Committee wish to streamline it, perhaps cutting back on the statutory requirements and leaving it to the administrator to flesh out? A simpler statute might be more enactable. As a result of differeing responses by administrators in different states, however, it might be less uniform, making it harder for providers to comply with the requirements of multiple jurisdictions.

SECTION 16. FORM AND CONTENTS OF AGREEMENT.

(a) Every debt-management-services agreement must:

(1) be in a record;

(2) be dated and signed by the debt-management-services provider and the individual;

(3) include the name and address of the individual and the name, address, and telephone number of the debt-management-services provider;

(4) disclose:

(A) the services to be provided;

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

[(C) that the debt-management-services provider may not require a voluntary contribution from the individual for any service provided to the individual;]

(D) the schedule of payments or deposits to be made by the

individual, including the amount of each payment, the date on which each payment is due, and an estimate in good faith of the date of the last payment;

(E) each creditor of the individual to which payment will be made, the amount owed to each creditor, the concessions the debt-management-services provider 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;

(F) each creditor that is not participating in the debt-management plan and to which the debt-management-services provider will not be directing money;

[(G) unless it is not true, that the debt-management-services provider may receive compensation from the individual's creditors for the benefits it provides to the creditors;]

[(H) that establishment of a debt-management plan may adversely affect the individual's credit rating and credit scores;]

(I) that the debt-management-services provider, if consistent with good faith, may terminate the agreement for good cause and upon return of unexpended money of the individual;

(J) that the individual may contact the administrator with any questions or complaints regarding the debt-management-services provider; and

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

(5) be delivered to the individual immediately upon formation of the agreement. Delivery of an electronic record to an individual who has consented to electronic

communication occurs when it is made available in a format in which the individual may retrieve, save, and print it.

(b) If the administrator supplies the debt-management-services provider with any of the information required under subsection (a)(3)(K), the provider complies with that subsection only by disclosing the information supplied by the administrator.

(c) Every debt-management-services agreement must provide that:

(1) the individual 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, in which event the provider will refund all unexpended money that the individual has paid the provider for the reduction or satisfaction of the individual's debt;

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

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

(A) the identity of the creditor; and

(B) the right of the individual to [modify or]terminate the debt-management-services agreement.

(d) A debt-management-services agreement may not:

(1) provide for payments by the individual for longer than 60 months or other period established by rule of the administrator;

(2) provide for application of the law of any jurisdiction other than this state or the state in which the individual resides;

(3) contain a provision that modifies or limits otherwise available forums or procedural rights that are generally available to the individual under law other than this [act];

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

(5) contain a provision that:

(A) limits or releases the liability of any person for failing to perform the debt-management-services agreement or violating this [act]; or

(B) indemnifies any person for liability arising under this [act] or out of performance of the debt-management-services agreement.

(e) The rights and obligations specified in subsection (c) exist even if the debt-management-services provider has not complied with the requirements of that subsection. A provision in a debt-management-services agreement that violates subsection (d) is void.

(f) An individual may rescind a debt-management-services agreement until midnight of the third business day after the individual receives a copy of an agreement that complies with this Section and Section 23. To exercise the right to rescind, the individual must give written or electronic notice to the debt-management-services provider. Notice by mail is given when mailed.

(g) Every debt-management-services agreement must be accompanied by a form that has the heading "Notice of Cancellation" and contains in bold face type:

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 receive a copy of it.

To cancel this agreement during this period, send an e-mail to (e-mail address of the provider) 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). If you cancel this agreement within the 3-day period, we will refund all money you already have paid us.

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

I hereby cancel this contract,

(date) ,

(individual's signature) .

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

Preliminary Comments

Subsection (a):

In a modest attempt to reduce the length and complexity of both the statute and the debt-management-services agreement, paragraphs (C), (G), and (H) are bracketed for suggested deletion. The substantive prohibition of required contributions lessens the need for paragraph

(C). The disclosure requirements in section 14 render the disclosures in paragraphs (G) and (H) redundant. Does the Committee concur? Should the disclosures be truncated further?

Paragraph (4)(D): The date of the last payment depends on the creditors' concessions and the amount of the monthly payment by the individual, each of which may change during the course of the plan. It also depends on the timeliness of payment by the individual. None of this can be known in advance. Therefore, paragraph (4)(D) requires a good faith estimate of the date of the final payment.

Paragraph (4)(F): As with Section 14(c)(2) (pre-agreement disclosures), identification of nonparticipating creditors includes secured creditors but refers only to creditors that the individual has disclosed to the debt-management-services provider or that the provider otherwise actually knows to be a creditor of the individual. Subparagraph (F) does not require the provider to make any disclosures with respect to creditors of which it is unaware.

Paragraph (4)(I): The good cause for termination by a provider pursuant to this paragraph does not encompass a desire to escape the fee structure to which the provider may have committed. Rather, it contemplates such things as the individual's failure to make monthly payments or to cooperate with the provider. The standard of good cause is higher with respect to a debt-settlement plan than for a debt-management plan because the adverse consequences to the individual are higher.

Paragraph (4)(K): Compliance with subparagraph (K) will mean that a provider that serves individuals in 50 states may have to have a different form for each state. Computerization of the standard document may minimize the difficulty of complying with this disclosure requirement.

A provision in paragraph (4) requiring disclosure of the name and address of the bank holding the trust account was deleted in an earlier draft.

Paragraph (5) requires immediate delivery of the record to the individual. If the record is electronic, delivery occurs when the provider makes it available in retrievable and printable form.

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

The prior draft gave the individual the right to modify an agreement under certain circumstances. This provision has been dropped because the right to terminate altogether may include the less drastic option of modifying the agreement. If the Drafting Committee believes that unilateral modification by the individual should be permitted, subsection (c)(1) will be modified to read, "right to terminate or modify the agreement at any time."

Subsection (d): This subsection seeks to preserve the individual'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 jurisdiction. Nor may an agency contract for a distant forum or the surrender of rights or remedies under other law, including the right to proceed by way of a class action when appropriate. A statute designed to protect individuals should not permit the deprivation of important procedural and jurisdictional rights by means of a unilateral decision by the other party.

Subsection (f): Section 16 specifies the form of the agreement, and Section 23 lists prohibited terms. Subsections (f) through (h) derive from section 125 of the Truth-in-Lending Act, 15 U.S.C. § 1635. Though the language of subsections (f) through (h) varies from the language of the federal statute, courts should interpret these subsections in a manner consistent with the interpretations of section 125, including Regulation Z and the Official Staff Commentary. If the agreement fails in any respect to comply with Sections 16 or 23, the three-day period never starts running. The remedy, under subsection (g), if forfeiture of all amounts paid, even those amount already paid over to creditors. If the Committee thinks this is too draconian, perhaps there should be a limit on the right to rescind, e.g., 30 or 60 days. The individual still would have the right to terminate under subsection (c).

SECTION 17. FOREIGN LANGUAGE. If a debt-management-services provider communicates with an individual primarily in a language other than English, all disclosures and documents required by this [act] must be in the other language.

Preliminary Comments

At the Annual Meeting several commissioners objected that the mandatory nature of this provision is too onerous. Salespersons, they said, often use a combination of English and any one

of hundreds of foreign languages to accommodate their customers. It is not reasonable to require the employer to have documents in every language that its employees and customers speak. An alternate version of this section might provide:

If a debt-management-services provider communicates with an individual [primarily] in a language other than English, the provider must comply with one of the following:

(a) all disclosures and documents required by this [act] must be in that other language; or

(b) the provider must explain in that other language the meaning of every provision in every disclosure and document required by this [act].

SECTION 18. VOID AGREEMENTS.

(a) A debt-management-services agreement between an individual and a person that is not registered under this [act] when the agreement is formed is void.

(b) If a debt-management-services agreement is void under subsection (a), an individual may recover from the debt-management-services provider all money paid by or on behalf of the individual pursuant to the agreement, together with costs and reasonable attorney's fees.

(c) A person that violates Section 5(a) or (b) does not have a claim against an individual for breach of contract and does not have a claim in restitution with respect to an agreement that is void under this section.

Preliminary Comments

Subsection (a): The Consumer Federation/NCLC report recommends that the contract be void if it violates any requirement of the proposed statute. This section (like the CFA/NCLC's Model Consumer Debt Management Services Act) does not go that far. It limits voidness to agreements by a debt-management-services provider that is not properly registered under Section 5. On the other hand, if a provider is not properly registered, it must return to the individual all money paid by the individual, even amounts passed on to creditors. This is a windfall to the individual and a penalty to the provider. It is included for its deterrent effect.

Subsection (b) as been rewritten to (1) use the active voice; and (2) add the phrase "void under subsection (a)" because subsection 21(e) also voids certain agreements, viz. those in which the individual is overcharged. If the Committee decides that the consequences under § 21(e) are the same as specified in this subsection, the phrase can be deleted.

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

SECTION 19. TRUST ACCOUNT.

(a) Within two business days after receipt, a debt-management-services provider shall deposit in a trust account established for the benefit of individuals all money paid by or on behalf of an individual for disbursement to the individual's creditors.

(b) Money in a trust account is not property of a debt-management-services provider. A trust account established pursuant to this section is not available to [judgment] creditors of the debt-management-services provider, other than an individual from whom or on whose behalf the debt-management-services provider has received money, to the extent that the money has not been distributed to creditors of the individual.

(c) A debt-management-services provider shall:

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

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

(A) the disbursement must comply with the due date established by each creditor; and

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

(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 individual for any costs or fees imposed by a creditor as a result of the failure to pay or misdirection.

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

(e) A debt-management-services provider shall reconcile the trust account at least once a month. The reconciliation must ascertain the cash balance in the account and compare it to the sum of the escrow balances in each individual'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 of a debt-management-services provider must at all times have a cash balance equal to or greater than the sum of the escrow balances of each individual's account.

(g) If its trust account does not contain sufficient money to cover the aggregate individual balances, the debt-management-services provider, immediately upon discovery, shall notify the administrator by telephone, facsimile, electronic mail, or other method approved by the administrator. Within [three] days, unless the administrator by rule provides otherwise, the debt-management-services provider shall also provide notice describing the remedial action taken or to be taken.

(h) If [all][a majority] of the unpaid creditors to whom a debt-settlement-services provider has submitted proposals refuse to assent to those proposals, the provider shall promptly refund to the individual all money paid by or on behalf of the individual which has not been paid to the creditors.

(i) Before changing the financial institution at which its trust account is located, a debt-management-services provider shall deliver to the administrator the consent required by Section 6(c)(16).

Preliminary Comments

Subsection (a): 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 money of residents of this state into a trust account located in another state and containing the money of individuals who reside in other states. But Section 6(c)(24) requires the depository bank to provide irrevocable consent to a turnover order by the administrator. A bank may be unwilling to do this if the account contains the money of individuals who reside in other states. As a practical matter, then, an agency may have to establish a separate account for each state whose residents it serves.

Subsection (b): As a person with a claim against a debt-management-services provider, the individual is a "creditor." Nevertheless, the individual should have access to the trust account, but only to the extent the debt-management-services provider has received money from or on behalf of the individual and has not distributed them to creditors. Without this limitation, the individual's compensation out of the trust account would come at the expense of other individuals whose money comprises the trust account. Compensation of the individual for other loss or damage will have to come from assets of the debt-management-services provider or the bond or other assurance required by Section 12. Because the money does not belong to the provider, the trust account may not bear interest for the benefit of the provider.

The language of the subsection has been modified, to finesse the need to specify the process by which the individual may access the trust account. This Act leaves that question to other law, but as a creditor of the provider, the individual has whatever rights creditors generally have. In addition, the individual may be the beneficiary of action by the administrator under §§ 26-27.

Subsection (c) contemplates that the debt-management-services agreement may establish a date by which the individual must remit to the provider and a date by which the provider must remit to the creditors. Paragraph (2) requires that any such agreement—and the provider's performance—must conform to the due dates established by the creditors. It is expected that, if necessary or desirable, the provider will secure the creditors' assent to modify the original due dates to maximize the feasibility of the plan. Subparagraph (B) has been revised to reflect the use of payment systems other than checks.

With respect to debt-settlement-services providers, the provider's business model may not entail a trust account. If, however, it does, does paragraph (2) deal with it appropriately?

Subsection (f): Section 29(b) provides that failure to maintain the amount is cause for summary suspension of registration.

Subsection (h): Once it becomes clear that a debt-settlement plan will not work, the provider must refund the individual's money. Should the trigger be rejection by all the creditors or something less than that?

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

Subsection (i): Section 6(c)(24) requires the agency and the bank to give irrevocable consent to permit the administrator to access the account in connection with enforcement of the Act.

SECTION 20. FEES: MONETARY LIMITS.

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

(b) Except as otherwise provided in subsection (c) and Section 15(a)(6), a person providing debt-management services to an individual may not impose charges or receive payment for the services until the person and the individual have executed a debt-management-services agreement that complies with Sections 16 and 23.

(c) Except as otherwise provided in Section 21(c):

(1) a debt-management-services provider may charge for its educational and counseling services a fee that is fair and reasonable, as permitted by the administrator; and

(2) if an individual enters a debt-management plan or a debt-settlement plan, the provider may charge a fee not exceeding $[50] for consultation, obtaining a credit report, setting up an account, and the like.

(d) The fees permitted by subsection (c) must be deducted from:

(1) the first six payments of any monthly maintenance fee in connection with a debt-management plan permitted by subsection (b); and

(2) the compensation permitted a debt-settlement-services provider by subsections (f) and (g).

(e) Except as otherwise provided in Section 21(c), 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 individual or $[8] for each creditor that is listed in the debt-management-services agreement between the debt-management-services provider and the individual, except that the total monthly maintenance fee may not exceed $[40].

(f) Except as otherwise provided in subsection (c), a person providing debt-settlement services may not charge or receive compensation until the settlement of an individual's debt with a creditor.

(g) 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 each creditor forgives.

(h) Except as otherwise provided in subsection (c), a person providing debt-

management services to an individual may not charge a fee to:

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

(2) provide education or counseling about the management of personal finance; or

(3) terminate a debt-management-services agreement.

(i) If a payment by an individual under this section is dishonored, a debt-management-services provider may impose a reasonable charge on the individual, not to exceed [$25][the amount allowable for dishonored checks or other instruments by Section ___].

(j) The administrator [shall] [may] adjust the dollar amounts specified in this section to reflect inflation, as measured by the United States Bureau of Labor Statistics Consumer Price Index for All Urban Consumers, or other index adopted by rule by the administrator.

Legislative Note: In subsection (i) insert the citation of the statute specifying the maximum charge a payee may impose for a dishonored check.

Preliminary Comments

Subsection (b): In addition to specifying some of the contents of a debt-management-services agreement, Section 16 requires immediate delivery of the record containing the agreement. If the record is a writing, this subsection prohibits a debt-management-services provider from collecting any money before the individual receives a copy of it. If the record is electronic, the provider may impose a fee as soon as it delivers the record, which occurs when it makes the record available in retrievable and printable form. Section 15(a)(6) permits delayed delivery of the written agreement by a provider that communicates by electronic means. The phrase "payment for the services," viz., debt-management services, means that the prohibition in this subsection does not apply to fees for education or counseling. If the debt-management-services provider creates a debt-management plan for the individual, the next subsection requires that the educational or counseling fees be credited against the fees for the DMP.

Subsection (c): Section 21(c) requires a tax-exempt provider to reduce or waive its fee in appropriate cases.

The Oregon 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.

At the Annual Meeting some commissioners questioned whether the fee limit should appear in the statute. They suggesged that the power to set fees should be vested in the administrator and that the statute should articulate standards for the administrator to use. Does the Committee wish to change its approach?

Subsection (d): Subsection (c) permits a debt-management-services provider to charge a set-up fee and a fee for educational services. Subsection (e) permits a monthly service fee, and this fee is comprehensive, so if there is a set-up fee or a charge for education or counseling before the individual enters a DMP, the provider must refund them, in the form of a credit against the accruing monthly charges. The Committee must decide whether to confirm this approach or adopt the current industry practice of cumulative set-up and maintenance fees.

Subsection (e): Using the numbers in brackets, the $40 limit would apply if either the number if creditors exceeds five or the monthly payment exceeds $666.

Some states cap the fees at a percentage of the monthly payment by the individual 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., California, use a combination of a percentage and a fixed cap. Washington prohibits imposition of a fee with respect to payments to utility companies or landlords. In Michigan, Nebraska, and Washington, the limit on the set-up fee is $25. The trade associations limit their member agencies to $75. See the Reporter's Note to subsection (g). 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% or more, 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 (g) establishes the cap for debt-settlement-services providers.

Subsections (f)-(g): 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. Subsection (f) makes this ban on monthly fees clear. Subsection (g) permits compensation of up to [$600] (or

[15% of $4000] of debt forgiveness) at the time the individual's debt to a creditor is settled, and subsection (d) requires that the amount of any set-up fee and any fee for education or counseling be credited against this compensation. The 15%/$600 cap applies to each debt that is settled. The Drafting Committee has not yet considered whether this approach and these limits are appropriate and has not yet considered whether debt-settlement-services providers should be subject to the same caps as other debt-management-services providers.

Subsection (i): The Drafting Committee may wish to consider whether it is appropriate to borrow the state's general provision on fees for bounced checks. In the context of debt-management-services agreements, it may be appropriate to set the sanction for writing a bad check at a level that just permits the provider to recover the costs a bad check causes it to incur.

Subsection (j): The Drafting Committee must decide whether there should be adjustment of dollar amounts and, if so, whether adjustments should be mandatory or optional. The Committee also must decide whether to specify the inflation index or leave it to the administrator. As drafted, the subsection establishes a default setting, thereby relieving the administrator of the burden when first assuming responsibility for this area.

SECTION 21. FEES: OTHER LIMITS.

(a) A [non-profit or tax-exempt] debt-management-services provider may not require a voluntary contribution from an individual or any other person for any service provided to the individual. A [non-profit or tax-exempt] debt-management-services provider may accept voluntary contributions from an individual but, until 30 days after completion or termination of a debt-management plan [or debt settlement plan], the aggregate amount of money received from or on behalf of the individual may not exceed the total amount the debt-management-services provider is authorized to charge the individual under Section 20.

(b) A debt-management-services provider, as a condition of entering into a debt-management plan or a debt-settlement plan, may not require an individual to purchase a counseling session, an educational program, or materials and supplies. Except as otherwise provided in subsection (c), however, the provider may charge the individual, to the extent

permitted by Section 20, for counseling sessions, educational programs, or supplies if the individual does not enter into a plan.

(c) A [non-profit or tax-exempt] debt-management-services provider may not deny services to an individual whom it determines cannot pay the provider's usual fee. The provider shall reduce its fee to the extent necessary to enable the individual to acquire its services.

(d) If an individual who has entered into a debt-management-services agreement does not make payments for a period of 60 days, the debt-management-services provider may terminate the agreement. The provider shall immediately return to the individual any money of the individual remaining in its possession or in the trust account.

(e) If a debt-management-services provider imposes a fee or other charge or receives money or other payments not authorized by subsection (a) or Section 20, except as a result of an unintentional and bona fide error notwithstanding the maintenance of procedures reasonably designed to prevent the error, the individual may void the debt-management-services agreement. If the individual voids the agreement, the debt-management-services provider [shall immediately pay the individual three times the amount of the unauthorized fees, charges, money, or payments] [shall return to the individual all amounts received from or on behalf of the individual].

(f) If, as a result of an unintentional error made in good faith notwithstanding the maintenance of procedures reasonably designed to prevent the error, a debt-management-services provider receives money not authorized by subsection (a) or Section 20, the provider shall return that money to the individual no later than two days after learning of the error.

Legislative Note: *If the state does not permit for-profit debt-management-services providers, the bracketed language that appears twice in subsection (a) and once in subsection (c) should be deleted. If the state permits for-profit providers, the brackets should be deleted from the phrases.*

Preliminary Comments

Subsection (a): Section 20(a) precludes a debt-management-services provider from requiring or receiving a "voluntary" payment in addition to or in excess of the amounts stipulated in Section 20 . The separate prohibition in this section 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 Section 20(a) instead of being included in the text of the statute. The limitation on voluntary contributions is designed to prevent evasions of the basic prohibition. It could survive even if the basic prohibition is removed from the text of the subsection. What is the Committee's pleasure?

Subsection (b): This subsection authorizes a counseling agency to impose charges for education or counseling services. Any charge must be reasonable.

Subsection (c): This is the current practice of most counseling agencies and is a requirement for qualification as a § 501(c)(3) entity. An industry Observer at the November 2003 meeting pointed to the risk of adverse selection since virtually all individuals seeking debt-management services are financially stressed. The ISO standards for accreditation, however, require that there "be objective evidence of conformance to demonstrate ... the individual credit counseling agency stands ready to serve all clients who seek service regardless of ... a client's ability to pay ...." Does the Committee wish to impose this obligation on for-profit entities, too?

Subsection (d): In the context of a debt-management plan, if the debt-management-services provider is acting in conformity with the Act, there will be no money in the trust account. This provision addresses the provider that has not distributed the money to creditors as required by Section 19(c)(2) . Perhaps more importantly, it requires the provider of debt-settlement services to return the individual's money.

Subsection (e) has been modified to eliminate automatic voidness if the provider overcharges and instead makes it optional with the individual. If the Committee concurs, the remaining issue is whether the sanction should be treble damages or the more deterrence-oriented remedy of returning all money received from the individual, including the money that was paid over to the creditors. For an overcharge, forfeiture of all amounts received may be too draconian. A similar question is presented under Section 18(b) (void agreements), where the remedy, although draconian, may nevertheless be appropriate.

The standard "unintentional error made in good faith notwithstanding the maintenance of procedures reasonably designed to prevent the error" derives from the federal Truth-in-Lending Act § 130(c), 15 U.S.C. § 1640(c). To promote consistency in the law of consumer protection,

courts should interpret the phrase in this Act in a manner consistent with the federal interpretations of the federal statute.

SECTION 22. 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 a debt-management-services agreement; and

(3) within five business days after a request by an individual.

(b) A debt-management-services provider shall provide each individual for whom it has established a debt-management plan or a debt-settlement plan a written accounting of:

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

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

(3) any amount deducted from amounts received from the individual; [and]

(4) [any amount held in reserve; and

(5)] the total amount and the terms on which a creditor has agreed to accept as payment in full on a debt owed by the individual.

(c) A debt-management-services provider shall maintain records for each

individual for whom it provides debt-management services for six years after the last payment made by the individual. The debt-management-services provider may use electronic or other means of storage of the records.

Preliminary Comments

Subsection (a): Some debt-management-services providers provide accountings on a monthly basis. Nothing in this section is intended to discourage this practice.

Subsection (b): Paragraph (2) has been revised to pick up those agencies, typically providers of debt-settlement services, that have the individual establish a savings account rather than sending payment to the provider for placement in an escrow account. The provider complies by stating the dates on which it directed the individual to make payment.

Paragraph (4) is bracketed because § 20 places strict limits on what the provider may charge and does not explicitly permit the provider to retain any amounts in reserve. Unless one can point to an appropriate instance of holding any of the individual's payment in reserve, the language should be omitted. Otherwise, it creates an implication that such a reserve is permissible.

Paragraph (5) applies primarily 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 and do not "agree" to accept any particular amount as payment in full.

Subsection (c): Implicit in the permission to maintain records electronically is a requirement that the records may be produced promptly upon proper request.

SECTION 23. PROHIBITED ACTS AND PRACTICES.

Preliminary Comments

Most states that regulate credit counseling agencies have a list of prohibited practices. The prohibited practices have several discrete purposes:

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

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

(3) to prevent deception;

(4) to promote the debt-management-services provider's duty of loyalty to the individual; and

(5) to prevent unfairness or abuse.

The section has been reorganized somewhat. At the Annual Meeting a commissioner noted that the prohibitions in subsection (a) would foreclose the specified activities even as to individuals with whom the debt-management-services provider is not providing debt-management services. If a provider is engaging in multiple lines of business, it could not make loans, purchase debts, etc., independently of its debt-management-services business. Therefore, subsection (a) has been rewritten to separate out and relocate to a new subsection those prohibitions from the prohibitions that should apply across the board.

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

(2) structure a debt-management plan in a manner that would result in a negative amortization of any of the individual's debts, unless a creditor that is owed a negatively amortizing debt agrees to refund or waive the finance charge upon payment of the principal amount of the debt;

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

(4) offer a gift, bonus, premium, reward, or other compensation to an

individual for executing a debt-management-services agreement;

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

(6) offer, pay, or give a 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 individual;

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

(8) compensate its employees on the basis of a formula that incorporates the number of individuals the employee induces to enter into debt-management-services agreements; or

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

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

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

(2) receive from or on behalf of an individual a promissory note or other negotiable instrument other than a check or a demand draft;

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

(4) obtain a mortgage or other security interest in property owned by an individual;

(5) make a representation that:

(A) the debt-management-services provider will provide money to pay bills or prevent attachments;

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

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

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

(A) the administrator, upon proper demand; or

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

(7) except as otherwise provided for debt-settlement-services providers in Section 20(g), provide the individual less than the full benefit of a compromise of a debt arranged by the provider;

(8) 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 debt-management services or education concerning personal finance; or

(9) furnish legal advice or perform legal services, including the preparation of or advice concerning a release of attachment or garnishment, stipulation, affidavit for exemption, compromise agreement, or other legal document other than a debt-management-

services agreement.

(c) A person that provides debt-management services may not, directly or indirectly, receive compensation for advising, arranging, or assisting an individual in connection with obtaining an extension of credit or other service from a lender or service provider if:

(1) the person providing debt-management services, or an officer, director, owner, employee, or affiliate of that person, has an ownership interest greater than [ten] percent in the lender or service provider; or

(2) an officer, director, owner, employee, or affiliate of the person providing debt-management services is an officer, director, owner, employee, or affiliate of the lender or service provider.

(d) A debt-management-services provider may not purchase goods, services, or facilities from a person if an officer, director, owner, employee, or affiliate of the debt-management-services provider has an ownership interest greater than [ten] percent in the person, or an officer, director, owner, or affiliate of the debt-management-services provider is an officer, director, owner, employee, or affiliate of the provider of the goods, services, or facilities. This subsection does not prohibit a debt-management-services provider from purchasing legal, accounting, or banking services from a member of its board of directors, if the supplier of those services both:

(1) supplies those services generally; and

(2) supplies them to the debt-management-services provider at a cost [no greater than][less than] the cost generally charged by the supplier of those services to other persons.

(e) A debt-management-services provider, in connection with collecting debts owed it or another person, may not use a false, deceptive, or misleading representation or means; engage in conduct the natural consequence of which is to harass, oppress, or abuse a person; or use unfair or unconscionable means.

(f) In applying subsection (d), the administrator and the courts shall give due consideration to judicial and administrative interpretations given to Sections 806 through 808 of the Federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692d-1692f), as amended.

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

Legislative Note: In lieu of subsection (a)(7), the state may wish to amend its general deceptive practices statute to clarify that that statute applies to providers of debt-management services as defined in this Act.

In states in which the phrase "as amended" in subsection (a) is not permitted by the constitution, the phrase should be deleted.

Preliminary Comments

Subsection (a):

At the Annual Meeting a commissioner suggested deleting subsection (a) and empowering the administrator of the UDAP statute to promulgate rules to deal with these various forms of unfair or deceptive practices. Does the Committee concur?

The November 2003 draft contained a prohibition against operating as a collection agency, as defined in federal and state law. Those definitions, however, contain an exception for nonprofit credit counseling agencies. E.g., Fair Debt Collection Practices Act § 803(6)(E), 15 U.S.C. § 1692a(6)(E). Hence, the prohibition is deleted. In its place new subsection (d) has been added to prohibit the offensive behavior that the debt collection statutes prohibit.

Paragraph (2): At the November 2003 meeting an Observer noted that at least one creditor engages in a practice that might, depending on the annual percentage rate and the amount of the monthly payment, result in negative amortization. This creditor, however, forgives or refunds the accrued finance charge if the individual completes the debt-management plan.

Apparently, this is true even if the individual ends his or her relationship with the counseling agency and self-administers the plan. If the individual does not self-administer it to completion, the negative amortization remains. Given the high rate of non-completion of plans, the Drafting Committee may wish to consider whether it is appropriate to encourage this creditor's practices by allowing plans to include debts that involve negative amortization. The Virginia statute deals with this general problem by prohibiting a plan that, at the conclusion of the plan, would result in negative amortization. This approach would not prohibit the practice of the creditor in question.

Paragraph (3): This paragraph prohibits false or misleading representations whether or not the provider knows of the deception. 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, the paragraph prohibits omissions only if the omitted facts are material and are known to the provider.

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

In lieu of the suggestion in the Legislative Note above, the Act could omit paragraph 3 altogether and provide specifically for amendment of the UDAP statute.

Paragraph (5) has been revised because some providers, viz., attorneys, perform legal services. Ultimately, this paragraph needs to be coordinated with the decision under § 4 concerning the scope of the exemption for licensed attorneys.

Paragraph (6): The November 2003 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 Drafting Committee may consider whether to prohibit the creditor from passing this indirect cost on to the debt-management-services provider.

The Committee may wish to consider whether there should be any prohibition on a provider's payment of referral fees. The rationale for the prohibition is to minimize the provider's costs of doing business, which ultimately are passed on to its customers. On the other side is an argument that payment of referral fees is an efficient way to attract business and achieve economies of scale.

Paragraph (7): This provision is the converse of paragraph (12). The November 2003 draft prohibited the agency from receiving "any cash, fee, gift, bonus, premium, reward, or other compensation from a person other than the individual or person on the individual'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" money 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 individual and distributing it to creditors. Thus the prior version might permit the agency to receive referral fees with respect to individuals who do not sign up for a debt-management plan. The current version avoids these problems. The purpose of paragraph (7) is to reduce or eliminate the economic incentive for an agency to refer individuals to persons who provide loans or other products. The Committee may wish to consider whether the protection of financially stressed, vulnerable consumers justifies discouraging a provider from recommending products provided by others.

Subsection (b):

Paragraph (2): At the November 2003 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.

Paragraphs (3)-(4): should there be an exception to these bans to permit the extension of secured or unsecured credit with respect to the provider's fees?

Paragraph (5): Subparagraphs (B)-(C) prohibit certain representations that sometimes are used to entice individuals 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. Does the Committee concur with this ban on truthful speech?

Paragraph (6): So long as the debt-management-services provider strips out the individual's identifying information, it would be free to disclose information for purposes of academic research or construction of a scoring system. On the other hand, the only permissible purpose for a disclosure to a creditor of the individual is to secure its cooperation.

Paragraph (7): The cross-referenced section permits debt-settlement-services providers to receive [15%] 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 § 20(g) to receive up to [15%] of the forgiven debt. Of course, the agency would then be subject to all other sections applicable to debt-settlement-services providers. Furthermore, since the fee cap for debt-settlement-services providers is a percentage of the forgiven debt, this would provide incentives to a credit counseling agency only

if it could negotiate a large reduction in the debt. If the agency provides both debt-management plans and debt-settlement plans, it must comply with provisions of the Act that apply to each.

Paragraph (8): This paragraph is intended to prohibit the sale to individuals of insurance and other products that in other contexts have been the cause of large expense for largely worthless products as a means of evading statutory regulation. The Drafting Committee may wish to consider whether there are other evasions that should specifically be mentioned, or whether the catch-all at the end of the paragraph suffices.

Paragraph (9): Paragraph (10) 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 paragraph makes it a violation of this Act, too. The Drafting Committee will need to resolve a dilemma: this paragraph prohibits some activity of debt-settlement-services providers, viz., preparation of or advice concerning a compromise agreement. In addition, depending on the resolution of the exemption issue, this paragraph may need an exception for providers that are licensed attorneys.

Subsection (c): This paragraph supplements subsection (a)(7) (prohibiting referral fees). It is narrower than subsection (a)(7) in that it only applies if there is a particular relationship between the agency and the other person.

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.

Subsection (d): The purpose of this subsection is to prohibit the use of a counseling agency to channel money 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 is designed to prevent attempted evasions of the limit. At the Annual Meeting a commissioner suggested changing "at a cost less than" to "at a cost no greater than." A restraint on insider dealing is more effective if the exception is limited to below-market prices, but the Committee may wish to consider the suggestion.

The Drafting Committee may wish to consider expanding the kinds of services covered by this subsection and the kinds of insiders from whom the agency may purchase services. To the extent the agency purchases at below-market prices, the transaction is unobjectionable. The risk, of course, is re-opening the door to self-dealing.

The Committee should consider whether the prohibitions of subsection (c) and (d) are appropriate if the provider is a for-profit entity. With respect to subsection (d), is it a sufficient protection that the provider's fees are capped? The prohibition in subsection (d) reinforces the

fee cap and may provide a second line of defense if an enacting state loosens or abandons fee caps.

Subsections (e)-(f): The language of subsection (e) is drawn almost verbatim from the federal statute. To eliminate some of the vagueness of the terms in these provisions, subsection (f) directs the courts 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.

SECTION 24. ADVERTISING; MANDATORY PUBLIC EDUCATION.

[(a)] All advertising for debt-management services other than debt-settlement services, regardless of medium, must disclose the information specified in Section 14(d). All advertising for debt-settlement services, regardless of medium, must disclose the information specified in Section 14(e).

[(b) In every calendar year, every debt-management-services provider shall spend on public education concerning personal finance an amount of money equal to the amount it spends on advertising via the print media, the broadcast media, and the electronic media, including e-mail. This public education may not contain any self-promotion, but 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 educational program. If the debt-management-services provider is identified, the educational program must clearly and conspicuously disclose the information specified in Section 14(d) or (e), as applicable.]

Preliminary Comments

Subsection (a): This subsection seeks to counteract the deception and pressure often exercised by debt-management-services providers that engage in extensive advertising. The cross

references are to the provisions requiring disclosure of the success rate of the agency's plans; the likely impact on the individual's credit report; that plans are not suitable for all individuals; and that other alternatives for dealing with indebtedness are available. The time and conspicuousness of the disclosures needs further attention, lest they become as incomprehensible as the Truth-in-Lending Act disclosures on TV and radio. At the Annual Meeting a commissioner suggested as an alternative that the administrator's web site contain appropriate disclosures.

Subsection (b): This subsection seeks to expand the amount of public education concerning management of personal finance. The Drafting Committee has not yet decided whether to include this section. It is a lightening rod for objections, may raise constitutional issues, and might require defining "public education" in such a way as to preclude self-serving infomercials that promote debt-management plans and underemphasize education. In addition, at the Annual Meeting a commissioner observed that a provider could evade the spirit of this requirement by placing the required advertising in a medium or at a time that would reach a different audience than its primary advertising reaches. It could, for example, direct its public education to an audience that it knows does not need the education or that the provider does not seek to serve. Does the Committee wish to pursue this subsection further? As an alternative, the Act could direct the administrator to provide public education, funded by fees imposed on licensed providers. For example: "A provider that spends more money on advertising than on public education shall pay a fee in an amount determined by the administrator. The administrator shall use the fee to provide public education concerning personal finance and shall set the fee to offset the cost of this education." Or section 26 (Powers of Administrator) could be revised to mandate or permit the administrator to provide public education (and to set the fees to offset the cost). Would the Committee like to pursue this further?

Duties of Creditors: 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 the Drafting Committee may wish to consider whether it is appropriate to impose some obligations on the creditors, too.

Caveat: Credit card issuers that are regulated by the federal banking authorities may not be subject to these restrictions by virtue of the preemption of state law. 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.

To stimulate discussion of the propriety of imposing obligations on credit card issuers, the following suggestion illustrates several obligations for the Drafting Committee to consider:

SECTION __. DUTIES OF CREDITORS.

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

(2) For purposes of this section only, "creditor" means a creditor that extends credit to individuals 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.

(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 an individual from a debt-management-services provider shall respond to that proposal within 30 days of receiving it.

(d) A creditor that receives payment on an individual's behalf from a debt-management-services provider shall permit the [individual/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 individual, in whole or in part because the individual has entered a debt-management plan with a debt-management-services provider.

(f) A creditor that receives money on behalf of individuals 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 [ten] percent 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 individuals to the provider.

(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].

Reporter's Note: The reference in subsection (a)(2) is to "open end credit plan" because the Truth-in-Lending Act 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.

The Reporter's Note to § 23(a)(12) raises the issue whether agencies should be permitted to pay for screening services. Subsection (g) presumes that the answer is "no," and complements that section by barring the creditor from charging for screening services.

SECTION 25. CRIMINAL PENALTY. A person that knowingly and willfully violates this [act] is guilty of a [felony/misdemeanor] and on conviction is subject to a fine not exceeding [$1,000] for the first violation and to a fine not exceeding [$5,000] or imprisonment not exceeding [five] years, or both, for each subsequent violation.

Preliminary Comments

At the Annual Meeting a commissioner suggested that if this section remains, it ought to specify the level of the crime (or leave that to each state) and not specify the sanction, since the general criminal law specifies the sanctions. Another commissioner suggested that not all violations of the Act merit criminal sanctions and this section should be narrowed accordingly. A third commissioner suggested eliminating the section altogether and rely on the general criminal statutes.

If the level of crime is a felony (of whatever class), the section might be limited to violations of § 5 (registration requirement), § 12 (bond requirement), § 19 (trust account requirement), § 20(a) (fee limits), and § 23 (prohibited acts and practices).

The Committee must decide: (1) whether the Act should contain criminal sanctions; (2) if so, whether it should be a felony or misdemeanor; and (3) the sections for which violation should carry criminal sanctions.

SECTION 26. POWERS OF ADMINISTRATOR.

(a) The administrator shall determine whether to approve an application for registration or renewal of registration of a debt-management-services provider.

(b) The administrator has the power to:

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

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

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

(c) The administrator may receive and act on complaints,take action to obtain voluntary compliance with this [act], refer cases to the [attorney general] for prosecution, and seek or provide remedies pursuant to Section 27.

(d) The administrator may adopt rules to carry out the requirements of this [act] in accordance with Section ____.

(e) The administrator may enter into cooperative arrangements with any other federal or state agency having authority over persons providing debt-management services and may exchange with any of those agencies information about a person providing debt-management services, including information obtained during an examination of the person.

(f) The administrator shall [may] establish reasonable fees for processing an application for registration or renewal of a registration.

Legislative Notes:

Subsection (d): If the administrator is the attorney general, the last clause should be deleted. If the state wishes the prosecution to be handled by some other official, that official should be substituted for "attorney general."

Subsection (e): Insert the citation to the appropriate section of the Administrative

Procedure Act or other statute governing administrative procedure.

Preliminary Comments

Subsection (b): At the Annual Meeting a commissioner suggested establishing a limit on the amount of expenses that could be charged to the provider, specifically, limiting liability for investigative charges to those instances in which the administrator concludes that the provider has violated the Act.

The prior draft of subsection (c) provided that failure to comply with subsection (b)(2) was grounds for a cease and desist order, but it was not clear what the person is to cease and desist from. In this draft the failure to comply is grounds for suspension of registration, and the provision has been moved to § 29(a)(4).

In subsection (f), does the Drafting Committee wish to specify criteria for setting "reasonable" fees, e.g., "establish reasonable fees to cover the cost of processing an application"? Or should the fees perhaps be set at a level to cover all the costs of administering the Act?

Subsection (f) might also provide, "The administrator may retain for the use of the administrator the aggregate of fees, reimbursement of examination expenses, and any other payment made to the administrator pursuant to this [act] and may carry forward any balance of money from a fiscal year to be expended for the administration and enforcement of the [act] in the following fiscal year." The Maryland statute contains a more elaborate version. The Oregon statute provides that fees of the type referred to here stay with the administrator, but that all civil penalties of the type received by the administrator pursuant to Section _27_ shall be credited to the general money of the state treasury.) Does the Drafting Committee wish to include anything along these lines?

SECTION 27. ADMINISTRATIVE REMEDIES.

(a) After notice and an opportunity for a hearing, the administrator may enforce this [act] and rules adopted under this [act] by:

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

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

(3) imposing a civil penalty not exceeding [$5,000] for each violation; and

(4) revoking, suspending, or denying renewal of a debt-management-services provider's registration in accordance with Section 29 .

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

(1) commencing a civil action to obtain restitution, an injunction or other equitable relief, or both; and

(2) intervening in an action brought pursuant to Section 30.

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

(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 factor the administrator considers relevant to the determination of the civil penalty.

Preliminary Comments

The administrator should be able to issue an order to an agent or employee of a debt-management-services provider, whether or not the administrator issues an order to the provider. Is this implicit in subsection (a), or should the section contain an explicit statement to that effect?

Subsection (a)(5) authorizes the administrator to commence civil actions. Section 26(d) authorizes the administrator to refer cases to the attorney general for prosecution. The drafting Committee needs to decide whether to place all enforcement in the hands of the administrator, split it between the administrator and the attorney general, or let the states choose which model to use.

The Oregon statute provides that an individual may initiate proceedings before the administrator, who is empowered to award damages, which may be recovered by resort to the debt-management-services provider's bond. The Drafting Committee may wish to consider the desirability of establishing this adjudicatory function for the administrator in this Act.

SECTION 28. 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, and in the brackets insert the appropriate descriptive phrase, e.g., "deceptive trade practice." In some states it may be necessary to amend that act to add this Act to the statutes whose violation constitutes a violation of that act. Alternatively, this entire Act could be appended to and be a part of that act. Depending on the provisions of that other act, this might permit deletion of Section 25 (criminal penalty), Section 26(b)-(e) (investigatory power, referral to the attorney general, rule-making power), and much of Section 27 (administrative remedies).

SECTION 29. SUSPENSION, REVOCATION, OR NON-RENEWAL OF REGISTRATION.

(a) After notice and an opportunity to be heard, the administrator may suspend, revoke, or deny renewal of a debt-management-services provider's registration if the administrator finds that:

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

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

(3) the debt-management-services provider is insolvent;

(4) the debt-management-services provider or an employee or affiliate of the provider has refused to permit the administrator to make an examination authorized by this [act], has failed to comply with Section 26(b)(3) within 15 days after request, or has made a material misrepresentation or omission in complying with Section 26(b)(3) ; or

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

(b) If a debt-management-services provider does not comply with Section 19(f) or if the administrator otherwise finds that the public health, safety, or welfare requires emergency action, the administrator may order a summary suspension effective on the date specified in the order. The administrator shall hold a hearing promptly thereafter.

(c) If the administrator suspends, revokes, or denies renewal of the registration of a debt-management-services provider, the administrator may seize any records and assets of the provider located in this state. This power is in addition to the powers of the administrator under the consent required by Section 6(c)(24) .

Preliminary Comments

Subsection (b): Section 19(f) deals with failure to maintain a trust account in an amount at least equal to the sum of the balances in each individual's escrow account.

Subsection (c): Section 6(c)(24) requires the agency to provide an irrevocable consent by the bank holding the trust account to enable the administrator to access to the account.

At the Annual meeting a commissioner suggested that this section be restructured. As now drafted, it places an adjudicatory function on the administrator. The suggestion is that the section specify the grounds on which the administrator could ask a court to suspend or revoke a registration. If this suggestion is pursued, it will be necessary to deal separately with non-renewal of registration.

SECTION 30. PRIVATE ENFORCEMENT.

(a) An individual who is injured by a violation of this [act] or a rule promulgated by the administrator under this [act] may recover in a civil action:

(1) subject to subsection (b)(1), compensatory damages or, for violation of Sections 14, 15, 16, 17, [19], 20, 21, 22, or 23, the greater of compensatory damages or $[1,000];

(2) subject to subsections (b)(2) and (c), punitive damages; and

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

(b) In a class action:

(1) the minimum damages provision in subsection (a)(1) does 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 factor the court considers relevant to the determination of the damages.

(d) An individual's action, except a class action, takes precedence over a prior or subsequent action by the administrator with respect to the claim of that individual. An individual's class action takes precedence over a subsequent action by the administrator with respect to claims common to both actions, but the administrator may intervene. An

administrator's action on behalf of a class of consumers takes precedence over a consumer's subsequent class action with respect to claims common to both actions. Whenever an action takes precedence over another action under this subsection, the latter action may be stayed to the extent appropriate while the precedent action is pending and may be dismissed if the precedent action is dismissed with prejudice or results in a final judgment granting or denying the claim asserted in the precedent action.

Preliminary Comments

Subsection (a): "Compensatory damage" in paragraph (1) includes recovery for non-economic injury, such as emotional distress, humiliation, aggravation, etc. Is "compensatory" the best word to capture this idea?

The minimum damages provision applies only to the specified violations (prerequisites for a plan, electronic communication, form and contents of an agreement, failure to use foreign language documents, trust account, fee caps, other limitations on fees, periodic reports, and prohibited acts and practices). For violation of other sections, including failure to register and failure to provide customer service, the aggrieved individual may recover actual and punitive damages. The administrator also may enforce these other sections. Does the Committee concur with this dichotomy?

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

Subsection (b): An aggrieved individual may proceed by class action if the prerequisites for class actions under the rules of civil procedure are satisfied.

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

SECTION 31. STATUTE OF LIMITATIONS.

(a) An action brought pursuant to Section 27 must be commenced within [four] years of the act of which the administrator complains.

(b) An action brought pursuant to Section 30 must be commenced within [four] years from the latest of:

(1) the individual's last transmission of money to a debt-management-services provider;

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

(3) a debt-management-services provider's last disbursement to creditors;

(4) a debt-management-services provider's last accounting to the individual pursuant to Section 22(a)(1) and (2); or

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

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

Preliminary Comments

Subsection (b): Paragraph (3) is new. It has been added to reflect that the scope of the Act encompasses debt settlement.

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

Subsection (c): The language of this subsection is from H.R. 3331, a bill to regulate debt-

management-services providers.

[SECTION 32. 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 33. 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 34. RELATION TO LAW OF OTHER STATES.

(a) If compliance with a 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 persons providing or offering to provide debt-management services, the debt-management-services provider need not comply with the provision with respect to its operations in that state.

(b) Failure to comply with a provision of this [act] pursuant to subsection (a) is not a violation of this [act] or ground for denial, suspension, or revocation of a license under this

[act].

Preliminary Comments

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 individuals in this state. It must comply with this Act also with respect to individuals 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. This section makes no allowance for agencies located in other states. Those entities must 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 individuals reside.

SECTION 35. 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 36. EFFECTIVE DATE. This [act] takes effect on [_____].

SECTION 37. REPEAL. The following sections are repealed:

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

SECTION 38. TRANSITIONAL PROVISIONS; APPLICATION TO EXISTING TRANSACTIONS. 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 a law amended, repealed, or modified by this [act] as though the amendment, repeal, or modification had not occurred.

Preliminary Comments

"Law" includes statutes, administrative rules, and judicial decisions. It may be burdensome for a debt-management-services provider to comply with prior law for some of its customers and with this Act for others of its customers. The language of this section, "may be," permits a provider to comply with this Act even with respect to transactions entered before this Act takes effect.