MEMORANDUM

TO: NCCUSL Standby Committee for the Uniform Debt Management Services Act
FROM: Joel Greenberg; Tiffany Worley; AICCCA; MMI
DATE: September 28, 2007
SUBJECT: Comments regarding the Uniform Debt Management Services Act

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Comments.

Below are our specific comments on the provisions of the Uniform Debt Management Services Act ("Act"), mostly in the order in which the provisions occur in the Act. In some instances, we propose new text that is indicated by double underlines and deletions are indicated using ~~strikethroughs~~.

A. Section 3(b)(2) Exempt Agreements and Persons

We suggest section 3(b)(2) be revised to state: "receives no compensation for debt-management services from or on behalf of the individuals to whom it provides the services~~ or from their creditors~~."

Regulation is necessary in the Credit Counseling Organization ("CCO") industry to protect consumers, not creditors. If individuals are not paying a fee, and the provisions of section 3 are otherwise met, the CCO should be exempt from the Act. Further, more and more creditors are moving away from fair share to a "grant" type contribution model, which complicates the issue of whether a CCO receives compensation on behalf of individuals to whom it provides services.

B. Sections 5 and 11 Insurance

We suggest section 5(b)(4) be revised to state: "evidence of insurance in the amount of $~~2~~250,000:

(A) against the risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant;
(B) issued by an insurance company authorized to do business in this state and rated at least A by a nationally recognized insurance rating organization;
(C) with ~~no~~ a deductible equal to no more than 5% of the applicant's net worth according to its audited financial statements for the previous year;
(D) payable to the applicant for claims made by individuals in this or any other state ~~the individuals~~ who have agreements with the applicant, ~~and this state,~~ as their interests may appear; and
(E) not subject to cancellation by the applicant without ~~the approval of the~~ prior notification to the administrator."

To promote consistency with the above suggestion, we also suggest that section 11(b)(5) be revised to state: "supply evidence of insurance in an amount equal to ~~the larger of~~

$250,000~~ or the highest daily balance in the trust account required by Section 22 during the six-month period immediately preceding the application~~:

> (i) against the risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant;
> (ii) issued by an insurance company authorized to do business in this state and rated at least A by a nationally recognized insurance rating organization;
> (iii) with ~~no~~a deductible equal to no more than 5% of the applicant's net worth according to its audited financial statements for the previous year;
> (iv) payable to the applicant for claims made by individuals in this or any other state ~~the individuals~~ who have agreements with the applicant~~, and this state,~~ as their interests may appear; and
> (v) not subject to cancellation by the applicant without ~~the approval of the~~prior notification to the administrator."

Employee dishonesty insurance is generally held by CCOs. However, $250,000 worth of employee dishonesty insurance is more than is necessary. Additionally, such coverage may lead to premiums that are not affordable for some CCOs, particularly with no deductible. The insurance market is such that deductibles and policy coverage amounts for this type of insurance are largely based on the number of CCO employees. Furthermore, it is difficult for a CCO to procure insurance with no deductible unless the CCO and coverage amount are extremely small. By ensuring that the CCO has a net worth equal to twenty times the deductible, the state will adequately protect against situations when CCOs cannot pay their insurance deductible. The language should eliminate the interpretation necessitating the need for separate policies for each state where a CCO is licensed. See Rhode Island's concern about which state's claim would go first and Wisconsin's amendment addressing this.

C. Section 6 Application Requirements

1. Criminal-Records Check

We suggest that section 6(14) be revised to state: "at the applicant's expense, the results of a criminal-records check~~, including fingerprints,~~ conducted within the immediately preceding 12 months~~,~~ covering every officer of the applicant and every employee ~~or agent~~ of the applicant who is authorized to have access to the trust account required by Section 22;"

Criminal-records checks are helpful to assure that officers and employees with trust account access are good citizens. However, fingerprinting requirements are unnecessarily burdensome, often difficult to obtain, time-consuming to process and rarely, if ever, provide information in addition to what results from a criminal-records check without fingerprinting.

We suggest deleting the records check altogether for agents of the applicant as this may imply that every bank employee processing checks for the trust account would be required to provide the Division with a criminal-records check. Such a standard would be difficult to meet and more suitably addressed by the laws regulating banks.

2. Board of Directors

We suggest that section 6(15) be revised to state: "the names and addresses of all employers of each <u>non-volunteer</u> director during the 10 years immediately preceding the application;"

CCOs generally have volunteer boards of directors who serve for no compensation whatsoever. Requiring them to provide 10 years of employment history, or otherwise provide a significant amount of personal information to the state, is excessive and may dissuade many quality and contributing members of the community from such board service.

We also suggest that section 6(16) be revised to state: "a description of any ownership interest of at least 10 percent by a director, owner, or employee of the applicant in:

> "(A) any affiliate of the applicant; or
> "(B) any entity that provides products or services to the applicant or any individual relating to the applicant's debt-management services<u>, not including creditors of individuals seeking debt-management services</u>;"

To promote consistency with the above suggestion, we also suggest that section 9(d) be revised to state: "Subject to adjustment of the dollar amount pursuant to Subsection 32(f), a board of directors is not independent for purposes of Subsection (c) of this section if more than one-fourth of its members:

> "(1) are affiliates of the applicant, as defined in Section 2(2)(A) or 2(2)(B)(i), (ii), (iv), (v), (vi), or (vii); or
> "(2) after the date ten years before first becoming a director of the applicant, were employed by or directors of a person that received from the applicant more than $25,000 in either the current year or the preceding year<u>, not including creditors of individuals seeking debt-management services</u>."

As currently drafted, it appears to be the state's intent to limit the number of CCO directors who are affiliates or who have lucrative service contracts with CCOs such as marketing or back office service providers. Furthermore, it does not appear that the state wishes to limit individuals who might be employed by a credit grantor from serving as CCO directors. The added verbiage clarifies this intent so that it may be easily interpreted by CCOs.

We suggest section 6(19) be renumbered as "(20)" leaving its text as it is and that the following becomes section 6(19): "<u>the process(es) by which individuals and the applicant will inform each other if they have knowledge that a creditor rejects or withdraws from an individual's plan; and</u>"

Communicating creditor updates in a timely fashion is something most CCOs have typically handled very well without legislation or regulation, since such creditor information dramatically affects clients in debt management plans. An outline of such processes should be provided to the state in each CCO's application for licensure under the Act and should include information on how the licensee and client will communicate with each other. Moreover, to best serve clients, CCOs must have the client's vigilance. Accordingly, this added language acknowledges that such communications come from both applicants and clients.

D. Section 7 Application for Registration: Obligation to Update Information

We suggest that section 7 be revised to state: "An applicant or registered provider shall notify the administrator within ~~10~~30 days after a change in the information specified in Section 5(b)(4) or (6) or 6(1), (3), (6), (12), or (13)."

The state could realize greater compliance if a more reasonable period of time were given for such information updates.

E. Section 11 Renewal Registration

We suggest that section 11 be revised to state: "(a) A provider must obtain a renewal of its registration ~~annually~~biennially."

Some states require renewals every 2 years. This significantly reduces each CCO's compliance burden without creating much additional risk for the Act's administrators. It also reduces the state's administrative burdens.

F. Sections 13 and 14 Bond Required

We suggest section 13(b)(1) be revised to state: "be in the amount of $~~50~~25,000, or other ~~larger or~~ smaller amount the administrator determines is warranted by the financial condition and business experience of the provider, the history of the provider in performing debt management services, the risk to individuals, and any other factor the administrator considers appropriate;"

To promote consistency with the above suggestion, we also suggest that section 13(c) be revised to state: "If the principal amount of a surety bond is reduced by payment of a claim or a judgment, the provider shall immediately notify the administrator and, within 30 days after notice by the administrator, file a new or additional surety bond in an amount set by the administrator. The amount of the new or additional bond must be at least the amount of the bond immediately before payment of the claim or judgment. If for any reason a surety terminates a bond, the provider shall immediately file a new surety bond in the amount of $~~50~~25,000 or other amount determined pursuant to subsection (b)."

We believe that a lower bond amount which also allows for further lowering will grant greater flexibility to the state in issuing licenses to smaller CCOs who should not be required to have a large bond amount.

G. Sections 17 through 20 Disclosures

1. General

Overall, the many disclosure provisions found in Sections 17 through 20 may overly discourage consumers from pursuing a debt management plan. At this time, less than one quarter of consumers who receive credit counseling choose to participate in a debt management plan (DMP). Therefore, it is our belief that such discouragement is not necessary. Ironically, such repetitive disclosures also may lead to the desensitization of consumers, hindering their ability to seriously consider the consequences of debt management. Please consider how lengthy consumer agreements tend to protect the companies who draft them from legal action by performing an "I told you so" function more than providing meaningful information to consumers. As an alternative, we suggest that CCOs be required to demonstrate when and how they inform consumers of the benefits as well as potential negative consequences of debt management in the debt management agreement, in a way that can be documented for review by the state.

We therefore suggest that the following be added to section 6 as another licensing application requirement: "demonstrate when and how the applicant informs individuals about the benefits and potential negative consequences of Plans."

To promote consistency we also suggest that the following be added as another debt management agreement requirement to section 19(a): "explain the benefits and potential negative consequences of debt management."

2. Fee Schedule

We suggest section 17(a) be revised to state: "~~Before providing debt management services, a~~A registered provider shall give the individual an itemized list of debt management goods and services and the charges for each in the debt management agreement for services, which will be executed prior to providing debt management services. The list must be clear and conspicuous, be in a record the individual may keep whether or not the individual assents to an agreement, and describe the debt management goods and services the provider offers:

(1) free of additional charge if the individual enters into an agreement;
(2) for a charge if the individual does not enter into an agreement; and
(3) for a charge if the individual enters into an agreement.~~, using the following terminology, as applicable, and format:~~

[deleting the remaining items as well] "

Many CCOs offer personal crisis counseling, bankruptcy counseling, financial education literature and other goods and services unrelated to debt management. To require such goods and services and their costs to be provided by any registered CCO to every resident before entering into a debt management plan could create consumer confusion and could lead to allegations of unfair trade practices by federal and state governments. By limiting the list to the debt management goods and services (i.e., the substance of the Act and the intent of the provisions) for which the consumer contacted the licensee in the first place, such confusion and liability may be avoided. Furthermore, the information may best be conveyed in the debt management agreement, whether or not it is signed. Last, so long as the CCO accomplishes section 17(a)(1)-(3), the terminology and form should be left to the CCO to construct based on its industry knowledge.

3. Creditor Participation

We suggest section 17(c)(3) be revised to state: "with respect to all creditors identified by the individual or otherwise known by the provider to be creditors of the individual, provide the individual with a list in the debt management agreement, to the best of the applicant's knowledge, of creditors that the provider expects to participate in the plan.~~:~~

~~(A) creditors that the provider expects to participate in the plan~~
~~(B) creditors that the provider expects not to participate in the plan.~~
~~(C) creditors that the provider expects not to participate in the plan; and~~
~~(D) all other creditors.~~"

CCOs do not control the constantly shifting creditor concessions which are not always communicated by the creditors. CCOs should make no guarantees regarding such concessions, although they should do their best to explain typical concessions and the fact that late and missing payments can prevent the full realization of creditor concessions.

Essentially, (C) and (D) are adequately addressed in the budget analysis required to be described in the licensure application by section 6(11). If a creditor is not going to participate in the plan, there is no reason to include this information in the debt management agreement. As the definition of "all other creditors" could be interpreted broadly and be impossible to meet from a compliance perspective, it is best deleted as the participating creditors are the crucial pieces of information the individual needs to understand for the successful completion of a debt management plan. In addition, since the information for (C) and (D) can only come from the debtor, the additional disclosure to the consumer of what the consumer has disclosed to the licensee serves no useful purpose.

4. Right to Cancel

We suggest that section 20(b) be deleted in its entirety and replaced with "An agreement must include information regarding how an individual may cancel the agreement and under which conditions they may receive a full refund of funds not disbursed to either the consumer's creditors or to the licensee as fees. Such information must include an email address and fax number to which individuals may send cancellation requests."

So long as information is provided to consumers on how to cancel the agreement, mandating a specific form or format is unnecessary.

5. Other Disclosures

We suggest section 17(d) should be revised to state: "Before an individual assents to and agreement to engage in a plan, the provider shall inform the individual~~,~~ in writing~~ a record that contains nothing else, that is given separately, and that the individual may keep whether or not the individual assents to the agreement~~:

"(1) of the name and business address of the provider;

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

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

"(4) that nonpayment of debt may lead creditors to increase finance and other charges or undertake collection activity, including litigation;

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

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

While it is important that consumers know the possible outcomes of debt management, the requirement of a separate record is excessive, burdensome, and may become administratively difficult to perform. Moreover, such a separate record unfortunately would only become another piece of paper that, due to the already large volume of paperwork necessary to execute a debt management plan, a consumer only marginally considers before signing. By having a written requirement, the intent of section 17(d) should be adequately met**.**

To promote consistency with the suggestion for section 17(d), we also suggest that (e) through (g) of section 17 and section 18(d) also should be deleted in their entirety.

In addition, to promote consistency with the above disclosure suggestions, we also suggest section 19(a)(6) should be revised to state: "disclose:

"(A) the services to be provided;

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

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

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

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

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

"~~(E) each creditor that the provider believes will not participate in the plan and to which the provider will not direct payment;~~

"~~(F) how the provider will comply with its obligations under Section 27(a);~~

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

"(E~~H~~) that the individual may cancel the agreement as provided in Section 20;

"(F~~I~~) that the individual may contact the administrator with any questions or complaints regarding the provider; and

"(G~~J~~) the address, telephone number, and Internet address or website of the administrator."

We suggest that section 19(d)(3) be revised to state: "the provider will notify the individual within a reasonable period of time ~~five days~~ after learning of a creditor's decision to reject or withdraw from a plan and in accordance with its written processes provided in its application. This notice will include:

"(A) the identity of the creditor; and

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

As discussed under the license application requirements, CCOs have processes in place for efficient client communication of all creditor actions. In addition, consumers often are the first to receive notification from creditors that the creditors are ceasing their plan participation via monthly statements.

H. Section 21 Required Language

We suggest that section 21 be revised to state: "Unless the administrator, by rule, provides otherwise, the disclosures and documents required by this [act] must be in English. If a provider communicates with an individual primarily in any language other than English, and the provider communicates with more than 25% of its new debt management clients in any given year in this other language, the provider must furnish a written translation in~~to~~ the other language of the disclosures and documents required by this chapter."

Translating documents into other languages is expensive and should only be required when there is enough demand to offset the costs associated with such translations. If a CCO has multi-lingual employees who can serve a variety of persons in need in their own language, the CCO should not be discouraged from assisting the consumer in that language due to a lack of translated disclosures and documents.

I. Section 22 Trust Account

We suggest that section 22(i) be revised to state: "Unless due to the independent action of the bank, before relocating a trust account from one bank to another, a provider shall inform the administrator of the name, business address, and telephone number of the new bank. As soon as practicable, the provider shall inform the administrator of the account number of the trust account at the new bank."

Banks are constantly merging and changing their organizational status. Given this, CCOs cannot always control when their trust accounts might appear to be moving to another bank due to such bank action. The requirement of providing the administrator with changes should not be necessary in the event of such a merger or bank initiated change.

J. Section 23 Fees and Other Charges

We suggest that section 23(d)(1)(A) should be revised to state: "a fee not exceeding $~~50~~ 100 for consultation, obtaining a credit report, setting up an account, and the like; and"

As most CCOs provide credit counseling free of charge, and considering that debt management plan enrollment is an expensive process, a $100 initial set up fee is more appropriate than $50. Furthermore, as creditor "fair share" payments have been decreasing consistently over the years, it is important that CCOs are able to collect adequate fees so they can continue to serve consumers in need. It is also important to note that most non-profit CCOs waive fees for individuals that do not have the ability to pay, so the average fee collected by a CCO would be less than $100. It would not be unreasonable for the state to ask for a report of the average fees collected prior to reissue of a license.

We suggest that section 23(d)(1)(B) should be revised to state: "a monthly service fee, not to exceed $10 times the number of creditors ~~remaining in~~ listed in the ~~a plan at the time the fee is assessed~~, but not more than $50 in any month and no less than $20 in any month. In the event a client makes more than one month's payment in one month, the provider may charge an additional fee.

For the sake of ease of administration, this monthly service fee should be calculated initially and not be subject to change once certain creditors are paid off. Furthermore, the fee should be allowed every time the client makes a payment in the amount scheduled monthly. For example, in the event a client makes two payments in one month, representing two months worth of payments, two fees should be allowed as scheduled.

Last, CCOs should be allowed to charge a minimum of $20 per month.

K. Section 28 Prohibitions

We suggest that section 28(d) be revised to state: "A provider may not receive a gift or bonus, premium, reward or other compensation, ~~directly or indirectly,~~ for advising, arranging, or assisting an individual in connection with obtaining~~,~~ an extension of credit or other service from a lender or service provider, except for educational or counseling services~~ required in connection with a government-sponsored program~~.”

Regardless of whether the educational or counseling services are required by a government-sponsored program, CCOs should be allowed to collect a fee, or at the very least, have their expenses reimbursed by credit grantors when providing education and counseling to the clients of credit grantors. In the United States, consumers are always considering extensions of credit regardless of whether CCOs may or may not be compensated. If a CCO is asked by lenders to educate and counsel consumers for a fee to be paid by the lender, such a practice should be encouraged as it promotes consumer education and places the cost on the financial institution which benefits from the possible loan. More importantly, extensions of credit may often be good solutions for consumers in debt; however, consumers need guidance to understand how to determine which loan terms are most beneficial to them and the consequences of certain unfavorable loan terms.

L. Section 30 Advertising

We suggest that section 30 be revised to state: “A provider, when~~that~~ exclusively advertising~~es~~ debt-management services, shall disclose~~,~~ in an easily comprehensible manner~~,~~ the information specified in Section 17(d)(3) and (4) in all television, radio, and Internet advertisements.”

As previously worded, this section seems to indicate that the disclosure requirements of the Act only apply to CCOs who advertise. We clarified that ‘debt management services only’ advertisements should include certain disclosures. Moreover, we limited the requirement to certain types of advertising as such disclosures would not be necessary or practical in a small Yellow Pages ad or listing, for example.

M. Section 33 Administrative remedies

We suggest that section 33(a)(3) should be revised to state: “subject to adjustment of the dollar amount pursuant to Subsection 13-42-132(6), imposing on a provider or a person that has caused a violation an administrative fine not exceeding $1~~0~~,000 for each violation.”

Although it is important that there be consequences to violating the Act, seeking such stiff penalties may discourage reputable CCOs from assisting residents. Many CCOs with limited funds may choose not to operate in smaller states with such strict penalties. With fewer CCOs operating in smaller states, residents will have fewer options for educational guidance when facing debt problems.

N. Section 35 Private Enforcement

We suggest that section 35(b) should be revised to state: "If an individual voids an agreement pursuant to Section 25(a), the individual may recover in a civil action ~~three times~~ the total amount of the fees, charges, money, and payments made by the individual to the provider plus interest in the amount of ten percent (10%) per year, in addition to the recovery under subsection (c)(4)."

We also suggest that section 35(c) should be revised to state: "Subject to subsection (d) of this section, an individual with respect to whom a provider intentionally violates this chapter may recover in a civil action from the provider and any person that caused the violation:

"(1) compensatory damages for injury~~, including noneconomic injury,~~ caused by the violation; and

"~~(2) except as otherwise provided in subsection (d) and subject to adjustment of the dollar amount pursuant to Section 32(f), with respect to a violation of Section 17, 19, 20, 21, 22, 23, 24, 27, or 28(a), (b), or (d), the greater of the amount recoverable under paragraph (1) or $5,000;~~

"~~(3) punitive damages; and~~

"(~~4~~2) reasonable attorney fees and costs."

Again, allowing for treble and punitive damages is excessive in cases where a CCO may have over-charged a consumer. Allowing for a generous interest rate should more than make whole a consumer who has been over-charged. Allowing consumers to collect for non-economic injury and allowing for a minimum $5,000 recovery is also excessive. Allowing these excessive recoveries may again cause fewer CCOs to operate in states who have adopted the Act, even if they are quality operations.

We suggest that the last sentence of section 35(f) should be revised to state: "If, in connection with a violation, the provider has received more money than authorized by an agreement or this [act], the defense provided by this Subsection is not available unless the provider refunds the excess within ~~two~~five business days of learning of the violation."

As there may be some disagreement as to whether a violation has taken place, CCOs should be provided adequate investigation time before refunding monies. Also, some CCOs may be unable to process such refund checks so quickly. Extending the refund window to five business days will still ensure a quick refund and will be more practical from an operational standpoint.