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FOR DISCUSSION ONLY

UNIFORM CONSUMER DEBT COUNSELING ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

January 3, 2005

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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CONSUMER DEBT COUNSELING ACT

TABLE OF CONTENTS

UNIFORM CONSUMER DEBT COUNSELING ACT

Prefatory Note

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

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

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

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

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

The Drafting Committee met again in October 2004, and this draft reflects the decisions and discussions at that meeting.

UNIFORM CONSUMER DEBT COUNSELING ACT

Legislative Note: *The state must make the basic policy decision whether to permit for-profit entities to engage in the [debt adjustment][debt management] business. This decision is implemented by virtue of the presence or absence of specified provisions in the following sections: [list to be developed].*

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

Preliminary Comment

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 Adjustment Act or Uniform Debt Management Act.

Reporter's Introductory Note to Section 2 (Definitions): There are two significant changes in the definitions:

(1) To simplify the language throughout the draft, the operative terms now are "provider," "plan," and "agreement." These terms are newly defined in Section 2, and they eliminate the need to define (and use) the cumbersome terms "debt-management-services provider," "debt-management plan," and "debt-management-services agreement." Throughout the draft, the Act now speaks simply of "provider," "plan," and "agreement."

(2) Because the Act now applies to both credit counseling and debt settlement, some definitions have been revised to encompass both entities and their activities. For example, subsection (9) defines "debt-management services" to encompass the activities of both kinds of entities. Similarly, subsection (12) defines "plan" to encompass what credit-counseling agencies now call a debt-management plan (or DMP) and what debt-settlement companies now call a "program." As a result of these changes, "provider" now refers to both types of entities, and the draft does not define or use the term "debt-settlement-services provider." At those points in the draft where it is desirable to have different rules for the two types of entities, a descriptive phrase differentiates them (e.g., in section 14: "if a plan contemplates that creditors will settle the debts for less than the full principal amount of the debt" and "if a plan contemplates concessions in the form of reduced finance charge or reduced fees for late payment, default, or delinquency.")

SECTION 2. DEFINITIONS. In this [act], unless the context requires otherwise:

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

(D) an aunt or uncle, great-aunt or -uncle, first- or second-cousin, 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 occupying the residence of 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 owns more than 10 percent of, 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 occupying the residence of an individual described in paragraph (A), (B), (C), (D), or (E); or

(G) an individual who has the relationship specified in subsection (2)(D) to an individual or the spouse of an individual described in paragraph (A), (B), (C), (D) or (E) of this subsection.

(4) “Agreement” [means] [is limited to] an agreement between a provider and an individual for the performance of debt-management services.

(5) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

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

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

(B) a training program approved by the administrator.

(7) “Day” means calendar day.

(8) “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 in the form of repayment on terms other than the terms of the original contracts between the individual and these creditors.

(9) “Employee,” when used in connection with “provider,” means an individual who furnishes services related to debt-management services whether or not paid by the provider that receives the benefit of the individual’s services. This definition does not apply in Section 4.

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

(11) "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.

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

(13) "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.

(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 provider or its designee that is:

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

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

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

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

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

Preliminary Comment

On rare occasion, the context of the statutory language may call for a definition not to apply. An example is section 22(a), which uses the phrase "five business days." Cf. paragraph (7) (defining "day").

Paragraphs (2)-(3)(affiliate): The term "affiliate" is used at three places in the Act: as a disclosure item in the application for registration (section 6(d)(2)); as a tool to ensure the independence of an agency's board of directors (section 8(b)(6), (c)); and as a limit on an agency's ability to engage in self-dealing (section 23(c)-(d)) . The Act does not impose obligations on affiliates that are not also officers or directors, nor does any provision impose liability on them.

The definition in paragraph (2) is drawn from § 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.

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. At the October 2004 meeting, the Committee adopted this approach.

Paragraph (2)(E) reverts to the approach of Article 9 and uses the phrase, "occupying the residence of" rather than "residing with," which appeared in the last draft. Is this acceptable?

Another commissioner at the Annual Meeting suggested that there ought not be two definitions of the same word (viz., “affiliate”) and that the Act use “relative” instead. The Committee on Style did not object to the double definition of “affiliate,” and at the October 2004 meeting the Drafting Committee decided to retain it.

The definition in paragraph (3) also is drawn from the definition of “person related to” in UCC § 9-102(a), but adds subparagraph (C). Subparagraph (D) has been modified to declare that a person that receives more than $25,000 from a provider is an affiliate of that provider. Paragraph 3 also stipulates that an owner or director of the recipient is an affiliate. Since the purpose of defining “affiliate” is to require independent boards of directors and prevent self-dealing, the level of ownership necessary to constitute “affiliate” should be relatively low. Is 10 percent the appropriate level of ownership necessary to trigger this status? Similarly, is $25,000 the appropriate level of benefit? Under paragraph (3)(D) a person is not an affiliate until the person of which it is an owner, employee, or director has received $25,001 in the relevant period.

The definition of “affiliate” does not include 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)(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 (5) (bank): This definition is from UCC Revised Article 1 (§ 1-201(b)(4)).

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

Paragraph (8)(debt-management services): At the October 2004 meeting, the Committee decided to expand the definition to encompass the activity of entities that act as an intermediary between an individual and the individual’s creditors, for the purpose of changing the terms of the original contract between the individual and those creditors. That is, there is no requirement that the individual’s funds flow through the provider. The definition includes credit-counseling agencies and debt-settlement companies even if they do not have control over the individual’s funds, as when they are in an account managed by the individual or a third party.

The definition includes credit-counseling agencies even if the concessions offered by creditors are not subject to negotiation. It does not, however, encompass a creditor that compromises a claim with its debtor. Although the creditor may receive money from an individual, it is not for the purpose of “distributing” that money to a creditor. And the definition does not encompass entities that provide only educational or counseling services concerning management of personal finance.

Former paragraph (9)(debt-management-services provider) has been deleted. The relevant definition now appears in paragraph (13)(provider).

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

Paragraph (9)(employee): The purpose of this definition is to prevent evasion of the Act by resort to outsourcing the services necessary for running a debt-management business. The phrase "related to debt-management services" is critical, because it has the effect of excluding from the definition, e.g., an individual who makes emergency repairs to the agency's plumbing system. "Services related to debt-management services" would include such things as marketing, customer service, education, counseling, interaction with creditors, processing of payments by individuals, and any other services provided by the agency to the individual.

The definition encompasses all persons who provide the specified services, regardless of who signs the paycheck and regardless of whether the employee works on-site at the provider's place of business or elsewhere (e.g., the individual's home or the site of an entity to which the provider has outsourced the services). The definition does not apply in Section 4, which excludes from the scope of the Act specified persons and their employees.

Paragraph (11)(person): This definition conforms to the Conference's standard definition. The definition encompasses for-profit, not-for-profit, and tax-exempt entities.

Paragraph (12)(plan): At the October 2004 meeting, observers representing debt-settlement companies informed the Committee that they do not form plans. Instead, they provide programs. The new definition of "plan" is designed to encompass both what now are typically called "debt-management plans" and the "programs" established by debt-settlement companies. This enables the operative provisions of the Act to use the term "plan" to apply to both types of providers. To be a plan, the program or strategy need not encompass all the debts of the individual. E.g., debt-management plans by traditional credit-counseling agencies have not typically included secured debt or debts owed utilities. No provision of this Act requires that a provider deal with all the creditors of an individual to whom it provides debt-management services.

Paragraph (13)(provider): This definition replaces former paragraph (9)(debt-management-services provider), thereby enabling reference throughout the Act to "provider," rather than its more cumbersome predecessor. 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 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 does not include an entity that merely offers to provide debt-management services; the entity must provide those services to more than three individuals. Once an entity is within the definition, however, its advertising and other sales practices are subject to the rules of the Act.

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

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

Paragraph (15)(signed): The definition of "signed" is drawn from UCC Revised §§ 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) its principal business office is located in this state or if it is formed under the laws of this state;

(2) by any means, including electronic communication, it solicits individuals located in this state to obtain debt-management services; or

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

Preliminary Comment

At the October 2004 meeting, the Committee questioned whether subsection (1) was too broad, to the extent it referred to "agents." The purpose of this subsection is to enable the state to regulate businesses that are located or operating within its borders, regardless of the location of their customers. A state should be able to regulate those entities that are physically present within its borders, as well as those that are incorporated there but not otherwise present. Subsection (1) has been revised accordingly and no longer refers to employees and agents. Subsection (2) focuses on the location of the provider's customers, regardless of the location of the entity, e.g, an independent call center, that does the soliciting. Subsection (3) also focuses on the customer's location, but the location as it is known or should be known by the provider.

Under this section the Act does not apply to: (1) a 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, while living in another state, forms an agreement with a non-resident provider and later moves to this state; or (4) a resident of this state who forms an agreement with a provider located in another state while the individual temporarily is in that other state, if the provider has no reason to know that the individual resides in this state.

Section 16(a)(3) requires the agreement between a provider and an individual to state the individual's address. If the individual supplies an address outside this state, the provider may have no reason to know that the individual is a resident of this state. The Act applies, however, if the individual is physically present in this state when the agreement is formed, if the provider has reason to know that fact.

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. Some observers have objected that the Act ought not apply to providers located in other states and that it is unconstitutional for a statute to provide otherwise. A cursory review of legislation reveals that statutes regulating debt-management services often apply to non-resident providers that do business with residents of the state. E.g., Connecticut (Ct. Gen. Stat. § 36a-656(a)); Illinois (205 Ill. Comp. Stat. Ann. § 665/2); Maryland (Md. Fin. Inst. Code Ann. § 12-924(D)); Michigan (Mich. Comp. Laws § 451.412(j)); New York (N.Y. Gen. Bus. Law § 455(1)); and Virginia (Va. Code Ann. § 6.1-363.3)). In addition, the U.S. District Court for the District of Kansas has upheld the constitutionality of applying the Kansas statute to a Massachusetts agency. Cambridge Credit Counseling Corp. v. Foulston, 303 F. Supp. 2d 1188 (D. Kan. 2003).

The Act applies to "persons," not just "providers." But persons other than providers need not register. Almost all of the prohibitions and other constraints apply to "providers." But see section 18 ("agreements" by persons that are not registered under this Act are voidable) and section 27 (liability of persons who cause or aid violations of the Act).

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 state- or federally chartered bank;

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

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

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

(6) a person licensed under Section ____ as a (<u>money transmitter</u>)].

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

Preliminary Comment

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

The exemption for banks in subsection (2) extends to subsidiaries of banks.

A debate arose at the Annual Meeting concerning whether attorneys should be exempt. Attorneys are governed by a code of conduct and elaborate disciplinary structure. On the other hand, this structure is not always effective to protect clients. A law firm operating as a provider in New York and Vermont recently inflicted substantial injury on indebted consumers. As originally enacted, the federal Fair Debt Collection Practices Act contained an exemption for lawyers. When it became clear that some attorneys were abusing this exemption, Congress amended the Act to remove the exemption altogether. The sentiment of the Committee at the October 2004 meeting was to exempt attorneys only if debt-management services are incidental to the attorneys' overall practice.A correspondent, whose letter to the Committee is posted on the Committee's web site (www.nccusl.org/Update/CommitteeSearchResults.aspx?Committee=222) questions the soundness of the reasoning underlying this decision. The correspondent makes a good point, and the Committee may wish to reconsider.

A second issue concerning this exemption which needs further attention is whether the exemption should be limited to attorneys who are licensed in this state. In connection with creating an exemption for attorneys, the Conference does not ask each enacting state to make a judgment whether that state's system of self-regulation by attorneys is effective. Rather, the Conference indulges in a presumption that it is. This suggests that the Conference should not ask a state to make that judgment about another state's system. It probably is desirable for the exemption to encompass attorneys who are licensed in any jurisdiction. If the Committee agrees, paragraph (4) could read, "a person who is licensed by a jurisdiction in the United States to practice law." Cf. section 23(b)(9)(prohibited acts include furnishing legal advice unless the person furnishing the advice "is licensed to practice law"). A similar issue exists with respect to accountants.

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" speaks of "acting as an intermediary between an individual and one or more creditors." With this language in place, it is not necessary for an exemption for creditors to appear in this section, since a creditor acting on its own behalf is not acting as an intermediary.

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

SECTION 5. REGISTRATION.

(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 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, or agents of the person.

(d) The administrator shall maintain and make public the names of all persons registered as providers under this [act].

Preliminary Comment

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

Subsection (b): Section 2(13) defines “provider” as “a person that . . . has provided debt-management services to more than three individuals” in a year.

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

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; [and]

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

(6) evidence of tax-exempt status under Section 501(c) of the Internal Revenue Code, 42 U.S.C. §501(c), as amended].

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

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

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

(3) the address of each location in this state at which the applicant will provide debt-management services, 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 owns more than 10 percent of the applicant;

(5) identification of every jurisdiction in which the applicant or any of its officers or directors has been licensed or registered or has accepted individuals for debt-management services during the five years immediately preceding the application;

(6) a statement describing, to the extent it is known or after reasonable investigation should be known, any material civil or criminal judgment or litigation, and a statement describing, to the extent it is known or after reasonable investigation should be known, any material administrative or enforcement action by a government agency in any jurisdiction

against the applicant or against any of its officers, directors, or owners or any person with authority to access the trust account required by Section 19;

(7) 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;

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

(9) 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;

(10) 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;

(11) a copy of each current form of agreement that the applicant will use with residents of this state;

(12) the current schedule or schedules of fees and charges that the applicant will use with individuals who are residents of this state;

(13) at the applicant's expense, the results of a criminal records check, including fingerprints, conducted within the immediately preceding 12 months, on every officer and on every employee or agent of the applicant who is authorized to have access to the trust account required by Section 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; and

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

(d) The application also must include, [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,]:

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

(2) a description of any ownership interest equal to or greater than 10 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; and

(4) 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:

(A) evidence of tax-exempt status under Section 501(c) of the Internal Revenue Code; and

(B) the identity of each director who is an affiliate, as defined in the paragraphs of Section 2 other than paragraph (3)(C), of the applicant.

(e) The applicant or registered 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 (c)(1), (3), (6), (11), or (12), or (d)(4) .

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

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

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

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

If the state wishes to permit for-profit entities to provide debt-management services, the bracketed language containing subsection (b)(6) should be deleted. If the state wishes to limit debt-management services to non-profit entities, the brackets should be deleted.

In subsection (d)(introduction), insert the citation to the statute that authorizes the formation of not-for-profit corporations. If the state does not permit for-profit entities to provide debt-management services, the bracketed language should be deleted.

In states in which the constitution does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsections (b)(6), (d)(introduction), and (d)(4).

Preliminary Comment

Subsection (a): "Form" encompasses format, and 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 (b)(4) requires insurance in the amount of $250,000 against the risk of employee misconduct, including theft of funds from the trust account. It is not common under existing state law to require both this kind of insurance and also a bond of the type required by section 12. The two requirements, however, protect against different risks. The insurance required by this section protects against the risk of employee dishonesty. The proceeds of the insurance policy would be payable to the provider and would enable it to continue operating. The bond required by section 12 protects against the risk of violation of any provision of this Act. The proceeds would be paid to or for the benefit of the administrator and the customers of the provider.

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

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

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

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

Paragraph (6) requires disclosure of material judicial and administrative proceedings in any jurisdiction against the officers, directors, owners, and persons authorized to access the trust account containing customers' funds. The administrator by rule can elaborate on what proceedings are material. This paragraph does not impose any disclosure requirement with respect to proceedings of which the applicant is reasonably unaware.

Paragraph (7) requires audited financial statements only if the applicant has them. If the applicant is not in the practice of obtaining audited statements, this paragraph does not require them. This is contrary to many existing statutes, which require an applicant to supply audited financial statements.

Paragraph (8): To obtain registration, a provider must employ counselors who are certified within 12 months of their initial employment. This requirement applies only to employees who act as counselors and educators. It does not apply to such other employees as customer service representatives. Section 14 prohibits a plan unless a certified counselor has done specified things. The reason for requiring an applicant to produce evidence that its counselors are certified is to assure the administrator that the provider will be able to comply with section 14.

Paragraph (9): As used in this paragraph, "programs" encompasses both a course of instruction, which may be entirely oral, and computer software.

Paragraph (11): An agency, whether located in this state or elsewhere, need supply only the documents that it will use with residents of this state. Section 26(c)(1) empowers the administrator to investigate the activities in another jurisdiction of a provider that is located in or doing business in this state. Under that section the administrator may obtain documents used in other jurisdictions.

Paragraph (12): As with paragraph (11), an applicant, whether located in this state or elsewhere, need supply only the schedules of fees and charges for residents of this state. For purposes of this paragraph, "fees and charges" includes all costs, however denominated (e.g., "voluntary contribution"), to be paid by customers of the applicant. This information will enable the administrator to monitor the industry's practices in the state. It should assist the administrator in determining whether an individual agency is gouging individuals, as well as whether to encourage the legislature to raise the fee cap when the passage of time or changed circumstances make it too low.

Paragraphs (11) and (12) require information that is current as of the time of the application. An applicant is free to modify the forms or the fees without prior approval, unless the administrator adopts a rule to the contrary. Subsection (e) of this section requires the provider to notify the administrator within 10 days of any changes in specified information required by this section, including the information required by paragraphs (11) and (12).

Paragraph (13): In some jurisdictions the mechanics and procedures for obtaining fingerprints are quite burdensome. This paragraph attempts to reduce the burden by permitting an applicant that has gone through this process in one state to use the results of the process for a period of 12 months in other states, too. The 12-month limitation applies to the criminal-records check, not the time of submission to the other state. The criminal-records check must include a check of fingerprints, but the fingerprints need not have been obtained during the 12-month period.

Former paragraph (16), which required an applicant to provide an irrevocable consent giving the administrator access to the trust account, has been deleted. In its place is new subsection 26(c)(4), empowering the administrator to obtain the funds, as well as all books and records, from the bank holding the trust account.

Paragraph (14): The administrator may require additional information either by rulemaking procedure applicable to all applicants or by specific request in response to a specific application.

Subsection (d) collects in one place additional disclosures for non-profit entities. An observer at the October 2004 meeting suggested that these disclosures be required of all entities, so as not to make the requirements for non-profits more onerous than for for-profits. The reporter's notes from that meeting fail to reflect any decision by the Committee with respect to this suggestion. Pending review by the Committee, this draft incorporates the suggestion. (If the

Committee's decision is to require these disclosure only of non-profits, the brackets will come off in the introductory clause, and the reference to non-profits in paragraph (4) will be deleted.)

Subsection (e): The cross-referenced sections require evidence of insurance against employee misconduct and disclosure of the name of the applicant, the addresses at which it operates, enforcement action against the applicant in another state, the applicant's fee schedule and standard forms, and tax-exempt status. Subsection (e) requires immediate notification of any change in this information, and since it applies to the "applicant or registered provider," this requirement of notification applies both before and after the administrator has issued a certificate of registration. Notification of change in other required information is governed by Section 10 (Renewal of Registration), which requires notification at the time of renewal of registration.

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)(7) and (13) and the addresses required by Section 6(c)(4). .

Preliminary Comment

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

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 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

(c) [With respect to non-profit or tax-exempt applicants,] the administrator shall deny registration if the board of directors is not independent of the applicant's officers, employees, and agents.

(d) A board of directors is not independent for purposes of subsection (c) if more than one-fourth of its members:

(1) are affiliates of the applicant as defined in 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.

Legislative Note: *If the state limits registration to non-profit entities, the bracketed language in* *subsection (c) should be deleted. If the state permits for-profit entities, the brackets should be deleted.*

Preliminary Comment

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

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

Subsection (d): Since the definition of "affiliate" includes directors, the board of directors could not possibly be independent. Hence paragraph (1) excludes directors from the definition of affiliates for purposes of determining the independence of the board.

SECTION 9. CERTIFICATE OF REGISTRATION: TIMING.

(a) The administrator shall approve or deny an initial registration within 60 days after an application is filed. In connection with a request pursuant to section 6(c)(14) for additional information, 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 denied.] 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 [or fails to act on an application within the time specified in subsection (a)], the applicant, before the expiration of [30] days after receiving notice of 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, and conform the number in brackets to the period specified in that Act.*

Preliminary Comment

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

The second approach is the converse of deeming the application approved: the application is deemed to be denied, and the applicant may exercise its right of appeal under subsection (b). To implement this alternative, one would add the bracketed sentence in subsection (a). This is the cleanest of the alternatives.

In the third approach, the bracketed sentence in subsection (a) is omitted and the bracketed clause in subsection (b) is added. Subsection (b) then would authorize a judicial appeal if the application is denied or if the administrator fails to act in a timely manner.

The fourth approach is to delete the bracketed material in both subsections and implicitly leave the entire matter to be handled by judicial procedure, such as mandamus.

The Committee discussed these alternatives at the October 2004 meeting, but did not decide which one to adopt. Which approach does the Committee prefer?

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)(8)and a financial statement of the kind required by Section 6(c)(7) 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 by it or its designee 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) disclose the total amount of money accumulated during the preceding 12 months pursuant to plans by or on behalf of individuals who reside in this state and with whom it has agreements; and

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

(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 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 ____. Until the appeal process is final, the applicant may continue to provide debt-management services. Thereafter, subject to the administrator's order and subject to Section 29(c), the applicant may continue serving its existing customers until, with the approval of the administrator, it transfers them to another registered 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 Comment

Subsection (a): The cross-referenced provision in paragraph (4) requires proof of counselor certification. The financial statement required by section 6(c)(7) is not necessarily an audited statement. Does the Committee want to impose a requirement that, once registered, providers must obtain audited financial statements?

Paragraphs (7) and (8) require disclosure of amounts paid or accumulated by individuals with whom the applicant has agreements. These amounts determine the size of the bonds required by section 12. Paragraph (7) refers to providers and their agents that receive and distribute the individual's money. Paragraph (8) is new; it applies to providers that do not take possession of those funds.

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

Subsection (c): The grounds for denial of an application to renew registration appear in Section 29. The administrator has 30 days to act on the application. The 30-day 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.

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

SECTION 11. REGISTRATION IN ANOTHER STATE. A person that has submitted an application for, and holds a certificate of, registration or renewal of registration as a 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) or Section 10(a). The administrator shall accept the application and the certificate from the other state as an application for registration or for renewal of registration, as appropriate, in this state if:

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

(2) the applicant, under oath:

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

(B) provides current information.

Preliminary Comment

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

SECTION 12. BOND.

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

(b) The surety bond must run concurrently with the period of registration and for two years thereafter if the provider ceases providing debt-management services to individuals in this state.

(c) If the principal place of business of a provider is:

(1) located in this state, a surety bond must run to individuals who obtain debt-management services from the provider and to the state for the benefit of the state and those individuals, wherever located; or

(2) not located in this state, a surety bond must run to the individuals who obtain debt-management services from the provider and who reside in this state and to the state for the benefit of the state and those individuals.

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

(1) be in an amount equal to [$100,000] or [two] times the average daily balance in the trust account required by Section 19 during the six months immediately preceding the date of the application for registration or renewal of registration, whichever is larger, or in such other amount that the administrator determines is warranted by the financial condition and business experience of the provider, the history of the provider in providing debt-management services, the potential loss to individuals, and any other factor the administrator considers appropriate;

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

(3) have payment conditioned upon the noncompliance of the provider or

its agents with this [act].

(e) If a 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 the larger of $100,000 or two times the average daily balance of the amounts received from residents of this state and deposited in the trust account required by Section 19 during the six months immediately preceding the date of the application for registration or renewal of registration, or such other amount as determined by the administrator.

(f) For an initial registration of a provider that has not provided debt-management services in this state within the immediately preceding five years, the amount of the surety bond is the larger of $100,000 or an amount determined by the administrator, based on the administrator’s consideration of the financial condition and business experience of the provider, the history of the 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 average daily balance 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 provider shall immediately notify the administrator of that fact and, within [30] days after notice by the administrator, shall file a new or additional surety bond in an amount set by the administrator, which amount 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 must immediately file a new surety bond in the same amount as the amount of the terminated bond.

(h) In lieu of the surety bond required by this section, a 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 $10,000 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 upon presentation of a certificate by the administrator and, as provided in subsection (i), 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]; 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 issues a final order under Section 27(a)(2) or recovers a final judgment under Section 27(a)(5) or any individual who recovers a final judgment pursuant to Section 30(a), (b), or (c)(1) or (3) 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. If claims against the security exceed the amount of the security, the surety or other stakeholder may petition the administrator to determine the order and amount in which the claims are paid.

Preliminary Comment

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

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

Subsection (c): The bond runs in favor of the state for the benefit of the state and 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. This includes individuals who reside in other states if the provider is based in this state. If the 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.

Subsection (d): For those providers that do not receive payments for distribution to creditors, and therefore are not required by Section 19 to establish a trust account, the bond requirement is $100,000. For others, the bond requirement is the greater of $100,000 or two times the average daily balance in the trust account. The amount of the bond would depend on the amount received from individuals and the frequency of the provider's payment to the creditors. A provider that receives payments of $130 million per year, or $2.5 million per week, and pays creditors twice a week, would have an average daily balance of approximately $900,000. Its bond requirement would be $1.8 million. This alternative gives the provider an incentive to make payments to creditors on a daily basis. The administrator is free to set the bond requirement for a particular provider at a different amount.

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

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

Subsection (e): A provider located in this state must provide a bond in an amount based on the size of its trust account, which may contain funds of individuals who reside in other states. The laws of those other states may require the provider to furnish a bond to protect the residents of those states. This subsection provides some relief from having to provide duplicative bonds. In no event, however, does the bond amount fall below the amount it would be if the provider were not located in 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.

Subsection (h): As an alternative to posting a bond, subsection (h) authorizes the provider to procure insurance or, subject to the administrator's approval, a letter of credit or debt instruments. The requirement of approval by the administrator extends to both the securities deposited and the terms of the account into which they are deposited, to ensure that they are available to pay claims of injured individuals. The administrator by rule can develop the mechanics for liquidating the securities and paying the proceeds to injured individuals.

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

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, damages for overcharges, 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?

The last sentence has been added, to permit the administrator to determine the order in which the security should be applied to satisfy claims. This seeks to make payment of claims equitable. But it may deprive individuals who uncovered wrongdoing and acted first from recovering full compensation for their injuries. At the expense of the diligent consumer, the provision enhances the position of the individual who files a copycat action. Should this last sentence be dropped? Should the administrator be directed to determine priority on the basis of first-in-time?

SECTION 13. CUSTOMER SERVICE. A 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 Comment

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

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

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

Section 15 permits a provider to comply with Sections 14, 16, and 22 by means of electronic communication. Section 13 makes no exception for this provider. Even if a provider desires to operate exclusively via electronic communication, it must comply with this section.

SECTION 14. PREREQUISITES FOR PROVIDING DEBT-MANAGEMENT

SERVICES.

(a) Before providing debt-management services to an individual, a provider shall give the individual a list, in a record the individual may keep whether or not the individual assents to an agreement, of services and the charges for each, describing:

(1) those goods and services the provider offers:

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

(B) for a charge, if the individual enters into an agreement; and

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

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

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

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

(2) has prepared a financial analysis and a plan;

(3) has made a good faith, reasonable determination, based on its analysis of the information provided by the individual and otherwise available to it, that the plan is suitable for the individual and the individual will be able to make the payments that the plan calls for the individual to make; and

(4) in good faith believes that each creditor of the individual listed as a

participating creditor in the plan will accept payment of the individual's debts as provided in the plan.

(c) Before an individual assents to an agreement to engage in a plan, a provider shall provide the individual with:

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

(2) with respect to all creditors identified by the individual or otherwise known by the provider to be creditors of the individual, a list of all creditors that the provider in good faith expects to participate in the plan and a list of all creditors that the provider in good faith expects not to grant concessions or as to which the provider has no reason to know.

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

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

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

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

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

(5) unless the individual is insolvent, if a creditor settles for less than the

full amount of the debt, the plan will result in the creation of taxable income to the individual even though the individual does not receive any money.

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

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

(2) Establishment of a debt-management plan may hurt your credit rating or credit scores.

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

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

IMPORTANT INFORMATION FOR YOU TO CONSIDER

(1) Our program is not suitable for all individuals, and you may ask us to provide information about bankruptcy and other ways to deal with indebtedness.

(2) Nonpayment of your debt pursuant to our program is likely to hurt your credit report and may lead creditors to undertake activity, including litigation, to collect their debts.

(3) Unless you are insolvent, our program will result in the creation of taxable

income to you even though you will not receive any money.

Preliminary Comment

Subsection (a): The disclosure of charges must contain the dollar amounts or the method of determining the dollar amounts, e.g., "$5 per month for each creditor that participates in the plan" or "five percent of the amount of debt that a creditor writes off."

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

The education may consist of an individual session with a counselor (which may also include the analysis required by paragraph (2)), a group class, or an electronic educational program. The education must be substantially more than an explanation of the benefits of a plan. It must begin but need not be completed before commencement of a plan, since a course of education may take months to complete. Education for financial literacy is receiving increased attention, and several entities are attempting to define standards for effectiveness. As these attempts come to fruition, the administrator may exercise power under Section 26(e) to establish minimum standards for the education.

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

Paragraph (4) of the prior version required a provider to make a good faith, reasonable determination that the individual can make the required payments and that creditors will participate in the plan. This requirement is feasible for credit-counseling agencies but perhaps not for debt-settlement companies. Therefore, the paragraph no longer requires that the provider reasonably believe that each creditor will participate. It suffices that the provider *honestly* believes that the creditor will participate. If a provider knows that a particular creditor will not participate, the provider cannot in good faith believe that the creditor will participate, and therefore cannot satisfy this paragraph if that creditor is included in the plan. Former paragraphs 3-4 have been slightly reorganized to implement these changes. The standards "good faith" and "reasonable" are vague. The administrator may promulgate rules to articulate factors relevant to determining whether these vague standards are met.

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

Subsection (c): Since secured creditors are creditors, paragraph (2) requires the provider to include secured creditors in the two lists, as appropriate. The language in the last draft ("accept the payment proposed in the plan") is appropriate for plans of credit-counseling agencies, but not for programs of debt-settlement companies. This draft changes the phrase to "participate in the plan." To conform to the change in subsection (b)(4), the standard in this paragraph is changed from reasonableness to good faith. Taken together, the two lists must include all the creditors whose existence the provider knows or has reason to know. It might be preferable to revert to the approach of the previous draft, requiring reasonableness rather than good faith and creating separate subsections with different standards for credit-counseling agencies and debt-settlement agencies.

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

SECTION 15. COMMUNICATION BY ELECTRONIC MEANS.

(a) A provider may comply with Section 14, 16, or 22 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 plan required by subsection 14(b)(2);

(2) the individual is advised of the availability of assistance by telephone

or in person and is afforded the opportunity for discussion of the financial analysis and the initial plan with a certified counselor;

(3) the disclosures and materials required by Sections 14, 16, and 22 are presented in such a way that the individual may retain them electronically and print them;

(4) (A) the provider informs the individual that upon electronic, telephonic, or written request within the next 30 days, the provider will send the individual a written copy of the materials required by Section 14(c) at no charge; and

(B) if requested to send a written copy of the materials, the provider sends it at no charge within three days of the request;

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

(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 within the next 30 days, it will send the individual a written version of the disclosures at no charge; and

(C) if requested to send a written version of the disclosures, the provider sends it at no charge within three days of the request; and

(6) (A) the provider informs the individual that upon electronic, telephonic, or written request within 90 days after the individual assents to an agreement, it will

send the individual a written copy of the agreement required by Sections 16 and 23; and

(B) if requested to send a written copy of the agreement required by Sections 16 and 23, the provider sends it at no charge within three days of the request;

(7) (A) At the time of providing an electronic version of a report required by Section 22, the provider informs the individual that upon electronic, telephonic, or written request within the next 30 days, it will send the individual a written copy of the report; and

(B) if requested to send a written copy of the report, the provider sends it at no charge within three days of the request.

(b) A 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 or on a page that is clearly and conspicuously linked to the home page:

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

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

(3) the names of its principal officers.

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

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

Preliminary Comment

Subsection (a) permits electronic delivery of the information required by Section 14, and it permits electronic formation of agreements. Under paragraph (2), if counseling in person is not readily available in reasonable proximity to the individual's residence, the provider must offer counseling or other assistance by telephone. An alternative approach would permit agencies to operate entirely by electronic communication, in which event paragraph (2) would be revised to require the agency to disclose that it operates entirely by electronic communication, that some other agencies provide personal contact, and that if the individual wants personal contact he or she should seek out one of those other agencies. (Section 13 (Customer Service) would also need revision.) Does the Committee wish to adopt this alternative?

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

To meet the objectives of the physical delivery contemplated by section 14, electronic delivery must satisfy certain requirements of form, such as appearing on a screen that contains no other information.

Even if a plan is formed over the Internet, the individual should have a hard copy of the agreement with the provider. Paragraph (3) requires that the agreement must be presented in a printable format. Paragraph (6) requires the provider to send a written copy if the individual requests it. The provider may not limit the medium by which the individual requests a copy. This is true also of the requests for written copies under paragraphs (4) and (5).

Section 22 requires periodic reports. Section 15 has been drafted to permit the provider to make these reports electronically. Does the Committee concur?

Subsection (b): An agency might do business under numerous names. Subsection (b) requires disclosure of all those names, along with the provider's principal location and officers, but it permits the provider to disclose this information via a link to another page of the website.

Subsection (c): A 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.

SECTION 16. FORM AND CONTENTS OF AGREEMENT.

(a) Every agreement must:

(1) be in a record;

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

(3) include the name and address of the individual and the name, address,

and telephone number of the 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) the schedule of payments or deposits 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 in good faith of the date of the last payment;

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

(E) if a plan provides for regular periodic payments to creditors, the schedule of payments to each creditor, including the amount and date on which each payment will be made;

(F) if the plan provides for other than regular periodic payments to creditors, the amounts of and dates on which the provider reasonably believes payments to creditors will be made;

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

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

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

(J) 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 provider with any of the information required under subsection (a)(4)(J), the provider complies with that subsection only by disclosing the information supplied by the administrator.

(c) Every agreement must provide that:

(1) the individual has a right to terminate the agreement at any time, without penalty or obligation, by giving the provider written or electronic notice, in which event the provider will refund all unexpended money that the provider has received from or on behalf of the individual for the reduction or satisfaction of the individual's debt;

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

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

(A) the identity of the creditor; and

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

(4) immediately before settling a debt with a creditor, the provider will obtain the individual's consent to the settlement.

(d) An agreement may not:

(1) provide for application of the law of any jurisdiction other than the United States and this state or the state in which the individual resides at the time of the agreement;

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

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

(4) contain a provision that:

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

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

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

(f) An individual may rescind an agreement until midnight of the third business day after the individual assents to it, unless the agreement fails to comply with this section or Section 23, in which event the individual may rescind the agreement until the expiration of 30 days after the individual assents to it. To exercise the right to rescind, the individual must give written or electronic notice to the provider. Notice by mail is given when mailed.

(g) Every 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 agree to it by electronic communication or by signing 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 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 rescind in the event of a personal emergency. To waive the right, the individual must send or deliver a signed, dated statement in his or her own words describing the circumstances that necessitate a waiver. The waiver must explicitly waive the right to rescind. A waiver by means of a written or electronic standard-form document is void.

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

Preliminary Comment

Subsection (a): At the October 2004 meeting, the Committee decided to drop several paragraphs of this subsection: former paragraph (4)(C) required disclosure that the provider may not require voluntary contributions. The substantive prohibition of required contributions in Sections 20-21 remains in the draft. The disclosure requirements in section 14 render the disclosures in former paragraphs (G) and (H) redundant, so they have been dropped as required disclosures here.

Paragraph (4)(C): 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)(C) requires a good faith estimate of the date of the final payment.

Paragraph (4)(D): At the October 2004 meeting an observer suggested changing the standard from reasonable to good faith. This change was made in Section 14, dealing with information provided before the individual assents to a plan. Under this section, however, before securing the individual's assent to a plan the provider must have a reasonable basis for believing that each creditor will make the concessions listed in the record. Former paragraph (E) has been broken into two paragraphs. One or the other, but not both, will apply to each provider. The first, here paragraph (E), will apply to credit-counseling agencies, and it contains the latter part of former paragraph (E). New paragraph (F) will apply to debt-settlement companies and requires disclosure of the amounts of and dates on which the provider expects payments to be made to creditors. It may not be feasible for debt-settlement companies to comply with paragraphs (D) and (F).

Paragraph (4)(G): 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 provider or that the provider otherwise actually knows to be a creditor of the individual. Subparagraph (G) does not require the provider to make any disclosures with respect to creditors of which it is unaware. The language has been modified to be more appropriate for debt-settlement companies.

Paragraph (4)(H): The good cause for termination by a provider pursuant to this paragraph does not encompass a desire to escape the fee structure to which the provider may have committed. Rather, it contemplates such things as the individual's failure to make monthly payments or to cooperate with the provider. The standard of good cause may vary depending on whether the provider is a credit-counseling agency or a debt-settlement company, because the adverse consequences to the individual in the event of termination may be different.

Paragraph (4)(J): Compliance with this paragraph 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.

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 providers. If the individual has an unlimited right of termination, it is questionable whether there is a contract at all. The requirement of notice may supply sufficient obligation to support a contract, but even if it does not, there is no reason why the industry, and regulation of the industry, cannot operate on the basis of agreements that are not enforceable under the common law of contracts. This Act provides the authorization for the industry, as well as the regulation of it.

For a termination to be effection under subsection (1), the individual must give written or electronic notice. Is this wise, or should oral notification suffice?

Subsection (4) is new. It requires debt-settlement companies to secure the individual's consent at the time of settling each debt. This affords the individual an opportunity to review the terms of the settlement before it becomes final.

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

Subsections (f) through (h) derive from section 125 of the Truth-in-Lending Act, 15 U.S.C. § 1635. Subsection (f) confers a right of rescission for three days after an agreement that complies with sections 16 and 23. Section 16 specifies the form and contents of the agreement, and Section 23 lists prohibited conduct. Some of the prohibited conduct might be manifest in an agreement, in which event the agreement would not comply with section 23. The October 2004 Meeting Draft provided that if the provider failed to comply with Section 16 or Section 23, the right of rescission never expired. This draft provides that if the agreement fails to comply with either of those sections, the individual has 30 days in which to rescind. If the individual rescinds, subsection (g) calls for forfeiture of all amounts paid, even those amounts already paid over to creditors. The purpose of this remedy is to provide an additional incentive for providers to comply with Sections 16 and 23. If the agreement complies with sections 16 and 23 but the provider fails to honor the individual's attempt to rescind, section 30(f) provides a similar remedy (recovery of all amounts paid or deposited by the individual). If the right to rescind has expired, the individual still has the right to terminate under subsection (c).

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

Preliminary Comment

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

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

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

SECTION 18. VOIDABLE AGREEMENTS.

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

(b) 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 Comment

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

Former subsection (b) contained the remedy for subsection (a)(the provider must return to the individual all money paid or deposited by the individual [which it has not already distributed to creditors]). This provision now appears as section 30(a).

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

SECTION 19. TRUST ACCOUNT.

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

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

(c) A provider shall:

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

(2) disburse money paid by or on behalf of the individual to creditors of the individual as disclosed in the agreement as required by Section 16(a)(4)(E), except that

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

(B) subject to rule of the administrator, 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 provider or other person in control of the trust account and reimburse the individual for any costs or fees imposed by a creditor as a result of the failure to pay or misdirection.

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

(e) A provider shall reconcile 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 balances in each individual's account. If the provider has more than one trust account, each trust account must be individually reconciled.

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

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

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

(i) Before changing the financial institution at which its trust account is located, a provider shall inform the administrator of the name, address, and telephone number of the new financial institution. As soon as practicable, the provider shall inform the administrator of the account number of the trust account at that institution.

Preliminary Comment

This section requires that persons that receive money for disbursement to creditors establish trust accounts. Some providers receive the money directly. Others use third parties for the purpose of receiving the funds and managing the accounts. Under either model, the recipient is a fiduciary and must establish a trust account. If the provider does not receive money for that purpose, but instead leaves the individual in control of that money, this section does not require a trust account. The Committee must decide how to deal with money in accounts that are owned by an individual but accessible to a provider by means of the power to initiate a debit transfer. As a first step toward dealing with this, a new provision has been added, section 23(b).

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

Subsection (b): As a person with a claim against a provider, the individual is a "creditor." Nevertheless, the individual should have access to the trust account, but only to the extent the provider has received money from or on behalf of the individual and has not distributed it to creditors. Without this limitation, the individual's compensation out of the trust account would come at the expense of other individuals whose money comprises the trust account. Compensation of the individual for other loss or damage will have to come from assets of the provider or the bond or other assurance required by Section 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 subsection (b) finesses the question of the process by which the individual may access the trust account. This Act leaves that question to other law, but as a creditor of the provider, the individual has whatever rights creditors generally have. In addition, the individual may be the beneficiary of action by the administrator under sections 26-27.

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

The subsection contemplates that the agreement may establish a date by which the individual must remit to the provider and a date by which the provider must remit to the creditors. In paragraph (2) the cross reference to section 16 has the effect of limiting paragraph (2) to credit-counseling agencies. Subparagraph (A) applies to credit-counseling agencies and requires that the agreement—and the provider's performance—must conform to the due dates established by the creditors. It is expected that, if necessary or desirable, the provider will secure the creditors' assent to modify the original due dates to maximize the feasibility of the plan. Subparagraph (B) reflects the use of payment systems other than checks. Reflecting a suggestion made at the October 2004 meeting, it also contemplates that the administrator may establish standards of finality for those other systems, e.g., ACH transfers, money orders, et al. Does it not suffice to reference the administrator's power in the Comment? If so, then the phrase at the beginning of subparagraph (B) ("subject to ...") may be deleted. Do we need anything comparable to paragraph (2) for debt-settlement companies?

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

At the October 2004 meeting, a member of the Committee suggested creating an exception to subsections (f) and (g) to allow a deficit in the account if the bank debits the account because of a bounced check or other reversal of a deposit. The draft does not incorporate this suggestion because if the bank reverses a credit, the provider would also debit the individual's account in the trust account. Hence, the trust account would not show a deficit. If the Committee still thinks a problem exists, the following clause could be appended to the end of subsection (f): "unless the reason for the deficit is that the bank has reversed a credit to the account."

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

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

The subsection has been further amended to require prompt refund of payments when an individual terminates the account.

SECTION 20. FEES: MONETARY LIMITS.

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

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

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

This draft contains three alternatives. Alternative A directs the administrator to set fee caps. Alternative B places fee caps in the statute. Alternative C contains a soft fee cap ("fair and reasonable") and relies on disclosure. Each alternative has multiple variations, which are not fully presented here. After the Committee has selected one of the alternatives, the variations will be ripe for consideration. In each alternative, subsections (a) and (b) are unchanged in substance from the last draft.

(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 by this section.

(b) 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 an agreement that complies with Sections 16 and 23.

ALTERNATIVE (A):

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

(1) a provider may charge for its educational and counseling services a fee that is fair and reasonable, as provided by rule of the administrator;

(2) if an individual assents to an agreement, the provider may charge:

(A) a reasonable fee, as provided by rule of the administrator, for consultation, obtaining a credit report, setting up an account, and the like; and

(B) a monthly service fee not in excess of the amount determined by rule of the administrator to be reasonable in relation to the services provided; and

(3) a provider that assists an individual in settling one or more of the individual's debts for less than the principal amount of the debt may not charge a settlement fee:

(A) in excess of the amount determined by rule of the administrator to be reasonable in relation to the services provided; or

(B) before settlement of the individual's debt.

ALTERNATIVE B:

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

(1) a provider may charge for its educational and counseling services a fee that is fair and reasonable, as provided by rule of the administrator; and

(2) if an individual assents to an agreement, the provider may charge a fee not exceeding $50 for consultation, obtaining a credit report, setting up an account, and the like.

(d) Except as otherwise provided in Section 21(c), [if a plan contemplates concessions by creditors in the form of reduced finance charge or reduced fees for late payment, default, or delinquency,] a provider may charge a monthly service fee not exceeding the lesser of 10 percent of the monthly payment by or on behalf of the individual or $10 for each creditor that is listed in the agreement between the provider and the individual, except that the total monthly service fee may not exceed $50.

(e) Except as otherwise provided in subsection (c) [and (d)] and in Section 21(c), if a plan contemplates that creditors will settle an individual's debts for less than the full principal amount of those debts:

(1) a provider may not charge or receive compensation with respect to a debt until the settlement of the debt;

(2) compensation for services in connection with settling a debt may not exceed, with respect to each debt, [the lesser of $600 or] 15 percent of the amount of the forgiven portion of the debt; and

(3) a provider may not receive any compensation with respect to a debt that the individual settles directly with the creditor to which that debt is owed.

ALTERNATIVE C:

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

(1) a provider may charge for its education and counseling services a fee that is fair and reasonable; and

(2) in connection with a plan, a provider may not receive compensation of any kind except for a set-up fee, a monthly service fee, and, if the plan contemplates that creditors will settle an individual's debts for less the the full principal amount of those debts, a settlement fee.

(d) If a plan contemplates that creditors will settle an individual's debts for less than the full principal amount of those debts, a provider may not charge or receive a settlement fee with respect to a debt until the settlement of the debt.

END OF ALTERNATIVES. Under each alternative, the section would continue:

(x) 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 for the individual;

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

(3) terminate an agreement.

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

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

Preliminary Comment

[If the Committee adopts Alternative C, the disclosure provision in Section 14(a) should be revised, perhaps as follows:

> (a) Before providing debt-management services to an individual, a person shall provide the individual an itemized list, in a record, of services and the charges for each, describing those goods and services the person offers:
>
> (1) free of charge, if the individual enters into an agreement;
>
> (2) for a charge, if the individual enters into an agreement, using the following terminology, as applicable, and format:
>
> Set-up fee [$ amount of fee]
> Monthly service fee [amount of fee or method of determining amount]
> Settlement fee [amount of fee or method of determining amount]
> Goods/services in addition to those provided in connection with a plan:
> [item] [$ amount or method]
> [item] [$ amount or method]

Perhaps something like this standardized disclosure should be incorporated into section 14 regardless of which alternative is selected in this section.

Subsection (b): In addition to specifying some of the contents of an agreement, section 16 requires immediate delivery of the record containing the agreement. If the record is a writing, this subsection prohibits a provider from collecting any money before the individual receives a copy of it. If the record is electronic, the provider may impose a fee as soon as it delivers the record, which occurs when it makes the record available in retrievable and printable form. 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.

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

At the Annual Meeting some commissioners questioned whether a fee limit should appear in the statute. They suggested that the power to set fees should be vested in the administrator and that the statute should articulate standards for the administrator to use. Alternative A implements this suggestion.

In the previous draft, subsection (d) required a provider to credit any set-up fee or education fee against the accruing monthly service fees. This provision has been deleted.

Subsection (y): 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, 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. The issue is of diminishing importance because the prevailing practice for both credit-counseling agencies and debt-settlement companies is to use direct debits to the individual's bank account. The use of checks is disappearing.

Former subsection (j) addressed the adjustment of dollar amounts. At the direction of the Committee, this provision has been moved to section 26 (Powers of Administrator), and the annual adjustment is mandatory.

SECTION 21. FEES: OTHER LIMITS.

(a) A provider may not solicit a voluntary contribution from an individual or any other person for any service provided to the individual. A provider may accept voluntary contributions from an individual but, until 30 days after completion or termination of a plan, the aggregate amount of money received from or on behalf of the individual may not exceed the total amount the provider is authorized to charge the individual under Section 20.

(b) Except as otherwise provided in Section 14(b), a provider may not require an individual, as a condition of entering into a plan, 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 a fair and reasonable amount for counseling sessions, educational programs, or supplies if the individual does not assent to an agreement.

(c) A [non-profit or tax-exempt] 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, for a period of 60 days, an individual who has entered into an agreement does not make payments required by the agreement, the 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 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 error made in good faith notwithstanding the maintenance of procedures reasonably designed to prevent the error, the individual may void the agreement.

(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 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 providers, the bracketed language in subsection (c) should be deleted. If the state permits for-profit providers, the brackets should be deleted.*

Preliminary Comment

Subsection (a): A common abuse by allegedly non-profit credit-counseling agencies has been coercing consumers into making allegedly voluntary contributions to the agency. Subsection (a) seeks to end this practice. The provision has been revised to (a) prohibit solicitation of contributions as well as requiring contributions, and (b) apply to for-profit entities in those states that choose to permit them. Section 20(a) precludes a provider from 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 providers is unlawful.

Neither section 20 nor this section prohibits the solicitation or receipt of charitable contributions for services other than debt management by entities that provide those other services. Section 20 puts the prohibition in terms of "receiv[ing] money ... for debt management services," and this section puts the prohibition in terms of "solicit[ing] a voluntary contribution

... for any service provided to the individual." The administrator and the courts have the power to prevent evasion of this subsection.

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

Subsection (c): This is the current practice of most counseling agencies, is a requirement for qualification as a section 501(c)(3) entity, and appears in some state statutes that regulate credit-counseling agencies. 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 credit-counseling agencies, if the provider is acting in conformity with the Act, there will be no money in the trust account. This provision addresses the provider that has not distributed the money to creditors as required by Section 19(c)(2). Perhaps more importantly, it requires a debt-settlement company in possession of an individual's money to return it.

Subsection (e): If a provider overcharges, the individual has the option of voiding the agreement. The portion of subsection (e) that, in the previous draft, dealt with the consequences of a provider's imposition or receipt of excess charges, has been relocated to Section 30(a)-(b) (Private Enforcement).

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

(1) at least once each month;

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

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

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

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

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

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

(4) [the 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 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 and produce them to the individual within a reasonable time after a request for them. The provider may use electronic or other means of storage of the records.

Preliminary Comment

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

Subsection (b): If any of "the amounts" is zero, the provider need not include any disclosure with respect to that paragraph. If a provider requires the individual to establish an account with a bank or other third party from which money is to be disbursed to creditors, the provider complies by stating the dates on which it directed the individual to make payment.

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

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

Subsection (c): The period of retention should be tied to the statute of limitations in section 31, perhaps one year longer than the statute, so as to afford a reasonable time for the discovery process to unfold.

SECTION 23. PROHIBITED ACTS AND PRACTICES.

(a) A provider may not:

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

(2) initiate a transfer from an individual's account at a bank or with another person unless the transfer is a return of money to the individual or:

(A) for the purpose of paying a monthly service fee, a settlement fee, or a settlement; and

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

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

(4) offer, pay, or give a gift, bonus, premium, reward, or other compensation to a person for referring a prospective customer;

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

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

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

(8) 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.

(9) lead an individual to believe that a payment to a creditor is in settlement of a debt to the creditor unless the provider receives from the creditor a certification that the payment is in full settlement of the debt;

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

(11) represent that it is a not-for-profit or tax-exempt entity unless it meets the standards for that status under the Internal Revenue Code and has received certification of that status from the Internal Revenue Service; or

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

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

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

(2) receive from or on behalf of the individual a promissory note or other

negotiable instrument other than a check or a demand draft;

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

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

(5) make a representation that:

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

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

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

(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 a plan;

(7) except as otherwise provided in Section 20(y), 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, coupons for goods or services, membership in a club, access to computers or the Internet, or any other matter not directly related to debt-management services or education concerning personal finance; or

(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 document, or other legal document other than an agreement for debt-management services, unless the person furnishing that advice or those services is licensed to practice law. This [act] does not authorize any person to engage in the practice of law.

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

(1) the person providing debt-management services, or an employee or affiliate of that person, owns more than 10 percent of the lender or service provider; or

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

(d) A provider may not purchase goods, services, or facilities from a person if an employee or affiliate of the provider owns more than 10 percent of the person, or an employee or affiliate of the provider is an employee or affiliate of the provider of the goods, services, or facilities. This subsection does not prohibit a provider from purchasing legal, accounting, or banking services from a member of its board of directors, if the supplier of those services:

(1) supplies those services generally; and

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

(e) In connection with collecting debts owed it or another person, a provider 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. In applying this subsection, 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.

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

Legislative Note: *In lieu of subsection (a)(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 constitution does not permit use of the phrase "as amended" in subsection (a), the phrase should be deleted.

Preliminary Comment

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

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

(1) Section 20 limits the extent to which a provider may profit at the expense of a customer.

(2) Section 23 prohibits

- misappropriation of trust funds
- unauthorized debiting of a customer's bank account
- revealing confidential information about a customer
- deception of the customer
- referral fees
- self-dealing via affiliates.

It would not seem wise to abandon these specific provisions in favor of a vague statement that a provider owes a fiduciary duty to its customers. Conversely, the addition of that vague statement to the existing list in this section is likely to be either aspirational (and therefore ineffectual) or productive of litigation about marginal conduct.

Subsection (a): The paragraphs of this subsection have been placed in a new order, and three new paragraphs (2, 9, and 10) have been added.

Paragraph (2): Credit-counseling agencies typically have access to their customers' checking accounts, for the purpose of withdrawing money to pay the customers' creditors and to pay the agency its monthly fee. Similarly, debt-settlement companies may have their customers establish accounts with banks or other persons for the purpose of accumulating money until it is paid to creditors, and the company typically initiates transfers out of these accounts to pay monthly service fees and/or settlement fees, as well as to pay creditors. This paragraph prohibits providers from initiating transfers that are not properly authorized by the agreement. Section 20 limits the amount of the fees and the timing of withdrawals that the agreement may authorize.

Paragraph (4): The November 2003 draft prohibited referral fees altogether. The Annual Meeting and September 2004 drafts prohibited them unless the referring party provides screening services to determine if the prospective customer is a good candidate for the educational or other services of the provider. Those drafts permitted compensation only for the screening services and not for the bare referral. The fact remains, however, that whether the screening function is done by a creditor in-house or is outsourced, it is a subset of the creditor's collection costs. The creditors' direct support of the counseling industry has declined over the last decade. At the October 2004 meeting, the Committee voted to prohibit the provider from permitting the creditor to pass this indirect cost on to it.

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

The prohibition against paying referral fees does not preclude payment for sales leads or lists of prospective customers, if the provider does not reveal the sources of the list. The vice here is misleading the individual into believing that an entity with which the individual has a relationship (viz., one of the individual's creditors) is disinterestedly recommending that the individual seek the services of the provider. Hence, the provider may not reveal to the individual that a creditor of the individual is in any way connected to the reason the provider is communicating with the individual. If the source of the list is identified to the individual by either the provider or the source, the sales lead becomes a referral, and the provider may not pay for it.

Paragraph (5): This provision is the converse of paragraph (4). Its purpose is to reduce or eliminate the economic incentive for an agency to refer individuals to persons who provide loans or other products. The protection of financially stressed, vulnerable consumers justifies discouraging a provider from recommending products provided by others. At the October 2004 meeting, it was suggested that this paragraph not prohibit a provider from including on its web site a link to the web site of an entity providing other services or products and receiving payment based on the number of times individuals hit that link. The assertion was that this is a form of advertising. No change to permit this has been made in the text or the comment of this draft, because the practice is indistinguishable from payment for referrals. Placing a link on the provider's web site necessarily amounts to an endorsement of or referral to the owner of the linked web site. It should not matter whether the referral is by electronic link or verbal recommendation. The provider is free, of course, to place the link on its web site, so long as it does not receive compensation from the owner/sponsor of the other web site. This distinguishes disinterested advice from referrals motivated by the provider's self-interest.

Paragraph (6): At the November 2003 meeting an Observer noted that at least one creditor engages in a practice that might, depending on the annual percentage rate and the amount of the monthly payment, result in negative amortization. This creditor, however, forgives or refunds the accrued finance charge if the individual completes the plan. Apparently, this is true even if the individual ends his or her relationship with the counseling agency and self-administers the plan. If the individual does not self-administer it to completion, the negative amortization remains. Given the high rate of non-completion of plans, the Drafting Committee may wish to consider whether it is appropriate to encourage this creditor's practices by allowing plans to include debts that involve negative amortization. The Virginia statute deals with this general problem by prohibiting a plan that, at the conclusion of the plan, would result in negative amortization. This approach would not prohibit the practice of the creditor in question. The Committee has yet to consider whether negative amortization should be permitted. Now is the time.

Paragraph (9): If a plan contemplates settlement of a debt for less than the full principal amount of the debt, the provider should not pay the creditor unless it receives formal acknowledgment from the creditor that the debt is satisfied. This paragraph seeks to accomplish that by barring a misrepresentation. To violate the paragraph, the misrepresentation does not have to be express. If the settlement contemplates that the creditor will be accepting installment payments, the provider must make it clear to the individual that the initial installment(s) do not settle the debt.

Paragraph (11): This paragraph prohibits false or misleading representations whether or not the provider knows of the deception. In accord with existing statutes prohibiting unfair or deceptive acts or practices, the risk of falsity or deception is on the person that makes an express statement. On the other hand, the paragraph prohibits omissions only if the omitted facts are material and are known to the provider.

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

Paragraph (6): So long as the provider strips out the individual's identifying information, it is free to disclose information for purposes of academic research or construction of a scoring system. If the identifying information is present, however, this paragraph prohibits disclosure of any of the information, except as permitted by the two specified exceptions. The only permissible purpose for a disclosure to a creditor of the individual is to secure its cooperation.

Paragraph (7): The cross-referenced section permits debt-settlement companies to receive a portion of the forgiven debt. Other entities are not permitted to receive any portion of any forgiven debt.

Paragraph (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 catch-all at the end of the paragraph is intended to thwart the exercise of ingenuity in generating new ideas to evade the limits imposed by the Act..

Paragraph (9): Subsection (a)(8) prohibits misrepresentations that an agency is authorized or competent to provide legal services. This subsection prohibits performing those services, unless the person is a licensed attorney. The unauthorized practice of law is prohibited by other law. This paragraph makes it a violation of this Act, too, and makes it clear that nothing in this Act authorizes a person to practice law. A provider does not violate this subsection if the person providing legal services is licensed in a state, even if not this state. It may, however, violate that other law. The Drafting Committee needs to resolve a dilemma: this paragraph prohibits some activity of debt-settlement companies, viz., preparation of or advice concerning a settlement.

Subsection (c): This paragraph prohibits a provider from receiving compensation for performing specified services for a third party if there is a certain connection between the third party (or persons related to the third party) and the provider (or persons related to the provider). In the previous draft the persons related to the third party or the provider included "officer, director, owner, employee, or affiliate." The definition of "affiliate," however, includes officers, directors, and controlling persons. Hence this draft deletes officers, directors, and owners from the list of related persons, which now consists of employees and affiliates. This is a drafting change but not a substantive change (except, perhaps to the extent that "owner" is different from "a person that controls").

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.

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.

At the October 2004 meeting, it was suggested that a provider be able to purchase goods, services, or facilities from any insider, not just directors, if the conditions of the second sentence are met. The reporter's notes fail to indicate the Committee's response to this suggestion. If the Committee wishes to pursue this approach, the paragraph might read as follows:

> A provider may not purchase goods, services, or facilities from a person if an employee or affiliate of the provider owns more than 10 percent of the person, or an employee or affiliate of the provider is an employee or affiliate of the provider of the goods, services, or facilities, except that this subsection does not prohibit a provider from purchasing legal, accounting, or banking services from any supplier of those services that both
>
> (1) supplies those services generally; and
>
> (2) supplies them to the provider at a cost [no greater than][less than] the cost generally charged by the supplier of those services to other persons.

Subsection (e): 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, it 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; PUBLIC EDUCATION.

(a) All advertising for debt-management services, regardless of medium, must disclose in a readily comprehensible manner the information specified in Section 14(d)(2)-(3).

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

Preliminary Comment

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

Subsection (b): This subsection seeks to expand the amount of public education concerning management of personal finance. As originally drafted, it imposed an obligation to provide public education on any provider that spent more money on advertising than on public education. It would have been a lightening rod for objections, may have raised constitutional issues, and might have required defining "public education" in such a way as to preclude self-serving infomercials that promote debt-management plans and underemphasize education. In addition, at the Annual Meeting a commissioner observed that a provider could evade the spirit of the requirement by placing the required advertising in a medium or at a time that would reach a different audience than its primary advertising reaches. It could, for example, direct its public education to a population that it knows does not need the education or that the provider does not seek to serve. The current draft makes public education a function of the administrator, leaves it to the discretion of the administrator, and authorizes the administrator to shift the costs of the effort to registered providers. The administrator may determine the fee structure in any reasonable manner, including fees based on the provider's revenues or on the provider's advertising expenditures. If the Committee adopts this approach, the provision could appear here or in section 26 (Powers of Administrator).

SECTION 25. CRIMINAL PENALTY. Upon conviction, a person that knowingly and willfully violates this [act] or a rule or order issued under this [act] shall be fined not more than [$1,000] for the first violation and shall be fined not more than [$5,000] or imprisoned not more than [five] years, or both, for each subsequent violation.

Preliminary Comment

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

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

prosecution and defense of these crimes will focus more on a determination of the facts and less on the semantics of the statutory section alleged to have been violated. Complexity is the enemy of justice when society seeks to define criminal behavior.

At the October 2004 meeting, a member of the Committee suggested the Uniform Securities Act as a model. The current draft of this section is modeled on section 508 of that act. It criminalizes all violations of the Act and all violations of the administrator's rules and orders. A more limited approach would be to criminalize the violation of specified sections of the Act, such as sections 5 (registration requirement), 12 (bond requirement), 19 (trust account requirement), 20(a) (fee limits), and 23 (prohibited acts and practices). This would be somewhat, though not totally, responsive to the views quoted above.

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

The Committee must decide: (1) whether the Act should contain criminal sanctions; and (2) 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 provider.

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

(c) The administrator may:

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

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

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

(4) recover from the bank at which the trust account required by Section 19 is maintained all money, books, records, accounts, and other property of the provider that is in the control of the bank and, if the provider is neither organized under the laws of this state nor maintains its principal office in this state, relates to individuals who reside in this state.

(d) The administrator may adopt rules to carry out the requirements and further the purposes 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, by rule, shall establish reasonable fees for processing an application for registration or renewal of a registration in the amount reasonably necessary for administering this [act].

(g) The administrator shall adjust the dollar amounts specified in Sections 2(3), 6(b), 8(c), 12(d), (e), (f), and (h), 20(c), (e), and (g), 25, 27(a) and (b), and 30(c) and (d) of this [act] 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: *Subsection (b): If the administrator is the attorney general, the penultimate* *clause ("refer cases to the [attorney general]") should be deleted. If the state wishes the prosecution to be handled by some other official the name of that official should be substituted for "attorney general."*

Subsection (d): Insert the citation to the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure.

Preliminary Comment

Subsections (b) and (c) from the October 2004 Meeting Draft have been inverted and modified to clarify that the administrator may act on its own initiative.

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

The prior draft of subsection (b) provided that failure to comply with what is now subsection (c)(3) was grounds for a cease and desist order, but it was not clear what the person is to cease and desist from. In this draft the failure to comply is grounds for suspension of registration, and the provision has been moved to section 29(a)(4).

Subsection (d): The administrator has broad powers to adopt rules to implement and further the purposes of this Act. In exercising this power, however, the administrator should be mindful of section 35, which exhorts those enforcing the Act to promote uniformity among the enacting states.

Subsection (f): The criterion for setting "reasonable" fees is the amount necessary to defray the costs of administering the Act, not just the costs of the registration process. This could be a very large figure. Does the Committee wish to reconsider this?

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?

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

Section 2(3)(D): threshold for becoming an affiliate ($25,000)
Section 6(b)(4): employee theft insurance ($250,000)
Section 8(c)(2): independence of board of directors ($25,000)
Section 12(d), (e), (f): bond ($100,000)
Section 12(h): insurance deductible ($10,000)
Section 20(c)(2), (e)(2): fee caps (Alt. B)
Section 20(g): NSF fee ($25)
Section 25: criminal penalty ($1000/$5000)
Section 27(a), (b): civil penalty ($10,000)
Section 30(c): minimum damages ($5,000)
Section 30(d): punitive damages ($10,000)

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

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

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

(4) revoking, suspending, or denying renewal of a provider's registration in accordance with Section 29;

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

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

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

(c) The administrator may institute in any [county] an action to enforce an order issued under this section.

(d) 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 net worth of the violator, and any other factor the administrator considers relevant to the determination of the civil penalty.

Preliminary Comment

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

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

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

SECTION 28. VIOLATION OF UNFAIR OR DECEPTIVE PRACTICES STATUTE. If an act or practice of a provider violates both this [act] and Section ______, an individual may not recover under both for the same act or practice.

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

Preliminary Comment

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

SECTION 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 provider's registration if the administrator concludes that:

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

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

(3) the provider is insolvent;

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

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

(b) If a provider does not comply with Section 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 to determine whether to revoke the registration.]

(c) If the administrator suspends, revokes, or denies renewal of the registration of a provider, the administrator may seize any records and assets of the provider which are located in this state.

Preliminary Comment

Subsection (a): The Committee did not discuss this section at the October 2004 meeting. Presumably, however, if the Act does not specify the need for notice and hearing in section 27, it need not specify it here either. Hence, the change in this subsection. Should the words "the administrator concludes that" be deleted as well?

Subsection (b): Section 19(f) deals with failure to maintain a trust account in an amount equal to the sum of the balances in each individual's escrow account. If the section does not specify the need for prior notice and opportunity for a hearing, the bracketed sentence should be deleted.

At the Annual meeting a commissioner suggested that this section be restructured. As now drafted, the administrator may take the specified actions. The suggestion is that the administrator not have the power to suspend or revoke a registration and that this section merely specify the grounds on which the administrator could ask a court to take that action. Does the Committee wish to pursue this suggestion? (If so, it will be necessary to deal separately with non-renewal of registration.)

SECTION 30. PRIVATE ENFORCEMENT.

(a) If an individual voids an agreement pursuant to Section 18(a), the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement [except for amounts paid to creditors], together with recovery under subsection (d)(2) and (3).

(b) If an individual voids an agreement pursuant to Section 21(e), the individual may recover in a civil action [three times the amount of the unauthorized fees, charges, money, or payments] [the total of all amounts paid or deposited by or on behalf of the individual pursuant to the agreement], together with recovery under subsection (d)(2) and (3).

(c) If a provider fails to comply with Section 21(f), an individual may recover in a civil action two times the unauthorized money, together with recovery under subsection (d)(2) and (3).

(d) An individual who is injured by a violation of this [act] other than Section 6 or 10 or by a violation of a rule adopted by the administrator under this [act] other than a rule adopted to implement Section 6 or 10 may recover in a civil action:

(1) subject to subsection (e)(1), compensatory damages, including damages for non-economic injury, or, for violation of Sections 14, 15, 16, 17, [19], 20, 21, 22, or 23, the greater of compensatory damages, including damages for non-economic injury, or $[5,000];

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

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

(e) In a class action:

(1) except for violation of Section 23(a)(2), the minimum damages provision in subsection (d)(1) does not apply; and

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

(f) In determining the amount of punitive damages under subsection (d)(2) or (e)(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 net worth of the violator, and any other factor the court considers relevant to the determination of the damages.

(g) In addition to the remedy available under subsection (d), if a provider fails to give effect to an individual's rights under Section 16(f), the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement.

(h) 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 Comment

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

Subsections (a), (b), and (c) have been relocated from sections 18 (Void Agreements) and 21 (Fees: Other Limits), pursuant to the Committee's decision to locate all remedies provisions in one section.

Subsection (a) : Section 18(a) makes an agreement voidable if the provider is not properly registered under this Act. Under this subsection the individual may recover all money paid by the individual[, except for amounts passed on to creditors]. This sanction is to disgorge all money that the provider otherwise would have earned for its services.

Subsection (b): Section 21(e) permits an individual to void an agreement if a provider exceeds the fee caps. The Committee must decide whether, when an individual elects to void the agreement, the individual should be able to recover three times the overcharge or the more deterrence-oriented remedy of returning all money received from the individual, including the money that was paid over to the creditors. For an overcharge, forfeiture of all amounts received may be too draconian. A similar question is presented under subsection (a), where the remedy, although draconian, may nevertheless be appropriate.

Subsection (c): Section 21(f) requires a provider that has unintentionally exceeded the fee caps to return the excess charges within two days after learning of the overcharge. If the provider fails to do so, subsection (c) provides for recovery of twice the overcharge.

Subsection (d): "Compensatory damage" in paragraph (1), which includes recovery for non-economic injury, encompasses emotional distress, humiliation, aggravation, etc.

The minimum damages provision applies only to the specified violations (prerequisites for a plan, electronic communication, form and contents of an agreement, failure to use foreign language documents, trust account, fee caps, other limitations on fees, periodic reports, and prohibited acts and practices). For violation of other sections, including failure to register and failure to provide customer service, the aggrieved individual may recover actual 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 (e): An aggrieved individual may proceed by class action if the prerequisites for class actions under the rules of civil procedure are satisfied.

Subsection (g) is new. It implements the remedy implicit in section 16(f) when an individual exercises the right to rescind: section 16(a)(5) requires a provider to deliver to the individual, immediately upon formation, a copy of an agreement that complies with Sections 16 and 23. If the provider complies with this obligation, the individual has only three days to rescind. Upon rescission, the provider must refund all money paid by the individual. The provider can protect itself against any out-of-pocket loss by keeping any such money until the three-day period has expired, in which event this subsection imposes no loss on the provider. If, however, the provider fails to deliver a proper copy of the agreement, the rescission period is 30 days, in which event rescission may very well occur after the provider has disbursed funds to creditors. In this scenario, the remedy in this subsection results in an out-of-pocket loss to the provider. It thus provides an additional incentive for the provider to conform to the requirements of sections 16 and 23.

At the Annual Meeting a commissioner suggested adding a provision to resolve possible conflicts between public and private enforcement actions. Subsection (h) 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 after the act of which the administrator complains.

(b) An action brought pursuant to Section 30 must be commenced within two years after the latest of:

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

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

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

(4) a provider's last accounting to the individual pursuant to Section 22(a)(1) and (2);

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

(6) termination of proceedings by the administrator with respect to a violation of the [act].

(c) The period prescribed in subsection (b)(5) is tolled during any period during which the defendant has materially and willfully misrepresented information required by this

[act] to be disclosed to the individual if the information so misrepresented is material to the establishment of the liability of the defendant under this [act].

Preliminary Comment

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

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

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

[SECTION 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 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 provider need not comply with that provision of this [act] 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 Comment

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.

The ABA Advisor to the Committee has observed that this provision does not adequately address the burden imposed on providers by section 3. That section extends this Act to a provider that is located in this state (or organized under the laws of this state) even though it does not provide services to any individual in this state. Section 34 offers relief to this provider only to the extent that compliance with the Act would place the provider in violation of the law of another state. If compliance with both is possible, the provider would have to comply with both. The result of this is that, with respect to each requirement that the two states impose, the provider will have to comply with the more onerous one. To illustrate, assume this state has a fee cap of $50 and a bond requirement of $100,000, and the state in which its customer resides has a fee cap of $75 and a bond requirement of $250,000. Under the operation of section 34, the provider would not get the benefit of the higher fee cap in the other state, since compliance with this Act would not put it in violation of the law of the other state; but it would have to post a bond of $250,000 even though this state only requires $100,000. The provider is in the position of determining whether the law of the two states on any given matter is different and then always having to comply with the more burdensome one. To respond to this predicament, subsection (a) could be revised to read:

> If a provider located in this state provides debt-management services to an individual residing in another state and the other state permits and regulates persons providing debt-management services to its residents, the provider need not comply with provisions of this [act] with respect to those individuals.

This would not relieve the provider of the need to register, and the state would retain its authority (and responsibility) to regulate entities that are located in the state or organized under the laws of the state. The Act would be fully applicable to the extent a provider is serving individuals in a state that bans the business of debt management or a state in which the statutes are silent. But if the other state has a statutory scheme for regulating providers, this language would relieve the provider of having to comply with any part of this Act with respect to the residents of the other state.

A less extreme response would be to exempt a provider from having to comply with the provisions of this Act that are different from the corresponding provisions of the law of the other state. So, for example, if the other state did not address the subject of dealing with affiliates, the provider would still have to comply with the ban in this Act. (The last clause might read, "the provider need not comply with provisions of this [act] that are different from the specific provisions of the law in the other state.")

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 consumer credit counseling, debt settlement, debt adjustment, debt prorating, or the like.*

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 Comment

"Law" includes statutes, administrative rules, and judicial decisions. It may be burdensome for a provider to comply with prior law for some of its customers and with this Act for others of its customers. 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.