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MEMORANDUM

June 20, 2011

To: UDMSA Standby Committee
Subject: Further Changes

Since the release of the draft resulting from our last conference call, we have received several requests to consider additional changes to the Act. Some of the changes probably should be made. They relate to the insurance/surety requirements and the use of powers of attorney.

Insurance

(1) For a provider to do business, the Act requires it to obtain insurance and a bond. It requires the insurance or bond to be supplied by an insurance company with a rating of at least A. This rating refers to capitalization, and only 3-4 insurance companies in this end of the business qualify. A rating of A- evidently signifies an adequately capitalized company and would bring more companies into the field of competition. We should change the minimum rating from A to A- in sections 5(b)(4)(B)(page 22), 11(b)(5)(page 35), and 13(b)(2)(page 40).

(2) In sections 5(b)(4)(D) and 11(b)(5)(D) the mandatory insurance is to be

> "(D) payable for the benefit of the applicant, this state, and individuals who are residents of this state, as their interests may appear; and"

It appears that it is not possible to obtain insurance payable to a class of persons whose identity is unknown at the time the insurance is written. These sections should be revised to read

> "(D) payable to the applicant and this state for the benefit of the residents of this state, as their interests may appear; and"

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(3) Section 13 requires a provider to obtain a surety bond of at least $50,000. Section 14 provides alternatives to the requirement of a surety bond. One of the alternatives is insurance (§ 14(a)(1)). Evidently this form of insurance is simply not available, and the presence of the alternative is causing confusion. We probably should delete this alternative. Section 14 would be revised as follows:

> (a) Instead of the surety bond required by Section 13, with the approval of the administrator and in the amount required by Section 13(b), a provider may deliver ~~to the administrator, in the amount required by Section 13(b), and, except as otherwise provided in paragraph (2)(A), payable or available to this state and to individuals who reside in this state when they agree to receive debt management services from the provider, as their interests may appear, if the provider or its agent does not comply with this [act]:~~
>
> ~~(1) a certificate of insurance:~~
>
> ~~(A) issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator; and~~
>
> ~~(B) with no deductible, or if the provider supplies a bond in the amount of $5,000, a deductible not exceeding $5,000; or~~
>
> ~~(2) with the approval of the administrator:~~
>
> ~~(A)~~(1) an irrevocable letter of credit, issued or confirmed by a bank approved by the administrator, payable upon presentation of a certificate by the administrator stating that the provider or its agent has not complied with this [act]; or
>
> ~~(B)~~(2) bonds or other obligations of the United States or guaranteed by the United States or bonds or other obligations of this state or a political subdivision of this state, to be
>
> (A) deposited and maintained with a bank approved by the administrator for this purpose; and
>
> (B) delivered by the bank to the administrator upon presentation of a certificate by the administrator stating that the provider or its agent has not complied with this (act).
>
> (b) If a provider furnishes a substitute pursuant to subsection (a), the provisions of Section 13(a), (c), (d), and (e) apply to the substitute.

Powers of Attorney

The Act permits the use of powers of attorney for settlements for no more than 50% of the principal but prohibits their use for less favorable settlements. Under the FTC regulation, however, the use of a power of attorney is ineffective to manifest the consumer's assent to a settlement. This led the Committee to conclude that there was no useful role for powers of attorney and that they should simply be banned, notwithstanding the observation of our ABA

representative that there remained a useful role for a power of attorney: a provider could settle a debt on behalf of a consumer whom it could not contact before the (often-very-short) deadline set by a creditor. However, if a debt were settled by exercise of a power of attorney, the provider could not be paid its fee unless and until the consumer approved the settlement. The provider thus would run a risk of not being paid, and the Committee dismissed the likelihood that providers would be willing to take this risk.

Information provided by representatives of a debt-settlement company and a trade association of debt-management-services providers provides persuasive evidence that our ABA representative was correct, and that we should not make any change to the Act's provisions on powers of attorney. A great majority of settlements are for less than 50% of the principal, and almost all consumers thereafter assent to the settlement. Our proposed revision of the Act would preclude a debt-settlement company from entering these favorable settlements on behalf of its customers. We should consider undoing the amendments that bar debt-settlement companies from taking powers of attorney. This would mean that we would be withdrawing our recommendation to revise Sections 19(e) and 28(a)(3)-(4). Those provisions would remain unchanged.