

DRAFT
FOR DISCUSSION ONLY

CONSUMER DEBT COUNSELING ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For Drafting Committee Meeting November 14-16, 2003

WITH REPORTER'S NOTES

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ON UNIFORM STATE LAWS

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CONSUMER DEBT COUNSELING ACT

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CONSUMER DEBT COUNSELING ACT

Reporter's Note:

This draft is an attempt to provide a context for the discussion of the Drafting Committee. It makes assumptions about the proper approach to regulation, assumptions that the Committee has not considered and with which it may not agree.

The draft draws very heavily on the recently enacted legislation in Maine and Maryland and on April 2003 report of the Consumer Federation and National Consumer Law Center. Parentheticals indicate the source of the ideas but do not necessarily mean that the language is taken verbatim from the source. Because the draft is an aggregation of statutes that have varying philosophies, there are inconsistencies from one section of the draft to another. These will disappear as the Drafting Committee selects the approach it wishes to pursue.

A question for the committee is whether to include debt settlement services within the scope of the Act. This preliminary draft assumes the answer to this question is yes. It subjects providers of those services to almost all of the constraints applicable to credit counseling agencies. In addition, it includes a few provisions applicable only to debt settlement companies. The primary source for the provisions on debt settlement is the March 2003 "Rough Discussion Draft" of a bill prepared by Rep. Julia Carson (D-IN).

1 **CONSUMER DEBT COUNSELING ACT**

2

3 **SECTION 1. SHORT TITLE.** This [act] is known as and may be cited as the

4 “Consumer Debt Counseling Act.”

5

6 **SECTION 2. DEFINITIONS.** As used in this Act, unless the context requires

7 otherwise, the following terms have the following meanings:

8 (a) “Administrator” means the [director of consumer credit regulation][director of

9 financial institutions][attorney general].

10 (b) “Consumer” means an individual [who resides in this state(?)] and seeks debt

11 management services or enters a debt management services agreement. (MD)

12 (c) “Debt management service” means the receiving of money from a consumer for

13 the purpose of distributing that money to or among one or more creditors of the consumer in

14 full or partial payment of the consumer’s obligations (ME). [... receiving funds periodically

15 from a consumer under an agreement with the consumer for the purpose of distributing the

16 funds among the consumer’s creditors in full or partial payment of the consumer’s debts

17 (MD)] The term includes “debt settlement service.”

18 ***Reporter's Note:** A question to consider is whether the definition should*

19 *include counseling or education, i.e. should those who provide only*

20 *counseling or education services be outside the scope of this Act?*

21

22 (d) “Debt management services agreement” means an agreement (written

23 agreement?) between a debt management services provider and a consumer for the

24 performance of debt management services (MD).

25 (e) “Debt management services provider” means a person that provides or offers to

1 provide to a consumer in this state or elsewhere any debt management services. (ME)

2 (f) “Debt settlement service” means the action or negotiation on behalf of a
3 consumer with one or more creditors of the consumer for the purpose of obtaining debt
4 forgiveness of a portion of the credit extended by the creditor to the consumer. (Carson bill)

5 (g) “Person” means an individual or an organization. (ME)

6 (h) “Trust account” means an account that is:

7 (1) established in a federally insured financial institution;

8 (2) separate from the debt management services provider’s operating
9 account;

10 (3) designated as a “trust account” or other appropriate designation indicating
11 that the funds in the account are not the funds of the provider or its officers, employees, or
12 agents;

13 (4) unavailable to creditors of the provider; and

14 (5) used to hold funds paid by consumers to the provider for disbursement to
15 creditors of the consumers. (MD)

16
17 **SECTION 3. JURISDICTION.** The business of providing debt management
18 services is conducted in this state if the business, its employees, or its agents are located in
19 this state or if the debt management services business solicits or contracts with consumers
20 located in this state.

21
22 **SECTION 4. EXEMPT ENTITIES.** This [act] does not apply to the following
23 persons when engaged in the regular course of their respective businesses and professions:

(MD)

- (a) an attorney at law;
- (b) an escrow agent;
- (c) a certified public accountant;
- (d) a federally insured financial institution; or
- (e) a judicial officer or person acting under a court order.

Reporter's Note: *Some states exempt bill payers, title insurers, mortgage loan servicers, business liquidators; ME exempts only attorneys and supervised financial institutions.*

SECTION 5. REGISTRATION.

(a) A person, whether or not located in this state, may not provide debt management services to consumers unless the person is registered with the Administrator. Registration expires on December 31st of the year in which the registration occurs.

(b) A debt management services provider must renew its registration every year. The application for renewal must be filed by December 1st of each year for the following year and expires on December 31st of that following year.

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

- (1) fees to be established by the Administrator [or by statute?];
- (2) the surety bond required in Section 7;
- (3) identification of a trust account; and
- (4) consent to the jurisdiction of this state and either:

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

1 (B) the appointment of the Administrator as the debt management
2 services provider's agent for purposes of service of process.

3 (d) Unless the Administrator notifies an applicant that a longer time period is
4 necessary, the Administrator shall approve or deny an initial registration within sixty days
5 after the date on which the complete application, including all required documents and
6 payments, is filed. Within thirty days of a denial of an application, the Administrator shall
7 inform the applicant in writing of the reasons for the denial.

8 (e) The Administrator shall approve or deny a renewal of registration within thirty
9 days after the date on which the complete application for renewal, including all required
10 documents and payments, is filed. Within seven days of a denial of a renewal of registration,
11 the Administrator shall inform the debt management services provider in writing of the
12 reasons for the denial.

13
14 **SECTION 6. APPLICATION FOR REGISTRATION (MD)**

15 (a) The application for registration and for renewal of registration shall include the
16 following information, as applicable:

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

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

21 (3) the name and address of each owner, officer, director, and principal of the
22 applicant;

23 (4) the name, address, and telephone number of the applicant's resident agent

1 in the state, if other than the Administrator;

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

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

7 (7) identification of every state in which:

8 (a) the applicant has ever engaged in the business of providing debt
9 management services;

10 (b) the applicant is registered or licensed to provide debt management
11 services; or

12 (c) the applicant's registration or license has been suspended or
13 revoked;

14 (8) the number of debt management plans the applicant undertook in each of
15 the three calendar years immediately preceding the year of the application and, with respect
16 to each year, the number of those plans that terminated before the consumer completed all
17 payments contemplated by the plan;

18 (9) a statement of whether any pending judgment, tax lien, litigation [material
19 litigation?], or administrative action by any government agency exists against the applicant;

20 (10) the most recent, unconsolidated financial statement of the applicant
21 including a certified opinion audit prepared by an independent certified public accountant,
22 including a certification that the applicant's salaries and expenses are comparable to the
23 salaries and expenses of others in the debt management services business; [NJ]

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

(12) a detailed description of the applicant's corporate structure, including parent companies, subsidiaries, and affiliates;

(13) evidence of general liability or fidelity insurance that insures against dishonesty, fraud, theft, or other malfeasance on the part of an employee of the applicant;

(14) a description of every consumer education program that the applicant provides to consumers;

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

(16) a copy of the debt management services agreement that the applicant will use in its debt management services business;

(17) fingerprints, at the applicant's expense, of the officers, directors, and owners, as required by the Administrator, and fingerprints, at the applicant's expense, of any employee or agent of the debt management services provider who has access to the trust account required by Section 11; and

(18) any other information that the Administrator requires.

(b) The Administrator may refuse an application if:

(1) it contains erroneous or incomplete information; or

(2) the Administrator finds that the financial responsibility, experience, character, or general fitness of the debt management services provider or its officers or directors are not such as to warrant belief that the business will be operated honestly, fairly,

1 and efficiently within the purposes of this Act. [NE, NY]

2 (c) The Administrator shall refuse an application if more than forty percent of the
3 directors have ties to the credit industry. [NJ]

4 (f) If at any time the information contained in an application changes, the applicant
5 or registered debt management services provider shall give written notice of the change
6 within ten days of the change.

7 (e) An application for renewal of registration shall disclose conspicuously any
8 changes in the information contained in the application or the applicant's immediately prior
9 application for renewal, along with any other information that the Administrator by rule
10 requires.

11
12 **SECTION 7. BOND** (shortened version of MD)

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

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

16 (c) The bond shall run to the state for the benefit of any consumer [person?] [who
17 resides in this state?] who is injured by a violation of this [act] or a regulation adopted under
18 this [act] committed by the debt management services provider or by an agent of the debt
19 management services provider, including an agent managing a trust account.

20 **Reporter's Note:** *Should the bond run in favor of consumers who reside in*
21 *other states? Presumably, if the debt management services provider is based*
22 *in this state, the answer is yes. But what if the debt management services*
23 *provider has no presence in this state other than its contracts with consumers*
24 *who live in this state?*
25

1 (d) The surety bond shall be:

2 (1) in an amount equal to the average size of the trust account required by
3 Section 11, but not less than \$25,000 and not more than \$1,000,000, as set by the
4 Administrator;

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

7 (3) conditioned so that the debt management services provider and its agents
8 shall comply with all state and federal laws and regulations governing the business of debt
9 management services providers and credit repair organizations.

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

16 (f) If the principal amount of a surety bond is reduced by payment of a claim or a
17 judgment, the debt management services provider shall file a new or additional surety bond
18 in an amount set by the Administrator, which amount shall be at least the amount of the bond
19 immediately before payment of the claim or judgment.

20 (g) A penalty under Section 18 or a judgment pursuant to Section 21 may be
21 paid and collected from the proceeds of the surety bond required pursuant to this section.

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

(1) provide a letter of credit from a financial institution approved by the Administrator; or

(2) deposit with a financial institution approved by the Administrator for this purpose bonds or other obligations of the United States or guaranteed by the United States or bonds or other obligations of the state or a political subdivision of the state, subject to the approval of the Administrator. [NY]

SECTION 8. PREREQUISITES FOR ESTABLISHING A DEBT MANAGEMENT PLAN. (MD)

***Reporter's Note:** Section 8 contemplates that the debt management services provider will provide an education program and prepare a tentative debt management plan before contracting for the consumer's enrollment in the plan. Section 9 requires the debt management services provider to obtain the creditors' commitment to participate in the plan before finalizing the plan and securing the consumer's assent.*

(a) No person [other than a debt settlement services provider?] shall provide debt management services for a consumer unless the person:

(1) through the services of a counselor certified by an independent accreditation organization,

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

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

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

1 (D) has provided the consumer[, for all creditors identified by the
2 consumer,?] a list of the creditors that the person reasonably expects to participate in the plan
3 and a list of the creditors, including secured creditors, that the person reasonably expects not
4 to participate; and

5 (E) has disclosed, in a document that contains nothing else:

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

9 (ii) with respect to all the debt management plans that
10 commenced within the 36-month period ending on the last day of the month preceding the
11 month in which the disclosure occurs, the percentage of debt management plans that
12 terminated before their scheduled termination date; [Consumer Federation/NCLC report] and

13 (iii) that the person receives compensation from some or all of
14 the consumer's creditors for its services in collecting the amounts owed to those creditors;

15 (2) has provided the consumer with a completed copy, signed by the person,
16 of a contract that complies with Sections 9 and 14;

17 (3) has a reasonable expectation that the consumer will be able to make the
18 payments that the debt management plan calls for the consumer to make;

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

23 (5) maintains a telephone system, staffed at a level that reasonably permits a

1 consumer to access a counselor during ordinary business hours.

2 (b) A person may provide the materials required under subsection (a)(1) via the
3 Internet if:

4 (1) a counselor certified by an independent accreditation organization has
5 reviewed and approved the educational program required by subparagraph (a)(1)(A) and the
6 computer program or application required by subparagraph (a)(1)(B) to be used to create the
7 financial analysis and the initial debt management services plan; and

8 (2) the consumer is advised of the availability of counseling [by telephone or
9 in person?] and is afforded the opportunity for counseling and for discussion of the financial
10 analysis and the initial debt management services plan with a counselor certified by an
11 independent accreditation organization.

12 ***Reporter's Note:*** *The Michigan Debt Management Act, Mich. Comp. L.*
13 *§451.422, lists the data that the budget analysis must contain. The list*
14 *includes, inter alia, the amount and source of all income; gross income per*
15 *pay period; net income per pay period; the number of exemptions on the*
16 *Federal Form 1040; the monthly housing payment (including any taxes); the*
17 *type and amount of all other fixed periodic obligations; the type and amount*
18 *of food, clothing, vehicle, and all other living expenses, a list of creditors*
19 *participating; and the periodic amount available for payment toward a debt*
20 *management plan.*
21

22 **SECTION 9. CONTENTS OF WRITTEN AGREEMENT**

23 (a) Every debt management services agreement shall:

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

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

- 1 (3) describe the services to be provided;
- 2 (4) state all fees, individually itemized, to be paid by the consumer;
- 3 (5) identify the name and address of the financial institution in which funds
- 4 of the consumer will be held pending disbursement to the consumer's creditors;
- 5 (6) provide the consumer in conspicuous language with a right to rescind the
- 6 agreement by giving notice of rescission before midnight of the third day following the
- 7 consumer's written assent to the contract;
- 8 (7) contain a schedule of payments to be made by the consumer, including
- 9 the amount of each payment, the date on which each payment is due, the date of the last
- 10 payment, and an itemization of each payment showing how much will be retained by the debt
- 11 management services provider for its services and how much will be distributed to the
- 12 consumer's creditors;
- 13 (8) list each participating creditor of the consumer to which payment will be
- 14 made, the amount owed to each creditor, the concessions offered by each creditor, and the
- 15 schedule of payments to each creditor, including the amount and date on which each
- 16 payment will be made; abd
- 17 (9) list each creditor, including each secured creditor, that is not participating
- 18 in the debt management plan.

19 (b) Every debt management services agreement shall disclose that:

- 20 (1) the debt management services provider may receive compensation from
- 21 the consumer's creditors for the benefits it provides to the creditors;

22 ***Reporter's Note:*** *The New York statute requires disclosure of the amount of*

23 *that compensation, but adds that nothing in the section shall require a debt*

24 *management services provider to share this compensation with the consumer.*

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

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

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

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

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

Reporter's Note: The MI statute also specifies the form the creditor's consent must take.

(c) No agreement established by a debt management plan shall provide for payments by the consumer for longer than [36] [60 (CO)] months [or other period established by rule of the Administrator].

(d) Every debt management services agreement shall provide that the consumer may modify or rescind the debt management services agreement if at any time:

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

1 (2) a creditor that is listed as participating in the debt management plan
2 withdraws from participation in the debt management plan.

3 (e) Every debt management services agreement shall provide that the debt
4 management services provider shall notify the consumer within fifteen days of learning of a
5 creditor's decision to withdraw from a debt management plan, but no later than five business
6 days before the consumer's next scheduled payment under the plan. This notice shall
7 include:

8 (1) the identity of the creditor; and

9 (2) the right of the consumer to modify or rescind the debt management
10 services agreement.

11 (f) Every debt management services agreement shall provide that either party may
12 terminate the contract on [30] days notice. (Consumer Federation/NCLC report)

13 (g) Every debt management services agreement shall be accompanied by a form, in
14 duplicate, that has the heading "Notice of Cancellation" and contains in bold face type the
15 following:

16 You may cancel this contract, without any penalty or obligation, at
17 any time before midnight of the third day that begins the day after you
18 sign it. In addition, you may cancel this contract at any time after that,
19 but that cancellation will not take effect until 30 days after you notify
20 [name of debt management services provider].

21 To cancel this contract before it takes effect, mail or deliver a signed,
22 dated copy of this notice, or any other written notice to [name of debt
23 management services provider] at [address] before midnight on [date].

1 To cancel this contract at any later time, you may use this notice or any
2 other written notice.

3 I hereby cancel this contract,

4 [date] .

5 [consumer's signature] . [Carson bill]

6 (h) The consumer who terminates is entitled to a refund of all unexpended funds that
7 the consumer has paid to the debt management services provider for the reduction of the
8 consumer's debt.

9
10 **SECTION 10. VOID AGREEMENTS.**

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

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

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

18 ***Reporter's Note:*** *The Consumer Federation/NCLC report recommends that*
19 *the contract be void if it violates any requirement of the proposed statute.*
20

21 **SECTION 11. TRUST ACCOUNTS. (MD)**

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

1 (b) Any trust account established pursuant to this section is not available to creditors
2 of the debt management services provider. (ME)

3 (c) The debt management services provider shall:

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

6 (2) disburse any funds paid by or on behalf of a consumer to creditors of the
7 consumer within [5, 8, 15] business days after receipt of the funds [or, disburse as disclosed
8 in the debt management services agreement];

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

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

14 (MD & ME: shall not commingle any trust account with any operating accounts)

15 (e) The provider shall reconcile the trust account not less than once a month. The
16 reconciliation shall ascertain the actual cash balance in the account and compare it with the
17 sum of the escrow balances in each consumer's account. Each trust account shall be
18 individually scheduled. (MI)

19 (f) The trust account shall at all times have an actual cash balance equal to or greater
20 than the sum of the escrow balances of each consumer's account, and failure to maintain that
21 amount is cause for a summary suspension of the registration. (MI)

22 (g) If a trust account fails to contain sufficient funds to cover the aggregate consumer
23 balances, the debt management services provider shall immediately upon discovery notify

1 the Administrator by telephone, facsimile, electronic mail, or other method approved by the
2 Administrator. The debt management services provider shall also provide written notice
3 including a description of the remedial action taken. (MI)

4 (h) If the trust account is maintained in a financial institution located outside the
5 State, the debt management services provider shall furnish a bond or irrevocable letter of
6 credit in an amount equal to or exceeding 100% of the average amount of deposits held in the
7 trust account from month to month. This requirement is in addition to the debt management
8 services provider's obligation under Section 7 (MI)

9 ***Reporter's Note:** The MI statute appears to require a bond in an amount at*
10 *least equal to the total amount of Michigan consumers' funds in the trust*
11 *account. If the trust account is at a foreign bank, there is an additional*
12 *requirement of a bond in an amount equal to the average amount of deposits*
13 *of funds of all consumers, wherever located, in the trust account. See Mich.*
14 *Comp. L. §§ 451.415(1)(c), 451.425(5).*
15

16 **SECTION 12. LIMITATION ON FEES. (MD)**

17 (a) With respect to the provision of debt management services, a debt management
18 services provider may not impose any fees or other charges on a consumer, or receive any
19 payment from a consumer or other person on behalf of a consumer except as allowed under
20 this section.

21 (b) Except as provided in subsection (c), a debt management services provider may
22 not impose charges or receive payment until it and the consumer have executed a debt
23 management services agreement.

24 (c) A debt management services provider may charge a consultation fee not
25 exceeding \$[50]. [In MI, NE, and WA, the limit is \$25.] The cost of any credit report shall
26 be paid from this consultation fee. The consultation fee shall be deducted from the monthly

1 maintenance fee under a debt management services agreement.

2 (d) A debt management services provider may charge a monthly maintenance fee not
3 exceeding \$[8] for each creditor of a consumer that is listed in the debt management services
4 agreement between the debt management services provider and the consumer, except that the
5 total monthly maintenance fee may not exceed \$[40].

6 **Reporter's Note:** In WA, the provider may not impose a fee with respect to
7 payments to utility companies or landlords. Instead of articulating the limit in
8 terms of an amount per creditor, some states cap the fees at a percentage of
9 the monthly payment by the consumer (15% in NE, MI, and WA).

10 Providers of debt settlement services typically charge a percentage of
11 the forgiven debt, as much as 25%, in addition to large front-end fees and
12 perhaps monthly charges. The limitation in this section would require a very
13 substantial reduction in the fees of debt settlement services providers.
14

15 (e) Except as provided in subsection (c), a debt management services provider may
16 not charge a fee:

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

18 (2) to counsel a consumer about debt management;

19 (3) to provide a consumer with the consumer education program required by
20 subsection 8(a) ; or

21 (4) to rescind a debt management services agreement.

22 **Reporter's Note:** The OR statute permits a charge for "education classes" if
23 (1) the classes and the fees are approved by the Administrator or (2) the
24 classes are required by federal or state law, the provider is a certified under
25 that law as an approved provider of the classes, and the Administrator
26 approves the fee.
27

28 (f) A debt management services provider may not require a voluntary contribution
29 from a consumer or any other person for any service provided to the consumer. A debt

1 management services provider may accept voluntary contributions from a consumer but,
2 until thirty days after completion of a debt management plan, the aggregate amount of money
3 received from the consumer, or on behalf of the consumer, may not exceed the total amount
4 the debt management services provider is authorized to charge the consumer under
5 subsections (c) and (d).

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

9 (1) those services that the debt management services provider offers:

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

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

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

16 (h) A debt management services provider may not, as a condition of entering into a
17 debt management services agreement, require a consumer to purchase for a fee a counseling
18 session, an educational program, or materials and supplies. The provider may, however,
19 charge the consumer for counseling sessions, educational programs, or supplies if the
20 consumer does not enter into a debt management services agreement.

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

1 [insert citation of applicable statute].

2 (j) If a consumer fails to make a payment within 60 days after it is due under a debt
3 management services agreement, the contract is considered canceled by the consumer. In the
4 event of cancellation in this manner, the consumer may, no later than 75 days after the
5 payment was due, file a letter of continuation of the contract. If the consumer does not file a
6 continuation, any funds of the consumer remaining in the trust account shall immediately be
7 returned to the consumer. All the following apply to a letter of continuation:

8 (1) a consumer may file only one letter of continuation for any contract;

9 (2) a letter of continuation must contain a detailed explanation of the reason
10 or reasons for the missed payment or payments;

11 (3) a contract for which a letter of continuation is filed remains in effect and
12 is subject to cancellation for any subsequent failure to make a payment; and

13 (4) the debt management services agreement shall clearly provide for one
14 letter of continuation (move to contents of contract section).

15 ***Reporter's Note:*** *This continuation provision comes from MI. The refund*
16 *provision, from WA.*

17 (k) If a debt management services provider imposes any fee or other charge or
18 receives any funds or other payments not authorized by this section, except as a result of an
19 accidental and bona fide error:

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

21 (2) The debt management services provider shall immediately return the amount of
22 the unauthorized fees, charges, funds, or payments to the consumer. [... shall return to the
23 consumer all amounts received from or on behalf of the consumer]
24

1 **SECTION 13. PERIODIC REPORTS AND RETENTION OF RECORDS. (MD**

2 & ME)

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

5 (1) at least once each calendar quarter;

6 (2) upon rescission or termination of the debt management services
7 agreement; and

8 (3) within 5 business days after a request by a consumer.

9 (b) A debt management services provider shall provide each consumer for whom it
10 has established a debt management plan a written accounting of:

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

12 (2) the amounts and dates of disbursement made on the consumer's behalf to
13 each creditor listed in the debt management plan since the last report;

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

15 (4) any amount held in reserve.

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

20
21 **SECTION 14. PROHIBITED ACTS AND PRACTICES. (MD)**

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

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

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

7 (3) to prevent deception (subsections 7-12);

8 (4) to promote the debt management services provider's duty of loyalty
9 to the consumer (subsections 13-18);

10 (5) to prevent unfairness or abuse (subsections 19-21).
11

12 (a) A debt management services provider may not:

13 (1) purchase any debt or obligation of a consumer;

14 (2) receive or charge any fee in the form of a promissory note or other
15 negotiable instrument other than a check or a draft; [WA, OR]

16 (3) lend money or provide credit to a consumer;

17 (4) obtain a mortgage or other security interest in property owned by a
18 consumer;

19 (5) operate as a collection agency, as defined in Section ____ [insert citation of
20 the state or federal statute regulating debt collectors];

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

23 (7) make any false, misleading, or deceptive representations or omissions of
24 information in connection with the advertisement, offer, sale, or performance of any service;

25 (8) employ any scheme, device, or artifice to defraud; (MI)

26 **Reporter's Note:** Alternate articulations include: "employ any false,
27 misleading, deceptive, or unfair [act] or practice" (OR); "engage in any act,
28 practice, or course of business that would operate as a fraud or deceit upon
29 any person" (MI).

1 (9) offer, pay, or give any [substantial] gift, bonus, premium, reward, or other
2 compensation to a person for referring a prospective customer;

3 (10) make any representation that:

4 (A) the debt management services provider will provide funds to pay
5 bills or prevent attachments;

6 (B) payment of a certain amount will handle a certain amount or range
7 of indebtedness; or

8 (C) participation in a debt management plan will or may prevent
9 garnishment, attachment, repossession, or loss of job; (MI)

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

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

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

16 (A) the Administrator; or

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

19 (14) receive any cash, fee, gift, bonus, premium, reward, or other
20 compensation from a person other than the consumer or person on the consumer's behalf in
21 connection with the debt management services provider's business of providing debt
22 management services; (MI) [alternatively, "receive any bonus, commission, or other
23 consideration for referring any consumer to any person for any reason" (NY)]

1 (15) fail to provide to the consumer the full benefit of a compromise of a debt
2 arranged by the debt management services provider; (MI, NE)

3 (16) charge for or provide credit insurance;

4 (17) compromise any debts of a consumer unless the provider has obtained
5 the prior written approval of the consumer, and the compromise benefits the consumer;

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

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

11 (20) prepare, advise, or sign a release of attachment or garnishment,
12 stipulation, affidavit for exemption, compromise agreement or other legal or court document,
13 nor furnish legal advice or perform legal services of any kind (WA); or

14 (21) include in a contract with a consumer any contractual provision that:

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

17 (i) failing to perform the debt management services agreement,
18 or

19 (ii) violating this Act; or

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

22 (i) under this Act, or

23 (ii) out of performance of the debt management services

1 agreement.

2 (b) Notwithstanding any other provision of law, a debt management services
3 provider may not, directly or indirectly, collect any fee for referring, advising, procuring,
4 arranging, or assisting a consumer in obtaining any extension of credit or other consumer
5 service from a lender or service provider if the debt management services provider, or any
6 owner, officer, director, principal, or employee of the debt management services provider is
7 an owner, partner, director, officer, or employee of the lender or service provider.

8 ***Reporter's Note:** This is drawn from MD, but the MD statute only bans the*
9 *practice if the debt management services provider fails to disclose the*
10 *relationship. If self-dealing is offensive, disclosure probably is not a sufficient*
11 *response.*
12

13 (c) A debt management services provider may not purchase goods, services, or
14 facilities from any person if:

15 (1) any owner, officer, director, principal, or employee of the debt
16 management services provider is an owner, partner, director, officer, or employee of the
17 provider of those goods, services, or facilities; or

18 (2) any owner, officer, director, or principal of the debt management services
19 provider is related by blood or consanguinity to any owner, partner, director, officer, or
20 principal of the provider of those goods, services, or facilities.

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

24
25 **SECTION 15. ADVERTISING; MANDATORY PUBLIC EDUCATION.**

1 (a) All advertising, regardless of medium, must disclose that:

2 (1) debt management plans are not suitable for everyone; and

3 (2) other alternatives for dealing with indebtedness are available.

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

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

10 (2) If the debt management services provider is identified, the education
11 program must clearly and conspicuously disclose the information specified in subparagraph
12 9(a)(6) (the success rate of the provider's debt management plans).

13
14 **SECTION 16. CRIMINAL PENALTY.** (MD) Any person who knowingly and
15 willfully violates any provision of this [act] is guilty of a felony and on conviction is subject
16 to a fine not exceeding [\$1000] for the first violation and not exceeding [\$5000] for each
17 subsequent violation or imprisonment not exceeding [five years], or both.

18
19 **SECTION 17. POWERS OF ADMINISTRATOR.** (ME)

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

22 (b) The Administrator may:

23 (1) investigate the activities of persons subject to this [act] to determine

1 compliance with it, including examination of the books, accounts, and records of any debt
2 management services provider;

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

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

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

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

12 (e) The Administrator may adopt rules and regulations to carry out the requirements
13 of this [act] in accordance with Section ____ [citation to the state administrative procedure
14 act].

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

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

23 ***Reporter's Note:*** See MD §12-905 for a more elaborate version. The Oregon

1 *statute provides that fees of the type referred to here stay with the*
2 *Administrator, but that all civil penalties received by the Administrator*
3 *pursuant to section 18 shall be paid to the State treasury and credited to the*
4 *general funds, and then be available for general governmental expenses.*
5

6 **SECTION 18. ADMINISTRATIVE REMEDIES. [MD]**

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

- 9 (1) ordering the violator to cease and desist from the violation and any
10 similar violations;
- 11 (2) ordering the violator to take affirmative action to correct the violation,
12 including the restitution of money or property to any person aggrieved by the violation;
- 13 (3) imposing a civil penalty not exceeding [\$1,000] for each violation;
- 14 (4) revoking, suspending, or denying renewal of the debt management
15 services provider's registration in accordance with Section 20 ; and
- 16 (5) commencing a civil action to obtain restitution, an injunction or other
17 equitable relief, or both.

18 ***Reporter's Note:*** *The OR statute provides that the consumer may initiate*
19 *proceedings before the Administrator, who is empowered to award the*
20 *consumer damages, which may be recovered by resort to the debt*
21 *management services provider's bond.*

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

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

1 and desist or for which the violator failed to corrective affirmative action.

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

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

9
10 **SECTION 19. VIOLATION OF UNFAIR PRACTICES STATUTE.** A violation
11 of this [act] constitutes [an unfair or deceptive act or practice] in violation of [insert citation
12 to the state's little-FTC act]. (OR)

13
14 **SECTION 20. SUSPENSION, REVOCATION, OR NON-RENEWAL OF**
15 **REGISTRATION.** (ME)

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

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

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

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

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

2 (4) the debt management services provider refuses to permit the
3 Administrator to make an examination authorized by this Act;

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

6 (6) the debt management services provider has had a license to engage in the
7 business of providing debt management services revoked or suspended in another state;

8 (7) an employee, officer, director, owner, has ever been convicted of a crime
9 involving moral turpitude or fraudulent or dishonest actions (NY) [, including forgery,
10 embezzlement, obtaining money under false pretenses, larceny, extortion, or any similar
11 offense (MI)]; or

12 (8) the debt management services provider has defaulted in the payment of
13 money collected for others, including the discharge of debts through bankruptcy. (MI)

14 (c) If the Administrator finds that the public health, safety, or welfare requires
15 emergency action, summary suspension may be ordered effective on the date specified in the
16 order. A hearing shall occur promptly thereafter.

17
18 **SECTION 21. PRIVATE ENFORCEMENT. [MD]**

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

22 (1) actual damages, but not less than \$[1,000];

23 (2) punitive damages; and

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

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

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

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

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

SECTION 22. STATUTE OF LIMITATIONS. An action brought pursuant to this [act] shall be commenced within four years from the later of:

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

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

(c) the debt management services provider's last accounting to the consumer pursuant to Section 13(a)(1)-(2); and

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

Reporter's Note: *The period contemplated by subsection (d) should be tolled during any period during which the defendant has misrepresented any material information that the Act requires to be disclosed.*

1
2 **SECTION 23. SEVERABILITY.** If any provision of this [act] or its application to
3 any person or circumstance is held invalid, the invalidity does not affect other provisions of
4 applications of this [act] that can be given effect without the invalid provision or application,
5 and to this end the provisions of this [act] are severable.
6

7 **SECTION 24. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
8 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the
9 federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001
10 et seq.) but does not modify, limit, or supersede Section 101(c) of that Act (15 U.S.C.
11 Section 7001(c)) or authorize electronic delivery of any of the notices described in Section
12 103(b) of that Act (15 U.S.C. Section 7003(b)).
13

14 **SECTION 24. EFFECTIVE DATE.** This [act] takes effect on [_____].
15

16 **SECTION 25. REPEAL.** The following sections are repealed: [citation to existing
17 legislation regulating debt management services]
18

19 **SECTION 26. TRANSITIONAL PROVISIONS; APPLICATION TO**
20 **EXISTING RELATIONSHIPS.**
21