Financial Education and Counseling Alliance
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Consumer Credit Counseling Service of Greater Dallas, Inc. ● Consumer Credit Counseling Service of San Francisco
CredAbility ● Money Management International, Inc.
Garden State Consumer Credit Counseling, Inc. d/b/a Novadebt ● GreenPath, Inc.
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March 21, 2011

Via Email (greenfim@wulaw.wustl.edu)

Professor Michael M. Greenfield
UDMSA Reporter
Washington University School of Law
Campus Box 1120
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St. Louis, MO 63130-4899

RE: Proposed Revisions to UDMSA Section 22, Dated March 17, 2011

Dear Professor Greenfield:

The Financial Education and Counseling Alliance (the "Alliance") appreciates this opportunity to comment on the draft proposed revisions to Section 22 of the Uniform-Debt Management Services Act ("UDMSA"), dated March 17, 2011 (the "Section 22 Revisions").[1]

While the resulting changes included in the Section 22 Revisions related to funds used to pay creditors are helpful, the Alliance still believes that substantial improvements must be made to limit the negative impact that restrictions on account administration will have on both nonprofit and for-profit DMP providers and consumers, as well as to align the UDMSA with the Federal Trade Commission's ("FTC") Telemarketing Sales Rule ("TSR").

The Alliance was pleased to see that the draft language made improvements to the trust account provision that would allow providers to continue to administer their own trust accounts that contain funds to pay creditors. This change recognizes a fundamental characteristic of a debt management plan ("DMP").

We are very concerned, however, about any limitation on administering an account holding funds to pay fees and creditors once services have been provided. Under the Section 22 Revisions, no provider may administer a trust account if it "contains money to be received by a provider in payment of its fees." This proposed limitation, especially when considered together

[1] The Section 22 Revisions are the second version of draft revisions commented on by the Alliance as part of the Standby Committee on the UDMSA's project to align the Act with the recently enacted debt relief amendments to the FTC's TSR. We understand that the stated goal of the Standby Committee is to finalize a revised draft UDMSA by the end of March 2011 for consideration by the Uniform Law Commission in July 2011.

with the advance fee ban in proposed Section 23, is essentially unworkable for a DMP provider and is in direct conflict with the TSR.

- **A Restriction on Trust Account Administration for DMPs is Not Consistent with the TSR**

The Section 22 Revisions would prohibit providers from administering trust accounts that receive funds for fees and payments to creditors. Rather, providers would only be allowed to administer trust accounts used for payments to creditors. But, with all due respect, the TSR would not limit the use of trust accounts by providers of DMPs to hold funds to pay fees or to pay creditors once a DMP has been established and the first payment (destined for creditors) is made to the provider. The TSR would only require independently administered "dedicated accounts" as an exception to the advance fee ban, which is only needed in cases – such as those involving certain debt settlement companies – where fees are sought to be collected and escrowed before services are provided.

While the TSR debt relief amendments were not written to regulate *bona fide* nonprofit providers, its language is unequivocal that the advance fee ban in TSR Section 310.4(a)(5) would not prevent the provider from charging a set-up or other fee after the consumer has enrolled in a DMP and made the first payment (destined to creditors) to the provider.[2] Instead, in the context of for-profit DMPs, the TSR's advance fee ban would require that the provider successfully provide the consumer with the represented services, such as counseling and enrollment in a DMP – with the consent of both the consumer and his or her creditors – and that one payment (destined for creditors) be made before charging any fees.

Many commentators to the Draft UDMSA, dated February 16, 2011, stressed that the FTC created the "dedicated account" option as an exception to its advance fee ban.[3] The

[2] *See Amended TSR and Statement of Basis and Purpose Final Rule* ("*TSR Amended Rule 2010"*), 75 Fed. Reg. 48489 n.431 (Aug. 10, 2010) (Footnote 431 to the SBP of the TSR is in connection with the statement, "For a DMP, the CCA must provide a debt management plan containing the altered terms and executed by the customer that is binding on all applicable creditors. The CCA also must have evidence that the consumer has made the first payment to the CCA for distribution to creditors.") (emphasis added); *see accord Telemarketing Sales Rule Notice of Proposed Rulemaking ("TSR NPRM")*, 74 Fed. Reg. 42009 n.241 (Aug. 19, 2009) (With regard to the then-proposed advance fee ban, the FTC explained in the *TSR NPRM* that in the context of for-profit companies: "CCAs commonly charge consumers not only an initial setup fee, but also periodic – usually monthly – fees throughout the consumer's enrollment in the DMP after the consumer is enrolled. Proposed amended Rule Section 310.4(a)(5) would prohibit CCAs from charging periodic fees before the consumer has enrolled in a DMP, but would not prevent subsequent periodic fees taken for servicing the account." *Id*.).

[3] *See e.g.*, Comment Letter of C. Witzel regarding "Proposed Revisions to the UDMSA" at 2 (Mar. 7, 2011) ("The sole purpose of the TSR "dedicated bank account" is to permit providers to "request" or "receive" fees early, without violating the advance fee ban."); *See, e.g., TSR Amended Rule 2010,* 75 Fed. Reg. 48471, 48479 n.432, 48490, n.434 (Aug. 10, 2010).

exception was created as a method to accommodate the providers' needs to ensure that funds would be available to pay fees when earned. The TSR provides that fees for debt relief services may not be collected until earned by performance, although there is nothing in the TSR that contemplates how providers manage funds to pay fees or creditors after the satisfaction of the requirements of the advance fee ban. With regard to for-profit DMP providers, "Final Rule § 310(a)(5) prohibits CCAs from charging a set-up fee or other fee before the consumer has enrolled in a DMP and made the first payment, but it would not prevent the CCA from collecting subsequent periodic fees for servicing the account."[4]

As a result, the draft is in direct conflict with the TSR. The Section 22 Revisions, unlike the TSR, would not permit providers to administer accounts with funds to pay fees and creditors once the conditions of the advance fee ban are satisfied. Additionally, unlike the TSR, the proposed revisions also do not appear to require that if fees are collected prior to services being performed, they should be held in a "dedicated account" along with funds to pay creditors.[5]

- **An Efficient Way to Incorporate the Advance Fee Ban Is to Track the TSR; with Clarification**

Many providers of DMPs utilize systems that are premised on receiving funds for payments of fees and creditors. The Alliance believes that tracking the advance fee ban and "dedicated account" approach taken in the TSR, with slight clarification, will achieve the proper balance – to the extent that the Standby Committee seeks to impose the same requirements on both nonprofit and for-profit DMP providers – but recognize that the timing of when services are provided to consumers on a DMP are substantially different from those enrolled in a debt settlement program.

- **Restricting Trust Account Administration Will Drive Away Nonprofit and For-Profit DMP Providers**

For states that adopt the UDMSA, there is a real risk that limiting the ability of providers to administer trust accounts as presently contemplated in the Section 22 Revisions will have the effect of driving away options for consumers. DMPs, in part, involve administering a trust account, receiving funds for the payment of fees and creditors, and disbursing the funds to creditors by the creditors' due dates.[6] The Section 22 Revisions would interfere with this

[4] *See supra* note 2.

[5] *See TSR Amended Rule 2010*, 75 Fed. Reg. 48490 n.444 (Aug. 10, 2010) ("If a provider is going to require a dedicated bank account, it may not require the use of a dedicated bank account solely to set aside funds for the provider's fees. *Id*.).

[6] For a diagram that illustrates the typical DMP money and information flow among consumers, the consumer's bank, the DMP provider, the creditor's bank, and the creditor, *see* MasterCard RPPS, "How Credit Counseling

successful, well-established process (that works to the benefit of consumers, and which the FTC found no problems with).[7] The availability of DMPs to consumers in UDMSA states will decline, particularly because the systems that exist to facilitate DMP payments, including electronic payment systems and provider interfaces, are not designed to handle payments in a manner contemplated by the Section 22 Revisions. Further, a provider that receives payments from creditors may never know if the statutory test is satisfied in instances involving "deducted" creditor contributions ("fair share").

As the Alliance touched on in its prior comments to the Standby Committee, the UDMSA, by definition, applies to registered providers that have subjected themselves to consumer protections related to funds received to pay creditors. Under the UDMSA, a provider that does not register or is registered and fails to comply with the Act's requirements is subject to enormous legal risk. On the other hand, the TSR was written based on a record that revealed abuses by for-profit providers that generally did not subject themselves to regulation in the states and collected exorbitant fees before services were performed.

Limiting the ability of DMP providers to administer trust accounts that contain funds for payment of fees will create a strong disincentive for legitimate DMP providers, since the requirement presents a virtually unworkable situation. In short, mandating "dedicated account" requirements intended for debt settlement providers will create a disadvantage to providers that collect funds for fees and creditors subject to state requirements, such as the UDMSA's requirements for bonding, insurance and regulator oversight.

Additionally, since illicit debt relief service providers are neither registered nor is the trust account language needed to bring such a provider within the scope of the UDMSA, the benefit of the restriction on who can administer a provider's trust account to consumers is minimal in the context of legitimate nonprofit and for-profit providers of DMPs. In this light, the "balance" between "leveling the playing field" for all who provide debt management services and the needs of consumer protection takes on another dimension. Neither the needs of "leveling the playing field" nor consumer protection are advanced by adopting a requirement intended for debt settlement companies under the TSR, which that if unregistered will not follow any of the requirements in first place.

It is widely known that debt settlement companies were the source of a disproportionate amount of the reports of consumer harm due to their business model of *not* obtaining creditor

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Works," *available at* https://www.mastercardintl.com/rpps/lvl2.cgi/cc_2,. MasterCard RPPS provides electronic and bill payment presentment services.

[7] Moreover, receiving funds to pay fees and creditors is already permitted under the existing language of UDMSA Section 22. However, within the UDMSA, there is nothing that requires providers to receive funds to pay creditors and, thus, to use a trust account. Accordingly, the TSR "dedicated account" model would not be prohibited by the UDMSA.

agreement to a plan at the time of enrollment that led to the advance fee ban in the TSR. In contrast, as the FTC acknowledged, DMPs involve creditor agreement to the plan from the start. There also is no evidence of which the Alliance is aware of misadministration of trust accounts by registered providers in states that have enacted the UDMSA. Hence, a restriction on trust account administration applicable to DMP providers (both nonprofit and for-profit) is counterproductive from the standpoint of addressing consumer protection concerns.

- **The Restriction on Trust Account Administration Should Be Deleted**

In adopting an advance fee ban and "dedicated account" model, consistent with the TSR, the existing UDMSA trust account requirement should not be altered. Rather, a nonprofit or for-profit DMP provider should be allowed to continue its present practice with regard to the administration of the trust account. Again, dropping the restriction on provider administration of trust accounts with funds for the payment of fees is consistent with TSR, where no such restriction exists. In sum, while recognizing the need ensure that consumers are protected from providers that seek to collect fees and provide no services; the UDMSA should not be crafted to restrict practices that would make it virtually impossible to efficiently administer a DMP. Moreover, not only are the restrictions on trust account administration for DMPs not needed, in light of increasing concerns about unregulated activity and costs to consumers, the use of an independent administrator for the administration of accounts for funds to pay fees would increase costs and diminish service to consumers.

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Accordingly, we strongly recommend that the language in the TSR be used instead of the Section 22 Revisions, with revisions to conform the TSR to the processes used by legitimate nonprofit and for-profit DMP providers that were not the focus or concern of the FTC rulemaking. While the revised draft language addresses one of the Alliance's concerns, as it stands, the improvements in this provision do not offset the increased burden and costs to consumers that it will bring. Further, the language does not meet the goal of aligning the UDMSA with the TSR.

The Alliance would be pleased to provide you with additional information, review additional revised draft language, and answer any other questions you may have. Thank you for this opportunity to comment.

Respectfully submitted,

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Attachment

cc: UDMSA Standby Committee (comments@uniformlaws.org)
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