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March 7, 2011

Via Email

Standby Committee for the Uniform Debt-Management Services Act
Uniform Law Commission (NCCUSL)
111 N. Wabash Avenue. Suite 1010
Chicago, IL 60602

Re: Proposed Revisions to the UDMSA

Dear Members:

I am the American Bar Association advisor to the Drafting Committee on the Uniform Debt-Management Services Act. I appreciate the opportunity to comment on the proposed revisions to the Uniform Debt-Management Services Act ("Draft").

The purpose of the Draft is to eliminate any inconsistency of the UDMSA with the recently amended Federal Trade Commission's Telemarketing Sales Rule ("TSR"). During my review of the Draft, however, I noticed that several of the revisions are inconsistent with the TSR and one is directly contrary to the TSR. I strongly recommend revising the UDMSA to be consistent with the TSR, rather than inconsistent. In addition, I would like to recommend one additional clarifying revision to the UDMSA.

Advance Fee Ban and Dedicated Bank Account

The proposed revisions to UDMSA §§ 22 and 23 conflict with the TSR. As noted in the memorandum accompanying the Draft, the ban on advance fees is one of the TSR's most significant changes. Under the TSR, no provider may "request" or "receive" any fee until services have been performed. TSR § 310.4(a)(5)(i).

During the process of revising the TSR, the FTC recognized that providers have a legitimate need to make sure that consumers have funds available to pay fees when they are earned by performance. The FTC notes that "an industry member stated that allowing providers to require consumers to set money aside in a dedicated bank account is 'absolutely necessary' to ensure that the money available is adequate to cover the settlement amount *and the provider's fee*. Additionally, a municipal consumer protection agency stated that dedicated bank accounts would *ensure that a debt settlement company could collect its fees* once it has settled a consumer's debt." 75 Fed. Reg. 48490 (August 10, 2010) (emphasis added). The FTC

understood that this could be accomplished in conjunction with its goal of protecting consumers by prohibiting advance fees.

To accommodate the providers' legitimate need to ensure that funds would be available to pay fees when earned, the FTC created an exception to the advance fee ban: if consumer funds to pay fees are held in a "dedicated bank account," the funds may be "requested" before services are performed *without violating the advance fee ban*. 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. The TSR is clear that the "dedicated bank account" is an *exception* to the advance fee ban: TSR § 310.4(a)(5)(i) [the advance fee ban] prohibits a provider from "requesting or receiving payment of any fee" until earned by performance and TSR § 310.4(a)(5)(ii) [the "dedicated bank account" provision] states that "Nothing in § 310.4(a)(5)(i) [the advance fee ban] prohibits requesting or requiring the customer to place funds in an account . . . ."

The Draft takes an entirely different approach. Section 22 of the Draft simply requires a "dedicated bank account" for any funds received from consumers, whether the funds are to be used to pay fees or to pay creditors. Additionally, the proposed revisions to § 23 do not provide that holding funds in a "dedicated bank account" is an exception to the Draft's advance fee ban.

As a result, the Draft, unlike the TSR, does not permit providers to require consumers to establish "dedicated bank accounts" to hold fees before they are earned by performance. Additionally, the Draft, unlike the TSR, prohibits providers from holding funds to pay creditors in trust accounts that are not "dedicated bank accounts." Neither of these changes is consistent with the TSR.

To be consistent with the TSR, UDMSA § 22 should remain unchanged and § 23 should be revised to track the approach taken in TSR § 310.4(a)(5) by clearly providing that the "dedicated bank account" is an exception to the advance fee ban. Additional conforming changes are required to the Draft.

The Draft also defines the "dedicated bank account" much more restrictively than does the TSR. The Draft provides in § 22(c)(ii) that the dedicated bank account must be administered by an entity that is not "(A) the provider or (B) an affiliate of the provider . . . ." The TSR only requires that "the entity administering the [dedicated bank] account is not owned or controlled by, or in any way affiliated with, the debt relief service . . . ," § 310.4(a)(5)(ii)(C), and does not preclude administration by the provider. The definition of "affiliate" in the UDMSA is very broad and would include, among others, a person that received or received more than $25,000 from the provider in the current or preceding year. UDMSA § 2(2)(B)(iv). Accordingly, if the administrator of the dedicated bank account, for example, an FDIC insured bank trustee, is paid more than $25,000 by the provider for actual services performed, which is permissible under the

TSR, the bank would become an "affiliate" and would not be permitted to serve as administrator. The TSR uses "affiliated with" to mean corporate affiliation. The Draft should be revised to track the TSR.

Power of Attorney

Section 19(e) of the Draft provides that a debt management agreement may not confer a power of attorney to settle a debt on a provider. This is inconsistent with the TSR. The TSR does prohibit a provider from taking a fee *until the consumer has assented* to the specific debt settlement and made a payment to the creditor. TSR § 319.4(a)(5)(i)(A) and (B) (emphasis added). <u>However, the TSR does not prohibit a provider from using a Power of Attorney to settle a debt</u>.

To get the best deal for consumers, providers sometimes must work fast to accept creditor settlement offers. A provider may be willing to settle under the terms of a Power of Attorney earlier granted by the consumer and then present the terms of settlement to the consumer for approval so that the provider may take its fee. A provider may be willing to take the risk that the consumer will not approve a settlement and, thus, that the provider will not be paid. The TSR permits this, but the Draft does not. The Draft should be revised to track the TSR.

Additional Clarifying Change

The UDMSA currently, and as proposed to be revised, bases fees for debt management plans that are not settlement plans on a monthly fee not to exceed $10.00 times "the number of *creditors* remaining in a plan at the time the fee is assessed, but not more than $50.00 in any month." UDMSA § 23(d)(1)(B) and Draft § 23(d)(3). The term "creditor" is not defined in the UDMSA.

Debtors may have more than one credit card, or credit card balance, with a particular extender or owner of credit. For example, the Victoria's Secret, Express, J. Crew, Anne Taylor, Eddie Bauer, and many more credit cards are all issued by the same bank, World Financial Network National Bank. Debtors may start out with different credit cards issued by different banks, for example, MBNA and Bank of America, and the banks may merge. Different banks may issue credit cards, the balances may go into default, and the debts may be sold to a single debt buyer. Debtors may have no idea from time to time to whom their credit card obligations are owed, but do appreciate that different "accounts" exist.

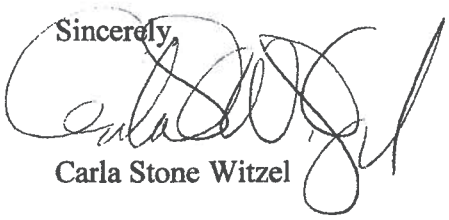
The use of the word "creditor" in the fee provisions creates ambiguity and is therefore problematic. This issue has been recognized in several states that have adopted the UDMSA. Relevantly, both the Nevada (N.R.S. § 676A.580(4)) and the Utah (Utah Code § 13-42-123(4)) versions of the UDMSA have changed the word "creditors" to "accounts."

Even if different credit cards are issued by the same bank or ultimately owned by the same bank after a merger or by the same debt buyer, separate "per account" payment processing is performed by a provider. The UDMSA charge per "creditor" is intended to reflect the level of effort required of the provider in administering the plan and disbursing payments; this is why the per "creditor" charge is reduced when there are fewer creditors in a plan. Therefore, substituting the term "accounts" for "creditors" would be consistent with the UDMSA's statutory purpose.

I have marked my recommendations on the attached Draft and include a rewrite of part of § 23, showing how it should be revised to be consistent with the UDMSA.

Thank you for this opportunity to participate.

Sincerely,



Carla Stone Witzel

Encl.

Revised Section 23 (a) through (d)

SECTION 23. FEES AND OTHER CHARGES.

(a) A provider may not impose directly or indirectly 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 provider may not impose charges or receive payment for debt-management services until the provider and the individual have signed an agreement that complies with Sections 19 and 28.

(c) If an individual assents to an agreement, a provider may not impose a fee or other charge for educational or counseling services, or the like, except as otherwise provided in this subsection and Section 28(d). The administrator may authorize a provider to charge a fee based on the nature and extent of the educational or counseling services furnished by the provider.

(d) Subject to adjustment of dollar amounts pursuant to Section 32(f), the following rules apply:

(1) If an individual assents to a plan that contemplates that creditors will reduce finance charges or fees for late payment, default, or delinquency, the provider may charge:

(A) a fee not exceeding $50 for consultation, obtaining a credit report, setting up an account, and the like; and

(B) a monthly service fee, not to exceed $10 times the number of *accounts* remaining in a plan at the time the fee is assessed, but not more than $50 in any month.

(2) If an individual assents to an agreement that contemplates that creditors will settle debts for less than the principal amount of the debt, a provider may charge:

(A) with respect to each debt, 30 percent of the excess of the principal amount of the debt over the amount paid the creditor pursuant to the agreement, and

(B) if the debt is to be settled by installment payments,

(i) the provider may receive this compensation in installments, made simultaneously with the individual's installment payments to the creditor, but

(ii) any such installment of the compensation may not be a greater percentage of the provider's total compensation for settlement of that debt than the simultaneous payment to the creditor is of the entire settlement amount for that debt.

(3) A provider may not impose or receive fees under both paragraphs (1) and (2).

(4) A provider may not request or receive any compensation from or on behalf of an individual unless:

(A) the provider has secured the assent of the individual and at least one creditor of the individual to a change in the terms of a debt, and

(B) the individual has made a payment toward satisfying the modified terms of the debt.

(5) Nothing in Section 23(d)(4) prohibits requesting or requiring an individual to place funds in an account to be used for the provider's fees and for payments to creditors, provided that:

(A) The funds are held in an account in an insured bank;

(B) The individual owns the funds in the account and any interest accruing on the individual's funds in the account is credited to the individual;

(C) The person administering the account is not controlled by, does not control and is not under common control with, the provider;

(D) The person administering the account may not give or accept any compensation from the provider in exchange for referrals of business involving debt-management services; and

(E) Upon termination of an agreement, the person administering the account shall, within seven business days of the termination, pay the individual all money received by or on behalf of the individual, other than amounts it has properly disbursed to creditors or the provider.

~~(17)~~(18) "Settlement fee" means a charge imposed on or paid by an individual in connection with a creditor's assent to accept in full satisfaction of a debt an amount less than the principal amount of the debt.

~~(18)~~(19) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

~~(19)~~(20) "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.

~~(20)~~(21) "Trust account" means an account to be used for payment of a provider's fees or for payment to creditors pursuant to a plan, or both.~~held by a provider that is:~~

~~(A) established in an insured bank;~~

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

~~(C) designated as a trust account or other account designated to indicate that the money in the account is not the money of the provider or its designee; and~~

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

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Legislative Note: *In connection with paragraph (1), the state must decide whether to create a new administrative agency or charge an existing entity with enforcement of this Act. If the latter, the state 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, deceptive trade practices act, or similar statute) or the entity charged with regulation of consumer credit or financial institutions. It may be desirable to amend that entity's organic statute to refer specifically to this Act.*

management services or a statement that the applicant will have no such location;

(4) the name and home address of each officer and director of the applicant and each person that owns at least 10 percent of the applicant;

(5) identification of every jurisdiction in which, during the five years immediately preceding the application:

(A) the applicant or any of its officers or directors has been licensed or registered to provide debt-management services; or

(B) individuals have resided when they received debt-management services from the applicant;

(6) a statement describing, to the extent it is known or should be known by the applicant, any material civil or criminal judgment or litigation and any material administrative or enforcement action by a governmental agency in any jurisdiction against the applicant, any of its officers, directors, owners, or agents, or any person who is authorized to have access to ~~the~~ a trust account ~~required by Section 22~~;

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(7) ~~the~~ applicant's financial statements, audited by an accountant licensed to conduct audits, for each of the two years immediately preceding the application or, if it has not been in operation for the two years preceding the application, for the period of its existence;

(8) evidence of accreditation by an independent accrediting organization approved by the administrator;

(9) evidence that, within 12 months after initial employment, each of the applicant's counselors becomes certified as a certified counselor or certified debt specialist;

(10) a description of the three most commonly used educational programs that the applicant provides or intends to provide to individuals who reside in this state and a copy of any

1 materials used or to be used in those programs;

2 (11) a description of the applicant's financial analysis and initial budget plan, including

3 any form or electronic model, used to evaluate the financial condition of individuals;

4 (12) a copy of each form of agreement that the applicant will use with individuals who

5 reside in this state;

6 (13) the schedule of fees and charges that the applicant will use with individuals who

7 reside in this state;

8 (14) at the applicant's expense, the results of a criminal-records check, including

9 fingerprints, conducted within the immediately preceding 12 months, covering every officer of

10 the applicant ~~and every~~ employee or agent of the applicant who is authorized to have access to

11 ~~the~~ a trust account ~~required by Section 22~~; STET

12 (15) the names and addresses of all employers of each director during the 10 years

13 immediately preceding the application;

14 (16) a description of any ownership interest of at least 10 percent by a director, owner, or

15 employee of the applicant in:

16 (A) any affiliate of the applicant; or

17 (B) any entity that provides products or services to the applicant or any

18 individual relating to the applicant's debt-management services;

19 (17) a statement of the amount of compensation of the applicant's five most highly

20 compensated employees for each of the three years immediately preceding the application or, if

21 it has not been in operation for the three years preceding the application, for the period of its

22 existence;

23 (18) the identity of each director who is an affiliate, as defined in Section 2(2)(A) or

~~(A) the provider will refund all unexpended money that the provider or its agent has received from or on behalf of the individual for the reduction or satisfaction of the individual's debt;~~

~~(B) with respect to an agreement that contemplates that creditors will settle debts for less than the principal amount of debt, the provider will refund 65 percent of any portion of the set-up fee that has not been credited against the settlement fee; and~~

~~(C) all powers of attorney granted by the individual to the provider are revoked and ineffective;~~

~~(2)~~(1) the individual authorizes any bank in which the provider or its agent has established a trust account to disclose to the administrator any financial records relating to the trust account; and

~~(3)~~(2) the provider will notify the individual within five days after learning of a creditor's final 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.

(e) ~~An agreement may confer on a provider a power of attorney to settle the individual's debt for no more than 50 percent of the principal amount of the debt.~~ An agreement may not confer a power of attorney to settle a debt ~~for more than 50 percent of that amount~~, but may confer a power of attorney to negotiate with creditors of the individual on behalf of the individual. An agreement must provide that the provider will obtain the assent of the individual after a creditor has assented to a settlement ~~for more than 50 percent of the principal amount of the debt~~.

(f) An agreement may not:

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~~agreement is signed, an individual may waive the right to cancel. To waive the right, the individual must send or deliver a signed, dated statement in the individual's own words describing the circumstances that necessitate a waiver. The waiver must explicitly waive the right to cancel. A waiver by means of a standard-form record is void.~~

SECTION 21. REQUIRED LANGUAGE. Unless the administrator, by rule, provides otherwise, the disclosures and documents required by this [act] must be in English. If a provider communicates with an individual primarily in a language other than English, the provider must furnish a translation into the other language of the disclosures and documents required by this [act].

SECTION 22. TRUST ACCOUNT.

(a) All money paid to a provider by or on behalf of an individual for distribution to creditors pursuant to a plan is held in trust. Within two business days after receipt, the provider shall deposit the money in a trust account. ~~established for the benefit of individuals to whom the provider is furnishing debt-management services.~~

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~~(b) Money held in trust by a provider is not property of the provider or its designee. The money is not available to creditors of the provider or designee, except an individual from whom or on whose behalf the provider received money, to the extent that the money has not been disbursed to creditors of the individual.~~

(b) A provider may request or require an individual to place money in a trust account.

(c) A trust account must be at an insured bank and, unless the individual owns the account, must:

(i) be designated as a trust account or other account designated to indicate the that money in the account is not the money of the provider or its designee;

Note - This material to be moved to §23

(ii) be administered by an entity that is not

(A) the provider or

(B) an affiliate of the provider; and

(iii) provide that any interest accruing on the individual's funds in the account is credited to the individual.

(d) A person administering a trust account may not give or accept any compensation from the provider in exchange for referrals of business involving debt-management services.

(e) Upon termination of an agreement, a person administering a trust account shall, within seven business days of the termination, pay the individual all money received by or on behalf of the individual, other than amounts it has properly disbursed to creditors or the provider.

(f) Money in a trust account is not property of the provider or the person administering the account. The money belongs to the individual from whom or on whose behalf it was deposited and is not available to creditors of the person administering the account or creditors of the provider.

~~(c) A provider~~(g) A person administering a trust account 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, except that:

(A) the ~~provider~~ person may delay payment to the extent that a payment by the individual is not final; and

(B) if a plan provides for regular periodic payments to creditors, the disbursement must comply with the due dates established by each creditor; and

1 (3) promptly correct any payments that are not made or that are misdirected as a
2 result of an error by the provider or other person in control of the trust account and reimburse the
3 individual for any costs or fees imposed by a creditor as a result of the failure to pay or
4 misdirection.

5 ~~(d) A provider may not commingle money in a trust account established for the benefit~~
6 ~~of individuals to whom the provider is furnishing debt-management services with money of other~~
7 ~~persons~~.

8 (h) A provider or person administering a trust account may not include in the trust
9 account money of individuals other than those to whom the provider is furnishing debt-
10 management services.

11 ~~(e)~~(i) A trust account must at all times have a cash balance equal to the sum of the
12 balances of each individual's account.

13 ~~(f) If a provider has established a trust account pursuant to subsection (a), the provider~~

14 (j) A person administering a trust account shall reconcile the trust account at least once a
15 month. The reconciliation must compare the cash balance in the trust account with the sum of the
16 balances in each individual's account. If the provider or its designee has more than one trust
17 account, each trust account must be individually reconciled.

18 ~~(g)~~(k) If a provider or person administering a trust account discovers, or has a reasonable
19 suspicion of, embezzlement or other unlawful appropriation of money held in trust, the provider
20 or person administering the account, respectively, immediately shall notify the administrator by a
21 method approved by the administrator. Unless the administrator by rule provides otherwise,
22 within five days thereafter, the provider shall give notice to the administrator describing the
23 remedial action taken or to be taken.

~~(h) If an individual terminates an agreement or 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 creditors, less fees that are payable to the provider under Section 23.~~

~~(i)~~(1) Before relocating a trust account from one bank to another, a ~~provider~~ person administering the account shall inform the administrator of the name, business address, and telephone number of the new bank. As soon as practicable, the ~~provider~~ person administering the account shall inform the administrator of the account number of the trust account at the new bank.

SEE ATTACHED

SECTION 23. FEES ~~AND OTHER CHARGES~~.

(a) A provider may not impose directly or indirectly 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 provider may not impose charges or receive payment for debt-management services until the provider and the individual have signed an agreement that complies with Sections 19 and 28.

(c) If an individual assents to an agreement, a provider may not impose a fee or other charge for educational or counseling services, or the like, except as otherwise provided in this subsection and Section 28(d). The administrator may authorize a provider to charge a fee based on the nature and extent of the educational or counseling services furnished by the provider.

(d) Subject to adjustment of dollar amounts pursuant to Section 32(f), the following rules apply:

(1) Subject to paragraph (2), if~~If~~ an individual assents to a plan that contemplates

SEE ATTACHED

1 that creditors will reduce finance charges or fees for late payment, default, or delinquency, the
2 provider may charge~~:~~
3 ~~(A)~~ a fee not exceeding $50 for consultation, obtaining a credit report,
4 setting up an account, and the like~~; and~~
5 ~~(B) a monthly service fee, not to exceed $10 times the number of~~
6 ~~creditors remaining in a plan at the time the fee is assessed, but not more than $50 in any month.~~
7 ~~(2) If an individual assents to an agreement that contemplates that creditors will~~
8 ~~settle debts for less than the principal amount of the debt, a provider may charge:~~
9 ~~(A) subject to Section 19(d), a fee for consultation, obtaining a credit~~
10 ~~report, setting up an account, and the like, in an amount not exceeding the lesser of $400 and~~
11 ~~four percent of the debt in the plan at the inception of the plan; and~~
12 ~~(B) a monthly service fee, not to exceed $10 times the number of~~
13 ~~creditors remaining in a plan at the time the fee is assessed, but not more than $50 in any month.~~
14 (2) A provider may not request or receive any compensation from or on behalf of
15 an individual unless:
16 (A) the provider has secured the assent of the individual and at least one
17 creditor of the individual to a change in the terms of a debt, and
18 (B) the individual has made a payment toward satisfying the modified
19 terms of the debt.
20 (3) Subject to subsection (d)(1), if an individual assents to a plan that
21 contemplates that creditors will reduce finance charges or fees for late payment, default, or
22 delinquency, the provider may receive compensation in the form of a monthly service fee, not to
23 exceed $10 times the number of creditors remaining in a plan at the time the fee is assessed, but

1 not more than $50 in any month. SEE ATTACHED

2 (4) Except as otherwise provided in subsection (c), if an agreement contemplates

3 that creditors will settle an individual's debts for less than the principal amount of the debt:

4 (A) compensation for services in connection with settling a debt may not

5 exceed, with respect to each debt, 30 percent of the excess of the principal amount of the debt

6 over the amount paid the creditor pursuant to the agreement, and

7 (B) if the debt is to be settled by installment payments,

8 (i) the provider may receive this compensation in installments,

9 made simultaneously with the individual's installment payments to the creditor, but

10 (ii) any such installment of the compensation may not be a greater

11 percentage of the provider's total compensation for settlement of that debt than the simultaneous

12 payment to the creditor is of the entire settlement amount for that debt.

13 ~~(3)~~(5) A provider that receives fees under paragraph (4) may not also impose or

14 receive fees under paragraphs (1) or (3). ~~A provider may not impose or receive fees under both~~

15 ~~paragraphs (1) and (2).~~

16 ~~(4)~~(6) Except as otherwise provided in Section 28(d), if an individual does not

17 assent to an agreement, a provider may receive for educational and counseling services it

18 provides to the individual a fee not exceeding $100 or, with the approval of the administrator, a

19 larger fee. The administrator may approve a fee larger than $100 if the nature and extent of the

20 educational and counseling services warrant the larger fee.

21 (e) If, before the expiration of 90 days after the completion or termination of

22 educational or counseling services, an individual assents to an agreement, the provider shall

23 refund to the individual any fee paid pursuant to subsection (d)~~(4)~~(5).

1 the individual upon the direction of the provider, since the last report to each creditor listed in
2 the plan;
3 (3) the amounts deducted from the amount received from the individual;
4 (4) the amount held in reserve; and
5 (5) if, since the last report, a creditor has agreed to accept as payment in full an
6 amount less than the principal amount of the debt owed by the individual:
7 (A) the total amount and terms of the settlement;
8 (B) the amount of the debt when the individual assented to the plan;
9 (C) the amount of the debt when the creditor agreed to the settlement; and
10 (D) the calculation of a settlement fee.
11 (c) A provider shall maintain records for each individual for whom it provides debt-
12 management services for five years after the final payment made by the individual and produce a
13 copy of them to the individual within a reasonable time after a request for them. The provider
14 may use electronic or other means of storage of the records.
15 **SECTION 28. PROHIBITED ACTS AND PRACTICES.**
16 (a) A provider may not, directly or indirectly:
17 (1) misappropriate or misapply money held in trust;
18 (2) settle a debt on behalf of an individual ~~for more than 50 percent of the~~
19 ~~principal amount of the debt owed a creditor~~, unless the individual assents to the settlement after
20 the creditor has assented;
21 (3) take a power of attorney that authorizes it to settle a debt~~, unless the power of~~
22 ~~attorney expressly limits the provider's authority to settle debts for not more than 50 percent of~~
23 ~~the principal amount of the debt owed a creditor~~;