March 17, 2011

Standby Committee on the Uniform Debt Management Services Act
National Conference of Commissioners on Uniform State Laws

Ladies and Gentlemen:

The Association of Settlement Companies ("TASC"), the leading industry trade association representing those debt settlement companies that have pledged full compliance with the Federal Trade Commission's ("FTC") Amended Telemarketing Sales Rule (the "TSR"), hereby submits the industry's comments and observations with respect to the Uniform Law Commission's ("ULC") proposed amendments to the 2008 version of the Uniform Debt Management Services Act ("UDMSA").

While we believe strongly in the principles underlying the UDMSA and support, generally, the work done the ULC, we were quite disappointed to discover that the amendments issued by the Standing Committee on February 8, 2011 were drafted without any substantive consultation with representatives of the industry the model act is designed to regulate[1]. Our disappointment was compounded by the fact that, in September 2010, following the FTC's publication of the final amendments to the TSR, TASC offered to furnish, and did furnish, to Michael Kerr, the ULC's Legislative Director, a complete markup of the UDMSA, which markup not only responded to the FTC's rulemaking but also highlighted a number of instances where time and experience have shown that the existing language of the UDMSA needed thoughtful attention. Sadly, based on the proposed amendments it would seem that our comments were not considered. We have attached as Exhibit A to this submission a markup of the current version of the UDMSA furnished to us by Mr. Kerr (the 2008 "official" version); this markup is a slightly updated version of what was furnished to Mr. Kerr in September of last year. We look forward to addressing our concerns in greater detail with the Committee at the earliest possible time.

In reviewing the proposed amendments, it would seem that, in at least two significant respects, the TSR has been interpreted by the drafter(s) of the proposed amendments in ways explicitly rejected by the FTC. TASC worked closely with the FTC for more than two years,

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1 We cannot speak to whether the credit counseling industry was consulted, only that the debt settlement industry was not.

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and that collaboration resulted in the TSR expressly permitting fees to be calculated in a manner not embraced by the proposed amendments, as well as expressly permitting the timing of fee collection in a manner actually rejected by the proposed amendments. In short, the proposed amendments appear to be substituting what can only be assumed to be the arbitrary positions of the drafter(s) for the actual findings of a Federal agency, findings made after more than two years of investigation, testimony, analysis and input from all interested parties, including the industry, the regulators and consumers.

For ease of reference, we have chosen to address in this letter only those issues that, we believe, either require immediate attention in the context of industry, consumer and regulatory experience with the UDMSA since 2005 or represent a significant and detrimental departure from the standards recently articulated by the Federal Trade Commission in the TSR. However, we commend to the Committee our red-line of the 2008 UDMSA, attached hereto as Exhibit A, which contains a substantial number of additional comments and suggestions.

BACKGROUND: TASC/ULC COLLABORATION

Since its founding in 2005, TASC has been an enthusiastic supporter of vigorous state regulation of all debt relief industry participants, not just debt settlement companies, and has worked alongside the ULC to help pass the UDMSA in a number of states, albeit in an amended form that reflects the reality that, although the UDMSA contains only one compensation mechanism (the so-called "percent of savings" mechanism), the industry almost universally employs a different model, the "flat fee" mechanism[2], whereby compensation is calculated as a percentage of the amount of enrolled debt. Of the six states that have adopted the UDMSA, only Rhode Island mandates the "percent of savings" mechanism, with the unfortunate result that, to our knowledge, not one debt settlement company operates in Rhode Island. Conversely, in every state where the UDMSA offers a choice of fee mechanisms, consumers enjoy a selection of providers, each of which is registered with, and regulated by, the appropriate state agency. It is worth noting that TASC research shows that, when consumers are offered a choice of compensation models, they overwhelmingly choose the fixed-fee model, so clearly a limitation of consumer choice is not what consumers want.

BACKGROUND: THE "ADVANCE FEE" PROHIBITION

Although TASC members have historically delivered excellent results for consumers, the experience of some consumers who, due to the actions of a few unscrupulous providers, paid fees but received no benefits often overwhelms in the public's mind the more common experience of satisfied consumers, those who received significant amounts of debt relief,

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[2] See, for example, Section 23 of the UDMSA, as adopted in Tennessee and which, following the UCL meeting in September 2009, we were informed was meant to be the "choirbook" for future introduction of the UDMSA. Note that, with the adoption of the TSR, much of the UDMSA fee language only applies to those debt relief enterprises that are able to claim and support an exemption from the TSR, such as the "face-to-face" exemption and the "legal model" exemption. TASC is of the view that the proper role of the UDMSA is to extend the TSR's reach to those otherwise exempted business models.

benefits often far in excess of fees paid. In October 2008, in response to this serious, if (we believe) somewhat overstated, public perception issue, the FTC started its inquiry into the business practices of the debt settlement industry, focusing specifically on the then-common business model whereby some or all of the provider's fees would be collected prior to the consumer realizing some or all of the hoped for debt relief.

TASC was initially resistant to the FTC's July 2009 proposal to change the industry's business model, principally because mandating a "back end" compensation system would almost certainly starve companies of needed cash flow, with the likely outcome that good providers as well as bad would be pushed out of business[3]. However, over time TASC came to believe that, because the practice of accepting fees in advance of delivering an outcome to the consumer had the potential for abuse, the interests of consumer protection would be better served by collaboration with, rather than opposition to, the FTC's initiatives. In that spirit, TASC pledged itself to a close working relationship with the FTC during the two years of its analysis and rulemaking and we are gratified that this collaboration resulted in many of TASC's suggestions being adopted in the final rule. Indeed, following the issuance of the final TSR, TASC announced publicly that it had endorsed the TSR and would thereafter limit membership in TASC only to those providers that pledged (and performed in) full compliance with the TSR provisions, specifically the prohibition on the charging and collection of "advance fees."

ISSUE #1: THE EXCLUSIVE COMPENSATION MODEL PROPOSED AMENDMENTS v. TSR

As discussed in the preceding paragraphs, the prevalent model in the debt relief industry – the model used by virtually all debt settlement companies both before **and after** the TSR – is the "fixed-fee" model, where the provider's compensation is calculated based on a percentage of enrolled debt[4]. Under the proposed amendments to the UDMSA, as in the 2008 version, only the "percent of savings" model is permitted. We believe that, in the post-TSR world where the consumer is fully aware of the applicable program fee **and** remains at all times in complete control of the provider's revenue event, it is time to revisit this mandate in a thoughtful, rather than reflexive, manner.

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[3] Unfortunately, this prediction turned out to be accurate: TASC estimates that, following implementation of the TSR about 60%, and possibly as much as 70%, of the industry has gone out of business.

[4] Prior to the TSR, a provider would collect the fee ratably over the estimated half-life of the consumer's program; subsequent to the TSR, a provider can only collect the fee pro rata, as debts are settled, and then only when the consumer actually accepts and makes a payment towards the settlement. Today, for example, a consumer with three debts of $10,000 each and a program fee of 25% will pay $2500 upon the settlement of each $10,000 debt but only after (a) the consumer accepts the proposed settlement and (b) makes at least one payment in satisfaction of the accepted settlement. By limiting the collection of fees until a debt actually settles – a process that takes many months, if not years – consumer cost has gone up in order to offset the provider's costs over the settlement period. However, even at today's prices, fees paid by consumers are far less than consumers pay for credit counseling, with outcomes that, we believe, are far superior and delivered in a much shorter time frame. See the brief discussion on page 7-9 of this letter and Exhibit B hereto.

The TSR expressly permits a provider to calculate compensation based on **either** a percent of savings or a flat-fee model, requiring only that the same mechanism be employed for all debts in each consumer's program. This change from the original proposal acknowledges, among other things, that some certainty of cash flow is necessary for a business to survive, as well as recognizing the role and value of the marketplace in allowing consumers to chose the model which best suits their goals[5].

Under the TSR, the consumer must give his or her approval to any proposed settlement. No longer may a provider hold even a limited power of attorney to act on behalf of the consumer in accepting a settlement. Further, no compensation of any sort may now be charged or accepted by a provider until the consumer has consented to the settlement and ratified that consent by making at least one payment toward the settlement. In other words, by giving the consumer complete control over the provider's revenue event, the FTC has made the manner in which the provider chooses to calculate compensation essentially irrelevant. The consumer now decides whether the cost of a settlement fits his or her settlement criteria, giving a substantial edge to a fee mechanism that allows the consumer to decide, in advance, how much he or she is willing to pay for the settlement of a specific debt.

When compensation is earned **only** when (a) results are delivered **and** (b) the consumer accepts those results, there is a proper alignment of incentives between the consumer and the provider. By making the provider's revenue event wholly dependent upon consumer acceptance, the provider is powerfully incented to present to the consumer only acceptable resolution proposals. Anything less will result in a rejected proposal, a very expensive consequence for a provider that now must go back to the drawing board, so to speak, without having been paid for any of the customer service, negotiating or overhead expense associated with the rejected offer. The consumer, of course, has not been disadvantaged in any way since until an offer is accepted the consumer pays nothing[6].

TASC has never taken the position that any one model should be the exclusive model for calculating compensation – ultimately, consumer choice and the marketplace should determine what model prevails. However, although the evidence is largely anecdotal, having been derived from TASC-sponsored focus groups, when given the choice consumers overwhelmingly chose the flat-fee compensation model. The reasons given are many, however predictability is the most often cited: with the flat-fee model a consumer will know, to the penny, what he or she will pay for the resolution of a specific debt. That, in turn,

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[5] It is fair to say that the FTC also considered the dangers inherent in an exclusive mandate of the percent of savings model: permitting creditors to control the amount as well as the timing of a provider's revenue event results in a conflict of interest, where a provider is incented to recommend a settlement that may not be in the best interests of the consumer. Moreover, such a mechanism opens up the possibility of collusion between the creditor and the provider. The fixed-fee model, on the other hand, partially neutralizes this power shift by denying creditors control over the amount of the provider's revenue event.

[6] The exclusive mandate of the percentage of savings model apparently is supported by the assumption that such a model more effectively aligns the interests of the parties. We respectfully submit that the percentage of savings model has exactly the opposite effect: the marginal benefit to the provider of trying to obtain an offer lower than the creditor's opening bid is always going to be outweighed by the provider's ongoing overhead cost. In other words, the longer a debt takes to settle, the lower the provider's incentive to continue service.

allows the consumer to make his or her expectations of a settlement range clear to the provider, critical guidance used by the provider to deliver an acceptable settlement offer.

Based on the foregoing, TASC respectfully submits that the UDMSA be amended to conform to the Federal Trade Commission's rules, specifically those that permit providers to calculate compensation for a consumer's program under one or the other of the "percent of savings" compensation model or the "fixed-fee" compensation model. Consumers should be allowed to choose the model best suited to their purpose, and providers should be encouraged to respond to consumer demand.

ISSUE #2: TERM SETTLEMENTS AND TIMING OF COMPENSATION PROPOSED AMENDMENTS v. TSR

One of the more unexpected, and shocking, proposals in the proposed amendments is to be found in Section 23(d)(4)(B), which requires that, if a debt is to be settled in installments, under the UDMSA the provider may only collect its fee *pro rata* with each installment payment. This proposal, we submit, would have greatly benefited from a dialogue with those of us who not only actually run businesses but also provided guidance to the FTC as they crafted the timing provisions of the TSR. This mandate is in direct conflict with the TSR provisions that permit a provider to charge and collect its entire fee when the consumer makes his first payment to the creditor, regardless of whether that first payment is a lump-sum or installment payment[7]. This change from the original proposal acknowledges not only that, unlike credit counseling where the service is ongoing (i.e., the continuous *pro rata* distribution of consumer funds), the debt settlement provider has completed its work when both the consumer and the creditor have agreed to the terms of the settlement and the first payment is made.

Unlike other provisions in the proposed amendments that have some demonstrable logic associated with them, we are confounded by this provision, given that it works to the detriment of all three parties involved in a settlement (the consumer, the creditor and the provider) and confers no discernable benefit to anyone. By way of illustration, if the provider is only able to collect a fee *pro rata* as installments are paid there will be no incentive whatsoever to negotiate a term settlement. That will not only reduce the available options for the consumer but also delay settlements, in some cases by a substantial amount of time. Similarly, creditors are often highly motivated to offer attractive terms for term settlements because they can be done more swiftly than if the creditor is forced to wait for the consumer to accumulate fund sufficient to satisfy a lump-sum settlement. In short, consumers get better deals when term settlements can be done. Moreover, even though the provider is entitled to 100% of the fee at the time the consumer makes his or her first payment, in order to get the best deal possible for the consumer a provider will often

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[7] While we do not suggest necessarily that the proposed amendment under discussion is impermissible, we do note that the FTC has stated, "... state laws can impose additional requirements as long as they do not directly conflict with the TSR." See Footnote 312 to the TSR" and 12 C.F.R. 210.4(a)(5)(i)(B).

voluntarily defer a portion of its fees over one or more of the subsequent installment payments[8].

The contra argument – that the provider shouldn't get his or her fee before the consumer is relieved of the debt – is specious at best. It is indisputable that, at the time the consumer accepts the settlement proposal, all of the provider's work has been done. When both parties have signed off on the settlement and the consumer has made at least one payment (per the TSR), there is no logical reason to hold the provider's fee hostage to subsequent events, all of which are under the sole control of the consumer.

Based on the foregoing, TASC respectfully submits that the UDMSA be amended to conform to the Federal Trade Commission's rules, specifically those that permit providers to charge and collect the full amount of their fees at such time as the first payment is made by the consumer pursuant to a settlement of a debt, regardless of whether the settlement is paid in a lump-sum or in installments. The proposal to tie fee payments to installment payments would result in serious and dramatic consumer harm.

ISSUE #3: FEE CAPS

Just as the FTC action of vesting the consumer with complete control over the provider's revenue event makes the manner in which the provider chooses to calculate compensation irrelevant, the TSR has really made the issue of fee caps likewise irrelevant. In the post-TSR world, if a consumer deems the price of the offered service too great then he or she can simply not approve an offered settlement. The consumer, knowing in advance (with the fixed-fee model) how much a settlement will cost, can decide what settlement he or she will accept and inform the provider accordingly. Viewed properly then as a zero-sum game, the provider will only bring to the consumer a settlement offer that meets the consumers all-in cost criteria.

Historically, the UDMSA predicated its permissible fee calculation on the permissibility of some "advance fee" component. In the case of a "percent of savings" model, the provider was permitted to charge and collect a monthly fee, generally no greater than what a non-profit credit counselor was permitted to charge (even though debt settlement enterprises are for-profit, taxable entities), as well as the back-end percentage of savings (30%), as long as the total fee collected did not exceed 20% of the original debt. In the case of a "fixed-fee" model, the provider would collect its fee (17% - 18% of enrolled debt) ratably over the estimated half-life of the program. Now, however, regardless of which method is chosen by the provider, no component of the fee may be collected in advance of the actual settlement of the debt. Absent an upward adjustment to these numbers that recognize the impact of delaying revenue, the fee caps – both the 30% proposed for the percent of savings model and the 17-18% in the fixed-fee model – are uneconomic.

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[8] This deferral is expressly permitted by Section 28(b)(3) of the UDMSA. Note that, per the statute, fee deferrals are cost-free to the consumer, with no interest or other finance charge allowed.

The FTC recognized that the delay in revenue would cause severe financial hardship to even the best-capitalized enterprises but was constrained by both its lack of jurisdiction in setting compensation levels and its unwillingness to interfere with the free market. When addressing the issue of fee caps the FTC was quite clear in its belief that the best regulator of fees is not a non-participant in the market but the consumer himself:

> In general, fee setting is best done by a competitive market, and the Commission's role is to remove obstacles to consumers making the informed choices that are necessary to a properly functioning market. The provisions of the Final Rule, including the narrowly tailored ban on advance fees, are designed to ensure that the debt relief market functions properly ....[9]

Based on the foregoing, TASC respectfully submits that, given the FTC's movement to completely redefine the business model of debt settlement by allowing compensation only when the consumer actually receives the benefit, as well as the FTC's belief, quoted above, that the free market, where consumers can choose the provider and the program that is most suitable to their financial criteria, is the best governor of pricing, the implementation of fee caps is unnecessary and certainly premature (because the market has yet to digest the effect of a back-end pricing model). We recommend that the Committee delete all references to fee caps in the proposed amendments and give the marketplace an opportunity to work the way the FTC intended and has recommended.

If, however, the Committee feels that price-fixing guidance to the states is appropriate, for whatever reason, then we respectfully submit that states be permitted to consider a fixed-fee program limit of 25% of enrolled debt and a percent of savings limit of 40%, be adopted, in recognition not only that existing compensation levels are unworkable, given the imposition of a material delay in revenue recognition, but also that the marketplace has yet to weigh in on what level of compensation is sufficient to deliver the service and results consumers demand. In both cases, however, the consumer should receive an offset for any payments made to the provider for any product or service supplied by the provider to the consumer **prior to** the execution of a debt settlement program agreement.

A QUICK WORD ON TOTAL COST: DEBT SETTLEMENT V. OTHER OPTIONS

While not overly germane to the issues under discussion, it is worth taking a moment to consider the generalized sense, found often when discussing fee caps with state and Federal legislators, that, on one hand, the fees charged by debt settlement enterprises are unjustly large and, on the other, that credit counseling is both far less expensive and far more effective than debt settlement. In both cases, nothing could be further from the truth. We have attached as Exhibit B to this submission TASC's response to a recent report questioning the value of debt settlement, and particularly commend to your attention Items 3-6, including the dramatic results described in the table found on page 4, which compares the total cost to a consumer of various debt relief options, under some common assumptions.

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[9] TSR at 114-115.

At a high level, the TASC response demonstrates unequivocally:

- The assumptions used by the authors of the report are completely without factual basis.
- Non-profit credit counseling (a) is considerably more expensive, (b) invariably lasts longer and (c) has far worse completion rates than debt settlement programs.
- Debt settlement delivers financial benefits far in excess of other options available to consumers.

While we believe there is an appropriate role for legitimate credit counseling programs it should be side-by-side with, not in replacement of, debt settlement programs: one does not, and cannot, substitute for the other.

ADDITIONAL ISSUES DESERVING ATTENTION

As noted above, we have attached a complete markup of the 2008 UDMSA, substantially similar to what was produced and furnished to the Committee last September. There are, however, a few issues that deserve particular attention by the Committee.

1. Section 2(2)(B)(iv). This provision, in the context of defining the term "affiliate," includes,

> … a person that receives or received more than $25,000 from the entity in either the current year or the preceding year or a person that owns more than 10% of, or an individual who is employed by or is a director of, a person that receives or received more than $25,000 from the entity in either the current year or the preceding year.

This provision would constitute a provider's landlord, as well as any employee of the landlord, as an "affiliate." It is simply not possible to identify all persons that are swept in by this definition, nor is it useful or practical information for a regulator.

We respectfully submit that (a) Section 2(2)(B)(iv) be deleted in its entirety, (b) Section 2(2)(B)(v) – (vii) be renumbered as Section 2(2)(B)(iv) – (vi) and (c) the following definition of "control" be added as new Section 2(2)(B)(vii):

> For purposes of this Section 2(2), "control" shall be presumed if the person holds 10% or more of the voting interests in the entity in question.

2. Section 2(20). Unlike credit counselors, debt settlement providers have no control, either actual or constructive, over the dedicated accounts used to accumulate settlement funds. The term "dedicated accounts" was chosen quite deliberately by the FTC to distinguish these accounts from the commonly understood concept of a "trust account," which is an account established and administered by one standing in a fiduciary relationship with the depositor. There is no such relationship in the context of debt settlement (as distinct from credit counseling, where the provider does accept consumer funds). Conflating the brand new concept of "dedicated accounts," which the FTC created and took pains to distinguish from the more classic notions of fiduciary accounts, with the well-established

legal concept of "trust accounts" could inappropriately cause a regulator or court to misperceive the true nature of the account and subject the provider to unwarranted liability.

We respectfully submit that Section 2(20) should make clear that the concept of "trust account" applies ONLY when the provider has actual or constructive receipt of consumer funds. We further submit that the addition of the FTC's concept of "dedicated accounts" should be added to the proposed amendments (we have added this concept as new Section 2(9A) in the markup).

3. Section 28(b)(3). There are instances where an affiliate of a provider could provide a great consumer benefit through the extension of credit to a consumer, provided that the affiliate be separately licensed as a lender in the consumer's home state. Accordingly, we respectfully submit that Section 28(b)(3) be amended to provide as follows:

> (3) ***other than by through an affiliate of the provider that is licensed lender in the jurisdiction in which the individual resides,*** lend money or provide credit to the individual, except as a deferral of a settlement fee at no additional expense to the individual;

We believe each state should have the right to decide whether this consumer benefit is outweighed by the potential for abuse. We submit that, where both entities are regulated by the appropriate state agency, consumer benefit should control.

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When practiced responsibly, debt settlement produces substantial and demonstrable benefits for a very needy constituency[10]. With the FTC having addressed the principal perceptual problem afflicting the debt settlement industry – the issue of "advance fees" – in the TSR, the free market, populated by informed consumers, should now be allowed to address such matters as product pricing, appropriate levels of working capital and competition.

Without repeating the arguments set forth above, TASC believes that the proposed amendments to the UDMSA discussed in this submission will seriously disadvantage consumers by reducing competition, driving good companies out of business, empowering creditors to the detriment of consumers and leaving consumers no choice but to pursue bankruptcy. Accordingly, we strongly urge the committee to reconsider the markup, as published on February 8, 2011, particularly with respect to the provisions (a) proposing to mandate a "percent of savings" model as the exclusive compensation mechanism for debt relief providers, (b) that go beyond the TSR in prescribing the timing of receipt of compensation in term settlements and (c) that imprudently limit performance based compensation. The consumer, not the ULC, should be the one determining whether a settlement is or is not appropriate.

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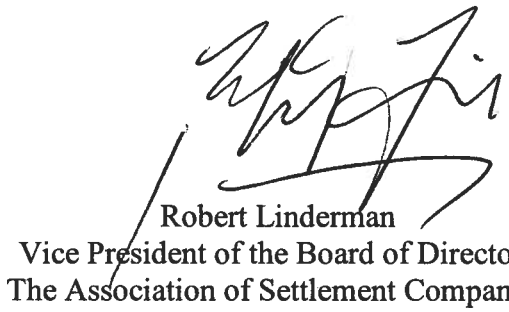
[10] J. Thomas Rosch, Commissioner, opening address, FTC Debt Settlement Workshop (September 25, 2008).

We would welcome the opportunity to discuss our comments with you at your earliest convenience, and look forward to continuing our collaboration in the service of consumer protection.

Very truly yours,



Robert Linderman
Vice President of the Board of Directors
The Association of Settlement Companies

Exhibit A

UNIFORM DEBT-MANAGEMENT SERVICES ACT

(Last Revised or Amended in 2008)

Comment [MK1]: update

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR
PITTSBURGH, PENNSYLVANIA

July 21-28, 2005

WITHOUT PREFATORY NOTE AND COMMENTS

Copyright 82005
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

March 6, 2008

Comment [MK2]: update

Uniform Debt Management Services Act (UDMSA)

Drafted by:
National Conference of Commissioners on Uniform State Laws (NCCUSL)
111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, 312-450-6600, www.nccusl.org

Brief description of act:
The **Uniform Debt Management Services Act (UDMSA)** was promulgated in 2005. The consumer debt management industry has taken many forms over the time since its development in the 1950s. The industry has had a checkered past, with frequent accusations of abuse. The interest in debt counseling and management, however, has been dramatically escalated by the bankruptcy reform legislation passed by Congress in 2005. It mandates counseling by a private agency before an individual may enter into bankruptcy. The Uniform Debt-Management Services Act regulates debt-management companies by requiring them to register with the state. To obtain a certificate of registration, a provider must supply information about itself, must obtain insurance against employee dishonesty, and must post a surety bond to safeguard any money that it receives from individuals for payment of creditors. The Act also regulates interaction with consumers, including steps to be taken before entering an agreement with an individual, the content of an agreement (including limitations on the fees that may be charged), and provisions concerning the performance and termination of agreements. Finally, the Act provides for enforcement both by a public authority and by private individuals, including rule-making power on the part of the administrator and recovery of minimum, actual, and, in appropriate cases, punitive damages in private enforcement actions.

Questions about UDMSA?
For further information contact the following persons:
William C. Hillman, Chair of UDMSA drafting committee: judge_william_hillman@mab.uscourts.gov
Michael Greenfield, Reporter for UDMSA drafting committee: michael.greenfield@wulaw.wustl.edu
Michael Kerr, NCCUSL Legislative Director: 312-450-6600, michael.kerr@nccusl.org

Notes about NCCUSL Acts:
For information on the specific drafting rules used by NCCUSL, the Conference *Procedural and Drafting Manual* is available online at www.nccusl.org.

Because these are uniform acts, it is important to keep the numbering sequence intact while drafting.

In general, the use of bracketed language in NCCUSL acts indicates that a choice must be made between alternate bracketed language, or that specific language must be inserted into the empty brackets. For example: "An athlete agent who violates Section 14 is guilty of a [misdemeanor] [felony] and, upon conviction, is punishable by [ ].

A word, number, or phrase, or even an entire section, may be placed in brackets to indicate that the bracketed language is suggested but may be changed to conform to state usage or requirements, or to indicate that the entire section is optional. For example: "An applicant for registration shall submit an application for registration to the [Secretary of State] in a form prescribed by the [Secretary of State]. [An application filed under this section is a public record.] The application must be in the name of an individual, and, except as otherwise provided in subsection (b), signed or otherwise authenticated by the applicant under penalty of perjury."

The sponsor may need to be consulted when dealing with bracketed language.

UNIFORM DEBT-MANAGEMENT SERVICES ACT

~~*Legislative Note: The state must decide whether to permit for-profit entities to provide credit-counseling services, debt-settlement services, or both. To implement its decision on this question, the state should follow the directions in the Legislative Notes to Sections 4, 5, and 9.*~~

Comment [r3]: There is a philosophical choice to be made here: do you want to retain the possibility that a debt settlement company could exist in the "intra-state exemption" world or the "attorney model" is found viable but still requires registration, or do you want to assume that all debt settlement must be compliant with the FTC model?

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Debt-Management Services Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Administrator" means the [insert the name of the agency or entity that will be charged with enforcement of this act].

(2) "Affiliate":

(A) with respect to an individual, means:

(i) the spouse of the individual;

(ii) a sibling of the individual or the spouse of a sibling;

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

(iv) an aunt, uncle, great aunt, great uncle, first cousin, niece, nephew, grandniece, or grandnephew, whether related by the whole or the half blood or adoption, or the spouse of any of them; or

(v) any other individual occupying the residence of the individual; and

(B) with respect to an entity, means:

(i) a person that directly or indirectly controls, is controlled by, or is under common control with the entity;

(ii) an officer of, or an individual performing similar functions with respect to, the entity;

(iii) a director of, or an individual performing similar functions with respect to, the entity;

~~(iv) subject to adjustment of the dollar amount pursuant to Section 32(f), a person that receives or received more than $25,000 from the entity in either the current year or the preceding year or a person that owns more than 10 percent of, or an individual who is~~

~~employed by or is a director of, a person that receives or received more than $25,000 from the entity in either the current year or the preceding year~~;

(v) an officer or director of, or an individual performing similar functions with respect to, a person described in subsubparagraph (i);

(vi) the spouse of, or an individual occupying the residence of, an individual described in subsubparagraphs (i) through (v); or

(vii) an individual who has the relationship specified in subparagraph (A)(iv) to an individual or the spouse of an individual described in subsubparagraphs (i) through (v).

(3) "Agreement" means an agreement between a provider and an individual for the performance of debt-management services.

(4) "Bank" means a financial institution, including a commercial bank, savings bank, savings and loan association, credit union, and trust company, engaged in the business of banking, chartered under federal or state law, and regulated by a federal or state banking regulatory authority.

(5) "Business address" means the physical location of a business, including the name and number of a street.

(6) (A) "Certified counselor" means an individual certified by a training program or certifying organization, approved by the administrator, that authenticates the competence of individuals providing education and assistance to other individuals in connection with debt-management services in which an agreement contemplates that creditors will reduce finance charges or fees for late payment, default, or delinquency.

(B) "Certified debt specialist" means an individual certified by a training program or certifying organization, approved by the administrator, that authenticates the competence of individuals providing education and assistance to other individuals in connection with debt-management services in which an agreement contemplates that creditors will settle debts for less than the full principal amount of debt owed.

(7) "Concessions" means assent to repayment of a debt on terms more favorable to an individual than the terms of the contract between the individual and a creditor.

(8) "Day" means calendar day.

Comment [r4]: As pointed out in the letter, this section is wildly overbroad: there are, in the normal course of business, a vast number of vendors that receive more than $25,000 from a debt settlement company – any one of the three credit bureaus, for example – and there's no logic for classifying them as affiliates. Similarly, the 10% limitation is WAY too restrictive. Even the Federal Reserve Board doesn't examine affiliate status until the holding reaches 25%. This would classify somebody owning 10% of a vending machine company that services the premises of a debt settlement company as an affiliate. That's unreasonable and unnecessary.

I would suggest adopting the simple SEC standard found in Rule 405: "controls, controlled by or under common control with" and drop all of the other stuff. In addition, a 10% voting power minimum could be dispositive with respect to the "control" issue.

(9) "Debt-management services" means services as an intermediary between an individual and one or more creditors of the individual for the purpose of obtaining concessions, but does not include:

(A) legal services provided ~~in~~ to a client as an incidental aspect of the attorney-client relationship by an attorney licensed or otherwise authorized to practice law in this state;

(B) accounting services provided ~~in~~ to a client as an incidental aspect of the accountant-client relationship by a certified public accountant licensed to provide accounting services in this state; or

(C) financial-planning services provided ~~in~~ to a client as an incidental aspect of the financial planner-client relationship by a member of a financial-planning profession whose members the administrator, by rule, determines are

(i) licensed by this state;

(ii) subject to a disciplinary mechanism;

(iii) subject to a code of professional responsibility; and

(iv) subject to a continuing-education requirement.

(9A) "Dedicated Account" means an account that is:

(A) established by and in the name of an individual in an insured bank;

(B) at all times the property and under the control of the individual, including any interest that may accrue thereupon, if the account is interest-bearing; and

(C) established by the individual directly or through an agent that is not under the control of the provider.

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

(11) "Good faith" means honesty in fact and the observance of reasonable standards of fair dealing.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity. The term does not include a public corporation, government, or governmental subdivision, agency, or instrumentality.

(13) "Plan" means a program or strategy in which a provider furnishes debt-

Comment [r5]: The ULC must come to grips with the proliferation of "attorney" models, where an attorney uses a debt settlement company as a back-end service provider and, thereby, evades not only the UDMSA but also the Telemarketing Sales Rule (meaning that they charge advance fees).

A better formulation would be as edited.

Comment [MK6]: expand?

Comment [MK7]: Def of "lead generator"?

RL: I don't think adding a definition of "lead generator" is necessary, given the scope of the definition of "provider." I would view a lead generator as someone who "offers to provide," especially with the "indirect" concept closing the definition..

management services to an individual and which includes a schedule of payments to be made by or on behalf of the individual and used to pay debts owed by the individual.

(14) "Principal amount of the debt" means the amount of a debt at the time of an agreement.

(15) "Provider" means a person that provides, offers to provide, or agrees to provide debt-management services directly or through others.

(16) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(17) "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) "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) "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) "Trust account" means an account held by a provider that is:

(A) established by and in the name of the provider 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 by the provider to creditors of the individuals.

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.*

Comment [MK8]: Need to match FTC?

RL: Absolutely. I have added a definition of "dedicated accounts." Trust accounts should not, under any circumstances, be conflated with dedicated accounts.

SECTION 3. EXEMPT AGREEMENTS AND PERSONS.

(a) This [act] does not apply to an agreement with an individual who the provider has no reason to know resides in this state at the time of the agreement.

(b) This [act] does not apply to a provider to the extent that the provider:

(1) provides or agrees to provide debt-management, educational, or counseling services to an individual who the provider, in the exercise of good faith, has no reason to know resides in this state at the time the provider agrees to provide the services; or

(2) receives no compensation for debt-management services from or on behalf of the individuals to whom it provides the services or from their creditors.

(c) This [act] does not apply to the following persons or their employees when the person or the employee is engaged in the regular course of the person's business or profession:

(1) a judicial officer, a person acting under an order of a court or an administrative agency, or an court or administratively appointed assignee for the benefit of creditors;

(2) a bank;

(3) an affiliate, as defined in Section 2(2)(B)(i), of a bank if the affiliate is regulated by a federal or state banking regulatory authority; or

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

SECTION 4. REGISTRATION ~~[AND NOT-FOR-PROFIT STATUS]~~ REQUIRED.

(a) Except as otherwise provided in subsection (b), a provider may not provide debt-management services to an individual who it reasonably should know resides in this state at the time it agrees to provide the services, unless the provider is registered under this [act].

(b) If a provider is registered under this [act], subsection (a) does not apply to an employee or agent of the provider.

(c) The administrator shall maintain and publicize a list of the names of all registered providers.

~~[(d) A provider [whose agreements contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency] [whose agreements contemplate~~

Comment [r9]: This is kind of screwy: on one hand, there should be an innocence exemption for contracts that bear no indicia of contact with the regulating state. On the other, every debt settlement contract has a residence address. In any event, i'd suggest deleting this subsection in favor of the more expansive definition in (b).

Comment [MK10]: Does this make sense

Sure, but keep a good faith requirement to prevent someone from gaming the system.

Comment [MK11]: Does this make sense?

RL: See above.

Comment [MK12]: Debt buyers? See my change.

~~that creditors will settle debts for less than the full principal amount of debt owed] may be registered only if it is:~~

~~(1) organized and properly operating as a not-for-profit entity under the law of the state in which it was formed; and~~

~~(2) exempt from taxation under the Internal Revenue Code, 26 U.S.C. Section 501 [as amended]].~~

~~***Legislative Note:*** *This section implements the state's decision concerning whether for-profit entities are permitted to provide debt-management services.*~~

~~*If the state wishes to permit only not-for-profit entities to provide debt-management services, use subsection (d) without the either of the two bracketed phrases, so that the introduction to subsection (d) states:*~~

~~*(d) A provider may be registered only if it is:*~~

~~*If the state wishes to permit for-profit entities to provide all kinds of debt-management services, omit subsection (d) and delete the bracketed material in the section caption.*~~

~~*If the state wishes to permit for-profit entities to provide debt-settlement services but not credit-counseling services, use the language in the first set of brackets, so that so that the introduction to subsection (d) states:*~~

~~*(d) A provider whose agreements contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency may be registered only if it is:*~~

~~*If the state wishes to permit for-profit entities to provide credit-counseling services but not debt-settlement services, use the language in the second set of brackets, so that so that the introduction to subsection (d) states:*~~

~~*(d) A provider whose agreements contemplate that creditors will settle debts for less than the full principal amount of debt owed may be registered only if it is:*~~

~~*In states in which the constitution does not permit the phrase, "as amended," when federal statutes are incorporated into state law, the phrase should be deleted in subsection (d)(2).*~~

SECTION 5. APPLICATION FOR REGISTRATION: FORM, FEE, AND ACCOMPANYING DOCUMENTS.

(a) An application for registration as a provider must be in a form prescribed by the administrator.

(b) Subject to adjustment of dollar amounts pursuant to Section 32(f), an application for registration as a provider must be accompanied by:

(1) the fee established by the administrator;

(2) the bond required by Section 13;

(3) identification of all trust accounts required by Section 22 and an irrevocable consent authorizing the administrator to review and examine the trust accounts;

(4) evidence of insurance in the amount of $250,000:

(A) against the risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant;

(B) issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator;

(C) with a deductible not exceeding $5,000;

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

(E) not subject to cancellation by the applicant or the insurer until 60 days after written notice has been given to the administrator;

(5) proof of compliance with [insert the citation to the statute specifying the prerequisites for an entity to do business in this state]; and

[(6) if the applicant is exempt from taxation under the Internal Revenue code, 26 U.S.C. Section 501[, as amended], evidence of that status, accompanied by the most recent Form 990, as filed with the Internal Revenue Service].

Legislative Note: *In states that do not empower administrative agencies to set fees, replace subsection (b)(1) with the desired fee.*

In subsection (b)(5) if the state has no statute specifying the prerequisites for an entity to do business in this state, substitute the following for subsection (b)(5):

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

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

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

~~*If the state wishes to permit only tax-exempt entities to provide debt-management services, the first bracketed language in paragraph (6) should be deleted so that paragraph (6) states:*~~

~~*(6) evidence of tax-exempt status applicable to the applicant under Internal*~~

Comment [r13]: My logic here is that the state administrator should have visibility into the salaries and expenses paid by non-profits operating in their states.

Comment [MK14]: Make mandatory

Absolutely.

~~Revenue Code, 26 U.S.C. Section 501 [, as amended].~~

~~If the state wishes to permit only not-for-profit entities to provide debt-management services, but does not wish to require that the entities also be exempt from taxation, substitute "organized as a not-for-profit entity" and omit the last part of paragraph (6), so that paragraph (6) would read, "if the applicant is organized as a not-for-profit entity, evidence of not-for-profit status."~~

~~If the state wishes to permit for-profit entities to provide all kinds of debt-management services, the brackets at the beginning of paragraph (6), should be deleted, so that paragraph (6) states:~~

~~(6) if the applicant is organized as a not-for-profit entity or is exempt from taxation under the Internal Revenue Code, 26 U.S.C. Section 501[, as amended], evidence of not-for-profit status, tax-exempt status, or both, as applicable.~~

~~If the state wishes to permit for-profit entities to provide debt-settlement services but not credit-counseling services:~~

~~(1) select the appropriate bracketed language and omit the other, so that paragraph (6) states: "(6) if the applicant's agreements contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency, evidence of [not-for-profit] [and] [tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501 [, as amended]]"; and~~

~~(2) add a new paragraph: "(7) if the applicant's agreements contemplate that creditors will settle debts for less than the full principal amount of debt owed and the applicant is~~

~~(A) organized as a not-for-profit entity, evidence of not-for-profit status;~~

~~(B) exempt from taxation, evidence of not-for-profit and tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501 [, as amended]."~~

~~If the state wishes to permit for-profit entities to provide credit-counseling services but not debt-settlement services:~~

~~(1) select the appropriate bracketed language and omit the other, so that paragraph (6) states: "(6) if the applicant's agreements contemplate that creditors will settle debts for less than the full principal amount of debt owed, evidence of [not-for-profit status] [and] [tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501[, as amended]]"; and~~

~~(2) add a new paragraph: "(7) if the applicant's agreements contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency and the applicant is~~

~~(A) organized as a not-for-profit entity, evidence of not-for-profit status;~~

~~(B) exempt from taxation, evidence of not-for-profit and tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501[, as amended], as applicable."~~

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

SECTION 6. APPLICATION FOR REGISTRATION: REQUIRED INFORMATION. An application for registration must be signed under [oath] [penalty of false statement] and include:

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

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

(3) the address of each location in this state at which the applicant will provide debt-management services 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~~affiliate 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;

Comment [r15]: It is unclear why this requirement is included. Many people move after they enter into contracts, some more than once. What is the purpose of this?

(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 trust account required by Section 22;

(7) The applicant's financial statements, reviewed by a licensed accountant, for each of the two (2) years immediately preceding the application or, if it has not been in operation for the two (2) years preceding the application, for the period of its existence. If the applicant claims nonprofit or tax exempt status, or if the applicant's business practices involve holding, accessing, or directing the funds of an individual, the financial statements required by this part

shall be audited by a licensed accountant~~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) if the applicant provides or intends to provide educational programs to individuals who reside in this state, 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 materials used or to be used in those programs;

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

(12) a copy of each form of agreement that the applicant will use with individuals who reside in this state;

(13) ~~the schedule~~a statement of all fees and charges that the applicant will use with individuals who reside in this state;

(14) at the applicant's expense, the results of a criminal-records check, including fingerprints, conducted within the immediately preceding 12 months, covering every executive officer of the applicant and every employee or agent of the applicant who is authorized to have access to the trust account required by Section 22;

(15) the names and addresses of all employers of each director during the 10 years immediately preceding the application;

(16) a description of any ~~ownership~~ voting interest of at least 10 percent by a director, owner, or employee of the applicant in:

(A) any affiliate of the applicant; or

(B) any entity that provides products or services to the applicant or any individual relating to the applicant's debt-management services;

(17) If an applicant claims nonprofit or tax exempt status, or if an applicant's

Comment [r16]: This is a suggested change because not every entity is, or should be required to, have a formal audit of their financial statements.

Comment [r17]: In that debt settlement companies do not always provide educational services, it makes little sense to make this mandatory and universal.

Comment [r18]: Debt or non-voting equity shouldn't count toward a definition of "control."

business practices involve holding, accessing or directing the funds of an individual, a statement of the amount of compensation of the applicant's five most highly compensated employees for each of the three years immediately preceding the application or, if it has not been in operation for the three years preceding the application, for the period of its existence;

(18) the identity of each director who is an affiliate, as defined in Section 2(2)(A) or (B)(i), (ii), (iv), (v), (vi), or (vii), of the applicant; and

(19) any other information that the administrator reasonably requires to perform the administrator's duties under Section 9.

Legislative Note: *In the introductory language to this section, the state must determine whether to require the application to be made "under oath" or "under penalty of false statement." Similar choices are necessary in Sections 11 and 12.*

SECTION 7. APPLICATION FOR REGISTRATION: OBLIGATION TO UPDATE INFORMATION. An applicant or registered provider shall notify the administrator within 10 days after a change in the information specified in Section 5(b)(4) or (6) or 6(1), (3), (6), (12), or (13).

SECTION 8. APPLICATION FOR REGISTRATION: PUBLIC INFORMATION. Except for the information required by Section 6 (7), (14), and (17) and the addresses required by Section 6(4), the administrator shall make the information in an application for registration as a provider available to the public.

SECTION 9. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL.

(a) Except as otherwise provided in subsections (c) and (d), the administrator shall issue a certificate of registration as a provider to a person that complies with Sections 5 and 6.

(b) If an applicant has otherwise complied with Sections 5 and 6, including a timely effort to obtain the information required by Section 6(14) but the information has not been received, the administrator may issue a temporary certificate of registration. The temporary certificate shall expire no later than 180 days after issuance.

(c) The administrator may deny registration if:

(1) the application contains information that is materially erroneous or incomplete;

Comment [r19]: I submit that this is only appropriate for non-profits – for-profit businesses receive no state subsidy. If this change is adopted, then the information here should be made public, since the forms 990 are public documents.

Comment [r20]: A director is by definition an affiliate, see 2(2)(B)(iii). Accordingly, I think this subsubsection could be deleted entirely.

Comment [r21]: See my comment to this section.

(2) an officer, director, or owner of the applicant has been convicted of a crime, or suffered a civil judgment, involving dishonesty or the violation of state or federal securities laws;

(3) the applicant or any of its officers, directors, or owners has defaulted in the payment of money collected for others; or

(4) the administrator finds that the financial responsibility, experience, character, or general fitness of the applicant or its owners, directors, employees, or agents does not warrant belief that the business will be operated in compliance with this [act].

(d) The administrator shall deny registration if[, with respect to an applicant that is organized as a not-for-profit entity or has obtained tax-exempt status under the Internal Revenue Code, 26 U.S.C. Section 501 [, as amended],] the applicant's board of directors is not independent of the applicant's employees and agents.

Comment [MK22]: Make mandatory

Yes.

(e) Subject to adjustment of the dollar amount pursuant to Section 32(f), a board of directors is not independent for purposes of subsection(d) if more than one-fourth of its members:

(1) are affiliates of the applicant, as defined in Section 2(2)(A) or (B)(i), (ii), (iv), (v), (vi), or (vii); or

(2) after the date 10 years before first becoming a director of the applicant, were employed by or directors of a person that received from the applicant more than $25,000 in either the current year or the preceding year.

Legislative Note: ~~*If the state wishes to permit only not-for-profit entities to provide debt-management services, in subsection (c)(2) all the bracketed language should be deleted. If the state wishes to permit for-profit entities to provide credit-counseling services, debt-settlement services, or both, the first set of brackets should be deleted.*~~

In states in which the constitution does not permit the phrase, "as amended," when federal statutes are incorporated into state law, the phrase should be deleted in subsection (c)(2).

SECTION 10. CERTIFICATE OF REGISTRATION: TIMING.

(a) The administrator shall approve or deny an initial registration as a provider within 120 days after an application is filed. In connection with a request pursuant to Section 6(19) for additional information, the administrator may extend the 120-day period for not more than 60 days. Within seven days after denying an application, the administrator, in a record, shall

inform the applicant of the reasons for the denial.

(b) If the administrator denies an application for registration as a provider or does not act on an application within the time prescribed in subsection (a), the applicant may appeal and request a hearing pursuant to [insert the citation to the appropriate section of the administrative procedure act or other statute governing administrative procedure].

(c) Subject to Sections 11(d) and 34, a registration as a provider is valid for one year.

SECTION 11. RENEWAL OF REGISTRATION.

(a) A provider must obtain a renewal of its registration annually.

(b) An application for renewal of registration as a provider must be in a form prescribed by the administrator, signed under [oath] [penalty of false statement], and:

(1) be filed no fewer than 30 and no more than 60 days before the registration expires;

(2) be accompanied by the fee established by the administrator and the bond required by Section 13;

(3) contain the matter required for initial registration as a provider by Section 6(8) and (9) and a financial statement, audited by an accountant licensed to conduct audits, for the applicant's fiscal year immediately preceding the application;

(4) disclose any changes in the information contained in the applicant's application for registration or its immediately previous application for renewal, as applicable. If an application is otherwise complete and the applicant has made a timely effort to obtain the information required by Section 6(14) but the information has not been received, the administrator may issue a temporary renewal of registration. The temporary renewal shall expire no later than 180 days after issuance;

(5) supply evidence of insurance in an amount equal to the larger of $250,000 or the highest daily balance in the trust account required by Section 22 during the six-month period immediately preceding the application:

(A) against risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant;

(B) issued by an insurance company authorized to do business in

this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator;

(C) with a deductible not exceeding $5,000;

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

(E) not subject to cancellation by the applicant or the insurer until 60 days after written notice has been given to the administrator;

(6) If an applicant claims nonprofit or tax exempt status, or if an applicant's business practices involve holding, accessing or directing the funds of an individual, disclose the total amount of money received by the applicant pursuant to plans during the preceding 12 months from or on behalf of individuals who reside in this state and the total amount of money distributed to creditors of those individuals during that period;

(7) If an applicant claims nonprofit or tax exempt status, or if an applicant's business practices involve holding, accessing or directing the funds of an individual, disclose, to the best of the applicant's knowledge, the gross amount of money accumulated during the preceding 12 months pursuant to plans by or on behalf of individuals who reside in this state and with whom the applicant has agreements; and

Comment [r23]: These should be limited to credit counselors, since a debt settlement company doesn't "receive" or "distribute" consumer funds.

(8) provide any other information that the administrator reasonably requires to perform the administrator's duties under this section.

(c) Except for the information required by Section 6(7), (14), and (17) and the addresses required by Section 6(4), the administrator shall make the information in an application for renewal of registration as a provider available to the public.

(d) If a registered provider files a timely and complete application for renewal of registration, the registration remains effective until the administrator, in a record, notifies the applicant of a denial and states the reasons for the denial.

(e) If the administrator denies an application for renewal of registration as a provider, the applicant, within 30 days after receiving notice of the denial, may appeal and request a hearing pursuant to [insert the citation to the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure]. Subject to Section 34, while the appeal is pending the applicant shall continue to provide debt-management services to

individuals with whom it has agreements. If the denial is affirmed, subject to the administrator's order and Section 34, the applicant shall continue to provide debt-management services to individuals with whom it has agreements until, with the approval of the administrator, it transfers the agreements to another registered provider or returns to the individuals all unexpended money that is under the applicant's control.

Legislative Note: *In the introduction to subsection (b), the state must determine whether to require the application to be made "under oath" or "under penalty of false statement."*

In states that do not empower administrative agencies to set fees, replace the first part of paragraph (b)(2) with the desired fee.

SECTION 12. REGISTRATION IN ANOTHER STATE. If a provider holds a license or certificate of registration in another state authorizing it to provide debt-management services, the provider may submit a copy of that license or certificate and the application for it instead of an application in the form prescribed by Section 5(a), 6, or 11(b). The administrator shall accept the application and the license or certificate from the other state as an application for registration as a provider or for renewal of registration as a provider, as appropriate, in this state if:

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

(2) the applicant provides the information required by Section 6(1), (3), (10), (12), and (13); and

(3) the applicant, under [oath] [penalty of false statement], certifies that the information contained in the application is current or, to the extent it is not current, supplements the application to make the information current.

Legislative Note: *In paragraph (3) the state must determine whether to require the certification to be made "under oath" or "under penalty of false statement."*

SECTION 13. BOND REQUIRED.

(a) Except as otherwise provided in Section 14, a provider that is required to be registered under this [act] shall file a surety bond with the administrator, which must:

(1) be in effect during the period of registration and for two years after the provider ceases providing debt-management services to individuals in this state; and

(2) run to this state for the benefit of this state and of individuals who reside in this state when they agree to receive debt-management services from the provider, as their interests may appear.

(b) Subject to adjustment of the dollar amount pursuant to Section 32(f), a surety bond filed pursuant to subsection (a) must:

(1) be in the amount of $50,000 or other larger or smaller amount that the administrator determines is warranted by the financial condition and business experience of the provider, the history of the provider in performing debt-management services, the risk to individuals, and any other factor the administrator considers appropriate;

(2) be issued by a bonding, surety, or insurance company authorized to do business in this state and rated at least A by a nationally recognized rating organization; and

(3) have payment conditioned upon noncompliance of the provider or its agent with this [act].

(c) If the principal amount of a surety bond is reduced by payment of a claim or a judgment, the provider shall immediately notify the administrator and, within 30 days after notice by the administrator, file a new or additional surety bond in an amount set by the administrator. The amount of the new or additional bond must be at least the amount of the bond immediately before payment of the claim or judgment. If for any reason a surety terminates a bond, the provider shall immediately file a new surety bond in the amount of $50,000 or other amount determined pursuant to subsection (b).

(d) The administrator or an individual may obtain satisfaction out of the surety bond procured pursuant to this section if:

(1) the administrator assesses expenses under Section 32(b)(1), issues a final order under Section 33(a)(2), or recovers a final judgment under Section 33(a)(4) or (5) or (d); or

(2) an individual recovers a final judgment pursuant to Section 35(a), (b), or (c)(1), (2), or (4).

(e) If claims against a surety bond exceed or are reasonably expected to exceed the amount of the bond, the administrator, on the initiative of the administrator or on petition of the surety, shall, unless the proceeds are adequate to pay all costs, judgments, and claims,

distribute the proceeds in the following order:

(1) to satisfaction of a final order or judgment under Section 33(a)(2), (4), or (5) or (d);

(2) to final judgments recovered by individuals pursuant to Section 35(a), (b), or (c) (1), (2) or (4), pro rata;

(3) to claims of individuals established to the satisfaction of the administrator, pro rata; and

(4) if a final order or judgment is issued under Section 33(a), to the expenses charged pursuant to Section 32(b)(1).

SECTION 14. BOND REQUIRED: SUBSTITUTE.

(a) Instead of the surety bond required by Section 13, a provider may deliver to the administrator, in the amount required by Section 13(b), and, except as otherwise provided in paragraph (2)(A), payable or available to this state and to individuals who reside in this state when they agree to receive debt-management services from the provider, as their interests may appear, if the provider or its agent does not comply with this [act]:

(1) a certificate of insurance

(A) issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator; and

(B) with no deductible, or if the provider supplies a bond in the amount of $5,000, a deductible not exceeding $5,000; or

(2) with the approval of the administrator:

(A) an irrevocable letter of credit, issued or confirmed by a bank approved by the administrator, payable upon presentation of a certificate by the administrator stating that the provider or its agent has not complied with this [act]; or

(B) bonds or other obligations of the United States or guaranteed by the United States or bonds or other obligations of this state or a political subdivision of this state, to be deposited and maintained with a bank approved by the administrator for this purpose.

(b) If a provider furnishes a substitute pursuant to subsection (a), the provisions of Section 13(a), (c), (d), and (e) apply to the substitute.

SECTION 15. REQUIREMENT OF GOOD FAITH. A provider shall act in good faith in all matters under this [act].

SECTION 16. CUSTOMER SERVICE. A provider that is required to be registered under this [act] shall maintain a toll-free communication system, staffed at a level that reasonably permits an individual to speak to a certified counselor, certified debt specialist, or customer-service representative, as appropriate, during ordinary business hours.

SECTION 17. PREREQUISITES FOR PROVIDING DEBT-MANAGEMENT SERVICES.

(a) Before providing debt-management services, a registered provider shall give the individual an itemized list of goods and services and the charges for each. The list must be clear and conspicuous, be in a record the individual may keep whether or not the individual assents to an agreement, and describe the goods and services the provider offers:

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

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

(3) for a charge if the individual enters into an agreement, using the following terminology, as applicable, and format:

Set-up fee _____
dollar amount of fee

Monthly service fee _____
dollar amount of fee or method of determining amount

Settlement fee _____
dollar amount of fee or method of determining amount

Goods and services in addition to those provided in connection with a plan:

_____ _____
(*item*) *dollar amount or method of determining amount*

_____ _____
(*item*) *dollar amount or method of determining amount.*

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

(1) provides the individual with reasonable ~~education~~ information about the ~~management of personal finance~~services offered;

(2) has prepared a financial analysis; and

Comment [r24]: Why limit it to "registered" providers? Aren't all providers required to be registered?

Comment [MK25]: Delete?

No. There are going to be providers who operate solely intra-state and these provisions are still relevant, just like the fee provisions. This will be -0- for FTC compliant providers, which looks good to the consumer.

(3) if the individual is to make regular, periodic payments to the provider, who will then make regular, periodic payments to creditors in exchange for reductions in finance charges or fees for late payment, default, or delinquency:

(A) has prepared a plan for the individual;

(B) has made a determination, based on the provider's analysis of the information provided by the individual and otherwise available to it, that the plan is suitable for the individual and the individual will be able to meet the payment obligations under the plan; and

(C) believes that each creditor of the individual listed as a participating creditor in the plan will accept payment of the individual's debts as provided in the plan.

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

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

(2) inform the individual of the availability, at the individual's option, of assistance by a toll-free communication system or in person to discuss the financial analysis and plan required by subsection (b); and

(3) If a plan contemplates that creditors will reduce finance charges or fees for late payment, default, or delinquency and that the individual will make regular, periodic payments to creditors on any debt as part of the debt-management services, with respect to all creditors identified by the individual or otherwise known by the provider to be creditors of the individual, provide the individual with a list of:

(A) creditors that the provider expects to participate in the plan and grant concessions;

(B) creditors that the provider expects to participate in the plan but not grant concessions;

(C) creditors that the provider expects not to participate in the plan; and

(D) all other creditors.

(d) Before an individual assents to an agreement, the provider shall inform the individual, in a record that contains nothing else, that is given separately, and that the individual may keep whether or not the individual assents to the agreement:

(1) of the name and business address of the provider;

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

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

(4) that nonpayment of debt may lead creditors to increase finance and other charges or undertake collection activity, including litigation;

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

(6) that, unless the individual is insolvent, if a creditor settles for less than the full amount of the debt, the plan may result in the creation of taxable income to the individual, even though the individual does not receive any money.

(e) If a provider may receive payments from an individual's creditors and the plan contemplates that the individual's creditors will reduce finance charges or fees for late payment, default, or delinquency, the provider may comply with subsection (d) by providing the following disclosure, surrounded by black lines:

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

(2) Using a debt-management plan may make it harder for you to obtain credit.

(3) We may receive compensation for our services from your creditors.

_____

Name and business address of provider

(f) If a provider will not receive payments from an individual's creditors and the plan contemplates that the individual's creditors will reduce finance charges or fees for late payment, default, or delinquency, a provider may comply with subsection (d) by providing the

following disclosure, surrounded by black lines:

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

(2) Using a debt-management plan may make it harder for you to obtain credit.

_____

Name and business address of provider

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

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

(2) Nonpayment of your debts under our program may

X hurt your credit rating or credit scores;

X lead your creditors to increase finance and other charges; and

X lead your creditors to undertake activity, including lawsuits, to collect the debts.

(3) Reduction of debt under our program may result in taxable income to you, even though you will not actually receive any money.

_____

Name and business address of provider

SECTION 18. COMMUNICATION BY ELECTRONIC OR OTHER MEANS.

(a) In this section:

(1) "Federal act" means the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended].

(2) "Consumer" means an individual who seeks or obtains goods or services that are used primarily for personal, family, or household purposes.

(b) A provider may satisfy the requirements of Section 17, 19, or 27 by means of the Internet or other electronic means if the provider obtains a consumer's consent in the manner

provided by Section 101(c)(1) of the federal act.

(c) The disclosures and materials required by Sections 17, 19, and 27 shall be presented in a form that is capable of being accurately reproduced for later reference.

(d) With respect to disclosure by means of an Internet website, the disclosure of the information required by Section 17(d) must appear on one or more screens that:

(1) contain no other information; and

(2) the individual must see before proceeding to assent to formation of an agreement.

(e) At the time of providing the materials and agreement required by Sections 17(c) and (d), 19, and 27, a provider shall inform the individual that upon electronic, telephonic, or written request, it will send the individual a written copy of the materials, and shall comply with a request as provided in subsection (f).

(f) If a provider is requested, before the expiration of 90 days after an agreement is completed or terminated, to send a written copy of the materials required by Section 17(c) and (d), 19, or 27, the provider shall send them at no charge within three business days after the request is received, but the provider need not comply with a request more than once per calendar month or if it reasonably believes the request is made for purposes of harassment. If a request is made more than 90 days after an agreement is completed or terminated, the provider shall send within a reasonable time a written copy of the materials requested.

(g) A provider that maintains an Internet website shall disclose on the home page of its website or on a page that is clearly and conspicuously connected to the home page by a link that clearly reveals its contents:

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

(2) its principal business address, telephone number, and electronic-mail address, if any; and

(3) the names of its principal officers.

(h) Subject to subsection (i), if a consumer who has consented to electronic communication in the manner provided by Section 101 of the federal act withdraws consent as provided in the federal act, a provider may terminate its agreement with the consumer.

(i) If a provider wishes to terminate an agreement with a consumer pursuant to

subsection (h), it shall notify the consumer that it will terminate the agreement unless the consumer, within 30 days after receiving the notification, consents to electronic communication in the manner provided in Section 101(c) of the federal act. If the consumer consents, the provider may terminate the agreement only as permitted by Section 19(a)(6)(G).

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

SECTION 19. FORM AND CONTENTS OF AGREEMENT.

(a) An agreement must:

(1) be in a record;

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

(3) include the name of the individual and the address where the individual resides;

(4) include the name, business address, and telephone number of the provider;

(5) be delivered to the individual immediately upon formation of the agreement; and

(6) disclose:

(A) the services to be provided;

(B) the amount, or method of determining the amount, of all fees, individually itemized, to be paid by the individual;

(C) ~~the schedule of payments to be made by or on behalf of the individual, including the amount of each payment, the date on which each payment is due, and an estimate of the date of the final payment~~if a plan contemplates that creditors will settle an individual's debts for less than the principal amount of the debt, a good faith estimate of

(i) the amount of time necessary to achieve the represented results, which shall coincide with the estimated program length;

(ii) the amount of savings needed before negotiations will begin in anticipation of the settlement of a debt, which amount may be expressed as a percentage of the balance of a debt or the number of deposits of a fixed amount that must be made into a dedicated bank account.

Comment [r26]: My language tracks the TSR.

(D) if a plan provides for regular periodic payments to creditors:

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

(ii) the schedule of payments to be made by or on behalf of the individual, including the amount of each payment, the date on which each payment is due, and an estimate of the date of the final payment~~the schedule of expected payments to each creditor, including the amount of each payment and the date on which it will be made~~;

(iii) how the provider will comply with its obligations under Section 27(a);

(iv) each creditor that the provider believes will not participate in the plan and to which the provider will not direct payment; and

(v) that the provider may terminate the agreement for good cause, upon return of unexpended money of the individual.

~~(E) each creditor that the provider believes will not participate in the plan and to which the provider will not direct payment;~~

~~(F) how the provider will comply with its obligations under Section 27(a)~~;

~~(G) that the provider may terminate the agreement for good cause, upon return of unexpended money of the individual~~;

(~~H~~E) that the individual may cancel the agreement as provided in Section 20;

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

(~~J~~G) the address, telephone number, and Internet address or website of the administrator.

(b) For purposes of subsection (a)(5), delivery of an electronic record occurs when it is made available in a format in which the individual may retrieve, save, and print it and the individual is notified that it is available.

(c) If the administrator supplies the provider with any information required under

Comment [r27]: These never should have been general requirements; they apply only to credit counseling because debt settlement companies don't hold funds. I moved all this into new Section (D).

Note that I haven't looked throughout the doc for all of the possible internal references to the renumbered sections.

Comment [r28]: NB: while I don't mind keeping this in, given that a consumer can (a) cancel at any time for any or no reason and (b) doesn't owe any fees until the debts are settled, why keep the three-day rescission in for debt settlement companies (it is definitely appropriate for credit counselors).

subsection (a)(6)(~~I~~G), the provider may comply with that requirement only by disclosing the information supplied by the administrator.

(d) An agreement must provide that:

(1) the individual has a right to terminate the agreement at any time, without penalty or obligation, by giving the provider written or electronic notice, in which event:

(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~~where fees are charged and collected pursuant to Section 23(f)(1), 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) 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) 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:

Comment [MK29]: Delete?

See my first note. I limited (B) to cases where fees are collected up front. (C) should probably stay in since the FTC rule doesn't really address the issue of powers of attorney.

Comment [MK30]: Conform to FTC?

I wouldn't – there may be intra-state providers, including law firms, that should be picked up. The FTC rule simply says that in order to get paid you have to have consumer consent so if the rule applies and someone tries to settle under a power of attorney they don't have the right to get paid.

(1) provide for application of the law of any jurisdiction other than the United States and this state;

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

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

(4) contain a provision that:

(A) limits or releases the liability of any person for not performing the agreement or for violating this [act]; or

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

(g) All rights and obligations specified in subsection (d) and Section 20 exist even if not provided in the agreement. A provision in an agreement which violates subsection (d), (e), or (f) is void.

Legislative Note: *In states in which the constitution does not permit use of the phrase, "as amended," when federal statutes are incorporated into state law, delete that phrase in subsection (f)(2)*

If the state has no statute authorizing predispute arbitration agreements, delete the second bracketed language, "or [insert . . . agreements," in subsection (f)(2).

SECTION 20. CANCELLATION OF AGREEMENT; WAIVER.

(a) If an agreement provides for regular periodic payments to creditors, ~~A~~an individual may cancel an agreement before midnight of the third business day after the individual assents to it, unless the agreement does not comply with subsection (b) or Section 19 or 28, in which event the individual may cancel the agreement within 30 days after the individual assents to it. To exercise the right to cancel, the individual must give notice in a record to the provider. Notice by mail is given when mailed.

(b) If an agreement provides for regular periodic payments to creditors, the~~An~~ agreement must be accompanied by a form that contains in bold-face type, surrounded by bold

Comment [MK31]: Why not a simple 30-day?

I'm in favor of dropping this entirely for debt settlement companies, since the consumer has the right to cancel at any time for any reason. I'd just make it applicable to credit counselors.

black lines:

Notice of Right to Cancel

You may cancel this agreement, without any penalty or obligation, at any time ~~before midnight of the third business day that begins the day~~ within 30 days after you agree to it by electronic communication or by signing it.

To cancel this agreement during this period, send an e-mail to _____ or mail or deliver a signed, dated copy of this
E-mail address of provider

notice, or any other written notice to _____
Name of provider

at _____ before midnight on _____.
Address of provider *Date*

If you cancel this agreement within the 30-day period, we will refund all money you already have paid us.

You also may terminate this agreement at any later time, but we may not be required to refund fees you have paid us.

I cancel this agreement,

_____
Print your name

_____
Signature

_____
Date

(c) If a personal financial emergency necessitates the disbursement of an individual's money to one or more of the individual's creditors before the expiration of ~~three~~ thirty days after an 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.

Comment [MK32]: Conforming amendments?

(a) If an agreement provides for regular periodic payments to creditors, ~~A~~all money paid to a provider by or on behalf of an individual for distribution to creditors pursuant to a plan ~~is~~ must be 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.

(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.

(c) A provider shall:

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

(2) if an agreement provides for regular periodic payments to creditors, 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 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

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

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

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

(f) If a provider has established a trust account pursuant to subsection (a), the provider shall reconcile the trust account at least once a month. The reconciliation must compare the cash balance in the trust account with the sum of the balances in each individual's account. If the provider or its designee has more than one trust account, each trust account must be individually reconciled.

(g) If a provider discovers, or has a reasonable suspicion of, embezzlement or other unlawful appropriation of money held in trust, the provider immediately shall notify the administrator by a method approved by the administrator. Unless the administrator by rule provides otherwise, within five days thereafter, the provider shall give notice to the administrator describing the 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) Before relocating a trust account from one bank to another, a provider shall inform the administrator of the name, business address, and telephone number of the new bank. As soon as practicable, the provider shall inform the administrator of the account number of the trust account at the new bank.

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.

Comment [MK33]: And ... (FTC) Nah – that's why we have a Federalism doctrine in this country.

(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 creditors 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 and where fees are charged and collected pursuant to Section 23(f)(1), a provider may charge:

~~(A) subject to Section 19(d), a fee for consultation, obtaining a credit report, setting up an account, and the like, in an amount not exceeding the lesser of $400 and four percent of the debt in the plan at the inception of the plan; and~~

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

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

(4) Except as otherwise provided in Section 28(d), if an individual does not assent to an agreement, a provider may receive for educational and counseling services it provides to the individual a fee not exceeding $100 or, with the approval of the administrator, a larger fee. The administrator may approve a fee larger than $100 if the nature and extent of the educational and counseling services warrant the larger fee.

(e) If, before the expiration of 90 days after the completion or termination of educational or counseling services, an individual assents to an agreement, the provider shall refund to the individual any fee paid pursuant to subsection (d)(4).

~~(f) Except as otherwise provided in subsections (c) and (d), if an agreement contemplates that creditors will settle an individual's debts for less than the principal amount of~~

Comment [MK34]: FTC

No – this applies to credit counseling and should (must) stay in the law.

Comment [r35]: I've never understood this – it applies to two, mutually exclusive situations. I'd delete it entirely.

Comment [MK36]: FTC

Again, I think it stays in but see my Note #1.

~~the debt, compensation for services in connection with settling a debt may not exceed, with respect to each debt:~~

~~(1) 30 percent of the excess of the principal amount of the debt over the amount paid the creditor pursuant to the agreement, less~~

~~(2) to the extent it has not been credited against an earlier settlement fee:~~

~~(A) the fee charged pursuant to subsection (d)(2)(A); and~~

~~(B) the aggregate of fees charged pursuant to subsection (d)(2)(B).~~

(f) Except as otherwise provided in subsections (c) and (d), if a plan contemplates that creditors will settle an individual's debts for less than the principal amount of the debt, a provider may charge and collect compensation for services in connection with settling a debt under only one of Section 23(f)(1), 23(f)(2)(A) or 23(f)(2)(B), the terms of which shall be clearly disclosed in the agreement:

(1) With respect to an agreement that provides for a flat fee based on the overall amount of included debt, the total aggregate amount of fees charged to any individual under this chapter, including fees charged under subdivisions 23(d)(2)(a) and (b), may not exceed seventeen percent (17%) of the principal amount of debt included at the inception of the agreement. The flat fee authorized under this subdivision (1) shall be assessed in equal monthly payments over at least half the length of the plan, as estimated at the plan's inception, unless the payment of fees is voluntarily accelerated by the individual in a separate record and at least half of the overall amount of outstanding debt covered by the agreement has been settled;

(2) With respect to agreements in which no fees are charged or collected until such time as a settlement agreement has been reached with a creditor and at least one payment has been made towards such agreement by the individual, the provider may collect a fee that

(A) is a percentage of the amount of debt that is enrolled in the service, which percentage bears the same proportional relationship to the total fee for

Comment [r37]: Completely replaced by new Section 23(f), which embraces both FTC compliant and noncompliant models.

Comment [MK38]: Needs conforming

renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount based on the time the debt was enrolled in the service; or

(B) is a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration, provided that the percentage charged to an individual cannot change from one debt to another, and provided further that the amount saved shall be calculated as the difference between the amount owed at the time the debt was enrolled in the plan and the amount actually paid to satisfy the debt.

(3) Settlement fees charged under Section 23(f)(2) must be in a reasonable amount and the amount or calculation must be disclosed at the time of the inception of the agreement between the provider and the individual.

(g) Subject to adjustment of the dollar amount pursuant to Section 32(f), if a payment to a provider by an individual under this [act] is dishonored, a provider may impose a reasonable charge on the individual, not to exceed the lesser of $25 and the amount permitted by law other than this [act].

SECTION 24. VOLUNTARY CONTRIBUTIONS. A provider may not solicit a voluntary contribution from an individual or an affiliate of the individual for any service provided to the individual. A provider may accept voluntary contributions from an individual but, until 30 days after completion or termination of a plan, the aggregate amount of money received from or on behalf of the individual may not exceed the total amount the provider may charge the individual under Section 23.

SECTION 25. VOIDABLE AGREEMENTS.

(a) If a provider imposes a fee or other charge or receives money or other payments not authorized by Section 23 or 24, the individual may void the agreement and recover as provided in Section 35.

(b) If a provider is not registered as required by this [act] when an individual assents to an agreement, the agreement is voidable by the individual.

(c) If an individual voids an agreement under subsection (b), the provider does

not have a claim against the individual for breach of contract or for restitution.

SECTION 26. TERMINATION OF AGREEMENTS.

(a) If an individual who has entered into an agreement fails for 60 days to make payments required by the agreement, a provider may terminate the agreement.

(b) If a provider or an individual terminates an agreement, the provider shall immediately return to the individual:

(1) any money of the individual held in trust for the benefit of the individual; and

(2) 65 percent of any portion of the set-up fee received pursuant to Section 23(d)(2) which has not been credited against settlement fees.

SECTION 27. PERIODIC REPORTS AND RETENTION OF RECORDS.

(a) If an agreement provides for regular periodic payments to creditors, a provider shall provide the accounting required by subsection (b):

(1) upon cancellation or termination of an agreement; and

(2) before cancellation or termination of any agreement:

(A) at least once each month; and

(B) within five business days after a request by an individual, but the provider need not comply with more than one request in any calendar month.

(b) If an agreement provides for regular periodic payments to creditors, a provider, in a record, shall provide each individual for whom it has established a plan an accounting of the following information:

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

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

(3) the amounts deducted from the amount received from the individual;

(4) the amount held in reserve; and

(5) if, since the last report, a creditor has agreed to accept as payment in full an amount less than the principal amount of the debt owed by the individual:

Comment [MK39]: Delete? No, but see Note #1.

RL: For FTC-compliant models, this is irrelevant.

Comment [r40]: Technically, there's no way for a debt settlement company to provide this information, since we don't hold consumer funds. Real world, our deals with payment processors require 24x7 online access to this information by consumers.

It should be limited to credit counselors.

Comment [r41]: Again, debt settlement companies don't have this information.

(A) the total amount and terms of the settlement;

(B) the amount of the debt when the individual assented to the plan;

(C) the amount of the debt when the creditor agreed to the settlement; and

(D) the calculation of a settlement fee.

(c) A provider shall maintain records for each individual for whom it provides debt-management services for five years after the final payment made by the individual and produce a copy of them to the individual within a reasonable time after a request for them. The provider may use electronic or other means of storage of the records.

SECTION 28. PROHIBITED ACTS AND PRACTICES.

(a) A provider may not, directly or indirectly:

(1) misappropriate or misapply money held in trust;

(2) where fees are charged and collected pursuant to Section 23(f)(1), settle a debt on behalf of an individual for more than 50 percent of the principal amount of the debt owed a creditor, unless the individual assents to the settlement after the creditor has assented;

(3) where fees are charged and collected pursuant to Section 23(f)(1), take a power of attorney that authorizes it to settle a debt, unless the power of attorney expressly limits the provider's authority to settle debts for not more than 50 percent of the principal amount of the debt owed a creditor;

(4) exercise or attempt to exercise a power of attorney after an individual has terminated an agreement;

(5) initiate a transfer from an individual's account at a bank or with another person unless the transfer is:

(A) a return of money to the individual; or

(B) before termination of an agreement, properly authorized by the agreement and this [act], and for:

(i) payment to one or more creditors pursuant to an agreement; or

Comment [MK42]: "collect fees before services are rendered"?

These edits limit the settlement authority to non-compliant models.

(ii) payment of a fee;

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

(7) offer, pay, or give a gift or bonus, premium, reward, or other compensation to a person for referring a prospective customer, if the person making the referral has a financial interest in the outcome of debt-management services provided to the customer, unless neither the provider nor the person making the referral communicates to the prospective customer the identity of the source of the referral;

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

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

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

(11) settle a debt or lead an individual to believe that a payment to a creditor is in settlement of a debt to the creditor unless, at the time of settlement, the individual receives a certification by the creditor that the payment is in full settlement of the debt or is part of a payment plan, the terms of which are included in the certification, that upon completion, will result in full settlement of the debt;

(12) make a representation that:

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

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

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

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

(14) represent in its agreements, disclosures required by this [act], advertisements, or Internet web site that it is

(A) a not-for-profit entity unless it is organized and properly operating as a not-for-profit entity under the law of the state in which it was formed; or

(B) a tax-exempt entity unless it has received certification of tax-exempt status from the Internal Revenue Service and is properly operating as a not-for-profit entity under the law of the state in which it was formed;

(15) take a confession of judgment or power of attorney to confess judgment against an individual; or

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

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

(1) purchase a debt or obligation of the individual, other than through a separate affiliate that is licensed in this state, or exempt from licensure;

(2) receive from or on behalf of the individual:

(A) a promissory note or other negotiable instrument other than a check or a demand draft; or

(B) a post-dated check or demand draft;

(3) lend money or provide credit to the individual, except as a deferral of a settlement fee at no additional expense to the individual, other than through a separate affiliate that is licensed in this state, or exempt from licensure;

(4) obtain a mortgage or other security interest from any person in connection with the services provided to the individual;

(5) except as permitted by federal law, disclose the identity or identifying information of the individual or the identity of the individual's creditors, except to:

(A) the administrator, upon proper demand;

(B) a creditor of the individual, to the extent necessary to secure the cooperation of the creditor in a plan; or

(C) the extent necessary to administer the plan;

(6) except as otherwise provided in Section 23(f), provide the individual less than the full benefit of a compromise of a debt arranged by the provider;

Comment [r43]: I don't understand this – it doesn't mean anything.

(7) charge the individual for or provide credit or other insurance, coupons for goods or services, membership in a club, access to computers or the Internet, or any other matter not directly related to debt-management services or educational services concerning personal finance, except to the extent such goods and services are expressly authorized by the administrator; or

(8) furnish legal advice or perform legal services, unless the person furnishing that advice to or performing those services for the individual is licensed to practice law.

(c) This [act] does not authorize any person to engage in the practice of law.

(d) A provider may not receive a gift or bonus, premium, reward, or other compensation, directly or indirectly, for advising, arranging, or assisting an individual in connection with obtaining, an extension of credit or other service from a lender or service provider, except for educational or counseling services required in connection with a government-sponsored program.

(e) Unless a person supplies goods, services, or facilities generally and supplies them to the provider at a cost no greater than the cost the person generally charges to others, a provider may not purchase goods, services, or facilities from the person if an employee or a person that the provider should reasonably know is an affiliate of the provider:

(1) owns more than 10 percent of the person; or

(2) is an employee or affiliate of the person.

SECTION 29. NOTICE OF LITIGATION. No later than 30 days after a provider has been served with notice of a civil action for violation of this [act] by or on behalf of an individual who resides in this state at either the time of an agreement or the time the notice is served, the provider shall notify the administrator in a record that it has been sued.

SECTION 30. ADVERTISING.

(a) If the agreements of a provider contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency and the provider advertises debt-management services, it shall disclose, in an easily comprehensible manner, that using a debt-management

Comment [MK44]: Provisions on Lead-generators?

plan may make it harder for the individual to obtain credit.

(b) If the agreements of a provider contemplate that creditors will settle for less than the full principal amount of debt and the provider advertises debt-management services, it shall disclose, in an easily comprehensible manner, the information specified in Section 17(d)(3) and (4).

SECTION 31. LIABILITY FOR THE CONDUCT OF OTHER PERSONS. If a provider delegates any of its duties or obligations under an agreement or this [act] to another person, including an independent contractor, the provider is liable for conduct of the person which, if done by the provider, would violate the agreement or this [act].

Comment [MK45]: Expand to pre-agreement? I think it's already here

SECTION 32. POWERS OF ADMINISTRATOR.

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

(b) The administrator may investigate and examine, in this state or elsewhere, by subpoena or otherwise, the activities, books, accounts, and records of a person that provides or offers to provide debt-management services, or a person to which a provider has delegated its obligations under an agreement or this [act], to determine compliance with this [act]. Information that identifies individuals who have agreements with the provider shall not be disclosed to the public. In connection with the investigation, the administrator may:

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

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

(3) seek a court order authorizing seizure from a bank at which the person maintains a trust account required by Section 22, any or all money, books, records, accounts, and other property of the provider that is in the control of the bank and relates to individuals who reside in this state.

(c) The administrator may adopt rules to implement the provisions of this [act] in accordance with [insert the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure].

(d) The administrator may enter into cooperative arrangements with any other federal or state agency having authority over providers and may exchange with any of those agencies information about a provider, including information obtained during an examination of the provider.

(e) The administrator, by rule, shall establish reasonable fees to be paid by providers for the expense of administering this [act].

(f) The administrator, by rule, shall adopt dollar amounts instead of those specified in Sections 2, 5, 9, 13, 23, 33, and 35 to reflect inflation, as measured by the United States Bureau of Labor Statistics Consumer Price Index for All Urban Consumers or, if that index is not available, another index adopted by rule by the administrator. The administrator shall adopt a base year and adjust the dollar amounts, effective on July 1 of each year, if the change in the index from the base year, as of December 31 of the preceding year, is at least 10 percent. The dollar amount must be rounded to the nearest $100, except that the amounts in Section 23 must be rounded to the nearest dollar.

(g) The administrator shall notify registered providers of any change in dollar amounts made pursuant to subsection (f) and make that information available to the public.

Legislative Note: *If the administrator is the attorney general, the bracketed language in subsection (a) ("refer cases to the [attorney general]") should be deleted. If the administrator is not the attorney general, those brackets and the brackets around "attorney general" should be deleted. If the state wishes the prosecution to be handled by some other official, the name of that official should be substituted for "attorney general."*

In states that do not empower administrative agencies to set fees, replace subsection (e) with the desired fees or fee structure.

The dollar amounts that appear in this Act were selected in August 2005. The state may wish to adjust those amounts to reflect changes in the index specified in subsection (f) between that date and the date of enactment. Subsection (f) specifies the sections in which dollar amounts appear.

SECTION 33. ADMINISTRATIVE REMEDIES.

(a) The administrator may enforce this [act] and rules adopted under this [act] by taking one or more of the following actions:

(1) ordering a provider or a director, employee, or other agent of a provider to cease and desist from any violations;

(2) ordering a provider or a person that has caused a violation to correct the violation, including making restitution of money or property to a person aggrieved by a violation;

(3) subject to adjustment of the dollar amount pursuant to Section 32(f), imposing on a provider or a person that has caused a violation a civil penalty not exceeding $10,000 for each violation;

(4) prosecuting a civil action to:

(A) enforce an order;

(B) obtain restitution or an injunction or other equitable relief, or both; or

(5) intervening in an action brought under Section 35.

(b) Subject to adjustment of the dollar amount pursuant to Section 32(f), if a person violates or knowingly authorizes, directs, or aids in the violation of a final order issued under subsection (a)(1) or (2), the administrator may impose a civil penalty not exceeding $20,000 for each violation.

(c) The administrator may maintain an action to enforce this [act] in any [county].

(d) The administrator may recover the reasonable costs of enforcing the [act] under subsections (a) through (c), including attorney's fees based on the hours reasonably expended and the hourly rates for attorneys of comparable experience in the community.

(e) In determining the amount of a civil penalty to impose under subsection (a) or (b), the administrator shall consider the seriousness of the violation, the good faith of the violator, any previous violations by the violator, the deleterious effect of the violation on the public, the net worth of the violator, and any other factor the administrator considers relevant to the determination of the civil penalty.

SECTION 34. SUSPENSION, REVOCATION, OR NONRENEWAL OF REGISTRATION.

(a) In this section, "insolvent" means:

(1) having generally ceased to pay debts in the ordinary course of business other than as a result of good-faith dispute;

(2) being unable to pay debts as they become due; or

(3) being insolvent within the meaning of the federal bankruptcy law, 11 U.S.C. Section 101 et seq.[, as amended].

(b) The administrator may suspend, revoke, or deny renewal of a provider's registration if:

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

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

(3) the provider is insolvent;

(4) the provider or an employee or affiliate of the provider has refused to permit the administrator to make an examination authorized by this [act], failed to comply with Section 32(b)(2) within 15 days after request, or made a material misrepresentation or omission in complying with Section 32(b)(2); or

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

(c) If a provider does not comply with Section 22(f) or if the administrator otherwise finds that the public health or safety or general welfare requires emergency action, the administrator may order a summary suspension of the provider's registration, effective on the date specified in the order.

(d) If the administrator suspends, revokes, or denies renewal of the registration of a provider, the administrator may seek a court order authorizing seizure of any or all of the money in a trust account required by Section 22, books, records, accounts, and other property of the provider which are located in this state.

(e) If the administrator suspends or revokes a provider's registration, the provider may appeal and request a hearing pursuant to [insert the citation to the appropriate section of the administrative procedure act or other statute governing administrative procedure].

Legislative Note: *In states in which the constitution does not permit the phrase, "as amended," when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a)(3).*

SECTION 35. PRIVATE ENFORCEMENT.

(a) If an individual voids an agreement pursuant to Section 25(b), the individual

may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement, except amounts paid to creditors, in addition to the recovery under subsection (c)(3) and (4).

(b) If an individual voids an agreement pursuant to Section 25(a), the individual may recover in a civil action three times the total amount of the fees, charges, money, and payments made by the individual to the provider, in addition to the recovery under subsection (c)(4).

(c) Subject to subsection (d), an individual with respect to whom a provider violates this [act] may recover in a civil action from the provider and any person that caused the violation:

(1) compensatory damages for injury, including noneconomic injury, caused by the violation;

(2) except as otherwise provided in subsection (d) and subject to adjustment of the dollar amount pursuant to Section 32(f), with respect to a violation of Section 17, 19, 20, 21, 22, 23, 24, 27, or 28(a), (b), or (d), the greater of the amount recoverable under paragraph (1) or $5,000;

(3) punitive damages; and

(4) reasonable attorney's fees and costs.

(d) In a class action, except for a violation of Section 28(a)(5), the minimum damages provided in subsection (c)(2) do not apply.

(e) In addition to the remedy available under subsection (c), if a provider violates an individual's rights under Section 20, the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement, except for amounts paid to creditors.

(f) A provider is not liable under this section for a violation of this [act] if the provider proves that the violation was not intentional and resulted from a good-faith error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. An error of legal judgment with respect to a provider's obligations under this [act] is not a good-faith error. If, in connection with a violation, the provider has received more money than authorized by an agreement or this [act], the defense provided by this subsection is not available unless the

provider refunds the excess within two business days of learning of the violation.

(g) The administrator shall assist an individual in enforcing a judgment against the surety bond or other security provided under Section 13 or 14.

SECTION 36. VIOLATION OF [UNFAIR OR DECEPTIVE PRACTICES] STATUTE. If an act or practice of a provider violates both this [act] and [insert a reference to the statute dealing with deceptive acts and practices in consumer transactions], an individual may not recover under both for the same act or practice.

Legislative Note: *The caption to this section should reflect the title of the applicable statute, be it Consumer Protection Act, Deceptive Trade Practices Act, or other.*

SECTION 37. STATUTE OF LIMITATIONS.

(a) An action or proceeding brought pursuant to Section 33(a), (b), or (c) must be commenced within four years after the conduct that is the basis of the administrator's complaint.

(b) An action brought pursuant to Section 35 must be commenced within two years after the latest of:

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

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

(3) the provider's last disbursement to a creditor of the individual;

(4) the provider's last accounting to the individual pursuant to Section 27(a);

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

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

(c) The period prescribed in subsection (b)(5) is tolled during any period during which the provider or, if different, the defendant has materially and willfully misrepresented information required by this [act] to be disclosed to the individual, if the information so misrepresented is material to the establishment of the liability of the defendant under this [act].

SECTION 38. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote

uniformity of the law with respect to its subject matter among states that enact it.

SECTION 39. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

SECTION 40. TRANSITIONAL PROVISIONS; APPLICATION TO EXISTING TRANSACTIONS. Transactions entered into before this [act] takes effect and the rights, duties, and interests resulting from them may be completed, terminated, or enforced as required or permitted by a law amended, repealed, or modified by this [act] as though the amendment, repeal, or modification had not occurred.

[**SECTION 41. SEVERABILITY.** If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] that can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

SECTION 42. REPEAL. The following laws are repealed:

Legislative Note: *Insert the citation to any existing legislation regulating consumer credit counseling, debt settlement, debt adjustment, debt prorating, or the like.*

SECTION 43. EFFECTIVE DATE. This [act] takes effect 12 months after enactment.

Legislative Note: *The effective date should be set in such a way that the administrator has an adequate opportunity to prepare to enforce the Act. It may be desirable to have the Act become effective in a staggered manner, delaying the effective date for registration. To implement this alternative, substitute the following language: "Sections 1 through 3 and 15 through 43 of this [act] take effect [six months after enactment]. Sections 4 through 14 of this [act] take effect on [insert date]."*

Exhibit B

March 11, 2011

TASC Response to Center for Responsible Lending Opinion on Debt Settlement Fees

Introduction

TASC makes this response to show that false assumptions were used in the Center for Responsible Lending's (CRL) paper alleging that debt settlement programs were not effective. Although CRL titles its paper "research", it uses no data and relies on no authority to make its conclusion, and as this response will show, CRL instead relies on assumptions it wrongly created.

Basic Assumptions Refuted

1. **Assumption:** 29.99% default interest rate accrues annually for a period of 4-5 years.
   True or False?: False

   Debts do not accrue interest at 30% for the duration of a debt settlement program. Federal regulations require that banks charge off revolving credit accounts 180 days after delinquency at which time the debt is removed from the creditors' books[1]. Thus, typically after 6 months, creditors charge off the accounts and accrual of interest stops altogether[2]. Suze Orman, host of *The Suze Orman Show* on CNBC, recognizes this and states,"At the time the account is charged off, the creditor usually stops the clock on interest charges . . ."[3]

   The assumption is further refuted by data for real programs and settlements. TASC reported that the average increase in debt balance from the time of enrollment until the time of settlement (accretion rate) was a total (not annual rate) of 21.9%[4]. Another member who has settled over $1 billion in debt reports an accretion rate of 21%[5] (including all fees and interest). This average rate was taken over the statistically significant sample of almost 200,000 settlements.

2. **Assumption:** A consumer can easily and readily negotiate a concession interest rate herself of 9.99% through hardship programs like credit counseling programs.
   True or False?: False

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[1] Cackley, Alicia Puente (2009). *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology*

[2] Collection charges may be separately imposed for attempts to collect a debt.

[3] http://www.suzeorman.com/igsbase/igstemplate.cfm?SRC=MD012&SRCN=aoedetails&GnavID=84&SnavID=20&TnavID=&AreasofExpertiseID=19

[4] TASC Supplemental Response and Data to FTC for Telemarketing Sales Rules – Debt Relief Amendment – R411011, dated March 8, 2010.

[5] Reported by Freedom Debt Relief as of December 31, 2010.

Consumers often do not qualify for credit counseling programs and continually report to debt settlement providers that attempts to work directly with the creditors have failed. Freedom Debt Relief reports that a majority of consumers that they talk to have tried and failed to get creditors to work out an affordable arrangement. An example is given in the below testimonial from a consumer who finished the debt settlement program:

> "I attempted to call the credit card companies to see if they would work with me on some type of payment plan so that I could get caught up with all the late payments and extra fees that they tacked on my balance. They would not work with me at all. The settlement on my largest debt so far exceeded my expectations . . . . Keep in mind this was the same creditor that would not talk to me at the beginning. There is no way I could do this by myself." Brian L.[6]

Further, credit counseling concession rates are significantly higher than CRL assumes. A nonprofit credit counselor testified that the best concession interest rate she was able to obtain for her consumers was 16%[7]. A paper by a consumer group listed the concession interest rates it was able to obtain and the average rate was 13%[8].

Lastly, CRL is inconsistent in promoting nonprofit credit counseling's charging of advance fees while opposing debt settlement even without any advance fees.

3. **Assumption:** Credit counseling fees are low – a set up fee of $49 and monthly fees of $45.
True or False: False

Many states permit credit counseling fees of higher amounts. There are a number of states that allow a 15% fee for credit counselors who are usually nonprofits including North Dakota, Idaho, Indiana, Iowa, Michigan, Minnesota, Montana, Nebraska, New Hampshire, Oregon, Virginia, Washington, and Wisconsin. However, the 15% is calculated as 15% of the total debt or payment made to the creditor and includes 15% of the principal and 15% of the interest paid as part of payment.

Using interest rates documented in point #2 above, for $25,000 in debt, a consumer could pay up to $85 a month in fees in the above states[9]. If you include the fair share payments that nonprofit credit counselors receive, the credit counselor can receive about $131 a month in fees. While the fair share is taken from the monthly payment to the creditor, it is still something the credit counselor receives in addition to the statutory permitted fee.

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[6] Delivering Value to Consumers in a Debt Settlement Program, Hasnain Walji, Ph.D., October 16, 2009 – Source: QSS 2009 Survey, an independent third-party survey company.

[7] Testimony of nonprofit credit counseling agency at a committee hearing in Salem, Oregon, February 9, 2009 – the credit counselor stated she was unable to obtain concession rates better than 16% for her consumers;

[8] *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants*, Consumer Federation of America and National Consumer Law Center, April 2003 – average of concession rates was approximately 13%.

[9] Some states have upper limit caps such as Minnesota which sets a maximum of $75.

Other states likewise have higher fees for credit counseling. New Jersey permits a monthly fee of up to $85 a month. Illinois, Arizona, Colorado, Delaware, Nevada, Tennessee, Utah, Pennsylvania, Texas and Rhode Island all permit fees of $50 a month and some have set up fees and/or counseling fees that may exceed $49.

4. **Assumption:** Monthly payments under credit counseling programs or self administered programs are lower than they are in debt settlement programs.
   True or False?: False

   While CRL claims monthly payments of 2.4% using self administered programs, monthly payments can be even more than the common 2.5% minimum payment requirement of credit card companies. Using the below chart in Point #6 comparing a consumer's various options, the consumer in a credit counseling program may pay 2.6% of debt as a monthly payment. Nevertheless, all of these numbers are very close to the minimum monthly payment required by credit card companies and simply do not provide sufficient payment relief for many consumers.

   Freedom Debt Relief, a TASC member, reports average payments in its debt settlement program to be 1.7% of debt based on an average of over 100,000 clients, a statistically significant sample.

5. **Assumption:** Debt management plans with credit counselors are more successful than debt settlement plans.
   True or False?: False

   Debt settlement is effective when compared to other debt relief options. The national rate of completion for confirmed Chapter 13 bankruptcy plans is 33%.[10] Nonprofit credit counseling companies historically have an approximate success rate of 21-26%[11]. Debt settlement completion rates for TASC members are higher – approximately 34.5%[12]. While CRL points out that the TASC numbers for the debt settlement rate was for completing 75% of the program, all but two of the companies reporting to arrive at this number reported completion rates for 100% of the program, so TASC reported conservatively.

6. **CRL Conclusion:** Debt settlement does not benefit consumers financially compared to other debt relief options.
   True or False: False.

   The total cost of a debt management plan or credit counseling plan or other debt relief options is much greater than just the principal amount of the debt because (1) there is no reduction in principal and (2) interest continues to accrue and is paid as part of the service. With debt settlement, reduction in principal provides significantly greater consumer benefit even including fees. For instance, if there was a 50% reduction in principal and a 25% of principal fee (only paid if the consumer accepts settlement), the total consumer cost for debt settlement would equal $18,750 compared to $39,250 for credit counseling. See below chart for comparison.

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[10] "Bankruptcy by the Numbers: Measuring Performance in Chapter 13" by Gordon Bermant and Ed Flynn, Executive Office for the U.S. Trustees.
[11] *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants*, Consumer Federation of America and National Consumer Law Center, April 2003.
[12] TASC Comment Letter to FTC, October 2009.

$25,000 debt	Debt Settlement	Credit Counseling	Debt Consolidation Home Equity Loan[1]	Pay Minimum Due @ 2.5% of Balance
Months to pay off debt	36	60	120	565 Mo | 47 Yrs
Interest Rate	0	13%[2]	9.00%[3]	21.00%
Monthly Fees	0	$5,120.00[5]	$1,500.00[6]	
Fair Share by Creditor to nonprofit CCCS	-	$2,730.00[7]	-	-
Total fees	$6,250.00[4]	$7,850.00	$1,500.00	
Interest[8]	0[10]	$9,130.00[8]	$13,000.00[8]	$57,377.37[8]
Amount of Debt on Day 1	$25,000.00	$25,000.00	$25,000.00	$25,000.00
Total Cost:	$18,750.00[11]	$39,250.00[9]	$39,500.00	$82,377.37

Even using CRL's assumptions, debt settlement compares favorably. The following chart, *CRL Analysis Using Correct Assumptions*, compares the total consumer cost for debt settlement, including the typical accretion rate for accrued interest, based on a fee of 15% of savings and a fee of 50% of savings with the total consumer cost of nonprofit credit counseling using CRL's assumptions of credit counseling fees and concession interest rates.

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[1] Assumes good credit and sufficient home equity.

[2] Testimony of nonprofit credit counseling agency at a committee hearing in Salem, Oregon, February 9, 2009 – the credit counselor stated she was unable to obtain concession rates better than 16% for her consumers; *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants*, Consumer Federation of America and National Consumer Law Center, April 2003 – average of concession rates was approximately 13%.

[3] Per Bankrate.com for Denver, Colorado area - Wells Fargo Bank.

[4] Assumes a fee of 25% of debt ($25,000 x 0.25).

[5]Assumes 15% of monthly payment for 5 years = 0.15 x ($25,000 principal + $9,130 interest) = $5,120.

[6]Assumes 10 year loan and total fees 6% of loan value.

[7] 8% of client payments fair share - See page 2, lines 41-43 of H.P. 895, Legislative Document No. 1289, 124th Maine Legislature.

[8] Interest calculated by using Bankrate.com or CNNMoney.com calculators; does not include potential late fees, penalties, other costs.

[9] $25,000 principal + $9,130 interest + $5,120 fees = $39,250. Fair share comes out of the principal/interest payment.

[10] The 50% settlement figure is based off of debt at time of enrollment and any interest accrued is factored into the settlement percentage for this example. Similar numbers can be calculated using accretion rates and corresponding settlement percentages. Accretion usually adds on 10% to the settlement number, so a 40% settlement based on the outstanding debt including interest is about a 50% settlement based on the enrolled debt.

[11] ($25,000 x 0.5) + $6,250 = $18,750.

CRL Analysis Using Correct Assumptions

	Debt Settlement - 15% of savings		Debt Settlement - 50% of savings		Non Profit Credit Counseling	
	Client 1	Client 2	Client 1	Client 2	Client 1	Client 2
Debt Enrolled	$10,000	$25,000	$10,000	$25,000	$10,000	$25,000
Interest Accrued Before Payoff	21%	21%[13]	21%	21%	$2,745	$6,863[14]
Total Debt including Interest	$12,100	$30,250	$12,100	$30,250	$12,745	$31,863[15]
Average % of Debt and Interest Paid by Consumer	45%	45%[16]	45%	45%	100%	100%
% of Debt Based on Enrolled Balance	54%	54%	54%	54%	127%	127%
Total Payments to Creditors (including Interest)	$5,445	$13,613	$5,445	$13,613	$12,745	$31,863
Savings (Increase) off Debt Enrolled	$4,555	$11,388	$4,555	$11,388	($2,745)	($6,863)
Fees Earned by Company						
One Time Startup Fee	$0	$0	$0	$0	$49	$49
Monthly Fee	$0	$0	$0	$0	$45	$45
Contingent Fee on Savings (Off Enrolled Debt)	15%	15%	50%	50%	0%	0%
Fair Share from Creditors	0%	0%	0%	0%	8%	8%
Average Months to Completion	**36**	**36**	**44**	**44**	**60**	**60**
Fees Paid By Consumers	$683	$1,708	$2,278	$5,694	$2,749	$2,749
Fees Paid by Creditors (Fair Share)	$0	$0	$0	$0	$1,020	$2,549
Total Fees Earned by DS of CCC Company	**$683**	**$1,708**	**$2,278**	**$5,694**	**$3,769**	**$5,298**
Total Cost to Consumer Including Fees	**$6,128**	**$15,321**	**$7,723**	**$19,306**	**$15,494**	**$34,612**
% of DMP Total Cost	**40%**	**44%**	**50%**	**56%**	**100%**	**100%**
Required Monthly Payment from Consumer	**$170.23**	**$425.57**	**$175.51**	**$438.78**	**$258.24**	**$576.87**
% of Enrolled Debt	1.70%	1.70%	1.76%	1.76%	2.58%	2.31%

[13] Represents average interest accretion from time debt is enrolled in a debt settlement program until the time it is settled, based on data from almost 200,000 settled creditor accounts.

[14] Total Interest payments to creditors at a 9.99% interest rate amortized over 60 months.

[15] Represents the total consumer payments to creditors in a 60 month credit counseling program that are required to payoff debt at a reduced 9.99 percent annual interest rate.

[16] Represents historical TASC settlement percentages (please note recent data in the past 2 - 3 years is closer to 42%).

7. **CRL Statement – there are other potential costs that are not included in the cost-benefit analysis.**
True or False: True. However, there are also many benefits not included in the analysis.

Some of the benefits not included in CRL's analysis include the following:

- Debt settlement provides greater payment relief.
- Debt settlement is usually a faster program than other debt relief options.
- Debt settlement is an option that can provide substantial relief when no other option is available.
- When used as an alternative to Chapter 7 bankruptcy, debt settlement can help avoid liquidating a home to pay off debts.
- Debt settlement provides help in budgeting and living within your means.
- Debt settlement can provide significant emotional or non-financial benefits.

The below excerpts from testimonials are just a few examples of these non-quantified benefits.

Lucida[17]
Upon your companies advice I looked into Consumer Credit Counseling and decided that it simply would take too long and I would not be able to afford those kinds of payments. By going through your debt settlement program I have learned to recognize my finances and put myself on a budget. I really feel that you have helped me out not just now but for the rest of my life."

Kregg[18]
I was really ready to end it all just about a year ago . . . faith in God and your encouragement helped me through.

Lisa[19]
I'd like to thank you and your organization ONE MORE TIME for all that you have/will do for me. I am extremely sure at this point, that you did indeed, literally, save my life.

Rick[20]
Debt settlement not only saved me a lot of money, but it taught me how not to get into trouble again."

Mary[21]
"Bankruptcy was not the answer . . . I feel the fees have been more than fair because of the settlements I have received already.

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[17] Excerpt from testimonial - Source: Quality Survey Services (QSS) 2009 Survey, an independent third-party survey company.
[18] Excerpt from testimonial submitted by TASC for FTC Workshop on Debt Settlement, Sept. 25, 2008.
[19] *Id.*
[20] Excerpt from testimonial - Source: Quality Survey Services (QSS) 2009 Survey, an independent third-party survey company.
[21] *Id.*

Brian[22]

I attempted to call the credit card companies to see if they would work with me on some type of payment plan so that I could get caught up with all the late payments and extra fees that they tacked on my balance. They would not work with me at all. The settlement on my largest debt so far exceeded my expectations . . . . Keep in mind this was the same creditor that would not talk to me at the beginning. There is no way I could do this by myself.

Joseph[23]

. . . due to you [sic] program I now do not have any unsecured debt which I NEVER would have been able to do without you. I also learned valuable lessons that have changed my lifestyle. Due to the counseling you gave me in the debt settlement program I have a much better idea of how to budget so that I never have to be in that position ever again.

In closing, CRL's conclusions are based on incorrect assumptions and once proper assumptions based on data and fact are used, debt settlement compares very favorably to other debt relief options. Individuals realize significant benefits in debt settlement that justify fees greater than nonprofit credit counseling. Further, if fees are not charged until a debt is settled and the individual authorizes and accepts the settlement, the individual always gets to choose whether a settlement is in her best interest. Debt settlement is a valuable service that provides significant benefits to individuals and a fair fee is both deserved and willingly paid.

[22] *Id.*
[23] *Id.*