AMENDMENTS TO

UNIFORM DEBT-MANAGEMENT SERVICES ACT

January 10, 2008

Section 2 is amended to read:

SECTION 2. DEFINITIONS. In this [act]:

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(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.

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Comment

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6. Paragraph (6) (certified counselor~~).~~ and certified debt specialist): "Debt specialist" includes a person who communicates with an individual about the features of a debt-settlement program or who, on behalf of a provider, forms an agreement with an individual.

Section 17 requires providers to perform certain functions, including education, through the services of a certified counselor or certified debt specialist; section 16 requires providers to make certified counselors and certified debt specialists available for consultation. The definition requires that the organization that trains or certifies counselors be approved by the administrator.

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Section 4 is amended to read:

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 ~~plans~~ agreements contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency] [whose ~~plans~~ agreements contemplate 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 ~~plans~~ 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 ~~plans~~ 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 is amended to read:

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 ~~no~~ a deductible not exceeding $5,000;

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

(E) not subject to cancellation by the applicant ~~without~~ or the ~~approval of~~ insurer until 60 days after written notice has been given to the administrator; [and]

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

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 ~~not-for-profit~~ 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 ~~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 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~~, evidence of not-for-profit and tax-exempt status applicable to the applicant~~ 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) ~~should state~~ states: "(6) if the applicant's ~~plans~~ 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 ~~plans~~ 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 ~~or is~~, 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) ~~should state~~ states: "(6) if the applicant's ~~plans~~ 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 ~~plans~~ 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 ~~or is~~, 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).

Comment

1. In subsection (a) "form" encompasses format, and the administrator by rule may permit all or part of the application to be submitted electronically.

2. Subsections (b)(2) and (3) refer to items "required by" other sections. If those other sections do not require the item as to a particular applicant, then the application may omit them.

The bond requirement in paragraph (2) may be satisfied also in the manner provided in section 14.

The consent required by paragraph (3) is for the purpose of satisfying the bank's requirements for disclosure of records to a person other than the account holder. The administrator may adopt a rule prescribing the form and content of that consent. Section 19(d)(2) requires a similar consent from the individuals whose money is in the trust account.

3. Subsection (b)(4) requires insurance in the amount of $250,000 against the risk of employee misconduct, including theft of funds from the trust account. Misconduct may consist of conduct that is prohibited by this Act or by other law, or it may consist of a failure to act when the provider has a duty to act. As used in this Act, "employee" encompasses officers of a provider.

4. The insurance required by this section must be provided by an insurer whose reliability is beyond question. Paragraph (B) speaks of an A rating, such as under the system of A.M. Best Co., but a comparable rating by any other administrator-approved, nationally recognized rating organization satisfies the requirement, even if the organization's system uses numbers or other symbols instead of letters. The purpose of the requirement is to ensure that the insurance will be issued by a very highly reliable insurer, and the requirements of paragraph (B) should be interpreted accordingly.

5. Ordinarily, the beneficiary of ~~such~~ insurance of the type required by this section would be the provider, but this paragraph expands the beneficiaries to include the state and the customers of the provider and requires that the insurance not be subject to cancellation without ~~the approval of~~ notice to the administrator. The insurance required by this paragraph overlaps the bond required by section 13.

~~4~~ 6. Subsection (b)(5) facilitates subjecting a non-resident business to the jurisdiction of this state. If the applicant is a domestic entity, so that the statute referenced in this subsection does not apply to it, the applicant complies with this subsection by indicating that fact. If existing statutes leave doubt about the mechanism for serving process on the provider and the state has chosen not to enact the language suggested in the Legislative Note, the administrator can promulgate a rule requiring the applicant to appoint a state official as the provider's agent for purposes of service of process.

Section 6 is amended to read:

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 of the applicant;

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

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

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

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

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

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

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

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

Comment

1. Paragraph (1) requires disclosure of the applicant's principal business address, in whatever jurisdiction it may be. It also requires disclosure of business addresses in this state, but not business addresses outside this state.

2. Paragraph (3) contemplates disclosure of the address of all facilities, like call centers and back-office operations, that are part of the provider's operations. It does not, however, require disclosure of the addresses of employees who work from home. If the applicant has no physical presence in this state, that must be disclosed.

3. Paragraph (4) requires identification of any person that owns more than 10 percent of an applicant. This applies to for-profit applicants, if the state permits them, and to nonprofit applicants that are owned by others. Most nonprofit entities are not owned by anyone, and, if that is true of an applicant, the applicant need only disclose that fact.

4. Paragraph (5) (identification of jurisdictions in which the applicant has done business or has been registered or licensed to provide debt-management services) requires information to enhance the administrator's ability to investigate the applicant and to coordinate enforcement efforts with administrators in other jurisdictions. Use of the word "jurisdiction" rather than "state" means that the applicant must disclose with respect to its activities in other countries, too. Unless required pursuant to paragraph (19), however, it does not mean that the applicant must break down its disclosures by county or other subdivision of a state or country.

5. Paragraph (6) requires disclosure of material judicial and administrative proceedings in any jurisdiction against the officers, directors, and owners (whether or not they are authorized to access the trust account containing customers' funds), as well as material judicial and administrative proceedings against any other persons who may be authorized to access the trust account. Proceedings dealing with matters of importance to the administrator in determining whether to approve an application for registration, such as alleged deception or financial irregularities, are material. See section 9(b)(4). The administrator by rule can elaborate on what proceedings are material. This paragraph does not impose any disclosure requirement with respect to proceedings of which the applicant reasonably is unaware, but the concept "should be known" encompasses facts that a reasonable investigation would have revealed. "Authorized to have access to the trust account" refers to persons who may initiate transactions in the account, not persons who merely are empowered to view the account.

6. Paragraph (7) requires financial statements by an accountant licensed to conduct audits. The accountant need not be licensed by this state.

7. Independent, nationally recognized accrediting organizations have been accrediting credit-counseling agencies for many years, though not all agencies have sought to be accredited. Paragraph (8) establishes accreditation as prerequisite to registration under this Act. The accreditation requirement, which applies to both credit-counseling entities and debt-settlement entities, reinforces regulation by the administrator and subjects providers to periodic review to ensure that they continue to meet the standards of the accrediting agency. The administrator must approve the organizations that accredit providers.

8. Paragraph (9) requires a provider to ensure that its counselors and debt specialists are

certified no later than 12 months after their initial employment. This requirement applies only with respect to employees who act as counselors, debt specialists, and educators. It does not apply to such other employees as customer service representatives. Section 17 prohibits ~~a plan~~ an agreement unless a certified counselor or certified debt specialist has done specified things. With respect to the obligations imposed by section 17(b), this [Act] draws no distinctions between credit-counseling entities and debt-settlement entities. Each must comply with the same obligations through the services of either certified counselors or certified debt specialists. Evidence that a provider has in place a system for certification of its counselors and debt specialists provides some assurance to the administrator that the provider will be able to comply with section 17.

9. As used in paragraph (10), "programs" encompasses both a course of instruction and computer software. Unless the administrator adopts a rule to the contrary, a course of instruction may be entirely oral.

10. An applicant, whether located in this state or elsewhere, need supply only those documents specified in paragraph (12) that it will use with residents of this state. If it will use more than one form, it must supply all of them. Section 32(b) empowers the administrator to investigate the activities in another jurisdiction of a provider that is doing business in this state. Under that section the administrator may obtain documents used in other jurisdictions.

11. As with the preceding paragraph, paragraph (13) only requires an applicant, regardless of its location, to supply the schedules of fees and charges for residents of this state, but if it uses more than one schedule, it must supply all of them. For purposes of this paragraph, "fees and charges" includes all costs, however denominated (e.g., "charitable subsidy"), to be paid by customers of the applicant. This information will enable the administrator to monitor the industry's practices in the state and may assist the administrator in determining whether an individual provider is gouging individuals or whether the legislature should be encouraged to raise the fee cap because the passage of time or changed circumstances make it too low. Section 23 imposes limitations on the amount of fees, and Section 24 prohibits the solicitation of voluntary contributions.

12. Paragraphs (12) and (13) require information that is current as of the time of the application. Unless the administrator adopts a rule to the contrary, an applicant is free to modify its forms or fees without prior approval, but section 7 requires the provider to notify the administrator promptly of any such modification.

13. Paragraph (14) requires the results of a criminal-records check on every officer of the applicant. In addition, it requires the results of a criminal-records check covering every employee or agent who is authorized to ~~access~~ initiate transactions in the applicant's trust account. If the applicant is a natural person, the criminal-records check must cover the applicant, too.

This paragraph requires "the results of a criminal-records check, including fingerprints."

In some jurisdictions the mechanics and procedures for obtaining fingerprints are quite burdensome. This paragraph attempts to reduce that burden. It does not require that an applicant obtain a criminal-records check specifically for the application for registration in this state. If an applicant has obtained a criminal-records check in connection with obtaining permission to do business in another state and that criminal-records check meets the standards of this paragraph, the applicant may submit the results of it in its application to this state. The 12-month limitation applies to the criminal-records check, not the time of submission to the other state. The criminal-records check must include a check of fingerprints, but the fingerprints need not have been obtained during the 12-month period.

14. Paragraphs (15)-(18) contain disclosures designed to enable the administrator to enforce the requirement of an independent board of directors and the restrictions on self-dealing. It requires these disclosures of all applicants, even for-profit entities, if they are permitted to provide debt-management services, because the restrictions on self-dealing (section 28(e)) apply to all providers. The disclosures also help the administrator monitor whether the fee limits are set at an appropriate level. Paragraph (16) requires the disclosure with respect to officers, since officers are included the category, "employees." In paragraph (17) "compensation" includes cash and all other items that ordinarily are considered part of compensation.

15. Paragraph (19) authorizes the administrator to require additional information either by rulemaking procedure applicable to all applicants or by specific request in response to a specific application. Section 9 specifies the grounds for denying registration (including a finding that the general fitness of the applicant is not such as to warrant belief that the applicant will comply with the Act). This paragraph authorizes the administrator to seek additional information relevant to the application of that standard.

Section 9 is amended to read:

SECTION 9. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL.

(a) Except as otherwise provided in subsections ~~(b)~~(c) and ~~(c)~~(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.

~~(b)~~(c) The administrator may deny registration if:

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

incomplete;

(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].

~~(c)~~(d) The administrator shall deny registration if~~:~~

~~(1) the application is not accompanied by the fee established by the administrator; or~~

~~(2)~~ [~~,~~ 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.

~~(d)~~(e) Subject to adjustment of the dollar amount pursuant to Section 32(f), a board of directors is not independent for purposes of subsection ~~(c)~~(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).

Comment

1. Section 6(14) requires an applicant to provide the results of a criminal-records check, including fingerprints. This information is provided by third parties, and the applicant has no control over the timeliness of any response. Subsection (b) therefore gives the administrator discretion to issue a temporary certificate of registration.

~~1~~ 2. Some conduct may justify a lifetime ban from the debt-management-services industry. Examples include some of the conduct described in subsection (b)(2) and (3). Other conduct can be readily corrected, e.g., subsection (b)(1). The introductory language of the subsection ("administrator *may* deny") gives the administrator discretion to consider the importance of various items of adverse information about an applicant, such as the precise nature and timing of past criminal conduct. The language of limitation at the end of subsection (b)(2) ("involving dishonesty or the violation of state or federal securities laws") applies to both criminal convictions and civil judgments. Subsection (b)(4) gives the administrator discretion to consider other relevant information, such as the fact of and reasons for any suspension or revocation of the applicant's right to provide debt-management services in another state.

~~2~~ 3. Paragraphs (2) and (3) do not express any temporal limts and therefore require disclosure of the specified information regardless of when the conviction, judgment, or default occurred.

~~3~~ 4. Because providers may have hundreds of employees, most of whom are not in control of the provider, subsection (b) does not include employees in the list of persons in paragraphs (2) and (3) whose conduct justifies the denial of registration. Conversely, paragraph (4) does include employees. It does not explicitly name officers, because officers are included in the category, "employee." The past misconduct of employees is a basis for action under paragraph (4), because the administrator has the discretion to deny registration if, e.g., a pattern of hiring raises doubts about the likelihood that the applicant will operate the business in compliance with the Act. Unless the administrator by rule requires otherwise, however, paragraph (4) does not require an applicant to disclose the convictions or adverse judgments of its employees. These disclosures are required by section 6(6), but only with respect to the applicant's officers, directors, owners, and those employees who are authorized to access the trust account.

~~4~~ 5. Subsection (c) states circumstances in which denial of registration is mandatory. Paragraph (2) requires that the board of directors of a nonprofit entity be independent of the management of the entity and independent of the creditors for whom the entity is, in a sense, acting as debt collector. If the board of directors is not independent, the administrator must deny registration. Similar to subsection (b)(4), this paragraph does not explicitly mention "officers" because officers are included in the term, "employee."

~~5~~ 6. Since the definition of "affiliate" includes directors (section 2(2)(B)(iii)), subsection (d)(1) omits this subparagraph of the definition of affiliates for purposes of determining the independence of the board.

~~6~~ 7. Subsection (d)(2) specifies a period beginning 10 years before a person first becomes a director. It specifies a starting point for the period but no ending point. This means that if a person meets the employee/director test of paragraph (2) while the person is on the applicant's board of directors, the person is not independent, even if more than 10 years have elapsed since the person first became a member of the applicant's board.

Section 11 is amended to read:

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 ~~no~~ a deductible not exceeding $5,000;

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

(E) not subject to cancellation by the applicant ~~without~~ or the ~~approval of~~ insurer until 60 days after written notice has been given to the administrator;

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Comment

1. A registration must be renewed every year. The administrator may adopt a rule specifying the timing of renewals, so that renewals of registration of all providers occur on the same date, occur on a rolling basis, or otherwise.

2. Subsection (b) states the prerequisites for renewal of registration. The bond requirement in paragraph (2) may be satisfied also in the manner provided in section 14.

3. Paragraph (4) requires a provider to update any required information that has changed. This includes background checks on anyone who, since the last renewal, has become an officer of the applicant or has been given power to initiate transactions in the trust account required by Section 22. Since acquisition of this information is not entirely within the control of the provider, this paragraph grants the administrator the discretion to issue a temporary renewal of registration.

~~3~~ 4. Paragraph (5) contains the same requirements that section 5(b)(4) does for initial registration, except that upon renewal the provider must obtain insurance in an amount equal to the highest balance in the trust account during the six months preceding the application for renewal.

~~4~~ 5. Paragraph (6) requires disclosure of two items. The first is the total amount received from its customers by a provider (or its designee). This requirement does not apply to a provider that directs its customers to accumulate money on their own. The second item is the total amount distributed to creditors, and this requirement applies to all providers, whether or not they (or their designees) take possession of their customers' funds.

~~5~~ 6. Paragraph (7) supplements paragraph (6) by requiring a provider that does not take possession of its customers' funds to disclose the gross amount its customers have accumulated. "Gross amount" means the total amount accumulated without adjustment for any debits, withdrawals, or payments for fees or for satisfaction of creditors' claims. A provider that does not take possession of its customers' money may monitor the customers' accounts, either by direct access to the accounts or by requiring the customers to provide periodic copies of bank statements. If the provider does not do either of these, and therefore has no knowledge of the amounts accumulated, it need make no disclosure under paragraph (7).

~~6~~ 7. Paragraph (8) authorizes the administrator to require additional information from an applicant. This refers both to information required by rule and information requested in response to the information in an application. For example, the administrator may exercise the rulemaking authority to require applicants to disclose indicia of success, such as the percentage of individuals who complete plans or the amounts a provider has received from creditors (or others).

~~7~~ 8. The home addresses, financial statements, salaries of the highest-paid employees, and results of the criminal-records check, as disclosed in an application for renewal, remain exempt from public disclosure.

~~8~~ 9. The grounds for denial of an application to renew registration appear in section 34. If a provider files a timely and complete application, subsection (d) provides that the registration remains effective until the administrator denies it. The denial of an application for renewal triggers a right of appeal under subsection (e). Pending completion of the appeals process, a provider is required to continue providing debt-management services, even though the administrator has determined that it should not be permitted to continue its business in this state. For this reason, subsection (e) limits to 30 days the time for initiating the appeals process. If the appeals process concludes with a determination upholding the administrator's decision, section 4(a) prohibits the provider from providing debt-management services. An abrupt end to the provider's activity, however, may adversely affect its customers who are in the middle of a plan. Consequently, this subsection qualifies section 4(a) and compels the provider to continue providing services to existing customers until the administrator authorizes it to cease.

Section 14 is amended to read:

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 16 is amended to read:

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 is amended to read:

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 about the management of personal finance;

(2) has prepared a financial analysis; and

(3) if the individual is to make regular, periodic payments:

(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) 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 ~~to engage in a plan~~, 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 ~~hurt your~~ make it harder for you to obtain credit ~~rating or credit scores~~.

(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 ~~hurt your~~ make it harder for you to obtain credit ~~rating or credit scores~~.

_____

Name and business address of provider

(g) If ~~a plan~~ 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

- hurt your credit rating or credit scores;
- lead your creditors to increase finance and other charges; and
- 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

Comment

* * *

8. Subsection (d) requires providers to give a warning to individuals before they commit to ~~a plan~~ an agreement, and it requires the warning to be given separately. This prohibits a provider from handing the warning over along with other documents or materials. The intention of the subsection is to require delivery in a form and context in which the individual will actually notice and read the warning.

9. Subsections (e) through (g) provide safe-harbor language for the provider to use. Subsection (e) is designed for credit-counseling entities that receive payments from the creditors of its customers. Subsection (f) is designed for credit-counseling entities that do not receive payments from their customers' creditors. Subsection (g) is designed for debt-settlement entities. Use of the exact language in these subsections, contained in a box consisting of black lines, constitutes compliance with subsection (d). This is true even though the language in subsections (e)(2) and (f)(2) differs significantly from the language in subsection (d)(3). If the provider uses ~~other~~ language other than that prescribed in subsections (e)-(g), the disclosure is subject to review to determine if it adequately discloses the ~~required~~ information required by subsection (d). If the provider furnishes both credit-counseling and debt-settlement services, it may combine the disclosures into one form, but this section does not provide any safe harbor.

Section 18 is amended to read:

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 ~~a plan~~ 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 ~~a plan~~ 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, 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 ~~a plan~~ 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).*

Comment

* * *

3. To meet the objectives of the separate delivery contemplated by section 17, electronic delivery must satisfy certain requirements of form, such as appearing on a screen that contains no other information. ~~Although~~ The subsection uses the term "screen," which is synonymous with "window," "web page," "tab within a browser display," and perhaps other terms. The critical factor is that the record may not contain other information~~,~~; but it does not violate subsection (d) if the record is an electronic page on a website and the record reveals how the individual may exit the page.

* * *

Section 19 is amended to read:

SECTION 19. FORM AND CONTENTS OF AGREEMENT.

* * *

(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, 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.

* * *

Section 20 is amended to read:

SECTION 20. CANCELLATION OF AGREEMENT; WAIVER.

(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) An agreement must be accompanied by a form that contains in bold-face type, surrounded by bold 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 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 3-day period, we will refund all money you already have paid us.

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

I cancel this agreement,

_____
Print your name

_____
Signature

_____
Date

* * *

Section 22 is amended to read:

SECTION 22. TRUST ACCOUNT.

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

* * *

Section 23 is amended to read:

SECTION 23. FEES AND OTHER CHARGES.

(a) A provider may not impose directly or indirectly a fee or other charge on an individual or receive money from or on behalf of an individual for debt-management services except as permitted by this section.

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

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

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

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

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

(B) a monthly service fee, not to exceed $10 times the number of

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 ~~a plan~~ an agreement that contemplates that creditors will settle debts for less than the principal amount of the debt, 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 ~~a plan~~ an agreement contemplates that creditors will settle an individual's debts for less than the principal amount of 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 ~~plan~~ agreement, less~~,~~

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

~~(1)~~(A) the fee charged pursuant to subsection (d)(2)(A); and

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

(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].

Comment

* * *

9. Paragraph (4) permits a provider to impose a charge for education or counseling if an individual does not enter ~~a plan~~ an agreement. The maximum fee for this education or counseling is specified in the statute, but this paragraph permits the administrator to authorize a larger fee. The approval may, but need not, refer to a specific provider or a specified program of study, such as a course of instruction developed by a third party for use by others. The nature and extent of the educational services may warrant approval of a larger fee if they exceed the minimum standard contemplated by section 17(b)(1).

* * *

12. Subsection (c) prohibits a provider from charging for education or counseling if an individual enters ~~a plan~~ an agreement. To evade this limitation, a provider might attempt to divide the enrollment process into two stages: a period of education or counseling, for which it imposes a fee, as permitted by subsection (d)(4), followed by a plan or an agreement, in connection with which it would obey the prohibition in subsection (c) against a fee for education or counseling. Subsection (e) addresses subterfuges like this by requiring a refund of the fee for education or counseling if the individual assents to ~~a plan~~ an agreement before the expiration of 90 days after the completion or termination of the education or counseling. This bright-line test is the minimum restriction on evasion of the limit on charges. Courts and the administrator can and should deal with attempts to evade the prohibition of subsection (c). Moreover, the obligation to act in good faith and the prohibition against unfair, unconscionable, or deceptive acts or practices also constrain attempts to evade the restrictions of this section.

* * *

Section 26 is amended to read:

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.

Comment

1. Section 19(a)(6)(G) requires a provider to include in an agreement a provision disclosing that the provider may terminate the agreement for good cause. Subsection (a) gives an example of what constitutes good cause. There may be others.

2. Upon termination, whether by the provider or the individual, the provider must immediately return the individual's money. In the context of credit-counseling entities, if the provider is acting in conformity with the Act, there will be no money in the trust account. Subsection (b)(1) addresses the provider that has not yet distributed the money to creditors as required by section 22(c)(2). It also requires a debt-settlement entity in possession of an individual's money to return it to the individual. Paragraph (1) does not require refund of money properly held as payment of fees. Paragraph (2), on the other hand, requires a debt settlement entity to refund 65 percent of any portion of the set-up fee that has not already, in effect, been refunded as a credit against settlement fees for debts already settled. To determine the amount of the refund, the provider must calculate how much of the set-up fee has been credited against the settlement fee. The provider must pay the individual 65% of the remainder. For commentary on how to make this calculation, see ~~Official~~ Comment 11 to section 19.

Section 28 is amended to read:

SECTION 28. PROHIBITED ACTS AND PRACTICES.

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

(1) misappropriate or misapply money held in trust;

(2) 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) 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 ~~a plan~~ an agreement; or

(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;

(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 ~~that it is~~

(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.

* * *

Comment

* * *

7. The practice of many providers has been to compensate their employees on the basis of how many individuals they can enroll in plans. This provides an incentive to the employees to engage in deceptive and coercive sales pitches. Paragraph (10) seeks to curb the deception and coercion by barring this method of compensating employees. The Bankruptcy Code, 11 U.S.C. § 111(c)(2)(F), contains a similar prohibition for the credit-counseling entities within its purview. Courts and the administrator should be vigilant to attempts to evade the prohibition of this

paragraph. Nevertheless, it is permissible for providers to create incentives for their employees to identify individuals who will be able to perform an agreement completely. Thus it is not a violation of this subsection for a provider to use the number of successfully completed agreements as a criterion for compensation of its employees.

8. If ~~a plan contemplates~~ an agreementcontemplates settlement of a debt for less than the full principal amount of the debt, paragraph (11) prohibits a provider from paying, or directing an individual to pay, a creditor unless the individual receives formal acknowledgment from the creditor that the debt is satisfied. This ~~acknowledgement~~ acknowledgment may come in at least two forms. The creditor may assent to a settlement in a communication offering to settle the debt in exchange for specified performance by the individual, typically payment of a specified amount by a specified date. This communication often is called a settlement offer and may be sent to the individual or the provider. After the individual renders the specified performance, the creditor may send a communication stating that the debt is satisfied. This communication often is called a satisfaction letter. This paragraph requires transmission of the settlement offer to the individual in all cases. If the creditor sends a satisfaction letter to the provider, the obligation of good faith requires the provider to forward that to the individual as well. In the case of either a settlement offer or a satisfaction letter, the creditor's certification may be passed on by the provider or come directly from the creditor.

9. Paragraph (11) also prohibits a provider from misleading an individual into believing that a payment will settle a debt. To violate the paragraph, a misrepresentation does not have to be express. If a settlement contemplates that a creditor will be accepting installment payments, the provider must make it clear to the individual that the initial installment does not settle the debt.

10. Paragraph (12) applies not only to statements made specifically to an individual; it also applies to advertising. Subparagraphs (B) and (C) prohibit certain representations that sometimes are used to entice individuals to sign up for plans. They are prohibited here even when they are true because they too often are untrue.

11. Paragraph (14) applies to advertisements and other communications that a provider intends to reach potential customers. Not-for-profit status is a status under state law. An entity may qualify for that status without also being tax-exempt under federal law. For a provider to represent that it is a nonprofit or not-for-profit entity, it is not enough that the provider was organized under a statute authorizing not-for-profits. Paragraph (14) requires that the provider also must be properly operating as a not-for-profit. Nor does it suffice that the provider has been granted tax-exempt status under the Internal Revenue Code. If it is not operating in a manner consistent with the law under which it was formed, a representation that it is a nonprofit or tax-exempt entity violates this section. A provider that is unsure whether it is properly operating as a not-for-profit entity may avoid liability under this paragraph by not representing that it has tax-exempt or not-for-profit status in any of its communications that are designed to reach the individuals it seeks to serve.

* * *

Section 30 is amended to read:

SECTION 30. ADVERTISING. ~~A provider that~~

(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 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 32 is amended to read:

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 is amended to read:

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; or

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

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

* * *