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FOR APPROVAL

UNIFORM CONSUMER DEBT COUNSELING ACT

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ON UNIFORM STATE LAWS

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UNIFORM CONSUMER DEBT COUNSELING ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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UNIFORM CONSUMER DEBT COUNSELING ACT

Prefatory Note

Background of the Project

The consumer-credit-counseling industry originated in the early twentieth century in the form of debt adjusters (also known as debt poolers, debt consolidators, debt managers, or debt pro-raters). This first generation of credit counselors consisted of profit-seeking enterprises that communicated with a consumer's creditors seeking to persuade them to accept less than full payment in satisfaction of the consumer's obligations. If the creditors agreed, the debt adjuster would collect a monthly payment from the consumer and forward appropriate portions of it to each of the creditors. They often charged hefty fees, leaving little for distribution to the creditors. The instances of deceptive advertising and theft of clients' funds were numerous enough that, starting in the 1950s, legislatures in more than half the states outlawed the business (e.g., N.Y. Gen. Bus. Law §§ 455-457). Of the remaining states, approximately two thirds opted for a regulatory approach, requiring licenses, imposing requirements on how the businesses operate, and restricting troublesome practices (e.g., Mich. Comp. Laws Ann. §§ 451.451-.465 (repealed in 1976 and replaced by §§ 451.411-.437)).

Many states exempted not-for-profit organizations from these statutes, enabling non-profits to render counseling services free of regulation. This led to the growth, starting in the 1950s, of the second generation of credit counselors. The growth of these non-profits was fueled by the National Foundation for Consumer Credit (NFCC) (now renamed the National Foundation for Credit Counseling), which was created by retailers and banks that issued credit cards. These creditors supported the formation of credit counseling agencies as a means of helping consumers in financial difficulty gain control of their finances and pay their credit card debts. The objectives were full repayment of debt and the avoidance of bankruptcy.

The counseling agencies provided community education, met individually with consumers, helped them develop or improve budgeting skills, and, when appropriate, enrolled them in debt-management plans (DMP's). To establish a DMP, the agency negotiated with each of the consumer's unsecured creditors to obtain concessions from them, in the form of some combination of reduced interest rate, waiver of default or delinquency fees, and monthly payments in an amount less than the contractual minimum. Thereafter, the consumer made monthly payments to the agency and the agency disbursed a pro-rata amount to each of the participating creditors. The creditors supported the counseling agencies by returning to them a percentage—often 15%—of the payments they received. The NFCC called this contribution the creditor's "fair share." The agencies also sometimes received charitable contributions from other sources and imposed modest fees on the consumer. This second generation of counseling agencies still operates.

Consumer advocates generally acknowledged the educational and budgeting benefits that the counseling agencies provided, but were critical—or at least skeptical—of their overall usefulness. They perceived the agencies as debt collectors for the credit card industry and were critical of the limited range of advice the agencies provided. The last thing a card issuer wanted to see was a consumer filing a petition in bankruptcy. Formed and supported primarily by the credit-card industry, most counseling agencies never recommended bankruptcy, and many never even mentioned it as a possibility.

The late 1980s and 1990s saw a dramatic increase in credit card debt. Consumers' income rose, and card issuers relaxed their standards of creditworthiness. The increase in the amount of debt was accompanied by an increase in the amount of debt in default and an increased opportunity for credit-counseling agencies. Many new entities arose, unaffiliated with the NFCC. They formed competing trade associations, e.g., the Association of Independent Consumer Credit Counseling Agencies (AICCCA) and the American Association of Debt Management Organizations (AADMO)). These new agencies—the third generation—rely heavily on advertising and telemarketing, and many conduct their business with consumers entirely by telephone or over the Internet. Perhaps because of their aggressive marketing and innovative business methods, their share of the counseling market grew from approximately 20% in 1996 to approximately 80% in 2001. For the most part, their focus is on the creation of DMP's, not on counseling and education. Indeed, at many agencies counseling and education have fallen entirely by the wayside.

Since many states prohibit for-profit debt-management businesses, and since card issuers limit their fair-share payments to non-profit agencies, members of this third generation of agencies are organized as non-profit entities. Many of them, however, do not operate as charitable or educational institutions. They uncritically enroll all their customers in DMP's, and they charge fees much higher than the fees charged by the agencies affiliated with the NFCC. At the traditional level of the creditors' fair share contribution, and with the educational function stripped away, many agencies generate revenues much larger than needed to provide debt-management services. They disburse these excess revenues in the form of generous compensation to affiliated entities that provide back-office services. They also pay salaries for the principal executives that are out of line with the salaries paid by other kinds of non-profit entities in the community. (For a description of three different models for channeling funds to related entities, see Staff Report, Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling (Permanent Subcommittee on Investigations of the Senate Governmental Affairs Committee) (S. Rep. 109-55 April 2005), available at http://hsgac.senate.gov/index.cfm?).

Meanwhile, in the 1990s credit card issuers saw that their fair-share payments to counseling agencies had increased to the extent that those payments approximated the amounts they were paying for all their other collection activities combined. In addition, they discerned that some of the counseling agencies were accumulating large surpluses and were enrolling in DMP's consumers whom the creditors believed could pay their debts without the concessions the creditors had been giving. They responded by reducing the concessions they were willing to make to consumers and by reducing the amounts they were willing to pay the counseling agencies. Some card issuers have stopped supporting the agencies altogether, and on average the amount returned to the agencies has dropped from more than 12% to less than 8%. This decrease has adversely affected the ability of counseling agencies to provide individual counseling and community education. Some major card issuers have abandoned the fair-share approach altogether and are developing proprietary models for compensating counseling agencies depending on such factors as the profiles of the debtors being served by an agency, the agency's record with the creditor, and the agency's advertising and business practices.

The objective of the counseling agencies discussed to this point is to enable consumers to repay their debts in full. There is, however, another segment of the industry—the fourth generation—whose members do not have this objective at all. These entities are known as debt-settlement companies, and they formed trade associations of their own (now merged into the United States Organizations for Bankruptcy Alternatives (USOBA)). Instead of helping the consumer pay his or her creditors in full, they attempt to persuade creditors to settle for less than the full amount of the consumer's debt, writing off the rest. Thus they represent a revival of the first generation of counseling agencies. Unlike their forebears, however, they do not negotiate with the creditors in advance of a consumer's default. Instead, they encourage the consumer to default on the debts and to make monthly payments to them or to a savings account of the consumer. When those payments reach a target percentage of the consumer's debt to one of his or her creditors, the agency submits an offer to that creditor (on the consumer's behalf) to settle the debt for the amount in hand. During the period when the funds are accumulating, the creditors receive nothing. As a result the creditors impose additional finance charges and delinquency fees, and they may undertake collection activity, including litigation.

Reports of abuses by credit-counseling agencies and debt-settlement companies and injury to consumers have appeared with increasing frequency in numerous media outlets. Reports of two prominent consumer organizations (Consumer Federation of America and the National Consumer Law Center) have documented the situation. (See CFA & NCLC, Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants (2003); NCLC, Credit Counseling in Crisis Update: Poor Compliance and Weak Enforcement Undermine Laws Governing Credit Counseling Agencies (2004); NCLC, An Investigation of Debt Settlement Companies: An Unsettling Business for Consumers (2005) (all available at http://www.nclc.org). The problems include

- deception concerning the nature of, the need for, the benefits of, and the cost of debt-management plans to help consumers deal with their debt;
- excessive cost to consumers; and
- self-dealing and other conduct by agencies to evade limitations in the Internal Revenue Code.

In January 2003 the Executive Committee of the Conference authorized the appointment of a drafting committee to develop a uniform law that would address the problems that have developed and enable the states to take a common approach to regulation of the counseling industry. A uniform approach is particularly important because the great majority of agencies operates in multiple states and would otherwise be subject to multiple and sometimes conflicting requirements.

History of the Draft

When it first authorized this project, the Executive Committee focused on the segment of the industry that counsels consumers and forms debt-management plans to assist them pay their debts in full. It did not contemplate entities engaged in debt settlement. Before the first meeting of the Drafting Committee, the Chair and the Reporter asked the Committee on Scope and Program to revise the Committee's charter to "permit the committee to determine whether regulation of the consumer credit counseling industry should encompass firms engaged in . . . debt settlement activity." The Committee on Scope and Program concurred. The Drafting Committee met twice in 2003-04 and at the Annual Meeting in 2004 recommended that the Committee of the Whole pass a sense-of-the-house resolution that the Act should encompass debt settlement. The Committee of the Whole passed that resolution. It also decided that the Drafting Committee should draft the Act in such a way as to permit the states to choose whether to permit for-profit entities to provide debt-management services. The Drafting Committee has met three times in 2004-05 and presents this Annual Meeting Draft, which implements the decisions of the Committee of the Whole last year.

The definition of "debt-management services" encompasses both credit counseling and debt settlement. With very few exceptions, the provisions of the Act apply equally to both types of debt-management services and the entities that provide them. As drafted, the Act requires providers of either kind of debt-management services to be tax-exempt entities under the Internal Revenue Code. But there are Legislative Notes at several places directing the states to an Appendix, which contains detailed instructions on how to modify the text to enable for-profit entities to provide credit-counseling services, debt-settlement services, or both.

Bankruptcy Code Amendments

Shortly before the last meeting of the Drafting Committee, Congress enacted revisions to the Bankruptcy Code. These revisions do not eliminate the need for this Act. On the contrary, they are likely to increase the demand for the services of entities that provide debt-management services.

Most publicized of the revisions is a bar to the availability of Chapter 7 liquidation proceedings to debtors who have the ability to make a certain level of payments to creditors out of current income. Debtors not eligible for Chapter 7 will be permitted to file only under Chapter 13, which entails payments to creditors out of current income for up to five years. The impact of this change on the demand for credit-counseling and debt-settlement services is not clear, but other changes in the Code are certain to increase the demand for credit-counseling services.

When the amendments become effective in October, section 109(h) of the Code will require a debtor who wishes to file under Chapter 7 to provide certification that he or she has received from an approved nonprofit credit-counseling agency assistance in preparing a budget analysis and information about credit counseling. In addition, section 727(a)(11) will require the debtor to complete an instructional course concerning personal financial management. Unlike the pre-filing certification required by section 109, there is no explicit requirement that the instructional course be provided by a nonprofit entity. These two new provisions are likely to increase the demand for services from entities regulated by this Act. To whatever extent the Bankruptcy Code may regulate the educational activities of persons regulated by this Act, its regulation of their other conduct within the scope of this Act is minimal. Since the revised Bankruptcy Code will induce more consumers to seek the services of those who provide debt-management services, the revisions increase the urgency of the need for states to adopt a uniform law governing debt-management services.

Description of the Act

Unlike many of the Conference's acts, this Act has its genesis in the existence of businesses that are widely perceived to be taking advantage of highly vulnerable consumers in serious financial distress. Hence, it is much more regulatory than most of the Conference's other acts. The whole purpose of the project has been to rein in the excesses while permitting the industry to continue providing services that benefit consumers. The Drafting Committee has benefited from the participation of credit-counseling agencies (and their trade associations), debt-settlement companies (and their trade association), representatives of consumer organizations, and attorneys general. The Act represents the Drafting Committee's judgment of how best to accommodate the conflicting views of these interested entities. As may be expected, it leaves all of them satisfied with some decisions and dissatisfied with others.

The Act applies to "providers" of "debt-management services" that enter "agreements" with individuals for the purpose of creating "plans." The definitions of the quoted terms are critical and appear in section 2, along with the definitions of several other terms. The Act speaks of "individuals," as opposed to "consumers," so that it applies to farmers and other individuals who are dealing with personal debt incurred in connection with their businesses.

To provide debt-management services to a resident of the enacting state, a provider must obtain a certificate of registration from the administrator of the Act. To obtain a certificate, 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 requirements concerning registration appear in sections 4-14 and 22.

The Act establishes requirements for providers to meet in connection with their interaction with the individuals they serve. Section 17 prescribes steps to be taken before entering an agreement with an individual. Sections 19-24 and 28 govern the content of an agreement, including limitations on the fees that may be charged (§§ 23-24). Other provisions deal with the performance and termination of agreements (§§ 25, 26, 28) and miscellaneous other matters.

The Act provides for enforcement both by a public authority and by private individuals. Sections 32-34 provide for public enforcement, including a rule-making power on the part of the administrator. Section 35 provides for private enforcement, including recovery of minimum, actual, and, in appropriate cases, punitive damages.

UNIFORM CONSUMER DEBT COUNSELING ACT

Reporter's Note: *The Drafting Committee has asked the Executive Committee to approve a change in the title of this Act. If approved, the title will be Uniform Debt-Management Services Act.*

Legislative Note: *As drafted, this Act requires persons that provide debt-settlement services or credit-counseling services to be nonprofit entities. The state may, however, wish to permit for-profit entities to engage in either or both of those activities. If the state decides to permit for-profit entities to provide either or both of those forms of debt-management services, the state should enact the provisions that appear in the Appendix to this Act. Those provisions modify sections 5(b)(6), 7, and 9(c)(2).*

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

Preliminary Comment

To reflect the decision to include debt-settlement companies within the scope of the Act, this section adopts a new name for the Act.

As the title indicates, the Act regulates debt-management services and the persons that provide those services. The Act does not regulate creditors, either in their relationship with their debtors or in their relationship with the entities that provide debt-management services.

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, second cousin, niece, nephew, grand-niece, or grand-nephew, whether related by the whole or the half blood, adoption, or step relationship, 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 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 subsubparagraph (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 subsubparagraph (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 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) "Certified counselor" means an individual certified by:

(A) an independent, nationally recognized certifying organization that authenticates the competence of individuals providing education and assistance to other individuals in connection with debt-management services; or

(B) a training program or certifying organization approved by the administrator.

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

(8) "Day" means calendar day.

(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.

(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-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 or its designee that is:

(A) established in an insured bank;

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

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

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

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 or similar statute) or the entity charged with regulation of consumer credit or financial institutions. It may be necessary or desirable to amend that entity's organic statute to refer specifically to this Act.*

Preliminary Comment

Paragraph (2) (affiliate): The term "affiliate" is used at six sections in the Act:

- as a basis for exempting from the Act certain entities related to banks (section 3(c)(3));
- as a disclosure item in the application for registration (section 6(16) and (18));
- as a tool to ensure the independence of a provider's board of directors (section 9(d));
- as a limit on solicitation of payment on behalf of an individual (section 24);
- as a limit on a provider's ability to engage in self-dealing (section 28(e); and
- as a ground for suspension or revocation of registration if persons related to a provider refuse to cooperate with the administrator's investigation of the provider (section 34(b)(4)).

The Act does not impose obligations on affiliates *qua* affiliates, nor does any provision impose liability on them.

The definition in paragraph (2)(A) is drawn from UCC § 9-102(a), but it includes more relatives in the definition. The definition in Article 9 is limited to relatives who live in the individual's home. This excludes such close relatives as nieces and first cousins unless they live in the individual's home. The language in paragraph (2)(A)(iv) includes those relatives regardless of where they live.

The definition in paragraph (2)(B) also is drawn from UCC § 9-102(a), but adds subparagraph (iv), which declares that a person that receives more than $25,000 from a provider is an affiliate of that provider. The cross reference to section 32(f) is to the provision directing the administrator to adjust dollar amounts. Subparagraph (iv) also stipulates that an owner or director of the recipient is an affiliate. Since the principal purposes of defining "affiliate" are to require independent boards of directors and prevent self-dealing, the level of ownership necessary to constitute "affiliate" is set at the relatively low figures of 10 percent and $25,000. Under subparagraph (iv) a person is not an affiliate until the person of which it is an owner, employee, or director has received $25,001 in the relevant period.

Paragraph (3) (agreement): This definition does not incorporate any requirement of "written" or "record." An oral agreement is within this definition. Requirements of form appear in section 19.

Paragraph (4) (bank): The definition encompasses banks, savings banks, credit unions, trust companies, and others.

Paragraph (5) (business address): Sections 17(d), 18(d), and 19(a) require providers to disclose their business addresses. The definition makes it clear that this means the place where the provider conducts business and not a post-office box or private-service mail drop.

Paragraph (7) (concessions): The word "concessions" appears in sections 2(9), 17(c), and 19(a). The "debt" referred to in the definition of "concessions" typically is a contractual obligation, but it may be a judgment or other obligation of the individual. The "more favorable" terms include such things as a reduction in finance charges or interest; a reduction or waiver of charges for late payment, default, or delinquency; and a reduction in the principal amount of the debt.

Paragraph (9) (debt-management services): The definition encompasses the activity of entities that act as an intermediary between an individual and the individual's creditors, for the purpose of changing the terms of the original contract between the individual and those creditors. There is no requirement that the individual's money flow through the provider. The definition includes the services of credit-counseling agencies and debt-settlement companies even if they do not have control over the individual's money, as when it is in an account managed by the individual or a third party.

The definition encompasses the services of persons that provide one-time assistance to an individual who has accumulated money and wants help negotiating with one or more of his or her creditors. This assistance is within the definition, and if the person provides this assistance to an individual who it has reason to know resides in this state, the person must, unless exempt under section 3, register and comply with the Act. Note that the assistance need not entail use of a "plan," as defined in paragraph (13).

The definition includes the services of credit-counseling agencies even if the concessions offered by creditors are not subject to negotiation. It does not include servies that consist solely of counseling or education concerning the management of personal finance. Nor does it include the activity of a creditor that compromises a claim with its debtor, because the creditor is not operating as an intermediary.

A creditor may have an agent or other intermediary. Examples include independent collection agencies and corporate subsidiaries whose mission is the collection of debts. For the purposes of the definition of debt-management services, a person in this category is a representative of the creditor. As such, a person who acts as an intermediary between this person and an individual for the purpose of obtaining concessions is providing debt-management services. Similarly, if a creditor transfers a debt to a debt collection agency or other person, the transferee becomes a creditor, and a person acting as an intermediary between the transferee of the debt and the individual for the purpose of obtaining concessions is providing debt-management services.

Paragraph (12) (person): This definition conforms to the Conference's standard definition. The definition encompasses for-profit, not-for-profit, and tax-exempt entities. A "public corporation" is a corporation that is authorized to exercise governmental functions. It is not a "publicly traded" corporation.

Paragraph (13) (plan): The definition of "plan" encompasses both what credit-counseling agencies typically call "debt-management plans" and what debt-settlement companies typically call "programs." This enables the operative provisions of the Act to use the term "plan" to apply to both types of providers. To be a plan, the program or strategy need not encompass all the debts of the individual. E.g., debt-management plans by traditional credit-counseling agencies have not typically included secured debt or debts owed utilities. No provision of this Act requires that a provider deal with all the creditors of an individual to whom it provides debt-management services.

The definition requires a schedule of payments. As used here, "payments" includes the deposit or transfer of money into the individual's checking or savings account, as well as a transfer to the provider (or the provider's designee) for deposit into a trust account. The definition requires that the payments be used to pay debts of the individual. This encompasses (a) full payment of some of the individual's debts; (b) full payment of all of the individual's debts; (c) partial payment of some of the individual's debts; and (d) partial payment of all of the individual's debts. Each of these arrangements suffices to bring the program or strategy within the definition of "plan."

Paragraph (14) (principal amount of the debt): This term is used only in connection with debt settlement. Treatment of accruing charges, such as interest or default fees, may be different under various statutes, e.g., usury, Truth-in-Lending, etc. For purposes of this Act, the definition of principal is a snapshot of the debt at the time an individual assents to an agreement for debt-management services. Finance charges and other fees that accrue after formation of the agreement retain their character as finance charges, etc., even if the creditor adds them to the principal amount of debt and even if the creditor thereafter calculates finance charges and fees on the increased amount.

Paragraph (15) (provider): This definition makes no reference to the location of the person that provides debt-management services. This means that the location of that person is irrelevant to the definition. Regardless of a person's location, if the person provides debt-management services, it is a provider under this Act. Section 3, however, exempts from the Act providers that do not enter agreements with individuals who reside in this state.

The intention is for the Act to have as expansive a reach as is constitutionally permissible. Common criteria for determining whether there is a sufficient jurisdictional nexus for an Internet-based business include the business' targeting a specific jurisdiction and the presence in the jurisdiction of the business' customer. Statutes regulating debt-management services often apply to non-resident providers that do business with residents of the state. E.g., Connecticut (Ct. Gen. Stat. § 36a-656(a)); Illinois (205 Ill. Comp. Stat. Ann. § 665/2); Maryland (Md. Fin. Inst. Code Ann. § 12-924(D)); Michigan (Mich. Comp. Laws § 451.412(j)); New York (N.Y. Gen. Bus. Law § 455(1)); and Virginia (Va. Code Ann. § 6.1-363.3)). In addition, the United States District Court for the District of Kansas has upheld the constitutionality of applying the Kansas statute to a Massachusetts company. Cambridge Credit Counseling Corp. v. Foulston, 303 F. Supp. 2d 1188 (D. Kan. 2003), appeal dismissed on motion of appellant and judgment vacated, No. 03-3317, 10th Cir., Oct. 19, 2004.

The definition includes persons that offer to provide debt-management services, as well as those that actually provide the services. Whether a person that merely offers to provide debt-management services must comply with a particular provision of the Act depends on the substance of that other provision. If a requirement of the Act is put in terms of "agreement" or "plan," a person that merely advertises or offers to provide debt-management services need not comply. On the other hand, unless exempt under section 3, a person that offers to provide debt-management services must comply with certain other provisions, e.g., section 28(a)(16) (prohibiting deceptive acts and practices). If a person forms an agreement with an individual and then transfers the account to another person, both those persons are within the definition of "provider."

The definition of "debt-management services" speaks of "acting as an intermediary between an individual and one or more creditors." A creditor acting on its own behalf is not acting as an intermediary and therefore is not a "provider." The definition also speaks of acting as an intermediary "for the stated purpose of obtaining concessions." This excludes from the definition of "provider" an entity that collects debts owed to its affiliate if the stated purpose is collection of the debt and not obtaining concessions from the creditor on behalf of the individual.

Paragraph (16) (record): This definition appears in UCC Revised Article 1 (§1-201(b)(31)).

Paragraph (17) (settlement fee): Use of the expression "a charge imposed on or paid by" is designed to be expansive. It does not matter what the provider calls the charge. Nor does it matter whether payment of the charge is described as voluntary or whether the payment occurs by debit to a demand-deposit account of the individual, debit to a trust account held by an agent of the provider, or otherwise. The definition encompasses any transfer of money from or on behalf of the individual.

Paragraph (18) (sign): This is the Conference's current definition.

SECTION 3. EXEMPT AGREEMENTS AND PERSONS.

(a) This [act] does not apply to an agreement with an individual who a 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 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.

(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 a court order, or an 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 subject to regulation by a federal or state banking regulatory authority;

(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;

(5) an attorney licensed by this state to practice law, if the provision of debt-management services is incidental to the attorney's practice; [or]

(6) an accountant licensed by this state, if the provision of debt-management services is incidental to the accountant's practice[; or

(7) a person licensed under [Insert the citation to any statute requiring money transmitters to be licensed] as a [money transmitter]].

Legislative Note: *In paragraph (7), conform the parenthetical to the terminology of the statute that requires money transmitters to be licensed and delete the second set of brackets. If there is no such statute, the brackets in paragraph (5) and the bracketed language in paragraphs (6) and (7) should be omitted.*

If the state's system of credentialing accountants and money transmitters does not entail licensing, then either (1) delete paragraphs (6) and (7), or (2) change "licensed" to conform to the applicable system of credentialing.

Preliminary Comment

Under section 2(15) a person is a provider even if the person has no physical presence in this state. If not exempted by this section, all persons within the definition of "provider" must comply with the Act. The objective of subsections (a) and (b)(1) is to limit applicability of the Act to providers that enter agreements with persons who they should reasonably know to reside in this state. Section 19(a)(3) requires the agreement between a provider and an individual to state the individual's address. If the individual supplies an address outside this state, the provider may have no reason to know that the individual is residing in this state at the time of the agreement. If a provider operates through an agent or independent contractor, the provider may have reason to know if the agent or independent contractor has reason to know. This is true even if the agent or independent contractor is itself within the definition of provider. In addition, the provider may be liable under section 31 for the conduct of the agent or independent contractor.

The Act applies to an agreement with an individual who is residing in this state on a non-permanent basis, such as a member of the armed services, an individual occupying a vacation home in this state, a student, or an individual who has lost his or her home and temporarily resides with a relative in this state. It does not apply to an agreement with an individual who resides in another state but comes to this state to meet with a provider. Nor does it apply to an agreement with an individual who moves to this state after formation of an agreement. If an agreement is formed with an individual who resides in another state, the continuation of services to that individual after he or she moves into this state is not an agreement within the meaning of the phrase in subsection (b)(1), "at the time the provider agrees to provide the services." Rather, it is the continuing performance of a commitment made by the provider at the outset of the relationship.

Subsection (b): Under paragraph (1) if the provider does not have reason to know that an individual to whom it agrees to provide services resides in this state, the provider is exempt from complying with this Act. The paragraph speaks of "debt-management, education, or counseling services" because section 23(d)(3) regulates the fees of a provider that furnishes an individual with education or counseling but not debt-management services.

The definition of "provider" encompasses persons that provide, agree to provide, or offer to provide debt-management services. The exemption in this paragraph applies only to providers that provide or agree to provide the specified services. Thus a person that offers to provide debt-management services is not exempt under this paragraph, even if it does not enter agreements with or provide debt-management services to individuals who reside in this state. But a distinction exists between an offer and an advertisement. A provider whose ads reach, or whose website is accessible to, individuals who reside in this state but who does not enter agreements with or provide services to those individuals is not offering to provide debt-management services to residents of this state.

Paragraph (2) exempts those persons, e.g., social workers, who may provide debt-management services at no cost as part of their overall services to clients. It also exempts individuals who assist family members or friends if they do not receive compensation for helping their relatives or friends to manage their money.

Subsection (c): Most of the exempt entities are extensively regulated by the state or federal government.

The exemption for banks in paragraphs (2) and (3) extends to subsidiaries of banks, but only if the subsidiary is subject to regulation by a federal or state banking regulatory authority.

Paragraph (4) exempts entities that provide bill-paying services if negotiation of the terms of payment is incidental to the services generally provided by the entity. Examples of entities that may be exempt under this paragraph include mortgage loan servicers, athletes' agents, artists' agents, financial planners, executors of estates, and personal representatives of decedents. These entities are exempt so long as negotiation of the amount to be paid individual creditors is incidental to their overall services.

A debate arose at the 2004 Annual Meeting concerning whether attorneys should be exempt. Attorneys are governed by a code of conduct and an elaborate disciplinary structure. On the other hand, this structure is not always effective to protect clients. A law firm operating as a provider in New York and Vermont inflicted substantial injury on indebted consumers. As originally enacted, the federal Fair Debt Collection Practices Act contained an exemption for lawyers. When it became clear that some attorneys were abusing this exemption, Congress amended the Act to remove the exemption altogether. After considering the debate at the Annual Meeting, the sentiment of the Committee at its meeting in October 2004 was to limit the exemption to attorneys for whom debt-management services are incidental to the attorneys' overall practice. The Committee reconsidered this position at the January and April 2005 meetings and decided to adhere to it. The Committee also decided that the exemption should be limited to attorneys and accountants who are licensed in this state.

The exemption for attorneys, accountants, and bill-paying services applies only if debt-management services are "incidental to" the regular course of the person's business or profession. If the person is held out as providing debt-management services, then debt-management services are not incidental. Beyond that, the test is flexible, looking to such matters as the amount of time devoted to providing debt-management services and the amount and percentage of revenues derived from debt-management services. The more isolated the provision of those services, the more likely it is that they are incidental. The more frequent the provision of those services, the more likely it is that they are not incidental. The administrator by rule may establish bright-line standards for determining "incidental to."

The phrase "incidental to" should be given an expansive interpretation, especially in the case of attorneys. In the course of providing legal services in many contexts, an attorney may be engaged in negotiating the amount of a client's liability. Even if this is done on a regular basis, it may still be incidental to the attorney's practice or incidental to the practice of the attorney's law firm. On the other hand, if an attorney or firm solicits clients for the purpose of providing debt-management services, those services are not incidental to the lawyer's or firm's practice.

SECTION 4. REGISTRATION 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], the registration requirement of subsection (a) does not apply to the employees or agents of the provider.

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

Preliminary Comment

Throughout, the Act uses the term "individual" rather than "consumer." The purpose of this usage is to enlarge the usual meaning of that term (viz., one who acquires goods or services for personal, family, or household purposes) to encompass individuals who have incurred personal debt for business purposes or in connection with farming operations.

Subsection (a) requires providers to register under this Act. This requirement applies to providers with no physical presence in this state, if they serve individuals who reside in this state. For elaboration on the "reasonably should know" standard, see the Comment to section 3.

Subsection (b): Employees and agents of a registered provider need not register. The word "employees" encompasses the entity's officers. Except as it may be changed by this Act, the common law of master-servant or principal-agent continues to apply, and a provider is responsible for the acts of its employees and agents.

Although employees and agents of a provider need not register, to the extent those persons are themselves within the definition of "provider," they must comply with all other requirements and prohibitions that apply to providers throughout the Act. In addition, they may be liable under sections 33(a)(2) and 35(c) if they have caused a provider to violate the Act.

Subsection (c): The objective of this subsection is to enable individuals and creditors to ascertain whether a given provider is registered. Posting on the Internet website of the administrator (or other appropriate official site) is the preferred method, because the information is instantaneously and continuously available. To "maintain" the list, the administrator must update it regularly.

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 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 against the risks of dishonesty, fraud, theft, and other or misconduct on the part of the applicant or a director, employee, or agent of the applicant, issued by an insurance company authorized to do business in this state and rated at least A by a nationally recognized rating organization, with no deductible, payable to the applicant, the individuals who have agreements with the applicant, and this state, as their interests may appear, and not subject to cancellation by the applicant without the approval of 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) evidence of tax-exempt status applicable to the applicant under the Internal Revenue Code, 26 U.S.C. Section 1 et seq.[, as amended.]].

Legislative Notes: *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.

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).

If the state wishes to permit for-profit entities to provide debt-management services, see the Appendix for modifications to this section.

Preliminary Comment

In the 2004 Annual Meeting draft, this section was extremely long. Its contents (as revised) now appear in sections 5-8.

Subsection (a): "Form" encompasses format, and the administrator by rule may permit all or part of the application to be submitted electronically.

Subsection (b): Paragraphs (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.

Paragraph (4) requires insurance in the amount of $250,000 against the risk of employee misconduct, including theft of funds from the trust account. As used in this Act, "employee" encompasses officers of a provider. Ordinarily, the beneficiary of such insurance 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 the administrator. The insurance required by this paragraph overlaps the bond required by section 13, but the bond covers more risks, viz., violation of any provision of the Act.

The purpose of paragraph (5) is to facilitate 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. APPLICATION FOR REGISTRATION: REQUIRED INFORMATION. An application for registration must be signed under oath and include:

(1) the applicant's name, principal business address and telephone number, 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 more than 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, 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, nationally recognized accrediting organization or an 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;

(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 copies 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 current form of agreement that the applicant will use with individuals who reside in this state;

(13) the current schedule or schedules 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 employee or agent of the applicant who is authorized to have access to the trust account required by Section 22 and every officer of the applicant;

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

(16) a description of any ownership interest equal to or greater than 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 compensation of the applicant's five most highly compensated employees for each of the three years immediately preceding the application; and

(18) the identity of each director who is an affiliate, as defined in Section 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 states in which the constitution does not permit the phrase, "as amended," when federal statutes are incorporated into state law, the phrase in paragraph 19 should be deleted.*

Preliminary Comment

Other than the applicant's principal business address, paragraph (1) requires disclosure only of business addresses in this state. It is not necessary for the applicant to list business addresses outside this state.

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.

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.

Paragraph (5) (identification of states 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 states.

Paragraph (6) requires disclosure of material judicial and administrative proceedings in any jurisdiction against the officers, directors, owners (whether or not they are authorized to access the trust account containing customers' funds), and against any other persons who may be authorized to access the trust account. 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.

Paragraph (7) is consistent with many existing statutes, which require an applicant to supply audited financial statements.

Paragraph (8): The requirement that providers be accredited reinforces regulation by the administrator and subjects providers to periodic review to ensure that they meet the standards of the accrediting agency.

Paragraph (9): To obtain registration, a provider must employ counselors who are certified within 12 months of their initial employment. This requirement applies only to employees who act as counselors and educators. It does not apply to such other employees as customer service representatives. Section 17 prohibits a plan unless a certified counselor has done specified things. The reason for requiring an applicant to produce evidence that its counselors are certified is to assure the administrator that the provider will be able to comply with section 17.

Paragraph (10): As used in this paragraph, "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.

Paragraph (12): An agency, whether located in this state or elsewhere, need supply only the documents that it will use with residents of this state. 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.

Paragraph (13): As with paragraph (12), an applicant, even if located in this state, need supply only the schedules of fees and charges for residents of this state. 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 agency is gouging individuals and 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.

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 of any such modification.

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 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 an applicant to obtain a criminal-records check specifically for the application for registration in this state. Therefore, if an applicant has obtained a criminal-records check in connection with obtaining permission to do business in another state, if 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.

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."

Paragraph (19): The administrator may 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).

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).

Legislative Note: *If the state wishes to permit for-profit entities to provide debt-management services, see the Appendix for modifications to this section.*

Preliminary Comment

The cross-referenced sections require evidence of insurance against employee misconduct; evidence of tax-exempt status; and disclosure of the name of the applicant, the addresses at which it operates, enforcement actions against the applicant in another state, and the applicant's standard forms and fee schedules. This section requires prompt notification of any change in this information, and since it applies to the "applicant or registered provider," the requirement of notification applies both before and after the administrator has issued a certificate of registration. Notification of change in other required information is governed by section 11(b)(5) (Renewal of Registration), which requires notification at the time of renewal of registration.

SECTION 8. APPLICATION FOR REGISTRATION: PUBLIC INFORMATION.

Except for the information required by Sections 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.

Preliminary Comment

This section preserves the confidentiality of home addresses, financial statements, salaries of the highest-paid employees, and the report on the criminal-records check. While this section prohibits the administrator from disclosing the specified information, it has no effect on the use of judicial process in connection with litigation to enforce the Act.

SECTION 9. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL.

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

(b) 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 ever 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 ever 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 the belief that the business will be operated in compliance with this [act].

(c) The administrator shall deny registration if:

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

(2) an applicant's board of directors is not independent of the applicant's employees and agents.

(d) Subject to Section 32(f), a board of directors is not independent for purposes of subsection (c) 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 receives or 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 for-profit entities to provide debt-management* *services, see the Appendix for modifications to this section.*

Preliminary Comment

Subsection (b): Some conduct justifies a lifetime ban from the debt-management-services industry. Examples include some of the conduct described in paragraphs (2) and (3). Other conduct can be readily corrected, e.g., paragraph (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. Paragraph (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.

Because providers may have hundreds of employees, most of whom are not in control of the provider, paragraphs (2) and (3) do not include employees in the list of persons whose conduct justifies the denial of registration. Conversely, subsections (b)(4) and (c)(2) do 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.

Subsection (c): 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.

Subsection (d): Since the definition of “affiliate” includes directors (section 2(2)(B)(iii)), paragraph (1) omits this subparagraph of the definition of affiliates for purposes of determining the independence of the board. Paragraph (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 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(20) 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 Section 34, a registration as a provider is valid for one year.

Preliminary Comment

Subsection (a) requires the administrator to act on an application in an expeditious manner. If the administrator needs additional information, the administrator may extend the period, but only for a limited time.

Subsection (b): If the administrator fails to act on an application within the specified time, the applicant may appeal to the courts.

Subsection (c): The cross reference is to the section that authorizes the administrator to suspend or revoke a provider's registration.

SECTION 11. RENEWAL OF REGISTRATION.

(a) A provider shall renew its registration every year.

(b) An application for renewal of registration as a provider must be in a form prescribed by the administrator 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) be signed under oath;

(4) 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;

(5) disclose any changes in the information contained in the applicant's application for registration or its immediately previous application for renewal, as applicable;

(6) supply evidence of insurance against risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant, 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, issued by an insurance company rated at least A by a nationally recognized rating organization, with no deductible, payable to the applicant, the individuals who have agreements with the applicant, and this state, as their interests may appear, and not subject to cancellation by the applicant without the approval of the administrator;

(7) disclose the total amount of money received by it or its designees 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;

(8) disclose, to the best of the applicant's knowledge, the total amount of money accumulated pursuant to plans during the preceding 12 months by or on behalf of

individuals who reside in this state and with whom it has agreements; and

(9) 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 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. Thereafter, 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 them to another registered provider or returns their money that is under its control.

Preliminary Comment

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

The cross-referenced provisions in paragraph (4) require proof of accreditation and counselor certification.

Paragraph (6) contains the same requirements that section 5(b)(4) does for initial registration, except that upon renewal the amount of the insurance is pegged to the highest balance in the trust account during the six months preceding the application for renewal.

Paragraphs (7) and (8) require disclosure of amounts paid or accumulated by individuals with whom the applicant has agreements. Paragraph (7) refers to providers and their agents that receive the individual's money. Paragraph (8) applies to providers that do not take possession of those funds. Some providers may require the individual to provide periodic copies of bank statements. Others may not and therefore may not know the amount accumulated by all of their customers. Paragraph (7) requires both types of providers to disclose the amount of money distributed to creditors.

Paragraph (9) 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.

Subsection (c): 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.

Subsection (d): The grounds for denial of an application to renew registration appear in section 34. If a provider files a timely application, the registration remains effective until the administrator denies it. The denial of an application for renewal triggers a right of appeal under subsection (e).

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 compels the provider to continue providing services to existing customers until the administrator authorizes it to cease.

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 in lieu of an application in the form prescribed by Sections 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; and

(2) the applicant, under oath, 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.

Preliminary Comment

This section provides for reciprocal use of applications in states that have adopted this Act. It simplifies registration in states that have substantially similar laws, thereby easing the burden placed on providers that operate in multiple states. This benefit is available, however, only if the law of the other state is substantially similar to this Act. It may be that, as a practical matter, a provider can comfortably rely on this section only if the other state has also adopted this Act. The administrator by rule may designate other states whose application requirements meet the standard "substantially similar to or more comprehensive than" the requirements of this Act. Some states may use a system of licensure rather than registration. This section permits use of a license and application for license.

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 a 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.

(b) Subject to Section 32(f), a surety bond filed pursuant to subsection (a) must:

(1) be in the amount of $50,000 or an 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 that is authorized to do business in this state and rated at least A by a nationally recognized rating organization; and

(3) be conditioned upon noncompliance of the provider or its agents 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)(2), 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) if a final order or judgment is issued under Section 33(a), to the costs recoverable under Section 32(b)(1);

(2) to satisfaction of an order or judgment under Sections 33(a)(2), (4), or (5) or (d);

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

(4) to claims of individuals established to the satisfaction of the administrator, pro rata.

Preliminary Comment

Subsection (a): The requirement of a bond applies to all providers that section 4 requires to be registered. This includes those that are not required to establish trust accounts. A provider's employee who serves as an intermediary between an individual and the individual's creditors, and therefore is a "provider," need not provide a bond, however, because section 4(b) exempts the employee from the registration requirement.

Paragraph (1): The bond is a source of payment of damages for a provider's failure to comply with this Act. It is conceivable that the administrator or an individual would not commence litigation until after a provider ceases providing services in this state. This subsection preserves the availability of the bond for two years after the year in which the provider's registration ends. Legislation in some states contains comparable provisions. E.g., 2004 Kan.

Sess. Laws 22 (§4(c))(2 years after the end of registration); Md. Fin. Inst. Code Ann. § 12-914(b)(3)(2 years after the provider ceases to be licensed). In others, it either requires the bond to be continuously in force, run concurrently with the period of registration, or does not address the duration of the bond.

Paragraph (2): The bond runs in favor of the state for the benefit of the state and for the benefit of the customers of the provider. Thus, it is available to compensate the administrator for its enforcement costs. The bond also runs directly in favor of customers who have a cause of action for a provider's noncompliance with the Act.

Subsection (b): Paragraph (1) sets the amount of the bond at $50,000, but gives the administrator the power to adjust the amount for a particular provider.

Paragraph (3) requires that the bond be conditioned upon noncompliance with the Act. Nothing is payable until the administrator or an individual obtains a judicial determination that the provider has failed to comply (or the administrator assesses costs under section 32(b)(1). In a typical case the surety would be joined as a party defendant.

Subsection (d): Section 32(b)(1) empowers the administrator to charge a provider for the costs of an investigation of the provider. Section 33 empowers the administrator to seek restitution for injured individuals and recover its costs of an enforcement action. Under subsection (d) the bond or other security required by this section is a source for payment of this restitution. Section 35 authorizes private rights of action. The bond or other security is a source of payment of actual damages, damages for overcharges, the $5,000 minimum damages, and costs and attorney's fees. It is not available to satisfy civil penalties under section 33 or punitive damages under section 35.

Subsection (e): This subsection sets out the priority of claims against the bond. It does not necessarily set out a temporal order of payment. That is, if it is clear that the bond is sufficient in amount to satisfy the claims in paragraphs (1)-(3), the administrator should distribute bond proceeds to individuals with final judgments even though the claim of the administrator under paragraph (1) or (2) is not yet final. To facilitate administration of this claims process, the administrator may set a deadline for individuals to submit the claims described in paragraph (4).

Section 35(h) requires the administrator to assist an individual in enforcing a judgment against the bond.

SECTION 14. BOND REQUIRED: SUBSTITUTE.

(a) In lieu of the surety bond required by Section 13, a provider may deliver to the administrator any of the following, 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 agents does not comply with this [act]:

(1) a certificate of insurance issued by an insurance company that is authorized to do business in this state and rated at least A by a nationally recognized rating organization, with no deductible; 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 agents 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.

Preliminary Comment

This section provides an alternative to posting a bond. It authorizes the provider to procure insurance or, with the administrator's approval, a letter of credit or debt instruments. With respect to debt instruments, the requirement of approval by the administrator extends to both the instruments deposited and the terms of the account into which they are deposited, to ensure that they are available to pay claims of injured individuals. The administrator by rule can develop the mechanics for liquidating the instruments and paying the proceeds to injured individuals.

With respect to letters of credit, the requirement of approval by the administrator extends to the identity of the bank and to the form of the letter of credit. Because presentation of a certificate to a distant bank may entail inconvenience or expense, the administrator may confine approval to banks located in this state or in an adjacent state. Paragraph (2)(A) requires that the letter of credit be payable upon presentation of a certificate by the administrator, and the administrator may determine the nature of that certificate. For example, the administrator may require that the letter of credit provide that the issuer will pay the amount stipulated in the certificate as costs assessed under section 32(b)(1) or the amount stipulated in the certificate as the amount of a judgment obtained by an individual. Section 35(h) requires the administrator to assist an individual enforce a judgment against the security posted by the provider.

Subsection (b): The enumerated provisions of section 13 refer to a surety bond. In stating that those provisions apply to the substitute security furnished under this section, subsection (b) requires the substitute security to be available for two years after a provider ceases providing services, available for the benefit of the state and residents of the state at the time of an agreement, replenished if depleted, available for payment of the claims specified in section 13(d), and distributed in the order specified in section 13(e).

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

Preliminary Comment

Good faith is defined in section 2(11).

The obligation to act in good faith relates to "all matters under this Act." If a person fails to act in good faith, this means that the person has failed to act as required in connection with some matter under this Act. Consequently, the person has violated the section dealing with that matter, and, depending on the sections on remedies (sections 33, 35), may be liable for violation of the section dealing with the underlying matter. But there is no independent cause of action for failure to act in good faith. The failure to act in good faith also may make unavailable a right or power that otherwise would have been available to the provider. See Commentary No. 10, section 1-203, Permanent Editorial Board for the Uniform Commercial Code (Feb. 10, 1994).

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

Preliminary Comment

Some inquiries require counseling services or assistance in dealing with creditors; others concern administrative matters such as confirmation of receipt of a payment, communication that a payment for a particular month will be late or in a different amount than scheduled, etc. The provider must provide sufficient staffing to meet the reasonably expectable demand for both kinds of requests.

This subsection contemplates responses to telephonic requests by existing customers. The staffing required by this subsection therefore is in addition to whatever staffing the provider might have for soliciting or responding to potential customers.

Section 18 permits a provider to comply with sections 17, 19, and 27 by means of electronic communication. Section 16 makes no exception for this provider. Even if a provider desires to operate exclusively via electronic communication, it must comply with this section. See section 18 and accompanying Comment.

SECTION 17. PREREQUISITES FOR PROVIDING DEBT-MANAGEMENT SERVICES.

(a) Before providing debt-management services to an individual, a provider shall give the individual an itemized list of goods and services and the charges for each. The list must be clear and conspicuous, 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 to an individual unless the provider, through the services of a certified counselor:

(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 its 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 provide the individual with:

(1) 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; and

(2) with respect to all creditors identified by the individual or otherwise

known by the provider to be creditors of the individual:

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

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

(C) a list of 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 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) that, unless it is not true, 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 plan contemplates that 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:

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

(2) Establishment of a debt-management plan may hurt your credit rating or credit scores.

(3) [unless it is not true] We may receive compensation for our services from some or all of your creditors.

[name and business address of provider]

(f) If a plan 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:

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

(2) Nonpayment of your debts pursuant to 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 litigation, to collect the debts.

(3) Unless you are insolvent, our program may result in the creation of taxable income to you, even though you will not actually receive any money.

[name and business address of provider]

Preliminary Comment

Subsection (a): This subsection requires a standardized disclosure and specifies the terminology and format to be used. The disclosure of charges must contain the dollar amounts or the method of determining the dollar amounts, e.g., "$5 per month for each creditor in the plan at the time the monthly charge is assessed, but not more than $25 in any month," or "five percent of the amount of debt that a creditor writes off."

Paragraph (3) requires disclosure of "goods and services in addition to those provided in connection with a plan." This must be read in conjunction with section 23(c), which sharply circumscribes the extent to which a provider is permitted to impose charges for education or counseling. Paragraph (3) requires disclosure of charges permitted by that section, but it does not enlarge the amount or kind of services for which a provider may charge.

Subsection (b): Paragraph (1) mandates that all providers, including debt-settlement companies, provide reasonable education through the services of a certified counselor.

The education may consist of an individual session with a counselor (which may also include the analysis required by paragraph (2)), a group class, or an electronic educational program. The education must be substantially more than an explanation of the benefits of a plan. It must begin but need not be completed before commencement of a plan, since a course of education may take months to complete. Education for financial literacy is receiving increased attention, and several entities are attempting to define standards for effectiveness. As these attempts come to fruition, the administrator may exercise rulemaking power under section 32(c) to establish minimum standards for the education.

Paragraph (2) requires preparation of a financial analysis. Although the education required by paragraph (1) may be standardized or provided on a group basis, the financial analysis required by paragraph (2) must be prepared specifically for the individual and based on the specific circumstances of the individual.

Paragraph (3) requires preparation of a plan, but only if the individual is to make regular, periodic payments. Thus the requirement does not apply when an individual has accumulated money and seeks the assistance of a debt-settlement company in negotiating a settlement with one or more of his or her creditors. Subparagraph (B) requires that the provider believe that the plan is suitable for the individual. For providers that assist an individual to repay in full, this requires a determination that the individual has sufficient income to permit payment to creditors after payment of living expenses, but not enough income to repay them in full without some concessions. For providers that assist an individual to settle debts for less than full payment, the suitability requirement means at a minimum that the individual does not have the ability to satisfy creditors out of current income within a reasonable time even if the creditors were to reduce finance charges and fees for late payment, default, and delinquency. Section 15, which requires providers to act in good faith, is especially important in connection with this paragraph. The administrator may adopt rules articulating specific standards for suitability.

Subparagraph (C) permits a provider to secure an individual's assent to a plan only if the provider believes that each creditor listed in the plan actually will participate in it. This limitation, too, must be read in conjunction with section 15, which requires the provider to act in good faith, defined as honesty and the observance of reasonable standards of fair dealing. If a provider knows or suspects that a particular creditor will not participate, the provider cannot in good faith believe that the creditor will participate, and therefore cannot satisfy this paragraph if that creditor is included as a participating creditor in the plan.

The requirement that the provider believe that the creditors will accept the plan does not mandate communication with the creditors before an agreement is formed. The provider's past experiences with the creditors may be a sufficient basis for the provider's good faith belief.

Subsection (c): Since secured creditors are creditors, paragraph (2) requires the provider to include secured creditors in the various lists, as appropriate. Taken together, the lists must include all the creditors whose existence the provider knows.

Subsections (d)-(f): Subsection (d) requires providers to give a warning to individuals before they commit to a plan. Subsections (e) and (f) provide safe-harbor language for the provider to use. Use of the exact language in these subsections constitutes compliance with subsection (d). If the provider uses other language, the disclosure is subject to review to determine if it adequately discloses the required information.

SECTION 18. COMMUNICATION BY ELECTRONIC MEANS.

(a) In this section, "federal act" means the Electronic Signatures in Global and

National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended].

(b) A provider may comply with Section 17, 19, or 27 by means of the Internet or other electronic means if the provider obtains the individual's consent in the manner provided by Section 101(c)(1) of the federal act and:

(1) a certified counselor has reviewed and approved the education required by Section 17(b)(1) and the computer program or application used to create the individual financial analysis and the plan required by Section 17(b)(2) and (3);

(2) the individual is advised of the availability of assistance by telephone or in person and is afforded the opportunity for discussion of the financial analysis and the initial plan with a certified counselor;

(3) the disclosures and materials required by Sections 17, 19, and 27 are presented in such a way that the individual may retain them electronically and print them;

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

(A) contain no other information; and

(B) the individual must see before proceeding to assent to formation of a plan; and

(5) the provider:

(A) at the time of providing an electronic version of the materials and agreement required by Sections 17(c) and (d), 19, and 27, informs the individual that upon electronic, telephonic, or written request, it will send the individual a written copy of the materials; and

(B) complies with the request as provided in subsection (c).

(c) If a provider is requested, before the expiration of 90 days after a plan is completed or terminated, to send a written copy of the materials, the provider shall send them at no charge within three business days after the request, except that 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 requested after the expiration of 90 days after a plan is completed or terminated, the provider shall send within a reasonable time a written copy of the materials requested.

(d) A provider that complies with Section 17 pursuant to this section shall disclose on the home page of its Internet 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 and telephone number; and

(3) the names of its principal officers.

(e) A provider that forms plans with individuals on its Internet website shall respond to electronically communicated requests for assistance within a reasonable time during ordinary business hours.

(f) Subject to subsection (g), if an individual who has consented 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 individual.

(g) If a provider wishes to terminate an agreement pursuant to subsection (f), it shall notify the individual that it will terminate the agreement unless the individual, within 30 days after receiving the notification, consents in the manner provided in Section 101(c) of the federal act. If the individual 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).*

Preliminary Comment

Subsection (b) permits electronic delivery of the information required by sections 17 and 27, and it permits electronic formation of agreements. To comply with the Act by electronic communication, however, a provider must comply with this section. If it fails to do so, then the permission granted by this section does not apply. Under paragraph (2), if counseling in person is not readily available in reasonable proximity to the individual's residence, the provider must offer counseling or other assistance by telephone. At the individual's option, the provider may provide assistance electronically. This assistance must be individualized, not merely "Frequently Asked Questions" or other standardized presentation of information. If the individual requests, the assistance must be by telephone or in person at a location in reasonable proximity to the individual's residence.

Paragraph (3) does not require a provider to verify that the individual has an operable printer; it merely requires that the material be presented in a printable format.

To meet the objectives of the physical 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 record may not contain other information, it does not violate this section if the record is an electronic page on a website and the record reveals how the individual may exit the page.

Section 27 requires periodic reports and this section permits a provider to make the reports electronically.

Even if a plan is formed over the Internet, the individual should be able to have a hard copy of the agreement with the provider. Paragraph (3) requires that the agreement and other specified materials must be presented in a printable format. Paragraph (5)(A) requires the provider to send a written copy if the individual requests it. The provider may not limit the medium by which the individual requests a copy. Paragraph (5)(B) protects the provider against harassment and stale requests. An example of harassment might be a request for a copy of a periodic report three years after the period covered by the report. The subsection does not establish a bright-line rule, however, and in a particular case the individual might indeed have a legitimate need for an old report.

Since the periodic reports must be made monthly and this section gives the individual a right to receive a written copy of the report, a request every month for a written version of that month's report cannot, within the meaning of this section, be made for purposes of harassment. If requested each month, the provider must comply each month. Similarly, if requested in advance to send written versions of the monthly reports, paragraph (5)(B) requires the provider to comply with the request (if the provider wants to take advantage of the permission granted by this section to comply with the Act by means of electronic communication), because the request is made before the expiration of 90 days after a plan is completed or terminated.

Paragraph (5)(B) requires the provider to supply a "copy" of the materials. If the request relates to historical materials, the provider may send a consolidated statement, rather than a copy of each periodic statement, so long as it clearly reveals the information required to be on each periodic report.

Section 27(c) requires a provider to retain records on an individual for five years. That sets the outer limit on the time within which an individual may make a request under this section.

Subsection (d): An agency might do business under numerous names. Subsection (b) requires disclosure of all those names, along with the provider's principal location and officers, but it permits the provider to disclose this information via a link to another page of the website. The link must reveal its contents, e.g., "For the address and other information about [name of provider], click here."

Subsection (e): A provider that operates exclusively via its website must comply with section 16 (maintain an adequate telephone system). Having invited electronic communication, however, it also must respond within a reasonable time to requests that are transmitted electronically. The choice between electronic and telephonic media is left to the individual.

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;

(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 expected payments to each creditor, including the amount of each payment and the date on which it will be made;

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

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

(J) 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 of the information required under subsection (a)(6)(J), the provider complies 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 agents 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 full principal amount of debt owed, the provider will refund 65 percent of any portion of the set-up fee which 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 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 an 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 consent of the individual after a creditor has assented to a settlement for more than 50 percent of the amount of the debt.

(f) An agreement may not:

(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,] 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 that violates subsection (d), (e), or (f) is void.

Legislative Note: *In subsection (f)(2), if the constitution does not permit use of the phrase, "as amended," when federal statutes are incorporated into state law, the phrase should be deleted.*

Preliminary Comment

In this section "provider" refers to the provider that is a party to the agreement. It does not contemplate an employee or other agent that forms an agreement on behalf of the provider, even if the employee or agent serves as an intermediary between an individual and the individual's creditors.

Subsection (a): Paragraph (5) requires immediate delivery of the record to the individual. Subsection (b) clarifies that if the record is electronic, delivery occurs when the provider makes it available in retrievable and printable form and notifies the individual that it is available.

Paragraph (6)(C): As in section 2(13) (defining "plan"), the word "payments" includes deposits, that is, payment to a bank account of the individual. The date of the last payment depends on the creditors' concessions and the amount of the monthly payment by the individual, each of which may change during the course of the plan. It also depends on the timeliness of payment by the individual. None of this can be known in advance. Therefore, paragraph (6)(C) requires a good faith estimate of the date of the final payment.

Paragraph (6)(E): As with section 17(c)(2) (pre-agreement disclosure of creditor participation), identification of nonparticipating creditors includes secured creditors but refers only to creditors that the individual has disclosed to the provider or that the provider otherwise actually knows to be a creditor of the individual. Subparagraph (E) does not require the provider to make any disclosures with respect to creditors of which it is unaware.

Paragraph (6)(F): Section 27 requires a provider to make periodic reports to an individual, accounting for payments, charges, and disbursements. This paragraph requires disclosure of the timing of those reports (monthly or more frequently) and the individual's right to receive an accounting upon request and upon termination of the agreement.

Paragraph (6)(G): The good cause for termination by a provider pursuant to this paragraph does not encompass a desire to escape the fee structure to which the provider may have committed. For example, when a plan nears completion, the monthly revenue, which is capped by reference to the number of creditors still in the plan, may not generate the revenue desired or needed by the provider. This does not amount to good cause for terminating an agreement. Rather, "good cause" contemplates such things as the individual's failure to make monthly payments or to cooperate with the provider. The standard of good cause may vary depending on whether the provider is a credit-counseling agency or a debt-settlement company, because the adverse consequences to the individual in the event of termination may be different.

Paragraph (6)(J): Compliance with this paragraph will mean that a provider that serves individuals in multiple states may have to have a different form for each state. Computerization of the standard document may minimize the difficulty of complying with this disclosure requirement.

Subsection (d): Current practice by many credit-counseling agencies is to permit termination at any time; they do not even purport to bind the individual to a contract. The draft mandates this right of termination for all providers. If the individual has an unlimited right of termination, it is questionable whether there is a contract at all. The requirement of notice may supply sufficient obligation to support a contract, but even if it does not, there is no reason why the industry, and regulation of the industry, cannot operate on the basis of agreements that are not enforceable under the common law of contracts. This Act provides the authorization for the industry, as well as the regulation of it.

For all providers, subsection (d) requires return of any unexpended money intended for payment to creditors. For debt-settlement companies, it requires the agreement to provide for refund of a portion of the set-up fee, but no refund of monthly fees or settlement fees. For credit-counseling agencies, no refund of set-up or monthly fees is required.

For a termination to be effective under subsection (d)(1), the individual must give written or electronic notice.

Subsection (e): The agreement may confer on the provider a power of attorney to settle debts for 50 cents on the dollar. Because "principal amount of the debt" is a defined term (see section 2(14)), the percentage is calculated with respect to the amount of debt at the inception of the plan, not the amount of debt at the time of settlement. For settlements less favorable than that, the provider must secure the assent of the individual and must do so after the creditor has assented to a settlement. This affords the individual an opportunity to review the terms of a settlement before it becomes final.

Subsection (f): This subsection seeks to preserve the individual's common law and statutory rights against the unilateral decision of a provider to remove or restrict them. Thus an agency may not evade this Act by adopting the law of another jurisdiction. Nor may an agency contract for a distant forum or the surrender of rights or remedies under other law, including the right to proceed by way of a class action when appropriate. A statute designed to protect individuals should not permit the deprivation of important procedural and jurisdictional rights by means of a unilateral decision by the other party.

SECTION 20. CANCELLATION OF AGREEMENT.

(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 written or electronic notice 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:

Notice of Cancellation

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 <u>(e-mail address of the provider)</u> or mail or deliver a signed, dated copy of this notice, or any other written notice to <u>(name of provider)</u> at <u>(address)</u> before midnight on <u>(date)</u>. 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 may not refund fees you have paid us.

I hereby cancel this contract,

<u>(date) ,</u>

(c) In the event of a personal financial emergency that necessitates the disbursement of an individual's money to one or more of the individual's creditors before the expiration of three 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 his or her 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.

Preliminary Comment

This section derives from section 125 of the Truth-in-Lending Act, 15 U.S.C. § 1635. Subsection (a) confers a right of cancellation for three days after an agreement that complies with sections 19 and 28. Section 19 specifies the form and contents of the agreement, and section 28 lists prohibited conduct. Some of the prohibited conduct might be manifest in an agreement, in which event the agreement would not comply with section 28. If the agreement fails to comply with either of those sections, the individual has 30 days in which to cancel. Failure to comply with subsection (b) includes putting the incorrect date in the notice required by that subsection. If the individual cancels within the three-day period, subsection (b) calls for a return of all amounts paid, even those amounts already paid over to creditors. If the agreement does not comply with section 19 or 28 and the provider fails to honor the individual's attempt to cancel during the 30-day period, the remedy is found in section 35(f) (recovery of all amounts paid or deposited by the individual (including all set-up and service fees), less amounts transmitted to creditors, plus damages under section 35(c)). If the right to cancel has expired, the individual still has the right to terminate under section 19(d)(1).

The individual may waive the right to cancel in the event of an emergency. The individual must honestly believe that it is necessary for the provider to disburse his or her money before expiration of the three days. The waiver must disclose the reasons for such haste, and the use of a standard-form record—be it written or electronic—is ineffective.

SECTION 21. REQUIRED LANGUAGE. If a provider communicates with an individual primarily in a language other than English, the disclosures and documents required by this [act] must be in the other language.

Preliminary Comment

At the 2004 Annual Meeting several commissioners objected that the mandatory nature of this provision is too onerous. Salespersons, they said, often use a combination of English and any one of hundreds of foreign languages to accommodate their customers. It is not reasonable to require the employer to have documents in every language that its employees and customers speak. After due deliberation, the Committee decided to leave the section in its present form. If the provider communicates primarily in a foreign language, it must provide documents and disclosures in that language. If the provider is not willing to do this, then it must communicate primarily in English. This places the burden on the individual to bring a translator along or assume the risk of not understanding any disclosures or documents that are beyond the individual's English-language skills.

SECTION 22. TRUST ACCOUNT.

(a) All money paid to a provider or its designee by or on behalf of an individual pursuant to a plan for distribution to creditors is held in trust. Within two business days after receipt, the provider or designee 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 is not property of a provider or its designee and is not available to creditors of the provider or designee, except an individual from whom or on whose behalf the provider or designee 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) 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) 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 person 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) If a provider or its designee 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 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.

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

(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 telephone, facsimile, electronic mail, or other 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.

Preliminary Comment

This section requires that persons that receive money for disbursement to creditors establish trust accounts. Providers may operate under any of several business models. Some providers receive the money directly. Others use third parties for the purpose of receiving the funds and managing the accounts. Under any such model, the provider is a fiduciary and must establish a trust account. If the provider or its designee does not receive money for that purpose, but instead leaves the individual in control of that money, this section does not require a trust account. If an account is owned by an individual but is accessible to a provider by means of the power to initiate a debit transfer, section 28(a)(5) limits the purposes for which a provider may initiate a transfer.

Subsection (a): For providers at brick and mortar locations, it would be feasible to require the trust account to be located in this state. For providers that operate (via the Internet or telephone) nationally out of an office not located in this state, it may be unduly burdensome to require a trust account in each state in which the provider operates. Some existing state statutes, however, do just that. This section permits the agency to deposit money of residents of this state into a trust account located in another state and containing the money of individuals who reside in other states.

Subsection (b): As a person with a claim against a provider, the individual is a "creditor" of the provider. Nevertheless, the individual should have access to the trust account, but only to the extent the provider has received money from or on behalf of the individual and has not distributed it to creditors. Without this limitation, the individual's compensation out of the trust account would come at the expense of other individuals whose money comprises the trust account. Compensation of the individual for other loss or damage will have to come from assets of the provider or the bond required by section 13. Any interest on the money of the individuals in the account must be credited to the individuals.

Subsection (b) does not address the question of the process by which an individual may access the trust account. This Act leaves that question to other law, but as a creditor of the provider, the individual has whatever rights creditors generally have. In addition, the individual may be the beneficiary of action by the administrator under sections 32-33.

Subsection (c) imposes obligations on the provider. If the provider uses a third party to administer the trust account, the provider may delegate these obligations to the third party. The provider, however, is responsible for performance of the obligations and is liable if they are not performed.

The subsection contemplates that the agreement may establish a date by which the individual must remit to the provider and a date by which the provider must remit to the creditors. Paragraph (2)(A) reflects the use of payment systems other than checks. Paragraph (2)(B) applies to credit-counseling agencies and requires that the agreement—and the provider's performance—must conform to the due dates established by the creditors. The obligation to act in good faith (section 15) means that, if necessary or desirable, the provider must attempt to secure the creditors' assent to modify the original due dates to maximize the feasibility of the plan.

Subsection (d): A provider or other person in control of a trust account must not commingle money held in the trust with money of the provider or any other person other than the individuals with whom the provider has agreements.

Subsection (f): Section 34(c) provides that failure to maintain the proper balance is cause for summary suspension of registration.

Subsection (g): This subsection specifies the circumstances under which a provider must notify the administrator that something may be amiss with respect to money held in trust. As used here, "appropriation" includes all kinds of taking, including theft of cash, electronic debiting of an account, etc.

Subsection (h): If the individual terminates the agreement or if it becomes clear that a plan will not work, the provider must refund the individual's money. Examples of the latter might include a total cessation of payments or sporadic payments by the individual with no indication that the payments will become regular. The test under this subsection is the vague standard, "reasonably apparent," which must be applied in conjunction with section 15 (Requirement of Good Faith). The subsection supplements the individual's right under section 19(d)(1) to terminate the agreement, in which event this subsection and section 19(d)(1)(A) require the provider to refund all unexpended funds. Presumably, the money is in a trust account, but the obligation applies regardless of where the money is, unless it already is under the individual's control.

Subsection (i): A provider may change banks, but must notify the administrator.

SECTION 23. FEES.

(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 charge a fee 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 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:

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

(B) may charge a monthly service fee, not to exceed $10 times the number of creditors remaining in a plan at the time the fee is assessed, except that the fee may not exceed $50 in any month;

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

(A) subject to Section 19(d), may charge 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) may charge a monthly service fee, not to exceed $10 times the number of creditors remaining in a plan at the time the fee is assessed, except that the fee may not exceed $50 in any month;

(3) Except at otherwise provided in Section 28(d), if an individual does not assent to an agreement, a provider may receive for its educational and counseling services 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)(3).

(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 full 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 amount of the debt when the individual assents to the plan over the amount paid the creditor pursuant to the plan; 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).

(g) Subject 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].

Preliminary Comment

Subsection (a): Since this section does not authorize fees for such matters as preparing a financial analysis, preparing a budget, or terminating an agreement, the prohibition in this subsection means that providers may not impose a charge for them.

Courts and the administrator should be vigilant to attempts to evade this limitation. A provider might attempt to divide the cost to an individual into separate components, some to be paid to the provider and some to be paid to others, with the provider arguing that only the amounts it receives are subject to this section. For example, a provider might use the services of a third person to solicit individuals, determine whether they are qualified for debt-management services, and refer them to the provider. This person might be paid by the provider or by the individual. If paid by the individual, this tactic shifts some of the provider's costs of doing business to the individual and amounts to an attempt to evade the limits of this section. Amounts paid to a third person for determining that an individual qualifies for debt-management services or for referring an individual to a provider, even if paid by the individual, should be viewed as part of the charge by the provider that this section limits. Hence, subsection (a) prohibits imposition of fees directly or indirectly except as permitted by this section.

Subsection (b): In addition to specifying some of the contents of an agreement, section 19 requires immediate delivery of the record containing the agreement. If the record is a writing, this subsection prohibits a provider from collecting any money before the individual receives a copy of it. If the record is electronic, the provider may impose a fee if otherwise permitted by this section, as soon as it delivers the record, which occurs (as provided in section 19(b)) when it makes the record available in retrievable and printable form and notifies the individual that it is available.

Subsection (c): Section 17(b)(1) requires a provider to provide reasonable education about the management of personal finance as a prerequisite to performing debt-management services. Subsection (c) of this section requires that the basic education and counseling be provided at no charge. This prohibition against charges encompasses charges for tangible materials, e.g., books, used in connection with the education. If the administrator determines that a provider's education or counseling services exceed the minimum standards for the basic service, the administrator may authorize the provider to charge a specific amount for its education or counseling services. The approval must relate to the specific course of instruction or counseling performed by the provider.

The administrator should be vigilant to attempts by a provider to evade the prohibition against charges for the basic education and counseling. Two factors are especially important: the voluntariness of the purchase by the individual and the substance of the education. Since the basic education must be provided at no charge, the individual must be permitted to form an agreement without having to purchase additional education. Voluntariness may be negated by the sales practices of the provider, including such things as the sales pitch and the manner in which the decision to acquire additional education is presented. If the cost of additional education is routinely included in the proposed agreement that a provider presents to the individuals it solicits, the purchase of additional education is not truly voluntary. This may be true even if the provider obtains a separate manifestation of the individual's assent to the additional charge. E.g., see In re USLIFE Credit Corp., 91 F.T.C. 1017, modified 92 F.T.C. 353, rev'd sub nom. USLIFE Credit Corp. v. FTC, 599 F.2d 1387 (5th Cir. 1979). For purposes of this Act, the opinion of the Federal Trade Commission, not the Fifth Circuit, takes the correct approach. Tactics such as these violate section 28(a)(16) (prohibiting unfair, unconscionable, or deceptive acts or practices).

The other factor is the substance of the education. To justify a charge, the education must go beyond the education that the provider must supply at no charge as a prerequisite to providing debt-management services and being compensated for providing those services. The education must consist of more than providing a book or other materials for the individual to read on his or her own. To prevent evasion of the prohibition of this subsection, the administrator must evaluate the program of instruction, including any materials to be used, in order to determine that it goes beyond the education that must be provided at no charge and to determine the amount of any additional charge that is appropriate.

Section 28(d) permits a provider to charge amounts permitted by government-sponsored programs that require persons such as first-time home buyers to receive education or counseling services as a condition of eligibility for the program. This subsection does not limit the charges authorized by those programs.

Subsection (d): Paragraphs (1) and (2) permit a provider to charge a set-up fee and a monthly service fee. For all providers, paragraph (2) permits a monthly fee of $10 per creditor, but not more than $50. Since some creditors may be paid off before others, the per creditor branch of the limit is to be determined with respect to the number of creditors remaining in the plan at the time the fee is assessed. Therefore, if there are only two creditors remaining in a plan, the maximum monthly charge is $20. Under no circumstances may the monthly fee exceed $50. Courts and the administrator should be vigilant to attempts to evade the per-creditor limitation of these paragraphs. For example, if a provider includes in a plan creditors who the provider knows will make no concessions and imposes a $10 per month fee for each of these creditors, the provider may violate this subsection or section 28(a)(16) (prohibiting unfair, unconscionable, or deceptive acts or practices).

If the provider is a credit-counseling agency, paragraph (1) permits a set-up fee not exceeding $50. If the provider is a debt-settlement company, paragraph (2) permits a set-up fee not to exceed four percent of the principal amount of the debt in the plan, but in no event more than $400. Anytime the aggregate debt in a plan exceeds $10,000, the maximum set-up fee is $400.

Paragraph (3) permits a provider to impose a charge for education or counseling if an individual does not enter a plan. 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.

For an elaboration on the cross reference to section 28(d), see the Comment to subsection (c).

All dollar amounts in subsection (d) are subject to adjustment by the administrator pursuant to section 32(f).

Subsection (e): This subsection addresses attempts to avoid the limitation on charges for education or counseling. Subsection (c) prohibits a provider from charging for education or counseling if an individual enters a plan. 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)(3), followed by a plan, 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 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 90-day limitation. Moreover, the obligation to act in good faith, imposed by section 15, also constrains attempts to evade the restrictions of this section, as does section 28(a)(16) (prohibiting unfair, unconscionable, or deceptive acts or practices).

Subsection (f): This subsection authorizes debt-settlement companies to charge a settlement fee, but requires them to credit against the settlement fee all set-up and monthly fees. The underlying idea is that the settlement fee represents the real compensation of the provider, and the other fees provide cash flow pending receipt of the settlement fee. Hence, they are advances against settlement fees and are to be credited against the settlement fee. This approach accommodates the provider's need for cash flow pending the first settlement and provides a simple way to effectuate the credit mechanism.

The operation of subsection (f) may be illustrated by the following facts: an agreement calls for a set-up fee of $360, monthly service fees starting at $40 per month, and a settlement fee of 20 percent of whatever portion of the principal amount of the debt the creditor forgives. For six months the individual pays $400 per month, at which time the provider induces a creditor to settle a debt. The amount of that debt was $4,000 when the individual assented to the plan, but at the time of settlement it has grown (because of delinquency fees and accruing finance charges) to $4,600. The creditor agrees to take $2,000 in full satisfaction of the debt. Under the agreement, the provider has received $360 (set-up fee) and $240 (monthly service fees), for a total of $600.

As a result of the settlement, the provider is entitled to a settlement fee of $400 (20% x ($4,000 – $2,000)). Subsection (e) requires that the $600 set-up and monthly fees be credited against the settlement fee. Since the credit is larger than the fee, the provider would not be entitled to any payment as a result of the settlement. Further, to the extent it is not credited against the first settlement fee, the $600 would carry forward as a credit against the next settlement fee. In the example, this is $200. (In generic terms, the carry-forward is the set-up fee plus the monthly fees minus the first settlement fee.) Hence, there would be a credit against the settlement fee at the time of the next settlement in the amount of $200 plus whatever monthly service fees have accrued between the time of the first settlement and the time of the second settlement. At a minimum, every settlement fee is subject to a credit in the amount of the monthly service fees that have accrued since the preceding settlement. (In the above example, if the amount of the settled debt at the time of the agreement were $6,000, the settlement fee would be $800 (20% x ($6,000-$2,000)). The provider would be entitled to a payment from the individual of $200 ($800 settlement fee minus $600 set-up and service fees). There would be no carry-forward, and at the time of the next settlement the provider would be entitled to 20% of the forgiven amount less the monthly service fee paid since the first settlement.)

Subsection (g): If an individual's payment is dishonored, a provider may impose a charge to recover its actual out-of-pocket expenses in connection with the dishonor. This charge may not exceed the lesser of $25 and the amount that other law permits a payee to charge for a dishonored item.

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.

Preliminary Comment

A common abuse by nominally nonprofit credit-counseling agencies has been deceiving or coercing consumers into making allegedly voluntary contributions to the agency. This section seeks to end this practice. The provision prohibits the solicitation of contributions as well as the requiring of contributions, and it applies to all providers. Section 23(a) precludes a provider from receiving a "voluntary" payment in addition to or in excess of the amounts stipulated in that section. The separate prohibition in this section is included in order to leave no doubt that the current practice of many providers is unlawful.

Neither section 23 nor this section prohibits the solicitation or receipt of charitable contributions by social service agencies or other entities that provide services in addition to debt-management services. Section 23 puts the prohibition in terms of "receiv[ing] money . . . for debt-management services," and this section puts the prohibition in terms of "solicit[ing] a voluntary contribution . . . for any service provided to the individual." The administrator and the courts should be vigilant to prevent evasion of this subsection.

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.

Preliminary Comment

Subsection (a): If a provider overcharges, the individual has the option of voiding the agreement. The individual's right to void the agreement is subject to the provider's defense under section 35(g) for an overcharge that results from a good-faith error.

Subsection (b): If a provider is not properly registered under section 4, the individual may void the agreement. If a provider uses an independent contractor that itself is within the definition of "provider" to secure the individual's assent, the agreement is voidable if either the provider or the independent contractor is not registered. The remedy appears in section 35(a) (in part, the provider must return to the individual all money paid or deposited by the individual which it has not already distributed to creditors).

Subsection (c): If an individual voids an agreement, the provider has no claim whatsoever against the individual. The individual's right to terminate the agreement would foreclose a claim for future loss, and this section is intended to make it clear that the provider has no claims with respect to any benefits conferred on the individual in the past.

SECTION 26. TERMINATION OF AGREEMENTS.

(a) If an individual who has entered into an agreement does not make payments required by the agreement for 60 days, 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.

Preliminary Comment

Subsection (b): Upon termination, whether by the provider or the individual, the provider must immediately return the individual's money. In the context of credit-counseling agencies, if the provider is acting in conformity with the Act, there will be no money in the trust account. Paragraph (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 company 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. But paragraph (2) requires a debt settlement company 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.

SECTION 27. PERIODIC REPORTS AND RETENTION OF RECORDS.

(a) 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, except that the provider need not comply with more than one request in any calendar month.

(b) 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:

(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) 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.

Preliminary Comment

Subsection (a): An individual is entitled to regular communication of the status of his or her account. This subsection requires providers to give accountings on a monthly basis. This adopts for all the current practice of many providers to give a monthly accounting.

Subsection (b): If any of the amounts required by a paragraph in this subsection is zero, the provider need not include any disclosure with respect to that paragraph. If a provider requires the individual to establish an account with a bank or other third party from which the individual is to disburse money to creditors and the provider does not know the date on which the individual made a payment, the provider complies by stating the date on which it directed the individual to make payment.

If a plan contemplates concessions consisting of reduction in finance charges or late payment, default, or delinquency fees, section 22(c)(2) requires distribution of all the money each month. With respect to individuals in these plans, accumulating reserves is not permitted. For plans that contemplate settlement for less than the full amount of principal owed a creditor, the provider or its designee may accumulate money from month to month.

Paragraph (5) applies primarily to debt-settlement companies. If no creditor has agreed to settlement terms during a reporting period, the subsection does not require the provider to make any disclosure. Hence, the subsection ordinarily would not apply to plans operated by credit-counseling agencies, because creditors receive the full principal amount of the debt owed them and do not “agree” to accept any particular amount as payment in full. As to debt-settlement companies, subparagraph (A) requires disclosure of the terms of a settlement, including the dollar amount paid and the percentage of the principal amount of the debt (see section 2(14) that that represents. Subparagraph (D) requires disclosure of the calculation of a settlement fee. The provider must disclose the method of arriving at the amount of the fee, e.g., “20% times the difference between the amount of the debt when you entered the plan and the amount paid pursuant to the settlement.”

Subsection (c): The period of retention is tied to the statute of limitations in section 37. For private actions, the statute of limitations is two years. For public enforcement, it is four years. To afford a reasonable time for the discovery process to unfold, subsection (c) requires retention of records for five years.

SECTION 28. PROHIBITED ACTS AND PRACTICES.

(a) A provider may not:

(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 settling 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; or

(ii) payment of a fee;

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

(7) offer, pay, or give a gift, 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 that it is a not-for-profit or tax-exempt entity unless it has received certification of tax-exempt status from the Internal Revenue Service;

(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;

(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;

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

(5) 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; or

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

(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; 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 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) A provider may not purchase goods, services, or facilities from a person if an employee or affiliate of the provider owns more than 10 percent of the person, or an employee or affiliate of the provider is an employee or affiliate of the person, unless the person supplies the 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.

Preliminary Comment

Subsection (a): Paragraphs (2) and (3) limit the extent to which a debt-settlement company may settle a debt without the individual's contemporaneous assent. They prohibit the use of a power of attorney to authorize the provider to settle debts on whatever terms the provider deems desirable, or an any terms other than those specified in paragraph (2). A power of attorney may authorize the provider to settle debts for 50 percent or less of the amount of the debt at the time the individual assented to the plan. See section 2(14) for the definition of "principal amount of the debt." For settlements less favorable to the individual than that, a power of attorney is prohibited and ineffectual. These paragraphs supplement section 19(e), which imposes similar limits on the terms that a provider may include in an agreement.

Paragraph (4) makes it a violation of the Act for a provider to attempt to exercise a power of attorney after an individual has terminated an agreement. It supplements section 19(d)(1)(C), which requires the agreement to provide that a power of attorney is automatically revoked if the individual terminates the agreement.

Paragraph (5): Credit-counseling agencies typically have access to their customers' checking accounts, for the purpose of withdrawing money to pay the customers' creditors and to pay the agency its monthly fee. Similarly, debt-settlement companies may have their customers establish accounts with banks or other persons for the purpose of accumulating money until it is paid to creditors, and the company typically initiates transfers out of these accounts to pay monthly service fees and/or settlement fees, as well as perhaps to pay creditors. This paragraph prohibits a provider from initiating transfers to itself or to creditors after the individual has terminated an agreement. It also prohibits a provider from initiating transfers that are not properly authorized by the agreement and the Act. Section 23 limits the amount of the fees.

Paragraph (6) prohibits compensation to an individual, but it does not prohibit a provider from reducing its normal fees for individuals who cannot afford them, so long as the reduction is in good faith and pursuant to the provider's established practices. It does prohibit such come-ons as "reduced price good for today only."

Paragraph (7): Payment of referral fees may be an efficient way to attract business and achieve economies of scale. But it creates a risk of deception. If a creditor, for example, refers an individual to a particular provider, the individual is likely to perceive this as an endorsement by a creditor that is seeking to help the individual. In fact, the referral may be driven by identification of which provider is willing to pay the highest price for the referrals.

The prohibition against paying referral fees does not preclude payment for sales leads or lists of prospective customers, if the person making the referral has no stake in the outcome of a plan or if the provider does not reveal the identity of the person that supplied the list. The vice here is misleading the individual into believing that an entity with which the individual has a relationship (viz., one of the individual's creditors) is disinterestedly recommending that the individual seek the services of the provider. Hence, neither the provider nor the creditor (or other person supplying the individual's name to the provider) may reveal to the individual that the person making the referral is in any way connected to the reason the provider is communicating with the individual. If the source of the list is identified to the individual by either the provider or the source, the sales lead becomes a referral, and the provider may not pay for it.

Paragraph (8) is the converse of paragraph (7). Its purpose is to reduce or eliminate the economic incentive for an agency to refer individuals to persons who provide loans, goods, services, facilities, or other products of any kind. The protection of financially stressed, vulnerable consumers justifies discouraging a provider from recommending products provided by others. The prohibition in this paragraph precludes a provider from including on its website a link to the website of an entity providing other services or products and receiving payment from that entity, whether a flat fee or a fee based on the number of times individuals hit that link. Although this appears to be a form of advertising, it actually is indistinguishable from payment for referrals. Placing a link on the provider's website amounts to an endorsement of or referral to the owner of the linked website. It should not matter whether the referral is by electronic link or verbal recommendation. The provider is free, of course, to place the link on its website, so long as it does not receive compensation or other benefit from the owner/sponsor of the other website. This distinguishes disinterested advice from referrals motivated by the provider's self-interest.

Paragraph (10): The current practice of some providers is 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. This paragraph seeks to curb the deception and coercion by barring this method of compensating employees. Courts and the administrator should be vigilant to attempts to evade the prohibition of this paragraph.

Paragraph (11): If a plan contemplates settlement of a debt for less than the full principal amount of the debt, the provider may not pay the creditor unless the individual receives formal acknowledgment from the creditor that the debt is satisfied. This acknowledgement 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 communication to the individual may come directly from the creditor.

The paragraph 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(s) do not settle the debt.

Paragraph (12): This paragraph 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.

Paragraph (14): Not-for-profit is a status under state law. An entity may qualify for that status without also being tax-exempt under federal law. Individuals, however, rarely understand this distinction. To avoid deception or confusion, this paragraph prohibits a provider from representing that it is nonprofit or not-for-profit unless it also has been granted tax-exempt status under the Internal Revenue Code.

Paragraph (16): This paragraph prohibits false or misleading representations whether or not the provider knows of the deception. In accord with existing statutes prohibiting unfair or deceptive acts or practices, the risk of falsity or deception is on the person that makes an express statement. On the other hand, the paragraph prohibits omissions only if the omitted facts are material and are known to the provider. The prohibition applies to all stages of a transaction between a provider and an individual, including, at the back end, a provider's attempt to collect a debt owed to it or to another person. At the front end, it applies to a provider's attempt to divert the individual's attention away from, or minimize the importance of, the disclosures required by sections 17 and 19 or to secure the individual's assent to the purchase of the education services permitted by section 23(c) and (d).

Subsection (b): Paragraph (3) prohibits a provider from extending credit to an individual to whom it provides debt-management services. Often, however, an individual has enough money to effect a settlement with a creditor but not enough to pay the fee associated with that settlement. This paragraph does not prohibit a provider from deferring collection of that fee, so long as there is no charge for the deferral in addition to the agreed-upon set-up, monthly service, and settlement fees authorized by section 23.

Paragraph (4) bans security interests altogether, in the property of any person. A provider may not take a security interest in property of an individual to whom it furnishes debt-management services or in the property of a family member or other person. The prohibition must be read in the context of the language introducing the subsection ("with respect to an individual to whom a provider furnishes debt-management services").

Paragraph (5) preserves the privacy of information about an individual with whom a provider has an agreement. So long as the provider strips out the individual's identifying information, however, it is free to disclose information for purposes of academic research or construction of a scoring system. On the other hand, if the identifying information is present, this paragraph prohibits disclosure of any of the information, except as permitted by the two specified exceptions. The only permissible purpose for a disclosure to a creditor of the individual is to secure its cooperation. Similarly, if a provider wants to refer an individual to another person for other goods or services (which subsection (a)(8) permits, so long as the provider receives no compensation for the referral), it must do so by providing the individual with the identity of the third person. This paragraph prohibits the provider from disclosing the identity of the individual to the third person for the third person to contact.

Paragraph (6): The cross-referenced section permits debt-settlement companies to receive a portion of the forgiven debt. Other entities are not permitted to receive any portion of any forgiven debt.

Paragraph (7): This paragraph is intended to prohibit the sale to individuals of insurance and other products that in other contexts have been a means of evading statutory regulation. The catch-all at the end of the paragraph is intended to thwart the exercise of ingenuity in generating new ideas to evade the limits imposed by the Act. The administrator may adopt rules specifying items that fall into the catch-all.

Paragraph (8): Subsection (a)(13) prohibits misrepresentations that an agency is authorized or competent to provide legal services. This paragraph prohibits performing those services, unless the person is a licensed attorney. A provider does not violate this subsection if the person providing legal services is licensed in a state, even if not this state. It may, however, violate other law that prohibits the unauthorized practice of law.

Subsection (d): This paragraph prohibits a provider from receiving compensation for performing specified services for a third party. The exception is to accommodate programs of governmental agencies that require counseling in connection with reverse mortgages, first-time homebuyers, or other programs.

This subsection supplements subsection (a)(8) (prohibiting referral fees). It is broader, in that it attempts to prevent evasions of subsection (a)(8) through the ruse of performing services for the lender or service provider.

Subsection (e): This subsection prohibits insider transactions unless the transactions are bona fide market transactions. The purpose of the subsection is to prohibit the use of a provider to channel money to related entities. Tax-exempt providers may do this in an attempt to evade restrictions on those with tax-exempt status. For-profit providers may do this in an attempt to establish a high cost of doing business, which they then might use to persuade the legislature to increase the permissible fees and charges.

SECTION 29. NOTICE OF LITIGATION. No later than 30 days after a registered provider has been served with notice of a civil action 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.

Preliminary Comment

To alert the administrator to the possibility of the need for action, this section requires a provider to notify the administrator when it has been sued.

SECTION 30. ADVERTISING. If a provider advertises debt-management services, the provider must disclose in an easily comprehensible manner the information specified in Section 17(d)(3) and (4).

Preliminary Comment

This section applies to advertising in any medium, be it print, broadcast, telecast, electronic, or other. But a mere listing in a directory, such as the Yellow Pages, is not an advertisement if the entry consists solely of the name, address, and phone number of a provider. If it goes beyond this, however, the entry is an advertisement and must comply with this section.

The section seeks to counteract the deception and pressure often exercised by providers that engage in extensive advertising. The cross reference is to the provisions that require disclosure of the likely impact on credit rating and the likelihood of collection efforts. To prevent the disclosures from becoming as incomprehensible as the Truth-in-Lending Act disclosures on TV and radio, this section requires that the information be disclosed "in an easily comprehensible manner." To be easily comprehensible, the type in a print ad must be large enough to be legible to an individual of average eyesight; and the type in a video ad must be large enough and must appear on the screen long enough to be legible to an individual of average eyesight. The audio portion of an ad must be spoken slowly enough to be understood by an individual of average hearing and comprehension.

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, violates the agreement or this [act].

Preliminary Comment

The agreement between a provider and an individual imposes duties and obligations on the provider. The provisions of this Act also impose duties and obligations, some affirmative (e.g., requirement that provider supply education) and some negative (e.g., prohibition against deception). A provider may not escape its obligations and duties under the agreement and this Act by contracting with others for the others to perform them. The delegee whose conduct fails to conform to the agreement or the Act may be liable as a provider if the delegee meets the definition of "provider" in section 2(15) or may be liable under section 35 as a person that caused a provider to violate the Act. Regardless, the provider that delegated the fulfillment of its duties or the performance of its obligations also is liable. This section imposes liability on the provider for the failure of the delegee to conform its conduct to both the affirmative and the negative duties and obligations.

For example, if a provider uses the services of another person to solicit individuals and secure their assent to agreements, which agreements then are to be performed by the provider, the provider necessarily has delegated its obligations under sections 17 (requiring pre-agreement analyses and disclosures) and 19 (prescribing the terms of an agreement). If the person fails to perform the duties imposed on providers by those sections, this section imposes liability on the provider. If the person's role stops short of securing the assent of the individual, so that section 19 is not implicated, the provider must comply with section 17. If the other person has not performed the obligations of section 17, the provider must.

If a provider uses the services of an independent contractor to receive and disburse the individuals' money to their creditors, or to provide the periodic reports required by section 27, the provider necessarily has delegated some of its obligations under this Act. If the conduct of the independent contractor fails to conform to the obligations placed on providers, the provider is liable under this section.

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 whom a provider has delegated its obligations under an agreement or this [act], to determine compliance with this [act]. 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) obtain from a court of competent jurisdiction an order authorizing seizure from a bank at which a trust account required by Section 22 is maintained, 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 in lieu 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, other index adopted by rule by the administrator. The administrator shall adopt a base year and shall 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; but 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 a change in dollar amounts pursuant to subsection (f) and make that information available to the public.

Legislative Note: *Subsection (a): If the administrator is the attorney general, the language in brackets ("refer cases to the [attorney general]") should be deleted. If not, 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."*

Preliminary Comment

Subsection (b): At the 2004 Annual Meeting a commissioner suggested, with respect to paragraph (2), that the administrator should be able to charge expenses to a provider only if the administrator concludes that the provider has violated the Act. After due consideration, the Drafting Committee concluded that if the administrator has sufficient grounds to trigger an investigation, it is appropriate to charge the provider with the expenses of investigation.

Paragraph (3) permits the administrator to obtain a court order to recover money and other property from the bank holding the trust account. The procedure for any such proceeding is determined by law other than this Act and, if authorized by that other law, may occur ex parte.

Subsection (c): The administrator has broad powers to adopt rules to implement and further the purposes of this Act. In exercising this power, however, the administrator should be mindful of section 38, which exhorts those enforcing the Act to promote uniformity among the enacting states.

Subsection (e): The administrator may establish a uniform fee to be paid by all providers.

Alternatively, the administrator may adopt a fee structure in which the amount of the fee depends on some characteristic of the provider, such as the amount of money received from residents of this state, total amount of debt owed by residents of this state, number of customers who reside in this state, etc. The standard for establishing the fee is reasonableness, and a fee structure is reasonable if it is based on a provider's presumptive ability to pay or on the administrative burden a provider places on the enforcement of the Act.

Subsection (f): The administrator must adjust annually all dollar amounts that appear in the Act. Those amounts are found in the following sections:

Section 2(2)(B)(iv): threshold for becoming an affiliate ($25,000)
Section 5(b)(4): employee theft insurance ($250,000)
Section 9(d)(2): independence of board of directors ($25,000)
Section 13(b): bond ($50,000)
Section 23(d)(1), (2), (3): fee caps
Section 23(g): NSF fee ($25)
Section 33(a), (b): civil penalty ($10,000, 20,000)
Section 35(c)(2): minimum damages ($5,000)
Section 35(d)(2): punitive damages ($10,000)

Since the adjustment will occur by promulgation of a rule, it will be a matter of public record, as is any other formally adopted rule. In addition, the administrator may wish to notify registered providers of the change and may wish to post the current amounts on a website dealing with this Act.

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 the violation and any similar violations;

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

(3) subject 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; and

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

(b) Subject 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.

Preliminary Comment

Subsection (a): Paragraphs (1) and (2) authorize the administrator to take action against providers that violate the Act; the directors or employees (including officers) of the provider; and any other person that has caused the provider to violate the Act.

Paragraph (4) authorizes the administrator to commence civil actions. Hence, the administrator may proceed either by administrative proceeding under paragraphs (1)-(3) or by civil action under paragraph (4). Furthermore, section 32(a) authorizes the administrator to refer cases to the attorney general for prosecution. Enforcement of the Act therefore is the responsibility of both the administrator and, if different from the administrator, the attorney general.

Subsection (b) speaks of "a person," which is defined in section 2(12). If a provider violates a final order, it is subject to the civil penalty of this subsection. If a director, employee (including officers), agent, etc., commits or directs commission of the act that constitutes the provider's violation, that person also is subject to the civil penalty of this subsection.

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 violated a material provision 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, safety, or 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 obtain from a court of competent jurisdiction an order authorizing seizure of any records and assets 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).*

Preliminary Comment

Subsection (b): At the 2004 Annual Meeting a commissioner suggested that the administrator not have the power to suspend or revoke a registration and that this section merely specify the grounds on which the administrator could ask a court to take that action. The Drafting Committee considered this suggestion but decided to leave this power with the administrator and not require the administrator to seek judicial relief in the first instance. A provider whose registration has been suspended has recourse under the administrative law of the state.

Subsection (c): Section 22(f) requires a trust account at all times to have a balance in an amount equal to the sum of the balances in each individual's account.

Subsection (d): As with section 32(b)(3), this Act does not specify the procedure to be used. If other law authorizes ex parte relief, the administrator may seek that relief under this subsection.

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 for 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, in addition to the recovery under subsection (c)(3) and (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 a person that caused the violation:

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

(2) subject to Section 32(f), with respect to 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:

(1) except for a violation of Section 28(a)(5), the minimum damages provided in subsection (c)(2) do not apply; and

(2) subject to Section 32(f), punitive damages may not exceed $10,000 per class member.

(e) In determining the amount of punitive damages under subsection (c) or (d), the court shall consider the seriousness of the violation, the good faith of the violator, any previous violations of the violator, the deleterious effect of the violation on the public, the net worth of the violator, and any other factor the court considers relevant to the determination of the damages.

(f) In addition to the remedy available under subsection (c), if a provider does not give effect to 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.

(g) 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.

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

(i) An individual's action, except a class action, takes precedence over a previous or subsequent action by the administrator with respect to the claim of the individual. An individual's class action takes precedence over a subsequent action by the administrator with respect to claims common to both actions, but the administrator may intervene in the class action. An administrator's action on behalf of a class of individuals takes precedence over an individual's subsequent class action with respect to claims common to both actions. If an action takes precedence over another action under this subsection, the action may be stayed to the extent appropriate while the action that takes precedence is pending and may be dismissed if the action that takes precedence is dismissed with prejudice or results in a final judgment granting or denying the claim.

Preliminary Comment

This section specifies the private remedies for an individual who has been injured by a violation of this Act. More than one subsection may apply to a particular violation, and the individual may recover under any of them.

Subsection (a): Section 25(b) makes an agreement voidable if the provider is not properly registered under this Act. Under this subsection the individual may recover all money paid by the individual, except for amounts passed on to creditors. This sanction is to disgorge all money that the provider otherwise would have earned for its services. If the minimum damages under subsection (c)(2) are larger than the amount specified in subsection (a), the individual may choose to proceed under subsection (c)(2) instead of subsection (a).

Subsection (b): Section 25(a) permits an individual to void an agreement if a provider exceeds the fee caps. Under this subsection the individual may recover treble damages, as well as recovering under subsection (c)(3) and (4). If the individual opts for recovery under this subsection, he or she may not also recover under subsection (c)(1) or (2). On the other hand, the individual may opt for recovery under subsection (c)(2) and forego recovery under subsection (b). The individual may choose which subsection to assert.

The treble damages remedy is available only if the individual voids the agreement. If the individual does not void the agreement, recovery is under subsection (c) (actual damages but not less than $5,000).

Subsection (c): This subsection provides the basic private remedy for an individual. The language in paragraph (1), "damages for injury . . . caused by the violation" means that there must be some causal connection between the violation and the individual's injury. Thus there is little likelihood of a private remedy for a provider's violation of section 4 by failing to register or section 29 by failing to notify the administrator that it has been sued.

On the other hand, for violation of the sections specified in paragraph (2), there is no requirement of causation. This means, for example, that an individual may recover the minimum damages under paragraph (2) for a provider's failure to make the disclosures required by section 17 or to conform its agreement to the requirements of section 19. The individual is entitled to this recovery even if the individual has not suffered any monetary loss. Alternatively, the individual may recover any loss that he or she can prove to have been caused by the violation.

"Compensatory damage" in paragraph (1), which includes recovery for noneconomic injury, encompasses emotional distress, humiliation, aggravation, etc.

The minimum damages provision in paragraph (2) applies only to the specified violations (prerequisites for a plan, form and contents of an agreement, cancellation of agreement, trust account, fee caps, voluntary contributions, periodic reports, and certain prohibited acts and practices). For violation of other sections of the Act, including failure to register and failure to provide customer service, the aggrieved individual may recover actual damages (if any are caused by the violation), punitive damages, or both. The administrator also may enforce these other sections.

"Costs" in paragraph (3) encompasses filing fees, jury fees, expert witness fees, and everything else that may be taxed as costs against the losing party. In determining the reasonable amount of attorney's fees, the court should consider the factors cited in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5^{th} Cir. 1974), and later cases, including Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986). In considering the amount of the fee award, however, courts should pay particular attention to the purpose of this section, which is to ensure that counsel is available for individuals to enforce their rights under this Act. The award of fees must be sufficient to encourage attorneys to take on representation of individuals whose rights under this Act have been violated. Consequently, the criteria in section 33(d) for determining a fee award to the administrator should serve as a floor for fee awards in private actions, and the amount of the recovery should play little or no role in determining the amount of the fees. See, e.g., Duval v. Midwest Auto City, Inc., 578 F.2d 721 (8th Cir. 1978); Jordan v. Transnational Motors, Inc., 537 N.W.2d 471 (Mich. App. 1993). Indeed, the risk inherent in litigation often justifies enhancement of the award.

The prerequisite to recovery under this section is a violation by a provider. But subsection (c) does not limit liability to just the provider. Under section 33(a)(2), the administrator may obtain relief not only against a provider but also against one who causes a provider to violate the Act. Similarly, subsection (c) of this section also authorizes relief against a person who is responsible for a provider's violation.

Subsection (d): An aggrieved individual may proceed by class action if the prerequisites for class actions under the rules of civil procedure are satisfied. The minimum damages provision does not apply unless the provider violates section 28(a)(5), which prohibits a provider from initiating a transfer of an individual's money unless the transfer is authorized by the Act and the agreement.

Subsection (f): This provision implements the remedy implicit in section 20 when an individual exercises the right to cancel: if the agreement complies with sections 19, 20, and 28, the individual has only three days to cancel. Upon cancellation, the provider must refund all money paid by the individual, as stated in section 20(b). The provider can protect itself against any out-of-pocket loss by keeping any such money until the three-day period has expired, in which event this subsection imposes no loss on the provider. If, however, the provider fails to comply with section 19, 20, or 28, the cancellation period is 30 days, in which event cancellation may very well occur after the provider has provided services to the individual. This subsection requires refund of all money not already paid to creditors, which means that the provider must return any money it has booked for set-up or monthly service fees. It thus provides an additional modest incentive for the provider to conform to the requirements of sections 19, 20, and 28. In addition to refund of fees and money held in trust, the individual is entitled to recovery under subsection (c) for minimum (or other actual) damages, punitive damages (if otherwise appropriate), and costs.

Subsection (g): A provider has a defense to civil liability under this section if its violation was a result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to prevent the error. This defense is adapted from section 130(c) of the federal Truth-in-Lending Act, 15 U.S.C. § 1640(c). It should be interpreted in a manner similar to the federal statute, as exemplified in Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974); Teel v. Thorp Credit Inc., 609 F.2d 1268 (7th Cir. 1979). The defense extends to clerical errors and mechanical malfunctions, but not to matters of legal judgment concerning the obligations imposed by this Act. For the defense under this subsection to be available to a provider with respect to a violation by a person to whom the provider has delegated its duties, the provider must prove that the person committed the violation unintentionally, as a result of good-faith error, and notwithstanding the maintenance of procedures reasonably designed to prevent the error.

If the violation relates to section 23 or 24, regulating permissible charges, the provider is not liable if both (a) the violation meets the good-faith error test, and (b) the provider refunds the excess portion of the charge within two business days of learning of its error. If either of these conditions is not met, the provider has no defense under this section; in addition, if the first condition is not met, the individual has a right to void the agreement under section 25 and recover treble damages under subsection (b) of this section.

Subsection (h): If an individual obtains a judgment against a provider, the administrator must assist the individual in enforcing that judgment against the bond or other security posted by the provider.

Subsection (i) addresses possible conflicts between public and private enforcement actions. It is drawn almost verbatim from UCCC § 6.113.

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(s) dealing with deceptive acts and practices in consumer transactions], an individual may not recover under both for the same act or practice.

Preliminary Comment

Conduct that violates this Act also may violate a deceptive practices statute. This section prohibits recovery under multiple statutes for the same conduct. The aggrieved individual may seek relief under either statute.

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 creditors;

(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].

Preliminary Comment

Subsection (a): The four-year limit applies to administrative and judicial proceedings under section 33(a). It also applies to actions under section 33(b), as to which the actionable conduct relates to violation of the final order, not the conduct that gave rise to the final order.

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. 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 41. 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.

Preliminary Comment

"Law" includes statutes, administrative rules, and judicial decisions. A provider may continue operating under prior law as to transactions in process when the Act becomes effective. It may be burdensome for a provider to comply with prior law for some of its customers and with this Act for others of its customers. Hence, the language of this subsection, "may be," permits a provider to comply with this Act even with respect to transactions entered before this Act takes effect.

For this section to save a transaction in progress when the Act takes effect, the transaction must have been permitted by prior law. If prior law prohibits a transaction, nothing in this section validates it.

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]."*

APPENDIX

This Act governs two forms of debt-management services: credit counseling and debt settlement. As of 2005 most credit-counseling agencies are organized as nonprofit, tax-exempt entities. If the state wants to permit only tax-exempt entities to provide credit-counseling services, it need make no changes in the text. If, however, the state wants to authorize for-profit entities to provide credit-counseling services to its residents, it should adopt the provisions as indicated below.

Also as of 2005, debt-settlement companies typically are organized as for-profit entities. If the state currently prohibits debt-settlement services by for-profit entities and wants to continue the prohibition, it need make no changes in the text. Similarly, if the state does not currently regulate debt settlement or permits for-profit debt-settlement entities, but wants to prohibit debt settlement by for-profit entities, it need make no changes in the text. If, however, the state wishes to permit for-profit entities to provide debt-settlement services to its residents, it should adopt the provisions as indicated below.

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

If the state wishes to permit for-profit entities to provide credit-counseling services but not debt-settlement services, insert the following at the beginning of subsection (b)(6): "if the applicant's plans contemplate that creditors will settle debts for less than the full principal amount of debt owed." Subsection (b)(6) then will state:

(6) if the applicant's plans contemplate that creditors will settle debts for less than the full principal amount of debt owed, evidence of tax-exempt status applicable to the applicant under the Internal Revenue Code, 42 U.S.C. Section 1 et seq.[, as amended.]

If the state wishes to permit for-profit entities to provide debt-settlement services but not credit-counseling services, insert the following at the beginning of subsection (b)(6): "if the applicant's plans contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency." Subsection (b)(6) then will state:

(6) if the applicant's plans contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency, evidence of tax-exempt status applicable to the applicant under the Internal Revenue Code, 42 U.S.C. Section 1 et seq.[, as amended.]

If the state wishes to permit for-profit entities to provide both forms of debt-management services, then:

(1) at the end of subsection (b)(4) add the word, "and";

(2) at the end of subsection (b)(5) delete "; and";

(3) delete subsection (6); and

(4) modify Section 7 as indicated below.

Subsections (b)(4) and (b)(5) then will state:

(4) evidence of insurance against the risks of dishonesty, fraud, theft, and other malfeasance or misconduct on the part of the applicant or a director, employee, or agent of the applicant in the amount of $250,000, issued by an insurance company authorized to do business in this state and rated at least A by a nationally recognized rating organization, with no deductible, payable to the applicant, the individuals who have agreements with the applicant, and this state, as their interests may appear, and not subject to cancellation by the applicant without the approval of 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].

SECTION 7. APPLICATION FOR REGISTRATION: OBLIGATION TO UPDATE INFORMATION.

If the state wishes to permit for-profit entities to provide both forms of debt-management services, delete the words "or (6)," so that section 7 then will state:

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 Section 6(1), (3), (6), (12), or (13).

SECTION 9. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL

If the state wishes to permit for-profit entities to provide debt-settlement services, credit-counseling services, or both, at the beginning of subsection (c)(2), insert the phrase, "with respect to an applicant that has obtained tax-exempt status under the Internal Revenue Code, 26 U.S.C. Section 1, et seq. [, as amended],". Subsection (c)(2) then will state:

(2) with respect to an applicant that has obtained tax-exempt status under the Internal Revenue Code, 26 U.S.C. Section 1, et seq. [, as amended], an applicant's board of directors is not independent of the applicant's employees and agents.