UNIFORM DEBT-MANAGEMENT SERVICES ACT
(Last Revised or Amended in 2008)

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR
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WITH PREFATORY NOTE AND COMMENTS

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ABOUT NCCUSL

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Prefatory Note

Background

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 to persuade them to accept partial payment in full 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. 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 §§ 451.451-.465 (repealed in 1976 and replaced by §§ 451.411-.437)).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) (later 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. As of 2005, this second generation of counseling agencies continues to operate.

Consumer advocates generally acknowledged the educational and budgeting benefits that the counseling agencies provided, but were critical—or at least ske 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 have developed 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.

An objective of credit-counseling agencies, whether or not they provide reasonable educational services, 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 (merged in 2004 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 establishing a plan for dealing with the consumer's debts. 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 debt owed to one of the 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.

Description of the Act

The purpose of the Act is to rein in the excesses while permitting credit-counseling agencies and debt-settlement companies to continue providing services that benefit consumers. The Conference 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 an accommodation of 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

with respect to, the entity;

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

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

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

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

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

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

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

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

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

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

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

(8) "Day" means calendar day.

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

(A) legal services provided in an attorney-client relationship by an attorney licensed or otherwise authorized to practice law in this state;

(B) accounting services provided in an accountant-client relationship by a certified public accountant licensed to provide accounting services in this state; or

(C) financial-planning services provided in a financial planner-client relationship by a member of a financial-planning profession whose members the administrator, by rule, determines are management services to an individual and which includes a schedule of payments to be made by or on behalf of the individual and used to pay debts owed by the individual.

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

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

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

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

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

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

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

(19) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

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

(A) established 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, deceptive trade practices act, or similar statute) or the entity charged with regulation of consumer credit or financial institutions. It may be desirable to amend that entity's organic statute to refer* *specifically to this Act.*

Comment

1. Paragraph (2) (affiliate): The term "affiliate" is used in 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 a person related to a provider refuses 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.

2. The definition in paragraph (2)(A)(iv) includes several specified relatives in the definition of "affiliate." It stops short of including persons in a step relationship, nor does it include cousins in a once-removed or more remote relationship. In states that recognize civil unions, the word "spouse" is to be interpreted to encompass persons in civil unions.

The definition in paragraph (2)(B)(iv) includes a person that receives more than $25,000 from a provider. It also includes an owner, director, or employee of the recipient. Since the principal purposes of defining "affiliate" are to require independent boards of directors and prevent self-dealing, the level of ownership and benefit necessary to constitute "affiliate" is set at the relatively low figures of 10 percent and $25,000. With respect to the dollar-amount, a person is not an affiliate until it or the person of which it is an owner, employee, or director has received $25,001 in the relevant period.

4. 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.

5. Paragraph (5) (business address): Sections 6, 17(d), 18(g), 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.

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

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

7. 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. In those instances "terms of the contract" should by analogy be understood as "terms of the judgment" or other obligation. The "more favorable" terms include such changes 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.

8. 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. Hence, 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 entities even if the concessions offered by creditors are not subject to negotiation. It does not include services 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.

9. 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 an individual and a debt collector (or other representative of the creditor) 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 individual and the transferee of the debt for the purpose of obtaining concessions is providing debt-management services.

10. The definition excludes professional services provided by attorneys or certified public accountants, but only if the attorney is licensed or otherwise authorized to practice in this state or the accountant is licensed by this state. The phrase “or otherwise authorized” is to recognize bar rules that contemplate interstate practice of law.

The exclusion applies only if the services are rendered in an attorney-client, accountant-client, or financial planner-client relationship. Thus it does not suffice that the owner of a provider is an attorney, an accountant, or a financial planner. The attorney, accountant, or financial planner must be providing legal [illegible] transfer to a 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 requirement is satisfied even if part of the payment is used to pay a monthly service fee to the provider. The requirement of payments of the individual's debts 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."

14. 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 debt-management-services 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.

15. 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. Subject to section 3, which 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. See, e.g., Cambridge Credit Counseling Corp. v. Foulston, 303 F. Supp. 2d 1188 (D. Kan. 2003) (upholding the constitutionality of applying to a Massachusetts company the Kansas statute regulating credit counseling), appeal dismissed on motion of appellant and judgment vacated, No. 03-3317 (10th Cir. Oct. 19, 2004).

16. The definition includes persons that offer to provide debt-management services, as well as those that actually provide the services. Unless exempt under section 3, a person that offers to provide debt-management services must comply with all applicable 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

18. The definition of “provider” encompasses those who, acting directly or through others, act as intermediaries between an individual and the individual’s creditors. If a provider contracts with another person for that person to perform services other than acting as an intermediary, such as maintaining the trust account required by section 22 or sending out the notices required by section 25, the other person may not be a “provider.” But the provider for which it is performing services is liable for any conduct of the other person that does not comply with the duties and obligations that this Act places on providers. See section 31. Conversely, the person whose conduct fails to conform to the Act is liable for causing the provider to violate the Act. See section 35(c).

At several places the Act speaks of “provider or its designee,” referring to the person holding money of an individual pursuant to a plan. This is intended to foreclose any attempt by a provider to evade its responsibilities under the Act by delegating to an independent contractor the tasks incident to receiving money of the individuals with whom it has agreements.

19. 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.

SECTION 3. EXEMPT AGREEMENTS AND PERSONS.

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

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

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

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

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

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

(2) a bank;

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

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

Comment

1. Under section 2(15) a person may be 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 is

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.

6. Subsection (b)(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. It does not, however, exempt a provider that recovers its operating expenses from creditors, even if the provider does not impose any cost on the individuals it serves.

7. The definition of "bank" in section 2(4) incorporates a requirement that the entity be "regulated by a federal or state banking regulatory authority." This section exempts not only banks, but also subsidiaries of banks. As with banks, a subsidiary of a bank is exempt only if it is subject to regulation by a federal or state banking regulatory authority. The exemption exists if the subsidiary is subject to regulation, even if the banking authority has not exercised its power with respect to debt-management services.

8. Subsection (c)(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.

The exemption for bill-paying services applies only if debt-management services are "incidental to" the regular course of the person's business of providing bill-paying services. If the person holds itself out as providing debt-management services, then debt-management services are not incidental.

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Comment

1. The Act uses the term “individual” rather than “consumer.” The purpose of this usage is to enlarge the usual meaning of “consumer” (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.

2. 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 Official Comment to section 3.

3. Under 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.

4. The objective of subsection (c) 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.

5. Subsection (d) requires [certain] providers to be organized and operating as a not-for-profit and also be tax-exempt under federal law. The former is a prerequisite for the latter. The purpose of stating it here as a separate requirement is to authorize a review of the ongoing, actual operation of the entity, even though at its formation it may truly have been a not-for-profit. See Zimmerman v. Cambridge Credit Counseling, 409 F.3d 473 (1st Cir. 2005). If an entity is not properly operating as a not-for-profit entity under the law of its organization, it is not properly registered under this Act.

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

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

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

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services, the first bracketed language in paragraph (6) should be deleted so that paragraph (6) states:

> *(6) evidence of tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501 [, as amended].*

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

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

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

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

> *(1) select the appropriate bracketed language and omit the other, so that paragraph (6) states: "(6) if the applicant's agreements contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency, evidence of [not-for-profit] [and] [tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501 [, as amended]]"; and*
>
> *(2) add a new paragraph: "(7) if the applicant's agreements contemplate that creditors will settle debts for less than the full principal amount of debt owed and the applicant is*
>
> *(A) organized as a not-for-profit entity, evidence of not-for-profit status;*
>
> *(B) exempt from taxation, evidence of not-for-profit and tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501 [, as amended]."*

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

> *(1) select the appropriate bracketed language and omit the other, so that paragraph (6) states: "(6) if the applicant's agreements contemplate that creditors will settle debts for less than the full principal amount of debt owed, evidence of [not-for-profit status] [and] [tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501[, as amended]]"; and*
>
> *(2) add a new paragraph: "(7) if the applicant's agreements contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency and the applicant is*

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

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

Comment

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

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

The bond requirement in paragraph (2) may be satisfied also in the mam3()(2)Tj12.96000.0004TD-0.220

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

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

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

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

(3) the address of each location in this state at which the applicant will provide debt-management services or a statement that the applicant will have no such location;

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

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

(A) the applicant or any

conduct audits, for each of the two years immediately preceding the application or, if it has not been in operation for the two years preceding the application, for the period of its existence;

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

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

respect to proceedings of which the applicant reasonably is unaware, but the concept "should be known" encompasses facts that a reasonable investigation would have revealed. "Authorized to have access to the trust account" refers to persons who may initiate transactions in the account, not persons who merely are empowered to view the account.

6. Paragraph (7) requires financial statements

industry's practices in the state and may assist the administrator in determining whether an individual provider is gouging individuals or whether the legislature should be encouraged to raise the fee cap because the passage of time or changed circumstances make it too low. Section 23 imposes limitations on the amount of fees, and Section 24 prohibits the solicitation of voluntary contributions.

12. Paragraphs (12) and (13) require information that is current as of the time of the application. Unless the a

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).

Comment

The cross-referenced sections require evidence of insurance against misconduct; evidence of not-for-profit and 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)(4) (Renewal of Registration), which requires notification at the time of renewal of registration. Notification of a change, of course, means that the applicant or registered provider must communicate the new information, not merely that the original information is no longer accurate.

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

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. Nor does it limit access to information that is available to the public under other law, such as the law governing tax-exempt entities.

SECTION 9. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL.

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

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

(c) The administrator may deny registration if:

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

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

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

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

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

(e) Subject to adjustment of the dollar amount pursuant to Section 32(f), a board

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

Comment

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

2. Some conduct may justify a lifetime ban from the debt-management-services industry. Examples include some of the conduct described in subsection (b)(2) and (3). Other conduct can be readily corrected, e.g., subsection (b)(1). The introductory language of the subsection ("administrator *may* deny") gives the administrator discretion to consider the importance of various items of adverse information about an applicant, such as the precise nature and timing of past criminal conduct. The language of limitation at the end of subsection (b)(2) ("involving

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

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

SECTION 10. CERTIFICATE OF REGISTRATION: TIMING.

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

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

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

Comment

The administrator must 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. If the administrator fails to act on an application within the specified time, the application is not automatically granted, because although that would encourage the administrator to act in a timely manner, granting the application of an unqualified provider would be to the detriment of the public. If the administrator fails to act as prescribed, the applicant may appeal to the courts.

SECTION 11. RENEWAL OF REGISTRATION.

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

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

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

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

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

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

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

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

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

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

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

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

(6) disclose the total amount of money received by the applicant pursuant to plans during the preceding 12 months from or on behalf of individuals who reside in this state

and the total amount of money distributed to creditors of those individuals during that period;

(7) disclose, to the best of the applicant's knowledge, the gross amount of money accumulated during the preceding 12 months pursuant to plans by or on behalf of individuals who reside in this state and with whom the applicant has agreements; and

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

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

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

(e) If the administrator denies an application for renewal of registration as a provider, the applicant, within 30 days after receiving notice of the denial, may appeal and request a hearing pursuant to [insert the citation to the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure]. Subject to Section 34, while the appeal is pending the applicant shall continue to provide debt-management services to individuals with whom it has agreements. If the denial is affirmed, subject to the administrator's order and Section 34, the applicant shall continue to provide debt-management services to individuals with whom it has agreements until, with the approval of the administrator, it transfers the agreements to another registered provider or returns to the individuals all unexpended money that is under the applicant's control.

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

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

Comment

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

remains effective until the administrator denies it. The denial of an application for renewal triggers a right of appeal under subsection (e). Pending completion of the appeals process, a provider is required to continue providing debt-management services, even though the administrator has determined that it should not be permitted to continue its business in this state. For this reason, subsection (e) limits to 30 days the time for initiating the appeals process. If the appeals process concludes with a determination upholding the administrator's decision, section

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 the provider ceases providing debt-management services to individuals in this state; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

1. Subsection (a) imposes the bond requirement on all providers that section 4 requires to be registered, including 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.

2. 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. Therefore, paragraph (1) seeks to preserve the availability of the bond for two years after the year in which the provider's registration ends.

3. Paragraph (2) requires the bond to run 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 the administrator's enforc

8. Subsection (e) creates an administrative procedure for the payment of claims, but it does not require use of that procedure. A surety may file an interpleader action for distribution of the proceeds. This subsection suggests the order in which a court should distribute the proceeds

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.

2. 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. If a letter of credit requires personal presentation of a certificate, presentation to a distant bank may entail inconvenience or expense. When this is the case, the administrator may confine approval to banks located in a specified geographic area.

3. Subsection (a)(2)(A) requires that a 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 a 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. Similarly, the administrator may require that a letter of credit provide for presentation of the certificate by mail or other specified means.

4. Subsection (b) refers to several provisions of section 13, which applies to surety bonds. 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).

5. Section 35(g) requires the administrator to fhe nature

d. availabl(larly)Tiof the state

SECTION 16. CUSTOMSTOMSTOM

following terminology, as applicable, and format:

Set-up fee	________________________________ *dollar amount of fee*
Monthly service fee	________________________________ *dollar amount of fee or method of determining amount*
Settlement fee	________________________________ *dollar amount of fee or method of determining amount*

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

________ (*item*)	________________________________ *dollar amount or method of determining amount*
________ (*item*)	________________________________ *dollar amount or method of determining amount*.

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

(1) provides the individual with reasonable education about the management of personal finance;

(2) has prepared a financial analysis; and

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

(A) has prepared a plan for the individual;

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

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

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

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

(2) inform the individual of the availability, at the individual's option, of assistance by a toll-free communication sy

default, or delinquency, the provider may comply

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

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

____

Name and business address of provider

Comment

1. Subsection (a) 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.” The subsection requires disclosure “as applicable.” Therefore, if a provider does not impose one or more of the specified fees, it need not make any disclosure with respect to the omitted fee(s).

Paragraph (3) requires disclosure of “goods and services in addition to those and expenses for the purpose of enabling the provider to make the suitability and feasibility determinations required by paragraph (3)(B).

4. 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 entity 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 o

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

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

SECTION 18. COMMUNICATION BY ELECTRONIC OR OTHER MEANS.

(a) In this section:

(1) "Federa

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

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

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

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

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

(3) the names of its principal officers.

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

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

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

Comment

1. Subsection (b) permits electronic delivery of the information required by sections 17 and 27, and it permits electronic formation of agreements. It is designed to coordinate with the federal E-Sign Act, which establishes certain prerequisites before written documents or disclosures required by state law may be delivered via electronic media. These prerequisites exist, however, only for transactions with consumers. States may not extend those prerequisites to non-consumers, so unlike the rest of this Act, some of this section applies only to interactions with consumers, a class that does not include all individuals.

If a merchant wants to provide required information by means of electronic communication, the federal statute requires it to obtain the consumer's affirmative consent to the use of electronic media and inform the consumer of any right to have the information or documents provided in written form and the right to withdraw at any time his or her consent to disclosure by electronic medium. Subsection (b) makes compliance with the federal statute a prerequisite also to complying with this Act through the use of electronic communication. If a provider fails to comply with this subsection, then the permission granted by this section does not apply, and the provider must deliver the required documents and disclosures in writing.

2. The language of subsection (c)

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, subsections (e) and (f) require the provider to comply with the request because the request is made before the expiration of 90 days after a plan is completed or terminated. 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.

6. A provider might do business under numerous names. Subsection (g) applies to all providers, even if they make disclosures and form agreements using a paper medium. It requires disclosure of all the provider's business 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."

7. Subsections (h) and (i) are designed to implement E-Sign section 101(c)(1)(B), which authorizes a consumer to withdraw consent to electronic communication, in which event the merchant may terminate the relationship. Subsection (h) gives a provider the right to terminate an agreement with a consumer, and subsection (i) gives the consumer a right to reinstate the agreement.

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 information required under subsection (a)(6)(J), the provider may comply with that requirement only by disclosing the information supplied by the administrator.

(d) An agreement must provide that:

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

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

(B) with respect to an agree

United States and this state;

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

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

(4) contain a provision that:

(A) limits or releases the liability of any person f section 17(a) requires to be disclosed before an agreement is formed. See Official Comment 1 to administrator informs the provider of the details by which individuals may make complaints or inquiries relating to this Act, subsection (c) requires the provider to disclose those details in the agreement. Compliance with this requirement 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.

11. The historic practice by many credit-counseling agencies has been to permit termination at any time; they do not even purport to bind the individual to a contract. Subsection (d) mandates this right of termination as against 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, if an individual terminates an agreement, paragraph (1)(A) requires return of any unexpended money intended for payment to creditors. For credit-counseling entities, no refund of set-up or monthly fees is required. For debt-settlement entities, however, paragraph (1)(B) requires the agreement to provide for refund of a portion of the set-up fee. Section 23(f) requires the provider to credit any set-up fee against a settlement fee. It also requires the provider to credit the monthly service fees against the settlement fee. To maximize the refund under this section, as contemplated here, the monthly service fees should credited first. To determine the refund due under paragraph (1)(B), the provider must deduct from the total amount of any settlement fees the total amount of monthly fees paid up to the time of termination. If the result is less than 0 (or if there have been no settlement fees), then no part of the set-up fee has yet been credited against the settlement fee, and the refund is 65% of the set-up fee. If the result is greater than 0, subtract that result from the set-up fee. The refund is 65% of the difference.

12. Paragraph (1)(C) requires the agreement to provide that in the event of termination, all powers of attorney terminate. Section 28(a)(4) complements this provision by making it unlawful for a provider to attempt to exercise a power of attorney after the individual has terminated the agreement.

13. Paragraph (2), in conjunction with section 5(b)(3), is designed to satisfy privacy laws in such a way that the administrator has access to information about a provider's trust account.

14. Subsection (e) permits an agreement to confer on the provider a power of attorney to settle debts for 50 cents on the dollar

terms of a settlement before it becomes final.

15. Subsection (f) seeks to preserve the individual's common law and statutory rights against the unilateral decision of a provider to remove or restrict them. Thus a provider may not evade this Act by adopting the law of another jurisdiction. Nor may a provider 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.

16. The failure of a provider to include in an agreement the provisions required by this section is a violation of the Act and justifies administrative enforcement under sections 32-33 and private enforcement under section 35. Even if omitted, however, subsection (g) makes the required provisions part of the agreement. Conversely, a provision that violates subsections (d)-(f) is void, but this does not render the entire agreement void.

SECTION 20. CANCELLATION OF AGREEMENT; WAIVER.

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

(b) An agreement must be accompanied by a form that contains in bold-face type, surrounded by bold black lines:

Notice of Right to Cancel

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

To cancel this agreement during this period, send an e-mail to

_____________________________ or mail or deliver a signed, dated copy of this
E-mail address of provider

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

at ________________________________ before midnight on ____________________.
Address of provider *Date*

If you cancel this agreement within the 3-day period, we will refund all money you already have paid us.

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

I cancel this agreement,

____
Print your name

____
Signature

____
Date

(c) If a personal financial emergency necessitates the disbursement of an individual's money to one or more of the individual's creditors before the expiration of three days after an agreement is signed, an individual may waive the right to cancel. To waive the right, the individual must send or deliver a signed, dated statement in the individual's own words describing the circumstances that necessitate a waiver. The waiver must explicitly waive the right to cancel. A waiver by means of a standard-form record is void.

Comment

1. 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. If the agreement calls for the performance of conduct prohibited by section 28, or if the agreement does not comply with subsection (b) or section 19, 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 amou1.3 0.0000 TD(n)Tj 5.2800 0 TD(t)Tj [illegible]

r i g

2. 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-

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

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

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

(g) If a provider discovers, or has a reasonable suspicion of, embezzlement or other unlawful appropriation of money held in trust, the provider immediately shall notify the admi 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 of the provider, any interest on the money of the individuals in the a requirement of section 15. 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.

SECTION 23. FEES AND OTHER CHARGES.

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

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

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

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

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

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

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

(2) If an individual assents to an agreement that contemplates that creditors will settle debts for less than the principal amount of the (2) I)p3I815.0eaamounts0800 cm0.0020.0000.00

and four percent of the debt in the plan at the inception of the plan; and

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

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

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

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

(f) Except as otherwise provided in subsections (c) and (d), if an agreement contemplates that creditors will settle an individual's debts for less than the principal amount of the debt, compensation for services in connection with settling a debt may not exceed, with respect to each debt:

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

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

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

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

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

Comment

1. Subsection (a) is comprehensive: unless authorized by this section, a provider may not

receive a payment for debt-management services. 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. This would be indirectly charging for debt-management services.

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 and argue that only some are properly viewed as charges for debt-management services. Or a provider might require the individual to pay some components of the cost to 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 provider routinely includes the cost of additional education in the proposed agreement that it 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.

5. 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. Subsection (c) does not limit the charges authorized by those programs.

6. Paragraphs (1) and (2) of subsection (d) 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, except that the monthly fee may not exceed $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 a creditor who the provider knows will make no concessions and imposes a $10 per month fee for that creditor, the provider may violate this subsection or section 28(a)(16) (prohibiting unfair, unconscionable, or deceptive acts or practices).

7. If the provider is a credit-counseling entity, 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. The cross reference in paragraph (2)(A) is to the section that requires refund of 65 percent of the set-up fee if the individual terminates the agreement.

8. A provider may engage in both credit counseling and debt settlement. If so, it must comply with the provisions in the Act applicable to each. Paragraph (3), however, prohibits the provider from being compensated separately for each role. To determine the monthly service fee, the provider must aggregate the number creditors in the plan—whether they are to receive regular payments or a one-time payment in settlement of the debt—and impose any per-creditor charge on that aggregate number (not to exceed a total of $50 in any month). Similarly, a provider may not receive both a $50 set-up fee under paragraph (1)(A) and a 4%/$400 set-up fee under paragraph (2)(A). The applicable limit on the set-up fee should be determined by examining whether the plan is predominantly for full payment of the individual’s debts (with reduction in finance charges or other fees) or predominantly for the settlement of those debts for an amount less than the full principal amount of debt owed.

9. Paragraph (4) permits a provider to impose a charge for education or counseling if an individual does not enter an agreement. The maximum fee for this education or counseling is specified in the statute, but this paragraph permits the administrator to authorize a larger fee. The approval may, but need not, refer to a specific provid(lis)Tj12 d7200 0.0000 TD0 TD(ot,)Tj1260D(Th)Tj

constrain attempts to evade the restrictions of this section.

13. Subsection (f) authorizes a debt-settlement entity to charge a settlement fee, but requires it 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.

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.

Comment

1. 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. It 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 practice is unlawful.

2. 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.

Comment

1. If a provider overcharges, subsection (a) gives the individual the option of voiding the agreement. The individual's right to void the agreement is subject to the provider's defense under section 35(f) for an overcharge that results from a good-faith error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

2. If a provider is not properly registered under section 4, subsection (b) empowers the individual to 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).

3. 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 subsection (c) 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 fails for 60 days to make payments required by the agreement, a provider may terminate the agreement.

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

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

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

Comment

1. Section 19(a)(6)(G) requires a pr

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 entities, 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 entities, the paragraph 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 amount and the method of arriving at the amount of the fee, e.g., "$100, which represents 20% of the difference between the amount of the debt when you entered the plan and the amount paid pursuant to the settlement."

5. The period of retention required by subsection (c) 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 r

another person unless the transfer is:

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

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

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

(ii) payment of a fee;

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

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

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

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

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

(11) settle a debt or lead an individual to believe that a payment to a creditor is in settlement of a debt to the creditor unless, at the time of settlement, the individual receives a certification by the creditor that the payment is in full settlement of the debt;

(12) make a representation that:

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

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

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

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

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

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

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

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

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

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

(1) purchase a debt or obligation of the individual;

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

(A) the

If a creditor, for example, suggests that an individual consult a particular provider, the individual is likely to perceive this as an endorsement by a creditor that is seeking to help the individual. The same is true if the creditor supplies the individual's name to a provider and the provider contacts the individual, telling the individual that the creditor suggested the communication. 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. A creditor is one example of a person that has a financial interest in the outcome of debt-management services. Another is a person whose compensation varies depend

7. The practice of many providers has been to compensate their employees on the basis of how many individuals they can enroll in plans. This provides an incentive to the employees to engage in deceptive and coercive sales pitche

granted tax-exempt status under the Internal Revenue Code. If it is not operating in a manner consistent with the law under which it on the dissemination of personal information. So long as the provider strips out the individual's identifying information, however, it is free under this Act to disclose information for purposes of academic research or construction of a scoring system. If the identifying information is present, this paragraph prohibits disclosure of any of the information, except as permitted by the three specified exceptions. To the extent that other law restricts the disclosure of information about an individual, the provider may be able to comply with that law by obtaining the individual's consent to the disclosure. But this paragraph makes no provision for authorizing the provider to release information with the individual's consent.

The only permissible purpose for a disclosure to a creditor of the individual is to secure its cooperation. Disclosure to other persons (other than the administrator) is permitted only if disclosure is necessary for the administration of a plan. For example, a provider may delegate to a third party its duty to administer a trust account or its duty to provide periodic reports. To the extent necessary to enable the third party to perform the tasks that have been delegated to it, the provider may disclose information concerning its customers.

On the other hand, 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.

17. The cross-referenced section paragraph (6) 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, but this paragraph should not be interpreted to prohibit the receipt of any fees permitted by this Act.

18. Paragraph (7) 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. It should be interpreted accordingly. The administrator may adopt rules specifying items that fall into 45.2800 evaskTjET1.00000 0.00000 0.0000 TD(ting ne)Tj32.8800

authorize providers or their employees to practice law. The Act does not, however, attempt to draw the line between the practice of law and the services required or permitted by the Act. Rather, it contemplates that the courts will continue to develop and apply the rules concerning the unauthorized practice of law.

21. Subsection (d) prohibits a provider from receiving compensation for performing specified services for a third party, a technique used in other contexts to evade regulation. The prohibition 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.

The purpose of the exception is to accommodate programs of governmental agencies that require counseling in connection with reverse mortgages, first-time homebuyers programs, or other financial services products.

22. Subsection (e) prohibits insider transactions unless the transactions are bona fide

SECTION 30. ADVERTISING.

(a) If the agreements of a provider contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency and the provider a

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.

To illustrate, 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.

Similarly, 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 which a provider has delegated its obligations under an agreement or this [act], to determine compliance with this [act]. Information that identifies individuals who have agreements with the provider shall not be disclosed to the publi

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

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

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

Comment

1. Subsection (b) authorizes the administrator to investigate the activities of a provider and its delegees. If permitted by the law generally applicable to administrative agencies, the administrator may publicize the results of an investigation. The administrator may not, however, publicize or otherwise disclose information that identifies individual customers of a provider. This restriction applies both to general publicity and to freedom-of-information requests.

2. 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.

3. Subsection (c) gives the administrator broad powers to adopt rules to implement and, to the extent permitted by the law governing administrative procedure, 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.

4. Under 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, the total amount of debt owed by residents of this state, the 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, inter alia, a provider's presumptive ability to pay or on the administrative burden a provider places on the enforcement of the Act.

5. Subsection (f) requires the administrator to 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)

6. 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. Nevertheless, subsection (g) requires the administrator to notify registered providers of the change, and the administrator may wish also 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 any violations;

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

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

(4) prosecuting a civil action to:

(A) e

investigation, but permits the recovery of costs against other persons who are found to violated the Act. See subsection (a)(3) (liability of a person that has caused a violation).

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

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

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

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

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

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

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

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

(3) the provider is insolvent;

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

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

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

(d) If the administrator suspends, revokes, or denies renewal of the registration of

(c)(4).

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

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

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

(3) punitive damages; and

(4) reasonable attorney's fees and costs.

(d) In a class action, except for a violation of Section 28(a)(5), the minimum d;dd;ddter of the

1. This section specifies the private remedies for an individual with respect to whom a provider or other person has violated the Act. More than one subsection may apply to a particular violation, and the individual may recover under any of them. If there are multiple acts that each violate a different provision of the Act, the individual may recover for the loss caused by each of them.

2. Section 25(b) makes an agreement voidable if the provider is not properly registered under this Act. Under subsection (a) the individual may recove

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

actions under the rules of civil procedure are satisfied. The minimum damages provision does not apply in a class action 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.

11. Subsection (e) 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.

12. A provider has a defense to civil liability under subsection (f) if its violation is 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 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. E.g., Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974).

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. It is not enough that the provider's violation was unintentional. The provider is liable under section 31 for the violations of its delegee, and the provider is exonerated by this subsection only if the delegee's conduct meets the standard of this subsection.

13. If a 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 of subsection (f), 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.

If a provider's violation of section 23 or 24 results from an act or a policy that affects more than one individual, the defense is available only if the provider makes refunds to all of them within two days of learning of the violation as to one individual. Once informed of the violation by a single individual, the provider has learned of the violation as to all individuals who were overcharged in the same way.

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

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

Comment

Conduct that violates this Act also may violate a deceptive practices statute, and this section prohibits recovery under multiple statutes for the same conduct. The aggrieved individual may assert both statutes but may recover only under one.

SECTION 37. STA

(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].

Comment

The four-year limit of subsection (a) 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 is the 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 enacttstatetsteg and

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.

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

SECTION 42. REPEAL. The following laws are repealed:

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

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

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