State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

PLEASE DO NOT REMOVE FROM DRAFTING FILE

Date Transfer Requested: 11/28/2006 (Per: MDK)

☞ Appendix A ... Part 01 of 05

☞ The 2005 drafting file for LRB 05–5042

has been transferred to the drafting file for

2007 LRB 07–0917

☞ This cover sheet, the final request sheet, and the final version of the 2005 draft were copied on yellow paper, and returned to the original 2005 drafting file.

☞ The attached 2005 draft was incorporated into the new 2007 draft listed above. For research purposes, this cover sheet and the complete drafting file were transferred, as a separate appendix, to the 2007 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

2005 DRAFTING REQUEST

Bill

Received: **06/02/2006**

Received By: **mkunkel**

Wanted: **As time permits**

Identical to LRB:

For: **Steve Wieckert (608) 266-3070**

By/Representing: **Scott Becher**

This file may be shown to any legislator: **NO**

Drafter: **mkunkel**

May Contact:

Addl. Drafters:

Subject: **Fin. Inst. - int. rates/loans**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Wieckert@legis.state.wi.us**

Carbon copy (CC:) to: **dan.schmidt@legis.state.wi.us**
mary.matthias@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Uniform Debt-Management Services Act

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?				_____			State
/P1	mkunkel 07/07/2006	lkunkel 07/13/2006	rschluet 07/14/2006	_____ _____	lnorthro 07/14/2006		State
/1	mkunkel 08/07/2006	kfollett 08/09/2006	rschluet 08/09/2006	_____ _____	sbasford 08/09/2006		

FE Sent For:

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philip.cardis@legis.state.wi.us Mary Mathias

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Topic:

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/?				_____			State
/P1	mkunkel 07/07/2006	lkunkel 07/13/2006	rschluet 07/14/2006	_____ _____	lnorthro 07/14/2006		

FE Sent For: 1 1 6 f 8/9 896 **<END>**

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Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	mkunkel	/pl/mk 7/13		LMK			State

FE Sent For:

7146

<END>

Kunkel, Mark

From: Becher, Scott
Sent: Thursday, June 01, 2006 10:20 AM
To: Kunkel, Mark
Subject: FW: NCCUSL acts in pdf format
Attachments: UARA_final_05.pdf; UFCMJRA_final_05.pdf; UDMSA_final_05.pdf; META_final_05.pdf

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From: Michael Kerr [mailto:MKerr@nccusl.org]
Sent: Wednesday, February 15, 2006 9:34 AM
To: Becher, Scott
Subject: NCCUSL acts in pdf format

Scott:

Got your message, here are the acts in PDF format. We also do a version that is text-only that drafting offices tend to like. Let me know if you want those as well.

-Mike Kerr
NCCUSL

A Few Facts About
UNIFORM DEBT-MANAGEMENT SERVICES ACT (2005)

PURPOSE: This Act provides guidance and regulation to the debt counseling industry. The Act applies to both consumer debt counseling services and debt management services. The Act is a comprehensive statute that provides rules for, among other things, registration requirements, bond requirements, disclosure requirements, and penalties for non-compliance.

ORIGIN: Completed by the Uniform Law Commissioners in 2005.

STATE ADOPTIONS:

2006 INTRODUCTIONS:
Colorado
Illinois
Nebraska
Utah

For any further information regarding the Uniform Debt-Management Services Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(2/2/06)

UNIFORM DEBT-MANAGEMENT SERVICES ACT

- A Summary -

Consumer debt counseling and management services have been available to individuals with serious credit problems going back to the 1950's. There are generally two kinds of services that have been available. Some of these services have provided counseling coupled with assisting debtors in establishing programs to pay off debts over an extended time. Others have provided consolidation and management services, in which agreements are reached with creditors to settle on a percentage of debt. Most of these services have collected a periodic amount from the debtors from which payment to creditors has been made. The general objective of these services has been debt satisfaction without resort to bankruptcy.

The history of debt counseling and management services is checkered. There have been numerous abuses and efforts to counter abuses statutorily in many states. These services have been criticized for their efforts to steer debtors away from bankruptcy when it may have been more advantageous and less costly to debtors to file. Many states prohibit for-profit debt management services while permitting nonprofit debt counseling services. One of the continuing controversies is whether for profit services should be allowed even if regulated.

However, federal bankruptcy reform effective in 2005 has changed the perspective on such services. For an individual to file for Chapter 7 bankruptcy, that individual will in most cases have to show that consumer debt counseling/management has been sought and attempted. This shifts a highly significant burden upon private services to perform honestly and effectively. Because the new bankruptcy rules are federal and apply in every state, regulating the counseling and management services in every state must be uniform in character for the new bankruptcy rules to be effective and for consumers to be protected.

In 2005, just in time for consideration in the state legislatures, the Uniform Law Commissioners promulgated the **Uniform Debt-Management Services Act (UDMSA).** It provides the states with a comprehensive act governing these services that will mean national administration of debt counseling and management in a fair and effective way.

UDMSA may be divided into three basic parts: registration of services, service-debtor agreements and enforcement. Each part contributes to the comprehensive quality of the Uniform Act.

Registration

No service may enter into an agreement with any debtor in a state without registering as a consumer debt-management service in that state. Registration requires submission of detailed information concerning the service, including its financial condition, the identity of principals, locations at which service will be offered, form for agreements with debtors and business history in other jurisdictions. To register, a service must have an effective insurance policy against

fraud, dishonesty, theft and the like in an amount no less than $250,000.00. It must also provide a security bond of a minimum of $50,000.00 which has the state administrator as a beneficiary. If a registration substantially duplicates one in another state, the service may offer proof of registration in that other state to satisfy the registration requirements in a state. A satisfactory application will result in a certificate to do business from the administrator. A yearly renewal is required.

Agreements

In order to enter into agreements with debtors, there is a disclosure requirement respecting fees and services to be offered, and the risks and benefits of entering into such a contract. The service must offer counseling services from a certified counselor and a plan must be created in consultation by the counselor for debt-management service to commence. The contents of the agreements and fees that may be charged are set by the statute. There is a penalty-free three-day right of rescission on the part of the debtor. The debtor may cancel the agreement also after 30 days, but may be subject to fees if that occurs. The service may terminate the agreement if required payments are delinquent for at least 60 days.

Any payments for creditors received from a debtor must be kept in a trust account that may not be used to hold any other funds of the service. There are strict accounting requirements and periodic reporting requirements respecting funds held.

Enforcement

The Act prohibits specific acts on the part of a service including: misappropriation of funds in trust; settlement for more than 50% of a debt with a creditor without a debtor's consent; gifts or premiums to enter into an agreement; and representation that settlement has occurred without certification from a creditor. Enforcement of the Uniform Act occurs at two levels, the administrator and the individual level. The administrator has investigative powers, power to order an individual to cease and desist; power to assess a civil penalty up to $10,000.00, and the power to bring a civil action. An individual may bring a civil action for compensatory damages, including triple damages if a service obtains payments not authorized in the Uniform Act, and may seek punitive damages and attorney's fees. A service has a good faith mistake defense against liability. The statute of limitations pertaining to an action by the administrator is four years, and two years for a private right of action.

Banks as regulated entities under other law are not subject to the Uniform Act, as are other kinds of activities that are incidental to other functions performed. For example, a title insurer that provides bill-paying service that is incidental to title insurance is not subject to it.

UDMSA provides comprehensive regulation of debt counseling and management services. It becomes an essential part of the law of creditor and debtor as bankruptcy reform enacted by Congress in 2005 takes effect.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300, Chicago, IL 60611
312-915-0195, Fax 312-915-0187, www.nccusl.org

Contact: John McCabe, NCCUSL Legislative Director, 312-915-5976
Katie Robinson, NCCUSL Communications Officer, 312-915-5962

For Immediate Release:

FEDERAL BANKRUPTCY LEGISLATION GOES INTO EFFECT TODAY
New State Law Will Help Regulate the Credit Counseling Industry

October 17, 2005 – Millions of Americans are in serious financial trouble, with consumer debt exceeding $2 trillion; the average American household has more than $7,000 in credit-card debt. Many have turned to debt-counseling services and debt-settlement firms for assistance with their debts. Under the new federal bankruptcy act (the *Bankruptcy Abuse Prevention and Consumer Protection Act)*, which goes into effect today, many more will be required to seek this help. Under the federal bill, a condition to filing for consumer bankruptcies will be a briefing by a debt counseling service. Under the federal law, the consumer pays for this mandatory credit counseling.

While the federal legislation mandates credit counseling, it does not authorize funds to investigate these agencies, their fees, practices or success rates. The only federal regulation of credit counseling agencies occurs through scrutiny of their tax-exempt status under Section 501 of the Internal Revenue Code. State regulation is spotty at best. But a state statute, recently approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL), could go a long way to regulate the credit counseling agency industry. The **Uniform Debt-Management Services Act** will bring much-needed guidance and regulation to the debt counseling industry.

The consumer credit counseling industry arose as a means of assisting individuals to pay their credit card debt without resorting to bankruptcy and to enable creditors to collect debt that would otherwise be discharged in bankruptcy. But over the last decade, the industry has changed significantly, and a new generation of agencies – many rife with deceptive practices – has appeared. The Federal Trade Commission has filed lawsuits against numerous companies; the Better Business Bureau has reported some 2,000 complaints in the past three years.

While there is clearly a need for better debt counseling to help consumers get out of financial trouble – according to the Administrative Offices of the U.S. Courts, in 2004, 1,137,958 individuals filed for Chapter 7 bankruptcy while 449,129 filed for Chapter 13 bankruptcy – there is currently very little oversight of these debt counseling services.

"The Uniform Debt Management Services Act addresses the problems that have developed and enables the states to take a common approach to regulation of the credit counseling industry," says John M. McCabe, Legal Counsel and Legislative Director for NCCUSL. "A uniform approach is particularly important because the great majority of agencies operates in multiple states and would otherwise be subject to multiple and sometimes conflicting requirements. The importance of this new uniform act is clear given the rules under the federal bankruptcy act, which requires consumers to consult a debt counseling service before declaring bankruptcy."

The purpose of the new Uniform Act is to bring guidance and regulation to the consumer debt counseling industry. The Act is a comprehensive statute that provides rules for, among other things, registration requirements, bond requirements, disclosure requirements (including a list of goods and services – and the charges for each – that the agency will provide to the consumer), and penalties for non-compliance.

The Act applies to both credit counseling services and debt settlement services (credit counseling services generally help a consumer repay all of his or her debt, while debt settlement services generally attempt to persuade creditors to settle for less than the full amount of the consumer's debt). The Act gives states the option of applying to both for-profit and not-for-profit agencies.

The approved text of the Uniform Debt-Management Services Act can be found at www.nccusl.org.

NCCUSL is the organization comprised of more than 350 practicing lawyers, governmental lawyers, judges, law professors and lawyer-legislators, who are appointed by each state, as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state laws where uniformity is desirable and practical. Now in its 114th year, NCCUSL has provided states with over 250 uniform acts that help bring clarity and stability to critical areas of state statutory law.

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WHY STATES SHOULD ADOPT THE UNIFORM DEBT-MANAGEMENT SERVICES ACT

The Uniform Debt-Management Services Act (UDMSA), promulgated by the National Conference of Commissioners on Uniform State Laws in 2005, is a comprehensive statute that provides guidance and regulation to the consumer debt counseling industry, while also providing fairer and better services to debtors. The consumer debt management industry has taken many forms over the time since its development in the 1950's. The industry has had a checkered past, with frequent accusations of abuse. The interest in debt counseling and management, however, has been dramatically escalated by the bankruptcy reform legislation passed by Congress in 2005. It mandates counseling by a private agency before an individual may enter into bankruptcy. The UDMSA regulates debt-management companies by requiring them to register with the state.

There are a number of reasons why every state should adopt the Uniform Debt Management Services Act.

- The Act applies to both credit counseling services and debt settlement services (credit counseling services generally help a consumer repay all of his or her debt, while debt settlement services generally attempt to persuade creditors to settle for less than the full amount of the consumer's debt).

- The Act requires registration of anybody offering debt-management services, mandating that a provider must supply information about itself, must obtain insurance against employee dishonesty, and must post a surety bond to safeguard any money that it receives from individuals for payment of creditors.

- The Act requires disclosure to debtors of goods and services – and the charges for each – that an agency will provide, and provisions governing the performance and termination of agreements.

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

- The Act strives to establish uniformity of regulation, including reciprocity to registrations from one state by another state.

UNIFORMITY

A uniform approach is particularly important because the great majority of agencies operates in multiple states and would otherwise be subject to multiple and sometimes conflicting requirements. Also, because the new bankruptcy rules are federal and apply in every state, regulating the counseling and management services in every state must be uniform in character for the new bankruptcy rules to be effective and for consumers to be protected. Every state should act quickly to adopt the Uniform Debt-Management Services Act.

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

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Chicago, IL 60610-4714
FAX: (312) 988-5785
http://www.abanet.org/legalservices

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February 7, 2006

John M. McCabe
Legal Counsel
National Conference of Commissioners on Uniform State Laws
211 E. Ontario, Suite 1300
Chicago, IL 60611

Re: ABA Recommendation 104B

Dear Mr. McCabe:

I write to you in my capacity as chair of the ABA Standing Committee on the Delivery of Legal Services. It is the mission of the committee to maximize access to legal services and justice for moderate-income people. As such, the committee has a lengthy history for the support of policies that set out reasonable regulations providing protections to consumers seeking solutions to their legal concerns.

Consequently, Standing Committee on the Delivery of Legal Services commends the work of the National Conference of Commissioners on Uniform State Laws for bringing forward Recommendation 104B and offers its support for the resolution.

Sincerely,

Lora J. Livingston
Chair

cc. Members of the Standing Committee on the Delivery of Legal Services
Richard Cassidy
Rochelle Evans

-5042

UNIFORM DEBT-MANAGEMENT SERVICES ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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

July 21-28, 2005

WITH PREFATORY NOTE AND COMMENTS

November 10, 2005

ABOUT NCCUSL

The **National Conference of Commissioners on Uniform State Laws** (NCCUSL), now in its 114th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

Conference members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- NCCUSL strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- NCCUSL statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- NCCUSL keeps state law up-to-date by addressing important and timely legal issues.
- NCCUSL's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- NCCUSL's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- NCCUSL Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- NCCUSL's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- NCCUSL is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

DRAFTING COMMITTEE ON UNIFORM DEBT-MANAGEMENT SERVICES ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Uniform Debt-Management Services Act consists of the following individuals:

WILLIAM C. HILLMAN, U.S. Bankruptcy Court, Room 1101, 10 Causeway St., Boston, MA 02222, *Chair*
BORIS AUERBACH, 332 Ardon Ln., Wyoming, OH 45215, *Enactment Plan Coordinator*
ROBERT G. BAILEY, University of Missouri-Columbia, 217 Hulston Hall, Columbia, MO 65211
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Copies of this Act may be obtained from:
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www.nccusl.org

UNIFORM DEBT-MANAGEMENT SERVICES ACT

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UNIFORM DEBT-MANAGEMENT SERVICES ACT

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 skeptical—of their overall usefulness. They perceived the agencies as debt collectors for the credit-card industry and were critical of the limited range of advice the agencies provided. The last thing a card issuer wanted to see was a consumer filing a petition in bankruptcy. Formed and supported primarily by the credit-card industry, most counseling agencies never recommended bankruptcy, and many never even mentioned it as a possibility. E.g., Gardner, Consumer Credit Counseling Services: The Need for Reform and Some Proposals for Change, 13 Advancing the Consumer Interest 30 (2001).

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

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

Meanwhile, in the 1990s credit card issuers saw that their fair-share payments to counseling agencies had increased to the extent that those payments approximated the amounts they were paying for all their other collection activities combined. In addition, they discerned that some of the counseling agencies were accumulating large surpluses and were enrolling in DMP's

consumers whom the creditors believed could pay their debts without the concessions the creditors had been giving. They responded by reducing the concessions they were willing to make to consumers and by reducing the amounts they were willing to pay the counseling agencies. Some card issuers have stopped supporting the agencies altogether, and on average the amount returned to the agencies has dropped from more than 12% to less than 8%. This decrease has adversely affected the ability of counseling agencies to provide individual counseling and community education. Some major card issuers have abandoned the fair-share approach altogether and 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.

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

History of the Draft

When it first authorized this project, the Executive Committee focused on the segment of the industry that counsels consumers and forms debt-management plans to assist them pay their debts in full. It did not contemplate entities engaged in debt settlement. At the 2004 Annual Meeting, the Conference authorized the Drafting Committee to include debt-settlement companies within the scope of the Act. It also directed the Drafting Committee to draft the Act in such a way that states could authorize for-profit entities to provide debt-management services.

The definition of "debt-management services" encompasses both credit counseling and debt settlement. With very few exceptions, the provisions of the Act apply equally to both types of debt-management services and the entities that provide them. The Act is neutral on the question whether for-profit entities should be permitted to provide debt-management services. Each state must decide whether to permit for-profit entities to provide credit-counseling services, debt-settlement services, or both. The state's decision is implemented by language in sections 4, 5, and 9. Each of these sections contains bracketed language and instructions on which language to adopt to implement the state's policy concerning for-profit entities.

Bankruptcy Code Amendments

Shortly before the last meeting of the Drafting Committee, Congress enacted revisions to the Bankruptcy Code. These revisions are likely to increase the demand for the services of entities that provide debt-management services.

Section 109(h) of the Code requires a debtor who wishes to file under Chapter 7 to provide certification that he or she has received from an approved nonprofit credit-counseling agency assistance in preparing a budget analysis and information about credit counseling. In addition, section 727(a)(11) establishes the completion of an instructional course concerning personal financial management as a prerequisite to obtaining a discharge. These two new provisions are likely to increase the demand for services from entities regulated by this Act. The Bankruptcy Code's regulation of persons regulated by this Act is terse and consistent with it. Since the revised Bankruptcy Code will induce more consumers to seek the services of those who provide debt-management services, the revisions increase the urgency of the need for states to adopt a uniform law governing debt-management services.

Description of the Act

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 who are dealing with personal debt incurred in connection with their businesses.

To provide debt-management services to a resident of the enacting state, a provider must obtain a certificate of registration from the administrator of the Act. To obtain a certificate, a provider must supply information about itself, must meet specified requirements of competency, must obtain insurance against employee dishonesty, and must post a surety bond to ensure its compliance with the Act. The requirements concerning registration appear in sections 4-14 and 22.

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

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

UNIFORM DEBT-MANAGEMENT SERVICES ACT

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

430.01

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

Comment

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

430.02

SECTION 2. DEFINITIONS. In this [act]:

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

(2) "Affiliate":

(a) (A) with respect to an individual, means:

1. (i) the spouse of the individual;

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

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

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

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

(b) (B) with respect to an entity, means:

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

2. (ii) an officer of, or an individual performing similar functions

with respect to, the entity;

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

4. (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; 430.32(6)

5. (v) an officer or director of, or an individual performing similar functions with respect to, a person described in subsubparagraph (i); subd. 1.

6. (vi) the spouse of, or an individual occupying the residence of, an individual described in subsubparagraphs (i) through (v); or subds 1 to 5.

7. (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). par (a)4 subds 1 to 5.

(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) "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.

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

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

(c) ~~(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

1. ~~(i)~~ licensed by this state;

2. (ii) subject to a disciplinary mechanism;

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

4. (iv) subject to a continuing-education requirement.

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

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

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

(13) "Plan" means a program or strategy in which a provider furnishes debt-management services to an individual and which includes a schedule of payments to be made by or on behalf of the individual and used to pay debts owed by the individual.

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

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

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

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

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

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

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

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

(20) "Trust account" means an account held by a provider 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): Section 17 requires providers to perform certain functions through the services of a certified counselor; section 16 requires providers to make certified counselors 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, accounting, or financial-planning services, respectively, to a client. Unless the services as an intermediary are provided in the course of providing legal, accounting, or financial-planning services, the exclusion does not apply, and the attorney, accountant, or financial planner is providing debt-management services and must

comply with the Act.

The exclusion of legal services and accounting services exists if the services are provided by a person licensed to provide those services. For the exclusion of financial-planning services, however, there are additional requirements, enumerated in subparagraph (C)(ii)-(iv). There are several kinds of financial-planning services, including investment advice, estate planning, etc. Those services are excluded from the definition only if the administrator, by rule, determines that the suppliers of those services are subject to the requirements specified in subparagraph (C). Thus the administrator must determine that the financial-planning profession has in place a bona fide, reasonable system of professional responsibility, discipline, and continuing education.

11. Paragraph (11) (good faith): The term appears in section 15, which imposes on providers the obligation to "act in good faith in all matters under this Act." The definition is relevant, then, under every section that governs the conduct of providers. In addition, the term is used in several provisions governing remedies (sections 33(e), 34(a), and 35(f)).

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

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

The definition requires a schedule of payments. As used here, "payments" includes the deposit or transfer of money into an individual's checking or savings account, as well as a 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 person, both those persons are within the definition of "provider."

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

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.

430.03

SECTION 3. EXEMPT AGREEMENTS AND PERSONS.

(1) (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.

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

(a) (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

(b) (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.

(3) (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:

(a) (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;

(b) (2) a bank; 430.02(2)(b)1.

(c) (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

(d) (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 know to reside in this state. Section 19(a)(3) requires the agreement between a provider and an individual to state the individual's address. If the individual supplies an address outside this state, the provider may have no reason to know that the individual is residing in this state at the time of the agreement. If a provider operates through an agent or independent contractor to solicit and enroll individuals in plans, the provider may have reason to know if the agent or independent contractor has reason to know. This is true even if the agent or independent contractor is itself within the definition of provider. In addition, the provider may be liable under section 31 for the conduct of the agent or independent contractor.

2. The Act applies to an agreement with an individual who is residing in this state on a non-permanent basis, such as a member of the armed services, an individual occupying a vacation home in this state, a student, or an individual who has lost his or her home and temporarily resides with a relative in this state.

3. The Act does not apply to an agreement with an individual who resides in another state but comes to this state to meet with a provider. Nor does it apply to an agreement with an individual who moves to this state after formation of an agreement. If an agreement is formed with an individual who resides in another state, the continuation of services to that individual after he or she moves into this state is not an agreement within the meaning of the phrase in subsection (b)(1), "at the time the provider agrees to provide the services." Rather, it is the continuing performance of a commitment made by the provider at the outset of the relationship.

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

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

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. Beyond that, the test is flexible, looking to such matters as the amount and percentage of time devoted to providing debt-management services and the amount and percentage of revenues derived from debt-management services. The more isolated the provision of those services, the more likely it is that they are incidental. The more frequent the provision of those services, the more likely it is that they are not incidental and the person is not exempt.

1130.04

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

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

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

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

[(d) A provider [whose plans contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency] [whose plans contemplate that creditors will settle debts for less than the full principal amount of debt owed] may be registered only if it

is:

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

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

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

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

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

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

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

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

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

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

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

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.

430.65

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

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

430.32(6)

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

(a) (1) the fee established by the administrator;

(b) (2) the bond required by Section 13; 430.13

430.22

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

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

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

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

(C) with no deductible;

(D) payable to the applicant, the individuals who have agreements with the applicant, and this state, as their interests may appear; and

(E) not subject to cancellation by the applicant without the approval of the administrator;

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

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

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

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

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

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

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

If the state wishes to permit only not-for-profit entities to provide debt-management services, the first bracketed language in paragraph (6) should be deleted so that paragraph (6) states:

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

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

(6) if the applicant is organized as a not-for-profit entity or is exempt from taxation, evidence of not-for-profit and tax-exempt status applicable to the applicant

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

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

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

(2) add a new paragraph: "(7) if the applicant's plans contemplate that creditors will settle debts for less than the full principal amount of debt owed and the applicant is organized as a not-for-profit entity or is exempt from taxation, evidence of not-for-profit and tax-exempt status applicable to the applicant under 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) paragraph (6) should state: "(6) if the applicant's plans contemplate that creditors will settle debts for less than the full principal amount of debt owed, evidence of not-for-profit and tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501[, as amended]"; and

(2) add a new paragraph: "(7) if the applicant's plans contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency and the applicant is organized as a not-for-profit entity or is exempt from taxation, evidence of not-for-profit and tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501[, as amended], as applicable."

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

Comment

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

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

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

The consent required by paragraph (3) is for the purpose of satisfying the bank's requirements for disclosure of records to a person other than the account holder. The

administrator may adopt a rule prescribing the form and content of that consent. Section 19(d)(2) requires a similar consent from the individuals whose money is in the trust account.

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

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

4. 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.

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

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

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

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

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

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

~~(a)~~ (A) the applicant or any of its officers or directors has been licensed or

registered to provide debt-management services; or

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

(6) a statement describing, to the extent it is known or should be known by the applicant, any material civil or criminal judgment or litigation and any material administrative or enforcement action by a governmental agency in any jurisdiction against the applicant, any of its officers, directors, owners, or agents, or any person who is authorized to have access to the trust account required by Section 22; 430.22

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

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

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

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

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

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

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

(14) at the applicant's expense, the results of a criminal-records check, including fingerprints, conducted within the immediately preceding 12 months, covering every officer of the applicant and every employee or agent of the applicant who is authorized to have access to the trust account required by Section 22; 430.22

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

years immediately preceding the application;

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

(A) any affiliate of the applicant; or

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

(17) a statement of the amount of compensation of the applicant's five most highly compensated employees for each of the three years immediately preceding the application or, if it has not been in operation for the three years preceding the application, for the period of its existence;

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

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

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

Comment

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

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

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

4. Paragraph (5) (identification of jurisdictions in which the applicant has done business or has been registered or licensed to provide debt-management services) requires information to

enhance the administrator's ability to investigate the applicant and to coordinate enforcement efforts with administrators in other jurisdictions. Use of the word "jurisdiction" rather than "state" means that the applicant must disclose with respect to its activities in other countries, too. Unless required pursuant to paragraph (19), however, it does not mean that the applicant must break down its disclosures by county or other subdivision of a state or country.

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

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

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

8. Paragraph (9) requires a provider to ensure that its counselors are certified no later than 12 months after their initial employment. This requirement applies only with respect to employees who act as counselors and educators. It does not apply to such other employees as customer service representatives. Section 17 prohibits a plan unless a certified counselor has done specified things. Evidence that a provider has in place a system for certification of its counselors provides some assurance to the administrator that the provider will be able to comply with section 17.

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

10. An applicant, whether located in this state or elsewhere, need supply only those documents specified in paragraph (12) that it will use with residents of this state. If it will use more than one form, it must supply all of them. Section 32(b) empowers the administrator to

investigate the activities in another jurisdiction of a provider that is doing business in this state. Under that section the administrator may obtain documents used in other jurisdictions.

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

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

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

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

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

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

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

(b) The administrator may deny registration if:

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

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

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

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

(c) The administrator shall deny registration if:

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

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

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

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

(2) after the date 10 years before first becoming a director of the applicant, were employed by or directors of a person that received from the applicant more than

$25,000 in either the current year or the preceding year.

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

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

Comment

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

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

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

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

because officers are included in the term, "employee."

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

6. 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.

430.10 **SECTION 10. CERTIFICATE OF REGISTRATION: TIMING.**

(1) (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.

430.06 (19)

sub (1)

(2) (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].

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

ss. 430.11(4) & 430.34

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.

430.11 **SECTION 11. RENEWAL OF REGISTRATION.**

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

(2) (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:

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

(b) (2) be accompanied by the fee established by the administrator and the bond required by Section 13; 430.13

(c) (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; 438.06

(d) (4) disclose any changes in the information contained in the applicant's application for registration or its immediately previous application for renewal, as applicable;

(e) (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: 430.22

1 (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;

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

3 (C) with no deductible;

4 (D) payable to the applicant, the individuals who have agreements with the applicant, and this state, as their interests may appear; and

5 (E) not subject to cancellation by the applicant without the approval of the administrator;

(f) (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;

(g) (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

(h) (8) provide any other information that the administrator reasonably requires to perform the administrator's duties under this section. 430.06(7) etc.

(3) (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. 430.06(4)

(4) (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.

(5) (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 430.34 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 430.34 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 same date, occur on a rolling basis, or otherwise.

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

3. Paragraph (5) contains the same requirements that section 5(b)(4) does for initial

registration, except that upon renewal the provider must obtain insurance in an amount equal to the highest balance in the trust account during the six months preceding the application for renewal.

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

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

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

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

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