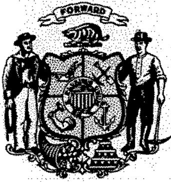


State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

PLEASE DO NOT REMOVE FROM DRAFTING FILE

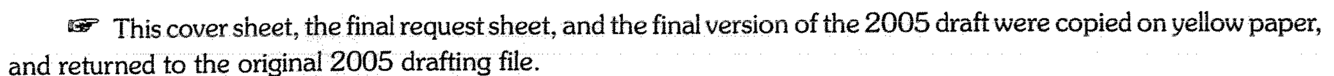
Date Transfer Requested: 11/28/2006 (Per: MDK)

☞ Appendix A ... Part 02 of 05

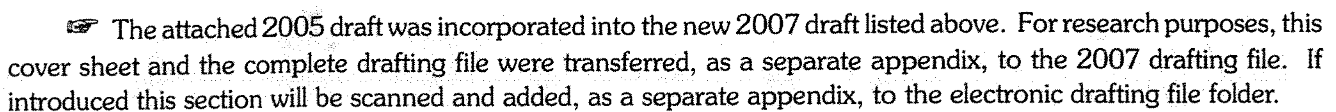
☞ The <u>2005</u> drafting file for LRB 05–5042

has been <u>transferred</u> 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.

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

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

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

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

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

Comment

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

SECTION 13. BOND REQUIRED.

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

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

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

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

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

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

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

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

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

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

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

(e) If claims against a surety bond exceed or are reasonably expected to exceed the amount of the bond, the administrator, on the initiative of the administrator or on petition of

the surety, shall, unless the proceeds are adequate to pay all costs, judgments, and claims, distribute the proceeds in the following order:

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

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

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

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

Comment

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

2. The bond is a source of payment of damages for a provider's failure to comply with this Act. It is conceivable that the administrator or an individual would not commence litigation until after a provider ceases providing services in this state. Therefore, paragraph (1) seeks to preserve the availability of the bond for two years after the year in which the provider's registration ends.

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

4. Subsection (b)(1) sets the amount of the bond at $50,000, but gives the administrator the power to adjust the amount, either higher or lower than $50,000, for a particular provider. A provider operating on a national basis must comply with the bond requirement of each state in which it operates. This may be burdensome, but it does not by itself justify a reduction in the amount of the bond required under this Act. Rather, the primary criterion should be the level of risk of injury associated with the provider. If the provider's history of operations leads the administrator to conclude that the risk of injury is sufficiently low, a reduction from $50,000 would be appropriate. By the same token, a provider's history of operations may lead the administrator to conclude that an increase is appropriate.

5. Subsection (b)(3) requires that payment of the bond be conditioned upon noncompliance with the Act. Bonds often are written in the form of penal bonds: the surety agrees to pay unless the principal obligor performs its obligations, performs a contract, enters a contract, etc. A bond in this form satisfies the requirement of this section because, although the formal condition may be compliance with the Act, in fact the sum is paid only if the provider fails to comply.

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

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

7. Section 35(g) requires the administrator to assist an individual in enforcing a judgment against the bond. Subsection (e) of this section sets out the priority of claims against the bond, but it does not necessarily set out a temporal order of payment. Hence, if it is clear that the bond is sufficient in amount to satisfy the claims in paragraphs (1) and (2), the administrator should distribute bond proceeds to individuals with final judgments even though the claim of the administrator under paragraph (1) is not yet final. To facilitate administration of this claims process, the administrator may set a deadline for individuals to submit the claims described in paragraph (3).

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

SECTION 14. BOND REQUIRED: SUBSTITUTE.

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

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

(2) with the approval of the administrator:

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

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

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

Comment

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

2. With respect to letters of credit, the requirement of approval by the administrator extends to the identity of the bank and to the form of the letter of credit. If a letter of credit requires personal presentation of a certificate, presentation to a distant bank may entail inconvenience or expense. When this is the case, the administrator may confine approval to banks located in a specified geographic area.

3. Subsection (a)(2)(A) requires that a letter of credit be payable upon presentation of a certificate by the administrator, and the administrator may determine the nature of that certificate. For example, the administrator may require that a letter of credit provide that the issuer will pay the amount stipulated in the certificate as costs assessed under section 32(b)(1) or the amount stipulated in the certificate as the amount of a judgment obtained by an individual. Similarly, the administrator may require that a letter of credit provide for presentation of the certificate by mail or other specified means.

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

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

5. Section 35(g) requires the administrator to assist an individual enforce a judgment against the security posted by the provider.

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

Comment

The obligation to act in good faith relates to "all matters under this Act." If a person fails to act in good faith, this means that the person has failed to act as required in connection with some matter under this Act. Consequently, the person has violated the section dealing with that matter, and, depending on the sections on remedies (sections 33, 35), may be liable for violation of the section dealing with the underlying matter. But there is no independent cause of action for failure to act in good faith. The failure to act in good faith also may make unavailable a right or power that otherwise would have been available to the provider. See Commentary No. 10, section 1-203, Permanent Editorial Board for the Uniform Commercial Code (Feb. 10, 1994). Good faith is defined in section 2(11).

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

Comment

1. The purpose of this section is to ensure adequate service to individual who have entered agreements with a provider. The staffing required by this section therefore is in addition to whatever staffing the provider might have for soliciting or responding to potential customers.

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

3. Section 18 permits a provider to comply with sections 17, 19, and 27 by means of electronic communication. This section makes no exception for this provider. Even if a provider desires to operate exclusively via electronic communication, it must comply with this section. If a provider forms plans by electronic means, it must, consistent with the obligation of good faith under section 15, respond to electronically communicated requests for assistance within a reasonable time during ordinary business hours. This assistance must be individualized, not merely "frequently asked questions" or other standardized presentation of information. This section requires the provider also to maintain a system that enables individuals to *speak* with an appropriate representative of the provider.

SECTION 17. PREREQUISITES FOR PROVIDING DEBT-MANAGEMENT SERVICES.

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

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

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

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

Set-up fee ______________________
dollar amount of fee

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

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

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

__________ ______________________
(*item*) *dollar amount or method of determining amount*

__________ ______________________
(*item*) *dollar amount or method of determining amount.*

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

(1) provides the individual with reasonable education about the

management of personal finance;

(2) has prepared a financial analysis; and

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

(A) has prepared a plan for the individual;

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

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

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

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

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

(3) with respect to all creditors identified by the individual or otherwise known by the provider to be creditors of the individual, provide the individual with a list of:

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

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

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

(D) all other creditors.

(d) Before an individual assents to an agreement to engage in a plan, the provider

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

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

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

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

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

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

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

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

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

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

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

____

Name and business address of provider

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

following disclosure, surrounded by black lines:

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

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

Name and business address of provider

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

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

(2) Nonpayment of your debts under our program may

- hurt your credit rating or credit scores;
- lead your creditors to increase finance and other charges; and
- lead your creditors to undertake activity, including lawsuits, to collect the debts.

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

Name and business address of provider

Comment

1. Subsection (a) requires a standardized disclosure and specifies the terminology and format to be used. The disclosure of charges must contain the dollar amounts or the method of determining the dollar amounts, e.g., "$5 per month for each creditor in the plan at the time the monthly charge is assessed, but not more than $25 in any month," or "five percent of the amount of debt that a creditor writes off." The subsection requires disclosure "as applicable. Therefore, if a provider does not impose one or more of the specified fees, it need not make any disclosure

with respect to the omitted fee(s).

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

2. Subsection (b) mandates that all providers, including debt-settlement companies, provide reasonable education through the services of a certified counselor. Section 6(9)-(10) requires the provider to supply the administrator with evidence that its counselors are certified, along with a description of its educational program and a copy of any materials used in that program. The education may consist of an individual session with a counselor (which may also include the analysis required by paragraph (2)), a group class, or an electronic educational program. The education must be substantially more than an explanation of the benefits of a plan. It must begin but need not be completed before commencement of a plan, since a course of education may take months to complete. Paragraph (1) of subsection (b) states a general standard for the quality of the education, viz., reasonableness. Education for financial literacy is receiving increased attention, and several entities are attempting to define standards for effectiveness. As these attempts come to fruition, the administrator may exercise rulemaking power under section 32(c) to establish more precise minimum standards for the education.

3. Paragraph (2) requires preparation of a financial analysis. Although the education required by paragraph (1) may be standardized or provided on a group basis, the financial analysis required by paragraph (2) must be prepared specifically for the individual and based on the specific circumstances of the individual. It must encompass the individual's assets, income, and expenses for the purpose of enabling the provider to make the suitability and feasibility determinations required by paragraph (3)(B).

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

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

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

6. Subsection (c)(2) requires a provider to inform the individual of the availability of assistance by telephone (or in person). It applies to all providers, but has special significance for providers that use electronic means to communicate with their customers. See section 16 and Official Comment 3. This requirement does not mean that the provider must maintain an office in this state. It does, however, require that the provider maintain an office somewhere with counselors available for in-person consultation, presumably at its principal business address. The obligation of good faith is relevant here, and locating the counselors in a state whose residents the provider does not serve would violate this subsection.

7. Since secured creditors are creditors, subsection (c)(3) requires the provider to include secured creditors in the various lists, as appropriate. Subparagraph (D) requires a listing of creditors as to whom the provider is ignorant with respect to their participation in the plan. Taken together, the lists must include all the creditors whose existence the provider knows.

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

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

SECTION 18. COMMUNICATION BY ELECTRONIC OR OTHER MEANS.

(a) In this section:

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

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

(b) A provider may satisfy the requirements of Section 17, 19, or 27 by means of the Internet or other electronic means if the provider obtains a consumer's consent in the manner provided by Section 101(c)(1) of the federal act.

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

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

(1) contain no other information; and

(2) the individual must see before proceeding to assent to formation of a plan.

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

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

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

that clearly reveals its contents:

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

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

(3) the names of its principal officers.

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

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

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

Comment

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

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

2. The language of subsection (c) is drawn from E-Sign § 7001(d)(1)(B), and in the context of this Act, the obligation of good faith requires that the provider present the material in a

printable format. The requirement of the subsection, however, is not limited to consumers. It applies with respect to all individuals.

3. To meet the objectives of the separate delivery contemplated by section 17, electronic delivery must satisfy certain requirements of form, such as appearing on a screen that contains no other information. Although the record may not contain other information, it does not violate subsection (d) if the record is an electronic page on a website and the record reveals how the individual may exit the page.

4. Subsections (e) and (f) are not limited to providers that communicate electronically and are not limited to consumers. They confer on all individuals the right, throughout the course of a plan and for 90 days thereafter, to receive a written version of all materials required by this Act within three days of requesting them. As to all individuals, this right must be disclosed in order for a provider to comply with this section, and if a provider wishes to comply with this section electronically, it must be disclosed to a consumer in order for the provider to comply with E-Sign (section 101(c)(1)(B)(iv), 15 U.S.C. § 7001(c)(1)(B)(iv)). See Official Comment 1.

5. A provider may not limit the medium by which the individual requests a copy. Subsection (f) protects the provider against harassment. An example of harassment might be a request for a copy of a periodic report three years after the period covered by the report. The subsection does not establish a bright-line rule, however, and in a particular case the individual might indeed have a legitimate need for an old report.

Since the periodic reports must be made monthly and this section gives the individual a right to receive a written copy of the report, a request every month for a written version of that month's report cannot, within the meaning of this section, be made for purposes of harassment. If requested each month, the provider must comply each month. Similarly, if requested in advance to send written versions of the monthly reports, subsections (e) and (f) require the provider to comply with the request because the request is made before the expiration of 90 days after a plan is completed or terminated. If the request relates to historical materials, the provider may send a consolidated statement, rather than a copy of each periodic statement, so long as it clearly reveals the information required to be on each periodic report.

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

6. A provider might do business under numerous names. Subsection (g) applies to all providers, even if they make disclosures and form agreements using a paper medium. It requires disclosure of all the provider's business names, along with the provider's principal location and officers, but it permits the provider to disclose this information via a link to another page of the website. The link must reveal its contents, e.g., "For the address and other information about [name of provider], click here."

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

SECTION 19. FORM AND CONTENTS OF AGREEMENT.

(a) An agreement must:

(1) be in a record;

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

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

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

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

(6) disclose:

(A) the services to be provided;

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) An agreement must provide that:

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

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

(B) with respect to an agreement that contemplates that creditors will settle debts for less than the principal amount of debt, the provider will refund 65 percent of any portion of the set-up fee that has not been credited against the settlement fee; and

(C) all powers of attorney granted by the individual to the provider are revoked and ineffective;

(2) the individual authorizes any bank in which the provider or its agent has established a trust account to disclose to the administrator any financial records relating to

the trust account; and

(3) the provider will notify the individual within five days after learning of a creditor's decision to reject or withdraw from a plan and that this notice will include:

(A) the identity of the creditor; and

(B) the right of the individual to modify or terminate the agreement.

(e) An agreement may confer on a provider a power of attorney to settle the individual's debt for no more than 50 percent of the principal amount of the debt. An agreement may not confer a power of attorney to settle a debt for more than 50 percent of that amount, but may confer a power of attorney to negotiate with creditors of the individual on behalf of the individual. An agreement must provide that the provider will obtain the assent of the individual after a creditor has assented to a settlement for more than 50 percent of the principal amount of the debt.

(f) An agreement may not:

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

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

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

(4) contain a provision that:

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

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

(g) All rights and obligations specified in subsection (d) and Section 20 exist

even if not provided in the agreement. A provision in an agreement which violates subsection (d), (e), or (f) is void.

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

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

Comment

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

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

3. In subsection (a), subparagraphs (6)(A) and (B) carry into the agreement the matter that section 17(a) requires to be disclosed before an agreement is formed. See Official Comment 1 to that section.

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

5. Paragraph (6)(D) applies primarily to credit-counseling entities. At the very outset of the agreement, the provider may not have communicated with an individual's creditors to ascertain their willingness to participate and the concessions that they will make. This paragraph requires the provider to use its best judgment, based on its past experience with each creditor, to disclose the likely payment amounts and concessions.

6. As with section 17(c)(3) (pre-agreement disclosure of creditor participation), identification in paragraph (6)(E) of nonparticipating creditors includes secured creditors but refers only to creditors that the individual has disclosed to the provider or that the provider otherwise actually knows to be a creditor of the individual. Subparagraph (E) does not require the provider to make any disclosures with respect to creditors of which it is unaware.

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

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

9. Section 20 gives an individual a three-day right of cancellation and the return of all money paid to or at the direction of the provider. It extends the three-day period to 30 days if the provider fails to comply with this section or section 20(b) or 28. Paragraph (6)(H) requires disclosure of this right, in addition to the separate notice required by section 20.

10. The administrator may have multiple phone numbers, e-mail addresses, etc. If the administrator informs the provider of the details by which individuals may make complaints or inquiries relating to this Act, subsection (c) requires the provider to disclose those details in the agreement. Compliance with this requirement will mean that a provider that serves individuals in multiple states may have to have a different form for each state. Computerization of the standard document may minimize the difficulty of complying with this disclosure requirement.

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

For all providers, if an individual terminates an agreement, paragraph (1)(A) requires return of any unexpended money intended for payment to creditors. For credit-counseling entities, no refund of set-up or monthly fees is required. For debt-settlement entities, however, paragraph (1)(B) requires the agreement to provide for refund of a portion of the set-up fee. Section 23(f) requires the provider to credit any set-up fee against a settlement fee. It also requires the provider to credit the monthly service fees against the settlement fee. To maximize the refund under this section, as contemplated here, the monthly service fees should credited first.

To determine the refund due under paragraph (1)(B), the provider must deduct from the total amount of any settlement fees the total amount of monthly fees paid up to the time of termination. If the result is less than 0 (or if there have been no settlement fees), then no part of the set-up fee has yet been credited against the settlement fee, and the refund is 65% of the set-up fee. If the result is greater than 0, subtract that result from the set-up fee. The refund is 65% of the difference.

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

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

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

15. Subsection (f) seeks to preserve the individual's common law and statutory rights against the unilateral decision of a provider to remove or restrict them. Thus a provider may not evade this Act by adopting the law of another jurisdiction. Nor may a provider contract for a distant forum or the surrender of rights or remedies under other law, including the right to proceed by way of a class action when appropriate.

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

SECTION 20. CANCELLATION OF AGREEMENT; WAIVER.

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

to the provider. Notice by mail is given when mailed.

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

Notice of Right to Cancel

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

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

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

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

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

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

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

I cancel this agreement,

____
Print your name

____
Signature

____
Date

(c) If a personal financial emergency necessitates the disbursement of an individual's money to one or more of the individual's creditors before the expiration of three days after an agreement is signed, an individual may waive the right to cancel. To waive the

right, the individual must send or deliver a signed, dated statement in the individual's own words describing the circumstances that necessitate a waiver. The waiver must explicitly waive the right to cancel. A waiver by means of a standard-form record is void.

Comment

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

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

SECTION 21. REQUIRED LANGUAGE. Unless the administrator, by rule, provides otherwise, the disclosures and documents required by this [act] must be in English. If a provider communicates with an individual primarily in a language other than English, the provider must furnish a translation into the other language of the disclosures and documents required by this [act].

Comment

1. Disclosures and documents required by this Act must be in English. The administrator may by rule permit providers to satisfy their obligations under the Act by giving disclosures and using documents in specified languages other than English if the provider communicates with an individual primarily in the other language. The promulgation of such a rule is discretionary with the administrator, since it may be unduly burdensome for the administrator to enforce the Act with respect to documents in the other language.

2. If a provider communicates primarily in a foreign language, it must provide a translation of documents and disclosures in that language. If the provider is not willing to do this, then it must communicate primarily in English. This places the burden on the individual to bring a translator along or assume the risk of not understanding any disclosures or documents that are beyond the individual's English-language reading skills.

SECTION 22. TRUST ACCOUNT.

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

(b) Money held in trust by a provider is not property of the provider or its designee. The money is not available to creditors of the provider or designee, except an individual from whom or on whose behalf the provider received money, to the extent that the money has not been disbursed to creditors of the individual.

(c) A provider shall:

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

(2) disburse money paid by or on behalf of the individual to creditors of the individual as disclosed in the agreement, except that:

(A) the provider may delay payment to the extent that a payment by the individual is not final; and

(B) if a plan provides for regular periodic payments to creditors, the disbursement must comply with the due dates established by each creditor; and

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

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

of other persons.

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

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

(g) If a provider discovers, or has a reasonable suspicion of, embezzlement or other unlawful appropriation of money held in trust, the provider immediately shall notify the administrator by a method approved by the administrator. Unless the administrator by rule provides otherwise, within five days thereafter, the provider shall give notice to the administrator describing the remedial action taken or to be taken.

(h) If an individual terminates an agreement or it becomes reasonably apparent to a provider that a plan has failed, the provider shall promptly refund to the individual all money paid by or on behalf of the individual which has not been paid to creditors, less fees that are payable to the provider under Section 23.

(i) Before relocating a trust account from one bank to another, a provider shall inform the administrator of the name, business address, and telephone number of the new bank. As soon as practicable, the provider shall inform the administrator of the account number of the trust account at the new bank.

Comment

1. This section requires that persons that receive money for disbursement to creditors establish trust accounts. Providers may operate under any of several business models. Some providers receive the individual's money directly. Others use third parties for the purpose of receiving the funds and managing the accounts. Under any such model, the provider is a fiduciary and must establish a trust account. This is true even if the third party is an independent contractor. A provider may delegate its duties under this section, but it remains responsible for complying with the section. For purposes of this Act, money transmitted to, or received by, a designee of a provider is to be treated as money transmitted to, or received by, the provider itself.

If the provider (or its designee) does not receive money for distribution to creditors, but instead leaves the individual in control of that money, this section does not require a trust account. If the individual's account is accessible to the provider, for example, by means of the power to initiate an electronic transfer, section 28(a)(5) limits the purposes for which a provider may initiate a transfer.

2. For providers at brick and mortar locations in this state, it would be feasible to require the trust account to be located in this state. For providers that operate (via the Internet or telephone) out of an office not located in this state, it may be unduly burdensome to require a trust account in this state and, by extension, each state in which the provider operates. By not prohibiting it, subsection (a) implicitly permits a provider, wherever located, to deposit money of residents of this state into a trust account located in another state and containing the money of individuals who reside in other states.

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

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

5. Subsection (c) imposes obligations on the provider. If the provider uses a third party to administer the trust account, the provider may delegate these obligations to the third party. The provider, however, is responsible for performance of the obligations and is liable if they are not performed. See section 31.

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

maximize the feasibility of the plan.

7. Subsection (d) prohibits a person in control of a trust account from commingling money held in the trust with money of the provider or any other person other than the individuals with whom the provider has agreements. In speaking of a "provider," the prohibition encompasses a person to whom the provider has delegated any of its obligations under this section. See section 31. The delegee also may be liable. Section 35(c).

8. Section 34(c), which provides that failure to maintain the proper balance is cause for summary suspension of registration, supplements subsections (e) and (f).

9. Subsection (g) specifies the circumstances under which a provider must notify the administrator that something may be amiss with respect to money held in trust. As used here, "appropriation" includes all kinds of taking, including theft of cash, electronic debiting of an account, etc. The administrator may authorize notice by courier, facsimile, electronic mail, telephone, etc.

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

SECTION 23. FEES AND OTHER CHARGES.

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

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

(c) If an individual assents to an agreement, a provider may not impose a fee or other charge for educational or counseling services, or the like, except as otherwise provided in

this subsection and Section 28(d). The administrator may authorize a provider to charge a fee based on the nature and extent of the educational or counseling services furnished by the provider.

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

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

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

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

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

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

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

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

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

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

(f) Except as otherwise provided in subsections (c) and (d), if a plan contemplates that creditors will settle an individual's debts for less than the principal amount of the debt, compensation for services in connection with settling a debt may not exceed, with respect to each debt, 30 percent of the excess of the principal amount of the debt over the amount paid the creditor pursuant to the plan, less, to the extent it has not been credited against an earlier settlement fee:

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

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

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

Comment

1. Subsection (a) is comprehensive: unless authorized by this section, a provider may not receive a payment for debt-management services. Since this section does not authorize fees for such matters as preparing a financial analysis, preparing a budget, or terminating an agreement, the prohibition in this subsection means that providers may not impose a charge for them. This would be indirectly charging for debt-management services.

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

2. In addition to specifying some of the contents of an agreement, section 19(a)(5)

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

3. Section 17(b)(1) requires a provider to provide reasonable education about the management of personal finance as a prerequisite to performing debt-management services. Subsection (c) of this section requires that the basic education and counseling be provided at no charge. This prohibition against charges encompasses charges for tangible materials, e.g., books, used in connection with the education. The education must meet the minimum standard of "reasonable," as determined by the administrator or the courts. To avoid creating a disincentive to exceed the minimum requirement, subsection (c) authorizes the administrator to approve a fee for education if the administrator determines that a provider's education or counseling services exceed the minimum standards for the basic service. The approval must specify the fee and must relate to the specific course of instruction or counseling performed by the provider.

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

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

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

6. Paragraphs (1) and (2) of subsection (d) permit a provider to charge a set-up fee and a monthly service fee. For all providers, paragraph (2) permits a monthly fee of $10 per creditor, except that the monthly fee may not exceed $50. Since some creditors may be paid off before others, the per-creditor branch of the limit is to be determined with respect to the number of creditors remaining in the plan at the time the fee is assessed. Therefore, if there are only two creditors remaining in a plan, the maximum monthly charge is $20.

Under no circumstances may the monthly fee exceed $50. Courts and the administrator should be vigilant to attempts to evade the per-creditor limitation of these paragraphs. For example, if a provider includes in a plan a creditor who the provider knows will make no concessions and imposes a $10 per month fee for that creditor, the provider may violate this subsection or section 28(a)(16) (prohibiting unfair, unconscionable, or deceptive acts or practices).

7. If the provider is a credit-counseling entity, paragraph (1) permits a set-up fee not exceeding $50. If the provider is a debt-settlement company, paragraph (2) permits a set-up fee not to exceed four percent of the principal amount of the debt in the plan, but in no event more than $400. Anytime the aggregate debt in a plan exceeds $10,000, the maximum set-up fee is $400. The cross reference in paragraph (2)(A) is to the section that requires refund of 65 percent of the set-up fee if the individual terminates the agreement.

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

9. Paragraph (4) permits a provider to impose a charge for education or counseling if an individual does not enter a plan. The maximum fee for this education or counseling is specified in the statute, but this paragraph permits the administrator to authorize a larger fee. The approval may, but need not, refer to a specific provider or a specified program of study, such as a course of

instruction developed by a third party for use by others. The nature and extent of the educational services may warrant approval of a larger fee if they exceed the minimum standard contemplated by section 17(b)(1).

10. For an elaboration on the cross reference to section 28(d), see Official Comment 5 above.

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

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

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

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

Comment

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

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

SECTION 25. VOIDABLE AGREEMENTS.

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

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

(c) If an individual voids an agreement under subsection (b), the provider does not have a claim against the individual for breach of contract or for restitution.

Comment

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

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

which it has not already distributed to creditors).

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

SECTION 26. TERMINATION OF AGREEMENTS.

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

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

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

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

Comment

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

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