SECTION 27. PERIODIC REPORTS AND RETENTION OF RECORDS.

(a) A provider shall provide the accounting required by subsection (b):

(1) upon cancellation or termination of an agreement; and

(2) before cancellation or termination of any agreement:

(A) at least once each month; and

(B) within five business days after a request by an individual, but the provider need not comply with more than one request in any calendar month.

(b) A provider, in a record, shall provide each individual for whom it has established a plan an accounting of the following information:

(1) the amount of money received from the individual since the last report;

(2) the amounts and dates of disbursement made on the individual's behalf, or by the individual upon the direction of the provider, since the last report to each creditor listed in the plan;

(3) the amounts deducted from the amount received from the individual;

(4) the amount held in reserve; and

(5) if, since the last report, a creditor has agreed to accept as payment in full an amount less than the principal amount of the debt owed by the individual:

(A) the total amount and terms of the settlement;

(B) the amount of the debt when the individual assented to the plan;

(C) the amount of the debt when the creditor agreed to the settlement; and

(D) the calculation of a settlement fee.

(c) A provider shall maintain records for each individual for whom it provides debt-management services for five years after the final payment made by the individual and produce a copy of them to the individual within a reasonable time after a request for them. The provider may use electronic or other means of storage of the records.

Comment

1. An individual must receive regular communication of the status of his or her account. Subsection (a) requires providers to give accountings monthly or upon request. A provider is free to provide the accounting more frequently than monthly.

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

3. If a plan contemplates concessions consisting of reduction in finance charges or late payment, default, or delinquency fees, section 22(c)(2) requires distribution of all the money each month. With respect to individuals in these plans, notwithstanding paragraph (4), accumulating reserves is not permitted. For plans that contemplate settlement for less than the principal amount of a debt owed a creditor, the provider may accumulate money from month to month.

4. Paragraph (5) applies primarily to debt-settlement entities. If no creditor has agreed to settlement terms during a reporting period, the subsection does not require the provider to make any disclosure. Hence, the subsection ordinarily would not apply to plans operated by credit-counseling entities, because creditors receive the full principal amount of the debt owed them and do not "agree" to accept any particular amount as payment in full. As to debt-settlement entities, the paragraph requires disclosure of the terms of a settlement, including the dollar amount paid and the percentage of the principal amount of the debt (see section 2(14)) that that represents. Subparagraph (D) requires disclosure of the calculation of a settlement fee. The provider must disclose the amount and the method of arriving at the amount of the fee, e.g., "$100, which represents 20% of the difference between the amount of the debt when you entered the plan and the amount paid pursuant to the settlement."

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

6. The Electronic Signatures in Global and national Commerce Act, 15 U.S.C. § 7001(d)(1) provides that a provider may comply with record-retention requirements under other law by "retaining an electronic record . . . that (A) accurately reflects the information . . . and (B) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise."

Subsection (c) requires the provider to produce a copy of the electronic record.

SECTION 28. PROHIBITED ACTS AND PRACTICES.

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

(1) misappropriate or misapply money held in trust;

(2) settle a debt on behalf of an individual for more than 50 percent of the principal amount of the debt owed a creditor, unless the individual assents to the settlement after the creditor has assented;

(3) take a power of attorney that authorizes it to settle a debt, unless the power of attorney expressly limits the provider's authority to settle debts for not more than 50 percent of the principal amount of the debt owed a creditor;

(4) exercise or attempt to exercise a power of attorney after an individual has terminated an agreement;

(5) initiate a transfer from an individual's account at a bank or with another person unless the transfer is:

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

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

(i) payment to one or more creditors pursuant to a plan; or

(ii) payment of a fee;

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

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

(8) receive a bonus, commission, or other benefit for referring an

individual to a person;

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

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

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

(12) make a representation that:

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

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

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

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

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

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

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

(b) If a provider furnishes debt-management services to an individual, the

provider may not, directly or indirectly:

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

(2) receive from or on behalf of the individual:

(A) a promissory note or other negotiable instrument other than a check or a demand draft; or

(B) a post-dated check or demand draft;

(3) lend money or provide credit to the individual, except as a deferral of a settlement fee at no additional expense to the individual;

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

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

(A) the administrator, upon proper demand;

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

(C) the extent necessary to administer the plan;

(6) except as otherwise provided in Section 23(f), provide the individual less than the full benefit of a compromise of a debt arranged by the provider;

(7) charge the individual for or provide credit or other insurance, coupons for goods or services, membership in a club, access to computers or the Internet, or any other matter not directly related to debt-management services or educational services concerning personal finance; or

(8) furnish legal advice or perform legal services, unless the person furnishing that advice to or performing those services for the individual is licensed to practice law.

(c) This [act] does not authorize any person to engage in the practice of law.

(d) A provider may not receive a gift or bonus, premium, reward, or other compensation, directly or indirectly, for advising, arranging, or assisting an individual in

connection with obtaining, an extension of credit or other service from a lender or service provider, except for educational or counseling services required in connection with a government-sponsored program.

(e) Unless a person supplies goods, services, or facilities generally and supplies them to the provider at a cost no greater than the cost the person generally charges to others, a provider may not purchase goods, services, or facilities from the person if an employee or a person that the provider should reasonably know is an affiliate of the provider:

(1) owns more than 10 percent of the person; or

(2) is an employee or affiliate of the person.

Comment

1. Paragraphs (2) and (3) of subsection (a) limit the extent to which a debt-settlement entity may settle a debt without the individual's contemporaneous assent. Paragraph (2) prohibits a provider from settling a debt, through the use of a power of attorney or otherwise, to authorize the provider to settle debts on whatever terms the provider deems desirable, or an any terms other than those specified here. Under paragraph (3) a power of attorney may authorize the provider to settle debts for 50 percent or less of the amount of the debt at the time the individual assented to the plan. See section 2(14) for the definition of "principal amount of the debt." For settlements less favorable to the individual than that, a power of attorney is prohibited and ineffectual. These paragraphs supplement section 19(e), which imposes similar limits on the terms that a provider may include in an agreement, and they negate the permissibility of using a separate document to obtain greater authorization than section 19 permits.

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

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

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

The Bankruptcy Code, 11 U.S.C. §111(c)(2)(B), requires credit-counseling entities within its purview to "provide services without regard to ability to pay the fee." The Internal Revenue Code extends this requirement to all entities exempt from taxation under section 501(c)(3). This Act does not require providers to reduce or waive fees for those who cannot afford them, but neither does it interfere with a provider's compliance with any federal or other state law that requires a reduction or waiver of fees.

5. Paragraph (7) prohibits certain referral fees. Payment of referral fees may be an efficient way to attract business and achieve economies of scale, but it creates a risk of deception. If a creditor, for example, suggests that an individual consult a particular provider, the individual is likely to perceive this as an endorsement by a creditor that is seeking to help the individual. The same is true if the creditor supplies the individual's name to a provider and the provider contacts the individual, telling the individual that the creditor suggested the communication. In fact, the referral may be driven by identification of which provider is willing to pay the highest price for the referrals.

The prohibition against paying referral fees does not preclude payment for sales leads or lists of prospective customers, if the person making the referral has no stake in the outcome of a plan or if the provider does not reveal the identity of the person that supplied the list. A creditor is one example of a person that has a financial interest in the outcome of debt-management services. Another is a person whose compensation varies depending on whether the individual it refers completes a plan or reaches some other milestone.

The vice here is misleading the individual into believing that an entity with which the individual has a relationship (e.g., one of the individual's creditors) is disinterestedly recommending that the individual seek the services of the provider. Hence, neither the provider nor the creditor (or other person supplying the individual's name to the provider) may reveal to the individual that the person making the referral is in any way connected to the reason the provider is communicating with the individual. If the source of the list is identified to the individual by either the provider or the source, paragraph (7) prohibits the provider from paying for it.

6. Paragraph (8) is the converse of paragraph (7). Its purpose is to eliminate the economic incentive for a provider to refer individuals to persons who provide loans, goods, services, facilities, or other products of any kind. The protection of financially stressed, vulnerable individuals justifies discouraging a provider, motivated by self-interest, from recommending products provided by others. The prohibition in paragraph (8) precludes a provider from

including on its website a link to the website of an entity providing other services or products and receiving payment from that entity, whether a flat fee or a fee based on the number of times individuals hit that link. Although this appears to be a form of advertising, for the purposes of this Act it is indistinguishable from payment for referrals. Placing a link on the provider's website amounts to an endorsement of or referral to the owner of the linked website. It should not matter whether the referral is by electronic link or verbal recommendation. The provider is free, of course, to place the link on its website, just as it is free to make an oral referral, so long as it does not directly or indirectly receive compensation or other benefit from the person to whom the individual is referred. This distinguishes disinterested advice from referrals motivated by the provider's self-interest.

For restrictions on the manner in which a provider may make a permissible referral, see subsection (b)(5) and Official Comment 16.

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

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

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

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

11. Not-for-profit is a status under state law. An entity may qualify for that status without also being tax-exempt under federal law. For a provider to represent that it is a nonprofit or not-for-profit entity, it is not enough that the provider was organized under a statute authorizing not-for-profits. Paragraph (14) requires that the provider also must be properly operating as a not-for-profit. Nor does it suffice that the provider has been granted tax-exempt status under the Internal Revenue Code. If it is not operating in a manner consistent with the law under which it was formed, a representation that it is a nonprofit entity violates this section.

12. Paragraph (15) prohibits the use of cognovit clauses or other procedural devices by which a provider is authorized to confess judgment against an individual.

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

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

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

the individual." Hence this paragraph does not prohibit an entity from taking a security interest in connection with extending credit or providing other kinds of services to persons to whom it does not provide debt-management services.

16. Paragraph (5) preserves the privacy of information about an individual with whom a provider has an agreement. It is intended to complement federal and other state law restrictions on the dissemination of personal information. So long as the provider strips out the individual's identifying information, however, it is free under this Act to disclose information for purposes of academic research or construction of a scoring system. If the identifying information is present, this paragraph prohibits disclosure of any of the information, except as permitted by the three specified exceptions. To the extent that other law restricts the disclosure of information about an individual, the provider may be able to comply with that law by obtaining the individual's consent to the disclosure. But this paragraph makes no provision for authorizing the provider to release information with the individual's consent.

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

On the other hand, if a provider wants to refer an individual to another person for other goods or services (which subsection (a)(8) permits, so long as the provider receives no compensation for the referral), it must do so by providing the individual with the identity of the third person. This paragraph prohibits the provider from disclosing the identity of the individual to the third person for the third person to contact.

17. The cross-referenced section paragraph (6) permits debt-settlement companies to receive a portion of the forgiven debt. Other entities are not permitted to receive any portion of any forgiven debt, but this paragraph should not be interpreted to prohibit the receipt of any fees permitted by this Act.

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

19. Subsection (a)(13) prohibits misrepresentations that a provider is authorized or competent to provide legal services. Paragraph (8) of subsection (b) prohibits the performance of those services, unless the person is a licensed attorney. A provider does not violate this

subsection if the person providing legal services is licensed in a state, even if not this state. It may, however, violate other law that prohibits the unauthorized practice of law in this state.

20. Section 17(d) requires providers to answer questions about how to deal with indebtedness, and the Act generally contemplates that providers act as intermediaries between individuals and their creditors. Subsection (c) of this section makes it clear that the Act does not authorize providers or their employees to practice law. The Act does not, however, attempt to draw the line between the practice of law and the services required or permitted by the Act. Rather, it contemplates that the courts will continue to develop and apply the rules concerning the unauthorized practice of law.

21. Subsection (d) prohibits a provider from receiving compensation for performing specified services for a third party, a technique used in other contexts to evade regulation. The prohibition supplements subsection (a)(8) (prohibiting referral fees). It is broader, in that it attempts to prevent evasions of subsection (a)(8) through the ruse of performing services for the lender or service provider.

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

22. Subsection (e) prohibits insider transactions unless the transactions are bona fide market transactions. The purpose of the subsection is to prohibit the use of a provider to channel money to related entities. Not-for-profit or tax-exempt providers may do this in an attempt to evade restrictions on entities with that status. For-profit providers may do this in an attempt to establish a high cost of doing business, which they then might use to persuade the legislature to increase the permissible fees and charges. Ordinarily a provider will know whether a person with whom it deals is its affiliate. The "should reasonably know" language is to protect a provider when its ignorance of that relationship is reasonable.

The subsection sets a minimum standard, but it does not displace other law governing not-for-profit entities. That other law may impose more stringent standards on engaging in transactions that benefit persons related to the not-for-profit entity.

SECTION 29. NOTICE OF LITIGATION. No later than 30 days after a provider has been served with notice of a civil action for violation of this [act] by or on behalf of an individual who resides in this state at either the time of an agreement or the time the notice is served, the provider shall notify the administrator in a record that it has been sued.

Comment

The purpose of this section is to alert the administrator to the possibility of the need for action.

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

Comment

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

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

3. If a provider advertises its debt-management services, it must comply with this section. If a third party advertises the debt-management services of a provider, the third party should be viewed as an agent of the provider, and the provider is liable under the law of agency if the advertisement fails to comply with this section. See also section 31.

SECTION 31. LIABILITY FOR THE CONDUCT OF OTHER PERSONS. If a provider delegates any of its duties or obligations under an agreement or this [act] to another person, including an independent contractor, the provider is liable for conduct of the person which, if done by the provider, would violate the agreement or this [act].

Comment

The agreement between a provider and an individual imposes duties and obligations on

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

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

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

SECTION 32. POWERS OF ADMINISTRATOR.

(a) The administrator may act on its own initiative or in response to complaints and may receive complaints, take action to obtain voluntary compliance with this [act], [refer cases to the [attorney general]], and seek or provide remedies as provided in this [act].

(b) The administrator may investigate and examine, in this state or elsewhere, by subpoena or otherwise, the activities, books, accounts, and records of a person that provides or offers to provide debt-management services, or a person to which a provider has delegated its obligations under an agreement or this [act], to determine compliance with this [act]. Information that identifies individuals who have agreements with the provider shall not be disclosed to the public. In connection with the investigation, the administrator may:

(1) charge the person the reasonable expenses necessarily incurred to

conduct the examination;

(2) require or permit a person to file a statement under oath as to all the facts and circumstances of a matter to be investigated; and

(3) seek a court order authorizing seizure from a bank at which the person maintains a trust account required by Section 22, any or all money, books, records, accounts, and other property of the provider that is in the control of the bank and relates to individuals who reside in this state.

(c) The administrator may adopt rules to implement the provisions of this [act] in accordance with [insert the appropriate section of the Administrative Procedure Act or other statute governing administrative procedure].

(d) The administrator may enter into cooperative arrangements with any other federal or state agency having authority over providers and may exchange with any of those agencies information about a provider, including information obtained during an examination of the provider.

(e) The administrator, by rule, shall establish reasonable fees to be paid by providers for the expense of administering this [act].

(f) The administrator, by rule, shall adopt dollar amounts instead of those specified in Sections 2, 5, 9, 13, 23, 33, and 35 to reflect inflation, as measured by the United States Bureau of Labor Statistics Consumer Price Index for All Urban Consumers or, if that index is not available, another index adopted by rule by the administrator. The administrator shall adopt a base year and adjust the dollar amounts, effective on July 1 of each year, if the change in the index from the base year, as of December 31 of the preceding year, is at least 10 percent. The dollar amount must be rounded to the nearest $100, except that the amounts in Section 23 must be rounded to the nearest dollar.

(g) The administrator shall notify registered providers of any change in dollar amounts made pursuant to subsection (f) and make that information available to the public.

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

official should be substituted for "attorney general."

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

Comment

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

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

3. Subsection (c) gives the administrator broad powers to adopt rules to implement and, to the extent permitted by the law governing administrative procedure, further the purposes of this Act. In exercising this power, however, the administrator should be mindful of section 38, which exhorts those enforcing the Act to promote uniformity among the enacting states.

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

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

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

Section 35(d)(2): punitive damages ($10,000)

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

SECTION 33. ADMINISTRATIVE REMEDIES.

(a) The administrator may enforce this [act] and rules adopted under this [act] by taking one or more of the following actions:

(1) ordering a provider or a director, employee, or other agent of a provider to cease and desist from any violations;

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

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

(4) prosecuting a civil action to:

(A) enforce an order; or

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

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

(b) Subject to adjustment of the dollar amount pursuant to Section 32(f), if a person violates or knowingly authorizes, directs, or aids in the violation of a final order issued under subsection (a)(1) or (2), the administrator may impose a civil penalty not exceeding $20,000 for each violation.

(c) The administrator may maintain an action to enforce this [act] in any [county].

(d) The administrator may recover the reasonable costs of enforcing the [act] under subsections (a) through (c), including attorney's fees based on the hours reasonably

expended and the hourly rates for attorneys of comparable experience in the community.

(e) In determining the amount of a civil penalty to impose under subsection (a) or (b), the administrator shall consider the seriousness of the violation, the good faith of the violator, any previous violations by the violator, the deleterious effect of the violation on the public, the net worth of the violator, and any other factor the administrator considers relevant to the determination of the civil penalty.

Comment

1. Paragraphs (1) and (2) of subsection (a) authorize the administrator to take action against providers, their directors or employees (including officers), and any other person that has caused the provider to violate the Act. Paragraph (3) authorizes imposition of civil penalties against any of these persons. The law governing administrative agencies governs the procedure to be used.

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

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

4. Subsection (d) places on the person violating this Act the costs of enforcing the Act against that person. To the extent those costs are attorney's fees, they are to be determined by looking to rates in the private-practice sector. This subsection complements section 32(b)(1), which authorizes the administrator to assess a provider or its delegee with the costs of investigation, but permits the recovery of costs against other persons who are found to violated the Act. See subsection (a)(3) (liability of a person that has caused a violation).

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

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

(1) having generally ceased to pay debts in the ordinary course of business

other than as a result of good-faith dispute;

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

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

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

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

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

(3) the provider is insolvent;

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

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

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

(d) If the administrator suspends, revokes, or denies renewal of the registration of a provider, the administrator may seek a court order authorizing seizure of any or all of the money in a trust account required by Section 22, books, records, accounts, and other property of the provider which are located in this state.

(e) If the administrator suspends or revokes a provider's registration, the provider may appeal and request a hearing pursuant to [insert the citation to the appropriate section of the administrative procedure act or other statute governing administrative procedure].

Legislative Note: *In states in which the constitution does not permit the phrase, "as amended," when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a)(3).*

Comment

1. Subsection (b) gives the power to suspend or revoke a registration. Subsection (e) gives recourse under the administrative law of the state to a provider whose registration has been suspended or revoked.

2. Section 22(e) requires a trust account at all times to have a balance in an amount equal to the sum of the balances in each individual's account, and section 22(f) requires a monthly reconciliation of the trust account. If money is missing, or in other proper circumstances, subsection (c) authorizes the administrator to take summary action. Subsection (e) contemplates prompt judicial review.

3. As with section 32(b)(3) (authorizing seizure of money and records from the bank holding a provider's trust account), subsection (d) does not specify the procedure to be used. If other law authorizes ex parte relief, the administrator may seek that relief under this subsection.

SECTION 35. PRIVATE ENFORCEMENT.

(a) If an individual voids an agreement pursuant to Section 25(b), the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement, except amounts paid to creditors, in addition to the recovery under subsection (c)(3) and (4).

(b) If an individual voids an agreement pursuant to Section 25(a), the individual may recover in a civil action three times the total amount of the fees, charges, money, and payments made by the individual to the provider, in addition to the recovery under subsection (c)(4).

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

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

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

(3) punitive damages; and

(4) reasonable attorney's fees and costs.

(d) In a class action, except for a violation of Section 28(a)(5), the minimum damages provided in subsection (c)(2) do not apply.

(e) In addition to the remedy available under subsection (c), if a provider violates an individual's rights under Section 20, the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement, except for amounts paid to creditors.

(f) A provider is not liable under this section for a violation of this [act] if the provider proves that the violation was not intentional and resulted from a good-faith error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. An error of legal judgment with respect to a provider's obligations under this [act] is not a good-faith error. If, in connection with a violation, the provider has received more money than authorized by an agreement or this [act], the defense provided by this subsection is not available unless the provider refunds the excess within two business days of learning of the violation.

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

Comment

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

2. Section 25(b) makes an agreement voidable if the provider is not properly registered under this Act. Under subsection (a) the individual may recover all money paid by the individual,

except for amounts passed on to creditors. This sanction is to disgorge all money that the provider otherwise would have earned for its services. If the minimum damages under subsection (c)(2) are larger than the amount specified in subsection (a), the individual is entitled to the minimum damages of subsection (c)(2) rather than recovery under subsection (a).

3. Section 25(a) permits an individual to void an agreement if a provider exceeds the fee caps. Subsection (b) permits the individual to recover treble damages, as well as recovering under subsection (c)(3) and (4). The amount to be trebled includes all payments made to the provider (or its designee), including amounts that thereafter are forwarded to the individual's creditors. If the individual opts for recovery under this subsection, he or she may not also recover under subsection (c)(1) or (2). On the other hand, if recovery is larger under subsection (c)(2) than under this subsection, the individual recovers the larger amount under subsection (c)(2). The individual may choose which subsection to assert.

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

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

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

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

6. The minimum damages provision in paragraph (2) applies only to the specified violations (prerequisites for a plan, form and contents of an agreement, cancellation of agreement, translation of documents, trust account, fee caps, voluntary contributions, periodic reports, and certain prohibited acts and practices). For violation of other sections of the Act, including failure to register and failure to provide customer service, the aggrieved individual may

recover actual damages (if any are caused by the violation), punitive damages, or both. The administrator, of course, may enforce all sections of the Act.

7. Paragraph (3) authorizes punitive damages. The courts should use the usual standards for determining the appropriateness and amount of punitive damages. Factors commonly considered are the seriousness of the violation, previous violations of the violator, the deleterious effect of the violation on the public, the net worth of the violator, the violator's intent to harm, etc.

Statutes in some states specify that a portion of an award of punitive damages is to be paid to someone other than the successful plaintiff. Paragraph (3) is intended to displace those statutes, so that the entire award is paid to the plaintiff.

8. "Costs" in paragraph (4) encompasses filing fees, jury fees, expert witness fees, and everything else that may be taxed as costs against the losing party. In determining the reasonable amount of attorney's fees, the court should use the lodestar approach. It should pay particular attention to the purpose of this section, which is to ensure that counsel is available for individuals to enforce their rights under this Act. The award of fees must be sufficient to encourage attorneys to take on representation of individuals whose rights under this Act have been violated. Often this representation will be on the basis of a contingency fee. Consequently, the criteria in section 33(d) for determining a fee award to the administrator should serve as a floor for fee awards in private actions, and the amount of the recovery should play little or no role in determining the amount of the fees. See, e.g., Jordan v. Transnational Motors, Inc., 537 N.W.2d 471 (Mich. App. 1993); Bittner v. Tri-County Toyota, Inc., 569 N.E.2d 464 (Ohio 1991). The contingent nature of the attorney's compensation or the risk of the litigation may justify enhancement of the award. See Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 203-06 (Wash. 1983).

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

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

11. Subsection (e) implements the remedy implicit in section 20 when an individual exercises the right to cancel: if the agreement complies with sections 19, 20, and 28, the individual has only three days to cancel. Upon cancellation, the provider must refund all money

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

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

For the defense under this subsection to be available to a provider with respect to a violation by a person to whom the provider has delegated its duties, the provider must prove that the person committed the violation unintentionally, as a result of good-faith error, and notwithstanding the maintenance of procedures reasonably designed to prevent the error. It is not enough that the provider's violation was unintentional. The provider is liable under section 31 for the violations of its delegee, and the provider is exonerated by this subsection only if the delegee's conduct meets the standard of this subsection.

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

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

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

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

Comment

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

SECTION 37. STATUTE OF LIMITATIONS.

(a) An action or proceeding brought pursuant to Section 33(a), (b), or (c) must be commenced within four years after the conduct that is the basis of the administrator's complaint.

(b) An action brought pursuant to Section 35 must be commenced within two years after the latest of:

(1) the individual's last transmission of money to a provider;

(2) the individual's last transmission of money to a creditor at the direction of the provider;

(3) the provider's last disbursement to a creditor of the individual;

(4) the provider's last accounting to the individual pursuant to Section 27(a);

(5) the date on which the individual discovered or reasonably should have discovered the facts giving rise to the individual's claim; or

(6) termination of actions or proceedings by the administrator with respect to a violation of the [act].

(c) The period prescribed in subsection (b)(5) is tolled during any period during which the provider or, if different, the defendant has materially and willfully misrepresented information required by this [act] to be disclosed to the individual, if the information so

misrepresented is material to the establishment of the liability of the defendant under this [act].

Comment

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

SECTION 38. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 39. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

SECTION 40. TRANSITIONAL PROVISIONS; APPLICATION TO EXISTING TRANSACTIONS. Transactions entered into before this [act] takes effect and the rights, duties, and interests resulting from them may be completed, terminated, or enforced as required or permitted by a law amended, repealed, or modified by this [act] as though the amendment, repeal, or modification had not occurred.

Comment

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

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

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

SECTION 42. REPEAL. The following laws are repealed:

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

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

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