



**WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM**

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON UNIFORM DEBT MANAGEMENT SERVICES

FROM: Mary Matthias, Senior Staff Attorney, and Dan Schmidt, Senior Analyst

RE: Comparison of LRB-5042/1, Relating to Adopting the Uniform Debt-Management Services Act and the Uniform Act on Uniform Debt Management Services as Passed by Utah, Rhode Island, and Delaware

DATE: November 30, 2006

This memorandum describes the substantive differences between LRB-5042/1, relating to adopting the Uniform Debt-Management Services Act, and the versions of the Uniform Act that have been enacted in the three states that have adopted it: Utah, where the Act takes effect on July 1, 2007; Rhode Island, where the Act takes effect on March 31, 2007; and Delaware, where the Act takes effect on January 17, 2007.

UTAH

Acceptance of Application for Registration (Licensing) in Another State

Under LRB-5042/1, if a debt management services provider (provider) holds a license to provide debt management services in another state, the Department of Financial Institutions (DFI) must accept the license held in the other state and the application for that license as an application for a license in Wisconsin if all of the following apply:

- (a) The application in the other state contains information substantially similar to or more comprehensive than that required in an application for licensing in Wisconsin;
- (b) The applicant provides certain information specific to its proposed operations in Wisconsin; and

(c) The applicant verifies under oath or affirmation that the information contained in the application is current, or to the extent it is not current, supplements the application to make it current.

In addition to the requirements set forth above, Utah law contains the following provisions:

(a) It authorizes the administrator to promulgate rules regarding acceptance of an application from another state and states that the provisions described above are subject to those rules;

(b) It requires the administrator to, by rule, designate the states from which it will accept a license and application; and

(c) It specifies that if a license and application from another state are accepted, the required surety bond (or substitute) must be solely payable or available to Rhode Island and to individuals who reside in Rhode Island.

Amount of Bond Required

LRB-5042/1 requires a provider to file a bond in the amount of \$50,000 or other larger or smaller amount that the DFI 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 DFI considers appropriate. LRB-5042/1 provides that the \$50,000 figure shall be adjusted periodically for inflation.

Utah law requires the bond to be in the amount of \$100,000, also subject to periodic adjustments for inflation.

Substitutes for the Required Bond

LRB-5042/1 allows a provider to submit any of the following instead of a bond:

(a) A certificate of insurance;

(b) With approval of DFI, an irrevocable letter of credit; or

(c) With approval of DFI, bonds or other obligations of the United States or guaranteed by the United States or bonds or other obligations of the state or a political subdivision of the state.

Utah law allows the alternatives set forth above, and also allows a submission of a certificate of deposit 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 the law governing debt management services.

Prohibited Acts and Practices

LRB-5042/1 contains a list of 16 acts and practices, which, if committed by a provider, are grounds for suspension, nonrenewal, or revocation of the provider's registration, and may also be grounds for a private cause of action against the provider. One of these prohibited acts is to "employ an unfair, unconscionable, or deceptive act or practice, including the knowing omission of any material information."

Utah law contains the prohibited acts and practices described above and also provides that no provider may "make or use any untrue or misleading statement to the administrator or in the provision of debt management services."

RHODE ISLAND

Exempt Persons

LRB-5042/1 sets forth a list of persons and their employees that are exempt from the Act when engaged in the regular course of their business or profession. That list includes "a bank," defined as follows:

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

Rhode Island law specifies, instead, that the "bank" exemption applies to any of the following:

- (a) A bank chartered under the laws of the United States or the state of Rhode Island;
- (b) A bank chartered under the laws of another state, if the laws of the other state expressly authorize the bank to operate in that state under conditions no more restrictive than those imposed by the laws of Rhode Island, as determined by the director (of the department of business regulation) or the director's designee; and
- (c) An affiliate of a bank described under (b), above, if the affiliate is regulated by a federal or state banking authority.

Contents of Agreement

Schedule of Payments

LRB-5042/1 specifies certain information that must be contained in an agreement for the provision of debt management services. One required item is a 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.

Rhode Island law provides that if the information described above is not known to the provider at the time the agreement is made, the agreement must contain an affirmative statement to that effect.

Expected Concessions by Creditors

LRB-5042/1 specifies that an agreement for the provision of debt management services must include the amount owed to each creditor and any concessions the provider reasonably believes that each creditor will offer to the individual.

Rhode Island law provides that if the provider cannot form a reasonable belief as to the amounts owed and concessions at the time the agreement is made, the agreement must contain an affirmative statement to that effect.

DELAWARE

Enforcement

The provisions of LRB-5042/1 are generally enforced by the Division of Banking of DFI.

The Delaware law is generally enforced by the Delaware Attorney General.

Definitions

Under LRB-5042/1, “bank” means a financial institution, including a commercial bank, savings bank, savings and loan association, credit union, and trust company, engaged in the business of banking, chartered under federal or state law, and regulated by a federal or state banking regulatory authority.

The definition of “bank” under Delaware law also includes a mortgage bank.

Application for Registration/License: Form, Fee, and Accompanying Documents

Fee

LRB-5042/1 requires the application for registration to be accompanied by the fee established by the DFI.

The Delaware law requires a statutorily established fee of \$2,000. The fee is nonrefundable.

Overdraft Notification Agreement

Under LRB-5042/1, an applicant must provide identification of all specified trust accounts and an irrevocable consent authorizing the administrator to review and examine the trust accounts.

The Delaware law requires that the applicant also provide an overdraft notification agreement which requires the bank to notify the Attorney General if there are insufficient funds in the applicant’s trust account.

Insurance

LRB-5042/1 requires an applicant for registration to provide evidence of insurance in the amount of \$250,000, with no deductible.

Delaware law requires an applicant to provide evidence of insurance in the amount of \$500,000 with a deductible no greater than \$5,000.

Not-for-Profit or Tax-Exempt Status

If the applicant is organized as a not-for-profit entity or is exempt from taxation, LRB-5042/1 requires the applicant to provide evidence of not-for-profit or tax-exempt status applicable to the applicant under the Internal Revenue Code, 26 U.S.C. s. 501.

Delaware law does not require any evidence of nonprofit or tax-exempt status to accompany a license application.

Application for Registration/License: Required Information

Agents

LRB-5042/1 does not explicitly require an application to contain the names and addresses of the applicant's registered agents.

Delaware law requires the name and address of the applicant's registered agent in Delaware to be included in the application for a license.

Financial Statement Audit

LRB-5042/1 requires the financial statements that must be filed with an application to be audited by an accountant licensed to conduct audits.

Delaware law requires that, at minimum, the financial statements must undergo an audited review by a certified accountant.

Prior Employment of Directors

LRB-5042/1 requires an applicant to provide the names and addresses of all employers of each director during the 10 years immediately preceding the application.

Delaware law requires the applicant to provide the names and addresses of all employers of each director during the five years immediately preceding the application.

Compensation Reports

LRB-5042/1 requires an applicant to provide a statement of the amount of compensation of the applicant's five most highly compensated employees for each of the three years immediately preceding

the application or, if it has not been in operation for the three years preceding the application, for the period of its existence.

Delaware law only requires such a statement if the provider was organized as a not-for-profit entity or has obtained tax-exempt status under federal law.

Registration/License: Issuance or Denial

LRB-5042/1 requires DFI to deny any application that is not accompanied by a bond under s. 422.513 or a bond substitute under s. 422.514.

Delaware law does not have such a requirement.

Renewal of Registration/License

LRB-5042/1 requires DFI to establish renewal fees and requires the applicant for renewal to provide evidence of insurance in an amount equal to the larger of \$250,000 or the highest daily balance in the required trust account during the six-month period immediately preceding the application. The insurance may not have a deductible.

Delaware law has a statutory renewal fee of \$1,000 and requires a similar \$250,000 insurance policy. The insurance policy may have a deductible of up to \$5,000.

Registration/License in Another State

LRB-5042/1 provides that an applicant that holds a license or certificate of registration in another state authorizing it to provide debt management services may submit a copy of that license or certificate and the application for it instead of an application in the form prescribed under the draft. DFI must accept the license or registration as an application for a license in Wisconsin if all of the following conditions apply:

- (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 certain information specific to its proposed operations in Wisconsin.
- (3) The applicant verifies under oath or affirmation 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.

Delaware law permits the use of any application forms approved by the Attorney General for use under the debt management services chapter.

Bond Required

Amount of Bond

LRB-5042/1 requires a bond of \$50,000 or other larger or smaller amount that DFI 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.

Delaware law has similar provisions, however, the determination of the bond amount is made by the Attorney General and the bond must be in the amount of \$50,000 minimum. No lesser amount is permitted.

Terms of Bond

LRB-5042/1 generally provides that the amount of the bond must 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.

Delaware law generally provides that the bond shall run to the state for the benefit of the Attorney General and for the benefit of *all consumers* injured by any wrongful act, omission, default, fraud, or misrepresentation by a licensed provider in the course of its activity as a licensed provider.

Time Limits for Payment of Claims; Rating of Surety

LRB-5042/1 does not contain a time limit for the payment of surety claims to the DFI. Any bond, surety, or insurance company fulfilling these requirements must be rated at least an "A" by a nationally recognized rating organization.

Claims under bonding provisions of the Delaware law must be paid to the Attorney General within 90 days of the insurer's receipt of the claim, or else interest accrues. The Delaware law does not require any specified rating for bonds, sureties, or insurance.

Cancellation Notification

LRB-5042/1 does not require notice to DFI when a bond held by a provider is cancelled or intended to be cancelled.

Delaware law states that a cancellation of any existing bond is not effective unless written notice of a surety's intention to cancel is filed with the Attorney General at least 30 days before the date upon which cancellation shall take effect.

Claim Notice

LRB-5042/1 requires that if the principal amount of a surety bond is reduced by payment of a claim or judgment, the provider must immediately notify DFI and file a new or additional surety bond in an amount set by DFI within 30 days after notice by the administrator.

Delaware law provides that when a surety company receives a claim against the bond of a licensed provider, it must immediately notify the Attorney General and may not pay any claim unless and until it receives notice to do so from the Attorney General.

Bond Required - Substitute

As discussed above, LRB-5042/1 permits a provider to submit a certificate of insurance, or with the approval of DFI, an irrevocable letter of credit or U.S. government bond or similar obligation guaranteed by the U.S. government, in lieu of a bond. A substitution is generally subject to similar conditions as a bond.

Delaware law permits only the submission of an irrevocable letter of credit in lieu of a bond, subject to conditions similar to those specified for a bond.

Prerequisites for Providing Debt Management Services

Written Disclosures

Before providing debt management services, LRB-5042/1 generally requires a provider to present an individual an itemized list of goods and services and their respective charges. The disclosure must be made using the following terminology and format:

Set-up fee <i>dollar amount of fee</i>
Monthly service fee <i>dollar amount of fee or method of determining amount</i>
Settlement fee <i>dollar amount of fee or method of determining amount</i>
Goods and services in addition to those provided in connection with a plan:	
..... <i>(item)</i> <i>dollar amount or method of determining amount</i>
..... <i>(item)</i> <i>dollar amount or method of determining amount</i>

Delaware law maintains the same disclosure terminology and format requirements for providers who hold money on behalf of an individual to pay creditors, but establishes a separate disclosure provision for providers who do not hold money on behalf of a debt to pay creditors. The disclosure provision for providers who do not hold money on behalf of a debt to pay creditors must be made using the following terminology and format:

Non Refundable Set-Up fee	_____
	Dollar amount of fee
Monthly service fee	_____
	Dollar amount of monthly service fee or the aggregate amount for the term of the plan 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

The maximum fee that you may be required to pay is 18% of the principal amount of the debt, and includes the set-up fee, monthly fee, settlement fee, or other service charges.

Determination Prohibitions

LRB-5042/1 prohibits a provider from furnishing debt management services unless the provider has satisfied certain requirements through the services of a certified counselor. These requirements include making 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. The provider must believe 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.

Delaware law permits the provider to determine either that the individual will be able to meet the payment obligations under the plan, as in LRB-5042/1, or that the creditor will likely engage in negotiations with the provider. In addition, the provider must also believe that each creditor of the individual listed as a participating creditor in the plan ***will likely*** accept payment of the individual's debts as provided in the plan.

Creditor Notice

LRB-5042/1 requires a provider to prepare a plan for debt management services and provide an individual with a list of all of the following as a condition of engaging in debt management services:

1. Creditors that the provider expects to participate in the plan and grant concessions.

2. Creditors that the provider expects to participate in the plan but not grant concessions.
3. Creditors that the provider expects not to participate in the plan.
4. All other creditors.

Delaware law does not require a provider to provide an individual with the list described above. Instead, it requires the provider to inform the individual that some creditors may be unwilling to negotiate with the provider.

Form and Contents of Agreement

With respect to an agreement that contemplates that creditors will settle debts for less than the principal amount of debt, LRB-5042/1 states that the provider must refund 65% of any portion of the set-up fee that has not been credited against the settlement fee.

Under Delaware law, the provider must refund 65% of fees associated with that percentage of the principal amount remaining unsettled at the time of the termination.

Trust Accounts

LRB-5042/1 requires a provider to hold all money paid to a provider by or on behalf of an individual for distribution to creditors to be held in a trust account established for the benefit of individuals for whom the provider is furnishing debt management services. LRB-5042/1 contains various requirements that apply to the operation and maintenance of such trust accounts.

In addition to these requirements, Delaware law requires all providers to maintain an overdraft notification agreement with every bank at which they have established a required trust account. The overdraft notification agreement must require the bank to notify the Attorney General in the event that any instrument in properly payable form is presented against a provider's trust account containing insufficient funds.

Delaware law also specifies that a provider shall be deemed not to hold a trust account for disbursement to creditors if such client funds are either retained by the client in a bank of their choosing at all times prior to their disbursement to the clients' creditors, or deposited by the client in a bank or with a third party designated by the provider, in an account that is in the name of the client, is not subject to claims of the creditors of any party other than the client, or the client exercises full control over all aspects of the account.

Fees and Other Charges

LRB-5042/1 provides that if a plan contemplates that creditors will settle debts for less than the principal amount of the debt, a provider may charge the following fees.

- (a) For consultation, obtaining a credit report, setting up an account "and the like": the lesser of \$400 and 4% of the debt in the plan at the inception of the plan.

- (b) As a monthly service fee: an amount not to exceed \$10 times the number of creditors remaining in the plan at the time the fee is assessed, but not more than \$50 in any month.

LRB-5042/1 provides that compensation for services in connection with settling a debt may not exceed, with respect to each debt, 30% of the amount by which the original amount of debt exceeds the amount paid to creditors under the plan, less the set-up fee and monthly service fees described above.

Delaware's law allows a provider to charge the fees set forth below. The amount of each fee is not specified or limited.

- (a) A fee for consultation and obtaining a credit report.
- (b) A monthly service fee.

Delaware law provides that compensation for services in connection with settling a debt may not exceed, with respect to each debt, 18% of the principal amount of the debt, less the set-up fee and monthly service fee described above.

Retention of Records

LRB-5042/1 requires a provider to maintain records for each individual for whom it has provided debt management services for five years after the final payment is made by the individual.

Delaware law contains the following additional provisions relating to retention of records by providers:

- (a) It requires a provider to maintain records as will enable the Attorney General to enforce full compliance with the Act.
- (b) It authorizes the Attorney General to, by rule, require records to be kept for longer than five years.
- (c) It authorizes the Attorney General to prescribe the minimum information that must be shown in the records retained by a provider.

Prohibited Acts and Practices

LRB-5042/1 contains a list of 16 acts and practices, which, if committed by a provider, are grounds for suspension, nonrenewal, or revocation of the provider's registration and may also be grounds for a private cause of action against the provider.

In addition to these acts and practices, Delaware law specifies that a provider may not "advise, encourage, or suggest to the individual not to make payment to creditors while under the plan."

Examination of Providers

Schedule of Examinations

LRB-5042/1 authorizes DFI to conduct examinations to determine compliance with the Act but does not require annual or periodic examinations.

Delaware law requires every provider to be examined annually or at such intervals as the Attorney General deems necessary, sets forth required elements of the examination, and states that in conducting an examination, the Attorney General shall be given broad access to the premises, records, and other pertinent property of the provider.

Costs of Examination

Delaware law specifies that if, in the Attorney General's opinion, it is necessary for a thorough examination of a licensed provider, the Attorney General may retain one or more accountants, attorneys, appraisers, or other third parties to assist the Attorney General. Within 10 days after receipt of a statement from the Attorney General, the licensed provider must pay or reimburse the fees, costs and expenses of any third parties retained by the Attorney General.

Civil Penalty

LRB-5042/1 provides for the following forfeitures for violation of the Act:

- (a) An amount not exceeding \$10,000 for each violation of the Act.
- (b) An amount not exceeding \$20,000 for each violation of a final order issued by DFI ordering a person to cease and desist from any violations or to correct a violation, including making restitution.

The Delaware law provides for the following civil penalties:

- (a) An amount not exceeding \$50,000 for each violation of the Act.
- (b) An amount not exceeding \$75,000 for each violation of a final order of the Attorney General ordering a person to cease and desist from any violations or to correct a violation, including making restitution.

Expenses of Enforcement

LRB-5042/1 provides that DFI may recover from a violator the reasonable costs of enforcing the Act, including reasonable attorney's fees.

Delaware law provides, in addition, that the Attorney General may recover from a violator the compensation of all employees of the Attorney General's office based on the time the employees reasonably expended on the matter.

Statute of Limitations

LRB-5042/1 contains a two-year statute of limitations for private civil actions for enforcement of the Act.

Delaware law contains a three-year statute of limitations for private civil actions for enforcement of the Act.

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