

# UNIFORM DEBT-MANAGEMENT SERVICES ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

ANNUAL CONFERENCE  
MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR  
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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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# UNIFORM DEBT-MANAGEMENT SERVICES ACT

## Prefatory Note

### Background

The consumer-credit-counseling industry originated in the early twentieth century in the form of debt adjusters (also known as debt poolers, debt consolidators, debt managers, or debt pro-raters). This first generation of credit counselors consisted of profit-seeking enterprises that communicated with a consumer's creditors to persuade them to accept partial payment in full satisfaction of the consumer's obligations. If the creditors agreed, the debt adjuster would collect a monthly payment from the consumer and forward appropriate portions of it to each of the creditors. They often charged hefty fees, leaving little for distribution to the creditors. Instances of deceptive advertising and theft of clients' funds were numerous enough that, starting in the 1950s, legislatures in more than half the states outlawed the business (e.g., N.Y. Gen. Bus. Law §§ 455-457). Of the remaining states, approximately two thirds opted for a regulatory approach, requiring licenses, imposing requirements on how the businesses operate, and restricting troublesome practices (e.g., Mich. Comp. Laws Ann. §§ 451.451-.465 (repealed in 1976 and replaced by §§ 451.411-.437)).

Many states exempted not-for-profit organizations from these statutes, enabling non-profits to render counseling services free of regulation. This led to the growth, starting in the 1950s, of the second generation of credit counselors. The growth of these non-profits was fueled by the National Foundation for Consumer Credit (NFCC) (later renamed the National Foundation for Credit Counseling), which was created by retailers and banks that issued credit cards. These creditors supported the formation of credit-counseling agencies as a means of helping consumers in financial difficulty gain control of their finances and pay their credit-card debts. The objectives were full repayment of debt and the avoidance of bankruptcy.

The counseling agencies provided community education, met individually with consumers, helped them develop or improve budgeting skills, and, when appropriate, enrolled them in debt-management plans (DMP's). To establish a DMP, the agency negotiated with each of the consumer's unsecured creditors to obtain concessions from them, in the form of some combination of reduced interest rate, waiver of default or delinquency fees, and monthly payments in an amount less than the contractual minimum. Thereafter, the consumer made monthly payments to the agency and the agency disbursed a pro-rata amount to each of the participating creditors. The creditors supported the counseling agencies by returning to them a percentage—often 15%—of the payments they received. The NFCC called this contribution the creditor's "fair share." The agencies also sometimes received charitable contributions from other sources and imposed modest fees on the consumer. As of 2005, this second generation of counseling agencies continues to operate.

Consumer advocates generally acknowledged the educational and budgeting benefits that

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

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

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

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

consumers whom the creditors believed could pay their debts without the concessions the creditors had been giving. They responded by reducing the concessions they were willing to make to consumers and by reducing the amounts they were willing to pay the counseling agencies. Some card issuers have stopped supporting the agencies altogether, and on average the amount returned to the agencies has dropped from more than 12% to less than 8%. This decrease has adversely affected the ability of counseling agencies to provide individual counseling and community education. Some major card issuers have abandoned the fair-share approach altogether and have developed proprietary models for compensating counseling agencies depending on such factors as the profiles of the debtors being served by an agency, the agency's record with the creditor, and the agency's advertising and business practices.

An objective of credit-counseling agencies, whether or not they provide reasonable educational services, is to enable consumers to repay their debts in full. There is, however, another segment of the industry—the fourth generation—whose members do not have this objective at all. These entities are known as debt-settlement companies, and they formed trade associations of their own (merged in 2004 into the United States Organizations for Bankruptcy Alternatives (USOBA)). Instead of helping the consumer pay his or her creditors in full, they attempt to persuade creditors to settle for less than the full amount of the consumer's debt, writing off the rest. Thus they represent a revival of the first generation of counseling agencies. Unlike their forebears, however, they do not negotiate with the creditors in advance of establishing a plan for dealing with the consumer's debts. Instead, they encourage the consumer to default on the debts and to make monthly payments to them or to a savings account of the consumer. When those payments reach a target percentage of the debt owed to one of the creditors, the agency submits an offer to that creditor (on the consumer's behalf) to settle the debt for the amount in hand. During the period when the funds are accumulating, the creditors receive nothing. As a result the creditors impose additional finance charges and delinquency fees, and they may undertake collection activity, including litigation.

Reports of abuses by credit-counseling agencies and debt-settlement companies and injury to consumers have appeared with increasing frequency in numerous media outlets. Reports of two prominent consumer organizations (Consumer Federation of America and the National Consumer Law Center) have documented the situation. (See CFA & NCLC, *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants* (2003); NCLC, *Credit Counseling in Crisis Update: Poor Compliance and Weak Enforcement Undermine Laws Governing Credit Counseling Agencies* (2004); NCLC, *An Investigation of Debt Settlement Companies: An Unsettling Business for Consumers* (2005), all available at <http://www.nclc.org>). The problems include:

- deception concerning the nature of, the need for, the benefits of, and the cost of debt-management plans to help consumers deal with their debt;
- excessive cost to consumers; and
- self-dealing and other conduct by agencies to evade limitations in the Internal Revenue Code.



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

### History of the Draft

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

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

### Bankruptcy Code Amendments

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

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

## Description of the Act

The purpose of the Act is to rein in the excesses while permitting credit-counseling agencies and debt-settlement companies to continue providing services that benefit consumers. The Conference has benefited from the participation of credit-counseling agencies (and their trade associations), debt-settlement companies (and their trade association), representatives of consumer organizations, and attorneys general. The Act represents an accommodation of the conflicting views of these interested entities. As may be expected, it leaves all of them satisfied with some decisions and dissatisfied with others.

The Act applies to “providers” of “debt-management services” that enter “agreements” with individuals for the purpose of creating “plans.” The definitions of the quoted terms are critical and appear in section 2, along with the definitions of several other terms. The Act speaks of “individuals,” as opposed to “consumers,” so that it applies to farmers and other individuals who are dealing with personal debt incurred in connection with their businesses.

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

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

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

## UNIFORM DEBT-MANAGEMENT SERVICES ACT

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

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

### Comment

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

**SECTION 2. DEFINITIONS.** In this [act]:

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

(2) “Affiliate”:

(A) with respect to an individual, means:

(i) the spouse of the individual;

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

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

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

(v) any other individual occupying the residence of the individual;

and

(B) with respect to an entity, means:

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

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

with respect to, the entity;

(iii) a director of, or an individual performing similar functions

with respect to, the entity;

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

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

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

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

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

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

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

(6) “Certified counselor” means an individual certified by a training program or certifying organization, approved by the administrator, that authenticates the competence of individuals providing education and assistance to other individuals in connection with debt-management services.

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

(8) “Day” means calendar day.

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

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

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

(C) financial-planning services provided in a financial planner-client relationship by a member of a financial-planning profession whose members the administrator, by rule, determines are

(i) licensed by this state;

(ii) subject to a disciplinary mechanism;

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

(iv) subject to a continuing-education requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) established in an insured bank;

(B) separate from other accounts of the provider or its designee;

(C) designated as a trust account or other account designated to indicate that the money in the account is not the money of the provider or its designee; and

(D) used to hold money of one or more individuals for disbursement to creditors of the individuals.

***Legislative Note:*** *In connection with paragraph (1), the state must decide whether to create a new administrative agency or charge an existing entity with enforcement of this Act. If the latter, the state must decide which existing entity to select. Logical choices include the attorney general or other entity charged with consumer protection generally (under a little-FTC act, deceptive trade practices act, or similar statute) or the entity charged with regulation of consumer credit or financial institutions. It may be desirable to amend that entity’s organic statute to refer specifically to this Act.*

### **Comment**

1. Paragraph (2) (affiliate): The term “affiliate” is used in six sections in the Act:

- as a basis for exempting from the Act certain entities related to banks (section 3(c)(3));
- as a disclosure item in the application for registration (section 6(16) and (18));

- as a tool to ensure the independence of a provider’s board of directors (section 9(d));
- as a limit on solicitation of payment on behalf of an individual (section 24);
- as a limit on a provider’s ability to engage in self-dealing (section 28(e); and
- as a ground for suspension or revocation of registration if a person related to a provider refuses to cooperate with the administrator’s investigation of the provider (section 34(b)(4)).

The Act does not impose obligations on affiliates *qua* affiliates, nor does any provision impose liability on them.

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

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

4. Paragraph (3) (agreement): This definition does not incorporate any requirement of “written” or “record.” An oral agreement is within this definition. Requirements of form appear in section 19.

5. Paragraph (5) (business address): Sections 6, 17(d), 18(g), and 19(a) require providers to disclose their business addresses. The definition makes it clear that this means the place where the provider conducts business and not a post-office box or private-service mail drop.

6. Paragraph (6) (certified counselor): Section 17 requires providers to perform certain functions through the services of a certified counselor; section 16 requires providers to make certified counselors available for consultation. The definition requires that the organization that trains or certifies counselors be approved by the administrator.

7. Paragraph (7) (concessions): The word “concessions” appears in sections 2(9), 17(c), and 19(a). The “debt” referred to in the definition of “concessions” typically is a contractual obligation, but it may be a judgment or other obligation of the individual. In those instances “terms of the contract” should by analogy be understood as “terms of the judgment” or other obligation. The “more favorable” terms include such changes as a reduction in finance charges or interest; a reduction or waiver of charges for late payment, default, or delinquency; and a reduction in the principal amount of the debt.

8. Paragraph (9) (debt-management services): The definition encompasses the activity of entities that act as an intermediary between an individual and the individual's creditors, for the purpose of changing the terms of the original contract between the individual and those creditors. There is no requirement that the individual's money flow through the provider. Hence, the definition includes the services of credit-counseling agencies and debt-settlement companies even if they do not have control over the individual's money, as when it is in an account managed by the individual or a third party.

The definition encompasses the services of persons that provide one-time assistance to an individual who has accumulated money and wants help negotiating with one or more of his or her creditors. This assistance is within the definition, and if the person provides this assistance to an individual who it has reason to know resides in this state, the person must, unless exempt under section 3, register and comply with the Act. Note that the assistance need not entail use of a "plan," as defined in paragraph (13).

The definition includes the services of credit-counseling entities even if the concessions offered by creditors are not subject to negotiation. It does not include services that consist solely of counseling or education concerning the management of personal finance. Nor does it include the activity of a creditor that compromises a claim with its debtor, because the creditor is not operating as an intermediary.

9. A creditor may have an agent or other intermediary. Examples include independent collection agencies and corporate subsidiaries whose mission is the collection of debts. For the purposes of the definition of debt-management services, a person in this category is a representative of the creditor. As such, a person who acts as an intermediary between an individual and a debt collector (or other representative of the creditor) for the purpose of obtaining concessions is providing debt-management services. Similarly, if a creditor transfers a debt to a debt-collection agency or other person, the transferee becomes a creditor, and a person acting as an intermediary between the individual and the transferee of the debt for the purpose of obtaining concessions is providing debt-management services.

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

The exclusion applies only if the services are rendered in an attorney-client, accountant-client, or financial planner-client relationship. Thus it does not suffice that the owner of a provider is an attorney, an accountant, or a financial planner. The attorney, accountant, or financial planner must be providing legal, accounting, or financial-planning services, respectively, to a client. Unless the services as an intermediary are provided in the course of providing legal, accounting, or financial-planning services, the exclusion does not apply, and the attorney, accountant, or financial planner is providing debt-management services and must



comply with the Act.

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

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

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

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

The definition requires a schedule of payments. As used here, “payments” includes the deposit or transfer of money into an individual’s checking or savings account, as well as a transfer to a provider (or the provider’s designee) for deposit into a trust account. The definition requires that the payments be used to pay debts of the individual. This requirement is satisfied even if part of the payment is used to pay a monthly service fee to the provider. The requirement of payments of the individual’s debts encompasses (a) full payment of some of the individual’s debts; (b) full payment of all of the individual’s debts; (c) partial payment of some of the individual’s debts; and (d) partial payment of all of the individual’s debts. Each of these arrangements suffices to bring the program or strategy within the definition of “plan.”

14. Paragraph (14) (principal amount of the debt): This term is used only in connection with debt settlement. Treatment of accruing charges, such as interest or default fees, may be different under various statutes, e.g., usury, Truth-in-Lending, etc. For purposes of this Act, the definition of principal is a snapshot of the debt at the time an individual assents to an agreement

for debt-management services. Finance charges and other fees that accrue after formation of the debt-management-services agreement retain their character as finance charges, etc., even if the creditor adds them to the principal amount of debt and even if the creditor thereafter calculates finance charges and fees on the increased amount.

15. Paragraph (15) (provider): This definition makes no reference to the location of the person that provides debt-management services. This means that the location of that person is irrelevant to the definition. Regardless of a person's location, if the person provides debt-management services, it is a provider under this Act. Subject to section 3, which exempts from the Act providers that do not enter agreements with individuals who reside in this state, the intention is for the Act to have as expansive a reach as is constitutionally permissible. See, e.g., *Cambridge Credit Counseling Corp. v. Foulston*, 303 F. Supp. 2d 1188 (D. Kan. 2003) (upholding the constitutionality of applying to a Massachusetts company the Kansas statute regulating credit counseling), appeal dismissed on motion of appellant and judgment vacated, No. 03-3317 (10th Cir. Oct. 19, 2004).

16. The definition includes persons that offer to provide debt-management services, as well as those that actually provide the services. Unless exempt under section 3, a person that offers to provide debt-management services must comply with all applicable provisions, e.g., section 28(a)(16) (prohibiting deceptive acts and practices). If a person forms an agreement with an individual and then transfers the account to another person, both those persons are within the definition of "provider."

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

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

At several places the Act speaks of "provider or its designee," referring to the person holding money of an individual pursuant to a plan. This is intended to foreclose any attempt by a

provider to evade its responsibilities under the Act by delegating to an independent contractor the tasks incident to receiving money of the individuals with whom it has agreements.

19. Paragraph (17) (settlement fee): Use of the expression “a charge imposed on or paid by” is designed to be expansive. It does not matter what the provider calls the charge. Nor does it matter whether payment of the charge is described as voluntary or whether the payment occurs by debit to a demand-deposit account of the individual, debit to a trust account held by an agent of the provider, or otherwise. The definition encompasses any transfer of money from or on behalf of the individual.

### **SECTION 3. EXEMPT AGREEMENTS AND PERSONS.**

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

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

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

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

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

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

(2) a bank;

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

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

#### **Comment**

1. Under section 2(15) a person may be a provider even if the person has no physical presence in this state. If not exempted by this section, all persons within the definition of

“provider” must comply with the Act. The objective of subsections (a) and (b)(1) is to limit applicability of the Act to providers that enter agreements with persons who they should reasonably know to reside in this state. Section 19(a)(3) requires the agreement between a provider and an individual to state the individual’s address. If the individual supplies an address outside this state, the provider may have no reason to know that the individual is residing in this state at the time of the agreement. If a provider operates through an agent or independent contractor to solicit and enroll individuals in plans, the provider may have reason to know if the agent or independent contractor has reason to know. This is true even if the agent or independent contractor is itself within the definition of provider. In addition, the provider may be liable under section 31 for the conduct of the agent or independent contractor.

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

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

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

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

6. Subsection (b)(2) exempts those persons, e.g., social workers, who may provide debt-management services at no cost as part of their overall services to clients. It also exempts individuals who assist family members or friends if they do not receive compensation for helping

their relatives or friends to manage their money. It does not, however, exempt a provider that recovers its operating expenses from creditors, even if the provider does not impose any cost on the individuals it serves.

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

8. Subsection (c)(4) exempts entities that provide bill-paying services if negotiation of the terms of payment is incidental to the services generally provided by the entity. Examples of entities that may be exempt under this paragraph include mortgage loan servicers, athletes’ agents, artists’ agents, financial planners, executors of estates, and personal representatives of decedents.

The exemption for bill-paying services applies only if debt-management services are “incidental to” the regular course of the person’s business of providing bill-paying services. If the person holds itself out as providing debt-management services, then debt-management services are not incidental. Beyond that, the test is flexible, looking to such matters as the amount and percentage of time devoted to providing debt-management services and the amount and percentage of revenues derived from debt-management services. The more isolated the provision of those services, the more likely it is that they are incidental. The more frequent the provision of those services, the more likely it is that they are not incidental and the person is not exempt.

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

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

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

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

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

is:

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

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

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

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

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

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

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

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

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

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

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

### **Comment**

1. The Act uses the term “individual” rather than “consumer.” The purpose of this usage is to enlarge the usual meaning of “consumer” (viz., one who acquires goods or services for personal, family, or household purposes) to encompass individuals who have incurred personal debt for business purposes or in connection with farming operations.

2. Subsection (a) requires providers to register under this Act. This requirement applies to providers with no physical presence in this state, if they serve individuals who reside in this state.

For elaboration on the “reasonably should know” standard, see the Official Comment to section 3.

3. Under subsection (b) employees and agents of a registered provider need not register. The word “employees” encompasses the entity’s officers. Except as it may be changed by this Act, the common law of master-servant or principal-agent continues to apply, and a provider is responsible for the acts of its employees and agents.

Although employees and agents of a provider need not register, to the extent those persons are themselves within the definition of “provider,” they must comply with all other requirements and prohibitions that apply to providers throughout the Act. In addition, they may be liable under sections 33(a)(2) and 35(c) if they have caused a provider to violate the Act.

4. The objective of subsection (c) is to enable individuals and creditors to ascertain whether a given provider is registered. Posting on the Internet website of the administrator (or other appropriate official site) is the preferred method, because the information is instantaneously and continuously available. To “maintain” the list, the administrator must update it regularly.

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

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

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

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

- (1) the fee established by the administrator;
- (2) the bond required by Section 13;
- (3) identification of all trust accounts required by Section 22 and an irrevocable consent authorizing the administrator to review and examine the trust accounts;
- (4) evidence of insurance in the amount of \$250,000;

- (A) against the risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant;
  - (B) issued by an insurance company authorized to do business in this state and rated at least A by a nationally recognized rating organization;
  - (C) with no deductible;
  - (D) payable to the applicant, the individuals who have agreements with the applicant, and this state, as their interests may appear; and
  - (E) not subject to cancellation by the applicant without the approval of the administrator;
- (5) proof of compliance with [insert the citation to the statute specifying the prerequisites for an entity to do business in this state]; and
- (6) [if the applicant is organized as a not-for-profit entity or is exempt from taxation,] evidence of not-for-profit and tax-exempt status applicable to the applicant under the Internal Revenue Code, 26 U.S.C. Section 501[, as amended].

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

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

- (5) a record consenting to the jurisdiction of this state containing:*
  - (A) the name, business address, and other contact information of its registered agent in this state for purposes of service of process; or*
  - (B) the appointment of the [administrator or other state official] as agent of the provider for purposes of service of process.*

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

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

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

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



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

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

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

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

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

*(1) paragraph (6) should state: “(6) if the applicant’s plans contemplate that creditors will settle debts for less than the full principal amount of debt owed, evidence of not-for-profit and tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501[, as amended] ”; and*

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

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

### **Comment**

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

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

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

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

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

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

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

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

## **SECTION 6. APPLICATION FOR REGISTRATION: REQUIRED**

**INFORMATION.** An application for registration must be signed under [oath] [penalty of false statement] and include:

- (1) the applicant’s name, principal business address and telephone number, and all other business addresses in this state, electronic-mail addresses, and Internet website addresses;
- (2) all names under which the applicant conducts business;
- (3) the address of each location in this state at which the applicant will provide debt-management services or a statement that the applicant will have no such location;
- (4) the name and home address of each officer and director of the applicant and each person that owns at least 10 percent of the applicant;
- (5) identification of every jurisdiction in which, during the five years immediately preceding the application:
  - (A) the applicant or any of its officers or directors has been licensed or

registered to provide debt-management services; or

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

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

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

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

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

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

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

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

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

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

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

years immediately preceding the application;

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

(A) any affiliate of the applicant; or

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

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

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

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

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

### **Comment**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**SECTION 7. APPLICATION FOR REGISTRATION: OBLIGATION TO UPDATE INFORMATION.** An applicant or registered provider shall notify the administrator within 10 days after a change in the information specified in Section 5(b)(4) or (6) or 6(1), (3), (6), (12), or (13).

**Comment**

The cross-referenced sections require evidence of insurance against misconduct; evidence of not-for-profit and tax-exempt status; and disclosure of the name of the applicant, the addresses at which it operates, enforcement actions against the applicant in another state, and the applicant's standard forms and fee schedules. This section requires prompt notification of any change in this information, and since it applies to the "applicant or registered provider," the requirement of notification applies both before and after the administrator has issued a certificate of registration. Notification of change in other required information is governed by section 11(b)(4) (Renewal of Registration), which requires notification at the time of renewal of registration. Notification of a change, of course, means that the applicant or registered provider must communicate the new information, not merely that the original information is no longer accurate.

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

**Comment**

This section preserves the confidentiality of home addresses, financial statements, salaries of the highest-paid employees, and the report on the criminal-records check. While this section prohibits the administrator from disclosing the specified information, it has no effect on the use of judicial process in connection with litigation to enforce the Act. Nor does it limit access to information that is available to the public under other law, such as the law governing tax-exempt entities.

**SECTION 9. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL.**

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

(b) The administrator may deny registration if:

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

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

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

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

(c) The administrator shall deny registration if:

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

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

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

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

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



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

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

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

### Comment

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

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

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

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

because officers are included in the term, “employee.”

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

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

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

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

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

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

#### **Comment**

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

#### **SECTION 11. RENEWAL OF REGISTRATION.**

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

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

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

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

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

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

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

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

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

(C) with no deductible;

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

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

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

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

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

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

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

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

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

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

### **Comment**

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

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

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

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

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

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

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

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

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

**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.

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*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.

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*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.

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*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 be 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 (5<sup>th</sup> 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.

**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 on 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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].”