

# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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**Legislative Document**

**No. 1289**

H.P. 895

House of Representatives, March 31, 2009

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**An Act To Enact the Uniform Debt Management Services Act**

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Reference to the Committee on Insurance and Financial Services suggested and ordered printed.

*Millicent M. MacFarland*  
MILLICENT M. MacFARLAND  
Clerk

Presented by Representative GOODE of Bangor.  
Cosponsored by Senator ALFOND of Cumberland and  
Representatives: BRYANT of Windham, CLEARY of Houlton, FLAHERTY of Scarborough,  
MITCHELL of the Penobscot Nation, PRIEST of Brunswick, RUSSELL of Portland, Senator:  
PERRY of Penobscot.



1 wanted to see was a consumer filing a petition in bankruptcy. Formed and supported  
2 primarily by the credit-card industry, most counseling agencies never recommended  
3 bankruptcy, and many never even mentioned it as a possibility. E.g., Gardner, Consumer  
4 Credit Counseling Services: The Need for Reform and Some Proposals for Change, 13  
5 Advancing the Consumer Interest 30 (2001).

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

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

34 Meanwhile, in the 1990s credit card issuers saw that their fair-share payments to  
35 counseling agencies had increased to the extent that those payments approximated the  
36 amounts they were paying for all their other collection activities combined. In addition, they  
37 discerned that some of the counseling agencies were accumulating large surpluses and were  
38 enrolling in DMP's consumers whom the creditors believed could pay their debts without the  
39 concessions the creditors had been giving. They responded by reducing the concessions they  
40 were willing to make to consumers and by reducing the amounts they were willing to pay the  
41 counseling agencies. Some card issuers have stopped supporting the agencies altogether, and  
42 on average the amount returned to the agencies has dropped from more than 12% to less than  
43 8%. This decrease has adversely affected the ability of counseling agencies to provide  
44 individual counseling and community education. Some major card issuers have abandoned  
45 the fair-share approach altogether and have developed proprietary models for compensating  
46 counseling agencies depending on such factors as the profiles of the debtors being served by  
47 an agency, the agency's record with the creditor, and the agency's advertising and business  
48 practices.

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

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

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

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

#### 38 History of the Draft

39 When it first authorized this project, the Executive Committee focused on the  
40 segment of the industry that counsels consumers and forms debt-management plans to assist  
41 them pay their debts in full. It did not contemplate entities engaged in debt settlement. At the  
42 2004 Annual Meeting, the Conference authorized the Drafting Committee to include debt-  
43 settlement companies within the scope of the Act. It also directed the Drafting Committee to  
44 draft the Act in such a way that states could authorize for-profit entities to provide debt-  
45 management services.

46 The definition of “debt-management services” encompasses both credit counseling  
47 and debt settlement. With very few exceptions, the provisions of the Act apply equally to both

1 types of debt-management services and the entities that provide them. The Act is neutral on  
2 the question whether for-profit entities should be permitted to provide debt-management  
3 services. Each state must decide whether to permit for-profit entities to provide credit-  
4 counseling services, debt-settlement services, or both. The state's decision is implemented by  
5 language in sections 4, 5, and 9. Each of these sections contains bracketed language and  
6 instructions on which language to adopt to implement the state's policy concerning for-profit  
7 entities.

#### 8 Bankruptcy Code Amendments

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

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

#### 22 Description of the Act

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

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

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

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

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

5 **Sec. 3. 32 MRSA c. 82** is enacted to read:

6 **CHAPTER 82**

7 **UNIFORM DEBT MANAGEMENT SERVICES ACT**

8 **§6301. Short title**

9 This chapter may be cited as the Uniform Debt Management Services Act.

10 **UNIFORM COMMENT**

11 (This is Section 1 of the Uniform Debt Management Services Act.)

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

16  
17 **§6302. Definitions**

18 As used in this chapter, unless the context otherwise indicates, the following terms  
19 have the following meanings.

20 **1. Administrator.** "Administrator" means the Director of the Office of Consumer  
21 Credit Regulation within the Department of Professional and Financial Regulation.

22 **2. Affiliate.** "Affiliate" means:

23 **A. With respect to an individual:**

24 (1) The spouse of the individual;

25 (2) A sibling of the individual or the spouse of a sibling;

26 (3) An individual or the spouse of an individual who is a lineal ancestor or lineal  
27 descendant of the individual or the individual's spouse;

28 (4) An aunt, uncle, great aunt, great uncle, first cousin, niece, nephew,  
29 grandniece or grandnephew, whether related by the whole or the half blood or  
30 adoption, or the spouse of any of them; or

31 (5) Any other individual occupying the residence of the individual; and

32 **B. With respect to an entity:**

33 (1) A person that directly or indirectly controls, is controlled by or is under  
34 common control with the entity;

- 1           (2) An officer of, or an individual performing similar functions with respect to,  
2           the entity;
- 3           (3) A director of, or an individual performing similar functions with respect to,  
4           the entity;
- 5           (4) A person that receives or received more than \$25,000 from the entity in  
6           either the current year or the preceding year or a person that owns more than 10%  
7           of, or an individual who is employed by or is a director of, a person that receives  
8           or received more than \$25,000 from the entity in either the current year or the  
9           preceding year;
- 10          (5) An officer or director of, or an individual performing similar functions with  
11          respect to, a person described in subparagraph (1);
- 12          (6) The spouse of, or an individual occupying the residence of, an individual  
13          described in subparagraphs 1 to 5; or
- 14          (7) An individual who has a relationship specified in paragraph A, subparagraph  
15          (4) to an individual or the spouse of an individual described in subparagraphs 1 to  
16          5.

17           **3. Agreement.** "Agreement" means an agreement between a provider and an  
18           individual for the performance of debt management services.

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

23           **5. Business address.** "Business address" means the physical location of a business,  
24           including the name and number of a street.

25           **6. Certified counselor.** "Certified counselor" means an individual certified by a  
26           training program or certifying organization, approved by the administrator, that  
27           authenticates the competence of individuals providing education and assistance to other  
28           individuals in connection with debt management services in which an agreement  
29           contemplates that creditors will reduce finance charges or fees for late payment, default  
30           or delinquency.

31           **7. Certified debt specialist.** "Certified debt specialist" means an individual certified  
32           by a training program or certifying organization, approved by the administrator, that  
33           authenticates the competence of individuals providing education and assistance to other  
34           individuals in connection with debt management services in which an agreement  
35           contemplates that creditors will settle debts for less than the full principal amount of debt  
36           owed.

37           **8. Concession.** "Concession" means assent to repayment of a debt on terms more  
38           favorable to an individual than the terms of the contract between the individual and a  
39           creditor.

40           **9. Day.** "Day" means a calendar day.



1           **10. Debt management services.** "Debt management services" means services as an  
2 intermediary between an individual and one or more creditors of the individual for the  
3 purpose of obtaining concessions, but does not include:

4           A. Legal services provided in an attorney-client relationship by an attorney licensed  
5 or otherwise authorized to practice law in this State;

6           B. Accounting services provided in an accountant-client relationship by a certified  
7 public accountant licensed to provide accounting services in this State; or

8           C. Financial planning services provided in a financial planner-client relationship by a  
9 member of a financial planning profession whose members the administrator, by rule,  
10 determines are:

11                   (1) Licensed by the State;

12                   (2) Subject to a disciplinary mechanism;

13                   (3) Subject to a code of professional responsibility; and

14                   (4) Subject to a continuing education requirement.

15           **11. Entity.** "Entity" means a person other than an individual.

16           **12. Good faith.** "Good faith" means honesty in fact and the observance of  
17 reasonable standards of fair dealing.

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

22           **14. Plan.** "Plan" means a program or strategy in which a provider furnishes debt  
23 management services to an individual and that includes a schedule of payments to be  
24 made by or on behalf of the individual and used to pay debts owed by the individual.

25           **15. Principal amount of the debt.** "Principal amount of the debt" means the  
26 amount of a debt at the time of an agreement.

27           **16. Provider.** "Provider" means a person that provides, offers to provide or agrees  
28 to provide debt management services directly or through others.

29           **17. Record.** "Record" means information that is inscribed on a tangible medium or  
30 that is stored in an electronic or other medium and is retrievable in perceivable form.

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

34           **19. Sign.** "Sign" means, with present intent to authenticate or adopt a record:

35                   A. To execute or adopt a tangible symbol; or



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

5           6. Paragraph (6) (certified counselor and certified debt specialist): "Debt specialist"  
6 includes a person who communicates with an individual about the features of a debt-  
7 settlement program or who, on behalf of a provider, forms an agreement with an individual.

8           Section 17 requires providers to perform certain functions, including education,  
9 through the services of a certified counselor or certified debt specialist; section 16 requires  
10 providers to make certified counselors and certified debt specialists available for consultation.  
11 The definition requires that the organization that trains or certifies counselors be approved by  
12 the administrator.

13           7. Paragraph (7) (concessions): The word "concessions" appears in sections 2(9),  
14 17(c), and 19(a). The "debt" referred to in the definition of "concessions" typically is a  
15 contractual obligation, but it may be a judgment or other obligation of the individual. In those  
16 instances "terms of the contract" should by analogy be understood as "terms of the judgment"  
17 or other obligation. The "more favorable" terms include such changes as a reduction in  
18 finance charges or interest; a reduction or waiver of charges for late payment, default, or  
19 delinquency; and a reduction in the principal amount of the debt.

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

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

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

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

47           10. The definition excludes professional services provided by attorneys or certified  
48 public accountants, but only if the attorney is licensed or otherwise authorized to practice in

1 this state or the accountant is licensed by this state. The phrase “or otherwise authorized” is to  
2 recognize bar rules that contemplate interstate practice of law.

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

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

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

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

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

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

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

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

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

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

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

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

37 At several places the Act speaks of "provider or its designee," referring to the person  
38 holding money of an individual pursuant to a plan. This is intended to foreclose any attempt  
39 by a provider to evade its responsibilities under the Act by delegating to an independent  
40 contractor the tasks incident to receiving money of the individuals with whom it has  
41 agreements.

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

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**§6303. Exempt agreements and persons**

**1. Application. This chapter does not apply to:**

A. An agreement with an individual who the provider has no reason to know resides in this State at the time of the agreement;

B. 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; and

C. 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 of a bank if the affiliate is regulated by a federal or state banking regulatory authority; and

(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.

**UNIFORM COMMENT**

(This is Section 3 of the Uniform Debt Management Services Act.)

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.

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

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

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

23           6. Subsection (b)(2) exempts those persons, e.g., social workers, who may provide  
24 debt-management services at no cost as part of their overall services to clients. It also  
25 exempts individuals who assist family members or friends if they do not receive  
26 compensation for helping their relatives or friends to manage their money. It does not,  
27 however, exempt a provider that recovers its operating expenses from creditors, even if the  
28 provider does not impose any cost on the individuals it serves.

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

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

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

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**§6304. Registration required**

**1. Requirement.** Except as otherwise provided in subsection 2, 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 chapter.

**2. Employee or agent.** If a provider is registered under this chapter, subsection 1 does not apply to an employee or agent of the provider.

**3. List of registered providers.** The administrator shall maintain and publicize a list of the names of all registered providers.

**UNIFORM COMMENT**

(This is Section 4 of the Uniform Debt Management Services Act.)

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.



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**§6305. Application for registration; form, fee and accompanying documents**

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

**2. Fee; accompanying documents.** Subject to adjustment of dollar amounts pursuant to section 6332, subsection 6, an application for registration as a provider must be accompanied by:

- A. The fee established by the administrator;**
- B. The bond required by section 6313;**
- C. Identification of all trust accounts required by section 6322 and an irrevocable consent authorizing the administrator to review and examine the trust accounts;**
- D. Evidence of insurance in the amount of \$250,000:**
  - (1) 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;**
  - (2) Issued by an insurance company authorized to do business in this State and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator;**
  - (3) With a deductible not exceeding \$5,000;**
  - (4) Payable for the benefit of the applicant, this State and individuals who are residents of this State, as their interests may appear; and**
  - (5) Not subject to cancellation by the applicant or the insurer until 60 days after written notice has been given to the administrator;**
- E. Proof of compliance with any relevant requirements regarding business entities, including but not limited to requirements set forth in Title 13-B and Title 13-C; and**
- F. If the applicant is organized as a not-for-profit entity or is exempt from taxation under 26 United States Code, Section 501, evidence of nonprofit status or tax-exempt status, or both, as applicable.**

**UNIFORM COMMENT**

(This is Section 5 of the Uniform Debt Management Services Act.)

- 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

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

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

8 4. The insurance required by this section must be provided by an insurer whose  
9 reliability is beyond question. Paragraph (B) speaks of an A rating, such as under the system  
10 of A.M. Best Co., but a comparable rating by any other administrator-approved, nationally  
11 recognized rating organization satisfies the requirement, even if the organization's system  
12 uses numbers or other symbols instead of letters. The purpose of the requirement is to ensure  
13 that the insurance will be issued by a very highly reliable insurer, and the requirements of  
14 paragraph (B) should be interpreted accordingly.

15 5. Ordinarily, the beneficiary of insurance of the type required by this section would  
16 be the provider, but this paragraph expands the beneficiaries to include the state and the  
17 customers of the provider and requires that the insurance not be subject to cancellation  
18 without notice to the administrator. The insurance required by this paragraph overlaps the  
19 bond required by section 13.

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

27

28 **§6306. Application for registration required**

29 **1. Required information.** An application for registration must be signed under oath  
30 and include:

31 A. The applicant's name, principal business address and telephone number, all other  
32 business addresses in this State, e-mail addresses and Internet addresses;

33 B. All names under which the applicant conducts business;

34 C. The address of each location in this State at which the applicant will provide debt  
35 management services or a statement that the applicant will have no such location;

36 D. The name and home address of each officer and director of the applicant and each  
37 person that owns at least 10% of the applicant;

38 E. Identification of every jurisdiction in which, during the 5 years immediately  
39 preceding the application;

40 (1) The applicant or any of its officers or directors has been licensed or  
41 registered to provide debt management services; or

- 1                   (2) Individuals have resided when they received debt management services from
- 2                   the applicant;
- 3                   F. A statement describing, to the extent it is known or should be known by the
- 4                   applicant, any material civil or criminal judgment or litigation and any material
- 5                   administrative or enforcement action by a governmental agency in any jurisdiction
- 6                   against the applicant, any of its officers, directors, owners or agents or any person
- 7                   who is authorized to have access to the trust account required by section 6322;
- 8                   G. The applicant's financial statements, audited by an accountant licensed to conduct
- 9                   audits, for each of the 2 years immediately preceding the application or, if it has not
- 10                   been in operation for the 2 years preceding the application, for the period of its
- 11                   existence;
- 12                   H. Evidence of accreditation by an independent accrediting organization approved
- 13                   by the administrator;
- 14                   I. Evidence that, within 12 months after initial employment, each of the applicant's
- 15                   counselors becomes certified as a certified counselor or certified debt specialist;
- 16                   J. A description of the 3 most commonly used educational programs that the
- 17                   applicant provides or intends to provide to individuals who reside in this State and a
- 18                   copy of any materials used or to be used in those programs;
- 19                   K. A description of the applicant's financial analysis and initial budget plan,
- 20                   including any form or electronic model, used to evaluate the financial condition of
- 21                   individuals;
- 22                   L. A copy of each form of agreement that the applicant will use with individuals who
- 23                   reside in this State;
- 24                   M. The schedule of fees and charges that the applicant will use with individuals who
- 25                   reside in this State;
- 26                   N. At the applicant's expense, the results of a criminal records check, including
- 27                   fingerprints, conducted within the immediately preceding 12 months, covering every
- 28                   officer of the applicant and every employee or agent of the applicant who is
- 29                   authorized to have access to the trust account required by section 6322;
- 30                   O. The names and addresses of all employers of each director during the 10 years
- 31                   immediately preceding the application;
- 32                   P. A description of any ownership interest of at least 10% by a director, owner or
- 33                   employee of the applicant in:
- 34                         (1) Any affiliate of the applicant; or
- 35                         (2) Any entity that provides products or services to the applicant or any
- 36                         individual relating to the applicant's debt management services;
- 37                   Q. A statement of the amount of compensation of the applicant's 5 most highly
- 38                   compensated employees for each of the 3 years immediately preceding the
- 39                   application or, if it has not been in operation for the 3 years preceding the application,
- 40                   for the period of its existence;



1 periodic review to ensure that they continue to meet the standards of the accrediting agency.  
2 The administrator must approve the organizations that accredit providers.

3 8. Paragraph (9) requires a provider to ensure that its counselors and debt specialists  
4 are certified no later than 12 months after their initial employment. This requirement applies  
5 only with respect to employees who act as counselors, debt specialists, and educators. It does  
6 not apply to such other employees as customer service representatives. Section 17 prohibits  
7 an agreement unless a certified counselor or certified debt specialist has done specified  
8 things. With respect to the obligations imposed by section 17(b), this [Act] draws no  
9 distinctions between credit-counseling entities and debt-settlement entities. Each must  
10 comply with the same obligations through the services of either certified counselors or  
11 certified debt specialists. Evidence that a provider has in place a system for certification of its  
12 counselors and debt specialists provides some assurance to the administrator that the provider  
13 will be able to comply with section 17.

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

17 10. An applicant, whether located in this state or elsewhere, need supply only those  
18 documents specified in paragraph (12) that it will use with residents of this state. If it will use  
19 more than one form, it must supply all of them. Section 32(b) empowers the administrator to  
20 investigate the activities in another jurisdiction of a provider that is doing business in this  
21 state. Under that section the administrator may obtain documents used in other jurisdictions.

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

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

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

40 This paragraph requires "the results of a criminal-records check, including  
41 fingerprints." In some jurisdictions the mechanics and procedures for obtaining fingerprints  
42 are quite burdensome. This paragraph attempts to reduce that burden. It does not require that  
43 an applicant obtain a criminal-records check specifically for the application for registration in  
44 this state. If an applicant has obtained a criminal-records check in connection with obtaining  
45 permission to do business in another state and that criminal-records check meets the standards  
46 of this paragraph, the applicant may submit the results of it in its application to this state. The  
47 12-month limitation applies to the criminal-records check, not the time of submission to the

1 other state. The criminal-records check must include a check of fingerprints, but the  
2 fingerprints need not have been obtained during the 12-month period.

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

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

18

19 **§6307. Application for registration; obligation to update information**

20 An applicant or registered provider shall notify the administrator within 10 days after  
21 a change in the information specified in section 6305, subsection 2, paragraph D or F or  
22 section 6306, subsection 1, paragraph A, C, F, L or M.

23

**UNIFORM COMMENT**

24 (This is Section 7 of the Uniform Debt Management Services Act.)

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

36

37 **§6308. Application for registration; public information**

38 Except for the information required by section 6306, subsection 1, paragraphs G, N  
39 and Q and the addresses required by section 6306, subsection 1, paragraph D, the  
40 administrator shall make the information in an application for registration as a provider  
41 available to the public.

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UNIFORM COMMENT

(This is Section 8 of the Uniform Debt Management Services Act.)

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.

**§6309. Certificate of registration; issuance or denial**

**1. Issuance.** Except as otherwise provided in subsections 3 and 4, the administrator shall issue a certificate of registration as a provider to a person that complies with sections 6305 and 6306.

**2. Temporary certificate.** If an applicant has otherwise complied with sections 6305 and 6306, including a timely effort to obtain the information required by section 6306, subsection 1, paragraph N but the information has not been received, the administrator may issue a temporary certificate of registration. The temporary certificate expires no later than 180 days after issuance.

**3. Denial.** The administrator may deny registration if:

A. The application contains information that is materially erroneous or incomplete;

B. 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;

C. The applicant or any of its officers, directors or owners has defaulted in the payment of money collected for others; or

D. 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 chapter.

**4. Denial based on absence of independence of board.** The administrator shall deny registration if, with respect to an applicant that is organized as a not-for-profit entity or has obtained tax-exempt status under 26 United States Code, Section 501, the applicant's board of directors is not independent of the applicant's employees and agents.

**5. Board not considered independent.** Subject to adjustment of the dollar amount pursuant to section 6332, subsection 6, a board of directors is not independent for purposes of subsection 4 if more than 1/4 of its members:

A. Are affiliates of the applicant, as defined in section 6302, subsection 2, paragraph A or section 6302, subsection 2, paragraph B, subparagraph (1), (2), (4), (5), (6) or (7); or





1 that if a person meets the employee/director test of paragraph (2) while the person is on the  
2 applicant's board of directors, the person is not independent, even if more than 10 years have  
3 elapsed since the person first became a member of the applicant's board.

4  
5 **§6310. Certificate of registration; timing**

6 **1. Timing.** The administrator shall approve or deny an initial registration as a  
7 provider within 120 days after an application is filed. In connection with a request  
8 pursuant to section 6306, subsection 1, paragraph S for additional information, the  
9 administrator may extend the 120-day period for not more than 60 days. Within 7 days  
10 after denying an application, the administrator, in a record, shall inform the applicant of  
11 the reasons for the denial.

12 **2. Appeal.** If the administrator denies an application for registration as a provider or  
13 does not act on an application within the time prescribed in subsection 1, the applicant  
14 may appeal and request a hearing.

15 **3. Duration.** Subject to section 6311, subsection 4 and section 6334, a registration  
16 as a provider is valid for one year.

17 **UNIFORM COMMENT**

18 (This is Section 10 of the Uniform Debt Management Services Act.)

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

26  
27 **§6311. Renewal of registration**

28 **1. Renewal.** A provider must obtain a renewal of its registration annually.

29 **2. Form.** An application for renewal of registration as a provider must be in a form  
30 prescribed by the administrator, signed under oath and:

31 **A. Be filed no fewer than 30 and no more than 60 days before the registration**  
32 **expires;**

33 **B. Be accompanied by the fee established by the administrator and the bond required**  
34 **by section 6313;**

35 **C. Contain the matter required for initial registration as a provider by section 6306,**  
36 **subsection 1, paragraphs H and I and a financial statement, audited by an accountant**  
37 **licensed to conduct audits, for the applicant's fiscal year immediately preceding the**  
38 **application;**

1 D. Disclose any changes in the information contained in the applicant's application  
2 for registration or its immediately previous application for renewal, as applicable. If  
3 an application is otherwise complete and the applicant has made a timely effort to  
4 obtain the information required by section 6306, subsection 1, paragraph N but the  
5 information has not been received, the administrator may issue a temporary renewal  
6 of registration. The temporary renewal expires no later than 180 days after issuance;

7 E. Supply evidence of insurance in an amount equal to the larger of \$250,000 or the  
8 highest daily balance in the trust account required by section 6322 during the 6-  
9 month period immediately preceding the application:

10 (1) Against risks of dishonesty, fraud, theft and other misconduct on the part of  
11 the applicant or a director, employee or agent of the applicant;

12 (2) Issued by an insurance company authorized to do business in this State and  
13 rated at least A or equivalent by a nationally recognized rating organization  
14 approved by the administrator;

15 (3) With a deductible not exceeding \$5,000;

16 (4) Payable for the benefit of the applicant, this State and individuals who are  
17 residents of this State, as their interests may appear; and

18 (5) Not subject to cancellation by the applicant or the insurer until 60 days after  
19 written notice has been given to the administrator;

20 F. Disclose the total amount of money received by the applicant pursuant to plans  
21 during the preceding 12 months from or on behalf of individuals who reside in this  
22 State and the total amount of money distributed to creditors of those individuals  
23 during that period;

24 G. Disclose, to the best of the applicant's knowledge, the gross amount of money  
25 accumulated during the preceding 12 months pursuant to plans by or on behalf of  
26 individuals who reside in this State and with whom the applicant has agreements; and

27 H. Provide any other information that the administrator reasonably requires to  
28 perform the administrator's duties under this section.

29 **3. Information.** Except for the information required by section 6306, subsection 1,  
30 paragraphs G, N and Q and the addresses required by section 6306, subsection 1,  
31 paragraph D, the administrator shall make the information in an application for renewal  
32 of registration as a provider available to the public.

33 **4. Effective until denial.** If a registered provider files a timely and complete  
34 application for renewal of registration, the registration remains effective until the  
35 administrator, in a record, notifies the applicant of a denial and states the reasons for the  
36 denial.

37 **5. Appeal.** If the administrator denies an application for renewal of registration as a  
38 provider, the applicant, within 30 days after receiving notice of the denial, may appeal  
39 and request a hearing. Subject to section 6334, while the appeal is pending the applicant  
40 shall continue to provide debt management services to individuals with whom it has  
41 agreements. If the denial is affirmed, subject to the administrator's order and section

1 6334, the applicant shall continue to provide debt management services to individuals  
2 with whom it has agreements until, with the approval of the administrator, it transfers the  
3 agreements to another registered provider or returns to the individuals all unexpended  
4 money that is under the applicant's control.

5 **UNIFORM COMMENT**

6 (This is Section 11 of the Uniform Debt Management Services Act.)

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

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

12 3. Paragraph (4) requires a provider to update any required information that has  
13 changed. This includes background checks on anyone who, since the last renewal, has  
14 become an officer of the applicant or has been given power to initiate transactions in the trust  
15 account required by Section 22. Since acquisition of this information is not entirely within the  
16 control of the provider, this paragraph grants the administrator the discretion to issue a  
17 temporary renewal of registration.

18 4. Paragraph (5) contains the same requirements that section 5(b)(4) does for initial  
19 registration, except that upon renewal the provider must obtain insurance in an amount equal  
20 to the highest balance in the trust account during the six months preceding the application for  
21 renewal.

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

27 6. Paragraph (7) supplements paragraph (6) by requiring a provider that does not take  
28 possession of its customers' funds to disclose the gross amount its customers have  
29 accumulated. "Gross amount" means the total amount accumulated without adjustment for  
30 any debits, withdrawals, or payments for fees or for satisfaction of creditors' claims. A  
31 provider that does not take possession of its customers' money may monitor the customers'  
32 accounts, either by direct access to the accounts or by requiring the customers to provide  
33 periodic copies of bank statements. If the provider does not do either of these, and therefore  
34 has no knowledge of the amounts accumulated, it need make no disclosure under paragraph  
35 (7).

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

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

45 9. The grounds for denial of an application to renew registration appear in section 34.  
46 If a provider files a timely and complete application, subsection (d) provides that the

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

12

13 **§6312. Registration in another state**

14 If a provider holds a license or certificate of registration in another state authorizing it  
15 to provide debt management services, the provider may submit a copy of that license or  
16 certificate and the application for it instead of an application in the form prescribed by  
17 section 6305, subsection 1, section 6306 or section 6311, subsection 2. The administrator  
18 shall accept the application and the license or certificate from the other state as an  
19 application for registration as a provider or for renewal of registration as a provider, as  
20 appropriate, in this State if:

21 1. Substantially similar. The application in the other state contains information  
22 substantially similar to or more comprehensive than that required in an application  
23 submitted in this State;

24 2. Provision of information. The applicant provides the information required by  
25 section 6306, subsection 2, paragraphs A, C, J, L and M; and

26 3. Certify information. The applicant, under oath, certifies that the information  
27 contained in the application is current or, to the extent it is not current, supplements the  
28 application to make the information current.

29

**UNIFORM COMMENT**

30 (This is Section 12 of the Uniform Debt Management Services Act.)

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

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**§6313. Bond required**

**1. Filing by provider.** Except as otherwise provided in section 6314, a provider that is required to be registered under this chapter shall file a surety bond with the administrator, which must:

A. Be in effect during the period of registration and for 2 years after the provider ceases providing debt management services to individuals in this State; and

B. 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.

**2. Bond requirements.** Subject to adjustment of the dollar amount pursuant to section 6332, subsection 6, a surety bond filed pursuant to subsection 1 must:

A. 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;

B. Be issued by a bonding, surety or insurance company authorized to do business in this State and rated at least A or equivalent by a nationally recognized rating organization; and

C. Have payment conditioned upon noncompliance of the provider or its agent with this chapter.

**3. Reduction of principal amount.** 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 2.

**4. Satisfaction.** The administrator or an individual may obtain satisfaction out of the surety bond procured pursuant to this section if:

A. The administrator assesses expenses under section 6332, subsection 2, paragraph A, issues a final order under section 6333, subsection 1, paragraph B or recovers a final judgment under section 6333, subsection 1, paragraph D or E or section 6333, subsection 4; or

B. An individual recovers a final judgment pursuant to section 6335, subsection 1 or 2, or section 6335, subsection 3, paragraph A, B or D.



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

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

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

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

24

25 **§6314. Bond required; substitute**

26 **1. Substitute.** Instead of the surety bond required by section 6313, a provider may  
27 deliver to the administrator, in the amount required by section 6313, subsection 2, and,  
28 except as otherwise provided in paragraph B, subparagraph (1), payable or available to  
29 this State and to individuals who reside in this State when they agree to receive debt  
30 management services from the provider, as their interests may appear, if the provider or  
31 its agent does not comply with this chapter:

32 **A. A certificate of insurance:**

33 (1) Issued by an insurance company authorized to do business in this State and  
34 rated at least A or equivalent by a nationally recognized rating organization  
35 approved by the administrator; and

36 (2) With no deductible, or if the provider supplies a bond in the amount of  
37 \$5,000, a deductible not exceeding \$5,000; or

38 **B. With the approval of the administrator:**

39 (1) An irrevocable letter of credit, issued or confirmed by a bank approved by  
40 the administrator, payable upon presentation of a certificate by the administrator  
41 stating that the provider or its agent has not complied with this chapter; or

42 (2) Bonds or other obligations of the United States or guaranteed by the United  
43 States or bonds or other obligations of this State or a political subdivision of this





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

8  
9 **§6316. Customer service**

10 A provider that is required to be registered under this chapter shall maintain a toll-  
11 free communication system, staffed at a level that reasonably permits an individual to  
12 speak to a certified counselor, certified debt specialist or customer service representative,  
13 as appropriate, during ordinary business hours.

14 **UNIFORM COMMENT**

15 (This is Section 16 of the Uniform Debt Management Services Act.)

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

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

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

34  
35 **§6317. Prerequisites for providing debt management services**

36 1. Itemized list; charges. Before providing debt management services, a registered  
37 provider shall give the individual an itemized list of goods and services and the charges  
38 for each. The list must be clear and conspicuous, be in a record the individual may keep  
39 whether or not the individual assents to an agreement and describe the goods and services  
40 the provider offers:

41 A. Free of additional charge if the individual enters into an agreement;

- 1           B. For a charge if the individual does not enter into an agreement; and
- 2           C. For a charge if the individual enters into an agreement, using the following
- 3           terminology, as applicable, and format:
- 4           Set-up fee ..... (dollar amount of fee)
- 5           Monthly service fee ..... (dollar amount of fee or method of
- 6           determining amount)
- 7           Settlement fee ..... (dollar amount of fee or method of determining
- 8           amount)
- 9           Goods and services in addition to those provided in connection with a plan:
- 10           ..... (item) ..... (dollar amount or method of
- 11           determining amount)
- 12           ..... (item) ..... (dollar amount or method of
- 13           determining amount)

14           **2. Provision of services.** A provider may not furnish debt management services  
 15           unless the provider, through the services of a certified counselor or certified debt  
 16           specialist:

- 17           A. Provides the individual with reasonable education about the management of
- 18           personal finance;
- 19           B. Has prepared a financial analysis; and
- 20           C. If the individual is to make regular, periodic payments:
- 21           (1) Has prepared a plan for the individual;
- 22           (2) Has made a determination, based on the provider's analysis of the
- 23           information provided by the individual and otherwise available to it, that the plan
- 24           is suitable for the individual and the individual will be able to meet the payment
- 25           obligations under the plan; and
- 26           (3) Believes that each creditor of the individual listed as a participating creditor
- 27           in the plan will accept payment of the individual's debts as provided in the plan.

28           **3. Information to consumer.** Before an individual assents to an agreement to  
 29           engage in a plan, a provider shall:

- 30           A. Provide the individual with a copy of the analysis and plan required by subsection
- 31           2 in a record that identifies the provider and that the individual may keep whether or
- 32           not the individual assents to the agreement;
- 33           B. Inform the individual of the availability, at the individual's option, of assistance
- 34           by a toll-free communication system or in person to discuss the financial analysis and
- 35           plan required by subsection 2; and
- 36           C. With respect to all creditors identified by the individual or otherwise known by
- 37           the provider to be creditors of the individual, provide the individual with a list of:



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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 make it harder for you to obtain credit.

..... (Name and business address of provider)

7. Form; settle debts for less than full amount owed. If an agreement contemplates that creditors will settle debts for less than the full principal amount of debt owed, a provider may comply with subsection 4 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 other ways, including bankruptcy, to deal with your debts.

(2) Nonpayment of your debts under our program may:

(a) Hurt your credit rating or credit scores;

(b) Lead your creditors to increase finance and other charges; and

(c) Lead your creditors to undertake activity, including lawsuits, to collect the debts.

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

..... (Name and business address of provider)

**UNIFORM COMMENT**

(This is Section 17 of the Uniform Debt Management Services Act.)

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

1 in that program. The education may consist of an individual session with a counselor (which  
2 may also include the analysis required by paragraph (2)), a group class, or an electronic  
3 educational program. The education must be substantially more than an explanation of the  
4 benefits of a plan. It must begin but need not be completed before commencement of a plan,  
5 since a course of education may take months to complete. Paragraph (1) of subsection (b)  
6 states a general standard for the quality of the education, viz., reasonableness. Education for  
7 financial literacy is receiving increased attention, and several entities are attempting to define  
8 standards for effectiveness. As these attempts come to fruition, the administrator may  
9 exercise rulemaking power under section 32(c) to establish more precise minimum standards  
10 for the education.

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

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

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

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

42 6. Subsection (c)(2) requires a provider to inform the individual of the availability of  
43 assistance by telephone (or in person). It applies to all providers, but has special significance  
44 for providers that use electronic means to communicate with their customers. See section 16  
45 and Official Comment 3. This requirement does not mean that the provider must maintain an  
46 office in this state. It does, however, require that the provider maintain an office somewhere  
47 with counselors available for in-person consultation, presumably at its principal business

1 address. The obligation of good faith is relevant here, and locating the counselors in a state  
2 whose residents the provider does not serve would violate this subsection.

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

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

13 9. Subsections (e) through (g) provide safe-harbor language for the provider to use.  
14 Subsection (e) is designed for credit-counseling entities that receive payments from the  
15 creditors of its customers. Subsection (f) is designed for credit-counseling entities that do not  
16 receive payments from their customers' creditors. Subsection (g) is designed for debt-  
17 settlement entities. Use of the exact language in these subsections, contained in a box  
18 consisting of black lines, constitutes compliance with subsection (d). This is true even though  
19 the language in subsections (e)(2) and (f)(2) differs significantly from the language in  
20 subsection (d)(3). If the provider uses language other than that prescribed in subsections (e)-  
21 (g), the disclosure is subject to review to determine if it adequately discloses the information  
22 required by subsection (d). If the provider furnishes both credit-counseling and debt-  
23 settlement services, it may combine the disclosures into one form, but this section does not  
24 provide any safe harbor.

25  
26 **§6318. Communication by electronic or other means**

27 **1. Definitions.** As used in this section, unless the context otherwise indicates, the  
28 following terms have the following meanings.

29 A. "Consumer" means an individual who seeks or obtains goods or services that are  
30 used primarily for personal, family or household purposes.

31 B. "Federal act" means the federal Electronic Signatures in Global and National  
32 Commerce Act, Public Law 106-229 (2000).

33 **2. Satisfy requirements.** A provider may satisfy the requirements of section 6317,  
34 6319 or 6327 by means of the Internet or other electronic means if the provider obtains a  
35 consumer's consent in the manner provided by Section 101(c) of the federal act.

36 **3. Disclosures.** The disclosures and materials required by section 6317, 6319 or  
37 6327 must be presented in a form that is capable of being accurately reproduced for later  
38 reference.

39 **4. Disclosures by means of website.** With respect to disclosure by means of a  
40 website, the disclosure of the information required by section 6317 must appear on one or  
41 more screens that:

42 A. Contain no other information; and



1 the use of electronic media and inform the consumer of any right to have the information or  
2 documents provided in written form and the right to withdraw at any time his or her consent  
3 to disclosure by electronic medium. Subsection (b) makes compliance with the federal statute  
4 a prerequisite also to complying with this Act through the use of electronic communication. If  
5 a provider fails to comply with this subsection, then the permission granted by this section  
6 does not apply, and the provider must deliver the required documents and disclosures in  
7 writing.

8 2. The language of subsection (c) is drawn from E-Sign § 7001(d)(1)(B), and in the  
9 context of this Act, the obligation of good faith requires that the provider present the material  
10 in a printable format. The requirement of the subsection, however, is not limited to  
11 consumers. It applies with respect to all individuals.

12 3. To meet the objectives of the separate delivery contemplated by section 17,  
13 electronic delivery must satisfy certain requirements of form, such as appearing on a screen  
14 that contains no other information. The subsection uses the term "screen," which is  
15 synonymous with "window," "web page," "tab within a browser display," and perhaps other  
16 terms. The critical factor is that the record may not contain other information; but it does not  
17 violate subsection (d) if the record is an electronic page on a website and the record reveals  
18 how the individual may exit the page.

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

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

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

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

45 6. A provider might do business under numerous names. Subsection (g) applies to all  
46 providers, even if they make disclosures and form agreements using a paper medium. It  
47 requires disclosure of all the provider's business names, along with the provider's principal  
48 location and officers, but it permits the provider to disclose this information via a link to



1 another page of the website. The link must reveal its contents, e.g., “For the address and other  
2 information about [name of provider], click here.”

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

8  
9 **§6319. Form and contents of agreement**

10 **1. Form; contents. An agreement must:**

11 **A. Be in a record;**

12 **B. Be dated and signed by the provider and the individual;**

13 **C. Include the name of the individual and the address where the individual resides;**

14 **D. Include the name, business address and telephone number of the provider;**

15 **E. Be delivered to the individual immediately upon formation of the agreement; and**

16 **F. Disclose:**

17 **(1) The services to be provided;**

18 **(2) The amount, or method of determining the amount, of all fees, individually**  
19 **itemized, to be paid by the individual;**

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

23 **(4) If a plan provides for regular periodic payments to creditors:**

24 **(a) Each creditor of the individual to which payment will be made, the**  
25 **amount owed to each creditor and any concessions the provider reasonably**  
26 **believes each creditor will offer; and**

27 **(b) The schedule of expected payments to each creditor, including the**  
28 **amount of each payment and the date on which it will be made;**

29 **(5) Each creditor that the provider believes will not participate in the plan and to**  
30 **which the provider will not direct payment;**

31 **(6) How the provider will comply with its obligations under section 6327,**  
32 **subsection 1;**

33 **(7) That the provider may terminate the agreement for good cause, upon return**  
34 **of unexpended money of the individual;**

35 **(8) That the individual may cancel the agreement as provided in section 6320;**

36 **(9) That the individual may contact the administrator with any questions or**  
37 **complaints regarding the provider; and**

1                   (10) The address, telephone number and e-mail address or website of the  
2                   administrator.

3                   2. Delivery. For purposes of subsection 1, paragraph E, delivery of an electronic  
4 record occurs when it is made available in a format in which the individual may retrieve,  
5 save and print and the individual is notified that it is available.

6                   3. Compliance. If the administrator supplies the provider with any information  
7 required under subsection 1, paragraph F, subparagraph (10), the provider may comply  
8 with that requirement only by disclosing the information supplied by the administrator.

9                   4. Required provisions in agreement. An agreement must provide that:

10                   A. The individual has a right to terminate the agreement at any time, without penalty  
11                   or obligation, by giving the provider written or electronic notice, in which event:

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

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

18                   (3) All powers of attorney granted by the individual to the provider are revoked  
19                   and ineffective;

20                   B. The individual authorizes any bank in which the provider or its agent has  
21                   established a trust account to disclose to the administrator any financial records  
22                   relating to the trust account; and

23                   C. The provider will notify the individual within 5 days after learning of a creditor's  
24                   final decision to reject or withdraw from a plan and that this notice will include:

25                   (1) The identity of the creditor; and

26                   (2) The right of the individual to modify or terminate the agreement.

27                   5. Power of attorney. An agreement may confer on a provider a power of attorney  
28 to settle the individual's debt for no more than 50% of the principal amount of the debt.  
29 An agreement may not confer a power of attorney to settle a debt for more than 50% of  
30 that amount, but may confer a power of attorney to negotiate with creditors of the  
31 individual on behalf of the individual. An agreement must provide that the provider will  
32 obtain the assent of the individual after a creditor has assented to a settlement for more  
33 than 50% of the principal amount of the debt.

34                   6. Prohibition. An agreement may not:

35                   A. Provide for application of the law of any jurisdiction other than the United States  
36                   and this State;

37                   B. Except as permitted by 9 United States Code, Section 2, contain a provision that  
38                   modifies or limits otherwise available forums or procedural rights, including the right

1 to trial by jury, that are generally available to the individual under law other than this  
2 chapter;

3 C. Contain a provision that restricts the individual's remedies under this chapter or  
4 law other than this chapter; or

5 D. Contain a provision that:

6 (1) Limits or releases the liability of any person for not performing the  
7 agreement or for violating this chapter; or

8 (2) Indemnifies any person for liability arising under the agreement or this  
9 chapter.

10 **7. Rights and obligations exist.** All rights and obligations specified in subsection 4  
11 and section 6320 exist even if not provided in the agreement. A provision in an agreement  
12 that violates subsection 4, 5 or 6 is void.

13 **UNIFORM COMMENT**

14 (This is Section 19 of the Uniform Debt Management Services Act.)

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

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

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

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

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

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

42 7. Section 27 requires a provider to make periodic reports to an individual,  
43 accounting for payments, charges, and disbursements. Paragraph (6)(F) of this section

1 requires disclosure of the timing of those reports (monthly or more frequently) and the  
2 individual's right to receive an accounting upon request and upon termination of the  
3 agreement.

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

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

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

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

33 For all providers, if an individual terminates an agreement, paragraph (1)(A) requires  
34 return of any unexpended money intended for payment to creditors. For credit-counseling  
35 entities, no refund of set-up or monthly fees is required. For debt-settlement entities, however,  
36 paragraph (1)(B) requires the agreement to provide for refund of a portion of the set-up fee.  
37 Section 23(f) requires the provider to credit any set-up fee against a settlement fee. It also  
38 requires the provider to credit the monthly service fees against the settlement fee. To  
39 maximize the refund under this section, as contemplated here, the monthly service fees should  
40 be credited first. To determine the refund due under paragraph (1)(B), the provider must deduct  
41 from the total amount of any settlement fees the total amount of monthly fees paid up to the  
42 time of termination. If the result is less than 0 (or if there have been no settlement fees), then  
43 no part of the set-up fee has yet been credited against the settlement fee, and the refund is  
44 65% of the set-up fee. If the result is greater than 0, subtract that result from the set-up fee.  
45 The refund is 65% of the difference.

46 12. Paragraph (1)(C) requires the agreement to provide that in the event of  
47 termination, all powers of attorney terminate. Section 28(a)(4) complements this provision by

1 making it unlawful for a provider to attempt to exercise a power of attorney after the  
2 individual has terminated the agreement.

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

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

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

18 16. The failure of a provider to include in an agreement the provisions required by  
19 this section is a violation of the Act and justifies administrative enforcement under sections  
20 32-33 and private enforcement under section 35. Even if omitted, however, subsection (g)  
21 makes the required provisions part of the agreement. Conversely, a provision that violates  
22 subsections (d)-(f) is void, but this does not render the entire agreement void.

23

24 **§6320. Cancellation of agreement; waiver**

25 **1. Cancellation.** An individual may cancel an agreement before midnight of the 3rd  
26 business day after the individual assents to it, unless the agreement does not comply with  
27 subsection 2 or section 6319 or 6328, in which event the individual may cancel the  
28 agreement within 30 days after the individual assents to it. To exercise the right to cancel,  
29 the individual must give notice in a record to the provider. Notice by mail is given when  
30 mailed.

31 **2. Form.** An agreement must be accompanied by a form that contains in boldface  
32 type, surrounded by bold black lines:

33

Notice of Right to Cancel

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

37 To cancel this agreement during this period, send an e-mail to ..... (E-  
38 mail address of provider) or mail or deliver a signed, dated copy of this notice, or any  
39 other written notice, to ..... (Name of provider) at ..... (Address of provider)  
40 before midnight on ..... (Date). If you cancel  
41 this agreement within the 3-day period, we will refund all money you already have  
42 paid us.



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**UNIFORM COMMENT**

(This is Section 21 of the Uniform Debt Management Services Act.)

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.

**§6322. Trust account**

**1. Deposit.** All money paid to a provider by or on behalf of an individual for distribution to creditors pursuant to a plan is held in trust. Within 2 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.

**2. Availability of funds.** 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.

**3. Requirements; provider.** A provider shall:

A. Maintain separate records of account for each individual to whom the provider is furnishing debt management services;

B. Disburse money paid by or on behalf of the individual to creditors of the individual as disclosed in the agreement, except that:

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

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

C. 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.

**4. Commingling.** 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.





1 money of residents of this state into a trust account located in another state and containing the  
2 money of individuals who reside in other states.

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

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

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

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

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

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

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

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

1 Presumably, the money is in a trust account, but the obligation applies regardless of where the  
2 money is, unless it already is under the individual's control.

3  
4 **§6323. Fees and other charges**

5 **1. Imposition of fee or charge.** A provider may not impose directly or indirectly a  
6 fee or other charge on an individual or receive money from or on behalf of an individual  
7 for debt management services except as permitted by this section.

8 **2. Agreement required.** A provider may not impose charges or receive payment for  
9 debt management services until the provider and the individual have signed an agreement  
10 that complies with sections 6319 and 6328.

11 **3. Fee for educational or counseling services.** If an individual assents to an  
12 agreement, a provider may not impose a fee or other charge for educational or counseling  
13 services, or the like, except as otherwise provided in this subsection and section 6328,  
14 subsection 4. The administrator may authorize a provider to charge a fee based on the  
15 nature and extent of the educational or counseling services furnished by the provider.

16 **4. Fees.** Subject to adjustment of dollar amounts pursuant to section 6332,  
17 subsection 6, the following rules apply.

18 **A.** If an individual assents to a plan that contemplates that creditors will reduce  
19 finance charges or fees for late payment, default or delinquency, the provider may  
20 charge:

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

23 **(2)** A monthly service fee, not to exceed \$10 multiplied by the number of  
24 creditors remaining in a plan at the time the fee is assessed, but not more than  
25 \$50 in any month.

26 **B.** If an individual assents to an agreement that contemplates that creditors will settle  
27 debts for less than the principal amount of the debt, a provider may charge:

28 **(1)** Subject to section 6319, subsection 4, a fee for consultation, obtaining a  
29 credit report, setting up an account and the like, in an amount not exceeding the  
30 lesser of \$400 and 4% of the debt in the plan at the inception of the plan; and

31 **(2)** A monthly service fee, not to exceed \$10 multiplied by the number of  
32 creditors remaining in a plan at the time the fee is assessed, but not more than  
33 \$50 in any month.

34 **C.** A provider may not impose or receive fees under both paragraphs A and B.

35 **D.** Except as otherwise provided in section 6328, subsection 4, if an individual does  
36 not assent to an agreement, a provider may receive for educational and counseling  
37 services it provides to the individual a fee not exceeding \$100 or, with the approval  
38 of the administrator, a larger fee. The administrator may approve a fee larger than



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

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

17 4. The administrator should be vigilant to attempts by a provider to evade the  
18 prohibition against charges for the basic education and counseling. Two factors are especially  
19 important: the voluntariness of the purchase by the individual and the substance of the  
20 education. Since the basic education must be provided at no charge, the individual must be  
21 permitted to form an agreement without having to purchase additional education.  
22 Voluntariness may be negated by the sales practices of the provider, including such things as  
23 the sales pitch and the manner in which the decision to acquire additional education is  
24 presented. If the provider routinely includes the cost of additional education in the proposed  
25 agreement that it presents to the individuals it solicits, the purchase of additional education is  
26 not truly voluntary. This may be true even if the provider obtains a separate manifestation of  
27 the individual's assent to the additional charge. E.g., see *In re USLIFE Credit Corp.*, 91  
28 F.T.C. 1017, modified 92 F.T.C. 353, rev'd sub nom. *USLIFE Credit Corp. v. FTC*, 599 F.2d  
29 1387 (5th Cir. 1979). For purposes of this Act, the opinion of the Federal Trade Commission,  
30 not the Fifth Circuit, takes the correct approach. Tactics such as these violate section  
31 28(a)(16) (prohibiting unfair, unconscionable, or deceptive acts or practices).

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

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

44 6. Paragraphs (1) and (2) of subsection (d) permit a provider to charge a set-up fee  
45 and a monthly service fee. For all providers, paragraph (2) permits a monthly fee of \$10 per  
46 creditor, except that the monthly fee may not exceed \$50. Since some creditors may be paid  
47 off before others, the per-creditor branch of the limit is to be determined with respect to the

1 number of creditors remaining in the plan at the time the fee is assessed. Therefore, if there  
2 are only two creditors remaining in a plan, the maximum monthly charge is \$20.

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

9 7. If the provider is a credit-counseling entity, paragraph (1) permits a set-up fee not  
10 exceeding \$50. If the provider is a debt-settlement company, paragraph (2) permits a set-up  
11 fee not to exceed four percent of the principal amount of the debt in the plan, but in no event  
12 more than \$400. Anytime the aggregate debt in a plan exceeds \$10,000, the maximum set-up  
13 fee is \$400. The cross reference in paragraph (2)(A) is to the section that requires refund of  
14 65 percent of the set-up fee if the individual terminates the agreement.

15 8. A provider may engage in both credit counseling and debt settlement. If so, it must  
16 comply with the provisions in the Act applicable to each. Paragraph (3), however, prohibits  
17 the provider from being compensated separately for each role. To determine the monthly  
18 service fee, the provider must aggregate the number creditors in the plan – whether they are to  
19 receive regular payments or a one-time payment in settlement of the debt – and impose any  
20 per-creditor charge on that aggregate number (not to exceed a total of \$50 in any month).  
21 Similarly, a provider may not receive both a \$50 set-up fee under paragraph (1)(A) and a  
22 4%/\$400 set-up fee under paragraph (2)(A). The applicable limit on the set-up fee should be  
23 determined by examining whether the plan is predominantly for full payment of the  
24 individual's debts (with reduction in finance charges or other fees) or predominantly for the  
25 settlement of those debts for an amount less than the full principal amount of debt owed.

26 9. Paragraph (4) permits a provider to impose a charge for education or counseling if  
27 an individual does not enter an agreement. The maximum fee for this education or counseling  
28 is specified in the statute, but this paragraph permits the administrator to authorize a larger  
29 fee. The approval may, but need not, refer to a specific provider or a specified program of  
30 study, such as a course of instruction developed by a third party for use by others. The nature  
31 and extent of the educational services may warrant approval of a larger fee if they exceed the  
32 minimum standard contemplated by section 17(b)(1).

33 10. For an elaboration on the cross reference to section 28(d), see Official Comment  
34 5 above.

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

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

1 unconscionable, or deceptive acts or practices also constrain attempts to evade the restrictions  
2 of this section.

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

10

11 **§6324. Voluntary contributions**

12 A provider may not solicit a voluntary contribution from an individual or an affiliate  
13 of the individual for any service provided to the individual. A provider may accept  
14 voluntary contributions from an individual but, until 30 days after completion or  
15 termination of a plan, the aggregate amount of money received from or on behalf of the  
16 individual may not exceed the total amount the provider may charge the individual under  
17 section 6323.

18

**UNIFORM COMMENT**

19 (This is Section 24 of the Uniform Debt Management Services Act.)

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

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

33

34 **§6325. Voidable agreements**

35 **1. Unauthorized charges.** If a provider imposes a fee or other charge or receives  
36 money or other payments not authorized by section 6323 or 6324, the individual may  
37 void the agreement and recover as provided in section 6335.

38 **2. Unregistered provider.** If a provider is not registered as required by this chapter  
39 when an individual assents to an agreement, the agreement is voidable by the individual.



1 money properly held as payment of fees. Paragraph (2), on the other hand, requires a debt  
2 settlement entity to refund 65 percent of any portion of the set-up fee that has not already, in  
3 effect, been refunded as a credit against settlement fees for debts already settled. To  
4 determine the amount of the refund, the provider must calculate how much of the set-up fee  
5 has been credited against the settlement fee. The provider must pay the individual 65% of the  
6 remainder. For commentary on how to make this calculation, see Comment 11 to section 19.

7  
8 **§6327. Periodic reports and retention of records**

9 **1. Timing.** A provider shall provide the accounting required by subsection 2:

10 **A. Upon cancellation or termination of an agreement; and**

11 **B. Before cancellation or termination of any agreement:**

12 **(1) At least once each month; and**

13 **(2) Within 5 business days after a request by an individual, but the provider need**  
14 **not comply with more than one request in any calendar month.**

15 **2. Contents.** A provider, in a record, shall provide each individual for whom it has  
16 **established a plan an accounting of the following information:**

17 **A. The amount of money received from the individual since the last report;**

18 **B. The amounts and dates of disbursement made on the individual's behalf, or by the**  
19 **individual upon the direction of the provider, since the last report to each creditor**  
20 **listed in the plan;**

21 **C. The amounts deducted from the amount received from the individual;**

22 **D. The amount held in reserve; and**

23 **E. If, since the last report, a creditor has agreed to accept as payment in full an**  
24 **amount less than the principal amount of the debt owed by the individual:**

25 **(1) The total amount and terms of the settlement;**

26 **(2) The amount of the debt when the individual assented to the plan;**

27 **(3) The amount of the debt when the creditor agreed to the settlement; and**

28 **(4) The calculation of a settlement fee.**

29 **3. Maintain records.** A provider shall maintain records for each individual for  
30 **whom it provides debt management services for 5 years after the final payment made by**  
31 **the individual and produce a copy of them to the individual within a reasonable time after**  
32 **a request for them. The provider may use electronic or other means of storage of the**  
33 **records.**



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**UNIFORM COMMENT**

(This is Section 27 of the Uniform Debt Management Services Act.)

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.

**§6328. Prohibited acts and practices**

**1. Prohibited acts. A provider may not, directly or indirectly:**

**A. Misappropriate or misapply money held in trust;**

- 1           B. Settle a debt on behalf of an individual for more than 50% of the principal amount  
2           of the debt owed a creditor, unless the individual assents to the settlement after the  
3           creditor has assented;
- 4           C. Take a power of attorney that authorizes it to settle a debt, unless the power of  
5           attorney expressly limits the provider's authority to settle debts for not more than 50%  
6           of the principal amount of the debt owed a creditor;
- 7           D. Exercise or attempt to exercise a power of attorney after an individual has  
8           terminated an agreement;
- 9           E. Initiate a transfer from an individual's account at a bank or with another person  
10          unless the transfer is:
- 11                 (1) A return of money to the individual; or
- 12                 (2) Before termination of an agreement, properly authorized by the agreement  
13                 and this chapter, and for:
- 14                         (a) Payment to one or more creditors pursuant to an agreement; or
- 15                         (b) Payment of a fee;
- 16          F. Offer a gift or bonus, premium, reward or other compensation to an individual for  
17          executing an agreement;
- 18          G. Offer, pay or give a gift or bonus, premium, reward or other compensation to a  
19          person for referring a prospective customer, if the person making the referral has a  
20          financial interest in the outcome of debt management services provided to the  
21          customer, unless neither the provider nor the person making the referral  
22          communicates to the prospective customer the identity of the source of the referral;
- 23          H. Receive a bonus, commission or other benefit for referring an individual to a  
24          person;
- 25          I. Structure a plan in a manner that would result in a negative amortization of any of  
26          an individual's debts, unless a creditor that is owed a negatively amortizing debt  
27          agrees to refund or waive the finance charge upon payment of the principal amount of  
28          the debt;
- 29          J. Compensate its employees on the basis of a formula that incorporates the number  
30          of individuals the employee induces to enter into agreements;
- 31          K. Settle a debt or lead an individual to believe that a payment to a creditor is in  
32          settlement of a debt to the creditor unless, at the time of settlement, the individual  
33          receives a certification by the creditor that the payment is in full settlement of the  
34          debt;
- 35          L. Make a representation that:
- 36                         (1) The provider will furnish money to pay bills or prevent attachments;
- 37                         (2) Payment of a certain amount will permit satisfaction of a certain amount or  
38                         range of indebtedness; or

1                   (3) Participation in a plan will or may prevent litigation, garnishment,  
2                   attachment, repossession, foreclosure, eviction or loss of employment;

3                   M. Misrepresent that it is authorized or competent to furnish legal advice or perform  
4                   legal services;

5                   N. Represent in its agreements, disclosures required by this chapter, advertisements  
6                   or website that it is:

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

9                   (2) A tax-exempt entity unless it has received certification of tax-exempt status  
10                  from the Internal Revenue Service and is properly operating as a not-for-profit  
11                  entity under the law of the state in which it was formed;

12                  O. Take a confession of judgment or power of attorney to confess judgment against  
13                  an individual; or

14                  P. Employ an unfair, unconscionable or deceptive act or practice, including the  
15                  knowing omission of any material information.

16                  **2. Debt management services; provider prohibitions.** If a provider furnishes debt  
17                  management services to an individual, the provider may not, directly or indirectly:

18                  A. Purchase a debt or obligation of the individual;

19                  B. Receive from or on behalf of the individual:

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

22                  (2) A postdated check or demand draft;

23                  C. Lend money or provide credit to the individual, except as a deferral of a  
24                  settlement fee at no additional expense to the individual;

25                  D. Obtain a mortgage or other security interest from any person in connection with  
26                  the services provided to the individual;

27                  E. Except as permitted by federal law, disclose the identity or identifying  
28                  information of the individual or the identity of the individual's creditors, except to:

29                  (1) The administrator, upon proper demand;

30                  (2) A creditor of the individual, to the extent necessary to secure the cooperation  
31                  of the creditor in a plan; or

32                  (3) The extent necessary to administer the plan;

33                  F. Except as otherwise provided in section 6323, subsection 6, provide the individual  
34                  less than the full benefit of a compromise of a debt arranged by the provider;

35                  G. Charge the individual for or provide credit or other insurance, coupons for goods  
36                  or services, membership in a club, access to computers or the Internet or any other  
37                  matter not directly related to debt management services or educational services  
38                  concerning personal finance; or

1 H. Furnish legal advice or perform legal services, unless the person furnishing that  
2 advice to or performing those services for the individual is licensed to practice law.

3 **3. Practice of law not authorized.** This chapter does not authorize any person to  
4 engage in the practice of law.

5 **4. Gifts.** A provider may not receive a gift or bonus, premium, reward or other  
6 compensation, directly or indirectly, for advising, arranging or assisting an individual in  
7 connection with obtaining an extension of credit or other service from a lender or service  
8 provider, except for educational or counseling services required in connection with a  
9 government-sponsored program.

10 **5. Purchase by provider.** Unless a person supplies goods, services or facilities  
11 generally and supplies them to the provider at a cost no greater than the cost the person  
12 generally charges to others, a provider may not purchase goods, services or facilities from  
13 the person if an employee or a person that the provider should reasonably know is an  
14 affiliate of the provider and:

15 A. Owns more than 10% of the person; or

16 B. Is an employee or affiliate of the person.

17 **UNIFORM COMMENT**

18 (This is Section 28 of the Uniform Debt Management Services Act.)

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

31 2. Paragraph (4) makes it a violation of the Act for a provider to attempt to exercise a  
32 power of attorney after an individual has terminated an agreement. It supplements section  
33 19(d)(1)(C), which requires the agreement to provide that a power of attorney is  
34 automatically revoked if the individual terminates the agreement.

35 3. A credit-counseling entity may have access to its customers' checking accounts,  
36 for the purpose of withdrawing money to pay the customers' creditors and to pay the entity its  
37 monthly fee. Similarly, a debt-settlement entity may have its customers establish accounts  
38 with banks or other persons for the purpose of accumulating money until it is paid to  
39 creditors, and the entity may initiate transfers out of these accounts to pay monthly service  
40 fees and settlement fees, as well as perhaps to pay creditors. Paragraph (5) prohibits a  
41 provider from initiating transfers to itself or to creditors after the individual has terminated an

1 agreement. It also prohibits a provider from initiating transfers that are not properly  
2 authorized by the agreement and the Act. Section 23 limits the amount of the fees.

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

7 The Bankruptcy Code, 11 U.S.C. § 111(c)(2)(B), requires credit-counseling entities  
8 within its purview to "provide services without regard to ability to pay the fee." The Internal  
9 Revenue Code extends this requirement to all entities exempt from taxation under section  
10 501(c)(3). This Act does not require providers to reduce or waive fees for those who cannot  
11 afford them, but neither does it interfere with a provider's compliance with any federal or  
12 other state law that requires a reduction or waiver of fees.

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

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

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

35 6. Paragraph (8) is the converse of paragraph (7). Its purpose is to eliminate the  
36 economic incentive for a provider to refer individuals to persons who provide loans, goods,  
37 services, facilities, or other products of any kind. The protection of financially stressed,  
38 vulnerable individuals justifies discouraging a provider, motivated by self-interest, from  
39 recommending products provided by others. The prohibition in paragraph (8) precludes a  
40 provider from including on its website a link to the website of an entity providing other  
41 services or products and receiving payment from that entity, whether a flat fee or a fee based  
42 on the number of times individuals hit that link. Although this appears to be a form of  
43 advertising, for the purposes of this Act it is indistinguishable from payment for referrals.  
44 Placing a link on the provider's website amounts to an endorsement of or referral to the  
45 owner of the linked website. It should not matter whether the referral is by electronic link or  
46 verbal recommendation. The provider is free, of course, to place the link on its website, just  
47 as it is free to make an oral referral, so long as it does not directly or indirectly receive

1 compensation or other benefit from the person to whom the individual is referred. This  
2 distinguishes disinterested advice from referrals motivated by the provider's self-interest.

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

5 7. The practice of many providers has been to compensate their employees on the  
6 basis of how many individuals they can enroll in plans. This provides an incentive to the  
7 employees to engage in deceptive and coercive sales pitches. Paragraph (10) seeks to curb the  
8 deception and coercion by barring this method of compensating employees. The Bankruptcy  
9 Code, 11 U.S.C. § 111(c)(2)(F), contains a similar prohibition for the credit-counseling  
10 entities within its purview. Courts and the administrator should be vigilant to attempts to  
11 evade the prohibition of this paragraph. Nevertheless, it is permissible for providers to create  
12 incentives for their employees to identify individuals who will be able to perform an  
13 agreement completely. Thus it is not a violation of this subsection for a provider to use the  
14 number of successfully completed agreements as a criterion for compensation of its  
15 employees.

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

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

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

39 11. Paragraph (14) applies to advertisements and other communications that a  
40 provider intends to reach potential customers. Not-for-profit status is a status under state law.  
41 An entity may qualify for that status without also being tax-exempt under federal law. For a  
42 provider to represent that it is a nonprofit or not-for-profit entity, it is not enough that the  
43 provider was organized under a statute authorizing not-for-profits. Paragraph (14) requires  
44 that the provider also must be properly operating as a not-for-profit. Nor does it suffice that  
45 the provider has been granted tax-exempt status under the Internal Revenue Code. If it is not  
46 operating in a manner consistent with the law under which it was formed, a representation  
47 that it is a nonprofit or tax-exempt entity violates this section. A provider that is unsure  
48 whether it is properly operating as a not-for-profit entity may avoid liability under this

1 paragraph by not representing that it has tax-exempt or not-for-profit status in any of its  
2 communications that are designed to reach the individuals it seeks to serve.

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

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

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

23 15. Paragraph (4) bans security interests altogether, in the property of any person. A  
24 provider may not take a security interest in property of an individual to whom it furnishes  
25 debt-management services or in the property of a family member or other person. The  
26 prohibition must be read in the context of the language introducing the subsection ("if a  
27 provider furnishes debt-management services to an individual") so that the phrase, "in  
28 connection with the services provided to the individual" means "in connection with the debt-  
29 management services provided to the individual." Hence this paragraph does not prohibit an  
30 entity from taking a security interest in connection with extending credit or providing other  
31 kinds of services to persons to whom it does not provide debt-management services.

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

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

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

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

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

15           19. Subsection (a)(13) prohibits misrepresentations that a provider is authorized or  
16 competent to provide legal services. Paragraph (8) of subsection (b) prohibits the performance  
17 of those services, unless the person is a licensed attorney. A provider does not violate this  
18 subsection if the person providing legal services is licensed in a state, even if not this state. It  
19 may, however, violate other law that prohibits the unauthorized practice of law in this state.

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

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

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

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

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



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**§6329. Notice of litigation**

No later than 30 days after a provider has been served with notice of a civil action for violation of this chapter 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.

**UNIFORM COMMENT**

(This is Section 29 of the Uniform Debt Management Services Act.)

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

**§6330. Advertising**

**1. Disclosure regarding obtaining credit.** If the agreements of a provider contemplate that creditors will reduce finance charges or fees for late payment, default or delinquency and the provider advertises debt management services, it shall disclose, in an easily comprehensible manner, that using a debt management plan may make it harder for the individual to obtain credit.

**2. Disclosure regarding credit scoring; finance charges.** If the agreements of a provider contemplate that creditors will settle for less than the full principal amount of debt and the provider advertises debt management services, it shall disclose, in an easily comprehensible manner, the information specified in section 6317, subsection 4, paragraphs C and D.

**UNIFORM COMMENT**

(This is Section 30 of the Uniform Debt Management Services Act.)

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.

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

5  
6 **§6331. Liability for the conduct of other persons**

7 If a provider delegates any of its duties or obligations under an agreement or this  
8 chapter to another person, including an independent contractor, the provider is liable for  
9 conduct of the person that, if done by the provider, would violate the agreement or this  
10 chapter.

11 **UNIFORM COMMENT**

12 (This is Section 31 of the Uniform Debt Management Services Act.)

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

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

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

37  
38 **§6332. Powers of administrator**

39 **1. Actions by administrator.** The administrator may act on its own initiative or in  
40 response to complaints and may receive complaints, take action to obtain voluntary  
41 compliance with this chapter, refer cases to the Attorney General and seek or provide  
42 remedies as provided in this chapter.



1 agencies, the administrator may publicize the results of an investigation. The administrator  
2 may not, however, publicize or otherwise disclose information that identifies individual  
3 customers of a provider. This restriction applies both to general publicity and to freedom-of-  
4 information requests.

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

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

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

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

24 Section 2(2)(B)(iv): threshold for becoming an affiliate (\$25,000)

25 Section 5(b)(4): employee theft insurance (\$250,000)

26 Section 9(d)(2): independence of board of directors (\$25,000)

27 Section 13(b): bond (\$50,000)

28 Section 23(d)(1), (2), (3): fee caps

29 Section 23(g): NSF fee (\$25)

30 Section 33(a), (b): civil penalty (\$10,000, \$20,000)

31 Section 35(c)(2): minimum damages (\$5,000)

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

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

37

38 **§6333. Administrative remedies**

39 **1. Enforcement.** The administrator may enforce this chapter and rules adopted  
40 under this chapter by taking one or more of the following actions:

41 A. Ordering a provider or a director, employee or other agent of a provider to cease  
42 and desist from any violations;

1 B. Ordering a provider or a person that has caused a violation to correct the  
2 violation, including making restitution of money or property to a person aggrieved by  
3 a violation;

4 C. Subject to adjustment of the dollar amount pursuant to section 6332, subsection 6,  
5 imposing on a provider or a person that has caused a violation a civil penalty not  
6 exceeding \$10,000 for each violation;

7 D. Prosecuting a civil action to:

8 (1) Enforce an order;

9 (2) Obtain restitution or an injunction or other equitable relief, or both; or

10 E. Intervening in an action brought under section 6335.

11 **2. Penalty.** Subject to adjustment of the dollar amount pursuant to section 6332,  
12 subsection 6, if a person violates or knowingly authorizes, directs or aids in the violation  
13 of a final order issued under subsection 1, paragraph A or B, the administrator may  
14 impose a civil penalty not exceeding \$20,000 for each violation.

15 **3. Action to enforce.** The administrator may maintain an action to enforce this  
16 chapter in any jurisdiction within the State.

17 **4. Recover costs.** The administrator may recover the reasonable costs of enforcing  
18 this chapter under subsections 1 to 3, including attorney's fees based on the hours  
19 reasonably expended and the hourly rates for attorneys of comparable experience in the  
20 community.

21 **5. Amount of penalty.** In determining the amount of a civil penalty to impose under  
22 subsection 1 or 2, the administrator shall consider the seriousness of the violation, the  
23 good faith of the violator, any previous violations by the violator, the deleterious effect of  
24 the violation on the public, the net worth of the violator and any other factor the  
25 administrator considers relevant to the determination of the civil penalty.

26 **UNIFORM COMMENT**

27 (This is Section 33 of the Uniform Debt Management Services Act.)

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

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

39 3. Subsection (b) speaks of "a person," which is defined in section 2(12). If a  
40 provider violates a final order, it is subject to the civil penalty of this subsection. If a director,

1 employee (including officers), agent, etc., commits or directs commission of the act that  
2 constitutes the provider's violation, that person also is subject to the civil penalty of this  
3 subsection.

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

11  
12 **§6334. Suspension, revocation or nonrenewal of registration**

13 **1. Definition.** In this section, "insolvent" means:

14 A. Having generally ceased to pay debts in the ordinary course of business other than  
15 as a result of a good faith dispute;

16 B. Being unable to pay debts as they become due; or

17 C. Being insolvent within the meaning of the federal bankruptcy law, 11 United  
18 States Code, Section 101 et seq.

19 **2. Suspend; revoke; deny.** The administrator may suspend, revoke or deny renewal  
20 of a provider's registration if:

21 A. A fact or condition exists that, if it had existed when the registrant applied for  
22 registration as a provider, would have been a reason for denying registration;

23 B. The provider has committed a material violation of this chapter or a rule or order  
24 of the administrator under this chapter;

25 C. The provider is insolvent;

26 D. The provider or an employee or affiliate of the provider has refused to permit the  
27 administrator to make an examination authorized by this chapter, failed to comply  
28 with section 6332, subsection 2, paragraph B within 15 days after request or made a  
29 material misrepresentation or omission in complying with section 6332, subsection 2,  
30 paragraph B; or

31 E. The provider has not responded within a reasonable time and in an appropriate  
32 manner to communications from the administrator.

33 **3. Summary suspension.** If a provider does not comply with section 6322,  
34 subsection 6 or if the administrator otherwise finds that the public health or safety or  
35 general welfare requires emergency action, the administrator may order a summary  
36 suspension of the provider's registration, effective on the date specified in the order.

37 **4. Seizure.** If the administrator suspends, revokes or denies renewal of the  
38 registration of a provider, the administrator may seek a court order authorizing seizure of

1 any or all of the money in a trust account required by section 6322, books, records,  
2 accounts and other property of the provider that are located in this State.

3 5. Appeal. If the administrator suspends or revokes a provider's registration, the  
4 provider may appeal and request a hearing pursuant to the Maine Administrative  
5 Procedure Act.

## 6 UNIFORM COMMENT

7 (This is Section 34 of the Uniform Debt Management Services Act.)

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

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

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

### 20 §6335. Private enforcement

21 1. Unregistered provider. If an individual voids an agreement pursuant to section  
22 6325, subsection 2, the individual may recover in a civil action all money paid or  
23 deposited by or on behalf of the individual pursuant to the agreement, except amounts  
24 paid to creditors, in addition to the recovery under subsection 3, paragraphs C and D.  
25

26 2. Unauthorized charges. If an individual voids an agreement pursuant to section  
27 6325, subsection 1, the individual may recover in a civil action 3 times the total amount  
28 of the fees, charges, money and payments made by the individual to the provider, in  
29 addition to the recovery under subsection 3, paragraph D.

30 3. Recovery. Subject to subsection 4, an individual with respect to whom a provider  
31 violates this chapter may recover in a civil action from the provider and any person that  
32 caused the violation:

33 A. Compensatory damages for injury, including noneconomic injury, caused by the  
34 violation;

35 B. Except as otherwise provided in subsection 4 and subject to adjustment of the  
36 dollar amount pursuant to section 6332, subsection 6, with respect to a violation of  
37 section 6317, 6319 to 6324, 6327 or section 6328, subsection 1, 2 or 4, the greater of  
38 the amount recoverable under paragraph A or \$5,000;

39 C. Punitive damages; and





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

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

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

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

20 6. The minimum damages provision in paragraph (2) applies only to the specified  
21 violations (prerequisites for a plan, form and contents of an agreement, cancellation of  
22 agreement, translation of documents, trust account, fee caps, voluntary contributions, periodic  
23 reports, and certain prohibited acts and practices). For violation of other sections of the Act,  
24 including failure to register and failure to provide customer service, the aggrieved individual  
25 may recover actual damages (if any are caused by the violation), punitive damages, or both.  
26 The administrator, of course, may enforce all sections of the Act.

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

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

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

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

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

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

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

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

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

46           If a provider's violation of section 23 or 24 results from an act or a policy that affects  
47 more than one individual, the defense is available only if the provider makes refunds to all of  
48 them within two days of learning of the violation as to one individual. Once informed of the

1 violation by a single individual, the provider has learned of the violation as to all individuals  
2 who were overcharged in the same way.

3  
4 **§6336. Violation of Maine Unfair Trade Practices Act**

5 If an act or practice of a provider violates both this chapter and the Maine Unfair  
6 Trade Practices Act, an individual may not recover under both for the same act or  
7 practice.

8 **UNIFORM COMMENT**

9 (This is Section 36 of the Uniform Debt Management Services Act.)

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

13  
14 **§6337. Statute of limitations**

15 **1. Administrative and judicial proceedings.** An action or proceeding brought  
16 pursuant to section 6333, subsection 1, 2 or 3 must be commenced within 4 years after the  
17 conduct that is the basis of the administrator's complaint.

18 **2. Private enforcement.** An action brought pursuant to section 6335 must be  
19 commenced within 2 years after the latest of:

20 A. The individual's last transmission of money to a provider;

21 B. The individual's last transmission of money to a creditor at the direction of the  
22 provider;

23 C. The provider's last disbursement to a creditor of the individual;

24 D. The provider's last accounting to the individual pursuant to section 6327,  
25 subsection 1;

26 E. The date on which the individual discovered or reasonably should have  
27 discovered the facts giving rise to the individual's claim; or

28 F. Termination of actions or proceedings by the administrator with respect to a  
29 violation of the chapter.

30 **3. Tolling of period.** The period prescribed in subsection 2, paragraph E is tolled  
31 during any period during which the provider or, if different, the defendant has materially  
32 and willfully misrepresented information required by this chapter to be disclosed to the  
33 individual, if the information so misrepresented is material to the establishment of the  
34 liability of the defendant under this chapter.

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**UNIFORM COMMENT**

(This is Section 37 of the Uniform Debt Management Services Act.)

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.

**§6338. Uniformity of application and construction**

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**§6339. Relation to Electronic Signatures in Global and National Commerce Act**

This chapter modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit or supersede Section 101(c) of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

**§6340. Transitional provisions; application to existing transactions**

Transactions entered into before this chapter 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 chapter as though the amendment, repeal or modification had not occurred.

**UNIFORM COMMENT**

(This is Section 40 of the Uniform Debt Management Services Act.)

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.

**Sec. 4. Effective date.** This Act takes effect October 1, 2010.

**SUMMARY**

This bill repeals the existing law governing debt management services and enacts in its stead the Uniform Debt Management Services Act.