



STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Tentative Report

Relating to

New Jersey Debt-Management Services Act

April 18, 2011

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the report, please inform the Commission so that your approval can be considered along with other comments.

Please send comments concerning this tentative report or direct any related inquiries, to:

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Introduction

The Uniform Debt-Management Services Act (“UDMSA”) was recommended for enactment by the National Conference of Commissioners on Uniform State Laws in 2005, and was later revised and amended by NCCUSL in 2008 and again in 2011 (in response to changes in federal law as explained more fully below).

The purpose of the Act is to “rein in the excesses while permitting credit-counseling agencies and debt-settlement companies to continue providing services that benefit consumers.” *NCCUSL Report*, 2008, page 4. UDMSA has been enacted in six states (Colorado (1/2008), Delaware (1/2007), Nevada (effective 7/2010), Rhode Island (3/2007), Tennessee (effective 7/2010) and Utah (7/2007)), and introduced in ten additional states and in the United States Virgin Islands in 2009 and 2010. In 2011, the Act was introduced in Massachusetts, New Jersey, New Mexico, New York, North Dakota and Texas.

A discussion of the evolution of debt-management services in this country is contained in the NCCUSL final report, which may be found at <http://www.law.upenn.edu/bll/archives/ulc/ucdc/2008final.htm>. Since the federal Bankruptcy Reform Act of 2005 requires an individual to show that debt counseling/management was attempted before filing for Chapter 7 bankruptcy, greater transparency and accountability are needed to prevent excesses and abuses.

The Act applies to “providers” of “debt-management services” that enter “agreements” with individuals for the purpose of creating “plans.” *Id.* at 4-5. The Act speaks of “individuals,” as opposed to “consumers,” so it applies to farmers and other individuals who incurred personal debt incurred in connection with their businesses. *Id.* at 5. The definition of “debt-management services” encompasses both credit counseling and debt settlement. The Uniform Act was originally neutral on whether for-profit entities should be permitted to provide debt-management services but, in its most recent revision, NCCUSL removed all language pertaining to a state’s optional exclusion for-profit entities. The states that have adopted some version of the act permit for-profit entities to participate in debt-management activities, but some states (Illinois, for example) have drafted their law in such a way that critics have suggested that it may be financially prohibitive for some of those entities to do so.

New Jersey does not currently allow for-profit entities to engage in debt relief activities within the State. Only not-for-profit entities may be licensed to do so pursuant to the current law. For-profit entities are generally associated with a type of debt-management known as debt-settlement. Debt-settlement involves a reduction of the principal amount of the debt and a payoff of the reduced debt in a lump sum or over a short period of time (three to six months). Traditional debt-management, on the other hand, involves creditor concessions such as reductions in the interest rate, finance charges, late fees, and the like, and a payoff of the full principal balance after concessions over a period of five years.

Commission Staff is not aware of any not-for-profit entity licensed to do business in the State of New Jersey that engages in debt-settlement. It appears that federal law limits the extent to which tax-exempt, not-for-profit entities may engage in debt-settlement and retain their tax-

exempt status because such activity falls outside of the permissible charitable or educational goals and is not an activity listed in the 501(q) provisions pertaining to such entities.

The most significant substantive change from the current law is the language allowing for-profit entities to participate in debt-management services in New Jersey. In an attempt to maximize the protections for New Jersey residents, this draft incorporates and expands upon the changes to the Federal Trade Commission Rule effective in 2010. Staff incorporated the language of the FTC Rule pertaining to the fees that may be charged by certain for-profit entities and applied it more broadly than the FTC did. This draft applies the FTC Rule to all entities that engage in debt settlement, not only those whose business model involves at least one interstate telephone call. This was done to address, among other things, Commission concerns about entities that operate solely via the internet.

In addition, the language of the NCCUSL act was modified to eliminate certain automatic exemptions from the law (for attorneys, CPAs and financial planners, for example) and to otherwise adjust the exemption language to afford more consumer protection. Additional language, based on the statutes of other states and designed to afford more protection to consumers, was added to the sections pertaining to the prerequisites for entering into an agreement, the mandatory agreement language, marketing and advertising requirements and remedies in the event of a violation of the act.

The language of the Uniform Act was also modified to require licensing, rather than registration in New Jersey. This was not done to effect a substantive change in the law, but to recognize that in New Jersey, “registration” implies a unilateral act on the part of the registrant, while licensure requires the approval of the licensing body.

This draft does not distinguish between secured and unsecured debt, but places mortgages in a class by themselves and permits debt-management services with regard to other debt, whether secured or unsecured. The current New Jersey law on this subject includes *N.J.S.* 17:16G-1 to G-9 (Debt Adjustment and Credit Counseling, enacted in 1979) and *N.J.S.* 45:18-1 to 18-6.1 (Collection Agencies, operation of collection agencies is addressed separately from debt adjusters; no licensing or reporting requirements are imposed on collection agencies).

To this time, comments and suggestions have been received from various entities, including the Office of the Attorney General, New Jersey Department of Banking and Insurance, Legal Services of New Jersey, the New Jersey Housing Mortgage & Finance Association, the Advisory Committee on Professional Ethics and representatives of both for-profit and not-for-profit providers of debt-management services as well as New Jersey Citizen Action and Consumer Union.

It is recommended that NJDMSA be adopted and that *N.J.S.* §§ 17:16G-1 to G-9 be repealed. The language contained in those sections pertaining to “high cost home loan counselors” (found at 17:16G-5 c. and d.) and the filing of annual reports by those individuals is recommended for inclusion in *N.J.S.* 46:10B-28 (which deals with the examination and investigation of persons licensed or subject to the provisions of the New Jersey Residential

Mortgage Lending Act), or in its own section of the statute within the RMLA. Conforming amendments will also be needed to *N.J.S. 2C:21-19(f)* and *N.J.S. 17:1C-33*.

DMSANJ - Draft Act

Section 1. Short title

This act may be cited as the Debt-Management Services Act of New Jersey.

COMMENT

This section contains Section 1 of the UDMSA. Current New Jersey law fails to protect New Jersey consumers from some of the abuses associated with debt relief services. The Department of Banking and Insurance noted that if this act is adopted, it will be necessary to amend the related provision of the criminal code, found at *N.J.S. 2C:21-19(f)*.

Section 2. Definitions

a. In this act:

(1) “Administrator” means the Commissioner of the Department of Banking and Insurance.

(2) “Affiliate”:

(A) with respect to an individual, means:

(i) the spouse, domestic partner or partner in a civil union of the individual;

(ii) a sibling of the individual or the spouse, domestic partner or partner in a civil union of a sibling;

(iii) an individual or the spouse, domestic partner or partner in a civil union of an individual who is a lineal ancestor or lineal descendant of the individual or the individual’s spouse, domestic partner or partner in a civil union;

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

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

(B) with respect to an entity, means:

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

(ii) an officer of, or an individual performing similar functions with respect to, the entity;

(iii) a director of, or an individual performing similar functions with respect to, the entity;

(iv) subject to adjustment of the dollar amount pursuant to Section 21f., a person that receives or received more than \$25,000 from the entity in either the current year or the preceding year or a person that owns more than 10 percent of, or an individual who is employed by or is a director of, a person that receives or received more than \$25,000 from the entity in either the current year or the preceding year;

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

(vi) the spouse, domestic partner or partner in a civil union of, or an individual occupying the residence of, an individual described in subsections (B)(i) through (v), inclusive; or

(vii) an individual who has the relationship specified in subsection (A)(iv) to an individual or the spouse, domestic partner or partner in a civil union of an individual described in subsections (B)(i) through (v), inclusive.

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

(3) “Bank” means a financial institution engaged in the business of banking, chartered under federal or state law, and regulated by a federal or state banking regulatory authority.

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

(5) (A) “Certified counselor” means an individual certified by a training program or certifying organization, approved by the administrator by regulation, that authenticates the competence of individuals providing education and assistance to other individuals in connection with debt-management services in which an agreement contemplates that creditors will reduce finance charges or fees for late payment, default, or delinquency.

(B) “Certified debt specialist” means an individual certified by a training program or certifying organization, approved by the administrator by regulation, that authenticates the competence of individuals providing education and assistance to other individuals in connection with debt-management services in which an agreement contemplates that creditors will settle debts for less than the full principal amount of debt owed.

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

(7) “Day” means calendar day.

(8) “Debt-management services” means services as an intermediary between an individual and one or more creditors of the individual for the purpose of obtaining concessions, including settlement, but does not include an individual or entity providing purely educational services.

(9) “Lead generator” means a person who supplies a provider with the names of potential customers, directs communications of an individual to a provider, or otherwise channels customers to a provider.

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

(11) “Plan” means a program or strategy in which a provider furnishes debt-management services to an individual and which:

(A) includes a schedule of payments to be made by or on behalf of the individual and used to pay debts owed by the individual; or

(B) has the purpose of settling or renegotiating an individual’s debt owed to a creditor or creditors in an amount less than the full amount of the principal amount of the debt.

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

(13) “Provider” means a person that provides, offers to provide, or agrees to provide debt-management services directly or through others and is or should be licensed pursuant to this act.

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

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

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

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

(16) “Trust account” means an account ~~held by a provider that is~~ to be used for payment of a provider’s fees or for payment to creditors pursuant to a plan, or both.

~~(A) established in an insured bank;~~

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

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

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

b. The administrator may define such other terms by regulation as the administrator deems necessary for the implementation and enforcement of this act.

COMMENT

This section contains Section 2 of the UDMSA. Current New Jersey law authorizes the Commissioner of the Department of Banking and Insurance to grant licenses to debt adjustment and credit counseling services (*N.J.S.* § 17:16G-2).

This definition of “affiliate” in this section was modified to replace the term “spouse” with “spouse, domestic partner or partner in a civil union” to comply with New Jersey law.

The definitions for “administrator”, “bank”, “concessions”, “day”, “person”, “principal amount of the debt”, and “sign” found in the NCCUSL act have been included here. Those definitions are included for the sake of clarity because those terms are used in this draft.

With regard to the certified counselors or certified debt specialists, it is noted that while DOBI had expressed concerns about the certification issue, most states debt-management statutes require counselor certification within 12 months of the counselor’s hiring date. Some not-for-profit entities in New Jersey reduced the time-frame to six months to comply with more stringent laws in other states (Maryland, for example). Counselors may presently obtain certification as a certified personal finance counselor from the Center for Financial Certifications, a division of the Institute for Financial Literacy. Certification requirements include a review of course materials and a passing score on a proctored exam. Maintaining certification requires a minimum of 20 hours of continuing education units every two years. Some commonly used third-party certifying agencies are: Association for Financial Counseling and Planning Education; Center for Financial Certifications; National Association of Certified Credit Counselors; National Foundation for Credit Counseling; and National Institute for Financial Education of America.

“Debt-management” has been removed from the definitions of “agreement”, “plan”, “provider” and “settlement fee” since the act specifies that those terms are defined for the purposes of this act and the additional words are not necessary for clarification.

Exemption language was removed from the definition of “debt-management services” and is now included in Section 3, which pertains to exempt agreements and persons so that all substantive exemption language is located in a single section. This section was revised to include an explicit reference to settlements as a type of debt-management service that an intermediary may provide under the Act.

Subsection a.(9) was added to reflect a change in NCCUSL’s draft in 2011 and in response to comments by LSNJ that the inclusion of lead generators was an important consumer protection. Subsection a.(11)(B) includes a definition for a plan that includes the debt settlement model of debt reduction to insure that all of the consumer protective language included in the act applies to individuals receiving assistance from a provider of the debt-management and the debt-settlement type. The added language was based on the enacted Illinois debt-settlement statute and a proposed New York bill. Subsection a.(13) was also revised in response to the comments from DOBI to add “and is or should be licensed pursuant to this act”. The definition of “trust account” was revised to reflect the language in the NCCUSL act.

Subsection a.(16), was changed to incorporate a change to the NCCUSL draft in 2011.

The current regulations contain a number of definitions to supplement those found in the statute. Subsection b. is new and is included to clarify that the administrator may define other terms by regulation as necessary.

Section 3. Exempt agreements and persons

a. This act does not apply to a provider to the extent that the provider receives no compensation for debt-management services.

b. This act does not apply to an attorney-at-law of this State or a certified public accountant of this State unless the attorney or certified public accountant is engaged in a business which regularly provides debt management services or the principal purpose of which is to provide debt management services. An attorney or certified public accountant who is subject to this act is not required to obtain an additional license from the administrator as long as his or her license is in good standing and has not been suspended or revoked.

c. This act does not apply to the following persons or their employees when engaged in the regular course of the person's business or profession:

(1) a judicial officer, a person acting under an order or judgment 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; or

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

d. This act does not apply to the following persons or their employees:

(1) a person who is a regular, full-time employee of a debtor, and who acts as an adjuster of his employer's debts;

(2) a person acting pursuant to any order or judgment of court, or pursuant to authority conferred by any law of this State or the United States;

(3) a person who is a creditor of the debtor, or an agent of one or more creditors of the debtor, and whose services in adjusting the debtor's debts are rendered without cost to the debtor;

(4) a person who, at the request of a debtor, arranges for or makes a loan to the debtor, and who, at the authorization of the debtor, acts as an adjuster of the debtor's debts in the disbursement of the proceeds of the loan, without compensation for the services rendered in adjusting those debts; or

(5) a person who is:

(A) certified by the United States Secretary of Housing and Urban Development as a housing counseling organization or agency pursuant to section 106 of Pub.L. 90-448 (12 U.S.C. s.1701x);

(B) participating in a counseling program approved by the New Jersey Housing and Mortgage Finance Agency; and

(C) not holding or disbursing the debtor's funds.

COMMENT

This section contains Section 3 of the UDMSA. The language of the NCCUSL act was modified to remove the exemption for attorneys, certified public accountants and financial planners from the definitions section and include it in this section pertaining to exemptions.

Subsection b. has been inserted in an effort to clarify that an attorney or CPA is not required to obtain a second license from DOBI, but that the remaining provisions of the act do apply to those who do a significant amount of debt-relief work. If an attorney or a CPA engages in a business which regularly provides debt management services or the principal purpose of which is to provide debt management services, this act applies to them. This change was made to address the fact that attorneys have been found to be “bad actors” in debt-relief activities in other states and because it has been suggested that an “attorney-referral” model of debt-settlement activity may increase in New Jersey. Comment from the State Bar Association regarding the application of the act to attorneys has been requested and is anticipated at the end of April or beginning of May.

The language was also modified to remove exemptions for a provider who “has no reason to know” that the individual they are dealing with resides in New Jersey in response to preliminary informal comments from the Attorney General’s Office seeking to increase the protection available to New Jersey consumers.

The language of subsection d. above contains exemptions found in N.J.S.A. 17:16G-1c.(2).

Section 4. Licensure required

a. Except as otherwise provided in subsection b. of this section, a provider may not provide debt-management services to an individual residing in this state at the time it agrees to provide the services unless the provider is licensed under this act.

b. If a provider is licensed under this act, subsection a. of this section does not apply to an employee or agent of the provider.

c. The administrator shall maintain and publicize, including through the administrator’s internet website, a list of the names of all licensed providers.

d. Both not-for-profit and for-profit entities may be licensed to provide debt-management services in New Jersey if the entity complies with the requirements of this act.

e. A provider may not provide services where an agreement contemplates managing or settling debts secured by a mortgage on real estate unless otherwise authorized to do so by federal or state law. For purposes of this act, the term “debt secured by mortgage on real estate” shall refer to any loan primarily for personal, family, or household purposes that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling, as defined in section 103(v) of the Truth in Lending Act, Pub.L.90-321 (15 U.S.C. s.1602(v)), or residential real estate upon which is constructed or intended to be constructed a dwelling.

f. Any person who knowingly and willfully engages in the business of debt-management in this State without a license, in violation of this act, shall be guilty of a crime of the fourth degree pursuant to N.J.S. 2C:21-19f.

COMMENT

This section contains Section 4 of the UDMSA, with the addition of New Jersey law, with the addition of language from the NCCUSL act and New Jersey law. UDMSA includes a requirement for registration, not licensure. The requirement has been changed to one for licensure to recognize the fact that, in New Jersey, registration implies a unilateral act, while licensure requires the approval of the licensing body. Subsection b., found in the NCCUSL

draft, has been included to clarify that if a provider is licensed pursuant to this act, its employees and agents need not be individually licensed.

This section includes the general requirement of a license and the specific information that must be provided with an application for licensure (or license renewal) are found in Section 5 below.

One of the key issues on which there has been substantial comment is the issue of allowing for-profit entities to engage in debt-management activities, generally involving debt settlement (a reduction of the principle amount of the debt, rather than a reduction in interest, finance charges, service charges and the like). Current New Jersey law does not allow for-profit entities to do so, although 42 other states permit for-profit entities to engage in debt-relief activities. It has been suggested that the IRS does not allow tax-exempt not-for-profit entities to engage in debt settlement because such activity falls outside of the permissible charitable or educational goals. If that is an accurate assessment of the impact of the law, then for-profit and not-for-profit entities seem to provide different types of services, suitable for – and helpful to – different segments of New Jersey consumers. Subsection d. was added to make explicit the significant proposed change in New Jersey to allow the participation of for-profit entities in debt-management services.

The UDMSA language was revised to clarify that it allows entities to provide debt-management services for debts other than those secured by a mortgage on real estate. The inclusion of the reference to real estate is to distinguish those from “chattel mortgages”. This is an archaic term that is nonetheless still used in this State. A special non-profit agency (HMFA) currently handles debts secured by mortgages. DOBI suggested incorporating the definition of “residential mortgage loan” found at *N.J.S. 17:11C-53* in this section, which was done in subsection e. Subsection f. incorporates the language presently found at *N.J.A.C. 3:25-3.1(d)*.

Section 5. Application for licensure or license renewal: form, fee, and accompanying documents

a. An application for licensure or the renewal of a license as a provider must be in a form prescribed by the administrator and shall contain, at a minimum:

- (1) the applicant’s name, principal business address and telephone number, and all other business addresses, electronic-mail addresses, and Internet website addresses;
- (2) all names under which the applicant conducts business;
- (3) the address of each location in this state at which the applicant will provide debt-management services or a statement that the applicant will have no such location;
- (4) if the applicant does not provide an in-state business address:
 - (A) the name and business address of an in-state agent to accept service of process in any action, suit or proceeding that may arise under this act; or
 - (B) designation of the administrator as the in-state agent to accept service of process.
- (5) evidence of accreditation for debt-management services by an independent accrediting organization recognized by the administrator pursuant to regulation;
- (6) an affirmation, with supporting evidence as appropriate, that each counselor employed by the applicant is, or will become within 12 months of being employed as a counselor, a certified counselor or certified debt specialist based on an accreditation from an independent accrediting organization recognized by the administrator pursuant to regulation;

(7) the name and home address of each officer and director of the applicant and each person that owns at least 10 percent of the applicant;

(8) identification of every jurisdiction in which, during the five years immediately preceding the application:

(A) the applicant or any of its officers or directors has been licensed or registered to provide debt-management services; or

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

(9) a statement describing, to the extent it is known or should be known by the applicant, any material civil or criminal judgment or litigation and any material administrative or enforcement action by a governmental agency in any jurisdiction against the applicant, any of its officers, directors, owners, or agents, or any person who is authorized to have access to a trust account ~~required by Section 14~~;

(10) an identification of all trust accounts to be used by the provider in the performance of debt-management services and an irrevocable consent authorizing the administrator to review and examine the trust accounts;

(11) a copy of the applicant's financial statements, for each of the two years immediately preceding the application or, if the applicant has not been in operation for the two immediately preceding years, for the period of its existence. The applicant is required to provide audited financial statements to the administrator only if audited statements are required to be provided to the IRS;

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

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

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

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

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

(A) any affiliate of the applicant; or

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

(17) a statement of the amount of compensation of the applicant's five most highly compensated employees for each of the three years immediately preceding the

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

(18) the name and business address of the employer of each director during the immediately-preceding 10 year period;

(19) the identity of each director who is an affiliate of the applicant; and

(20) any other information deemed necessary by the administrator by regulation.

b. Subject to adjustment of dollar amounts pursuant to Section 21f., an application for licensure or the renewal of a license as a provider must be accompanied by:

(1) for an initial application for licensure, the fee established by the administrator. The fee is not required with an application for the renewal of a license pursuant to this act;

(2) the bond required by Section 8;

(3) identification of all trust accounts ~~required by Section 14~~ and an irrevocable consent authorizing the administrator to review and examine the trust accounts;

(4) for an initial application for licensure, the applicant shall provide evidence of insurance in the amount of \$250,000. An application for renewal of a license shall include evidence of insurance in an amount equal to the larger of \$250,000 or the highest daily balance in a trust account ~~required by Section 14~~ during the six-month period immediately preceding the application:

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

~~(B) 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 or, alternatively, deemed satisfactory by the administrator;~~ an insurance company authorized by law to do business in this State;

(C) with a deductible not exceeding \$5,000;

(D) payable for the benefit of the applicant, this state, and individuals who are residents of this state, as their interests may appear; and

(E) not subject to cancellation by the applicant or the insurer until 60 days after written notice has been given to the administrator; and

(5) if the applicant is organized as a not-for-profit entity or is exempt from taxation under the Internal Revenue Code, 26 U.S.C. Section 501, as amended:

(A) evidence of not-for-profit status, tax-exempt status, or both, as applicable;

(B) a certification by a certified public accountant or public accountant that the salaries and expenses paid by the applicant are reasonable compared to those incurred by comparable organizations providing similar services; and

(C) proof of compliance with N.J.S. 15A:1-1 et seq.

c. An application for licensure shall be accompanied by the applicant's submission to the administrator of the name, address, fingerprints and written consent for a criminal history record background check to be performed on each officer, director, and owner of the applicant, and any employee or agent of the applicant who is authorized to access the applicant's trust accounts. The administrator is authorized to exchange fingerprint data with and receive criminal history record information from the State Bureau of Identification in the Division of State Police and the Federal Bureau of Investigation consistent with applicable State and federal laws, rules and regulations, for the purposes of facilitating determinations concerning the license eligibility for the applicant, based upon any findings related to an officer, director, owner, employee, or agent. The applicant shall bear the cost for the criminal history record background check, including all costs of administering and processing the check. The Division of State Police shall promptly notify the administrator in the event an officer, director, owner, employee, or agent who was the subject of a criminal history record background check pursuant to this subsection, is arrested for a crime or offense in this State after the date the background check was performed, whether the person represents a prospective new licensee, or subsequently, a current licensee.

d. A license is valid for two years. A provider must obtain a renewal of its license biannually. In addition to the requirements imposed by subsections a., b. and c. above, an application for renewal of a license as a provider must:

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

(2) contain any required evidence of independent accreditation or certification and a financial statement for the applicant's fiscal year immediately preceding the application. The applicant is required to provide audited financial statements to the administrator only if audited statements are required to be provided to the IRS;

(3) disclose any changes in the information contained in the applicant's application for license or its immediately previous application for renewal, as applicable. If an application is otherwise complete and the applicant has made a timely effort to obtain information pertaining to criminal record checks and fingerprints but the information has not been received, the administrator may issue a temporary renewal of license. The temporary renewal shall expire no later than 180 days after issuance;

(4) disclose the total amount of money received by the applicant pursuant to plans during the preceding ~~12~~ 24 months from or on behalf of individuals who reside in this state and the total amount of money distributed to creditors of those individuals during that period;

(5) disclose, to the best of the applicant's knowledge, the total amount of money deposited in trust accounts or accumulated during the preceding ~~12~~ 24 months pursuant to plans by or on behalf of individuals who reside in this state and with whom the applicant has agreements; and

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

e. If a license provider files a timely and complete application for renewal of license, the license remains effective until the administrator, in a record, notifies the applicant of a denial and states the reasons for the denial.

f. If the administrator denies a timely and complete application for renewal of license as a provider, the applicant, within 30 days after receiving notice of the denial, may appeal and request a hearing pursuant to N.J.S. 52:14B-11. Subject to Section 23, while the appeal is pending the applicant shall continue to provide debt-management services to individuals with whom it has agreements. If the denial is affirmed, subject to the administrator's order and Section 23, the applicant shall continue to provide debt-management services to individuals with whom it has agreements until, with the approval of the administrator, it transfers the agreements to another licensed provider or returns to the individuals all unexpended money that is under the applicant's control.

g. An applicant or provider shall notify the administrator within 10 days after a change in the information pertaining to:

- (1) the required insurance policy;
- (2) the taxation status;
- (3) any name or address information;

(4) any material civil, or criminal judgment or litigation or material administrative or enforcement action by a governmental agency in any jurisdiction against the applicant or provider or any of its officers, directors, owners, agents or any person authorized to have access to the applicant's or provider's trust account;

(5) any form of agreement that will be used with individuals who reside in this state; or

(6) the schedule of fees and charges that will be used with individuals who reside in this state.

COMMENT

This section combines Sections 5, 7 and 11 in the UDMSA since the information required to be submitted with an initial application for a license and the information required to renew a license is substantially similar.

The language in subsection a.(7) regarding prior jurisdictions in which services were provided or in which an individual received debt-management services was expanded to follow the NCCUSL draft in order to provide greater clarity. Subsection a.(10) was modified to track the NCCUSL draft more closely. Subsection a.(19) contains language taken from *N.J.A.C. 3:25-2.2(a)(11)*. Subsection b.(5) has been revised to include reference to New Jersey's statutory requirements for not-for-profit entities.

DOBI advised that New Jersey's licensing laws generally establish a two-year cycle for licenses and recommended the incorporation of the two-year cycle in this act. The language was modified to eliminate the fee on renewal in response to information supplied by DOBI indicating that, pursuant to New Jersey's dedicated funding laws (*N.J.S. 17:1C-33 et seq.*), applicants do not pay a fee for the renewal of licenses.

Subsection b.(4)(B) was previously modified in response to a comment by DOBI suggesting that requiring an "A" rating might unnecessarily narrow the field of entities who are permitted to provide bonds. It was suggested that determinations of satisfactory bonding companies could be made on a case-by-case basis or by rulemaking. The language of the section was altered to permit either an "A" rating or the approval of the Commissioner. In response

to a request for additional information, DOBI advised that it recommended the elimination of any reference to the insurer's rating. DOBI explained that none of New Jersey's current licensing laws prescribe a rating but instead establish only basic requirements, indicating, for example, that the bond must be obtained from "a surety company authorized by law to do business in this State." See, N.J.S.17:11C-63 (residential mortgage lenders), N.J.A.C. 3:27-4.1(a) (money transmitters), N.J.A.C. 3:25-2.4(a) (debt adjusters). DOBI further explained that the precise rating of a fidelity or performance bond insurer is generally more of an issue with construction contracts to which the State is a party and that it has not had a negative experience with the solvency or performance of bond insurers contracted in connection with licensing requirements that would suggest any real need for the additional complications of imposing a rating requirement in this new licensing program.

Also, as a result of concerns regarding the expense of obtaining audited financial statements (which may start at \$2,000 for a small entity) DOBI suggested modifying the language to require audited statements only when they are required by the IRS (currently, when revenue exceeds \$1 million for a non-profit entity). Subsection b.(5)(B) includes the language now found at *N.J.S. 17:16G-5e*.

Subsection c. above is taken from A1949, rather than the language of the NCCUSL act since the bill included more detailed and New Jersey-specific language.

Since the draft contemplates a 24 month licensure period, the prior references to 12 months have been changed to 24 months in this draft. Subsection d.(5) was modified to reflect NCCUSL's 2011 changes.

Subsection g. is taken from Section 7 of the NCCUSL act but it has been modified to reflect licensure and to include the substance of the provisions about which the administrator must be notified, rather than just referring to them by section number.

Section 6. Application for licensure: required information; public information.

a. An application for licensure must be signed under oath and made on forms prescribed by the administrator, who shall, after consultation with the Attorney General of this State, promulgate regulations setting forth any information in addition to that required by Section 5 that is to be included on the application in order to demonstrate that the applicant is qualified to be licensed and possesses the necessary financial resources to sustain its operation.

b. If a provider holds a license or certificate of registration in another state authorizing it to provide debt-management services, the provider may submit a copy of that license or certificate and the application for it instead of an application in the form prescribed by this act and any regulations promulgated pursuant to this act. If the application, license or certificate issued by another state meets the following criteria, the administrator shall accept the application and the license or certificate from the other state as an application for licensure as a provider or for renewal of licensure as a provider if:

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

(2) the applicant, under oath, certifies that the information contained in the application is current or, to the extent it is not current, supplements the application to make the information current.

c. The submission in lieu of an application by a debt-management provider licensed or registered out-of-state shall be reviewed and issued or denied in the same manner as set forth for an application.

d. Except for information pertaining to financial statements, criminal records checks, and the addresses and compensation of employees, the administrator shall make the information in an application for licensure or the renewal of a license as a provider available to the public. Except for information pertaining to financial statements, criminal records checks, and the addresses and compensation of employees, the provider shall make a copy of the information contained in an application for licensure or the renewal of a license as a provider, and a copy of its annual report, available to the public at each of its physical locations and on any website pertaining to its debt-management business.

COMMENT

This section combines the provisions of Sections 6 and 12 of the NCCUSL act plus New Jersey law.

Current New Jersey law contains language like that found in subsection a. of this section and the current requirements for the license application are set forth in a regulation at *N.J.A.C. 3:25-2.2*.

Commenters, including DOBI, raised a concern that the language of this provision not be interpreted as automatic or “rubber stamp” acceptance of licensing in another state.

The second sentence of subsection d. is derived from the language of *N.J.S. 17:16G-5*.

Section 7. License: issuance or denial

a. Upon determining that an applicant is qualified for licensure under this act, the administrator shall issue a license for each location where the licensee may conduct debt adjustment activities on behalf of debtors residing in New Jersey.

b. The administrator may deny licensure if:

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

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

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

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

c. The administrator shall deny a license if, with respect to an applicant that is organized as a not-for-profit entity or has obtained tax-exempt status under the Internal Revenue Code, 26 U.S.C. Section 501, as amended, the applicant’s board of directors is not independent of the applicant’s employees and agents.

d. Subject to adjustment of the dollar amount pursuant to Section 21f., a board of directors is not independent for purposes of subsection c. of this section if more than one-fourth of its members:

(1) are affiliates of the applicant; or

(2) after the date 10 years before first becoming a director of the applicant, were employed by or directors of a person that received from the applicant more than \$25,000 in either the current year or the preceding year.

e. An application for the renewal of a license shall be reviewed, and the license issued or denied, in the same manner as an initial application for a license.

COMMENT

This is Section 9 of the UDMSA. The language of subsection a. of this section is taken from N.J.A.C. 3:25-2.2b. Since the current law does not contain the 120-day review period within which the administrator is required to act, no such time limitation is contained in this draft.

When asked how quickly the Department generally acts with regard to these matters, and about the possibility of including a time period for review within the statute, DOBI explained that, as a general matter, the Department does not favor the statutory establishment of a time period within which a completed application for a license must be acted upon by the Department. DOBI explained that such provisions do exist in the statute with respect to lesser filings, submitted in the course of dealings after initial licensing or chartering, e.g., the bylaws amendment provision for credit unions, at N.J.S. 17:13-94. DOBI indicated that, as the credit union provision illustrates, an alternative to a statutory deadline is the possibility of a “deemer clause” that operates to grant automatic approval of the application. DOBI suggested that while a deemer clause makes business and policy sense with certain applications affecting issues after the initial formation or licensing of an entity, the Department does not believe that it makes sense as applied to fundamental qualification issues included in a license application.

The Department’s website does provide public information on the licensing process. This information includes a Frequently Asked Questions section for debt adjusters. In the FAQ, DOBI advises applicants that the process time for a fully completed application is normally 90 days and has no problem with advising about such timing in an informative but non-binding manner. DOBI expressed concerns regarding a change to the law and the attendant complications of starting up an entirely new, comprehensive licensing program under DMSA. DOBI requested that no specific deadline for Department action (approval or denial) on a license application be inserted in this statute, noting the absence of such timeframes imposed for other types of license applications.

Language authorizing a temporary license on an initial application was removed after consideration of the fact that perhaps it is more appropriate to wait until the criminal background check and fingerprint information is obtained on an initial application, but a temporary license is available on renewal since the submission of the criminal history check and fingerprint information is not within the control of the applicant.

This draft does not contain language that mandates that the administrator provide written information within a set number of days after denying a license. Section 5f., above, contains language pertaining to the appeal of a denial of licensure.

Subsection e. above is taken from Section 7a. of A1949.

Section 8. Bond or authorized substitute required

a. Except as otherwise provided in subsections f. and g. of this section, a provider that is required to be licensed under this act shall file a surety bond with the administrator, which must:

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

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

b. Subject to adjustment of the dollar amount pursuant to Section 21f., a surety bond filed pursuant to subsection a. of this section must:

(1) be in an amount not less than \$50,000 for the first office and \$25,000 for each additional office, or such other amount as the administrator determines is warranted by the financial condition and business experience of the provider, the history of the provider in performing debt-management services, the risk to individuals, and any other factor the administrator considers appropriate;

(2) ~~be issued by a bonding, surety, or insurance company authorized to do business in this state and rated at least A by a nationally recognized rating organization or, alternatively, deemed satisfactory by the administrator~~ an insurance company authorized by law to do business in this State;

(3) have payment conditioned upon noncompliance of the provider or its agent with this act; and

(4) be considered as attributable to the first 250 debtors serviced at any office and the first \$250,000 in funds held in the trust account of the licensee. The amount of the bond required by this section shall be increased based on information regarding the number of New Jersey debtors serviced by and the balance held in the trust accounts of licensees as set forth below:

(A) The amount of the bond shall be increased by \$25,000 for each additional set of 250 New Jersey debtors or portion thereof serviced at each office as reported in the most recent annual report; and

(B) The amount of the bond shall be increased by \$25,000 for each set of \$250,000 or portion thereof in additional funds held in the trust account of the licensee based on the average of the highest daily balance each month as reported in the most recent annual report.

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

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

(1) the administrator assesses expenses under Section 21b.(1), issues a final order under Section 22a.(2), or recovers a final judgment under Section 22a.(4) or (5) or d.; or

(2) an individual recovers a final judgment pursuant to Section 24a., b., or c.(1), (2), or (4).

e. The surety company shall pay consumers claims based on the damages directly incurred by the wrongful act, default, fraud or misrepresentation of the licensee. Attorney's fees, pre- or post-judgment interest, court costs and similar charges are not recoverable through the

bond unless such charges are included in a final judgment against the licensee and the surety company was given prior notice of the court action and an opportunity to respond. The bond shall not be payable for claims made by business creditors. The bond shall not be payable for treble damage claims pursuant to the Consumer Fraud Act or any other State or Federal law.

f. If claims against a surety bond exceed or are reasonably expected to exceed the amount of the bond, the administrator, on the initiative of the administrator or on petition of the surety, shall, unless the proceeds are adequate to pay all costs, judgments, and claims, distribute the proceeds in the following order:

(1) to satisfaction of a final order or judgment under Section 22a.(2), (4), or (5) or (d);

(2) to final judgments recovered by individuals pursuant to Section 24a., b., or c. (1), (2) or (4), pro rata;

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

(4) if a final order or judgment is issued under Section 22a., to the expenses charged pursuant to Section 21b.(1).

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

(1) a certificate of insurance

(A) ~~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~~ an insurance company authorized by law to do business in this State; and

(B) with no deductible, or if the provider supplies a bond in the amount of \$5,000, a deductible not exceeding \$5,000; or

(2) with the approval of the administrator:

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

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

h. If a provider furnishes a substitute pursuant to subsection g., the provisions of subsections a., c., d., e. and f. apply to the substitute.

COMMENT

This section combines Sections 13 and 14 of the NCCUSL act, plus New Jersey law. DOBI suggested modifying subsection (b)(2) to remove the requirement of an “A” rated bonding company as explained in the comment to section 5 above. Subsections b.(2) and g.(1)(A) were modified in the same manner as Section 5 above in response to additional information provided by DOBI.

Some of the New Jersey law language added in subsection b.(4) was drawn from *N.J.A.C. 3:25-2.4*. The language found in subsection e. was drawn from *N.J.A.C. 3:25-2.4(a), (c), (d) and (e)*.

Section 9. Customer service

a. A provider that is required to be licensed under this act shall maintain a toll-free communication system, including a toll-free telephone number, staffed at a level that reasonably permits an individual to speak to a certified counselor, certified debt specialist, or customer-service representative, as appropriate, during ordinary business hours.

b. Unless the administrator, by regulation, provides otherwise, the disclosures and documents required by this act must be in English. If a provider communicates with an individual primarily in a language other than English, the provider must furnish a translation into the other language of the disclosures and documents required by this act.

COMMENT

This section combines Sections 16 and 21 of the NCCUSL act with the substitution of the term “licensed” for “registered” and “regulation” for “rule”.

Section 10. Prerequisites for Providing Debt-Management Services.

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

- (1) free of additional charge if the individual enters into an agreement;
- (2) for a charge if the individual does not enter into an agreement; and
- (3) for a charge if the individual enters into an agreement, using the following terminology, as applicable, and format:

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

b. A provider may not furnish debt-management services unless the provider:

(1) provides the individual with reasonable education about the management of personal finance, with education including such topics as planning a budget, increasing personal savings, and reforming spending practices;

(2) has prepared a financial analysis of the individual's information, including the individual's income, expenses, and debts; and

(3) if the individual is to make more than one payment to a creditor or creditors:

(A) has prepared a plan for the individual;

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

(C) has provided the individual with a statement containing a good faith estimate of the length of time the plan will take to complete; and

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

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

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

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

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

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

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

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

(D) all other creditors.

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

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

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

(3) that establishment of a plan may harm the individual's credit history and credit rating or credit scores;

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

(5) that using a debt-management service may not stop all creditor activity, including creditor lawsuits and garnishments;

(6) that not all creditors will accept a reduction in the balance, interest rate, or fees a consumer owes;

(7) the amount of time estimated to be necessary to achieve the represented results;

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

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

(10) if applicable, a statement setting forth the estimated amount of money or the percentage of the debt the consumer must accumulate before a settlement offer will be made to each of the individual's creditors.

e. If an agreement contemplates that creditors will settle debts for less than the full principal amount of debt owed, before an individual assents to such an agreement a provider shall, in addition to the disclosures required by subsection d. of this section, prepare and provide to the consumer in writing and retain a copy of the following:

(1) a financial analysis of the individual's information, including the individual's income, expenses, and debts;

(2) a statement containing a good faith estimate of the length of time it will take to complete a debt settlement program, the total amount of debt owed to each creditor included in the debt settlement program, the total savings estimated to be necessary to complete the debt settlement program, and the monthly targeted savings amount estimated to be necessary to complete the debt settlement program;

(3) a statement setting forth the estimated amount of money or the percentage of debt the consumer must accumulate before a settlement offer will be made to each of the individual's creditors; and

(4) a written notice that clearly and conspicuously contains the following disclosure:

CAUTION

We CANNOT GUARANTEE that you will successfully reduce or eliminate your debt.

If you stop paying your creditors, EVEN if you do so pursuant to a plan, there is a strong likelihood that some or all of the following may happen:

- **Creditors may still contact you and try to collect.**
- **Creditors may still sue you for the money you owe.**
- **Your wages or bank account may still be garnished.**
- **Your credit rating and credit score will likely be harmed.**
- **Liens may be placed on your property.**
- **Not all creditors will agree to accept a balance reduction.**
- **You should consider all of your options for addressing your debt, including credit counseling and bankruptcy filing.**
- **The amount of money you owe may increase due to the creditor imposing interest charges, late fees and other penalty fees.**
- **Even if we do settle your debt, you may still be required to pay taxes on the amount forgiven.**

f. The administrator may promulgate regulations modifying the notices required to be given to the individual by the provider.

COMMENT

This language is drawn from section 17 of the NCCUSL act and has been modified. Language found in the UDMSA allowing the provider to comply with the disclosures called for in subsection d. by providing a much more limited disclosure was removed.

The language of this section was also expanded (in subsection b., d. and e.) to include language adapted from the recently-enacted Illinois statute pertaining to debt settlement. Changes were made to the language to reflect commenter’s concerns regarding parity between the types of debt-management services. The language of subsection f. is new and is designed to permit the Commissioner to revise the requirements or incorporate more stringent guidelines for notifications as appropriate.

Section 11. Communication by electronic or other means.

a. In this section “federal act” means the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., as amended.

b. A provider may satisfy the requirements of Section 10, 12, or 15 by means of the Internet or other electronic means if the provider obtains an individual’s consent in the manner provided by Section 101(c)(1) of the federal act.

c. The disclosures and materials required by Sections 10, 12, or 15 shall be presented in a form that is capable of being accurately reproduced for later reference.

d. With respect to disclosure by means of an Internet website, the disclosure of the information required by Section 10(d) must appear on one or more screens that:

(1) contain no other information; and

(2) the individual must see before proceeding to assent to formation of an agreement.

e. At the time of providing the materials and agreement required by Sections 10c. and d., 12, and 15, a provider shall inform the individual that upon electronic, telephonic, or written

request, it will send the individual a written copy of the materials, and shall comply with a request as provided in subsection f. of this section.

f. If a provider is requested, before the expiration of 90 days after an agreement is completed or terminated, to send a written copy of the materials required by Section 10c. and d., 12, or 15, the provider shall send them at no charge within three business days after the request is received, but the provider need not comply with a request more than once per calendar month or if it reasonably believes the request is made for purposes of harassment. If a request is made more than 90 days after an agreement is completed or terminated, the provider shall send within a reasonable time a written copy of the materials requested.

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

- (1) its name and all names under which it does business;
- (2) its principal business address, telephone number, and electronic-mail address, if any; and
- (3) the names of its principal officers.

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

i. If a provider wishes to terminate an agreement with a individual pursuant to subsection h. of this section, it shall notify the individual that it will terminate the agreement unless the individual, within 30 days after receiving the notification, consents to electronic communication in the manner provided in Section 101(c) of the federal act. If the individual consents, the provider may terminate the agreement only as permitted by Section 12a.(6)(G).

COMMENT

This language is found at Section 18 of the NCCUSL act but the definition of “consumer” (“an individual who seeks or obtains goods or services that are used primarily for personal, family, or household purposes”) was removed and the word “consumer” replaced with “individual” for consistency with the other language of the act.

The impact of the reference to federal law in this section seems to be that if consent is given to exchange information in electronic form, then the electronic records shall be valid and effective notwithstanding any state law to the contrary. The federal law requires that a consumer be provided with a clear and conspicuous statement explaining the right to paper/non-electronic records and must waive those rights in order to receive electronic records. A provider must specify the transactions to which a consent applies and additional information concerning how to request paper copies and various software/hardware requirements for storage of, and access to, electronic records. It appears that one situation in which this section may be an issue is if a consumer signs documents electronically after consenting to electronic documents, and then requests the records in a paper form (as the consumer may do pursuant to this draft), and then challenges a discrepancy between the documents. It appears that the electronic documents might prevail in such a case.

It appears, however, that the federal act applies only to transactions affecting interstate commerce, so if a New Jersey company deals only with New Jersey consumers, the provisions of the federal act might not be applicable.

Section 12. Form and contents of agreement

a. An agreement must:

- (1) be in a record;
 - (2) be dated and signed by the provider and the individual;
 - (3) include the name of the individual and the address where the individual resides;
 - (4) include the name, business address, telephone number, email address and internet website address of the provider;
 - (5) be delivered to the individual immediately upon formation of the agreement;
- and
- (6) disclose:
 - (A) the services to be provided;
 - (B) the amount, or method of determining the amount, of all fees, individually itemized, to be paid by the individual;
 - (C) the schedule of payments to be made by or on behalf of the individual, including the amount of each payment, the date on which each payment is due, and an estimate of the date of the final payment;
 - (D) if a plan provides for more than one payment to a creditor or creditors:
 - (i) each creditor of the individual to which payment will be made, the amount owed to each creditor, and any concessions the provider reasonably believes each creditor will offer; and
 - (ii) the schedule of expected payments to each creditor, including the amount of each payment and the date on which it will be made;
 - (E) each creditor that the provider believes will not participate in the plan and to which the provider will not direct payment;
 - (F) how the provider will comply with its obligations under Section 16 regarding periodic reports and the retention of records;
 - (G) that the provider may terminate the agreement for good cause, upon return of unexpended money of the individual;
 - (H) that the individual may cancel the agreement as provided in Section 13;
 - (I) that the individual may contact the administrator with any questions or complaints regarding the provider; and
 - (J) the address, telephone number, and Internet address or website of the administrator.

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

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

d. An agreement must provide that:

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

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

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

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

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

(A) the identity of the creditor; and

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

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

f. An agreement may not:

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

(2) except as permitted by Section 2 of the Federal Arbitration Act, 9 U.S.C. Section 2, as amended, or N.J.S. 2A:23B-1 et seq., contain a provision that modifies or limits otherwise available forums or procedural rights, including the right to trial by jury, that are generally available to the individual under law other than this act;

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

(4) contain a provision that:

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

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

g. All rights and obligations specified in subsection d. of this section and Section 13 exist even if not provided in the agreement. A provision in an agreement which violates subsection d., e., or f. of this section is void.

COMMENT

This language is found at section 19 of the NCCUSL act. The language as shown here uses the term "record" and "electronic record" rather than "written" to reflect the possibility that the transaction may be conducted entirely on-line.

Subsection e. reflects the changes to the NCCUSL document in 2011.

Subsection f.(2) includes reference to the New Jersey version of the Uniform Arbitration Act of 2000, promulgated by NCCUSL and adopted by the Legislature.

NCCUSL's 2011 revision eliminated the first sentence of subsection g. and eliminated the reference to subsection d. in the second sentence. Those changes have not been reflected in this draft.

Section 13. ~~Cancellation of agreement; waiver; Termination of agreement~~

~~a. An individual may cancel an agreement before midnight of the third business day after the individual assents to it, unless the agreement does not comply with subsection b. of this section or Section 12 or 18, in which event the individual may cancel the agreement within 30 days after the individual assents to it. To exercise the right to cancel, the individual must give notice in a record to the provider. Notice by mail is given when mailed.~~

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

Notice of Right to Cancel

~~You may cancel this agreement, without any penalty or obligation, at any time before midnight of the third business day that begins the day after you agree to it by electronic communication or by signing it. This period under the law extends to 30 days if _____ failed to comply with certain requirements of the law.~~

~~Name of provider~~

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

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

~~notice, or any other written notice to _____
Name of provider~~

at _____ before midnight on _____.
Address of provider _____ Date

~~If you cancel this agreement within the 3 of 30-day period, as allowed by law, we will refund all money you already have paid us.~~

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

~~I cancel this agreement,~~

Print your name

Signature

Date

~~e. If a personal financial emergency necessitates the disbursement of an individual's money to one or more of the individual's creditors before the expiration of three days after an agreement is signed, an individual may waive the right to cancel. To waive the right, the individual must send or deliver a signed, dated statement in the individual's own words describing the circumstances that necessitate a waiver. The waiver must explicitly waive the right to cancel. A waiver by means of a standard form record is void.~~

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

~~e. If a provider or an individual terminates an agreement, the provider shall immediately return to the individual any money of the individual held in trust for the benefit of the individual, less fees that are payable to the provider pursuant to this section and Section 15.~~

a. An individual may terminate an agreement at any time, without penalty or obligation, by giving the provider written or electronic notice.

b. A provider may terminate an agreement if an individual fails for 60 days to make payments required by the agreement or for other good cause.

c. In the event of termination for any reason:

(1) the provider shall, within seven business days of the termination, pay all money that the provider, its agent, or person administering a trust account has received from or on behalf of the individual, other than amounts properly disbursed to creditors or received pursuant to Section 15; and

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

COMMENT

This language is found at sections 20 and 26 of the NCCUSL act (subsections d. and e. are Section 26 of the Model Act). 20 of the 2011 NCCUSL document.

Section 14. Trust account.

a. 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 two business days after receipt, the provider shall deposit the money in a trust account. ~~established for the benefit of individuals to whom the provider is furnishing debt management services.~~

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

b. A provider may request or require an individual to place money in a trust account.

c. A trust account must be at an insured bank and, unless the individual owns the account, must:

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

(2) be administered by an entity that is not:

(A) the provider or

(B) an affiliate of the provider; and

(3) provide that any interest accruing on the individual's funds in the account is credited to the individual.

d. A person administering a trust account may not give or accept any compensation from the provider in exchange for referrals of business involving debt-management services.

e. Upon termination of an agreement, a person administering a trust account shall, within seven business days of the termination, pay the individual all money received by or on behalf of the individual, other than amounts it has properly disbursed to creditors or the provider.

f. Money in a trust account is not property of the provider or the person administering the account. The money belongs to the individual from whom or on whose behalf it was deposited and is not available to creditors of the person administering the account or creditors of the provider.

~~(e) A provider~~ (g) A person administering a trust account shall:

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

(2) disburse money paid by or on behalf of the individual to creditors of the individual as disclosed in the agreement, within 10 days of receipt, except that:

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

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

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

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

h. A provider or person administering a trust account may not include in the trust account money of individuals other than those to whom the provider is furnishing debt management services.

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

~~f. If a provider has established a trust account pursuant to subsection (a), the provider~~

j. A person administering a trust account shall reconcile the trust account at least once a month. The reconciliation must compare the cash balance in the trust account with the sum of the balances in each individual's account. If the provider or its designee has more than one trust account, each trust account must be individually reconciled.

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

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

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

COMMENT

This revised language is found at section 22 of the 2011 NCCUSL act. Subsection c.(2) incorporates the 10 day time limit for disbursements from the current New Jersey law, N.J.S. 17:16G-9.

Section 15. Fees and other charges

a. Unless the administrator promulgates regulations altering the fees and charges that may be imposed by providers of debt-management services, the permissible fees and charges are those set forth in this section.

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

c. A provider may not impose charges or receive payment for debt-management services until the provider and the individual have signed an agreement that complies with Sections 12 and 18 of this act.

~~d. If an individual assents to an agreement, a provider may not impose a fee or other charge for educational or counseling services, or the like, except as otherwise provided in this subsection and Section 18.~~

d. Unless otherwise prohibited by law, a provider may charge a one-time fee for consultation, obtaining a credit report, setting up an account, and the like, which fee shall not exceed \$75.

e. Unless otherwise prohibited by law, a provider may charge, for credit counseling services, a fee that shall not exceed \$60 in any one month unless the administrator authorizes the provider to charge a different fee based on the nature and extent of the educational or counseling services furnished by that provider. If, before the expiration of 90 days after the completion or termination of educational or counseling services, an individual assents to an agreement, the provider shall refund to the individual any fee paid pursuant to this subsection.

f. A provider offering debt-management services that contemplate the reduction, by creditors, of finance charges, interest or fees for late payment, default or delinquency may not request or receive payment of any fee or consideration for any service until and unless:

(1) the provider has secured the assent of the individual and at least one creditor of the individual to a change in the terms of a debt; and

(2) the individual has made at least one payment toward satisfying the modified terms of the debt.

g. A provider offering debt-management services that contemplate the reduction, by creditors, of finance charges, interest or fees for late payment, default or delinquency may charge a monthly fee not to exceed the lesser of one percent of the gross monthly income of the individual or \$25 per month. \$10 times the number of creditors remaining in the plan at the time that the fee is assessed or \$50 per month.

h. A provider offering debt-management services to settle an individual's debts with creditors for less than the full principal amount of the debt may not request or receive payment of any fee or consideration for any service until and unless:

(1) the provider has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to an agreement signed by the individual; and

(2) the individual has made at least one payment pursuant to that agreement between the individual and the creditor or debt collector.

i. A provider offering debt-management services to settle an individual's debts with creditors for less than the full principal amount of the debt may charge a fee not to exceed 15%

of the amount saved. The amount saved is the difference between the principal amount of debt owed at the time the debt was enrolled in the plan and the amount actually paid to a creditor to satisfy the debt. A fee payable pursuant to this subsection is payable at the time a debt enrolled in a plan is reduced and the reduced amount is paid to the creditor to resolve that debt. If a renegotiated debt is reduced, and the reduced amount is paid to the creditor:

(1) in a lump sum, the fee is payable to the provider at the time that the lump sum is paid to the creditor; or

(2) in more than one payment, then a partial payment of the fee is payable at the time each payment is made to the creditor. The amount of the partial payment of the fee due shall bear the same proportional relationship to the total fee as the partial payment of the reduced debt bears to the total reduced amount to be paid to the creditor.

j. A debt management service provider may not charge more than one fee authorized under this section on the basis that the consumer has entered into a debt management services agreement for joint obligations of a consumer and a consumer's spouse or other member of the consumer's household.

k. Any fees included in this section may be waived at the discretion of the provider.

l. Subject to adjustment of the dollar amount pursuant to Section 21f., if a payment to a provider by an individual under this act is dishonored, a provider may impose a reasonable charge on the individual, not to exceed the lesser of \$25 and the amount permitted by law other than this act.

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

COMMENT

This language of this section is found at section 23 and 24 (subsection g.) in the revised 2011 NCCUSL act.

The fee issue is the one that has generated substantial controversy. With more than 30 years of experience in the regulation and enforcement of New Jersey's current Debt Adjustment and Credit Counseling Act, DOBI may be the most appropriate entity to establish the fees for debt-management services in this state, guided by any applicable federal law (including the FTC Rule pertaining to fees that may be imposed by debt settlement entities). Default fee provisions have been included in this section of the draft.

The fees that may be charged under the current act are set forth in the regulations (*N.J.A.C. 3:25-1.2*) and in the statute (*N.J.S. 17:16G-6*) but the regulations have been more frequently, and more recently, updated. The current regulations for debt-adjusting have guided the fees set here for debt-management services, including education and counseling. This section leaves open the possibility of DOBI altering the fee amounts through regulations. The fee limitations for debt-settlement services included here were incorporated from the enacted Illinois law, much lauded for its level of consumer protection. If the amount proves to be prohibitive to debt-settlement providers doing business in New Jersey, the Department of Banking and Insurance may choose to promulgate new fees.

The original language of the draft called for the following fees for "debt-management" services (the reduction in finance charges, interest and/or fees for late payment, default or delinquency): (A) a fee not exceeding

\$50 for consultation, obtaining a credit report, setting up an account, and the like; and (B) a monthly service fee, not to exceed \$10 times the number of creditors remaining in a plan at the time the fee is assessed, but not more than \$50 in any month. The original subsection c. also called for the following fees for “debt settlement” (a reduction in the principal amount of the debt): (A) subject to Section 19(d), a fee for consultation, obtaining a credit report, setting up an account, and the like, in an amount not exceeding the lesser of \$400 and four percent of the debt in the plan at the inception of the plan; and (B) a monthly service fee, not to exceed \$10 times the number of creditors remaining in a plan at the time the fee is assessed, but not more than \$50 in any month. A provider was precluded from imposing or receiving fees under both fee schedules. The UDMSA also provided that except as otherwise provided in subsections (c) and (d), if an agreement contemplates that creditors will settle an individual’s debts for less than the principal amount of the debt, compensation for services in connection with settling a debt may not exceed, with respect to each debt: (1) 30% of the excess of the principal amount of the debt over the amount paid the creditor pursuant to the agreement, less (2) to the extent it has not been credited against an earlier settlement fee: (A) the fee charged pursuant to subsection (d)(2)(A); and (B) the aggregate of fees charged pursuant to subsection (d)(2)(B).

After the NCCUSL act was drafted, the Federal Trade Commission amended the Telemarketing Sales Rules to limits fees for certain for-profit entities who engage in “debt settlement” (reduction in the principal amount of the debt). Pursuant to those Rules (specifically 16 C.F.R. Sec. 310.4(a)(5)), a provider subject to the rules may not request or receive payment of any fee or consideration for any debt relief service until and unless certain conditions are met. The relevant language of the rules has been incorporated here (modified slightly to use UDMSA terminology) and applied to all entities engaging in debt settlement (although the federal Rule is limited to for-profit entities whose activities involve at least one interstate telephone call). The FTC Rule limits only the timing, not the amount of the payments. In addition, the FTC Rule allowed either a flat fee or a percentage figure to be charged as a fee. The option has not been preserved in this draft, which permits only a percentage of savings to be charged since it appears that consumers may be best protected when the interests of the provider and the consumer are aligned with regard to the fees; as it is set up here, the more the consumer saves, the more the provider may charge. The language of this section is based on a review of the revised NCCUSL 2011 draft, but does not incorporate all of the changes since New Jersey’s underlying statutory and regulatory structure differs from the structure of the revised draft and the revised draft is not an exact match for the fee provisions crafted for a prior version of this draft.

Subsection d. allows any provider to charge a one-time set-up fee of \$75. This represents an increase from the \$50 included in the prior draft based on the Maine statute.

Subsection g. contains modified language based on the 2011 NCCUSL revision.

The comments regarding fees since the distribution of the last revised draft of this report in February are summarized as follows – if additional information is required to be added to this summary, Staff relies on the commenters to advise accordingly:

(1) For-profit commenters have indicated that: the debt-settlement process is more labor-intensive than debt-management (as described, in part, in a work-flow chart distributed previously) since a debt-management plan, once established, is described as a turn-key operation; the most expensive part of the settlement process is negotiation, a component entirely absent from debt-management work; debt-settlement entities require unique systems, well-trained negotiators, and ongoing support to the consumer; debt-settlement providers use their history of experience with creditors (each of which deals with delinquent debtors in different ways and has different business cycles) and pit one against the other; some for-profit entities have indicated that they support a fee model in which the provider receives a percentage of the consumer’s savings, because then the interests of the parties are aligned; no two consumers are exactly alike; although not-for-profit entities claim that they are not paid adequately for the work they perform, management at some of those entities is paid salaries in the mid-six-figures according to a news article found at NorthJersey.com March 27, 2011 (of the 44 non-profits authorized by the federal government to provide bankruptcy counseling to NJ residents, 12 pay their top executives more than \$300,000.

(2) Not-for-profit commenters have indicated that debt-settlement is not more labor intensive than the debt-management services provided by non-profits; debt-settlement entities claim that their costs for providing services are very high, when in reality it is their advertising costs that are very high; debt-settlement entities do not disburse

monies monthly for each consumer, as debt-management entities do; (additional information is anticipated to be received in advance of the April meeting and will be provided to the Commission at that time).

(3) Legal Services of New Jersey and other consumer-protection groups (the comments are not uniform and are summarized below without attribution) have indicated that: their strong preference is that no action be taken on this project at this time; consumers are better off negotiating directly with creditors than hiring a debt-settlement provider; when consumers withhold payments to accumulate funds with which to make lump-sum offers under a debt-settlement plan, they incur default penalty rates and are subject to more vigorous collection efforts; at debt-settlement fee rates of 25-50%, the debtors incurred considerably more in total costs than debtors negotiating on their own; even with a 15% back-end fee, the consumer does not come out ahead; applying the FTC Rule provisions to all debt-settlement providers, rather than as limited by the FTC Rule itself, and including fee caps in the statute are strong consumer-protective components.

(4) Maine: It was suggested to Staff that no for-profit debt-settlement providers will operate in Maine (fee: 15% of the difference between the debt enrolled in a plan and the debt at the time of settlement) or Illinois (fee: 15% of savings to debtor as described in NJ draft). In an effort to obtain additional information for the Commission, Staff contacted the Bureau of Consumer Credit Protection in Maine. The representative with whom Staff spoke indicated that several years ago, Maine decided to regulate the act, not the actor, and opened the state to the participation of for-profit entities. Maine imposes a fee cap of 15% but it is based on the amount of the debt at the time the debt is settled. If \$7,000 of debt is enrolled in a plan in Maine, and it grows to \$10,000 during the course of the plan, but is settled for \$5,000, the debt-settlement provider is permitted to take 15% of the \$5,000 “saved” rather than 15% of the \$2,000 difference between the amount initially enrolled and the amount paid. By the end of this year, Maine expects to have about six registered debt-settlement companies (they have a population of approximately 1.2 million people). As it was explained to Staff, Maine already had (as New Jersey does) bad actor debt-settlement companies engaging in predatory business practices. By allowing for-profit entities to operate there legally, Maine offers consumers an option with the protection of the bond required to be posted. Last year, Maine discussed raising its fee to 20% for debt-settlement work. Debt-settlement companies said even that was not enough and it was decided that the fee level would remain at 15%. Maine’s perspective is that allowing for-profit entities to participate in the state legally affords some measure of accountability to the consumer since a surety bond and other protections are provided. In addition, the State is able to review contracts, accounts, etc. Even if, as it has been said, Maine is now “licensing the best of the worst”, at least the State has a relationship with responsible providers who generally have legal counsel and are somewhat responsive to consumer complaints and issues.

Subsection j. is taken from the Maine statutes in order to make it clear that a husband and wife, or others sharing the same household and the same debts shall not be charged more than one fee.

Section 16. Periodic reports and retention of records

a. A provider shall provide the accounting required by subsection b. of this section:

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

(2) before cancellation or termination of any agreement:

(A) at least once each month; and

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

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

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

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

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

(4) the amount held in reserve; and

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

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

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

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

(D) the calculation of a settlement fee.

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

d. Each provider shall file with the administrator on or before April 1 of each year a copy of its annual report, containing the information required by the administrator by regulation. A provider that fails to make and file its annual report in the form and within the time provided in this section shall be subject to a penalty of not more than \$100 for each day's failure, and the administrator may revoke or suspend its authority to do business in this State. The penalty may be collected in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," (2A:58-10 et seq.). A warrant may issue in lieu of a summons.

COMMENT

The language of this section is found at section 27 in the NCCUSL act and in *N.J.S. 17:16G-5*.

The language of subsection d. of this section is contained in current New Jersey law at *N.J.S. 17:16G-5*. DOBI indicated that it was critical to retain this language from the existing statute because the annual reports described in this Section are an important part of the dedicated funding assessment process that funds the budget of the Division of Banking. It was also noted that conforming amendments to *N.J.S. 17:1C-33 et seq.* will be needed to include update it with references to NJDMSA.

Section 17. Voidable agreements

a. If a provider imposes a fee or other charge or receives money or other payments not authorized by Section 15, or violates the provisions of Section 12e. or f. pertaining to limitations of a power of attorney issued to the provider and the limitations regarding the applicable law or available remedies, the individual may void the agreement and recover as provided in Section 24.

b. If a provider is not licensed as required by this act when an individual assents to an agreement, the agreement is voidable by the individual.

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

COMMENT

The language of this section is found at section 25 in the NCCUSL act.

Section 18. Prohibited acts and practices; liability

a. A provider may not, directly or indirectly:

(1) misappropriate or misapply money held in trust;

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

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

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

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

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

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

(i) payment to one or more creditors pursuant to an agreement; or

(ii) payment of a fee;

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

(7) offer, pay, or give a gift or bonus, premium, reward, or other compensation to a lead generator or other person for referring a prospective customer, if the person making the referral

(A) has a financial interest in the outcome of debt-management services provided to the customer, unless neither the provider nor the person making the referral communicates to the prospective customer the identity of the source of the referral or

(B) compensates its employees on the basis of a formula that incorporates the number of individuals the employee refers to the provider;

(8) receive a bonus, commission, or other benefit for referring an individual to a person;

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

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

(11) settle a debt or lead an individual to believe that a payment to a creditor is in settlement of a debt to the creditor unless, at the time of settlement, the individual receives a certification by the creditor that the payment is in full settlement of the debt or is part of a payment plan, the terms of which are included in the certification, that upon completion will lead to full settlement of a debt;

(12) make a representation that:

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

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

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

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

(14) represent in its agreements, disclosures required by this act, advertisements, or Internet web site that it is

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

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

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

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

b. If a provider furnishes debt-management services to an individual, the provider may not, directly or indirectly:

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

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

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

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

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

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

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

(A) the administrator, upon proper demand;

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

(C) the extent necessary to administer the plan;

(6) except as otherwise provided in Section 15, provide the individual less than the full benefit of a compromise of a debt arranged by the provider;

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

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

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

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

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

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

e. If a provider delegates any of its duties or obligations under an agreement or this act to another person, including an independent contractor, the provider is liable for conduct of the person which, if done by the provider, would violate the agreement or this act.

f. A lead generator or other person that provides services to or for a provider may not engage in an unfair, unconscionable, or deceptive act or practice, including the knowing omission of any material information, in its interactions with an individual whom it has reason to believe is or may become a customer of the provider.

COMMENT

Most of the language of this section is found at Section 28 in the NCCUSL act.

Subsections a.(2), (3) and (7) were modified in response to the 2011 NCCUSL revised document.

The language of this section was also modified to incorporate a change to subsection a.(11) recommended by TASC based on the assertion that settlements are sometimes negotiated to be paid over time. Subsection b.(7)

was also changed to incorporate language recommended by TASC based on a claim that this would make the language consistent with language from other states.

The original subsection c., which states that the act “does not authorize any person to engage in the practice of law” was removed as unnecessary.

Subsection f. was added in response to the 2011 NCCUSL revised document.

Section 19. Notice of litigation

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

COMMENT

The language of this section is found at section 29 in the NCCUSL act.

Section 20. Advertising and marketing practices

a. A provider shall not, expressly or by implication:

(1) represent any results or outcomes of its debt-management services in any advertising, marketing, or other communication to consumers unless the debt-management services provider provides substantiation for such representation at the time that the representation is made; or

(2) make any unfair or deceptive representation or omission of material fact in any of its advertising or marketing communications concerning debt-management services.

b. If the agreements of a provider contemplate that creditors will reduce finance charges, interest rates, 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.

c. 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 that propose to settle an individual’s debts for less than the full principal amount of debt, the provider shall disclose in **all** advertising and marketing communications, clearly and conspicuously, the following information:

“Debt settlement management services are not right for everyone and other options may be available. A fee will be charged for these services. Failure to pay your monthly bills in a timely manner will result in increased balances and fees and may harm your credit rating. Not all creditors will agree to reduce principal balance or agree to a settlement. Creditors may pursue collection, including lawsuits.”

d. The administrator may promulgate regulations pertaining to advertising.

COMMENT

Some of the language of this section is found at section 30 of the NCCUSL act. It reflects the addition of “interest rates” as proposed above. Subsection a. is new and subsection c. was revised to incorporate more stringent advertising and marketing guidelines. The language of both of these subsections is based on the law enacted in Illinois in an effort to further protect consumers. Subsection c. is drawn from Illinois law and it proposes specific language that all providers would have to disclose to potential consumers when advertising debt-management (including debt-settlement) services. This section was also revised to include a sentence alerting individuals that they should expect to pay a fee for the service. Subsection d. is new and would allow the Commissioner to incorporate some of the more detailed language found in the Illinois law as necessary and appropriate.

Section 21. Powers of administrator

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

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

(1) charge the person the reasonable expenses necessarily incurred to conduct the examination;

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

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

c. The administrator may adopt regulations to implement the provisions of this act in accordance with the Administrative Procedure Act, N.J.S. 52:14B-1 et seq.

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

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

f. The administrator, may, on the administrator’s own initiative or on application of a provider or providers and for good cause shown, adopt dollar amounts instead of those specified in this act, as set forth in regulations promulgated by the administrator.

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

COMMENT

The language of this section is found at section 29 in the NCCUSL act. Subsection b. contains additional language for clarification, incorporated from the NCCUSL act and subsections c., e., f. and g. are newly added.

The language of the act contains a formula for the increase of the amounts and Staff recommends that the Commissioner incorporate that language in the regulations, modified as appropriate. DOBI suggested that rather than requiring the Commissioner to automatically raise fees to adjust for inflation, the providers be required to affirmatively apply for an increase in the permitted rates. This change is reflected in subsection f., which was also modified to permit the administrator to do so on his or her own initiative.

Section 22. Administrative remedies

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

(1) ordering a provider, a lead generator, a person administering a trust account, ~~or~~ a director, employee, or other agent of a provider to cease and desist from any violations;

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

(3) subject to adjustment of the dollar amount pursuant to Section 21, imposing on a provider or ~~a~~ other person that has violated or caused a violation a civil penalty not exceeding \$10,000 for each violation;

(4) prosecuting a civil action to:

(A) enforce an order;

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

(5) intervening in a private enforcement action.

b. Subject to adjustment of the dollar amount pursuant to Section 21, if a person violates or knowingly authorizes, directs, or aids in the violation of a final order issued under subsection a.(1) or (2), the administrator may impose a civil penalty not exceeding \$20,000 for each violation.

c. The administrator may maintain an action to enforce this act in any county.

d. If a provider has violated this act or the regulations promulgated pursuant to this act, the administrator may maintain an action in New Jersey to enforce this act if the provider has entered into an agreement or discussed an agreement with a New Jersey resident.

e. The administrator may recover the reasonable costs of enforcing the act under subsections a. through d., including attorney's fees based on the hours reasonably expended and the hourly rates for attorneys of comparable experience in the community.

f. In determining the amount of a civil penalty to impose under subsection a. or b., the administrator shall consider the seriousness of the violation, the good faith of the violator, any previous violations by the violator, the deleterious effect of the violation on the public, the net

worth of the violator, and any other factor the administrator considers relevant to the determination of the civil penalty.

COMMENT

The language of this section is found at section 33 in the UDMSA. This section spells out the powers of the administrator in more detail than the UDMSA in response to a suggestion from DOBI that such detail is of assistance to the Department – the additional detail includes: clarification of the actions that may be taken by the administrator, enhanced penalties for violation of a final administrative order, and additional detail regarding the recovery of attorney fees and the determination of the proper penalty amount.

Some of the provisions of subsection a. were revised in response to NCCUSL's 2011 revisions. Subsection b.(5) was modified to refer directly to a private action rather than to the section discussing private actions. Subsection d. is new and clarifies the administrator's ability to pursue out-of-state violators in New Jersey.

Section 23. Suspension, revocation, or nonrenewal of license.

a. The administrator may suspend, revoke, or deny renewal of a provider's license if:

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

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

(3) the provider is insolvent;

(4) the provider or an employee or affiliate of the provider, a lead generator, a person administering a trust account, or a person to which the provider has delegated its obligations under an agreement or this act has refused to permit the administrator to make an examination authorized by this act, failed to comply with Section 21(b)(2) within 15 days after request, or made a material misrepresentation or omission in complying with Section 21(b)(2); or

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

b. If a provider does not comply with Section 14 or if the administrator finds that the public health or safety or general welfare requires emergency action, the administrator may order a summary suspension of the provider's license, effective on the date specified in the order.

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

d. If the administrator suspends or revokes a provider's license, the provider may appeal and request a hearing pursuant to the Administrative Procedure Act, N.J.S. 52:14B-11.

COMMENT

The language of this section is found at section 34 in the NCCUSL act. The NCCUSL language was modified to refer to licensing and to the New Jersey statute as well as to remove the definition of "insolvent". Subsection a.(4) was revised in response to NCCUSL's 2011 revision.

Section 24. Private enforcement

a. If an individual voids an agreement pursuant to Section 17b., the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement, except amounts paid to creditors, in addition to the recovery under subsection c.(3) and (4).

b. An individual may recover in a civil action three times the total amount of the fees, charges, money, and payments made by the individual to the provider, in addition to the recovery under subsection c.(4) if:

(1) the individual voids an agreement pursuant to Section 17a.; or

(2) the provider fails to comply with the requirements contained in Section 11, 13 or 18a., b. or d.

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

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

(2) except as otherwise provided in subsection d. and subject to adjustment of the dollar amount pursuant to Section 22f., with respect to a violation of Section 9b., 10, 12, 13, 14, 15, 16, or 18a., b., or d., the greater of the amount recoverable under subsection c.(1) or \$5,000;

(3) punitive damages; and

(4) reasonable attorney's fees and costs.

d. In a class action, except for a violation of Section 18a.(5), the minimum damages provided in subsection c.(2) do not apply.

e. In addition to the remedy available under subsection c., if a provider violates an individual's rights under Section 13a. – c., the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement, except for amounts paid to creditors.

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

g. The administrator shall assist an individual in enforcing a judgment against the surety bond or other security provided under Section 8.

COMMENT

The language of this section is found at section 35 in the NCCUSL act. This language provides detail regarding a possible recovery if an individual voids an agreement because the provider is not licensed or collects an unauthorized fee.

The 2011 NCCUSL revision eliminated subsection e. That change has not been made to this draft.

The revised language also attempts to provide additional protection for New Jersey consumers by authorizing an award of treble damages in an expanded category of cases, not only those in which an improper fee is charged, or cases in which the Consumer Fraud Act would apply to permit treble damages, but also cases in which the provider fails to comply with the prerequisites for providing debt-management services (Section 10), fails to comply with the requirements for the form and contents of the agreement (Section 12) or engages in certain significant prohibited acts and practices (Section 18a., b. and d.). This draft also provides additional guidance regarding class actions and requires the assistance of the administrator in enforcing judgments against the bond or other security.

Section 25. Violation of consumer protection statutes

a. The right of an individual to seek relief pursuant to New Jersey's Consumer Fraud Act, N.J.S.56:8-1 et seq., or any other New Jersey or federal law is hereby preserved.

b. Notwithstanding subsection a. of this section, if an act or practice of a provider violates both this act and New Jersey's Consumer Fraud Act, or any New Jersey or federal law dealing with consumer protection or unfair or deceptive trade practices in consumer transactions, an individual may plead and pursue claims based on this act as well as other law but may not recover under both for the same act or practice.

COMMENT

The language of this section is found at section 36 in the UDMSA but now includes a specific reference to the New Jersey Consumer Fraud Act. The suggestion of LSNJ to expressly preserve consumer remedies available under other laws has been incorporated into this section as subsection a., but subsection b. is intended to preclude a duplicative recovery for the same act or practice. This Section is not, however, intended to preclude an individual from pleading and pursuing claims pursuant to both this act and other law, but is only intended to preclude a double recovery (recovery pursuant to this act and other law for the same act or practice).

Section 26. Statute of limitations

a. An action or proceeding brought pursuant to Section 22(a), (b), or (c) must be commenced within four years after the conduct that is the basis of the administrator's complaint.

b. An action brought pursuant to Section 24 must be commenced within two years after the latest of:

- (1) the individual's last transmission of money to a provider;
- (2) the individual's last transmission of money to a creditor at the direction of the provider;
- (3) the provider's last disbursement to a creditor of the individual;
- (4) the provider's last accounting to the individual pursuant to Section 16(a);

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

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

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

COMMENT

The language of this section is found at section 37 in the NCCUSL act.

Section 27. Electronic Signatures in Global and National Commerce Act.

This act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

COMMENT

The language of this section is found at section 39 in the NCCUSL act.

Section 28. Regulations; transitional provisions; severability; repeal; effective date

a. The administrator shall promulgate such regulations as may be necessary to effectuate the purposes of this act.

b. Transactions entered into before this act takes effect and the rights, duties, and interests resulting from them may be completed, terminated, or enforced as required or permitted by a law amended, repealed, or modified by this act as though the amendment, repeal, or modification had not occurred.

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

d. This act shall take effect 12 months after the Department of Banking and Insurance promulgates the regulations required by the provisions of this act.

e. The following are repealed: P.L. 1979 c. 16 (C.17:16G-1 et seq.) and Section 3 of P.L. 2005, c. 287 (C. 17:16G-9).

COMMENT

The language of this section is taken from sections 40, 41, 42 and 43 of the NCCUSL act with changes as shown. The NCCUSL act also contains a recommendation that the Act become effective in a staggered manner, which could be incorporated.