



## **STATE OF NEW JERSEY**

NEW JERSEY LAW REVISION COMMISSION

### **Draft Tentative Report**

Relating to

## **Uniform Debt-Management Services Act**

**January 11, 2010**

This draft 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 draft tentative report, please inform the Commission so that your approval can be considered along with other comments.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN MARCH 18, 2010.**

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

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## Introduction

Uniform Debt-Management Services Act (“UDMSA”) was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws in 2005, and was last revised and amended by NCCUSL in 2008. It provides the states with a comprehensive Act governing these services with the goal of national administration of debt counseling and management in a fair and effective way. The Act became an essential part of the creditor and debtor law when the Bankruptcy Reform Act of 2005 took effect. 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, substantially without material changes, in Colorado (1/2008), Delaware (1/2007), Nevada (approved 5/2009, effective 7/2010), Rhode Island (3/2007), Tennessee (approved 6/2009, effective 7/2010) and Utah (7/2007), and introduced in eight more states in 2009 (Connecticut, Maine, Minnesota, Missouri, New Mexico, New York, Texas, and Washington).

Background information discussing the history and the evolution of debt management services in this country from the early twentieth century to the Bankruptcy Reform Act of 2005 is contained in the NCCUSL final report. According to the report, there have been four generations of credit counseling services in this country.

As the NCCUSL report explains, the first generation of credit counselors consisted of for-profit enterprises that “communicated with a consumer’s creditors to persuade them to accept partial payment in full satisfaction of the consumer’s obligations.” *NCCUSL Report*, page 1. The debt adjuster would collect a monthly payment from the consumer and forward portions of it to each of the creditors who agreed to debt adjuster’s terms. *Id.* These debt adjusters were not regulated. They often charged very high fees, leaving little money to pay to the creditors, used deceptive advertising practices and outright stole clients’ money. *See, id.* The complaints were so frequent that in the 1950s legislatures in more than half the states outlawed the business (*see, e.g.*, N.Y. Gen. Bus. Law §§ 455-457). The remaining states largely turned to a regulatory approach, “requiring licenses, imposing requirements on how the businesses operate, and restricting troublesome practices” (*see, e.g.*, Mich. Comp. Laws Ann. §§ 451.451-.465 (repealed in 1976 and replaced by §§ 451.411-.437)). *See, id.*

The second generation of debt management services started to grow at the same time due to the fact that many states exempted not-for-profit organizations from these statutes, enabling them to render counseling services essentially free of regulation. The National Foundation for Consumer Credit (NFCC) (later renamed the National Foundation for Credit Counseling), created by retailers and banks that issued credit cards supported the formation of non-profit credit-counseling agencies. *Id.* Those businesses and banks believed that credit counseling should help consumers in financial difficulty to gain control of their finances, repay the debt and avoid bankruptcy. *Id.*

The NCCUSL Report indicated that counseling agencies helped customers with budgeting skills, and created debt-management plans (DMP's) for them. *Id.* The particular agency negotiated with each of the consumer's unsecured creditors to obtain some concessions, including reduced interest rate, waiver of delinquency fees, and lower monthly payments, and created a DMP which included concessions made by each participating creditor. *Id.* The consumer then made monthly payments to the agency and the agency disbursed the money according to DMP terms to all participating creditors. *Id.* The creditors supported the counseling agencies by returning to them as much as 15% of the payments they received. *Id.* The NFCC called this contribution the creditor's "fair share." *Id.* The second generation of credit counseling agencies also provided financial education to the consumers and still continues to operate. *Id.*

The major drawback of this arrangement utilized by the second generation counseling agencies was the non-profit counseling agencies' close involvement with the credit card industry. This involvement made them "debt collectors for the credit-card industry," and they were heavily criticized by the consumer advocate groups for the limited range of advice they provided. *Id.* at 2. "Formed and *supported primarily by the credit-card industry*, most counseling agencies never recommended bankruptcy, and many never even mentioned it as a possibility." *See, e.g., Gardner, Consumer Credit Counseling Services: The Need for Reform and Some Proposals for Change*, 13 *Advancing the Consumer Interest* 30 (2001) (emphasis in original). *Id.*

The next (third) generation of debt management services started in the late 1980s and 1990s as a result of a dramatic increase in credit-card debt and, consequently, debt in default. As the NCCUSL Report explains, the need for credit counseling services and opportunity for such counseling agencies increased as consumers' income rose and card issuers relaxed their standards of creditworthiness. *Id.* Many new entities arose, unaffiliated with the NFCC. *Id.* They formed competing trade associations, e.g., the Association of Independent Consumer Credit Counseling Agencies (AICCCA) and the American Association of Debt Management Organizations (AADMO). *Id.* These entities "rely heavily on advertising and telemarketing, and many conduct their business with consumers entirely by telephone or over the Internet." *Id.* In the five years from 1996 to 2001 their share of the counseling market grew from approx. 20% to about 80%. *Id.* Their focus is primarily on the creation of DMPs, and consumers typically receive very little counseling and education before they are enrolled in such plan. *Id.*

Members of this third generation of agencies are usually organized as nonprofit entities, due to state laws prohibiting for-profit debt-management services, and card issuers limiting the "fair-share" payments to non-profit entities. *Id.* However, many have not shown any charitable or educational inclinations whatsoever. *Id.* They uncritically enrolled all of their customers in DMPs, charging much higher fees than the agencies affiliated with the NFCC. *Id.* This led to the generation of revenue generation far in excess of that required to provide debt-management services, which revenues were usually disbursed as generous compensation to affiliated entities that provide back-office services and high salaries for the principal executives that are out of line with the salaries at non-profit entities of comparable size. (For a description of three different models for channeling funds to related entities, *see* Staff Report, *Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling* (Permanent Subcommittee on Investigations of

the Senate Governmental Affairs Committee) (S. Rep. 109-55 April 2005), *available at* <http://hsgac.senate.gov/index.cfm?>). *Id.*

After the third generation of debt management services arrived on the scene, credit card issuers quickly saw an increase of their fair-share payments to counseling agencies, up to the point where such payments were almost as much as the payments for all other collection activities combined. *Id.* In addition, they realized that some agencies were enrolling in payment plans even those consumers who could pay their debts without the concessions from the creditors. *Id.* The credit card issuers responded by reducing the concessions and the ‘fair share’ payments to the counseling agencies, some even discontinuing support to the agencies altogether. *Id.* On average payments to the agencies dropped from over 12% to below 8%. *Id.* This decrease had an adverse effect on the ability of counseling agencies to provide individual counseling and community education services. *Id.* at 2-3. Some major card issuers abandoned the fair-share approach altogether, developing proprietary models for compensating counseling agencies depending on many factors, including the profiles of the debtors, the agency’s record with the creditor, and the agency’s advertising and business practices. *Id.* at 3.

Finally, as explained in the NCCUSL Report, the fourth generation of debt management services differs from all other credit counseling entities in their approach to debt repayment. Instead of helping the consumer pay his or her creditors in full, this generation of debt management services persuades creditors to settle for less than the full amount of the consumer’s debt. *Id.* These entities are known as debt-settlement companies, and they formed trade associations of their own (merged in 2004 into the United States Organizations for Bankruptcy Alternatives (USOBA)). *Id.* They are a revival of the first generation of counseling agencies with a new twist. *Id.* Unlike their predecessors, they do not negotiate with the creditors in advance, but *encourage* the consumer to default on the debts, instead making monthly payments to them or to a consumer’s savings account. *Id.* When the saved funds reach a target percentage of the debt owed to one of the creditors, the agency sends an offer to that creditor to settle the debt for the lesser amount. *Id.* During the period when the funds are accumulating, the creditors receive nothing. *Id.* As a result, the creditors impose additional finance charges, delinquency fees, and may undertake collection activity, including litigation. *Id.* Consumers, however, frequently are not told about these risks by the debt-settlement companies. Abuses by credit-counseling agencies and debt-settlement companies are resulting in injury to numerous consumers with increasing frequency. Reports of two prominent consumer organizations (Consumer Federation of America and the National Consumer Law Center) have documented the situation. *Id.*

Prior to 2005, the issue of whether to resort to debt counseling and management services was generally a voluntary decision on the part of an individual with credit problems. However, federal Bankruptcy Reform Act of 2005 changed the status quo. Under that law, to file for Chapter 7 bankruptcy, the individual in most cases has to show that consumer debt counseling/management has been sought and attempted. Greater transparency and accountability are needed to prevent excesses and abuses of the new powers of debt counseling and management services. Because the new bankruptcy rules are federal and apply in every state, it has been suggested that regulation of the counseling and management services in every state must be uniform in character in order for the new bankruptcy rules to be effective and for consumers to be adequately protected. NCCUSL suggests that enacting the UDMSA, already

adopted or being considered for adoption in almost 1/3 of the states, is the best way to reach the desired uniformity, transparency and efficacy of these services.

### **Summary of the Act**

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 definitions of the quoted terms are critical and appear in Section 2, along with the definitions of several other terms. The Act speaks of “individuals,” as opposed to “consumers,” so that it applies to farmers and other individuals who are dealing with personal debt incurred in connection with their businesses. *Id.* at 5.

The definition of “debt-management services” encompasses both credit counseling and debt settlement. With very few exceptions, the provisions of the Act apply equally to both types of debt-management services and the entities that provide them. The Act is neutral on the question whether for-profit entities should be permitted to provide debt-management services. Each state must decide whether to permit for-profit entities to provide credit-counseling services, debt-settlement services, or both. *Id.* at 6. The state’s decision is implemented by language in Sections 4, 5, and 9.

UDMSA may be divided into three basic parts: registration of services, service-debtor agreements and enforcement. Each part contributes to the comprehensive quality of the Uniform Act.

#### Registration

No debt-management service may enter into an agreement with any debtor in a state without registering as a consumer debt-management service in that state. Registration requires submission of detailed information concerning the service, including its financial condition, the identity of principals, locations at which service will be offered, form for agreements with debtors and business history in other jurisdictions. To register, a service must have an effective insurance policy against fraud, dishonesty, theft and the like in an amount no less than \$250,000. It must also provide a security bond of a minimum of \$50,000 which has the state administrator as a beneficiary. If a registration substantially duplicates one in another state, the service may offer proof of registration in that other state to satisfy the registration requirements in a state. A satisfactory application will result in a certificate to do business from the administrator. A yearly renewal is required. The requirements concerning registration appear in sections 4-14 and 22.

#### Agreements

In order to enter into agreements with debtors, there is a disclosure requirement respecting fees and services to be offered, and the risks and benefits of entering into such a contract. Section 17 prescribes steps to be taken before entering an agreement with an individual. The service must offer counseling services from a certified counselor and a plan must be created in consultation by the counselor for debt-management service to commence. Sections 19-24 and 28 govern the content of an agreement, including limitations on the fees that may be charged (Sec. 23-24). Other provisions deal with the performance and termination of agreements (Sec.

25, 26, 28) and miscellaneous other matters. There is a penalty-free three-day right of rescission on the part of the debtor. The debtor may cancel the agreement also after 30 days, but may be subject to fees if that occurs. The service may terminate the agreement if required payments are delinquent for at least 60 days.

Any payments for creditors received from a debtor must be kept in a trust account that may not be used to hold any other funds of the service. There are strict accounting requirements and periodic reporting requirements respecting funds held.

### Enforcement

The Act provides for enforcement both by a public authority and by private individuals. The Act prohibits specific acts on the part of a service including: misappropriation of funds in trust; settlement for more than 50% of a debt with a creditor without a debtor's consent; gifts or premiums to enter into an agreement; and representation that settlement has occurred without certification from a creditor. Sections 32-34 provide for public enforcement, including a rule-making power on the part of the administrator. The administrator has investigative powers, power to order an individual to cease and desist; power to assess a civil penalty up to \$10,000, and the power to bring a civil action. Section 35 provides for private enforcement, including recovery of minimum, actual, and, in appropriate cases, punitive damages and attorney's fees. A service has a good faith mistake defense against liability. The statute of limitations pertaining to an action by the administrator is four years, and two years for a private right of action.

Banks as regulated entities under other law are not subject to the Uniform Act, as are other kinds of third-party payment activities that are incidental to other services and functions performed. For example, a title insurer that provides bill-paying service that is incidental to title insurance is not subject to it.

### **Current NJ Law**

#### N.J.S.A. 17:16G-1 to G-9. "Debt Adjustment and Credit Counseling"

This chapter was enacted in 1979 and some sections have not been amended since then. Meanwhile, debt management, debt adjustment and credit counseling services have evolved significantly during these past 30 years. As a result, a comprehensive revision may be particularly appropriate at this time.

Section 17:16G-1 contains definitions of "Nonprofit social service agency" or "nonprofit consumer credit counseling agency", "Credit counseling" and "Debt adjuster". In section 17:16G-2 the state of New Jersey prohibits any person "other than a nonprofit social service agency or a nonprofit consumer credit counseling agency" to act as a debt adjuster, and requires a *license* obtainable "from the Commissioner of the Department of Banking" to perform debt adjustment or offer credit counseling services. Sections 17:16G-3 and 17:16G-6 cover license application process and fees for counseling services. These sections were enacted in 1979 and last amended in 1986. Sections 17:16G-4. Duties of commissioner; fees, and 17:16G-7. Board of directors of agency - have not been amended since their enactment in 1979.

Penalty provisions in section 17:16G-8 were last amended in 2005 (eff. April 9, 2006). In addition to the fines that can be collected under this section, the law authorizes summary action by the State to enjoin the person or licensee from continuing unlawful practices. Furthermore, a private civil action for recovery of damages is authorized under this section.

Section 17:16G-9. Duties of debt adjuster – was added in 2005 (eff. April 9, 2006). It provides guidelines to debt adjusters on disbursements of funds and record keeping. The most recently amended section is 17:16G-5 – amended by L.2007, c. 81, § 25, eff. May 4, 2007, retroactive to July 1, 2006. It deals with bond requirements; financial records audit; and annual reporting requirements for debt adjusters. The annual reporting requirements were first introduced by the amendment of 2005 c. 287, § 1.

#### Title 45, Chapter 18. “Collection Agencies”.

Operation of collection agencies is addressed separately from debt adjusters in N.J.S.A. §§ 45:18-1 to 18-6.1. The law requires collection agencies to post bonds to operate, but no licensing or reporting requirements are imposed on collection agencies.

### **UDMSA Impact on New Jersey Law**

There will be a number of changes to existing New Jersey law if UDMSA is enacted. Currently, New Jersey law provides for licensing of debt adjusters and credit counseling services. The UDMSA replaces this with registration requirement, which has to be renewed every year. To obtain registration under the UDMSA, the debt-management service providers, in addition to filing a bond, will have to purchase insurance against the risks of fraud or misconduct on the part of themselves or their agents.

UDMSA mandates denial of registration if the board of directors of a debt-management service provider is not independent. Current NJ law allows up to 40% of company affiliates on the board still considering it independent. The UDMSA reduces this requirement to no more than 25% of the board members.

Both existing New Jersey law and UDMSA require providers that receive money for disbursements to creditors to establish a separate trust account for this purpose. However, New Jersey law has a requirement that all money (less appropriate fees) should be disbursed to the creditors within ten days of receipt, and the Uniform act does not impose any time limit for disbursements. It is suggested that the 10-day time limit should be included into the UDMSA Section 22(c)(2).

Collection agencies are not encompassed by definition of debt-management service provider because they act as either representatives of the creditor or the new creditor, if the debt is transferred to a collection agency (*see* NCCUSL Uniform Act, Section 2, comment 9).

### **Conclusion**

Staff received inquiries regarding the proposed project from several New Jersey government and private entities. During the course of this project, Staff will be requesting comments and suggestions from various entities, including the New Jersey Department of Banking & Insurance, Legal Services of New Jersey, the New Jersey Housing Mortgage & Finance Association, the New Jersey Senate Democratic Office, the Division of Consumer Affairs, and the Advisory Committee on Professional Ethics. Staff encourages comments and suggestions from all interested parties to ensure that the proposed changes in the law adequately address the problems inherent in the current New Jersey statute and adequately protect the interests of consumers.

In summary, Staff recommends revising the current New Jersey law regarding debt-management service providers through recommending to the legislature adoption of the UDMSA with appropriate changes that reflect specific New Jersey practices and repealing *N.J.S.* §§ 17:16G-1 to G-9. The suggested UDMSA provisions follow. Changes to the Model Act are shown with ~~strikeout~~ and underlining.

## UDMSA - Draft Act

### Section 1. Short title.

This act may be cited as the Uniform Debt-Management Services Act.

#### COMMENT

The language of this section is taken directly from the Model Act without changes.

### Section 2. Definitions.

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 of the individual;
    - (ii) a sibling of the individual or the spouse of a sibling;
    - (iii) an individual or the spouse of an individual who is a lineal ancestor or lineal descendant of the individual or the individual’s spouse;
    - (iv) an aunt, uncle, great aunt, great uncle, first cousin, niece, nephew, grandniece, or grandnephew, whether related by the whole or the half blood or adoption, or the spouse of any of them; or
    - (v) any other individual occupying the residence of the individual; and
  - (B) with respect to an entity, means:
    - (i) a person that directly or indirectly controls, is controlled by, or is under common control with the entity;
    - (ii) an officer of, or an individual performing similar functions with respect to, the entity;
    - (iii) a director of, or an individual performing similar functions with respect to, the entity;
    - (iv) subject to adjustment of the dollar amount pursuant to Section 32(f), a person that receives or received more than \$25,000 from the entity in either the current year or the preceding year or a person that owns more than 10 percent of, or an individual who is employed by or is a director of, a person that receives or received more than \$25,000 from the entity in either the current year or the preceding year;
    - (v) an officer or director of, or an individual performing similar functions with respect to, a person described in subparagraph (i);
    - (vi) the spouse of, or an individual occupying the residence of, an individual described in subparagraphs (i) through (v); or
    - (vii) an individual who has the relationship specified in subparagraph (A)(iv) to an individual or the spouse of an individual described in subparagraphs (i) through (v).
- (3) “Agreement” means an agreement between a provider and an individual for the performance of debt-management services.
- (4) ~~“Bank” means a financial institution, including a commercial bank, savings bank, savings and loan association, credit union, and trust company, engaged in the business of banking,~~

~~chartered under federal or state law, and regulated by a federal or state banking regulatory authority.~~

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

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

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

~~(8) “Day” means calendar day.~~

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

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

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

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

(i) licensed by this state;

(ii) subject to a disciplinary mechanism;

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

(iv) subject to a continuing-education requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) established in an insured bank;

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

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

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

#### COMMENT

In connection with paragraph (1), the state must decide whether to create a new administrative agency or charge an existing entity with enforcement of this Act.” (UDMSA, § 1, Legislative Note). Staff confirmed that 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). Staff is not aware of any reasons why a new agency needs to be created. Subsection (1) reflects the current authorization under the existing New Jersey law. The NCCUSL suggests “to amend that entity’s organic statute to refer specifically to this Act.”

The definitions included here are present in the Model Act. Staff suggests that some of the commonly used words should not be defined in this section, if adequately defined elsewhere in Title 17. These are indicated by strikethrough.

One commentator suggested that this law is an unfunded mandate that would put additional responsibilities on the Department of Banking and Insurance, require the hiring of additional staff, and would be “incredibly expensive to properly oversee.” The commentator’s rationale for this assertion is as follows:

New Jersey is among the highest taxed states in this nation. In fact, HUD housing counselors are having difficulty helping those facing foreclosure meet the affordability index in President Obama’s Making Home Affordable initiative because our property taxes are so high (even with large concessions by the FNMA and FHLMC).

The Department of Banking and Insurance, however, has preliminarily supported this project and has not suggested that enactment would be unduly burdensome for the Department.

### Section 3. Exempt Agreements and Persons.

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

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

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

- (2) receives no compensation for debt-management services from or on behalf of the individuals to whom it provides the services or from their creditors.
- (c) This act does not apply to the following persons or their employees when the person or the employee is engaged in the regular course of the person's business or profession:
  - (1) a judicial officer, a person acting under an order of a court or an administrative agency, or an assignee for the benefit of creditors;
  - (2) a bank;
  - (3) an affiliate, as defined in Section 2(2)(B)(i), of a bank if the affiliate is regulated by a federal or state banking regulatory authority; or
  - (4) a title insurer, escrow company, or other person that provides bill-paying services if the provision of debt-management services is incidental to the bill-paying services.

#### COMMENT

The language of this section is taken directly from the Model Act without changes.

### **Section 4. Registration and Not-for-profit Status Required.**

- (a) Except as otherwise provided in subsection (b), a provider may not provide debt-management services to an individual who it reasonably should know resides in this state at the time it agrees to provide the services, unless the provider is registered under this act.
- (b) If a provider is registered under this act, subsection (a) does not apply to an employee or agent of the provider.
- (c) The administrator shall maintain and publicize a list of the names of all registered providers.
- (d) A provider may be registered only if it is:
  - (1) organized and properly operating as a not-for-profit entity under the law of the state in which it was formed; and
  - (2) exempt from taxation under the Internal Revenue Code, 26 U.S.C. Section 501, as amended.

#### COMMENT

The NCCUSL requires the states to make a determination in sections 4, 5 and 9 whether the state allows for-profit entities to provide debt management services. Current New Jersey law does not allow for-profit entities to provide debt management services, reflecting the concerns outlined in the introduction. This section as written above conforms to the existing NJ law (*N.J.S. § 17:16G-2*) that for-profit entities are not permitted to provide debt-management services.

Staff was, however, made aware that the current NJ law on the subject is considered to be poorly drafted and outdated. It was also suggested that the distinction between not-for-profit and for-profit entities in the area of unsecured debt is an artificial one. Since not-for-profit entities are funded largely by credit card companies and banks, as well as fees charged to the consumer, the impression that they are more protective of the consumer than for-profit entities may no longer be warranted.

Support for UDMSA and for the inclusion of for-profit entities in the law was received from CareOne Services Incorporated, a national debt relief services company founded in 2002. CareOne is authorized to provide credit counseling and debt management services in 38 states. It is not authorized to do so in New Jersey because it is not a not-for-profit entity. CareOne has indicated that it would like to be able to offer its services to New Jersey residents and it supports the enactment of UDMSA as a "tough law" that requires "that providers of these services must ensure the service is right for the debtor and that the debtor fully understands the costs, benefits and ramifications of enrolling in a debt management or debt settlement plan".

Staff will seek additional comments on this issue from interested parties and make the recommendation as to whether for-profit companies should be allowed to provide these services. In the interim, based on the preliminary comments received, Staff has prepared alternative language for the consideration of the Commission, which follows as Section 4A.

#### **Section 4A. Registration Required.**

- (a) Except as otherwise provided in subsection (b), a provider may not provide debt-management services to an individual who it reasonably should know resides in this state at the time it agrees to provide the services, unless the provider is registered under this Act.
- (b) If a provider is registered under this Act, subsection (a) does not apply to an employee or agent of the provider.
- (c) The administrator shall maintain and publicize a list of the names of all registered providers.
- (d) A provider whose agreements contemplate managing or settling secured debts may be registered only if it is:
  - (1) organized and properly operating as a not-for-profit entity under the law of the state in which it was formed; and
  - (2) exempt from taxation under the Internal Revenue Code, 26 U.S.C. Section 501, as amended.

#### **COMMENT**

The alternative sections 4A, 5A and 9A were drafted to allow for-profit entities to provide debt management services for unsecured debts. This alternative is also supported by the fact that all six states that have enacted UDMSA allowed in their statutes both non-for-profit and for-profit entities to provide debt management services to consumers. The language of this section generally follows the UDMSA guidelines for allowing for-profit entities to provide debt management services. Since the UDMSA makes no distinction between secured and unsecured debt, a distinction was made here by including the underlined language in subsection (d). This subsection allows only not-for-profit organizations to work with secured debts.

Staff was made aware that currently a special non-profit agency (HMFA) handles debts secured by mortgages. However, there appear to be other types of secured debt. The staff will solicit comments to obtain more information on the kinds of secured debts and the agencies that currently handle them. In this regard, definitions of secured and/or unsecured debt may be useful to include in the Definitions section.

CareOne Services Incorporated, a national debt relief services company, suggested, in response to the draft report, that “strong and enforceable regulation of debt management services - not tax status – is the best structure for protecting consumers and enabling a sound and effective industry.” CareOne said that as “tax neutral regulatory” structures have become more common in recent years, “Better Business Bureau complaints about debt management services have decreased significantly”. CareOne likewise suggested that it is a “false conclusion” that “nonprofit providers offer a better service to consumers than taxable providers” and noted that “[t]axable and nonprofit providers coexist and compete in health care, education, utilities and social services across the state of New Jersey”. As a result, CareOne indicated that, in view of the consumer protections (regulatory requirements, surety bonds, writing requirements, trust account requirements, fee caps, penalties for violations and reporting and examination requirements) afforded by UDMSA, it strongly supports “enactment of a tax neutral UDMSA in New Jersey.”

#### **Section 5. Application for Registration: Form, Fee, and Accompanying Documents.**

- (a) An application for registration as a provider must be in a form prescribed by the administrator.
- (b) Subject to adjustment of dollar amounts pursuant to Section 32(f), an application for registration as a provider must be accompanied by:
  - (1) the fee established by the administrator;
  - (2) the bond required by Section 13;

- (3) identification of all trust accounts required by Section 22 and an irrevocable consent authorizing the administrator to review and examine the trust accounts;
- (4) evidence of insurance in the amount of \$250,000:
  - (A) against the risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant;
  - (B) issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator;
  - (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;
- (5) proof of compliance with N.J.S.A. 15A:1-1 et seq.; and
- (6) evidence of tax-exempt status applicable to the applicant under Internal Revenue Code, 26 U.S.C. Section 501, as amended.

#### COMMENT

Subsection (b)(5) refers to the statute specifying the prerequisites to form a not for profit entity in this state. Staff will confirm that the references to NJ law in this section are accurate. Subsections (b)(5) and (b)(6) conform the Uniform Act to the existing NJ law (N.J.S. § 17:16G-2) that for-profit entities are not permitted to provide debt-management services.

Since it appears that there may be considerable support for the participation of for-profit entities with regard to unsecured debts, Staff has prepared alternative language for the consideration of the Commission, which follows as Section 5A.

#### **Section 5A. Application for Registration: Form, Fee, and Accompanying Documents.**

- (a) An application for registration as a provider must be in a form prescribed by the administrator.
- (b) Subject to adjustment of dollar amounts pursuant to Section 32(f), an application for registration as a provider must be accompanied by:
  - (1) the fee established by the administrator;
  - (2) the bond required by Section 13;
  - (3) identification of all trust accounts required by Section 22 and an irrevocable consent authorizing the administrator to review and examine the trust accounts;
  - (4) evidence of insurance in the amount of \$250,000:
    - (A) against the risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant;
    - (B) issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator;
    - (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;

- (5) proof of compliance with N.J.S. 15A:1-1 et seq.; and
- (6) 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, evidence of not-for-profit status, tax-exempt status, or both, as applicable.

#### COMMENT

The alternative sections 4A, 5A and 9A were drafted to allow for-profit entities to provide debt management services for unsecured debts. This alternative is also supported by the fact that all six states that have enacted UDMSA, had allowed in their statutes both non-for-profit and for-profit entities to provide debt management services to consumers. The language of this section follows the UDMSA guidelines for allowing for-profit entities to provide debt management services, which is reflected in the underlined subsection (b)(6).

### **Section 6. Application for Registration: Required Information.**

An application for registration must be signed under oath and include:

- (1) the applicant's name, principal business address and telephone number, and all other business addresses in this state, electronic-mail addresses, and Internet website addresses;
- (2) all names under which the applicant conducts business;
- (3) the address of each location in this state at which the applicant will provide debt-management services or a statement that the applicant will have no such location;
- (4) the name and home address of each officer and director of the applicant and each person that owns at least 10 percent of the applicant;
- (5) identification of every jurisdiction in which, during the five years immediately preceding the application:
  - (A) the applicant or any of its officers or directors has been licensed or registered to provide debt-management services; or
  - (B) individuals have resided when they received debt-management services from the applicant;
- (6) a statement describing, to the extent it is known or should be known by the applicant, any material civil or criminal judgment or litigation and any material administrative or enforcement action by a governmental agency in any jurisdiction against the applicant, any of its officers, directors, owners, or agents, or any person who is authorized to have access to the trust account required by Section 22;
- (7) the applicant's financial statements, audited by an accountant licensed to conduct audits, for each of the two years immediately preceding the application or, if it has not been in operation for the two years preceding the application, for the period of its existence;
- (8) evidence of accreditation by an independent accrediting organization approved by the administrator;
- (9) evidence that, within 12 months after initial employment, each of the applicant's counselors becomes certified as a certified counselor or certified debt specialist;
- (10) a description of the three most commonly used educational programs that the applicant provides or intends to provide to individuals who reside in this state and a copy of any materials used or to be used in those programs;
- (11) a description of the applicant's financial analysis and initial budget plan, including any form or electronic model, used to evaluate the financial condition of individuals;
- (12) a copy of each form of agreement that the applicant will use with individuals who reside in this state;

- (13) the schedule of fees and charges that the applicant will use with individuals who reside in this state;
- (14) at the applicant's expense, the results of a criminal-records check, including fingerprints, conducted within the immediately preceding 12 months, covering every officer of the applicant and every employee or agent of the applicant who is authorized to have access to the trust account required by Section 22;
- (15) the names and addresses of all employers of each director during the 10 years immediately preceding the application;
- (16) a description of any ownership interest of at least 10 percent by a director, owner, or employee of the applicant in:
  - (A) any affiliate of the applicant; or
  - (B) any entity that provides products or services to the applicant or any individual relating to the applicant's debt-management services;
- (17) a statement of the amount of compensation of the applicant's five most highly compensated employees for each of the three years immediately preceding the application or, if it has not been in operation for the three years preceding the application, for the period of its existence;
- (18) the identity of each director who is an affiliate, as defined in Section 2(2)(A) or (B)(i), (ii), (iv), (v), (vi), or (vii), of the applicant; and
- (19) any other information that the administrator reasonably requires to perform the administrator's duties under Section 9.

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

One commentator warned that "the requirement that volunteer Board Members be fingerprinted will make it virtually impossible to find truly independent willing volunteer board members." That commentator explained that Board Members are guiding a non-profit agency that is helping people and do so without compensation. He suggested that an additional requirement of fingerprinting involving time and expense is likely to deter willing volunteers from participating on the Board.

**Section 7. Application for Registration: Obligation to Update Information.**

An applicant or registered provider shall notify the administrator within 10 days after a change in the information specified in Section 5(b)(4) or (6) or 6(1), (3), (6), (12), or (13).

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 8. Application for Registration: Public Information.**

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

## **Section 9. Certificate of Registration: Issuance or Denial.**

- (a) Except as otherwise provided in subsections (c) and (d), the administrator shall issue a certificate of registration as a provider to a person that complies with Sections 5 and 6.
- (b) If an applicant has otherwise complied with Sections 5 and 6, including a timely effort to obtain the information required by Section 6(14) but the information has not been received, the administrator may issue a temporary certificate of registration. The temporary certificate shall expire no later than 180 days after issuance.
- (c) The administrator may deny registration if:
  - (1) the application contains information that is materially erroneous or incomplete;
  - (2) an officer, director, or owner of the applicant has been convicted of a crime, or suffered a civil judgment, involving dishonesty or the violation of state or federal securities laws;
  - (3) the applicant or any of its officers, directors, or owners has defaulted in the payment of money collected for others; or
  - (4) the administrator finds that the financial responsibility, experience, character, or general fitness of the applicant or its owners, directors, employees, or agents does not warrant belief that the business will be operated in compliance with this act.
- (d) The administrator shall deny registration if the applicant's board of directors is not independent of the applicant's employees and agents.
- (e) Subject to adjustment of the dollar amount pursuant to Section 32(f), a board of directors is not independent for purposes of subsection(d) if more than one-fourth of its members:
  - (1) are affiliates of the applicant, as defined in Section 2(2)(A) or (B)(i), (ii), (iv), (v), (vi), or (vii); or
  - (2) after the date 10 years before first becoming a director of the applicant, were employed by or directors of a person that received from the applicant more than \$25,000 in either the current year or the preceding year.

### **COMMENT**

The language of this section is taken directly from the Model Act without changes. Subsection (d) reflects the legislative choice to conform the Uniform Act to the existing NJ law (N.J.S. § 17:16G-2) that for-profit entities are not permitted to provide debt-management services.

As noted above, since it appears that there may be considerable support for the participation of for-profit entities with regard to unsecured debts, Staff has prepared alternative language for the consideration of the Commission, which follows as Section 9A.

## **Section 9A. Certificate of Registration: Issuance or Denial.**

- (a) Except as otherwise provided in subsections (c) and (d), the administrator shall issue a certificate of registration as a provider to a person that complies with Sections 5 and 6.
- (b) If an applicant has otherwise complied with Sections 5 and 6, including a timely effort to obtain the information required by Section 6(14) but the information has not been received, the administrator may issue a temporary certificate of registration. The temporary certificate shall expire no later than 180 days after issuance.
- (c) The administrator may deny registration if:
  - (1) the application contains information that is materially erroneous or incomplete;

- (2) an officer, director, or owner of the applicant has been convicted of a crime, or suffered a civil judgment, involving dishonesty or the violation of state or federal securities laws;
  - (3) the applicant or any of its officers, directors, or owners has defaulted in the payment of money collected for others; or
  - (4) the administrator finds that the financial responsibility, experience, character, or general fitness of the applicant or its owners, directors, employees, or agents does not warrant belief that the business will be operated in compliance with this act.
- (d) The administrator shall deny registration if, with respect to an applicant that is organized as a not-for-profit entity or has obtained tax-exempt status under the Internal Revenue Code, 26 U.S.C. Section 501, the applicant's board of directors is not independent of the applicant's employees and agents.
- (e) Subject to adjustment of the dollar amount pursuant to Section 32(f), a board of directors is not independent for purposes of subsection(d) if more than one-fourth of its members:
- (1) are affiliates of the applicant, as defined in Section 2(2)(A) or (B)(i), (ii), (iv), (v), (vi), or (vii); or
  - (2) after the date 10 years before first becoming a director of the applicant, were employed by or directors of a person that received from the applicant more than \$25,000 in either the current year or the preceding year.

**COMMENT**

The alternative sections 4A, 5A and 9A were drafted to allow for-profit entities to provide debt management services for unsecured debts, as suggested by DOBI. This alternative is also supported by the fact that all six states that have enacted UDMSA, had allowed in their statutes both non-for-profit and for-profit entities to provide debt management services to consumers. The language of this section follows the UDMSA guidelines for allowing for-profit entities to provide debt management services, which is reflected in the underlined portion of subsection (d).

**Section 10. Certificate of Registration: Timing.**

- (a) The administrator shall approve or deny an initial registration as a provider within 120 days after an application is filed. In connection with a request pursuant to Section 6(19) for additional information, the administrator may extend the 120-day period for not more than 60 days. Within seven days after denying an application, the administrator, in a record, shall inform the applicant of the reasons for the denial.
- (b) If the administrator denies an application for registration as a provider or does not act on an application within the time prescribed in subsection (a), the applicant may appeal and request a hearing pursuant to N.J.S. 52:14B-9.
- (c) Subject to Sections 11(d) and 34, a registration as a provider is valid for one year.

**COMMENT**

Other than the reference to the New Jersey statute, the language this section is taken directly from the Model Act without changes. Staff will confirm that the reference to NJ law in the subsection (b) is accurate.

**Section 11. Renewal of Registration.**

- (a) A provider must obtain a renewal of its registration annually.
- (b) An application for renewal of registration as a provider must be in a form prescribed by the administrator, signed under oath, and:

- (1) be filed no fewer than 30 and no more than 60 days before the registration expires;
  - (2) be accompanied by the fee established by the administrator and the bond required by Section 13;
  - (3) contain the matter required for initial registration as a provider by Section 6(8) and (9) and a financial statement, audited by an accountant licensed to conduct audits, for the applicant's fiscal year immediately preceding the application;
  - (4) disclose any changes in the information contained in the applicant's application for registration or its immediately previous application for renewal, as applicable. If an application is otherwise complete and the applicant has made a timely effort to obtain the information required by Section 6(14) but the information has not been received, the administrator may issue a temporary renewal of registration. The temporary renewal shall expire no later than 180 days after issuance;
  - (5) supply evidence of insurance in an amount equal to the larger of \$250,000 or the highest daily balance in the trust account required by Section 22 during the six-month period immediately preceding the application:
    - (A) against risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant;
    - (B) issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator;
    - (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;
  - (6) disclose the total amount of money received by the applicant pursuant to plans during the preceding 12 months from or on behalf of individuals who reside in this state and the total amount of money distributed to creditors of those individuals during that period;
  - (7) disclose, to the best of the applicant's knowledge, the gross amount of money accumulated during the preceding 12 months pursuant to plans by or on behalf of individuals who reside in this state and with whom the applicant has agreements; and
  - (8) provide any other information that the administrator reasonably requires to perform the administrator's duties under this section.
- (c) Except for the information required by Section 6(7), (14), and (17) and the addresses required by Section 6(4), the administrator shall make the information in an application for renewal of registration as a provider available to the public.
- (d) If a registered provider files a timely and complete application for renewal of registration, the registration remains effective until the administrator, in a record, notifies the applicant of a denial and states the reasons for the denial.
- (e) If the administrator denies an application for renewal of registration as a provider, the applicant, within 30 days after receiving notice of the denial, may appeal and request a hearing pursuant to N.J.S. 52:14B-11. Subject to Section 34, while the appeal is pending the applicant shall continue to provide debt-management services to individuals with whom it has agreements. If the denial is affirmed, subject to the administrator's order and Section 34, the applicant shall continue to provide debt-management services to individuals with whom it has agreements until,

with the approval of the administrator, it transfers the agreements to another registered provider or returns to the individuals all unexpended money that is under the applicant's control.

#### COMMENT

Other than the reference to the New Jersey statute, the language this section is taken directly from the Model Act without changes. Staff will confirm that the reference to NJ law in the subsection (e) is accurate.

### **Section 12. Registration in Another State.**

If a provider holds a license or certificate of registration in another state authorizing it to provide debt-management services, the provider may submit a copy of that license or certificate and the application for it instead of an application in the form prescribed by Section 5(a), 6, or 11(b). The administrator shall accept the application and the license or certificate from the other state as an application for registration as a provider or for renewal of registration as a provider, as appropriate, in this state if:

- (1) the application in the other state contains information substantially similar to or more comprehensive than that required in an application submitted in this state;
- (2) the applicant provides the information required by Section 6(1), (3), (10), (12), and (13); and
- (3) the applicant, under oath, 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.

#### COMMENT

The language of this section is taken directly from the Model Act without changes.

### **Section 13. Bond Required.**

(a) Except as otherwise provided in Section 14, a provider that is required to be registered under this act shall file a surety bond with the administrator, which must:

- (1) be in effect during the period of registration and for two years after the provider ceases providing debt-management services to individuals in this state; and
- (2) run to this state for the benefit of this state and of individuals who reside in this state when they agree to receive debt-management services from the provider, as their interests may appear.

(b) Subject to adjustment of the dollar amount pursuant to Section 32(f), a surety bond filed pursuant to subsection (a) must:

- (1) be in the amount of \$50,000 or other larger or smaller amount that the administrator determines is warranted by the financial condition and business experience of the provider, the history of the provider in performing debt-management services, the risk to individuals, and any other factor the administrator considers appropriate;
- (2) be issued by a bonding, surety, or insurance company authorized to do business in this state and rated at least A by a nationally recognized rating organization; and
- (3) have payment conditioned upon noncompliance of the provider or its agent with this act.

(c) If the principal amount of a surety bond is reduced by payment of a claim or a judgment, the provider shall immediately notify the administrator and, within 30 days after notice by the administrator, file a new or additional surety bond in an amount set by the administrator. The

amount of the new or additional bond must be at least the amount of the bond immediately before payment of the claim or judgment. If for any reason a surety terminates a bond, the provider shall immediately file a new surety bond in the amount of \$50,000 or other amount determined pursuant to subsection (b).

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

- (1) the administrator assesses expenses under Section 32(b)(1), issues a final order under Section 33(a)(2), or recovers a final judgment under Section 33(a)(4) or (5) or (d); or
- (2) an individual recovers a final judgment pursuant to Section 35(a), (b), or (c)(1), (2), or (4).

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

- (1) to satisfaction of a final order or judgment under Section 33(a)(2), (4), or (5) or (d);
- (2) to final judgments recovered by individuals pursuant to Section 35(a), (b), or (c) (1), (2) or (4), pro rata;
- (3) to claims of individuals established to the satisfaction of the administrator, pro rata; and
- (4) if a final order or judgment is issued under Section 33(a), to the expenses charged pursuant to Section 32(b)(1).

#### COMMENT

The language of this section is taken directly from the Model Act without changes.

One commentator expressed concern that the added cost of compliance with insurance and bonding requirements of this law is likely to be passed on to consumers by the debt management agencies “at a time when the clients needing our services are up and grant funding is down, the unintended consequence is that our clients will have to bear the brunt of the cost.”

#### **Section 14. Bond Required: Substitute.**

(a) Instead of the surety bond required by Section 13, a provider may deliver to the administrator, in the amount required by Section 13(b), and, except as otherwise provided in paragraph (2)(A), payable or available to this state and to individuals who reside in this state when they agree to receive debt-management services from the provider, as their interests may appear, if the provider or its agent does not comply with this act:

- (1) a certificate of insurance
  - (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; 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.

(b) If a provider furnishes a substitute pursuant to subsection (a), the provisions of Section 13(a), (c), (d), and (e) apply to the substitute.

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 15. Requirement of Good Faith.**

A provider shall act in good faith in all matters under this act.

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 16. Customer Service.**

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 17. Prerequisites for Providing Debt-Management Services.**

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

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

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

(item)                      dollar amount or method of determining amount.

- (b) A provider may not furnish debt-management services unless the provider, through the services of a certified counselor or certified debt specialist:
- (1) provides the individual with reasonable education about the management of personal finance;
  - (2) has prepared a financial analysis; and
  - (3) if the individual is to make regular, periodic payments:
    - (A) has prepared a plan for the individual;
    - (B) has made a determination, based on the provider's analysis of the information provided by the individual and otherwise available to it, that the plan is suitable for the individual and the individual will be able to meet the payment obligations under the plan; and
    - (C) believes that each creditor of the individual listed as a participating creditor in the plan will accept payment of the individual's debts as provided in the plan.
- (c) Before an individual assents to an agreement to engage in a plan, a provider shall:
- (1) provide the individual with a copy of the analysis and plan required by subsection (b) in a record that identifies the provider and that the individual may keep whether or not the individual assents to the agreement;
  - (2) inform the individual of the availability, at the individual's option, of assistance by a toll-free communication system or in person to discuss the financial analysis and plan required by subsection (b); and
  - (3) with respect to all creditors identified by the individual or otherwise known by the provider to be creditors of the individual, provide the individual with a list of:
    - (A) creditors that the provider expects to participate in the plan and grant concessions;
    - (B) creditors that the provider expects to participate in the plan but not grant concessions;
    - (C) creditors that the provider expects not to participate in the plan; and
    - (D) all other creditors.
- (d) Before an individual assents to an agreement, the provider shall inform the individual, in a record that contains nothing else, that is given separately, and that the individual may keep whether or not the individual assents to the agreement:
- (1) of the name and business address of the provider;
  - (2) that plans are not suitable for all individuals and the individual may ask the provider about other ways, including bankruptcy, to deal with indebtedness;
  - (3) that establishment of a plan may adversely affect the individual's credit rating or credit scores;
  - (4) that nonpayment of debt may lead creditors to increase finance and other charges or undertake collection activity, including litigation;
  - (5) unless it is not true, that the provider may receive compensation from the creditors of the individual; and
  - (6) that, unless the individual is insolvent, if a creditor settles for less than the full amount of the debt, the plan may result in the creation of taxable income to the individual, even though the individual does not receive any money.

(e) If a provider may receive payments from an individual's creditors and the plan contemplates that the individual's creditors will reduce finance charges or fees for late payment, default, or delinquency, the provider may comply with subsection (d) by providing the following disclosure, surrounded by black lines:

**IMPORTANT INFORMATION FOR YOU TO CONSIDER**

- (1) Debt-management plans are not right for all individuals, and you may ask us to provide information about other ways, including bankruptcy, to deal with your debts.
- (2) Using a debt-management plan may make it harder for you to obtain credit.
- (3) We may receive compensation for our services from your creditors.

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Name and business address of provider

(f) If a provider will not receive payments from an individual's creditors and the plan contemplates that the individual's creditors will reduce finance charges or fees for late payment, default, or delinquency, a provider may comply with subsection (d) by providing the following disclosure, surrounded by black lines:

**IMPORTANT INFORMATION FOR YOU TO CONSIDER**

- (1) Debt-management plans are not right for all individuals, and you may ask us to provide information about other ways, including bankruptcy, to deal with your debts.
- (2) Using a debt-management plan may make it harder for you to obtain credit.

---

Name and business address of provider

(g) If an agreement contemplates that creditors will settle debts for less than the full principal amount of debt owed, a provider may comply with subsection (d) by providing the following disclosure, surrounded by black lines:

**IMPORTANT INFORMATION FOR YOU TO CONSIDER**

- (1) Our program is not right for all individuals, and you may ask us to provide information about bankruptcy and other ways to deal with your debts.
- (2) Nonpayment of your debts under our program may
  - hurt your credit rating or credit scores;
  - lead your creditors to increase finance and other charges; and
  - lead your creditors to undertake activity, including lawsuits, to collect the debts.
- (3) Reduction of debt under our program may result in taxable income to you, even though you will not actually receive any money.

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Name and business address of provider

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

## **Section 18. Communication by Electronic or Other Means.**

(a) In this section:

(1) “Federal act” means the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., as amended.

(2) “Consumer” means an individual who seeks or obtains goods or services that are used primarily for personal, family, or household purposes.

(b) A provider may satisfy the requirements of Section 17, 19, or 27 by means of the Internet or other electronic means if the provider obtains a consumer’s consent in the manner provided by Section 101(c)(1) of the federal act.

(c) The disclosures and materials required by Sections 17, 19, and 27 shall be presented in a form that is capable of being accurately reproduced for later reference.

(d) With respect to disclosure by means of an Internet website, the disclosure of the information required by Section 17(d) must appear on one or more screens that:

(1) contain no other information; and

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

(e) At the time of providing the materials and agreement required by Sections 17(c) and (d), 19, and 27, a provider shall inform the individual that upon electronic, telephonic, or written request, it will send the individual a written copy of the materials, and shall comply with a request as provided in subsection (f).

(f) If a provider is requested, before the expiration of 90 days after an agreement is completed or terminated, to send a written copy of the materials required by Section 17(c) and (d), 19, or 27, the provider shall send them at no charge within three business days after the request 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), if a consumer who has consented to electronic communication in the manner provided by Section 101 of the federal act withdraws consent as provided in the federal act, a provider may terminate its agreement with the consumer.

(i) If a provider wishes to terminate an agreement with a consumer pursuant to subsection (h), it shall notify the consumer that it will terminate the agreement unless the consumer, within 30 days after receiving the notification, consents to electronic communication in the manner provided in Section 101(c) of the federal act. If the consumer consents, the provider may terminate the agreement only as permitted by Section 19(a)(6)(G).

### **COMMENT**

The language of this section is taken directly from the Model Act without changes.

## Section 19. Form and Contents of Agreement.

- (a) An agreement must:
- (1) be in a record;
  - (2) be dated and signed by the provider and the individual;
  - (3) include the name of the individual and the address where the individual resides;
  - (4) include the name, business address, and telephone number of the provider;
  - (5) be delivered to the individual immediately upon formation of the agreement; and
  - (6) disclose:
    - (A) the services to be provided;
    - (B) the amount, or method of determining the amount, of all fees, individually itemized, to be paid by the individual;
    - (C) the schedule of payments to be made by or on behalf of the individual, including the amount of each payment, the date on which each payment is due, and an estimate of the date of the final payment;
    - (D) if a plan provides for regular periodic payments to creditors:
      - (i) each creditor of the individual to which payment will be made, the amount owed to each creditor, and any concessions the provider reasonably believes each creditor will offer; and
      - (ii) the schedule of expected payments to each creditor, including the amount of each payment and the date on which it will be made;
    - (E) each creditor that the provider believes will not participate in the plan and to which the provider will not direct payment;
    - (F) how the provider will comply with its obligations under Section 27(a);
    - (G) that the provider may terminate the agreement for good cause, upon return of unexpended money of the individual;
    - (H) that the individual may cancel the agreement as provided in Section 20;
    - (I) that the individual may contact the administrator with any questions or complaints regarding the provider; and
    - (J) the address, telephone number, and Internet address or website of the administrator.
- (b) For purposes of subsection (a)(5), delivery of an electronic record occurs when it is made available in a format in which the individual may retrieve, save, and print it and the individual is notified that it is available.
- (c) If the administrator supplies the provider with any information required under subsection (a)(6)(J), the provider may comply with that requirement only by disclosing the information supplied by the administrator.
- (d) An agreement must provide that:
- (1) the individual has a right to terminate the agreement at any time, without penalty or obligation, by giving the provider written or electronic notice, in which event:
    - (A) the provider will refund all unexpended money that the provider or its agent has received from or on behalf of the individual for the reduction or satisfaction of the individual's debt;
    - (B) with respect to an agreement that contemplates that creditors will settle debts for less than the principal amount of debt, the provider will refund 65 percent of any portion of the set-up fee that has not been credited against the settlement fee; and

- (C) all powers of attorney granted by the individual to the provider are revoked and ineffective;
- (2) the individual authorizes any bank in which the provider or its agent has established a trust account to disclose to the administrator any financial records relating to the trust account; and
- (3) the provider will notify the individual within five days after learning of a creditor's 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.
- (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) and Section 20 exist even if not provided in the agreement. A provision in an agreement which violates subsection (d), (e), or (f) is void.

#### COMMENT

Other than the reference to the New Jersey statute, the language this section is taken directly from the Model Act without changes. The subsection (f)(2) includes reference to the NJ version of the Uniform Arbitration Act of 2000, promulgated by NCCUSL and adopted by the NJ state legislature.

### **Section 20. Cancellation of Agreement; Waiver.**

- (a) An individual may cancel an agreement before midnight of the third business day after the individual assents to it, unless the agreement does not comply with subsection (b) or Section 19 or 28, in which event the individual may cancel the agreement within 30 days after the individual assents to it. To exercise the right to cancel, the individual must give notice in a record to the provider. Notice by mail is given when mailed.
- (b) An agreement must be accompanied by a form that contains in bold-face type, surrounded by bold black lines:

Notice of Right to Cancel

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

To cancel this agreement during this period, send an e-mail to \_\_\_\_\_ or mail or deliver a signed, dated copy of this

E-mail address of provider  
notice, or any other written notice to \_\_\_\_\_

Name of provider  
at \_\_\_\_\_ before midnight on \_\_\_\_\_.

Address of provider Date

If you cancel this agreement within the 3-day period, we will refund all money you already have paid us.

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

I cancel this agreement,

\_\_\_\_\_  
Print your name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 21. Required Language.**

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

## Section 22. 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.
- (c) A provider shall:
- (1) maintain separate records of account for each individual to whom the provider is furnishing debt-management services;
  - (2) disburse money paid by or on behalf of the individual to creditors of the individual as disclosed in the agreement, within ten days of receipt, except that:
    - (A) the provider may delay payment to the extent that a payment by the individual is not final; and
    - (B) if a plan provides for regular periodic payments to creditors, the disbursement must comply with the due dates established by each creditor; and
  - (3) promptly correct any payments that are not made or that are misdirected as a result of an error by the provider or other person in control of the trust account and reimburse the individual for any costs or fees imposed by a creditor as a result of the failure to pay or misdirection.
- (d) A provider may not commingle money in a trust account established for the benefit of individuals to whom the provider is furnishing debt-management services with money of other persons.
- (e) A trust account must at all times have a cash balance equal to the sum of the balances of each individual's account.
- (f) If a provider has established a trust account pursuant to subsection (a), the provider shall reconcile the trust account at least once a month. The reconciliation must compare the cash balance in the trust account with the sum of the balances in each individual's account. If the provider or its designee has more than one trust account, each trust account must be individually reconciled.
- (g) If a provider discovers, or has a reasonable suspicion of, embezzlement or other unlawful appropriation of money held in trust, the provider immediately shall notify the administrator by a method approved by the administrator. Unless the administrator by rule provides otherwise, within five days thereafter, the provider shall give notice to the administrator describing the remedial action taken or to be taken.
- (h) If an individual terminates an agreement or it becomes reasonably apparent to a provider that a plan has failed, the provider shall promptly refund to the individual all money paid by or on behalf of the individual which has not been paid to creditors, less fees that are payable to the provider under Section 23.
- (i) Before relocating a trust account from one bank to another, a provider shall inform the administrator of the name, business address, and telephone number of the new bank. As soon as practicable, the provider shall inform the administrator of the account number of the trust account at the new bank.

#### COMMENT

Subsection (c)(2) incorporates the time limit for disbursements from the current NJ law, N.J.S. 17:16G-9. The Model UDMSA does not contain any time limit for disbursements. However, the current law in New Jersey requires service providers to disburse money to the creditors within ten days of their receipt from a debtor. The added language in the subsection reflects this law. Staff welcomes comments as to whether this time limit is adequate. Other than that change, the language this section is taken directly from the Model Act without changes.

### **Section 23. Fees and Other Charges.**

- (a) A provider may not impose directly or indirectly a fee or other charge on an individual or receive money from or on behalf of an individual for debt-management services except as permitted by this section.
- (b) A provider may not impose charges or receive payment for debt-management services until the provider and the individual have signed an agreement that complies with Sections 19 and 28.
- (c) If an individual assents to an agreement, a provider may not impose a fee or other charge for educational or counseling services, or the like, except as otherwise provided in this subsection and Section 28(d). The administrator may authorize a provider to charge a fee based on the nature and extent of the educational or counseling services furnished by the provider.
- (d) Subject to adjustment of dollar amounts pursuant to Section 32(f), the following rules apply:
  - (1) If an individual assents to a plan that contemplates that creditors will reduce finance charges or fees for late payment, default, or delinquency, the provider may charge:
    - (A) a fee not exceeding \$50 for consultation, obtaining a credit report, setting up an account, and the like; and
    - (B) a monthly service fee, not to exceed \$10 times the number of creditors remaining in a plan at the time the fee is assessed, but not more than \$50 in any month.
  - (2) If an individual assents to an agreement that contemplates that creditors will settle debts for less than the principal amount of the debt, a provider may charge:
    - (A) subject to Section 19(d), a fee for consultation, obtaining a credit report, setting up an account, and the like, in an amount not exceeding the lesser of \$400 and four percent of the debt in the plan at the inception of the plan; and
    - (B) a monthly service fee, not to exceed \$10 times the number of creditors remaining in a plan at the time the fee is assessed, but not more than \$50 in any month.
  - (3) A provider may not impose or receive fees under both paragraphs (1) and (2).
  - (4) Except as otherwise provided in Section 28(d), if an individual does not assent to an agreement, a provider may receive for educational and counseling services it provides to the individual a fee not exceeding \$100 or, with the approval of the administrator, a larger fee. The administrator may approve a fee larger than \$100 if the nature and extent of the educational and counseling services warrant the larger fee.
- (e) If, before the expiration of 90 days after the completion or termination of educational or counseling services, an individual assents to an agreement, the provider shall refund to the individual any fee paid pursuant to subsection (d)(4).
- (f) Except as otherwise provided in subsections (c) and (d), if 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 percent 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).
- (g) Subject to adjustment of the dollar amount pursuant to Section 32(f), if a payment to a provider by an individual under this act is dishonored, a provider may impose a reasonable charge on the individual, not to exceed the lesser of \$25 and the amount permitted by law other than this act.

#### **COMMENT**

The language of this section is taken directly from the Model Act without changes.

This section by far had generated the biggest controversy.

One commentator has suggested that service fee caps mandated by this section should be eliminated and a scalable system be used instead, in which people using the service are charged according to their ability to pay. He contends that fee caps force credit counselors to provide low-level services with expenses at or below the cap, and high-level services are eliminated since agencies cannot perform them at a loss. According to that commenter, the fee cap system promotes large-volume agencies with low level of services, which have been proven to be a disservice to consumers. As he explained his position,

[u]nder a scalable system, those who can afford to pay more do so, so others who cannot afford to pay, will still have access to the service. For example, a dual income professional couple with gambling problems may have a higher recommended contribution so that a single mother of three can obtain the same level of service for free. At the end, the cost of providing the service to the agency remains the same but if forced to recognize a low cap fee, the ability to offer quality services to those truly in need is removed as there is no funding source. The bottom line is that good counseling costs money and we should be allowed to charge those who can afford it.

Also, according to the commentator quoted above, caps encourage counseling agencies to handle only those debts which are covered by “fair share” payments of creditors or are easily handled electronically. This policy results in that the agency’s debt management plan does not handle the total debt of a consumer, moreover the consumer is left with harder debts to handle on his/her own. Therefore, the \$50 cap “is beneficial to no one except creditors.”

Another commentator suggested that the low dollar cap of \$50 prevents companies from handling secured debts of consumers because it takes more time and effort to do so, and suggested 15% fee for 6 months with a maximum of \$150 for those companies handling secured debt of consumers.

In the neighboring state of New York, however, the gist of testimony of a consumer attorney who provides free legal representation to low income people was that the UDMSA fee provisions are too weak to deter predatory debt settlers charging high fees and not getting the consumers out of debt. He recommended following the approach of some states (Kansas, South Carolina, Georgia and Minnesota) “to permit only small set-up and maintenance fees that are well below those recommended in the UDMSA.” For example, the lowest fees are in Kansas where the law limits initial set up fees to \$50 and a monthly maintenance fee of \$20. South Carolina law allows debt management entities to charge twice as much. Georgia limits fee collection to 7.5% of the monthly payment, and Minnesota limits set-up fee to \$200 or 2% of the debt whichever is lower. As a result, only one traditional debt settlement company has been registered in Kansas and South Carolina. Contrasting this with Colorado, which had adopted the UDMSA fee structure (although without the \$400 cap on set-up fees and few limits on monthly maintenance fees), he concluded that Colorado’s weak fee structure is the main reason why 7 out of 41 companies licensed in Colorado are ‘traditional’ (predatory) debt settlers, which should be deterred from providing debt management services in the state.

Staff encourages comment on this issue in order to determine whether revision of this section is warranted.

## **Section 24. Voluntary Contributions.**

A provider may not solicit a voluntary contribution from an individual or an affiliate of the individual for any service provided to the individual. A provider may accept voluntary contributions from an individual but, until 30 days after completion or termination of a plan, the aggregate amount of money received from or on behalf of the individual may not exceed the total amount the provider may charge the individual under Section 23.

### **COMMENT**

The language of this section is taken directly from the Model Act without changes.

## **Section 25. Voidable Agreements.**

- (a) If a provider imposes a fee or other charge or receives money or other payments not authorized by Section 23 or 24, the individual may void the agreement and recover as provided in Section 35.
- (b) If a provider is not registered as required by this act when an individual assents to an agreement, the agreement is voidable by the individual.
- (c) If an individual voids an agreement under subsection (b), the provider does not have a claim against the individual for breach of contract or for restitution.

### **COMMENT**

The language of this section is taken directly from the Model Act without changes.

## **Section 26. Termination of Agreements.**

- (a) If an individual who has entered into an agreement fails for 60 days to make payments required by the agreement, a provider may terminate the agreement.
- (b) If a provider or an individual terminates an agreement, the provider shall immediately return to the individual:
  - (1) any money of the individual held in trust for the benefit of the individual; and
  - (2) 65 percent of any portion of the set-up fee received pursuant to Section 23(d)(2) which has not been credited against settlement fees.

### **COMMENT**

The language of this section is taken directly from the Model Act without changes.

## **Section 27. Periodic Reports and Retention of Records.**

- (a) A provider shall provide the accounting required by subsection (b):
  - (1) upon cancellation or termination of an agreement; and
  - (2) before cancellation or termination of any agreement:
    - (A) at least once each month; and
    - (B) within five business days after a request by an individual, but the provider need not comply with more than one request in any calendar month.
- (b) A provider, in a record, shall provide each individual for whom it has established a plan an accounting of the following information:
  - (1) the amount of money received from the individual since the last report;

- (2) the amounts and dates of disbursement made on the individual's behalf, or by the individual upon the direction of the provider, since the last report to each creditor listed in the plan;
  - (3) the amounts deducted from the amount received from the individual;
  - (4) the amount held in reserve; and
  - (5) if, since the last report, a creditor has agreed to accept as payment in full an amount less than the principal amount of the debt owed by the individual:
    - (A) the total amount and terms of the settlement;
    - (B) the amount of the debt when the individual assented to the plan;
    - (C) the amount of the debt when the creditor agreed to the settlement; and
    - (D) the calculation of a settlement fee.
- (c) A provider shall maintain records for each individual for whom it provides debt-management services for five years after the final payment made by the individual and produce a copy of them to the individual within a reasonable time after a request for them. The provider may use electronic or other means of storage of the records.

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 28. Prohibited Acts and Practices.**

- (a) A provider may not, directly or indirectly:
  - (1) misappropriate or misapply money held in trust;
  - (2) settle a debt on behalf of an individual for more than 50 percent of the principal amount of the debt owed a creditor, unless the individual assents to the settlement after the creditor has assented;
  - (3) take a power of attorney that authorizes it to settle a debt, unless the power of attorney expressly limits the provider's authority to settle debts for not more than 50 percent of the principal amount of the debt owed a creditor;
  - (4) exercise or attempt to exercise a power of attorney after an individual has terminated an agreement;
  - (5) initiate a transfer from an individual's account at a bank or with another person unless the transfer is:
    - (A) a return of money to the individual; or
    - (B) before termination of an agreement, properly authorized by the agreement and this act, and for:
      - (i) payment to one or more creditors pursuant to 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 person for referring a prospective customer, if the person making the referral has a financial interest in the outcome of debt-management services provided to the customer, unless neither the provider nor the person making the referral communicates to the prospective customer the identity of the source of the referral;
  - (8) receive a bonus, commission, or other benefit for referring an individual to a person;

- (9) structure a plan in a manner that would result in a negative amortization of any of an individual's debts, unless a creditor that is owed a negatively amortizing debt agrees to refund or waive the finance charge upon payment of the principal amount of the debt;
  - (10) compensate its employees on the basis of a formula that incorporates the number of individuals the employee induces to enter into agreements;
  - (11) settle a debt or lead an individual to believe that a payment to a creditor is in settlement of a debt to the creditor unless, at the time of settlement, the individual receives a certification by the creditor that the payment is in full settlement of the debt;
  - (12) make a representation that:
    - (A) the provider will furnish money to pay bills or prevent attachments;
    - (B) payment of a certain amount will permit satisfaction of a certain amount or range of indebtedness; or
    - (C) participation in a plan will or may prevent litigation, garnishment, attachment, repossession, foreclosure, eviction, or loss of employment;
  - (13) misrepresent that it is authorized or competent to furnish legal advice or perform legal services;
  - (14) represent 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 settlement fee at no additional expense to the individual;
  - (4) obtain a mortgage or other security interest from any person in connection with the services provided to the individual;
  - (5) except as permitted by federal law, disclose the identity or identifying information of the individual or the identity of the individual's creditors, except to:
    - (A) the administrator, upon proper demand;
    - (B) a creditor of the individual, to the extent necessary to secure the cooperation of the creditor in a plan; or
    - (C) the extent necessary to administer the plan;
  - (6) except as otherwise provided in Section 23(f), provide the individual less than the full benefit of a compromise of a debt arranged by the provider;

- (7) charge the individual for or provide credit or other insurance, coupons for goods or services, membership in a club, access to computers or the Internet, or any other matter not directly related to debt-management services or educational services concerning personal finance; or
  - (8) furnish legal advice or perform legal services, unless the person furnishing that advice to or performing those services for the individual is licensed to practice law.
- (c) This act does not authorize any person to engage in the practice of law.
- (d) A provider may not receive a gift or bonus, premium, reward, or other compensation, directly or indirectly, for advising, arranging, or assisting an individual in connection with obtaining, an extension of credit or other service from a lender or service provider, except for educational or counseling services required in connection with a government-sponsored program.
- (e) Unless a person supplies goods, services, or facilities generally and supplies them to the provider at a cost no greater than the cost the person generally charges to others, a provider may not purchase goods, services, or facilities from the person if an employee or a person that the provider should reasonably know is an affiliate of the provider:
- (1) owns more than 10 percent of the person; or
  - (2) is an employee or affiliate of the person.

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 29. Notice of Litigation.**

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 30. Advertising.**

- (a) If the agreements of a provider contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency and the provider advertises debt-management services, it shall disclose, in an easily comprehensible manner, that using a debt-management plan may make it harder for the individual to obtain credit.
- (b) If the agreements of a provider contemplate that creditors will settle for less than the full principal amount of debt and the provider advertises debt-management services, it shall disclose, in an easily comprehensible manner, the information specified in Section 17(d)(3) and (4).

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

### **Section 31. Liability for the Conduct of Other Persons.**

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

#### **COMMENT**

The language of this section is taken directly from the Model Act without changes.

### **Section 32. Powers of Administrator.**

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

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

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

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

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

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

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

#### COMMENT

Staff will confirm that the reference to NJ law in the subsection (c) is accurate. Other than the reference to the New Jersey statute, the language this section is taken directly from the Model Act without changes.

The NCCUSL states in its Model Act that “the dollar amounts that appear in this Act were selected in August 2005. The state may wish to adjust those amounts to reflect changes in the index specified in subsection (f) between that date and the date of enactment. Subsection (f) specifies the sections in which dollar amounts appear.” Staff will perform further research and encourage comments on this section in order to determine the appropriate manner in which to deal with the dollar amounts in the statute. One option, of course, is to leave the amounts to be determined by the Commissioner and adopted by rule.

### **Section 33. Administrative Remedies.**

- (a) The administrator may enforce this act and rules adopted under this act by taking one or more of the following actions:
- (1) ordering a provider or a director, employee, or other agent of a provider to cease and desist from any violations;
  - (2) ordering a provider or a person that has caused a violation to correct the violation, including making restitution of money or property to a person aggrieved by a violation;
  - (3) subject to adjustment of the dollar amount pursuant to Section 32(f), imposing on a provider or a person that has caused a violation a civil penalty not exceeding \$10,000 for each violation;
  - (4) prosecuting a civil action to:
    - (A) enforce an order;
    - (B) obtain restitution or an injunction or other equitable relief, or both; or
  - (5) intervening in an action brought under Section 35.
- (b) Subject to adjustment of the dollar amount pursuant to Section 32(f), if a person violates or knowingly authorizes, directs, or aids in the violation of a final order issued under subsection (a)(1) or (2), the administrator may impose a civil penalty not exceeding \$20,000 for each violation.
- (c) The administrator may maintain an action to enforce this act in any county.
- (d) The administrator may recover the reasonable costs of enforcing the act under subsections (a) through (c), including attorney’s fees based on the hours reasonably expended and the hourly rates for attorneys of comparable experience in the community.
- (e) In determining the amount of a civil penalty to impose under subsection (a) or (b), the administrator shall consider the seriousness of the violation, the good faith of the violator, any previous violations by the violator, the deleterious effect of the violation on the public, the net worth of the violator, and any other factor the administrator considers relevant to the determination of the civil penalty.

#### COMMENT

The language of this section is taken directly from the Model Act without changes.

### **Section 34. Suspension, Revocation, or Nonrenewal of Registration.**

- (a) In this section, “insolvent” means:
- (1) having generally ceased to pay debts in the ordinary course of business other than as a result of good-faith dispute;
  - (2) being unable to pay debts as they become due; or

- (3) being insolvent within the meaning of the federal bankruptcy law, 11 U.S.C. Section 101 et seq., as amended.
- (b) The administrator may suspend, revoke, or deny renewal of a provider's registration if:
  - (1) a fact or condition exists that, if it had existed when the registrant applied for registration as a provider, would have been a reason for denying registration;
  - (2) the provider has committed a material violation of this act or a rule or order of the administrator under this act;
  - (3) the provider is insolvent;
  - (4) the provider or an employee or affiliate of the provider has refused to permit the administrator to make an examination authorized by this act, failed to comply with Section 32(b)(2) within 15 days after request, or made a material misrepresentation or omission in complying with Section 32(b)(2); or
  - (5) the provider has not responded within a reasonable time and in an appropriate manner to communications from the administrator.
- (c) If a provider does not comply with Section 22(f) or if the administrator otherwise finds that the public health or safety or general welfare requires emergency action, the administrator may order a summary suspension of the provider's registration, effective on the date specified in the order.
- (d) If the administrator suspends, revokes, or denies renewal of the registration of a provider, the administrator may seek a court order authorizing seizure of any or all of the money in a trust account required by Section 22, books, records, accounts, and other property of the provider which are located in this state.
- (e) If the administrator suspends or revokes a provider's registration, the provider may appeal and request a hearing pursuant to the Administrative Procedure Act, N.J.S. 52:14B-11.

#### COMMENT

Other than the reference to the New Jersey statute, the language this section is taken directly from the Model Act without changes. Staff will confirm that the reference to NJ law in the subsection (e) is accurate.

### **Section 35. Private Enforcement.**

- (a) If an individual voids an agreement pursuant to Section 25(b), the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement, except amounts paid to creditors, in addition to the recovery under subsection (c)(3) and (4).
- (b) If an individual voids an agreement pursuant to Section 25(a), the individual may recover in a civil action three times the total amount of the fees, charges, money, and payments made by the individual to the provider, in addition to the recovery under subsection (c)(4).
- (c) Subject to subsection (d), an individual with respect to whom a provider violates this act may recover in a civil action from the provider and any person that caused the violation:
  - (1) compensatory damages for injury, including noneconomic injury, caused by the violation;
  - (2) except as otherwise provided in subsection (d) and subject to adjustment of the dollar amount pursuant to Section 32(f), with respect to a violation of Section 17, 19, 20, 21, 22, 23, 24, 27, or 28(a), (b), or (d), the greater of the amount recoverable under paragraph (1) or \$5,000;
  - (3) punitive damages; and

- (4) reasonable attorney's fees and costs.
- (d) In a class action, except for a violation of Section 28(a)(5), the minimum damages provided in subsection (c)(2) do not apply.
- (e) In addition to the remedy available under subsection (c), if a provider violates an individual's rights under Section 20, the individual may recover in a civil action all money paid or deposited by or on behalf of the individual pursuant to the agreement, except for amounts paid to creditors.
- (f) A provider is not liable under this section for a violation of this act if the provider proves that the violation was not intentional and resulted from a good-faith error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. An error of legal judgment with respect to a provider's obligations under this act is not a good-faith error. If, in connection with a violation, the provider has received more money than authorized by an agreement or this act, the defense provided by this subsection is not available unless the provider refunds the excess within two business days of learning of the violation.
- (g) The administrator shall assist an individual in enforcing a judgment against the surety bond or other security provided under Section 13 or 14.

#### COMMENT

The language of this section is taken directly from the Model Act without changes.

### **Section 36. Violation of Consumer Protection Statutes.**

If an act or practice of a provider violates both this act and NJ Consumer Fraud Act, N.J.S. 56:8-1 et seq., or any other NJ statute dealing with consumer protection or unfair or deceptive trade practices in consumer transactions, an individual may not recover under both for the same act or practice.

#### COMMENT

Per Model Act suggestion, the caption to this section reflects, and the reference in the text of the section is made to the New Jersey Consumer Fraud Act. Staff will confirm whether references to other NJ laws are necessary here. Other than the reference to the New Jersey statute, the language this section is taken directly from the Model Act without changes.

### **Section 37. Statute of Limitations.**

- (a) An action or proceeding brought pursuant to Section 33(a), (b), or (c) must be commenced within four years after the conduct that is the basis of the administrator's complaint.
- (b) An action brought pursuant to Section 35 must be commenced within two years after the latest of:
- (1) the individual's last transmission of money to a provider;
  - (2) the individual's last transmission of money to a creditor at the direction of the provider;
  - (3) the provider's last disbursement to a creditor of the individual;
  - (4) the provider's last accounting to the individual pursuant to Section 27(a);
  - (5) the date on which the individual discovered or reasonably should have discovered the facts giving rise to the individual's claim; or
  - (6) termination of actions or proceedings by the administrator with respect to a violation of the act.

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 38. Uniformity of Application and Construction.**

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 39. Relation to Electronic Signatures in Global and National Commerce Act.**

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 40. Transitional Provisions; Application to Existing Transactions.**

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 41. Severability.**

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

**COMMENT**

The language of this section is taken directly from the Model Act without changes.

**Section 42. Repeal.**

The following laws are repealed:

N.J.S.A. 17:16G-1 to 17:16G-9.

**COMMENT**

Citations to the existing NJ legislation on the subject are included here. Staff will confirm whether citations to any other NJ laws are necessary.

**Section 43. Effective Date.**

This act takes effect 12 months after enactment.

**COMMENT**

The Model Act contains the following recommendation on the effective date:

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

Staff will address the issue of an effective date at a later time.