

Senate Bill No. 375

(By Senator Minard)

[Introduced January 20, 2012; referred to the Committee on
Interstate Cooperation; and then to the Committee on the
Judiciary.]

11 A BILL to amend the Code of West Virginia, 1931, as amended, by
12 adding thereto a new article, designated §47-26-1, §47-26-2,
13 §47-26-3, §47-26-4, §47-26-5, §47-26-6, §47-26-7, §47-26-8,
14 §47-26-9, §47-26-10, §47-26-11, §47-26-12, §47-26-13,
15 §47-26-14, §47-26-15, §47-26-16, §47-26-17, §47-26-18,
16 §47-26-19, §47-26-20, §47-26-21, §47-26-22, §47-26-23,
17 §47-26-24, §47-26-25, §47-26-26, §47-26-27, §47-26-28,
18 §47-26-29, §47-26-30, §47-26-31, §47-26-32, §47-26-33,
19 §47-26-34, §47-26-35, §47-26-36, §47-26-37, §47-26-38 and
20 §47-26-39, all relating to creating the Uniform Debt
21 Management Services Act; regulating debt management services
22 providers; providing for the registration of debt management
23 service providers with the Division of Banking; defining

1 terms; providing exemptions for certain agreements and
2 persons; establishing the application information and fees
3 required for registration; requiring applicants and
4 registrants to provide the Commissioner of Banking with
5 certain updated information provided as part of the
6 application; establishing the grounds under which the
7 commissioner may deny a registration; requiring the
8 commissioner to act on a registration application within one
9 hundred twenty days of receipt of the complete application;
10 requiring an annual renewal of all registrations; requiring
11 periodic reporting by providers; requiring a surety bond for
12 registered providers; requiring providers of debt management
13 services to act in good faith and maintain customer service
14 access during ordinary business hours; establishing the
15 prerequisites for providing debt management services;
16 requiring certain provisions in all contracts to provide debt
17 management services; providing for the ability to terminate a
18 debt management services agreement upon notice; providing that
19 all money paid to a debt management services provider shall be
20 held in trust in an insured bank account; prohibiting the
21 imposition of a fee or other charge for debt management
22 services until the provider and customer have signed an
23 agreement; providing that an individual may void an agreement

1 and recover a refund of any moneys paid; providing a five-year
2 period for retention of records; establishing prohibited acts
3 and practices of a debt management services provider;
4 requiring a provider to provide the commissioner with notice
5 of any civil litigation against it relating to violation of
6 this article; requiring certain disclosures in advertising by
7 debt management services providers; authorizing the Division
8 of Banking to examine providers for compliance; requiring
9 background investigation of principals of providers;
10 authorizing the Division of Banking and the Office of the
11 Attorney General to enforce the act; providing for private
12 enforcement remedies; and establishing statutes of
13 limitations.

14 *Be it enacted by the Legislature of West Virginia:*

15 That the Code of West Virginia, 1931, as amended, be amended
16 by adding thereto a new article, designated §47-26-1, §47-26-2,
17 §47-26-3, §47-26-4, §47-26-5, §47-26-6, §47-26-7, §47-26-8,
18 §47-26-9, §47-26-10, §47-26-11, §47-26-12, §47-26-13, §47-26-14,
19 §47-26-15, §47-26-16, §47-26-17, §47-26-18, §47-26-19, §47-26-20,
20 §47-26-21, §47-26-22, §47-26-23, §47-26-24, §47-26-25, §47-26-26,
21 §47-26-27, §47-26-28, §47-26-29, §47-26-30, §47-26-31, §47-26-32,
22 §47-26-33, §47-26-34, §47-26-35, §47-26-36, §47-26-37, §47-26-38
23 and §47-26-39, all to read as follows:

1

2 **ARTICLE 26. THE UNIFORM DEBT MANAGEMENT SERVICES ACT.**

3 **§47-26-1. Short title.**

4 This article may be cited as "The Uniform Debt Management
5 Services Act."

6 **§47-26-2. Definitions.**

7 For the purposes of this article, the words or terms defined
8 in this article, and any variation of those words or terms required
9 by the context, have the meanings ascribed to them in this article.
10 These definitions are applicable unless a different meaning clearly
11 appears from the context:

12 (1) "Commissioner" means the Commissioner of the West Virginia
13 Division of Banking;

14 (2) "Affiliate":

15 (A) With respect to an individual, means:

16 (i) The spouse of the individual;

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

18 (iii) An individual or the spouse of an individual who is a
19 lineal ancestor or lineal descendant of the individual or the
20 individual's spouse;

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

1 or

2 (v) Any other individual occupying the residence of the
3 individual; and

4 (B) With respect to an entity, means:

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

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

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

11 (iv) Subject to adjustment of the dollar amount pursuant to
12 subsection (f), section thirty-two of this article, a person that
13 receives or received more than \$25,000 from the entity in either
14 the current year or the preceding year or a person that owns more
15 than ten percent of, or an individual who is employed by or is a
16 director of, a person that receives or received more than \$25,000
17 from the entity in either the current year or the preceding year;

18 (v) An officer or director of, or an individual performing
19 similar functions with respect to, a person described in
20 subparagraph (i), paragraph (B) of this subdivision;

21 (vi) The spouse of, or an individual occupying the residence
22 of, an individual described in subparagraphs (i) through (iv),
23 paragraph (B) of this subdivision; or

1 (vii) An individual who has the relationship specified in
2 subparagraph (iv), paragraph (A) of this subdivision to an
3 individual or the spouse of an individual described in
4 subparagraphs (i) through (v) of that paragraph;

5 (3) "Agreement" means an agreement between a provider and an
6 individual for the performance of debt management services;

7 (4) "Bank" means a financial institution, including a
8 commercial bank, savings bank, savings and loan association, credit
9 union, and trust company, engaged in the business of banking,
10 chartered under federal or state law, and regulated by a federal or
11 state banking regulatory authority;

12 (5) "Business address" means the physical location of a
13 business, including the name and number of a street;

14 (6) "Concessions" means assent to repayment of a debt on terms
15 more favorable to an individual than the terms of the contract
16 between the individual and a creditor;

17 (7) "Day" means calendar day;

18 (8) "Debt management services" means services as an
19 intermediary between an individual and one or more creditors of the
20 individual for the purpose of obtaining concessions, but does not
21 include:

22 (A) Legal services provided in an attorney-client
23 relationship, if:

1 (i) The services are provided by an attorney who:

2 (I) Is licensed to practice law in this state; and

3 (II) Provides legal services in representing the individual in
4 the individual's relationship with a creditor; and

5 (ii) There is no intermediary between the individual and the
6 creditor other than the attorney or an individual under the direct
7 supervision of the attorney;

8 (B) Accounting services provided in an accountant-client
9 relationship, if:

10 (i) The services are provided by a certified public accountant
11 who:

12 (I) Is licensed to provide accounting services in this state;
13 and

14 (II) Provides accounting services in representing the
15 individual in the individual's relationship with a creditor; and

16 (ii) There is no intermediary between the individual and the
17 creditor other than the accountant or an individual under the
18 direct supervision of the accountant;

19 (9) "Entity" means a person other than an individual;

20 (10) "Good faith" means honesty in fact and the observance of
21 reasonable standards of fair dealing;

22 (11) "Lead generator" means a person that, in the regular
23 course of business, supplies a provider with the name of a

1 potential customer, directs a communication of an individual to a
2 provider, or otherwise refers a customer to a provider;

3 (12) "Nationwide Mortgage Licensing System and Registry" means
4 a mortgage licensing system developed and maintained by the
5 Conference of State Bank Supervisors and the American Association
6 of Residential Mortgage Regulators for the licensing and
7 registration of mortgage brokers, lenders, loan originators and
8 other entities subject to licensing or registration by financial
9 supervisors;

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

15 (14) "Plan" means a program or strategy in which a provider
16 furnishes debt management services to an individual and which
17 includes a schedule of payments to be made by or on behalf of the
18 individual and used to pay debts owed by the individual;

19 (15) "Principal amount of the debt" means the amount of a debt
20 at the time of an agreement;

21 (16) "Provider" means a person that provides, offers to
22 provide, or agrees to provide debt management services directly or
23 through others;

1 (17) "Record" means information that is inscribed on a
2 tangible medium or that is stored in an electronic or other medium
3 and is retrievable in perceivable form;

4 (18) "Settlement fee" means a charge imposed on or paid by an
5 individual in connection with a creditor's assent to accept in full
6 satisfaction of a debt an amount less than the principal amount of
7 the debt;

8 (19) "Sign" means, with present intent to authenticate or
9 adopt a record:

10 (A) To execute or adopt a tangible symbol; or

11 (B) To attach to or logically associate with the record an
12 electronic sound, symbol or process;

13 (20) "State" means a state of the United States, the District
14 of Columbia, Puerto Rico, the United States Virgin Islands, or any
15 territory or insular possession subject to the jurisdiction of the
16 United States; and

17 (21) "Trust account" means an account held by a provider which
18 is:

19 (A) Established in a bank in which deposit accounts are
20 insured;

21 (B) Separate from other accounts of the provider or its
22 designee;

23 (C) Designated as a trust account or other account designated

1 to indicate that the money in the account is not the money of the
2 provider; and

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

5 **§47-26-3. Exempt agreements and persons.**

6 (a) This article does not apply to an agreement with an
7 individual who is not a legal resident of this state at the time of
8 the agreement.

9 (b) This article does not apply to a provider to the extent
10 that the provider:

11 (1) Provides or agrees to provide debt management,
12 educational, or counseling services to an individual who is not a
13 legal resident of this state at the time the provider agrees to
14 provide the services; or

15 (2) Receives no compensation for debt management services from
16 or on behalf of the individuals to whom it provides the services or
17 from their creditors.

18 (c) This article does not apply to the following persons or
19 their employees when the person or the employee is engaged in the
20 regular course of the person's business or profession:

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

1 (2) A bank;

2 (3) An affiliate, as defined in subparagraph (i), paragraph
3 (B), subdivision (2), section two of this article, of a bank if the
4 affiliate is regulated for debt management services by a federal or
5 state banking regulatory authority; or

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

9 **§47-26-4. Registration required.**

10 (a) Except as otherwise provided in subsection (b) of this
11 section, a provider may not provide debt management services to an
12 individual who it reasonably should know resides in this state at
13 the time it agrees to provide the services, unless the provider is
14 registered under this article.

15 (b) If a provider is registered under this article, subsection
16 (a) of this section does not apply to an employee or agent of the
17 provider.

18 (c) The commissioner shall maintain and publish annually a
19 list of the names of all registered providers.

20 **§47-26-5. Application for registration: form, fee, and**
21 **accompanying documents.**

22 (a) An application for registration as a provider must be in
23 a form prescribed by the commissioner, and if so directed by the

1 commissioner, be provided to the Nationwide Mortgage Licensing
2 System and Registry.

3 (b) An application for registration as a provider must be
4 accompanied by:

5 (1) A fee of \$1,000 plus an additional \$300 for each branch
6 office engaging in debt management services for individuals
7 residing in this state, plus any maintenance fees prescribed by the
8 Nationwide Mortgage Licensing System and Registry;

9 (2) The bond required by section thirteen of this article;

10 (3) Identification of all trust accounts subject to section
11 twenty-two of this article and an irrevocable consent authorizing
12 the commissioner to review and examine the trust accounts;

13 (4) A certificate from the Secretary of State certifying that
14 the applicant is authorized by the Secretary of State to transact
15 business in this state; and

16 (5) If the applicant is organized as a not-for-profit entity
17 or has obtained tax-exempt status under the Internal Revenue Code,
18 26 U.S.C. §501, as amended, evidence of not-for-profit status or
19 tax-exempt status, or both.

20 **§47-26-6. Application for registration; required information.**

21 An application for registration as a provider must be signed
22 under oath and include:

23 (1) The applicant's name, principal business address and

1 telephone number, and all other business addresses in this state,
2 electronic-mail addresses, and Internet website addresses;

3 (2) All names under which the applicant conducts business;

4 (3) The address of each location in this state at which the
5 applicant will provide debt-management services or a statement that
6 the applicant will have no such location;

7 (4) The name and home address of each officer, director and
8 principal, as defined by subdivision (4), subsection (b), section
9 four, article two of chapter thirty-one-a of this code, of the
10 applicant;

11 (5) Identification of every jurisdiction in which, during the
12 five years immediately preceding the application:

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

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

17 (6) A statement describing, to the extent it is known or
18 should be known by the applicant, any material civil or criminal
19 judgment or litigation and any material administrative or
20 enforcement action by a governmental agency in any jurisdiction
21 against the applicant, any of its officers, directors, owners, or
22 agents, or any person that is authorized to have access to the
23 trust account required by section twenty-one of this article;

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

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

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

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

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

17 (12) At the applicant's expense, submit the required forms and
18 authorizations for the commissioner, the Nationwide Mortgage
19 Licensing and Registry Service, or its designated vendor, to
20 perform a criminal background investigation and credit
21 investigation covering every principal officer of the applicant and
22 every employee or agent of the applicant who is authorized to have
23 access to the trust account required by section twenty-one of this

1 article;

2 (13) The names and addresses of all employers of each director
3 during the ten years immediately preceding the application;

4 (14) A description of any ownership interest of at least ten
5 percent by a director, owner, or employee of the applicant in:

6 (A) Any affiliate of the applicant; or

7 (B) Any entity that provides a product or service to the
8 applicant or any individual relating to the applicant's
9 debt-management services;

10 (15) A statement of the amount of compensation of the
11 applicant's five most highly compensated employees for each of the
12 three years immediately preceding the application or, if it has not
13 been in operation for the three years preceding the application,
14 for the period of its existence;

15 (16) The identity of each director who is an
16 affiliate of the applicant, as defined in paragraph (A),
17 subdivision (2), section two of this article or subparagraph (i),
18 (ii), (iv), (v), (vi) or (vii), paragraph (B), subdivision (2),
19 section two of this article; and

20 (17) Any other information that the
21 commissioner reasonably requires to perform the commissioner's
22 duties under section nine of this article.

23 **§47-26-7. Application for registration: obligation to update**

1 **information.**

2 An applicant or registered provider shall notify the
3 commissioner no later than ten days after a change in the
4 information specified in subdivision (5), subsection (b), section
5 five of this article or subdivision (1), (3), (6), (10) or (11),
6 section six of this article.

7 **§47-26-8. Application for registration: public information.**

8 Except for the information required by subdivisions (7), (14)
9 and (17), section six of this article and the addresses required by
10 subdivision (4), section six of this article, the commissioner
11 shall make the information in an application for registration as a
12 provider available to the public.

13 **§47-26-9. Certificate of registration: issuance of denial.**

14 (a) Except as otherwise provided in subsections (c) and (d) of
15 this section, the commissioner shall issue a certificate of
16 registration as a provider to a person that complies with sections
17 five and six of this article.

18 (b) The commissioner may deny registration if:

19 (1) The application contains information that is materially
20 erroneous or incomplete;

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

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

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

7 (c) The commissioner shall deny registration if, with respect
8 to an applicant that is organized as a not-for-profit entity or has
9 obtained tax-exempt status under the Internal Revenue Code, 26
10 U.S.C. §501, as amended, the applicant's board of directors is not
11 independent of the applicant's employees and agents.

12 (d) A board of directors is not independent for purposes of
13 subsection (d) if more than one-fourth of its members:

14 (1) Are affiliates of the applicant, as defined in paragraph
15 (A), subdivision (2), section two of this article or subparagraph
16 (i), (ii), (iv), (v), (vi) or (vii), paragraph (B), subdivision
17 (2), section two of this article; or

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

22 **§47-26-10. Certificate of registration: timing.**

23 (a) The commissioner shall approve or deny an initial

1 registration as a provider no later than one hundred twenty days
2 after a complete application is filed. In connection with a request
3 pursuant to subdivision (17), section six of this article for
4 additional information, the commissioner may extend the one hundred
5 twenty day period for not more than sixty days. The commissioner,
6 by written order, shall inform the applicant of the reasons for the
7 denial.

8 (b) If the commissioner denies an application for registration
9 as a provider or does not act on an application within the time
10 prescribed in subsection (a) of this section, the applicant may
11 appeal and request a hearing pursuant to article five, chapter
12 twenty-nine-a of this code.

13 (c) Subject to subsection (d), section eleven and section
14 thirty-three of this article, a registration as a provider is valid
15 for one year.

16 **§47-26-11. Renewal of Registration.**

17 (a) All registrations under this article expire at the end of
18 the calendar year.

19 (b) An application for renewal of registration as a provider
20 must be in a form prescribed by the commissioner, signed under
21 oath, and:

22 (1) Be filed no fewer than thirty and no more than sixty days
23 before the registration expires;

1 (2) Be accompanied by the fee established by the commissioner
2 and the bond required by section thirteen of this article;

3 (3) Contain a financial statement, audited by an accountant
4 licensed to conduct audits, for the applicant's fiscal year
5 immediately preceding the application;

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

9 (5) Disclose the total amount of money received by the
10 applicant pursuant to plans during the preceding twelve months from
11 or on behalf of individuals who reside in this state and the total
12 amount of money distributed to creditors of those individuals
13 during that period;

14 (6) Disclose, to the best of the applicant's knowledge, the
15 gross amount of money accumulated during the preceding twelve
16 months pursuant to plans by or on behalf of individuals who reside
17 in this state and with whom the applicant has agreements; and

18 (7) Provide any other information that the commissioner
19 reasonably requires to perform the commissioner's duties under this
20 section.

21 (c) Except for the information required by subdivisions (7),
22 (12) and (15), section six of this article and the addresses
23 required by subdivision (4), section six of this article, the

1 commissioner shall make the information in an application for
2 renewal of registration as a provider available to the public.

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

7 (e) If the commissioner denies an application for renewal of
8 registration as a provider, the applicant, no later than thirty
9 days after receiving notice of the denial, may appeal and request
10 a hearing pursuant to article five, chapter twenty-nine-a of this
11 code. Subject to section thirty-three of this article, while the
12 appeal is pending the applicant shall continue to provide debt
13 management services to individuals with whom it has agreements that
14 were established prior to receipt of the denial. If the denial is
15 affirmed, subject to the commissioner's order and section
16 thirty-three of this article, the applicant shall continue to
17 provide debt-management services to individuals with whom it has
18 agreements for up to sixty days until, with the approval of the
19 commissioner, it transfers the agreements to another registered
20 provider or returns to the individuals all unexpended money that is
21 under the applicant's control.

22 §47-26-12. Provider reporting requirements.

23 Providers registered under this article shall provide periodic

1 reports of their activities as required by the commissioner.

2 **§47-26-13. Bond required.**

3 (a) A provider that is required to be registered under this
4 article shall file a surety bond on a form prescribed by the
5 commissioner, which must:

6 (1) Be in effect during the period of registration and for two
7 years after the provider ceases providing debt-management services
8 to individuals in this state; and

9 (2) Be in favor of this state for the benefit of the
10 commissioner and of individuals who reside in this state when they
11 agree to receive debt-management services from the provider, as
12 their interests may appear and for the benefit of the commissioner
13 to cover any unpaid civil penalties or examination fees and
14 expenses.

15 (b) A surety bond filed pursuant to subsection (a) of this
16 section must:

17 (1) Be in the amount of \$50,000 or other larger or smaller
18 amount that the commissioner determines is warranted by the
19 financial condition and business experience of the provider, the
20 history of the provider in performing debt-management services, the
21 risk to individuals, and any other factor the commissioner
22 considers appropriate;

23 (2) Be issued by a bonding, surety, or insurance company

1 authorized to do business in this state and rated at least A- by a
2 nationally recognized rating organization; and

3 (3) Have payment conditioned on noncompliance of the provider
4 or its agent with this article.

5 (c) If the principal amount of a surety bond is reduced by
6 payment of a claim or a judgment, the provider shall immediately
7 notify the commissioner and, no later than thirty days after notice
8 by the commissioner, file a new or additional surety bond in an
9 amount set by the commissioner. The amount of the new or additional
10 bond must be at least the amount of the bond immediately before
11 payment of the claim or judgment. If for any reason a surety
12 terminates a bond, the provider shall immediately file a new surety
13 bond in the amount of \$50,000 or other amount determined pursuant
14 to subsection (b) of this section.

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

17 (1) The commissioner assesses expenses under subdivision (1),
18 subsection (b), section thirty-one of this article, issues a final
19 order under subdivision (2), subsection (a), section thirty-two of
20 this article, or recovers a final judgment under subdivisions (4)
21 or (5), subsection (a), section thirty-two or subsection (d),
22 section thirty-two of this article; or

23 (2) An individual recovers a final judgment pursuant to

1 subsections (a) or (b), section thirty-four of this article or
2 subdivision (1), (2) or (4), subsection (c), section thirty-four of
3 this article.

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

9 (1) To satisfaction of a final order or judgment under
10 subdivision (2), (4) or (5), subsection (a), section thirty-two of
11 this article or subsection (d), section (d), section thirty-two of
12 this article;

13 (2) To final judgments recovered by individuals pursuant to
14 subsection (a) or (b), section thirty-four of this article or
15 subdivision (1), (2) or (4), subsection (c), section thirty-four of
16 this article, pro rata;

17 (3) To claims of individuals established to the satisfaction
18 of the commissioner, pro rata; and

19 (4) If a final order or judgment is issued under subsection
20 (a), section thirty-two of this article, to the expenses charged
21 pursuant to subdivision (1), subsection (b), section thirty-one of
22 this article.

23 **§47-26-14. Requirement of good faith.**

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

3 **§47-26-15. Customer service.**

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

9 **§47-26-16. Prerequisites for providing debt-management services.**

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

16 (1) Free of additional charge if the individual enters into an
17 agreement;

18 (2) For a charge if the individual does not enter into an
19 agreement; and

20 (3) For a charge if the individual enters into an agreement,
21 using the following terminology, as applicable, and format:

22 Set-up fee _____ Dollar amount of fee

23 Monthly service fee _____

1 Dollar amount of fee or method of determining amount of
2 settlement fee _____

3 Dollar amount of fee or method of determining amount of goods and
4 services in addition to those provided in connection with a plan:
5 _____

| 6 | Item | Dollar amount or method of determining amount |
|---|-------|---|
| 7 | _____ | _____ |

8 (b) A provider may not furnish or contract to furnish debt
9 management services unless the provider, through the services of a
10 certified counselor or certified debt specialist:

11 (1) Provides the individual with reasonable education about
12 the management of personal finance;

13 (2) Has prepared and documented a financial analysis including
14 at least the following matters affecting the individual's financial
15 condition:

16 (A) Assets;

17 (B) Income;

18 (C) Debt, including secured debt; and

19 (D) Other liabilities; and

20 (3) If the individual is to make regular, periodic payments:

21 (A) Has prepared a plan for the individual;

22 (B) Has made a determination, based on the provider's analysis
23 of the information provided by the individual and otherwise

1 available to it, that the plan is suitable for the individual and
2 the individual will be able to meet the payment obligations under
3 the plan; and

4 (C) Believes that each creditor of the individual listed as a
5 participating creditor in the plan will accept payment of the
6 individual's debts as provided in the plan.

7 (c) Before an individual assents to an agreement to engage in
8 a plan, a provider shall:

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

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

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

20 (A) Creditors that the provider expects to participate in the
21 plan and grant concessions;

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

1 (C) Creditors that the provider expects not to participate in
2 the plan; and

3 (D) All other creditors.

4 (d) Before an individual assents to an agreement, the provider
5 shall inform the individual in a separate record that the
6 individual may keep whether or not the individual assents to the
7 agreement:

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

9 (2) That plans are not suitable for all individuals and the
10 individual may ask the provider about other ways, including
11 bankruptcy, to deal with indebtedness;

12 (3) That establishment of a plan may adversely affect the
13 individual's credit rating or credit scores;

14 (4) That nonpayment of debt may lead creditors to increase
15 finance and other charges or undertake collection activity,
16 including litigation;

17 (5) Unless it is not true, that the provider may receive
18 compensation from the creditors of the individual; and

19 (6) That, unless the individual is insolvent, if a creditor
20 settles for less than the full amount of the debt, the plan may
21 result in the creation of taxable income to the individual, even
22 though the individual does not receive any money.

23 (e) If a provider may receive payments from an individual's

1 creditors and the plan contemplates that the individual's creditors
2 will reduce finance charges or fees for late payment, default, or
3 delinquency, the provider may comply with subsection (d) of this
4 section by providing the following disclosure in at least twelve
5 point font, surrounded by black lines:

6 IMPORTANT INFORMATION FOR YOU TO CONSIDER

7 (1) Debt management plans are not right for all individuals,
8 and you may ask us to provide information about other ways,
9 including bankruptcy, to deal with your debts.

10 (2) Using a debt management plan may make it harder for you to
11 obtain credit.

12 (3) We may receive compensation for our services from your
13 creditors.

14 _____

15 Name and business address of provider

16 (f) If a provider will not receive payments from an
17 individual's creditors and the plan contemplates that the
18 individual's creditors will reduce finance charges or fees for late
19 payment, default, or delinquency, a provider may comply with
20 subsection (d) by providing the following disclosure in at least
21 twelve point font, surrounded by black lines:

22 IMPORTANT INFORMATION FOR YOU TO CONSIDER

23 (1) Debt management plans are not right for all individuals,

1 and you may ask us to provide information about other ways,
2 including bankruptcy, to deal with your debts.

3 (2) Using a debt management plan may make it harder for you to
4 obtain credit.

5

6 Name and business address of provider

7 (g) If an agreement contemplates that creditors will settle
8 debts for less than the full principal amount of debt owed, a
9 provider may comply with subsection (d) by providing the following
10 disclosure in at least twelve point font, surrounded by black
11 lines:

12 IMPORTANT INFORMATION FOR YOU TO CONSIDER

13 (1) Our program is not right for all individuals, and you may
14 ask us to provide information about bankruptcy and other ways to
15 deal with your debts.

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

17 (A) Hurt your credit rating or credit scores;

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

19 and

20 (C) Lead your creditors to undertake activity, including
21 lawsuits, to collect the debts.

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

1

2 Name and business address of provider

3 **§47-26-17. Communication by electronic or other means.**

4 (a) In this section:

5 (1) "Consumer" means an individual who seeks or obtains goods
6 or services that are used primarily for personal, family, or
7 household purposes.

8 (2) "Federal act" means the Electronic Signatures in Global
9 and National Commerce Act, 15 U.S.C. §7001, et seq., as amended.

10 (b) A provider may satisfy the requirements of sections
11 sixteen, eighteen or twenty-six of this article by means of the
12 Internet or other electronic means if the provider obtains a
13 consumer's consent in the manner provided by section 101(c)(1) of
14 the federal act.

15 (c) The disclosures and materials required by sections
16 sixteen, eighteen and twenty-six of this article shall be presented
17 in a form that is capable of being accurately reproduced for later
18 reference.

19 (d) With respect to disclosure by means of an Internet
20 website, the disclosure of the information required by subsection
21 (d), section sixteen of this article must appear on one or more
22 screens that:

23 (1) Contain no other information; and

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

3 (e) At the time of providing the materials and agreement
4 required by subsections (c) and (d), section sixteen, section
5 eighteen and twenty-six of this article, a provider shall inform
6 the individual that on electronic, telephonic, or written request,
7 it will send the individual a written copy of the materials, and
8 shall comply with a request as provided in subsection (f) of this
9 section.

10 (f) If a provider is requested, before the expiration of
11 ninety days after an agreement is completed or terminated, to send
12 a written copy of the materials required by subsections (c) and
13 (d), section sixteen, section eighteen and twenty-six of this
14 article, the provider shall send them at no charge no later than
15 three business days after the request is received, but the provider
16 need not comply with a request more than once per calendar month or
17 if it reasonably believes the request is made for purposes of
18 harassment. If a request is made more than ninety days after an
19 agreement is completed or terminated, the provider shall send
20 within a reasonable time a written copy of the materials requested.

21 (g) A provider that maintains an Internet website shall
22 disclose on the home page of its website or on a page that is
23 clearly and conspicuously connected to the home page by a link that

1 clearly reveals its contents:

2 (1) Its name and all names under which it does business;

3 (2) Its principal business address, telephone number, and
4 electronic-mail address, if any; and

5 (3) The names of its principal officers.

6 (h) Subject to subsection (i) of this section, if a consumer
7 who has consented to electronic communication in the manner
8 provided by section 101 of the federal act withdraws consent as
9 provided in the federal act, a provider may terminate its agreement
10 with the consumer.

11 (i) If a provider wishes to terminate an agreement with a
12 consumer pursuant to subsection (h) of this section, it shall
13 notify the consumer that it will terminate the agreement unless the
14 consumer, no later than thirty days after receiving the
15 notification, consents to electronic communication in the manner
16 provided in section 101(c) of the federal act. If the consumer
17 consents, the provider may terminate the agreement only as
18 permitted by paragraph (G), subdivision (6), subsection (a),
19 section eighteen of this article.

20 **§47-26-18. Form and contents of agreement.**

21 (a) An agreement must:

22 (1) Be in a record;

23 (2) Be dated and signed by the provider and the individual;

1 (3) Include the name of the individual and the address where
2 the individual resides;

3 (4) Include the name, business address, and telephone number
4 of the provider;

5 (5) Be delivered to the individual immediately on formation of
6 the agreement; and

7 (6) Disclose:

8 (A) The services to be provided;

9 (B) In a clear and conspicuous manner the amount, or method of
10 determining the amount, of all fees, individually itemized, to be
11 paid by the individual using only the terminology contained in
12 section twenty-two of this article;

13 (C) The schedule of payments to be made by or on behalf of the
14 individual, including the amount of each payment, the date on which
15 each payment is due, and an estimate of the date of the final
16 payment and an estimate of the total of all payments to be made
17 under the plan;

18 (D) If a plan provides for regular periodic payments to
19 creditors:

20 (i) Each creditor of the individual to which payment will be
21 made, the amount owed to each creditor, and any concessions the
22 provider reasonably believes each creditor will offer;

23 (ii) The schedule of expected payments to each creditor,

1 including the amount of each payment and the date on which it will
2 be made; and

3 (iii) Each creditor that the provider believes will not
4 participate in the plan and to which the provider will not direct
5 payment;

6 (E) If a plan contemplates the settlement of the individual's
7 debt for less than the principal amount of the debt, an estimate
8 of:

9 (i) The duration of the plan based on all enrolled debts;

10 (ii) The length of time before the individual may reasonably
11 expect a settlement offer and;

12 (iii) The amount of savings needed to accrue before the
13 individual may reasonably expect a settlement offer, expressed as
14 both a dollar amount and percentage, for each enrolled debt;

15 (F) State how the provider will comply with its obligations
16 under subsection (a), section twenty-six of this article and that
17 the provider may terminate the agreement for good cause, on return
18 of unexpended money of the individual;

19 (G) That the individual may terminate the agreement at any
20 time by giving written or electronic notice, and that, if notice of
21 termination is given, the individual will receive all unexpended
22 money that the provider or its designee has received from or on
23 behalf of the individual for payment of a creditor and, except to

1 the extent they have been earned, the provider's fees;

2 (H) That the individual may contact the commissioner with any
3 questions or complaints regarding the provider; and

4 (I) The address, telephone number and Internet address or
5 website of the commissioner.

6 (b) For purposes of subdivision (5), subsection (a) of this
7 section, delivery of an electronic record occurs when it is made
8 available in a format in which the individual may retrieve, save,
9 and print it and the individual is notified that it is available.

10 (c) If the commissioner supplies the provider with any
11 information required under paragraph (I), subdivision (6)
12 subsection (a) of this section, the provider may comply with that
13 requirement only by disclosing the information supplied by the
14 commissioner.

15 (d) An agreement must provide that:

16 (1) The individual authorizes any bank in which the provider
17 or its agent has established a trust account to disclose to the
18 commissioner any financial records relating to the trust account;
19 and

20 (2) The provider will notify the individual no later than five
21 days after learning of a creditor's final decision to reject or
22 withdraw from a plan and that this notice will include:

23 (A) The identity of the creditor; and

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

3 (e) An agreement may not:

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

6 (2) Except as permitted by Section 2 of the Federal
7 Arbitration Act, 9 U.S.C. §2, as amended, contain a provision that
8 modifies or limits otherwise available forums or procedural rights,
9 including the right to trial by jury, that are generally available
10 to the individual under law other than this article;

11 (3) Contain a provision that restricts the individual's
12 remedies under this article or law other than this article; or

13 (4) Contain a provision that:

14 (A) Limits or releases the liability of any person for not
15 performing the agreement or for violating this article or
16 indemnifies any person for liability arising under the agreement or
17 this article.

18 (f) A provision in an agreement which violates subsection (f)
19 of this section is void.

20 **§47-26-19. Termination of agreement.**

21 (a) An individual who is a party to an agreement may terminate
22 the agreement at any time, without penalty or obligation, by giving
23 the provider notice in a record.

1 (b) A provider may terminate an agreement if an individual who
2 is a party to the agreement fails for sixty days to make a payment
3 or deposit required by the agreement or if other good cause exists.

4 (c) If an agreement is terminated:

5 (1) The provider, no later than seven business days after the
6 termination, shall pay the individual who is a party to the
7 agreement all money the provider or its designee received from or
8 on behalf of the individual, other than:

9 (A) An amount properly disbursed to a creditor; and

10 (B) Fees earned pursuant to section twenty-two of this
11 article; and

12 (2) Any power of attorney granted by the individual to the
13 provider is revoked.

14 **§47-26-20. Required language.**

15 Unless the commissioner, by rule, provides otherwise, the
16 disclosures and documents required by this article must be in
17 English. If a provider communicates with an individual primarily in
18 a language other than English, the provider must furnish a
19 translation in the other language of the disclosures and documents
20 required by this article.

21 **§47-26-21. Trust account and independently administered account.**

22 (a) All money paid to a provider by or on behalf of an
23 individual for distribution to creditors pursuant to a plan is held

1 in trust. No later than two business days after receipt, the
2 provider shall deposit the money in a trust account established for
3 the benefit of individuals to whom the provider is furnishing debt
4 management services.

5 (b) A provider whose agreement contemplates the settlement of
6 an individual's debt for less than the principal amount of the debt
7 may request or require the individual to place money in an account
8 to be used to pay a creditor or the provider's fees, or both, if:

9 (1) The money is held in an insured account at a bank;

10 (2) The individual owns the money held in the account and is
11 paid any interest accrued on the account;

12 (3) The entity administering the account is not the provider
13 or an affiliate of the provider, unless the affiliate is described
14 in subparagraph (iv), paragraph (B), subdivision (2), section two
15 of this article;

16 (4) The entity administering the account does not give or
17 accept any money or other compensation in exchange for a referral
18 of business involving debt-management services; and

19 (5) The individual may terminate the agreement at any time
20 without penalty and on termination must receive all money in the
21 account, other than money earned by the provider in compliance with
22 this section;

23 (c) If an agreement contemplates the reduction of finance

1 charges or fees for late payment, default, or delinquency and the
2 provider complies with subsection (a) of this section, the provider
3 may request or require the individual to make payment to be used
4 for both distribution to creditors and payment of the provider's
5 fees.

6 (d) Money held in trust by a provider is not property of the
7 provider or its designee. The money is not available to creditors
8 of the provider or designee, except an individual from whom or on
9 whose behalf the provider received money, to the extent that the
10 money has not been disbursed to creditors of the individual.

11 (e) A provider shall:

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

14 (2) Disburse money paid by or on behalf of the individual to
15 creditors of the individual as disclosed in the agreement, except
16 that:

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

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

22 (3) Promptly correct any payments that are not made or that
23 are misdirected as a result of an error by the provider or other

1 person in control of the trust account and reimburse the individual
2 for any costs or fees imposed by a creditor as a result of the
3 failure to pay or misdirection.

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

7 (g) A trust account must at all times have a cash balance
8 equal to the sum of the balances of each individual's account.

9 (h) If a provider has established a trust account pursuant to
10 subsection (a) of this section, the provider shall reconcile the
11 trust account at least once a month. The reconciliation must
12 compare the cash balance in the trust account with the sum of the
13 balances in each individual's account. If the provider or its
14 designee has more than one trust account, each trust account must
15 be individually reconciled.

16 (i) If a provider discovers, or has a reasonable suspicion of,
17 embezzlement or other unlawful appropriation of money held in
18 trust, the provider immediately shall notify the commissioner by a
19 method approved by the commissioner. Unless the commissioner by
20 rule provides otherwise, no later than five days thereafter, the
21 provider shall give notice to the commissioner describing the
22 remedial action taken or to be taken.

23 (j) If an individual terminates an agreement or it becomes

1 reasonably apparent to a provider that a plan has failed, the
2 provider shall refund promptly to the individual all money paid by
3 or on behalf of the individual which has not been paid to
4 creditors, less fees that are payable to the provider under section
5 twenty-two of this article.

6 (k) Before relocating a trust account from one bank to
7 another, a provider shall inform the commissioner of the name,
8 business address, and telephone number of the new bank. As soon as
9 practicable, the provider shall inform the commissioner of the
10 account number of the trust account at the new bank.

11 **§47-26-22. Fees and other charges.**

12 (a) A provider may not impose directly or indirectly a fee or
13 other charge on an individual or receive money from or on behalf of
14 an individual for debt-management services except as permitted by
15 this section.

16 (b) A provider may not impose charges or receive payment for
17 debt-management services until the provider and the individual have
18 signed an agreement that complies with sections eighteen and
19 twenty-seven of this article.

20 (c) If an individual assents to an agreement, a provider may
21 not impose a fee or other charge for educational, counseling, or
22 similar services, except as otherwise provided in this section and
23 subsection (d), section twenty-seven of this article. The

1 commissioner may authorize a provider to charge a fee based on the
2 nature and extent of the services furnished by the provider.

3 (d) The following rules apply:

4 (1) If an individual assents to a plan that contemplates that
5 creditors will reduce finance charges or fees for late payment,
6 default, or delinquency, the provider may charge: (A) A fee not
7 exceeding \$50 for consultation, obtaining a credit report, and
8 setting up an account: and (B) a monthly service fee, not to exceed
9 \$10 times the number of creditors remaining in a plan at the time
10 the fee is assessed, but not more than \$50 in any month.

11 (2) If an individual assents to a plan that contemplates that
12 creditors or debt collectors will settle debts for less than the
13 principal amount of the debt:

14 (A) A provider may not request or receive payment of any fee
15 or consideration until and unless:

16 (i) The provider has settled the terms of at least one debt
17 pursuant to a settlement agreement or other valid contractual
18 agreement executed by the individual;

19 (ii) The individual has made at least one payment pursuant to
20 that settlement agreement or other valid contractual agreement
21 between the individual and the creditor or debt collector; and

22 (iii) The fee or consideration either bears the same
23 proportional relationship to the total fee for settling the terms

1 of the entire debt balance as the individual debt amount bears to
2 the entire debt amount, in which case the individual debt amount
3 and the entire debt amount are those owed at the time the debt was
4 enrolled in the service; or is a percentage of the amount saved as
5 a result of the settlement. The percentage charged cannot change
6 from one individual debt to another. The amount saved is the
7 difference between the amount owed at the time the debt was
8 enrolled in the plan and the amount actually paid to satisfy the
9 debt.

10 (3) No individual who completes all of his or her obligations
11 under the agreement may be charged fees such that those fees, when
12 added to the aggregate of offers of settlement obtained by the
13 provider for the debtor, exceeds the principal amount of the debt.

14 (4) A provider may not impose or receive fees under both
15 subdivisions (1) and (2) of this subsection.

16 (5) Except as otherwise provided in subsection (d), section
17 twenty-eight of this article, if an individual does not assent to
18 an agreement, a provider may receive for educational and counseling
19 services it provides to the individual a fee not exceeding \$100 or,
20 with the approval of the commissioner, a larger fee. The
21 commissioner may approve a fee larger than \$100 if the nature and
22 extent of the educational and counseling services warrant the
23 larger fee.

1 (e) If, before the expiration of ninety days after the
2 completion or termination of educational or counseling services, an
3 individual assents to an agreement, the provider shall refund to
4 the individual any fee paid pursuant to subdivision (6), subsection
5 (d) of this section.

6 (f) If a payment to a provider by an individual under this
7 article is dishonored, a provider may impose a reasonable charge on
8 the individual, not to exceed the lesser of \$25 and the amount
9 permitted by another provision of this code.

10 **§47-26-23. Voluntary contributions.**

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

19 **§47-26-24. Voidable agreements.**

20 (a) If a provider imposes a fee or other charge or receives
21 money or other payments not authorized by section twenty-two or
22 twenty-three of this article, the individual may void the agreement
23 and recover as provided in section thirty-four of this article.

1 (b) If a provider is not registered as required by this
2 article when an individual assents to an agreement, the agreement
3 is voidable by the individual.

4 (c) If an individual voids an agreement under subsection (b)
5 of this section, the provider does not have a claim against the
6 individual for breach of contract or for restitution.

7 **§47-26-25. Retention of records.**

8 For each individual for whom a provider provides
9 debt-management services, the provider shall maintain records for
10 five years after the final payment made by the individual. The
11 provider shall produce a copy of the records to the individual
12 within a reasonable time after a request for the records. The
13 provider may use electronic or other means of storage of the
14 records if they are readily convertible into legible, tangible
15 documents as required by the commissioner for examination.

16 **§47-26-26. Periodic reports.**

17 (a) A provider shall provide the accounting required by
18 subsection (b) of this section:

19 (1) On cancellation or termination of an agreement; and

20 (2) Before cancellation or termination of any agreement:

21 (A) At least once each month; and

22 (B) No later than five business days after a request by an
23 individual, but the provider need not comply with more than one

1 request in any calendar month.

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

5 (1) The amount in an account containing money paid by or on
6 behalf of the individual for fees or distribution to a creditor, or
7 both, as of the date one month before the date of the accounting;

8 (2) The amount paid into the account since the last report;

9 (3) The amounts and dates of disbursement made on the
10 individual's behalf, or by the individual on the direction of the
11 provider, since the last report, to each creditor listed in the
12 plan;

13 (4) The amounts deducted, as fees or otherwise, from the
14 amount paid into the account since the last report;

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

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

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

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

23 (D) The calculation of a settlement fee; and

1 (6) The amount in the account as of the date of the
2 accounting.

3 (c) If an agreement contemplates that a creditor will settle
4 a debt for less than the principal amount of the debt and the
5 provider delegates performance of its duties under this section to
6 another person, the provider may provide the information required
7 by subdivision (5), subsection (b) of this section in a record
8 separate from the record containing the other information required
9 by subsection (b) of this section.

10 **§47-26-27. Prohibited acts and practices.**

11 (a) A provider may not, directly or indirectly:

12 (1) Include a secured debt in a plan, except as authorized by
13 law other than this article;

14 (2) Misappropriate or misapply money held in trust;

15 (3) Settle a debt on behalf of an individual without the
16 individual's agreement to the settlement terms pursuant to a
17 settlement agreement or other valid contractual agreement executed
18 by the individual.

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

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

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

1 (B) Before termination of an agreement, properly authorized by
2 the agreement and this article, and for:

3 (i) Payment to one or more creditors pursuant to an agreement;
4 or

5 (ii) Payment of a fee;

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

8 (7) Offer, pay, or give a gift or bonus, premium, reward, or
9 other compensation to a lead generator or other person for
10 referring a prospective customer, if the person making the
11 referral:

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

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

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

21 (9) Structure a plan in a manner that would result in a
22 negative amortization of any of an individual's debts, unless a
23 creditor that is owed a negatively amortizing debt agrees to refund

1 or waive the finance charge on payment of the principal amount of
2 the debt;

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

6 (11) Settle a debt or lead an individual to believe that a
7 payment to a creditor is in settlement of a debt to the creditor
8 unless, at the time of settlement, the individual receives a
9 certification by the creditor that the payment is in full
10 settlement of the debt or is part of a settlement plan, the terms
11 of which are included in the certification, that, if completed
12 according to its terms, will satisfy the debt;

13 (12) Make a representation that:

14 (A) The provider will furnish money to pay bills or prevent
15 attachments;

16 (B) Payment of a certain amount will permit satisfaction of a
17 certain amount or range of indebtedness; or

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

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

23 (14) Represent in its agreements, disclosures required by this

1 article, advertisements, or Internet website that it is:

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

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

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

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

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

16 (1) Purchase a debt or obligation of the individual;

17 (2) Receive from or on behalf of the individual:

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

20 (B) A post-dated check or demand draft;

21 (3) Lend money or provide credit to the individual, except as
22 a deferral of a settlement fee at no additional expense to the
23 individual;

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

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

6 (A) The commissioner, on proper demand;

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

9 (C) The extent necessary to administer the plan;

10 (6) Except as otherwise provided in section subdivision (3),
11 subsection (d), section twenty-two of this article, provide the
12 individual less than the full benefit of a compromise of a debt
13 arranged by the provider;

14 (7) Charge the individual for or provide credit or other
15 insurance, coupons for goods or services, membership in a club,
16 access to computers or the Internet, or any other matter not
17 directly related to debt-management services or educational
18 services concerning personal finance; or

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

22 (c) This article does not authorize any person to engage in
23 the practice of law.

1 (d) A provider may not receive a gift or bonus, premium,
2 reward, or other compensation, directly or indirectly, for
3 advising, arranging, or assisting an individual in connection with
4 obtaining, an extension of credit or other service from a lender or
5 service provider, except for educational or counseling services
6 required in connection with a government-sponsored program or
7 authorized under subdivision (5), subsection (d), section
8 twenty-two of this article.

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

15 (1) Owns more than ten percent of the person; or

16 (2) Is an employee or affiliate of the person.

17 **§47-26-28. Notice of litigation.**

18 No later than thirty days after a provider has been served
19 with notice of a civil action for violation of this article by or
20 on behalf of an individual who resides in this state at either the
21 time of an agreement or the time the notice is served, the provider
22 shall notify the commissioner in a record that it has been sued.

23 **§47-26-29. Advertising.**

1 (a) If the agreements of a provider contemplate that creditors
2 will reduce finance charges or fees for late payment, default, or
3 delinquency and the provider advertises debt-management services,
4 it shall disclose, in an easily comprehensible manner, that using
5 a debt-management plan may make it harder for the individual to
6 obtain credit.

7 (b) If the agreements of a provider contemplate that creditors
8 will settle for less than the full principal amount of debt and the
9 provider advertises debt-management services, it shall disclose, in
10 an easily comprehensible manner, the information specified in
11 subdivisions (3) and (4), subsection (d), section sixteen of this
12 article.

13 (c) A provider must disclose its registration number on all
14 solicitations or advertisements intended to reach citizens of this
15 state.

16 **§47-26-30. Liability of a provider for conduct of another person;**
17 **unlawful conduct by another person.**

18 (a) If a provider delegates any of its duties or obligations
19 under an agreement or this article to another person, including an
20 independent contractor, the provider is liable for conduct of the
21 person which, if done by the provider, would violate the agreement
22 or this article.

23 (b) A lead generator or other person that provides services to

1 or for a provider may not engage in an unfair, unconscionable, or
2 deceptive act or practice, including the knowing omission of any
3 material information, with respect to an individual who the lead
4 generator or other person has reason to believe is or may become a
5 customer of the provider.

6 **§47-26-31. Powers of commissioner.**

7 (a) The commissioner may act on his or her own initiative or
8 in response to complaints and may receive complaints, take action
9 to obtain voluntary compliance with this article, refer cases to
10 the office of the Attorney General, and seek or provide remedies as
11 provided in this article.

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

21 (1) Charge the person the reasonable expenses necessarily
22 incurred to conduct the examination;

23 (2) Require or permit a person to file a statement under oath

1 as to all the facts and circumstances of a matter to be
2 investigated; and

3 (3) Seek a court order authorizing seizure from a bank at
4 which the person maintains an account contemplated by section
5 twenty-two of this article, any or all money, books, records,
6 accounts, and other property of the provider that is in the control
7 of the bank and relates to individuals who reside in this state.

8 (c) The commissioner is authorized and empowered to promulgate
9 reasonable rules in accordance with the provisions of article
10 three, chapter twenty-nine-a of this code to implement the
11 provisions of this article.

12 (d) The commissioner may enter into cooperative arrangements
13 with any other federal or state agency having authority over
14 providers and may exchange with any of those agencies information
15 about a provider, including information obtained during an
16 examination of the provider.

17 (e) The commissioner may participate in the Nationwide
18 Mortgage Licensing System and Registry and permit such system to
19 process applications for registration under this article and
20 receive and maintain records related to such registrations that are
21 allowed or required to be maintained by the commissioner.

22 **§47-26-32. Administrative remedies.**

23 (a) The commissioner may enforce this article and rules

1 adopted under this article by taking one or more of the following
2 actions:

3 (1) Ordering a provider, lead generator, person administering
4 an account pursuant to subsection (b), section twenty-one of this
5 article, or director, employee, or other agent of a provider to
6 cease and desist from any violation;

7 (2) Ordering a provider, lead generator, person administering
8 an account pursuant to subsection (b), section twenty-one of this
9 article, or person that has caused a violation to correct the
10 violation, including making restitution of money or property to a
11 person aggrieved by a violation;

12 (3) Imposing on a provider, lead generator, person
13 administering an account pursuant to subsection (b), section
14 twenty-one, or other person that violates or causes a violation a
15 civil penalty not exceeding \$10,000 for each violation;

16 (4) Prosecuting a civil action to:

17 (A) Enforce an order; or

18 (B) Obtain restitution or equitable relief, or both; or

19 (5) Intervening in an action brought under section thirty-four
20 of this article.

21 (b) If a person violates or knowingly authorizes, directs, or
22 aids in the violation of a final order issued under subdivision (1)
23 or (2), subsection (a) of this section, the commissioner or circuit

1 court may impose a civil penalty not exceeding \$20,000 for each
2 violation.

3 (c) The commissioner or Attorney General may maintain an
4 action to enforce this article in the circuit court of the county
5 in which the violations or violations, or any part thereof, has
6 occurred, is occurring, or is about to occur.

7 (d) The commissioner or Attorney General may recover the
8 reasonable costs of enforcing this article under subsections (a)
9 through (c) of this section, including attorney's fees.

10 (e) In determining the amount of a civil penalty to impose
11 under subsection (a) or (b) of this section, the commissioner or
12 circuit court shall consider the seriousness of the violation, the
13 good faith of the violator, any previous violations by the
14 violator, the deleterious effect of the violation on the public,
15 the net worth of the violator, and any other factor the
16 commissioner or circuit court considers relevant to the
17 determination of the civil penalty.

18 **§47-26-33. Suspension, revocation, or nonrenewable of**
19 **registration.**

20 (a) In this section, "insolvent" means:

21 (1) Having generally ceased to pay debts in the ordinary
22 course of business other than as a result of good-faith dispute;

23 (2) Being unable to pay debts as they become due; or

1 (3) Being insolvent within the meaning of the federal
2 bankruptcy law, 11 U.S.C. §101, et seq., as amended.

3 (b) In addition to the remedies otherwise available under this
4 article, the commissioner may suspend, revoke, or deny renewal of
5 a provider's registration if:

6 (1) A fact or condition exists that, if it had existed when
7 the registrant applied for registration as a provider, would have
8 been a reason for denying registration;

9 (2) The provider has committed a material violation of this
10 article or a rule or order of the commissioner under this article;

11 (3) The provider is insolvent;

12 (4) The provider, an employee or affiliate of the provider, a
13 lead generator for the provider, a person administering an account
14 for the provider pursuant to subsection (b) section twenty-one of
15 this article, or a person to which the provider has delegated its
16 obligations under an agreement or this article has refused to
17 permit the commissioner to make an examination authorized by this
18 article, failed to comply with subdivision (2), subsection (b),
19 section thirty-one of this article no later than fifteen days after
20 request, or made a material misrepresentation or omission in
21 complying with subdivision (2), subsection (b), section thirty-one
22 of this article; or

23 (5) The provider has not responded within a reasonable time

1 and in an appropriate manner to communications from the
2 commissioner.

3 (c) If a provider does not comply with subsection (h), section
4 twenty-two of this article or if the commissioner otherwise finds
5 that the public health or safety or general welfare requires
6 emergency action, the commissioner may order a summary suspension
7 of the provider's registration, effective on the date specified in
8 the order.

9 (d) If the commissioner suspends, revokes, or denies renewal
10 of the registration of a provider, the commissioner may seek a
11 court order authorizing seizure of any or all of the money in a
12 trust account required by section twenty-one of this article,
13 books, records, accounts, and other property of the provider which
14 are located in this state.

15 (e) If the commissioner suspends or revokes a provider's
16 registration, the provider may appeal and request a hearing
17 pursuant to article five, chapter twenty-nine-a of this code.

18 **§47-26-34. Private enforcement.**

19 (a) If an individual voids an agreement pursuant to subsection
20 (b), section twenty-five of this article, the individual may
21 recover in a civil action all money paid or deposited by or on
22 behalf of the individual pursuant to the agreement, except amounts
23 paid to creditors, in addition to the recovery under subdivisions

1 (3) and (4), subsection (c) of this section.

2 (b) If an individual voids an agreement pursuant to subsection
3 (a), section twenty-four of this article, the individual may
4 recover in a civil action three times the total amount of the fees,
5 charges, money, and payments made by the individual to the
6 provider, in addition to the recovery under subdivision (4),
7 subsection (c) of this section.

8 (c) Subject to subsection (d) of this section, an individual
9 with respect to whom a provider or other person violates this
10 article may recover in a civil action from the provider, the
11 person, and any person that caused the violation:

12 (1) Compensatory damages for injury, including noneconomic
13 injury, caused by the violation;

14 (2) Except as otherwise provided in subsection (d) of this
15 section, with respect to a violation of sections sixteen, eighteen,
16 nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-six,
17 of subsection (a), (b) or (d), section twenty-seven of this article
18 the greater of the amount recoverable under subdivision (1) of this
19 subsection or \$5,000;

20 (3) Punitive damages; and

21 (4) Reasonable attorney's fees and costs.

22 (d) In a class action, except for a violation of subdivision
23 (5), subsection (a), section twenty-seven of this article, the

1 minimum damages provided in subdivision (2), subsection (c) of this
2 section do not apply.

3 (e) A provider is not liable under this section for a
4 violation of this article if the provider proves that the violation
5 was not intentional and resulted from a good-faith error
6 notwithstanding the maintenance of procedures reasonably adapted to
7 avoid the error. An error of legal judgment with respect to a
8 provider's obligations under this article is not a good-faith
9 error. If, in connection with a violation, the provider has
10 received more money than authorized by an agreement or this
11 article, the defense provided by this subsection is not available
12 unless the provider refunds the excess no later than two business
13 days of learning of the violation.

14 **§47-26-35. Violation of West Virginia Consumer Credit and**
15 **Protection Act.**

16 If an act or practice of a provider violates both this article
17 and section one hundred four, article six, chapter forty-six-a of
18 this code, an individual may not recover under both for the same
19 act or practice.

20 **§47-26-36. Statute of limitations.**

21 (a) An action or proceeding brought pursuant to subsection
22 (a), (b) or (c), section thirty-two of this article must be
23 commenced no later than four years after the conduct that is the

1 basis of the commissioner's complaint.

2 (b) An action brought pursuant to section thirty-four of this
3 article must be commenced no later than two years after the latest
4 of:

5 (1) The individual's last transmission of money to a provider;

6 (2) The individual's last transmission of money to a creditor
7 at the direction of the provider;

8 (3) The provider's last disbursement to a creditor of the
9 individual;

10 (4) The provider's last accounting to the individual pursuant
11 to subsection (a), section twenty-six of this article;

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

15 (6) Termination of actions or proceedings by the commissioner
16 with respect to a violation of the article.

17 (c) The period prescribed in subdivision (5), subsection (b)
18 of this section is tolled during any period during which the
19 provider or, if different, the defendant has materially and
20 willfully misrepresented information required by this article to be
21 disclosed to the individual, if the information so misrepresented
22 is material to the establishment of the liability of the defendant
23 under this article.

1 **§47-26-37. Uniformity of application and construction.**

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

5 **§47-26-38. Relation to Electronic Signatures in Global and**
6 **National Commerce Act.**

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

13 **§47-26-39. Severability.**

14 If any provision of this article or its application to any
15 person or circumstance is held unconstitutional or invalid, such
16 unconstitutionality or invalidity shall not affect other provisions
17 or applications of the article, and to this end the provisions of
18 this article are hereby declared to be severable.

NOTE: This bill creates "The Uniform Debt Management Services Act." The bill regulates debt management services providers. The bill provides for the registration of debt management service providers with the Division of Banking. The bill defines terms. The bill provides exemptions for certain agreements and persons. The

bill establishes the application information and fees required for registration. The bill requires applicants and registrants to provide the Commissioner of Banking with certain updated information provided as part of the application. The bill establishes the grounds under which the commissioner may deny a registration. The bill requires the commissioner to act on a registration application within one hundred twenty days of receipt of the complete application. The bill requires an annual renewal of all registrations. The bill requires periodic report by providers. The bill requires a surety bond for registered providers. The bill requires providers of debt management services to act in good faith and maintain customer service access during ordinary business hours. The bill establishes the prerequisites for providing debt management services. The bill requires certain provisions in all contracts to provide debt management services. The bill provides for the ability to terminate a debt management services agreement upon notice. The bill provides that all money paid to a debt management services provider shall be held in trust in an insured bank account. The bill prohibits the imposition of a fee or other charge for debt management services until the provider and customer have signed an agreement. The bill provides that an individual may void an agreement and recover a refund of any money paid. The bill provides a five-year period for retention of records. The bill establishes prohibited acts and practices of a debt management service provider. The bill requires a provider to provide the commissioner with notice of any civil litigation against it relating to violation of this article. The bill requires certain disclosures in advertising by debt management services providers. The bill authorizes the Division of Banking to examine providers for compliance. The bill requires background investigation of principals of providers. The bill authorizes the Division of Banking and the office of the Attorney General to enforce the act. The bill provides for private enforcement remedies. The bill establishes statutes of limitations.

This article is new; therefore, strike-throughs and underscoring have been omitted.