

## UNIFORM DEBT-MANAGEMENT SERVICES ACT - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3006 (attached as an [appendix](#)) directs the Legislative Management to study the Uniform Debt-Management Services Act, including consideration of the most appropriate administrator of the law, how the Uniform Act would impact existing state laws, and what issues other states have addressed in enacting the Uniform Act. The Uniform Act, which was completed by the National Conference of Commissioners on Uniform State Laws in 2005, provides guidance and regulation to the debt counseling industry. The Uniform Act applies to consumer debt-counseling services and debt-management services. The Uniform Act is a comprehensive statute that provides rules for, among other things, registration requirements, bond requirements, disclosure requirements, and penalties for noncompliance.

The Uniform Debt-Management Services Act has been adopted in Colorado, Delaware, Missouri, Nevada, Rhode Island, Tennessee, and Utah.

### BACKGROUND

#### History of Debt Counseling and Management Services

Consumer debt counseling and management services have been available to individuals with serious credit problems going back to the 1950s. There are generally two kinds of services that have been available. Some of these services have provided counseling coupled with assisting debtors in establishing programs to pay off debts over an extended time. Others have provided consolidation and management services in which agreements are reached with creditors to settle on a percentage of debt. Most of these services have collected a periodic amount from the debtors from which payment to creditors has been made. The general objective of these services has been debt satisfaction without resorting to bankruptcy.

The history of debt counseling and management services is checkered. There have been numerous abuses and efforts to counter abuses statutorily in many states. These services have been criticized for their efforts to steer debtors away from bankruptcy when it may have been more advantageous and less costly to debtors to file. Many states prohibit for-profit debt-management services while permitting nonprofit debt-counseling services. One of the continuing controversies is whether for-profit services should be allowed even if regulated.

Federal bankruptcy reform effective in 2005 changed the perspective on debt-management services. For an individual to file for Chapter 7 bankruptcy, that individual in most cases has to show that consumer debt counseling/management has

been sought and attempted. This shifts a highly significant burden upon private services to perform honestly and effectively. Because the new bankruptcy rules are federal and apply in every state, the National Conference of Commissioners on Uniform State Laws recommends that the regulation of the counseling and management services in every state should be uniform in character for the new bankruptcy rules to be effective and for consumers to be protected.

#### Summary of Uniform Debt-Management Services Act

As discussed previously, the National Conference of Commissioners on Uniform Law Commissioners completed the Uniform Debt-Management Services Act in 2005. In 2008, the North Dakota Commission on Uniform State Laws recommended the enactment of the Uniform Act. The Uniform Act provides the states with a comprehensive act governing these services that will mean national administration of debt counseling and management in a fair and effective way.

The Uniform Debt-Management Services Act may be divided into three basic parts: registration of services, service-debtor agreements, and enforcement.

#### Registration

The Uniform Debt-Management Services Act provides that a service may not enter an agreement with any debtor in a state without registering as a consumer debt-management service in that state. Under the Uniform Act, registration requires submission of detailed information concerning the service, including its financial condition, the identity of principals, locations at which service will be offered, forms 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. The service also must 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 results in a certificate to do business from the administrator. A yearly renewal is required.

#### Agreements

In order to enter agreements with debtors, the Uniform Act requires a disclosure requirement respecting fees and services to be offered and the risks and benefits of entering such a contract. 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. The contents of the agreements and fees that may be charged are set by the statute. The Uniform Act provides for a penalty-free three-day right of rescission on the part of the debtor. The debtor also may cancel the agreement 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. The Uniform Act contains strict accounting requirements and periodic reporting requirements respecting funds held.

### Enforcement

The Uniform Act prohibits specific acts on the part of a service, including misappropriation of funds in trust, settlement for more than 50 percent of a debt with a creditor without a debtor's consent, gifts or premiums to enter an agreement, and representation that settlement has occurred without certification from a creditor. Enforcement of the Uniform Act occurs at two levels--the administrator and the individual level. 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. An individual may bring a civil action for compensatory damages, including triple damages if a service obtains payments not authorized in the Uniform Act, and may seek 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 activities that are incidental to other functions performed. For example, a title insurer that provides bill-paying service that is incidental to title insurance is not subject to the Uniform Act.

### North Dakota Statutory Provisions

There are several areas of North Dakota law which may be impacted by the enactment of the Uniform Debt-Management Services Act. North Dakota laws regarding debt adjustment and consumer credit counseling services are contained in Chapters 13-06 and 13-07. Chapter 13-06, which relates to debt adjusting, provides that unless exempted, any person who engages in the business of debt adjusting is guilty of a Class A misdemeanor. Section 13-06-03 provides for the following exemptions from the prohibition on debt adjusting:

1. Situations involving debt adjusting incurred incidentally in the lawful practice of law in this state.
2. Banks and fiduciaries, as duly authorized and admitted to transact business in this state and

performing credit and financial adjusting service in the regular course of their principal business.

3. Title insurers and abstract companies, while doing an escrow business.
4. Judicial officers or others acting under court orders.
5. Nonprofit or charitable corporations or associations engaged in debt adjusting.
6. Situations involving debt adjusting incurred incidentally in connection with lawful practice as a certified public accountant and licensed public accountant.
7. Bona fide trade or mercantile associations in the course of arranging adjustment or debts with business establishments.
8. Employers for their employees.
9. Any person who, at the request of a debtor, arranges for or makes a loan to the debtor, and who, at the authorization of the debtor, acts as an adjuster of the debtor's debts in the disbursement of the proceeds of the loan, without compensation for services rendered in adjusting the debts.
10. Licensed and bonded collection agencies.

Chapter 13-07, which was enacted in 1993, provides for the regulation of consumer credit counseling services. Under Section 13-07-01, a consumer credit counseling service is defined as "a nonprofit corporation engaged in the business of debt adjusting as defined in section 13-06-01." Section 13-07-02, which sets forth the contract requirements in an agreement between the consumer credit counseling service and the debtor, provides that a consumer credit counseling service may not enter an agreement with a debtor unless a thorough written budget analysis indicates that the debtor can reasonably meet the requirements of the financial adjustment plan and that the debtor will be benefited by the plan. Section 13-07-06 authorizes the consumer credit counseling service to charge an origination fee of up to \$50. Section 13-07-07 prohibits a consumer credit counseling service from taking a confession of judgment or a power of attorney to confess judgment against the debtor or appear as the debtor in any judicial proceeding. This section also authorizes the Attorney General to receive and investigate complaints against a consumer credit counseling service. The remaining sections in this chapter set forth the surety bond, trust account, and accounting requirements for a consumer credit counseling service.

### RECOMMENDATION OF NORTH DAKOTA COMMISSION ON UNIFORM STATE LAWS

The North Dakota Commission on Uniform State Laws consists of 10 members. The primary function of the commission is to represent North Dakota in the National Conference of Commissioners on Uniform State Laws. The national conference consists of

representatives of all states and its purpose is to promote uniformity in state law on all subjects on which uniformity is desirable and practicable and to serve state government by improving state laws for better interstate relationships. Under Sections 54-35-02 and 54-55-04, the state commission may submit its recommendations for enactment of uniform laws or proposed amendments to existing uniform laws to the Legislative Management for its review and recommendation during the interim between legislative sessions.

The Uniform Debt-Management Services Act was among the 2008 recommendations of the North Dakota Commission on Uniform State Laws for introduction in the 2009 legislative session. Before the 2009 legislative session, concerns were expressed by members of the commission, the Attorney General, and the director of banking and financial institutions that before the Uniform Act is introduced for adoption in North Dakota, a determination should be made as to which state agency would be the most appropriate agency for the administration and enforcement of the Uniform Debt-Management Services Act. It was also noted that the Uniform Debt-Management Services Act is a complicated Act that will require additional staffing and budget to implement. Because of these concerns, it was recommended that a study of the Uniform Debt-

Management Services Act be conducted to address these concerns before introduction.

### **SUGGESTED STUDY APPROACH**

The committee, in its study of the Uniform Debt-Management Services Act, may wish to approach this study as follows:

- Receive information from the National Conference of Commissioners on Uniform State Laws regarding the adoption of the Uniform Debt-Management Services Act and the issues that have arisen in other states that have adopted the Act.
- Receive information, testimony, and recommendations from the Attorney General, the director of banking and financial institutions, and other interested parties regarding the administration and enforcement of the Uniform Debt-Management Services Act.
- Review current state law to determine the impact the Uniform Debt-Management Services Act would impact those laws.
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1