

H. B. 4278

(By Delegates Moore, Reynolds and Azinger)
 [Introduced January 24, 2012; referred to the
 Committee on Banking and Insurance then the Judiciary.]

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

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

1 a provider to provide the commissioner with notice of any
 2 civil litigation against it relating to violation of this
 3 article; requiring certain disclosures in advertising by debt
 4 management services providers; authorizing the Division of
 5 Banking to examine providers for compliance; requiring
 6 background investigation of principals of providers;
 7 authorizing the Division of Banking and the Office of the
 8 Attorney General to enforce the act; providing for private
 9 enforcement remedies; and establishing statutes of
 10 limitations.

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

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

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

22 **§47-26-1. Short title.**

23 This article may be cited as "The Uniform Debt Management
 24 Services Act."

1 **§47-26-2. Definitions.**

2 For the purposes of this article, the words or terms defined
3 in this article, and any variation of those words or terms required
4 by the context, have the meanings ascribed to them in this article.
5 These definitions are applicable unless a different meaning clearly
6 appears from the context:

7 (1) "Commissioner" means the Commissioner of the West Virginia
8 Division of Banking;

9 (2) "Affiliate":

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

11 (i) The spouse of the individual;

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

13 (iii) An individual or the spouse of an individual who is a
14 lineal ancestor or lineal descendant of the individual or the
15 individual's spouse;

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

20 (v) Any other individual occupying the residence of the
21 individual; and

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

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

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

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

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

12 (v) An officer or director of, or an individual performing
13 similar functions with respect to, a person described in
14 subparagraph (i), paragraph (B), subdivision (2) of this section;

15 (vi) The spouse of, or an individual occupying the residence
16 of, an individual described in subparagraphs (i) through (iv),
17 paragraph (B), subdivision (2) of this section; or

18 (vii) An individual who has the relationship specified in
19 subparagraph (iv), paragraph (A) of this subdivision to an
20 individual or the spouse of an individual described in
21 subparagraphs (i) through (v) of that paragraph;

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

24 (4) "Bank" means a financial institution, including a

1 commercial bank, savings bank, savings and loan association, credit
2 union, and trust company, engaged in the business of banking,
3 chartered under federal or state law, and regulated by a federal or
4 state banking regulatory authority;

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

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

10 (7) "Day" means calendar day;

11 (8) "Debt management services" means services as an
12 intermediary between an individual and one or more creditors of the
13 individual for the purpose of obtaining concessions, but does not
14 include:

15 (A) Legal services provided in an attorney-client
16 relationship, if:

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

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

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

21 (ii) There is no intermediary between the individual and the
22 creditor other than the attorney or an individual under the direct
23 supervision of the attorney;

24 (B) Accounting services provided in an accountant-client

1 relationship, if:

2 (i) The services are provided by a certified public accountant

3 who:

4 (I) Is licensed to provide accounting services in this state;

5 and

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

8 (ii) There is no intermediary between the individual and the
9 creditor other than the accountant or an individual under the
10 direct supervision of the accountant;

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

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

14 (11) "Lead generator" means a person that, in the regular
15 course of business, supplies a provider with the name of a
16 potential customer, directs a communication of an individual to a
17 provider, or otherwise refers a customer to a provider;

18 (12) "Nationwide Mortgage Licensing System and Registry" means
19 a mortgage licensing system developed and maintained by the
20 Conference of State Bank Supervisors and the American Association
21 of Residential Mortgage Regulators for the licensing and
22 registration of mortgage brokers, lenders, loan originators and
23 other entities subject to licensing or registration by financial
24 supervisors;

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

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

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

12 (16) "Provider" means a person that provides, offers to
13 provide, or agrees to provide debt management services directly or
14 through others;

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

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

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

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

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

3 (20) "State" means a state of the United States, the District
4 of Columbia, Puerto Rico, the United States Virgin Islands, or any
5 territory or insular possession subject to the jurisdiction of the
6 United States; and

7 (21) "Trust account" means an account held by a provider which
8 is:

9 (A) Established in a bank in which deposit accounts are
10 insured;

11 (B) Separate from other accounts of the provider or its
12 designee;

13 (C) Designated as a trust account or other account designated
14 to indicate that the money in the account is not the money of the
15 provider; and

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

18 **§47-26-3. Exempt agreements and persons.**

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

22 (b) This article does not apply to a provider to the extent
23 that the provider:

24 (1) Provides or agrees to provide debt management,

1 educational, or counseling services to an individual who is not a
2 legal resident of this state at the time the provider agrees to
3 provide the services; or

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

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

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

13 (2) A bank;

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

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

21 **§47-26-4. Registration required.**

22 (a) Except as otherwise provided in subsection (b) of this
23 section, a provider may not provide debt management services to an
24 individual who it reasonably should know resides in this state at

1 the time it agrees to provide the services, unless the provider is
2 registered under this article.

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

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

8 **§47-26-5. Application for registration: form, fee, and**
9 **accompanying documents.**

10 (a) An application for registration as a provider must be in
11 a form prescribed by the commissioner, and if so directed by the
12 commissioner, be provided to the Nationwide Mortgage Licensing
13 System and Registry.

14 (b) An application for registration as a provider must be
15 accompanied by:

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

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

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

24 (4) A certificate from the Secretary of State certifying that

1 the applicant is authorized by the Secretary of State to transact
2 business in this state; and

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

7 **§47-26-6. Application for registration: required information.**

8 An application for registration as a provider must be signed
9 under oath and include:

10 (1) The applicant's name, principal business address and
11 telephone number, and all other business addresses in this state,
12 electronic-mail addresses, and Internet website addresses;

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

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

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

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

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

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

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

10 (7) The applicant's financial statements, audited by an
11 accountant licensed to conduct audits, for each of the two years
12 immediately preceding the application or, if it has not been in
13 operation for the two years preceding the application, for the
14 period of its existence;

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

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

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

24 (11) the schedule of fees and charges that the applicant will

1 use with individuals who reside in this state;

2 (12) At the applicant's expense, submit the required forms and
3 authorizations for the commissioner, the Nationwide Mortgage
4 Licensing and Registry Service, or its designated vendor, to
5 perform a criminal background investigation and credit
6 investigation covering every principal officer of the applicant and
7 every employee or agent of the applicant who is authorized to have
8 access to the trust account required by section twenty-one of this
9 article;

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

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

14 (A) Any affiliate of the applicant; or

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

18 (15) A statement of the amount of compensation of the
19 applicant's five most highly compensated employees for each of the
20 three years immediately preceding the application or, if it has not
21 been in operation for the three years preceding the application,
22 for the period of its existence;

23 (16) The identity of each director who is an affiliate of the
24 applicant, as defined in paragraph (A), subdivision (2), section

1 two of this article or subparagraphs (i), (ii), (iv), (v), (vi) or
2 (vii), paragraph (B), subdivision (2), section two of this article;
3 and

4 (17) Any other information that the commissioner reasonably
5 requires to perform the commissioner's duties under section nine of
6 this article.

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

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

14 **§47-26-8. Application for registration: public information.**

15 Except for the information required by section subdivisions
16 (7), (14) and (17), section six of this article and the addresses
17 required by subdivision (4), section six of this article, the
18 commissioner shall make the information in an application for
19 registration as a provider available to the public.

20 **§47-26-9. Certificate of registration: issuance of denial.**

21 (a) Except as otherwise provided in subsections (c) and (d) of
22 this section, the commissioner shall issue a certificate of
23 registration as a provider to a person that complies with sections

1 five and six of this article.

2 (b) The commissioner may deny registration if:

3 (1) The application contains information that is materially
4 erroneous or incomplete;

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

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

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

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

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

21 (1) Are affiliates of the applicant, as defined in paragraph
22 (A), subdivision (2), section two of this article or subparagraphs
23 (i), (ii), (iv), (v), (vi) or (vii), paragraph (B), subdivision
24 (2), section two of this article; or

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

5 **§47-26-10. Certificate of registration: timing.**

6 (a) The commissioner shall approve or deny an initial
7 registration as a provider no later than one hundred twenty days
8 after a complete application is filed. In connection with a request
9 pursuant to subdivision (17), section six of this article for
10 additional information, the commissioner may extend the one hundred
11 twenty day period for not more than sixty days. The commissioner,
12 by written order, shall inform the applicant of the reasons for the
13 denial.

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

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

22 **§47-26-11. Renewal of Registration.**

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

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

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

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

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

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

14 (5) Disclose the total amount of money received by the
15 applicant pursuant to plans during the preceding twelve months from
16 or on behalf of individuals who reside in this state and the total
17 amount of money distributed to creditors of those individuals
18 during that period;

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

23 (7) Provide any other information that the commissioner
24 reasonably requires to perform the commissioner's duties under this

1 section.

2 (c) Except for the information required by subdivisions (7),
3 (12) and (15), section six of this article and the addresses
4 required by subdivision (4), section six of this article, the
5 commissioner shall make the information in an application for
6 renewal of registration as a provider available to the public.

7 (d) If a registered provider files a timely and complete
8 application for renewal of registration, the registration remains
9 effective until the commissioner, in a record, notifies the
10 applicant of a denial and states the reasons for the denial.

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

1 under the applicant's control.

2 **§47-26-12. Provider reporting requirements.**

3 Providers registered under this article shall provide periodic
4 reports of their activities as required by the commissioner.

5 **§47-26-13. Bond Required.**

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

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

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

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

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

1 considers appropriate;

2 (2) Be issued by a bonding, surety, or insurance company
3 authorized to do business in this state and rated at least A- by a
4 nationally recognized rating organization; and

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

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

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

19 (1) The commissioner assesses expenses under section 31(b)(1)
20 of this article, issues a final order under subdivision (2),
21 subsection (a), section thirty-two of this article, or recovers a
22 final judgment under subdivisions (4) or (5), subsection (a),
23 section thirty-two or subsection (d), section thirty-two of this
24 article; or

(2) An individual recovers a final judgment pursuant to subsections (a) or (b), section thirty-four of this article or subdivisions (1), (2) or (4), subsection (c), section thirty-four of this article.

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

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

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

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

(4) If a final order or judgment is issued under section 32(a) of this article, to the expenses charged pursuant to section 31(b) (1) of this article.

§47-26-14. Requirement of good faith.

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

1 article.

2 **§47-26-15. Customer service.**

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

8 **§47-26-16. Prerequisites for providing debt-management services.**

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

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

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

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

21 Set-up fee _____ Dollar amount of fee

22 Monthly service fee _____

23 Dollar amount of fee or method of determining amount of

24 settlement fee _____

1 Dollar amount of fee or method of determining amount of goods and
 2 services in addition to those provided in connection with a plan:

3 _____
 4 Item Dollar amount or method of determining amount

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

9 (1) Provides the individual with reasonable education about
 10 the management of personal finance;

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

14 (A) Assets;

15 (B) Income;

16 (C) Debt, including secured debt; and

17 (D) Other liabilities; and

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

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

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

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

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

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

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

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

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

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

21 (C) Creditors that the provider expects not to participate in
22 the plan; and

23 (D) All other creditors.

24 (d) Before an individual assents to an agreement, the provider

1 shall inform the individual in a separate record that the
 2 individual may keep whether or not the individual assents to the
 3 agreement:

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

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

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

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

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

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

19 (e) If a provider may receive payments from an individual's
 20 creditors and the plan contemplates that the individual's creditors
 21 will reduce finance charges or fees for late payment, default, or
 22 delinquency, the provider may comply with subsection (d) of this
 23 section by providing the following disclosure in at least twelve
 24 point font, surrounded by black lines:

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

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

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

Name and business address of provider

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

IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

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

Name and business address of provider

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

6 IMPORTANT INFORMATION FOR YOU TO CONSIDER

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

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

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

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

13 and

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

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

18 _____
19 Name and business address of provider

20 **§47-26-17. Communication by electronic or other means.**

21 (a) In this section:

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

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

3 (b) A provider may satisfy the requirements of sections
4 sixteen, eighteen or twenty-six of this article by means of the
5 Internet or other electronic means if the provider obtains a
6 consumer's consent in the manner provided by [section 101\(c\)\(1\)](#) of
7 the federal act.

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

12 (d) With respect to disclosure by means of an Internet
13 website, the disclosure of the information required by subsection
14 (d), section sixteen of this article must appear on one or more
15 screens that:

16 (1) Contain no other information; and

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

19 (e) At the time of providing the materials and agreement
20 required by subsections (c) and (d), section sixteen, section
21 eighteen and twenty-six of this article, a provider shall inform
22 the individual that on electronic, telephonic, or written request,
23 it will send the individual a written copy of the materials, and
24 shall comply with a request as provided in subsection (f) of this

1 section.

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

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

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

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

20 (3) The names of its principal officers.

21 (h) Subject to subsection (i) of this section, if a consumer
22 who has consented to electronic communication in the manner
23 provided by section 101 of the federal act withdraws consent as
24 provided in the federal act, a provider may terminate its agreement

1 with the consumer.

2 (i) If a provider wishes to terminate an agreement with a
3 consumer pursuant to subsection (h) of this section, it shall
4 notify the consumer that it will terminate the agreement unless the
5 consumer, no later than 30 days after receiving the notification,
6 consents to electronic communication in the manner provided in
7 section 101(c) of the federal act. If the consumer consents, the
8 provider may terminate the agreement only as permitted by paragraph
9 (G), subdivision (6), subsection (a), section eighteen of this
10 article.

11 **§47-26-18. Form and contents of agreement.**

12 (a) An agreement must:

13 (1) Be in a record;

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

15 (3) Include the name of the individual and the address where
16 the individual resides;

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

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

21 (6) Disclose:

22 (A) The services to be provided;

23 (B) In a clear and conspicuous manner the amount, or method of
24 determining the amount of all fees, individually itemized, to be

1 paid by the individual using only the terminology contained in
2 section twenty-two of this article;

3 (C) The schedule of payments to be made by or on behalf of the
4 individual, including the amount of each payment, the date on which
5 each payment is due, and an estimate of the date of the final
6 payment and an estimate of the total of all payments to be made
7 under the plan;

8 (D) If a plan provides for regular periodic payments to
9 creditors:

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

13 (ii) The schedule of expected payments to each creditor,
14 including the amount of each payment and the date on which it will
15 be made; and

16 (iii) Each creditor that the provider believes will not
17 participate in the plan and to which the provider will not direct
18 payment;

19 (E) If a plan contemplates the settlement of the individual's
20 debt for less than the principal amount of the debt, an estimate
21 of:

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

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

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

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

8 (G) That the individual may terminate the agreement at any
 9 time by giving written or electronic notice, and that, if notice of
 10 termination is given, the individual will receive all unexpended
 11 money that the provider or its designee has received from or on
 12 behalf of the individual for payment of a creditor and, except to
 13 the extent they have been earned, the provider's fees;

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

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

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

22 (c) If the commissioner supplies the provider with any
 23 information required under paragraph (I), subdivision (6)
 24 subsection (a) of this section, the provider may comply with that

1 requirement only by disclosing the information supplied by the
2 commissioner.

3 (d) An agreement must provide that:

4 (1) the individual authorizes any bank in which the provider
5 or its agent has established a trust account to disclose to the
6 commissioner any financial records relating to the trust account;
7 and

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

11 (A) The identity of the creditor; and

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

14 (e) An agreement may not:

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

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

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

24 (4) Contain a provision that:

1 (A) Limits or releases the liability of any person for not
2 performing the agreement or for violating this article or
3 indemnifies any person for liability arising under the agreement or
4 this article.

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

7 **§47-26-19. Termination of agreement.**

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

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

14 (c) If an agreement is terminated:

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

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

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

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

24 **§47-26-20. Required language.**

1 Unless the commissioner, by rule, provides otherwise, the
2 disclosures and documents required by this article must be in
3 English. If a provider communicates with an individual primarily in
4 a language other than English, the provider must furnish a
5 translation in the other language of the disclosures and documents
6 required by this article.

7 **§47-26-21. Trust account and independently administered account.**

8 (a) All money paid to a provider by or on behalf of an
9 individual for distribution to creditors pursuant to a plan is held
10 in trust. No later than two business days after receipt, the
11 provider shall deposit the money in a trust account established for
12 the benefit of individuals to whom the provider is furnishing debt
13 management services.

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

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

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

21 (3) The entity administering the account is not the provider
22 or an affiliate of the provider, unless the affiliate is described
23 in subparagraph (iv), paragraph (B), subdivision (2), section two
24 of this article;

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

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

8 (c) If an agreement contemplates the reduction of finance
9 charges or fees for late payment, default, or delinquency and the
10 provider complies with subsection (a) of this section, the provider
11 may request or require the individual to make payment to be used
12 for both distribution to creditors and payment of the provider's
13 fees.

14 (d) Money held in trust by a provider is not property of the
15 provider or its designee. The money is not available to creditors
16 of the provider or designee, except an individual from whom or on
17 whose behalf the provider received money, to the extent that the
18 money has not been disbursed to creditors of the individual.

19 (e) A provider shall:

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

22 (2) Disburse money paid by or on behalf of the individual to
23 creditors of the individual as disclosed in the agreement, except
24 that:

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

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

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

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

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

16 (h) If a provider has established a trust account pursuant to
17 subsection (a) of this section, the provider shall reconcile the
18 trust account at least once a month. The reconciliation must
19 compare the cash balance in the trust account with the sum of the
20 balances in each individual's account. If the provider or its
21 designee has more than one trust account, each trust account must
22 be individually reconciled.

23 (i) If a provider discovers, or has a reasonable suspicion of,
24 embezzlement or other unlawful appropriation of money held in

1 trust, the provider immediately shall notify the commissioner by a
2 method approved by the commissioner. Unless the commissioner by
3 rule provides otherwise, no later than five days thereafter, the
4 provider shall give notice to the commissioner describing the
5 remedial action taken or to be taken.

6 (j) If an individual terminates an agreement or it becomes
7 reasonably apparent to a provider that a plan has failed, the
8 provider shall refund promptly to the individual all money paid by
9 or on behalf of the individual which has not been paid to
10 creditors, less fees that are payable to the provider under section
11 twenty-two of this article.

12 (k) Before relocating a trust account from one bank to
13 another, a provider shall inform the commissioner of the name,
14 business address, and telephone number of the new bank. As soon as
15 practicable, the provider shall inform the commissioner of the
16 account number of the trust account at the new bank.

17 **§47-26-22. Fees and other charges.**

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

22 (b) A provider may not impose charges or receive payment for
23 debt-management services until the provider and the individual have
24 signed an agreement that complies with sections eighteen and

1 twenty-seven of this article.

2 (c) If an individual assents to an agreement, a provider may
 3 not impose a fee or other charge for educational, counseling, or
 4 similar services, except as otherwise provided in this section and
 5 subsection (d), section twenty-seven of this article. The
 6 commissioner may authorize a provider to charge a fee based on the
 7 nature and extent of the services furnished by the provider.

8 (d) The following rules apply:

9 (1) If an individual assents to a plan that contemplates that
 10 creditors will reduce finance charges or fees for late payment,
 11 default, or delinquency, the provider may charge: (A) a fee not
 12 exceeding \$50 for consultation, obtaining a credit report, and
 13 setting up an account: and (B) a monthly service fee, not to exceed
 14 \$10 times the number of creditors remaining in a plan at the time
 15 the fee is assessed, but not more than \$50 in any month.

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

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

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

24 (ii) The individual has made at least one payment pursuant to

1 that settlement agreement or other valid contractual agreement
2 between the individual and the creditor or debt collector; and
3 (iii) The fee or consideration either bears the same
4 proportional relationship to the total fee for settling the terms
5 of the entire debt balance as the individual debt amount bears to
6 the entire debt amount, in which case the individual debt amount
7 and the entire debt amount are those owed at the time the debt was
8 enrolled in the service; or is a percentage of the amount saved as
9 a result of the settlement. The percentage charged cannot change
10 from one individual debt to another. The amount saved is the
11 difference between the amount owed at the time the debt was
12 enrolled in the plan and the amount actually paid to satisfy the
13 debt.

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

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

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

1 commissioner may approve a fee larger than \$100 if the nature and
2 extent of the educational and counseling services warrant the
3 larger fee.

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

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

13 **§47-26-23. Voluntary contributions.**

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

22 **§47-26-24. Voidable agreements.**

23 (a) If a provider imposes a fee or other charge or receives
24 money or other payments not authorized by section twenty-two or

1 twenty-three of this article, the individual may void the agreement
2 and recover as provided in section thirty-four of this article.

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

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

9 **§47-26-25. Retention of records.**

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

18 **§47-26-26. Periodic reports.**

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

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

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

23 (A) At least once each month; and

24 (B) No later than five business days after a request by an

1 individual, but the provider need not comply with more than one
2 request in any calendar month.

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

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

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

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

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

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

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

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

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

24 (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

24 (B) Before termination of an agreement, properly authorized by

1 the agreement and this article, and for:

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

3 or

4 (ii) Payment of a fee;

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

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

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

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

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

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

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

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

11 (12) Make a representation that:

12 (A) The provider will furnish money to pay bills or prevent
13 attachments;

14 (B) Payment of a certain amount will permit satisfaction of a
15 certain amount or range of indebtedness; or

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

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

21 (14) Represent in its agreements, disclosures required by this
22 article, advertisements, or Internet web site that it is:

23 (A) A not-for-profit entity unless it is organized and
24 properly operating as a not-for-profit entity under the law of the

1 state in which it was formed; or

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

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

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

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

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

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

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

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

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

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

23 (5) Except as permitted by federal law, disclose the identity
 24 or identifying information of the individual or the identity of the

1 individual's creditors, except to:

2 (A) The commissioner, on proper demand;

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

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

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

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

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

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

20 (d) A provider may not receive a gift or bonus, premium,
21 reward, or other compensation, directly or indirectly, for advising,
22 arranging, or assisting an individual in connection with obtaining,
23 an extension of credit or other service from a lender or service
24 provider, except for educational or counseling services required in

1 connection with a government-sponsored program or authorized under
2 subdivision (5), subsection (d), section twenty-two of this article.

3 (e) Unless a person supplies goods, services, or facilities
4 generally and supplies them to the provider at a cost no greater
5 than the cost the person generally charges to others, a provider may
6 not purchase goods, services, or facilities from the person if an
7 employee or a person that the provider should reasonably know is an
8 affiliate of the provider:

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

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

11 **§47-26-28. Notice of litigation.**

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

17 **§47-26-29. Advertising.**

18 (a) If the agreements of a provider contemplate that creditors
19 will reduce finance charges or fees for late payment, default, or
20 delinquency and the provider advertises debt-management services,
21 it shall disclose, in an easily comprehensible manner, that using
22 a debt-management plan may make it harder for the individual to
23 obtain credit.

24 (b) If the agreements of a provider contemplate that creditors

1 will settle for less than the full principal amount of debt and the
2 provider advertises debt-management services, it shall disclose, in
3 an easily comprehensible manner, the information specified in
4 subdivisions (3) and (4), subsection (d), section sixteen of this
5 article.

6 (c) A provider must disclose its registration number on all
7 solicitations or advertisements intended to reach citizens of this
8 state.

9 **§47-26-30. Liability of a provider for conduct of another person;**
10 **unlawful conduct by another person.**

11 (a) If a provider delegates any of its duties or obligations
12 under an agreement or this article to another person, including an
13 independent contractor, the provider is liable for conduct of the
14 person which, if done by the provider, would violate the agreement
15 or this article.

16 (b) A lead generator or other person that provides services to
17 or for a provider may not engage in an unfair, unconscionable, or
18 deceptive act or practice, including the knowing omission of any
19 material information, with respect to an individual who the lead
20 generator or other person has reason to believe is or may become a
21 customer of the provider.

22 **§47-26-31. Powers of commissioner.**

23 (a) The commissioner may act on his or her own initiative or
24 in response to complaints and may receive complaints, take action

1 to obtain voluntary compliance with this article, refer cases to the
2 office of the Attorney General, and seek or provide remedies as
3 provided in this article.

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

13 (1) Charge the person the reasonable expenses necessarily
14 incurred to conduct the examination;

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

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

23 (c) The commissioner is authorized and empowered to promulgate
24 reasonable rules in accordance with the provisions of article three,

1 chapter twenty-nine-a of this code to implement the provisions of
2 this article.

3 (d) The commissioner may enter into cooperative arrangements
4 with any other federal or state agency having authority over
5 providers and may exchange with any of those agencies information
6 about a provider, including information obtained during an
7 examination of the provider.

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

13 **§47-26-32. Administrative remedies.**

14 (a) The commissioner may enforce this article and rules adopted
15 under this article by taking one or more of the following actions:

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

20 (2) Ordering a provider, lead generator, person administering
21 an account pursuant to subsection (b), section twenty-one of this
22 article, or person that has caused a violation to correct the
23 violation, including making restitution of money or property to a
24 person aggrieved by a violation;

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

5 (4) Prosecuting a civil action to:

6 (A) Enforce an order; or

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

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

10 (b) If a person violates or knowingly authorizes, directs, or
11 aids in the violation of a final order issued under subdivisions (1)
12 or (2), subsection (a) of this section, the commissioner or circuit
13 court may impose a civil penalty not exceeding \$20,000 for each
14 violation.

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

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

22 (e) In determining the amount of a civil penalty to impose
23 under subsection (a) or (b) of this section, the commissioner or
24 circuit court shall consider the seriousness of the violation, the

1 good faith of the violator, any previous violations by the violator,
2 the deleterious effect of the violation on the public, the net worth
3 of the violator, and any other factor the commissioner or circuit
4 court considers relevant to the determination of the civil penalty.

5 **§47-26-33. Suspension, revocation, or nonrenewable of**
6 **registration.**

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

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

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

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

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

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

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

21 (3) The provider is insolvent;

22 (4) The provider, an employee or affiliate of the provider, a
23 lead generator for the provider, a person administering an account
24 for the provider pursuant to subsection (b) section twenty-one of

1 this article, or a person to which the provider has delegated its
2 obligations under an agreement or this article has refused to permit
3 the commissioner to make an examination authorized by this article,
4 failed to comply with subdivision (2) subsection (b), section
5 thirty-one of this article no later than fifteen days after request,
6 or made a material misrepresentation or omission in complying with
7 subdivision (2) subsection (b), section thirty-one of this article;
8 or

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

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

17 (d) If the commissioner suspends, revokes, or denies renewal
18 of the registration of a provider, the commissioner may seek a court
19 order authorizing seizure of any or all of the money in a trust
20 account required by section twenty-one of this article, books,
21 records, accounts, and other property of the provider which are
22 located in this state.

23 (e) If the commissioner suspends or revokes a provider's
24 registration, the provider may appeal and request a hearing pursuant

1 to article five, chapter twenty-nine-a of this code.

2 **§47-26-34. Private enforcement.**

3 (a) If an individual voids an agreement pursuant to subsection
4 (b), section twenty-five of this article, the individual may recover
5 in a civil action all money paid or deposited by or on behalf of the
6 individual pursuant to the agreement, except amounts paid to
7 creditors, in addition to the recovery under subdivisions (3) and
8 (4), subsection (c) of this section.

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

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

19 (1) Compensatory damages for injury, including noneconomic
20 injury, caused by the violation;

21 (2) Except as otherwise provided in subsection (d) of this
22 section, with respect to a violation of sections sixteen, eighteen,
23 nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-six,
24 of subsections (a), (b) or (d), section twenty-seven of this article

1 the greater of the amount recoverable under subdivision (1) of this
2 subsection or \$5,000;

3 (3) Punitive damages; and

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

5 (d) In a class action, except for a violation of subdivision
6 (5), subsection (a), section twenty-seven of this article, the
7 minimum damages provided in subdivision (2), subsection (c) of this
8 section do not apply.

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

19 **§47-26-35. Violation of West Virginia Consumer Credit and**
20 **Protection Act.**

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

1 **§47-26-36. Statute of limitations.**

2 (a) An action or proceeding brought pursuant to subsections
3 (a), (b) or (c), section thirty-two of this article must be
4 commenced no later than four years after the conduct that is the
5 basis of the commissioner's complaint.

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

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

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

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

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

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

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

21 (c) The period prescribed in subdivision (5), subsection (b)
22 of this section is tolled during any period during which the
23 provider or, if different, the defendant has materially and
24 willfully misrepresented information required by this article to be

1 disclosed to the individual, if the information so misrepresented
2 is material to the establishment of the liability of the defendant
3 under this article.

4 **§47-26-37. Uniformity of application and construction.**

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

8 **§47-26-38. Relation to Electronic Signatures in Global and**
9 **National Commerce Act.**

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

16 **§47-26-39. Severability.**

17 If any prevision of this article or its application to any
18 person or circumstance is held unconstitutional or invalid, such
19 unconstitutionality or invalidity shall not affect other provisions
20 or applications of the article, and to this end the provisions of
21 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 moneys 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, it has been completely underscored.