SLS 04-890 **ORIGINAL**

Regular Session, 2004

SENATE BILL NO. 652

BY SENATOR JACKSON

CONSUMERS/PROTECTION. Creates the "Consumer Debt Management Services Act". (1/1/05)

AN ACT

To enact Part XX of Chapter 2 of Code Title XII of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 9:3577.11 through 3577.26, relative to consumer debt management services; to provide for definitions; to provide for applicability; to provide for registration; to provide for record keeping; to provide for bonding requirements; to provide for advertising; to require certain acts; to provide for management services agreements; to provide for fees; to provide for trust accounts; to prohibit certain practices; to provide for fiduciary duty; to provide for powers of the Administrator; to provide for remedies; to provide for prescription; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Part XX of Chapter 2 of Code Title XII of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 9:3577.11 through 3577.26 is hereby enacted to read as follows:

PART XX. CONSUMER DEBT MANAGEMENT SERVICES ACT

Part XX is all proposed new law.

§3577.11. Title; Purpose

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R.S. 9:3577.11 is all proposed new law.

This Part shall be known as the Consumer Debt Management Services Act. This Act shall be liberally construed to effectuate its purpose. The purpose of the Act is to protect consumers who contract for services with debt management services providers. This Act is to be construed as a consumer protection statute for all purposes.

§3577.12. Definitions

R.S. 9:3577.12 is all proposed new law.

For the purposes of this Part, the following terms shall have the following meanings unless the context clearly indicates otherwise:

(1) "Administrator" means the Attorney General.

(2) "Advertising" means any and all written and oral information about the debt management services provider or about the provider's debt management services, communicated to individual consumers or to the public by phone, television, Internet, radio, or other electronic medium, or by written materials sent by mail, posted publicly or posted at the provider's business location.

(3) "Consumer" means an individual who resides in this state and seeks debt management services or enters a debt management service agreement.

(4) "Consumer arbitration contract provision" means a provision in a standardized contract where one party requires that disputes arising after the contract's signing be submitted to binding arbitration, and the other party is a consumer. Such a contract does not include a public or private sector collective bargaining agreement.

(5) "Creditor" means any person to whom a person owes money.

(6) "Debt management service(s)" means:

(a) The receiving of money from a consumer for the purpose of distributing that money to or among one or more of the creditors of the consumer in full or partial payment of the consumer's obligations.

(b) Arranging or assisting a consumer to arrange for the distribution of one

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or more payments to or among one or more creditors of the consumer in full or partial payment of the consumer's obligations.

(c) Exercising control, directly or indirectly, or arranging for the exercise of control over funds of a consumer for the purpose of distributing payments to or among one or more creditors of the consumer in full or partial payment of the consumer's obligations.

(7) "Debt management service agreement" means a written agreement between a debt management services provider and a consumer for the performance of debt management services.

(8) "Debt management services provider" (hereafter "provider") means a person that provides or offers to provide to a consumer in this state or elsewhere any debt management services.

(9) "Person" means an individual, partnership, corporation, limited liability company, association, or organization.

(10) "Secured debt" means a debt for which a creditor has collateral in the form of a mortgage, lien, or security interest in certain items of property.

(11) "Trust account" means an account that is:

(a) Established in a federally insured financial institution.

(b) Separate from any and all of the debt management service provider's account(s).

(c) Designated as a "trust account" or other appropriate designation indicating that the funds in the account are not funds of the provider or its officers, employees, or agents.

(d) Unavailable to creditors of the provider.

(e) Used exclusively to hold funds paid by consumers to the provider for disbursement to creditors of the consumer.

(12) "Unsecured Debt" means a debt for which a creditor does not have collateral.

§3577.13. Applicability

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R.S. 9:3577.13 is all proposed new law.

A. Except as otherwise provided in this Part, this Part applies to any debt management service provider as defined in Section 3578.2, regardless of whether the provider charges a fee or receives consideration for services. This Part applies to any debt management services provider regardless of whether the provider has federal or state nonprofit or tax-exempt status.

B. The business of providing debt management services is conducted in this state if its business, its employees, or its agents are located in this state or if the debt management services provider solicits or contracts with consumers located in this state.

C. This Part does not apply to the following persons:

(1) An attorney licensed to practice in this state, unless the attorney holds him/herself out to the public as a debt management services provider or is employed, affiliated with, or otherwise working on behalf of a debt management services provider.

(2) A title insurance or abstract company employee or agent or other person legally authorized to do escrow business in the state and only while engaged in the escrow business.

(3) A judicial officer or person acting under a court order.

(4) A person who has legal authority under federal or state law to act as a representative payee for a consumer and only to the extent the person is paying bills or other debts on behalf of that consumer.

(5) A person who pays bills or other debts owed by a consumer and on behalf of a consumer, provided that the funds used to make the payments belong exclusively to the consumer and the person does not initiate any contact or promise to initiate any contact with individual creditors of the consumer to compromise a debt, arrange a new payment schedule or otherwise change the terms of the debt.

D. The following are not "debt management services" for purposes of this Part:

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(1) Extensions of credit, including consolidation loans and refinance loans.

(2) Bankruptcy services provided by an attorney licensed to practice in this state.

E. This state's consumer protection law applies to debt management services providers.

F. The provisions of this Part shall apply to any person who seeks to evade its applicability by any device, subterfuge, or pretense whatsoever.

§3577.14. Registration

R.S. 9:3577.14 is all proposed new law.

A. A person, whether or not located in this state, may not provide debt management services to consumers in this state unless the person is registered with the Administrator. Registration expires on December 31 of the year in which the registration occurs.

B. A debt management services provider must renew its registration every year. An initial registration may be submitted at any time. Deadlines to apply for renewals of registration shall be set by the Administrator.

C. An application for an initial or renewal of registration must be in a form prescribed by the Administrator. It must be accompanied by:

(1) Fees to be established by the Administrator.

(2) The surety bond required in Section 3578.6 of this Part.

(3) Identification of a trust account.

(4) Consent to the jurisdiction of this state and either:

(a) The name and address of its registered agent in this state for purposes of service of process.

(b) The appointment of the Administrator as the debt management service provider's agent for purposes of service of process.

(5) Basic identification information as prescribed by the Administrator.

(6) If applicable, proof of federal non-profit or tax-exempt status.

(7) A description of the applicant's corporate structure, including parent

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companies, subsidiaries and affiliates and if applicable proof of incorporation in this state and any other state in which the provider does business.

(8) A description of the ownership interest of any officer, director, agent, or employee of the applicant in any affiliate or subsidiary of the applicant or in any other business entity that provides services to the applicant or any consumer relating to the applicant's debt management services business.

(9) A statement whether the applicant and any principals of the applicant have been convicted of any crime or found liable for any civil violation of law and a description of any such convictions or civil violations.

(10) A statement of any pending or completed judgments, tax liens, private or public litigation, or administrative actions by any government agency against the applicant and any principals of the applicant and a description of any such judgments, liens, litigation or actions.

(11) A statement whether the applicant's registration or license to provide debt management services in this state or any other state has previously been revoked or suspended and a description of such events.

(12) Evidence of any accreditation by a nationally recognized accrediting organization.

(13) Any other information that the Administrator requires.

D. In addition to the information required by this Section, an application for renewal of registration must be accompanied by the record keeping information described in Section 3577.15 of this Part.

E. If a person is registered under this Part, the officers and employees of the person need not be separately registered.

F. Unless the Administrator notifies an applicant that a longer time period is necessary, the Administrator shall approve or deny an initial registration within sixty days after the date on which the completed application, including all required documents and payments, is filed. Within thirty days of a denial of an application, the Administrator shall inform the applicant in writing of the reason(s) for the denial.

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G. The Administrator shall approve or deny a renewal of registration within thirty days after the date on which the completed application for renewal, including all required documents and payments, is filed. Within thirty days of a denial of a renewal of registration, the Administrator shall inform the debt management services provider in writing of the reason(s) for the denial.

H. The Administrator may refuse an initial or renewal application if:

(1) The application contains errors or incomplete information. An application is incomplete if it does not include all of the information required by this Section and Section 3577.15 of this Part.

(2) The applicant or any principals of the applicant has ever been convicted of a crime or found civilly liable for an offense involving moral turpitude, including forgery, embezzlement, obtaining money under false pretenses, larceny, extortion, conspiracy to defraud, or any other similar offense or violation.

(3) The applicant's, or any principals of the applicant's, registration has previously been revoked or suspended in this state or any other state, unless the applicant provides information that the Administrator finds sufficient to show that the grounds for the previous revocation or suspension no longer exist and any problems cited in the previous revocation have been corrected.

(4) The Administrator concludes that the applicant's business will not be operated lawfully and fairly and within the provisions and purposes of this Part.

I. Upon written request, the applicant is entitled to a hearing, pursuant to the Administrative Procedure Act, on the question of the applicant's qualifications for initial or renewal registration if the Administrator has notified the applicant in writing that the initial or renewal application has been denied. A request for a hearing may not be made more than sixty days after the Administrator has mailed a notice to the applicant stating that the application has been denied and stating the reasons for the denial of the application.

J. In addition to the power to refuse an initial or renewal application as specified in this Section, the Administrator may suspend or revoke a debt management

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services provider's registration if the Administrator finds that any of the following conditions are met:

(1) A fact or condition exists that if it had existed when the provider applied for registration, would have been grounds for denying registration.

(2) A fact or condition exists that the Administrator was not aware of when the provider applied for registration and would have been grounds for denying registration.

(3) The provider violates a provision of this Part or rule or order of the Administrator pursuant to this Part.

(4) The provider is insolvent.

(5) The provider refuses to permit the Administrator to make an examination authorized by this Part.

(6) The provider fails to respond within a reasonable time and in an appropriate manner to communications from the Administrator.

(7) The provider has defaulted in making payments to creditors on behalf of consumers as required by agreements between the provider and consumers.

(8) The Administrator determines that the provider's trust account does not have an actual cash balance equal to or greater than the sum of the escrow balances of each consumer's account.

(9) The Administrator concludes that the applicant's business will not be operated lawfully and fairly and within the provisions and purposes of this Part.

K. Within ten days of a decision to revoke or suspend registration, the Administrator shall inform the debt management services provider in writing of the reason(s) for the decision. Upon written request, the applicant is entitled to a hearing, pursuant to the Administrative Procedure Act, to challenge the Administrator's decision.

L. If the Administrator finds that the public health, safety or welfare requires emergency action, summary suspension may be ordered effective on the date specified in the order. A hearing shall occur promptly thereafter.

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M. The Administrator shall maintain a list of registered agencies, which is to be made available to interested persons and to the public.

§3577.15. Record Keeping

R.S. 9:3577.15 is all proposed new law.

A. Each debt management services provider shall keep and use books, accounts, and records that will enable the Administrator to determine if the provider is complying with the provisions of the Act and maintain any other records as required by the Administrator. The Administrator is authorized to examine such records at any reasonable time. All such records must be kept for six years following the last service on a consumer's debt management plan.

B. Each debt management services provider shall file a report with the Administrator each time that the provider files an application to renew registration. Such reports shall at a minimum disclose in detail and under appropriate headings:

(1) The resources, assets, and liabilities of such provider at the beginning and end of the period.

(2) The total number of debt management plans the provider has initiated during that year.

(3) The total number of consumers who initiated debt management services and began making payments pursuant to debt management services agreements in each of the immediately preceding three calendar years and the total number of consumers who have stopped making payments pursuant to these agreements.

(4) Records of total and average fees charged to consumers, including all voluntary contributions received from consumers.

C. Such reports shall be verified by the oath or affirmation of the owner, manager, or president of the provider.

D. Each provider shall file a blank copy of the agreement described in Section 3577.19 of this Part, and blank copies of the written information required in Section 3577.18(A) of this Part, with the Administrator prior to the date of commencement of business at each location, at the time any changes are made to the documents and

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annually thereafter upon renewal of registration.

E. The Administrator shall compile annual reports from the information provided under this Section and provide a copy to the Governor and the Legislature. Annual reports shall be made available to interested parties and to the general public.

§3577.16. Bond

R.S. 9:3577.16 is all proposed new law.

A. Every debt management services provider shall file a surety bond in a form approved by the Administrator at the time the agency files an initial or renewal registration application with the Administrator.

B. The bond shall run concurrently with the period of registration.

C. Such bond must be available to pay damages and penalties to consumers harmed by any violation of this Part.

D. The bond shall run to the Administrator and be:

(1) In an amount equal to the average size of the debt management service provider's trust account over the six month period preceding the issuance of the bond, but not less than $25,000 and not more than $1,000,000.

(2) Issued by a bonding, surety, or insurance company that is authorized to do business in the state.

(3) Conditioned so that the provider and its agents shall comply with all state and federal laws and regulations governing the business of debt management services.

E. The Administrator may adjust the amount of the debt management service provider's bond only at such time as the provider applies for renewal of registration and requests a review of the bond amount. The Administrator may reduce the amount of the surety bond only if the average size of the debt management service provider's trust account, as provided in this Section has decreased and only in proportion to such decrease.

§3577.17. Advertising

R.S. 9:3577.17 is all proposed new law.

A. Providers shall not engage in false or deceptive advertising.

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B. All advertisements and other information made available to the public about the debt management services provider must include a clear and conspicuous statement that:

(1) Debt management plans are not suitable for all consumers and consumers may request information about other ways, including bankruptcy, to deal with indebtedness.

(2) Unless the following statement is not true, that the debt management plans offered by the provider do not include secured debt, including a brief description of the most common types of secured debt such as mortgages and car loans.

(3) If the provider is a non-profit or tax-exempt organization under federal or state law, a statement that it cannot require donations or contributions.

§3577.18. Required acts

R.S. 9:3577.18 is all proposed new law.

A. No person shall provide debt management services for a consumer unless the person through the services of a counselor certified by an independent accreditation organization:

(a) Has provided the consumer individualized counseling and educational information that at a minimum addresses the following topics: managing household finances, managing credit and debt, budgeting and personal savings strategies.

(b) Has prepared in writing and provided to the consumer in a form that he or she may keep, an individualized financial analysis and an initial debt management plan for the consumer's debts with specific recommendations regarding actions the consumer should take.

(c) Evaluated the consumer to determine his or her suitability for the services.

(d) Ensured that the services are suitable for the consumer.

(e) Determined that the consumer has a reasonable ability to make payments under the proposed debt management plan.

(f) Has a substantial expectation that each creditor of the consumer listed as a participating creditor in the plan will accept payment of the consumer's debts as

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provided in the initial plan.

(g) For all creditors identified by the consumer or identified through additional investigation by the provider, has prepared a written list provided to the consumer in a form the consumer may keep of the creditors that the provider reasonably expects to participate in the plan and the creditors, including secured creditors, that the provider reasonably expects not to participate.

(h) Has provided a written document to the consumer in a form the consumer may keep that clearly and conspicuously contains the following statements and nothing else:

(i) That debt management services are not suitable for all consumers and that consumers may request information about other ways, including bankruptcy, to deal with indebtedness.

(ii) Unless the following statement is not true, that the debt management services offered by the provider do not include secured debt, including a brief description of the most common types of secured debt such as mortgages and car loans.

(iii) If the provider is a non-profit or tax-exempt organization under federal or state law, a statement that it cannot require donations or contributions.

(iv) That most of the provider's funding comes from contributions from creditors who participate in debt management plans. A provider, at its discretion, may substitute "Most" with the actual percentage of creditor contributions it received during the most recent reporting period.

(v) The total number of consumers who initiated debt management services and began making payments pursuant to debt management agreements in each of the immediately preceding three calendar years and the total number of consumers who have stopped making payments pursuant to these agreements.

B. If the provider discusses its services with a consumer primarily in a language other than English, the provider must provide the information required by this Section in that language.

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C. Each provider must cancel a debt management services agreement upon consumer request at any time for any reason. A consumer must give at least ten days notice to the provider of a request to cancel. A consumer who cancels a debt management services agreement is entitled to a refund of all unexpended funds that the consumer has paid to the provider.

D. A provider may provide the information required by this Section via its Internet web site if:

(1) It has complied with the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. §7001 et seq.).

(2) The information appears, without any other information besides the identity of the provider, on a separate screen or screens that the consumer must see before proceeding to assent to formation of a debt management services agreement.

(3) It informs the consumer that, upon electronic, telephonic, or written request the provider will send the consumer a paper copy or copies.

(4) The provider discloses the following on the home page of its Internet web site: its name and all names under which it does business, principal business address, telephone number and the names of its principal officers.

E. A debt management service provider, including a provider that does business only or principally via the Internet, must maintain a telephone system, staffed at a level that reasonably permits a consumer to access a counselor during ordinary business hours.

F. A provider shall provide each consumer for whom it provides debt management services a written accounting of:

(1) The amount of funds received from the consumer since the last report.

(2) The amounts and dates of disbursement made on the consumer's behalf to each creditor listed in the agreement since the last report.

(3) Any amount deducted from amounts received from the consumer.

(4) Any amount held in reserve.

G. The debt management services provider shall provide the accounting

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described in Subsection (F) of this Section:

(1) At least once each calendar quarter.

(2) Upon rescission or termination of the agreement.

(3) Within five business days after a request by a consumer.

§3577.19. Written debt management services agreement

R.S. 9:3577.19 is all proposed new law.

A. A debt management services provider shall not prepare a debt management services agreement until the provider has fully complied with the requirements of Section 3577.18 of this Part.

B. Every debt management services agreement shall:

(1) Be dated and signed by the debt management services provider and the consumer.

(2) Include the name and address of the consumer and the name, address, and telephone number of the provider.

(3) Describe the full services to be provided.

(4) State all fees, individually itemized, to be paid by the consumer, as well as any fees, payments or funding received by the provider from any creditors or financial institutions.

(5) Identify the name and address of the financial institution in which funds of the consumer will be held pending disbursement to the consumer's creditors.

(6) List each participating creditor of the consumer to which payments will be made, the amount owed to each creditor, the significant concessions that the debt management services provider actually and reasonably expects each creditor to offer, including offers to reduce interest rates, waive interest payments, reduce fees charged, or re-age accounts, the schedule of payments the consumer will be required to make to the creditor, including the amount and date on which each payment will be due and the date of the estimated last payment, and the schedule of payments the provider will make to each creditor.

(7) Based on the list of creditors given to the provider by the consumer and

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any additional investigation by the provider, a list of each of the consumer's creditors, including each secured creditor that is not participating in the debt management services agreement.

(8) State the existence of a surety bond for consumer claims.

(9) State that establishment of a debt management plan may adversely impact the consumer's credit rating and credit scores.

(10) In a prominent location in the document, state in conspicuous print size that either party may cancel the agreement without penalty at any time upon ten days notice and that a consumer who cancels an agreement is entitled to a refund of all unexpended funds that the consumer has paid to the debt management services provider.

(11) Specify that the provider shall notify the consumer within fifteen days of learning of a creditor's decision to withdraw from a plan, but provided it is feasible, no later than five business days before the consumer's next scheduled payment under the plan. This notice shall include:

(a) The identity of the creditor withdrawing from the plan.

(b) The right of the consumer to modify or cancel the agreement.

(12) Provide contact information for the Administrator and a statement that the consumer may contact the Administrator if the consumer has complaints about the debt management services provider.

C. The provider may not begin performance of services until the provider and consumer sign the written agreement and the consumer is given a written copy.

D. A debt management services provider may deliver the debt management services agreement via the Internet provided that the provider:

(1) Has complied with the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. §7001 et seq.).

(2) The information appears, without any other information besides the identity of the provider, on a separate screen or screens that the consumer must see before proceeding to assent to formation of a debt management plan.

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(3) The provider sends the consumer a paper copy within seven calendar days.

(4) The provider discloses on the home page of its Internet web site: its name and all names under which it does business, principal business address and telephone number and the names of its principal officers.

E. If the provider discusses its services or negotiates with a consumer primarily in a language other than English, the provider may not begin performance of services until the provider and consumer sign a copy of the written agreement, provided by the debt management services provider, in that language and the consumer is given a written copy.

§3577.20. Permitted Fees

R.S. 9:3577.20 is all proposed new law.

A. With respect to the provision of debt management services, a provider may not impose any fees or other charges on a consumer, or receive any payment from a consumer or other person on behalf of a consumer except as is allowed under this Section.

B. The fees or charges referred to in this section include both voluntary contributions and any other fees charged to or collected from a consumer or on behalf of the consumer.

C. A provider may not charge an up-front, initial, set-up, or consultation fee that exceeds fifty dollars. The fee or a portion of the fee may not be charged until the provider has fully complied with Sections 3577.18 and 3577.19 of this Part. The Administrator may adjust this amount on no more than an annual basis by an amount equivalent to any annual increase in the Consumer Price Index, published by the United States Department of Labor, and only after public hearings.

D. A provider may charge a monthly maintenance fee only if the fee is fair and reasonable. In the absence of exceptional circumstances to the contrary, a provider shall assume that a total monthly fee of no more than thirty five dollars is fair and reasonable. The Administrator may adjust this amount on no more than an annual basis by an amount equivalent to any increase in the Consumer Price Index, as

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determined by the United States Department of Labor, and only after public hearings.

E. A debt management services provider may not, as a condition of entering into a debt management services agreement, require a consumer to purchase for a fee a counseling session, an educational program or materials and supplies.

F. Fees charged for services other than debt management services must be fair and reasonable. The Administrator may set out a schedule of approved fee limits for various services.

G. If a debt management services provider imposes any fee or other charge or receives any funds or other payments not authorized by this section, except as a result of an accidental and bona fide error, then the debt management services agreement shall be void and the debt management services provider shall return to the consumer all fees received from or on behalf of the consumer.

§3577.21. Trust Accounts

R.S. 9:3577.21 is all proposed new law.

A. Within two business days of receipt, a provider shall deposit in a trust account established for the benefit of consumers all funds paid by or on behalf of a consumer for disbursement to the consumer's creditors.

B. Any trust account established pursuant to this Section is not available to creditors of the debt management services provider.

C. The provider shall:

(1) Maintain separate records of account for each consumer to whom the provider is providing services.

(2) Disburse any funds paid by or on behalf of a consumer to creditors of the consumer within seven days after receipt of the funds or earlier if necessary to comply with the due date in the contract between the consumer and the creditor.

(3) Promptly correct any payments that are not made or that are misdirected as a result of an error by the provider and reimburse the consumer for any costs or fees imposed by a creditor as a result of such misdirection and inform the consumer in writing that the error(s) was the fault of the provider.

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D. A provider shall not commingle the funds in any trust account established for the benefit of consumers with any operating funds of the provider.

E. The provider shall reconcile the trust account not less than once a month. The reconciliation shall ascertain the actual cash balance in the account and compare it with the sum of the escrow balances in each consumer's account. If the provider has more than one trust account, each account shall be individually scheduled and reconciled.

F. Each trust account shall at all times have an actual cash balance equal to or greater than the sum of the escrow balances of each consumer's account, and failure to maintain that amount is cause for a summary suspension of registration under Section 3577.14 of this Part.

G. If a trust account fails to contain sufficient funds to cover the aggregate consumer balances, the provider shall immediately upon discovery notify the Administrator by telephone, facsimile, electronic mail, or other method approved by the Administrator. The provider shall also provide written notice including a description of the remedial action taken.

§3577.22. Prohibited Practices

R.S. 9:3577.22 is all proposed new law.

A. Debt management services providers shall not:

(1) Purchase any debt or obligation of a consumer.

(2) Receive or charge any fee in the form of a promissory note or other negotiable instruments other than a check or a draft.

(3) Lend money or provide credit to the consumer.

(4) Obtain a mortgage or other security interest in property owned by a consumer.

(5) Structure a debt management agreement that would result in negative amortization of any debt in the plan.

(6) Structure a debt management agreement that provides for payments by the consumer that last longer than sixty months.

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(7) Offer, pay, or give any gift, bonus, premium, reward or other compensation to a person for referring a prospective consumer.

(8) Offer, pay or give any gift, bonus, premium, reward or other compensation to a person for entering into debt management services.

(9) Represent that it is authorized or competent to furnish legal advice or perform legal services unless supervised by an attorney as required by state Bar rules.

(10) Compensate its employees on the basis of a formula that incorporates the number of consumers the employee induces to sign a debt management services agreement.

(11) Disclose the identity or the identifying information of the consumer or the identity of the consumer's creditors, except to the Administrator upon request or a creditor of the consumer, and then only to the extent necessary to secure the cooperation of the creditor in the plan.

(12) Use any unconscionable means to obtain a contract with any consumer.

(13) Engage in any unfair, deceptive or unconscionable act or practice in connection with any service provided to any consumer.

(14) Require or attempt to require payment of a sum that the provider states, discloses, or advertises to be a voluntary contribution from the consumer.

(15) Directly or indirectly, collect any fee for referring, advising, procuring, arranging, or assisting a consumer in obtaining any extension of credit or other consumer service from a lender or service provider.

B. A provider shall have no claim for breach of contract against a consumer who cancels an agreement pursuant to this Act.

C. A provider shall have no claim in restitution with respect to an agreement that is void under this Section.

D. A provider shall not include any of the following in any disclosures related to debt management services or in any debt management services agreement:

(1) A hold harmless clause.

(2) A confession of judgment clause.

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(3) A waiver of the right to a jury trial, if applicable, in any action brought by or against a consumer.

(4) Any assignment of or order for payment of wages or other compensation for services.

(5) A provision in which the consumer agrees not to assert any claim or defense arising out of the contract.

(6) A waiver of any provision of the Act.

E. A consumer arbitration provision in a debt management services agreement is void and unenforceable except to the extent federal law provides for its enforceability.

§3577.23. Fiduciary Duty

R.S. 9:3577.23 is all proposed new law.

A debt management services provider has a fiduciary duty to any consumer who receives debt management services from the provider.

§3577.24. Enforcement Powers of the Administrator

R.S. 9:3577.24 is all proposed new law.

A. The Administrator may promulgate regulations to carry out the provisions of this Act.

B. In addition to the powers specified in Section 3577.14 of this Part, the Administrator may:

(1) Investigate the activities of persons subject to this Part to determine compliance with it, including examination of the books, accounts, and records of any debt management services provider.

(2) Require or permit a person to file a statement under oath and otherwise subject to the penalties of perjury, as to all the facts and circumstances of the matter to be investigated.

C. Failure to comply with this Section shall be the basis for issuance of a cease and desist order.

D. The Administrator may receive and act on complaints, take action to

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obtain voluntary compliance with this Act, and refer cases to the District Attorney for prosecution.

E. The Administrator may enforce the provisions of this Part and rules adopted pursuant to this Part by:

(1) Ordering the violator to cease and desist from the violation and any similar violations.

(2) Ordering the violator to take affirmative action to correct the violation, including the restitution of money or property to any person aggrieved by the violation.

(3) Imposing a civil penalty not to exceed one thousand dollars per violation.

(4) Rejecting initial or renewal applications and revoking or suspending registration as provided in Section 3578.14 of this Part.

F. In determining the amount of a civil penalty to be imposed under this Section, the Administrator shall consider the seriousness of the violation, the good faith of the violator, the violator's history of previous violations, the deleterious effect of the violation on the public, the assets of the violator, and any other factors the Administrator deems relevant.

§3577.25. Remedies

R.S. 9:3577.25 is all proposed new law.

A. An agreement between a consumer and a person that is not properly registered under this Act shall be null and void.

B. All fees paid by a consumer under a void agreement shall be recoverable, together with costs and reasonable attorney's fees.

C. In addition to any other remedies provided in this Part, a consumer who is aggrieved by a violation of this Part, a rule promulgated by the Administrator under this Part, or by any unfair, unconscionable, or deceptive act of practice may recover:

(1) Actual damages, but not less than $1,000.

(2) The costs of the action, including reasonable attorney's fees based on the amount of time involved.

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D. An aggrieved consumer may sue for injunctive and other appropriate equitable relief to stop any person from violating any provision of this Act.

E. The remedies provided in this Section are not intended to be the exclusive remedies available to a consumer nor must the consumer exhaust any administrative remedies provided under this Act or any other applicable law.

§3577.26. Prescription

R.S. 9:3577.26 is all proposed new law.

An action brought pursuant to this Act shall be commenced within four years from the latest of:

(1) The consumer's last transmission of funds to the provider.

(2) The provider's last disbursement to the consumer's creditors.

(3) The provider's last accounting to the consumer.

(4) The date on which the consumer reasonably discovered or reasonably should have discovered the facts giving rise to the consumer's claim.

Section 2. This Act shall become effective on January 1, 2005.

The original instrument and the following digest, which constitutes no part of the legislative instrument, were prepared by Alan Miller.

DIGEST

Proposed law provides for the "Consumer Debt Management Services Act".

Proposed law provides that the attorney general serves as the Administrator of the program.

Proposed law applies to debt service management providers regardless of whether they charge fees or receive other consideration.

Proposed law provides for the following:

(1) Registration of providers

(2) Requires certain record keeping procedures

(3) Sets a bond equal to the average size of the provider's trust account

(4) Regulates the type of advertising providers may perform

(5) Requires certain disclosure, requires written debt management services agreements, describes what fees are permitted

(6) Requires the provider to establish a trust account, establishes certain prohibited

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practices, describes the fiduciary duty the provider has to the consumer

(7) Grants enforcement power to the Attorney General

Proposed law provides for private remedies and prescription.

Effective January 1, 2005.

(Adds R.S. 9:3577.11-3577.26)

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