

SPONSOR: Rep. Keeley

HOUSE OF REPRESENTATIVES

142nd GENERAL ASSEMBLY

HOUSE BILL NO. 461

AN ACT TO AMEND TITLES 5 AND 6 OF THE DELAWARE CODE RELATING TO REGULATION OF CREDIT COUNSELING AND DEBT MANAGEMENT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend Title 6, Chapter 24 of the Delaware Code by eliminating the title of that Chapter and substituting in lieu thereof the following:

"CHAPTER 24. CREDIT SERVICES AND DEBT MANAGEMENT ORGANIZATIONS"

Section 2. Amend Title 6, Chapter 24 of the Delaware Code by redesignating the existing statutory content as "Subchapter I. Credit Services Organizations" and creating a new subchapter to read as follows:

"Subchapter II. Debt Management Organizations

§2425. Purpose and Findings of the General Assembly

The General Assembly of the State of Delaware finds that there has been a rapid increase in the number and variety of debt management services available to consumers in this State. While many providers of such services are doing so in a way that benefits consumers, creditors and the providers in a mutually acceptable manner, the instances of abuse in this expanding industry have created an unbalanced situation, necessitating the imposition of regulation of this industry for the purpose of protecting the consumers of these services.

§2426. Definitions

In this subchapter:

(1) "Consultation fee" means a fee paid by a consumer to a debt management services provider in connection with the processing of any application that the consumer makes for debt management services.

(2) "Consumer" means an individual who:

(a) resides in this State; and

(b) is seeking debt management services or has entered into a debt management services agreement.

(3) "Conducting business" means providing, or offering or advertising to provide, debt management services to consumers.

(4) "Consumer education program" means a program or plan that seeks to improve the financial literacy of consumers.

(5) "Debt management counselor" means a permanent, temporary, or contractual employee of a debt management services provider or an independent contractor associated with a debt management services provider who provides counseling to consumers on behalf of the debt management services provider.

(6) "Debt management services" means receiving funds periodically from a consumer under and agreement with the consumer for the purpose of distributing the funds among the consumer's creditors in full or partial payment of the consumer's debts with those creditors.

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

(8) "Debt management services provider" means an individual, organization or entity that provides or offers to provide debt management services.

(9) "Fund" means the Debt Management Services Fund established under §2432 of this subchapter.

(10) "Maintenance fee" means a fee paid by a consumer to a debt management services provider for the maintenance or servicing of the consumer's accounts with the consumer's creditors.

(11) "Organization" means any group, individual, entity or organization that is exempt from taxation under §502(c) of the Internal Revenue Code.

(12) "Registrant" means an organization registered with the State of Delaware pursuant to this subchapter to provide or offer to provide debt management services to consumers within this state.

(13) "Resident agent" means an individual or entity acting as registered agent for service for a business entity pursuant to the Delaware Code.

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

(a) established in a federally insured financial institution;

(b) separate from the debt management services provider's operating accounts;

(c) designated as a "trust account" or other appropriate designation indicating that the funds contained therein are being held in a fiduciary capacity and are not the funds of the registrant, its officer, employees or agents;

(d) unavailable to the creditors of the debt management services provider; and

(e) used to hold funds paid to the debt management services provider by consumers for the purpose of disbursement to creditors of the consumer in accordance with the consumer's debt management services agreement.

§2427. Applicability

This subchapter shall not apply to:

(1) The following persons or entities in the regular course of their respective businesses and professions:

(a) An attorney at law;

(b) An escrow agent;

(c) A certified public accountant;

(d) A banking institution, out-of-state bank, national banking association, credit union, or savings and loan association.

(e) A title insurer, title insurance agency, or abstract company;

(f) A judicial officer or other person acting under color of court order.

(2) A person or entity performing services incidental to the dissolution, winding up or liquidation of a partnership, corporation or other business entity;

(3) A licensed lender, as defined under the Chapter 22 of Title 5 of the Delaware Code, engaged in adjusting a debt of a consumer held by that lender.

§2428. Registration of Debt Management Services Providers.

(a) Notwithstanding any other registration requirements of doing business in the State of Delaware, any person, entity or organization, not otherwise exempted from the applicability of this subchapter by §2427, shall file a registration statement with the State Bank Commissioner prior to conducting business within this State. The registration statement must contain:

(1) The name and address of the debt management services provider;

(2) The name and address of any person who directly or indirectly owns or controls 10 percent or more of the debt management services provider.

(3) A full and complete disclosure of any unresolved litigation or complaint filed with or by a court or governmental authority of this or any other State, or the federal government, related to the operation of the debt management services provider.

(4) A statement that any litigation or complaint filed with or by any court or governmental agency in this State has been resolved, with full disclosure of how that matter was resolved.

(5) The name and address of the debt management service provider's registered agent in this state authorized to receive service of process.

(6) A statement that none of the owners, officers directors and principals of the debt management services provider have never been convicted of a crime involving fraud, deceit, abuse of fiduciary capacity or theft.

(7) Proof that the registrant has posted the bond or other security required under §2431 of this subchapter.

(b) The debt management services provider shall update the statement not later than the 60th day after the date on which a change in the information required in the statement occurs.

(c) Each debt management services provider shall maintain a copy of the registration statement and any updates thereof in the files of the debt management services provider.

(d) Any person requesting a copy of the registration statement shall receive from the debt management services provider, within five business days of the request, a copy of the statement and all updates.

(e) The registration statement must be renewed every year, notwithstanding any updates made by the debt management services provider.

(f) The registration statement shall accompanied by a notarized affidavit, signed by each of any persons named as owners of more then 10 percent of the debt management services provider, attesting that all information contained in the registration statement is true and correct.

(g) Discovery that any information contained in the registration statement is not correct shall subject the debt management services provider and any signatories to the penalties of this subchapter, cumulative of any other violation of Delaware Law constituted by such an action.

§2429. Registration Fees

(a) The State Bank Commissioner shall, by regulation, establish:

(1) A fee, not exceeding $2,000 for the receipt of a registration statement from a debt management services provider;

(2) A fee, not exceeding $1,000 for the receipt of registration renewal of a debt management services provider;

(3) A fee, not exceeding $100 for each location in the State at which a registrant provides debt management services. For purposes of such a regulation, the advertising of a telephone number or the establishment of a web site accessible to Delaware consumers shall each constitute a "location" within the State.

(4) A fee, not exceeding $500 for the receipt of a statement of withdraw.

(5) A fee covering the costs of any investigation of a debt management services provider instituted under the provisions of §2438 of this subchapter.

§2430. Statement of Withdraw.

(a) In the event that a debt management services provider elects to cease conducting business in this State, the debt management services provider shall file with the State Bank Commissioner a statement of withdraw, providing:

(1) the effective date of the withdraw, not to be less than thirty days from the date of the filing of the statement of withdraw;

(2) a notarized statement that any litigation or complaint filed with or by any court or governmental agency in this state has been resolved, with full disclosure of the outcome.

(b) A debt management services provider may not withdraw its registration during the pendancy of any unresolved litigation or complaint within this State. However, a debt management services provider may cease conducting business in this State pending resolution of any such matters.

§2431. Bond Requirement.

(a) Prior to conducting business in the State, or - in the case of a debt management services provider already conducting business in this State upon enactment of this subchapter – within 30 days of enactment of this subchapter, a debt management services provider shall obtain a surety bond in the amount of $500,000.

(b) Proof of the bond shall be filed with any registration statement or renewal of a registration statement.

(c) The bond shall be issued by a bonding, surety or insurance company authorized to do business in this State, and shall run to the benefit of the State for the further benefit of any consumer who is injured by a violation of this subchapter or any regulations adopted for the implementation of this subchapter.

(d) Upon application to the Commissioner, the bond amount may be reduced or the bond waived if the volume of debt management services provided by the applicant does not warrant the need for a surety bond of that value.

(e) The liability of the surety:

(1) shall not be affected by the insolvency or bankruptcy of the registrant or its agents, or by any misrepresentation, breach of warranty, failure to pay a premium, or other act or omission of the registrant or its agents;

(2) shall continue as to all transactions of the registrant or its agents on behalf of the registrant for the period of the civil statute of limitations provided for in §2441 of this subchapter;

(3) shall not include any award of punitive damages; and

(4) shall not exceed, in the aggregate of all injured consumers, the amount of the bond.

§ 2432. Debt Management Services Fund.

(a) There is established a Debt Management Services Fund that consists of:

(1) All revenue received for the registration of organizations that provide debt management services under this subchapter;

(2) Income from investments that the State Treasurer makes for the Fund; and

(3) Any other fee or revenue received by the Commissioner under this subtitle.

(b) The purpose of the Fund is to defray the costs and expenses incurred by the Commissioner that are related to the regulation of the debt management services business under this subtitle, including:

(1) Expenditures authorized under this subtitle; and

(2) Any other expense authorized in the State budget.

(c) The State Treasurer is the Custodian of the Fund, who shall deposit payments received from the Commissioner in to the Fund, and make all necessary investments of the fund to effect its purpose.

(d) The Fund is a continuing, non-lapsing fund and may not be deemed a part of the General Fund of the State. Unless otherwise provided by law, no part of the Fund may revert or be credited to the General Fund of the State; any other special fund of the State.

(e) All costs and expenses of the Commissioner relating to the regulation of the debt management services providers under this subtitle shall be included in the State budget.

(f) If, in any fiscal year, the amount of the revenue collected by the Commissioner and deposited into the Fund exceeds the actual appropriation for the Commissioner to regulate the debt management services under this subtitle, the excess amount shall be carried forward within the Fund.

(g) If, in any fiscal year, the amount of revenue collected by the Commissioner fails to meet, or is projected to fail to meet, the fiscal necessities of carrying out the requirements of this subchapter, the Commissioner may request an

appropriation from the General Fund to meet those expenses. The other identifiable funding sources of the State Bank Commissioner's office shall not be applied to the expenses of carrying out the requirements of this subchapter.

§2433. Requirements for Providing Debt Management Services.

(a) A registrant may not perform debt management services for a consumer unless:

(1) The registrant provides the consumer with a consumer education program.

(2) The registrant, through a debt management counselor, certified by an independent organization, has:

A. Prepared a financial analysis of and an initial budget plan for the consumer's debt obligations;

B. Provided a copy of the financial analysis and the initial budget plan to the consumer; and

C. Provided to the consumer, for all creditors identified by the consumer, a list of:

(i.) The creditors that the registrant reasonably expects to participate in the management of the consumer's debt under the debt management services agreement; and

(ii.) The creditors that the registrant reasonably expects not to participate in the management of the consumer's debt under the debt management services agreement;

(3) The registrant and the consumer have executed a debt management services agreement that describes the debt management services to be provided by the registrant to the consumer;

(4) The registrant has a reasonable expectation based on the registrant's past experience that each creditor of the consumer that is listed as a participating creditor in the consumer's debit management services agreement will accept payment of the consumer's debts owed to the creditor as provided in the consumer's debt management services agreement; and

(5) A copy of the completed debt management services agreement has been provided to the consumer.

(b) A registrant may provide to a consumer the materials required under paragraph (a)(2) of this subsection using the Internet if:

1. A debt management counselor of the registrant has reviewed and approved the computer program or application used to create the financial analysis and initial budget plan; and

2. The consumer is advised of the availability of counseling; and afforded the opportunity for counseling and for discussion of the financial analysis and initial budget plan with a debt management counselor at any time.

(c) Each debt management services agreement shall:

(1) Be signed and dated by the registrant and the consumer; and

(2) Include, in at least 12 point type:

(A) The name, address, and phone number of the consumer;

(B) The name, address, and phone number and license number of the registrant;

(C) A description of the debt management services to be provided to the consumer and any fees to be charges to the consumer for the debt management services;

(D)A disclosure pf the existence of the surety bond required under this subchapter;

(E) The name and address of the financial institution in which funds, paid by the consumer to the registrant for disbursement to the consumer's creditor's will be held;

(F) A notice of the right of a party to the debt management services agreement to rescind the debt management services agreement by given written notice of rescission to the other party;

(G) A schedule of payments that the consumer must make to the debt management services provider including:

(i.) The amount of each payment and the date on which each payment is due; and

(ii.) An itemization of the maintenance fees that will be retained by the debt management services provider, and the amount of money that will be paid to the consumer's creditors, from each payment the consumer makes to the debt management services provider;

(H) A list of:

(i.) Each participating creditor of the consumer to which payments will be made under the debt management services agreement;

(ii.) The amount owed to each creditor; and

(iii.) A schedule of payments that the debt management services provider will make to each participating creditor from the consumer's payments, including the amount of each payment and the date on which each payment will be made; and

(iv.) Each creditor that the registrant reasonably expects not to participate in the management of that consumer's debt under the debt management services agreement;

(I) A disclosure that the registrant also may receive compensation from the consumer's creditors for providing debt management services to the consumer;

(J) A disclosure that the registrant may not, as a condition of entering into a debt management services agreement, require a consumer to purchase for a fee a counseling sessions, an educational program, or materials and supplies;

(K) A disclosure that the registrant may not require a voluntary contribution from a consumer for any service provided by the registrant to the consumer;

(L) A disclosure that, by executing the debt management services agreement, the consumer authorizes any financial institution in which the registrant has established a trust account for deposit of the consumer's funds to disclose to the Commissioner any financial records relating to the trust account during the course of any investigation or examination of the registrant by the Commissioner;

(M) A disclosure that execution of a debt management services agreement may impact the consumer's credit rating and credit scores; and

(N) The following notice:

'(Name of debt management services provider) is registered to provide debt management services in the State of Delaware. While this registration carries with it some regulation by the State of Delaware, it does not mean the State of Delaware has fully reviewed or approved all of the activities of (name of debt management services provider). If you have questions about any of the information you have been given by (name of debt management services provider), before you sign anything, you should seek appropriate legal counsel to determine if this transaction complies with Chapter 24 of Title 6 of the Delaware Code.'

(d) A debt management services agreement between a consumer and a person that is not a registrant under this subtitle shall be null and void, and all fees paid to the person under the debt management services agreement shall be recoverable by the consumer, together with reasonable attorney's fees.

§2434. Trust account.

(a) Within 2 business days after receipt, a registrant shall deposit, in a trust account established for the benefit of consumers, any funds paid to the registrant by or on behalf of a consumer for disbursement to the consumer's creditors.

(b) A registrant shall:

(1) Maintain separate records of account for each consumer to whom the registrant is providing debt management services;

(2) Disburse any funds paid by or on behalf of a consumer to the consumer's creditors within 8 business days after receipt of the funds; and

(3) In the case of any misdirected payments:

(i) Correct any misdirected payments resulting from an error by the registrant; and

(ii) Reimburse the consumer for any actual fees or other charge imposed by a creditor as a result of the misdirection.

(c) A registrant may not commingle any trust account established for the benefit of consumers with any operating accounts of the registrant.

§2435. Fees for Debt Management Services.

(a) A registrant may not impose any fees or other charges on a consumer, or receive any funds or other payments from a consumer or another person on behalf of a consumer only as allowed under this section.

(b) A registrant may charge a consultation fee not exceeding $50. The cost of a credit report on a consumer shall be paid from the consultation fee paid by the consumer.

(c) A registrant my charge a monthly maintenance fee not exceeding $5 for each creditor of a consumer that is listed in the debt management services agreement between the registrant and the consumer. The total fees charged under this subsection may not exceed $40 per month.

(d) A registrant may collect from or on behalf of a consumer the funds the consumer has agreed to pay the registrant under the debt management services agreement.

(e) A registrant may not charge a fee to:

(1) Prepare a financial analysis or an initial budget plan for the consumer;

(2) Counsel a consumer about debt management;

(3) Provide a consumer with the consumer education program described in the registrant's license application; or

(4) Rescind a debt management services agreement.

(f) A registrant may accept a voluntary contribution from a consumer for a debt management services provided by the registrant if the aggregate amount of the voluntary contribution and any other fees received by the registrant from the consumer debt management services does not exceed the total amount the registrant is authorized to charge the consumer under subsections (b) and (c) of this section.

(g) Before providing debt management services to a consumer, a registrant shall provide the consumer with a list of services and their charges describing:

(1) Those services that the registrant offers:

(A) Free of charge if the consumer enters into a debt management services agreement with the registrant; and

(B) For a charge if the consumer does not enter into a debt management services agreement with the registrant, and;

(2) Those services that the registrant offers for a charge that are not offered as part of debt management services.

(h) A registrant 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.

(i) A registrant may charge a consumer a fee for a counseling session, an educational program, or materials and supplies if the consumer does not enter into a debt management services agreement with the registrant.

(j) In addition to any other right of rescission contained in the debt management services agreement, a consumer may modify or rescind a debt management services agreement if the consumer is notified of a creditor's nonparticipation under this subsection. If a creditor that is listed as participating in the debt management services agreement declines to participate in debt management services under the agreement, the registrant shall notify the consumer by certified mail, or other verifiable means approved by the consumer, at least 5 business days before the consumer's next scheduled payment under the agreement. The notice shall include the identity of the creditor, and the right of the consumer to modify or rescind the agreement. A consumer who rescinds a debt management services agreement under this subsection is entitled to a refund of all unexpended funds that the consumer has paid to the registrant for the reduction of the consumer's debt.

(k) If a payment by a consumer under this section to a registrant is dishonored, the registrant may charge the consumer the amount allowable for dishonored checks or other instruments under Delaware Law, whether or not the consumer has entered into a debt management services agreement with the registrant.

(l) With respect to the provision of debt management services, if a registrant imposes any fee or other charge or receives any funds or other payments not authorized under this section, except as a result of an accidental and bona fide error, the debt management services agreement shall be void, and the registrant shall return the amount of the unauthorized fees, charges, funds, or payments to the consumer.

§2436. Accounting.

(a) A registrant shall provide to each consumer with whom the registrant has a debt management services agreement a written accounting of the amount of funds received from the consumer for payment to the consumer's creditors since the last report, and the amounts and dates of disbursements made to each creditor of the consumer since the last report.

(b) A registrant shall provide the accounting is required under subsections (a) of this section at least once during each calendar quarter; and upon cancellation or termination of the debt management services agreement.

§2437. Prohibited Activities.

(a) A registrant, inclusive of its owners, directors, employees, agents, or independent contractors, may not:

(1) Charge a consumer or receive from a consumer money or other valuable consideration before completing performance of all services the debt management services provider has agreed to perform for the consumer, unless the debt management services provider has obtained a surety bond as required under §2431 of this subchapter;

(2) Purchase any debt or obligation of a consumer;

(3) Lend money or provide credit to a consumer;

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

(5) Operate as a collection agency;

(6) Structure a debt management services agreement in a manner that would result in a negative amortization of any of the consumer's debts;

(7) Make any false, misleading, or deceptive representations or omissions of information in connection with the offer, sale, or performance of any service;

(8) Offer, pay, or give a substantial gift, bonus, premium, reward, or other compensation to a person for referring a prospective customer to the registrant;

(9) Offer an incentive, including a gift, bonus, premium, reward, or other compensation to a consumer for executing a debt management services agreement with the registrant;

(10) Charge for or provide credit insurance; or

(11) Compromise any debts of a consumer unless the registrant has obtained the prior written approval of the consumer, and the compromise benefits the consumer.

(12) Advertise or cause to be advertised, in any manner whatsoever, the services of the debt management services provider without first filing a registration statement with the State Bank Commissioner.

(b) Notwithstanding any other provision of State law, a registrant may not, 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 if the registrant or any owner, officer, director, principal, or employee of the registrant, is an owner, partner, director, officer or employee of the lender or service provider.

(c) The prohibition contained in subsection (b) does not prohibit a registrant from referring, advising, procuring, arranging, or assisting a consumer in obtaining any extension of credit or other consumer service from a lender or service provider of which the registrant or any owner, officer, director, principle, or employee of the registrant, is an owner, partner, director, officer or employee, if the registrant does not directly or indirectly collect any fee; and the consumer is provided with a written disclosure of the relationship.

§2438. Investigation.

(a) To discover any violations of this subtitle or to obtain any information required by this subtitle, the Commissioner or the Attorney General at any time may investigate the business of:

(1) A registrant;

(2) A person that is engaged or participating in the business of providing debt management services; and

(3) Any other person that the Commissioner has cause to believe is violating this subtitle or any regulation adopted under this subtitle, whether that person claims to be within or beyond the scope of this subtitle.

(b) For the purposes of this sections, the Commissioner and the Attorney General:

(1) Shall be given access to the place of business, books, papers, records, safes, and vaults of the person under investigation; and

(2) May summon and examine under oath any person whose testimony the Commissioner or Attorney General requires.

(c) If, after an investigation conducted under this subsection, the Commissioner or Attorney General finds that the person that was investigated violated this subtitle or any regulation adopted under this subtitle, the person shall pay all reasonably incurred costs of the investigation.

(d) If a person failed to comply with a subpoena or summons of the Commissioner or Attorney General under this subtitle or to testify concerning any matter about which the person may be interrogated under this subtitle, the Commissioner or Attorney General may file a petition for enforcement with any court of competent jurisdiction within the State. On petition by the Commissioner or Attorney General, the court may order the person to attend and testify or produce evidence.

(e) In the event that an investigation conducted by the Commissioner produces credible evidence of a violation of this subchapter, the Commissioner shall forward such evidence to the Attorney General, who shall initiate a prosecution the violation.

§2439. Penalty for Violation of Subchapter.

A person who knowingly violates any provision of this subtitle is guilty of a Class G felony and on conviction is subject to a fine not exceeding $1,000 for the first violation and not exceeding $5,000 for each subsequent violation and/or imprisonment not exceeding 5 years.

§2440. Civil Action.

In addition to any other remedies provided in this subtitle, a consumer may bring a civil action to recover for any damages caused by a violation of this subtitle, including court costs and reasonable attorney's fees. Damages may be doubled if the victim is over the age of 65 or suffers from a physical or mental handicap. Punitive damages may be available to any successful plaintiff.

§ 2441. Statute of Limitations.

A private legal action may not be brought under this subchapter the later of 4 years after the date of the execution of the debt management services agreement to which the action relates or 3 years after the violation of the provisions of this subchapter.

§ 2442. Burden of Proving Exemption

In an action under this chapter the burden of proving an exemption under §2427 of this title shall be on the person or entity claiming the exemption."

Section 3. Amend Subchapter II of Chapter 1 of Title 5 of the Delaware Code by creating a new section to read as follows:

"§146. Authority Over Debt Management Services Providers.

(a) The Commissioner shall have authority over debt management services providers as defined under §2426 of Title 6 of this Code.

(b) Under that authority, the Commissioner shall have the responsibility to implement and ensure compliance of Subchapter II of Chapter 24 of Title 6 of the Delaware Code.

(c) The Commissioner may implement any and all such regulations necessary to fulfill this responsibility."

Section 4. A position is created within the office of the State Bank Commissioner for processing of registrants and investigation of any debt management services provider, subject to appropriation of the necessary funding in the budget of the State Bank Commissioner.

Section 5. This act shall be subject to sunset review upon enactment of any federal statutory provision that substantially addresses the purposes of this act. Unless federally preempted by such legislation, this act shall remain in full force and effect until such time as sunset review is completed and any subsequent legislation is enacted.

Section 6. Any provision of this act that is deemed unlawful shall be stricken and the remainder of the act shall remain in full force and effect.

SYNOPSIS

This act provides for the registration of debt management services providers conducting business in the State of Delaware. The providers would not be licensed, but would be required to post a bond prior to providing services in this State. They would be subject to regulation by the State Bank Commissioner to ensure compliance with the established prohibited activities. The State Bank Commissioner or the Attorney General would have the authority to investigate any alleged violation of fair practices by a debt management services provider. Consumers would also have a private right of action against any provider that committed unfair practices.