

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 2233
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Business & Commerce
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In 2005 and 2007, legislation was passed placing nonprofit and for-profit debt management services, including consumer credit counseling services and debt management companies, under the regulatory authority of the Office of Consumer Credit Commissioner (OCCC). Due to federal bankruptcy reform legislation passed in 2005, as well as the current economic downturn, a more uniform approach to the regulation of all providers of debt management services is timely.

This legislation provides consistent guidance and regulation for all providers of debt management services, including those currently regulated, as well as debt settlement companies, which are not currently regulated under state law. It contains comprehensive provisions outlining requirements for registration, bonding, disclosures, and service agreements, and gives OCCC enforcement authority.

C.S.S.B. 2233 amends current law relating to the regulation of debt management services providers and provides a penalty.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Finance Commission of Texas in SECTION 1 (Sections 394.321 and 394.332, Finance Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 394, Finance Code, by adding Subchapter D, as follows:

SUBCHAPTER D. UNIFORM DEBT MANAGEMENT SERVICES ACT

Sec. 394.301. **SHORT TITLE.** Authorizes this subchapter to be cited as the Uniform Debt Management Services Act.

Sec. 394.302. **DEFINITIONS.** Defines "administrator," "affiliate," "agreement," "bank," "business address," "certified counselor," "certified debt specialist," "concessions," "day," "debt management services," "entity," "good faith," "person," "plan," "principal amount of the debt," "provider," "record," "settlement fee," "sign," "state," and "trust account."

Sec. 394.303. **APPLICABILITY.** (a) Provides this subchapter does not apply to an agreement with an individual who the provider has no reason to know resides in this state at the time of the agreement.

(b) Provides that this subchapter does not apply to a provider to the extent that the provider:

(1) provides or agrees to provide debt management, educational, or counseling services to an individual who the provider has no reason to know resides in this state at the time the provider agrees to provide the services; or

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

(c) Provides that this subchapter does not apply to the following persons or their employees when the person or the employee is engaged in the regular course of the person's business or profession:

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

(2) a bank;

(3) an affiliate, as defined in Section 394.302(2)(B)(i), of a bank if the affiliate is regulated by a federal or state banking regulatory authority; or

(4) a title insurer, title insurance agent, escrow company, or other person that provides bill-paying services if the provision of debt management services is incidental to the bill-paying services or a disbursement, closing, or settlement.

Sec. 394.304. REGISTRATION REQUIRED. (a) Prohibits a provider, except as otherwise provided in Subsection (b), from providing debt management services to an individual who it reasonably should know resides in this state at the time it agrees to provide the services, unless the provider is registered under this subchapter.

(b) Provides that if a provider is registered under this subchapter, Subsection (a) does not apply to an employee or agent of the provider.

(c) Requires the administrator (consumer credit commissioner) to maintain and publicize a list of the names of all registered providers.

Sec. 394.305. APPLICATION FOR REGISTRATION: FORM, FEE, AND ACCOMPANYING DOCUMENTS. (a) Requires that an application for registration as a provider be in a form prescribed by the administrator.

(b) Requires that an application for an initial registration, subject to adjustment of dollar amounts pursuant to Section 394.332(f), be accompanied by:

(1) the appropriate fees set by the Finance Commission of Texas (finance commission) in an amount necessary to recover the costs of administering this subchapter;

(2) the bond required by Section 394.313;

(3) identification of all trust accounts required by Section 394.322 and an irrevocable consent authorizing the administrator to review and examine the trust accounts;

(4) evidence of insurance in the amount of \$250,000 against the risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant; issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator; with a deductible not exceeding \$5,000; payable for the benefit of the applicant, this state, and individuals who are residents of this state, as their interests may appear; and not subject to cancellation by the applicant or the insurer until 60 days notice after written notice has been given to the administrator; and

(5) a certificate of authority to do business in this state, if applicable.

Sec. 394.306. APPLICATION FOR REGISTRATION: REQUIRED INFORMATION. (a) Requires that an application for registration be signed under oath and include certain information and documents.

(b) Requires that the applicant's financial statements required by Subsection (a)(7) (relating to the inclusion of an applicant's financial statements in an application for registration), if the applicant claims nonprofit or tax-exempt status, or if the applicant's business practices involve holding, accessing, or directing the funds of an individual, to be audited by an accountant licensed to practice accounting under Chapter 901 (Accountants), Occupations Code.

Sec. 394.307. APPLICATION FOR REGISTRATION: OBLIGATION TO UPDATE INFORMATION. Requires an applicant or registered provider to notify the administrator within 10 days after a change in certain information specified in Section 394.305 or Section 394.306.

Sec. 394.308. APPLICATION FOR REGISTRATION: PUBLIC INFORMATION. Requires the administrator, except for certain information required by Section 394.306 and certain addresses required by Section 394.306, to make the information in an application for registration as a provider available to the public.

Sec. 394.309. CERTIFICATE OF REGISTRATION: ISSUANCE OR DENIAL. (a) Requires the administrator, except as otherwise provided in Subsections (c) and (d), to issue a certificate of registration as a provider to a person that complies with Sections 394.305 and 394.306.

(b) Authorizes the administrator, if an applicant has otherwise complied with Sections 394.305 and 394.306, including a timely effort to obtain the information required by Section 394.306(14) (relating to requiring an application for registration to include the results of a criminal records check), but the information has not been received, to issue a temporary certificate of registration. Requires that the temporary certificate expire not later than 180 days after issuance.

(c) Authorizes the administrator to deny registration under certain circumstances.

(d) Requires the administrator to deny registration with respect to an applicant that claims nonprofit or tax-exempt status if the applicant's board of directors is not independent of the applicant's employees and agents.

(e) Provides that, subject to adjustment of the dollar amount pursuant to Section 394.332(f), a board of directors is not independent for purposes of Subsection (d) if more than one-fourth of its members are affiliates of the applicant, as defined in Section 394.302; or in the 10 years before initially becoming a director of the applicant, were employed by or directors of a person that received from the applicant more than \$25,000 in either the current year or the preceding year.

Sec. 394.310. CERTIFICATE OF REGISTRATION: TIMING. (a) Requires the administrator to approve or deny an initial registration as a provider not later than the 60th day after the date on which the completed application, including all required documents and payments, is filed. Requires the administrator to inform the applicant in writing of the reasons for the denial.

(b) Authorizes the applicant to appeal and request a hearing pursuant to Chapter 2001 (Administrative Procedure), Government Code, if the administrator denies an application for registration as a provider. Authorizes the applicant to appeal and request a hearing on the question of the applicant's qualifications for initial registration as a provider if the administrator has notified the applicant in a record that the initial application has been denied. Prohibits a request for a hearing from being made after the 30th day after the date the administrator mails a notice to the

applicant stating that the application has been denied and stating the reasons for the denial.

(c) Provides that a registration as a provider is valid for one year.

Sec. 394.311. RENEWAL OF REGISTRATION. (a) Requires a provider to obtain a renewal of its registration annually.

(b) Requires that an application for renewal of registration as a provider be in a form prescribed by the administrator, signed under oath, and:

(1) be filed not less than 30 days or more than 60 days before the registration expires;

(2) be accompanied by the fee established by the finance commission and the bond required by Section 394.313;

(3) subject to Subsection (b-1), contain the matters required for initial registration as a provider by Sections 394.306(8) (relating to requiring an application for registration to include evidence of accreditation by an independent accrediting organization) and (9) (relating to requiring an application for registration to include evidence that each of the applicant's counselors became certified) and a financial statement for the applicant's fiscal year immediately preceding the application;

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

(5) supply evidence of insurance in an amount equal to the larger of \$250,000 or the highest daily balance in the trust account required by Section 394.322 during the six-month period immediately preceding the application against risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant; issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator; with a deductible not exceeding \$5,000; payable for the benefit of the applicant, this state, and individuals who are residents of this state, as their interests may appear; and not subject to cancellation by the applicant or the insurer until 60 days after written notice has been given to the administrator;

(6) disclose the total amount of money received by the applicant pursuant to plans during the preceding 12 months from or on behalf of individuals who reside in this state and the total amount of money distributed to creditors of those individuals during that period;

(7) disclose, to the best of the applicant's knowledge, the gross amount of money accumulated during the preceding 12 months pursuant to plans by or on behalf of individuals who reside in this state and with whom the applicant has agreements; and

(8) provide any other information that the administrator reasonably requires to perform the administrator's duties under this section.

(b-1) Requires that the provider's financial statement required by Subsection (b)(3), if the provider claims nonprofit or tax-exempt status, or if a provider's business practices involve holding, accessing, or directing the funds of an individual, be audited by an accountant licensed to practice accounting under Chapter 901, Occupations Code.

(c) Requires the administrator, except for certain information required by Section 394.306(7) (relating to the disclosure of an applicant's financial statements), (14) (relating to the disclosure of the results of an applicant and the applicant's employees' or agents' criminal records check), and (17) (relating to the disclosure of the amount of the compensation of the applicant's five most highly compensated employees for each of the three years immediately preceding the application), the information required by Section 394.306(6) (relating to the disclosure of a statement describing any material civil or criminal judgment or litigation or any material administrative or enforcement action by a governmental agency in any jurisdiction against the applicant) with respect to for-profit entities, and the addresses required by Section 394.306(4) (relating to the disclosure of the name and home address of each officer and director of the applicant and each person that owns at least 10 percent of the applicant), to make the information in an application for renewal of registration as a provider available to the public.

(d) Provides that the registration remains effective until the administrator, in a record, notifies the applicant of a denial and states the reasons for the denial if a registered provider files a timely and complete application for renewal of registration.

(d-1) Authorizes the administrator to issue a temporary renewal of registration if an application is otherwise complete and the applicant has made a timely effort to obtain the information required by Section 394.306(14) but the information has not been received. Requires that the temporary renewal expire not later than 180 days after issuance.

(e) Authorizes an applicant, if the administrator denies an application for renewal of registration as a provider, to, within 30 days after receiving notice of the denial, appeal and request a hearing pursuant to Chapter 2001, Government Code. Requires the applicant, subject to Section 394.334, while the appeal is pending, to continue to provide debt management services to individuals with whom it has agreements. Requires the applicant, if the denial is affirmed, subject to the administrator's order and Section 394.334, to continue to provide debt management services to individuals with whom it has agreements until, with the approval of the administrator, it transfers the agreements to another registered provider or returns to the individuals all unexpended money that is under the applicant's control.

Sec. 394.312. **REGISTRATION IN ANOTHER STATE.** Authorizes a provider, if the provider holds a license or certificate of registration in another state authorizing it to provide debt management services, to submit a copy of that license or certificate and the application for it instead of an application in the form prescribed by Sections 394.305 and 394.306 or by Section 394.311. Requires the administrator to accept the application and the license or certificate from the other state as an application for registration as a provider or for renewal of registration as a provider, as appropriate, in this state under certain circumstances.

Sec. 394.313. **BOND REQUIRED.** (a) Requires a provider that is required to be registered under this subchapter, except as otherwise provided in Section 394.314, to file a surety bond with the administrator, which must be in effect during the period of registration and for two years after the provider ceases providing debt management services to individuals in this state; and run to this state for the benefit of this state and of individuals who reside in this state when they agree to receive debt management services from the provider, as their interests may appear.

(b) Requires that a surety bond, subject to adjustment of the dollar amount pursuant to Section 394.332(f), filed pursuant to Subsection (a), meet certain criteria.

(c) Requires the provider, if the principal amount of a surety bond is reduced by payment of a claim or a judgment, to immediately notify the administrator and,

within 30 days after notice by the administrator, file a new or additional surety bond in an amount set by the administrator. Requires that the amount of the new or additional bond be at least the amount of the bond immediately before payment of the claim or judgment. Requires a provider, if for any reason a surety terminates a bond, to immediately file a new surety bond in the amount of \$50,000 or other amount determined pursuant to Subsection (b).

(d) Authorizes the administrator or an individual to obtain satisfaction out of the surety bond procured pursuant to this section under certain circumstances.

(e) Requires the administrator, if claims against a surety bond exceed or are reasonably expected to exceed the amount of the bond, to distribute the proceeds in a certain manner on the initiative of the administrator or on petition of the surety, unless the proceeds are adequate to pay all costs, judgments, and claims.

Sec. 394.314. BOND REQUIRED; SUBSTITUTE. (a) Authorizes a provider, instead of the bond required by Section 394.313, to deliver to the administrator a substitute provided by this section. Requires that the substitute be in the amount required by Section 394.313(b), and except as otherwise provided in Subdivision (2)(A), payable or available to this state and to individuals who reside in this state when they agree to receive debt management services from the provider, as their interests may appear, if the provider or its agent does not comply with this subchapter. Authorizes a provider, on satisfying the requirements of this subsection, to deliver to the administrator one of the following substitutes:

(1) a certificate of insurance issued by an insurance company authorized to do business in this state and rated at least A or equivalent by a nationally recognized rating organization approved by the administrator; and with no deductible, or if the provider supplies a bond in the amount of \$5,000, a deductible not exceeding \$5,000; or

(2) with the approval of the administrator, (A) an irrevocable letter of credit, issued or confirmed by a bank approved by the administrator, payable on presentation of a certificate by the administrator stating that the provider or its agent has not complied with this subchapter; or (B) bonds or other obligations of the United States or guaranteed by the United States or bonds or other obligations of this state or a political subdivision of this state, to be deposited and maintained with a bank approved by the administrator for this purpose.

(b) Provides that, if a provider furnishes a substitute pursuant to Subsection (a), Sections 394.313(a), (c), (d), and (e) apply to the substitute.

Sec. 394.315. REQUIREMENT OF GOOD FAITH. Requires a provider to act in good faith in all matters under this subchapter.

Sec. 394.316. CUSTOMER SERVICE. Requires a provider that is required to be registered under this chapter to maintain a toll-free communication system, staffed at a level that reasonably permits an individual to speak to a certified counselor, certified debt specialist, or customer service representative, as appropriate, during ordinary business hours.

Sec. 394.317. PREREQUISITES FOR PROVIDING DEBT MANAGEMENT SERVICES. (a) Requires a registered provider, before providing debt management services, to give the individual an itemized list of goods and services and the charges for each. Requires that the list be clear and conspicuous; be in a record the individual may keep whether or not the individual assents to an agreement; and describe the goods and services the provider offers free of additional charge if the individual enters into an agreement, for a charge if the individual does not enter into an agreement, and for a charge if the individual enters into an agreement that uses certain terminology and is in a certain format.

(b) Prohibits a provider from furnishing debt management services unless the provider, through the services of a certified counselor or certified debt specialist:

(1) provides the individual with reasonable education about the management of personal finance;

(2) has prepared a financial analysis; and

(3) if the individual is to make regular periodic payments to a creditor or provider has prepared a plan for the individual; has made a determination, based on the provider's analysis of the information provided by the individual and otherwise available to it, that the plan is suitable for the individual and the individual will be able to meet the payment obligations under the plan; and believes that each creditor of the individual listed as a participating creditor in the plan will accept payment of the individual's debts as provided in the plan.

(c) Requires a provider to perform certain tasks before an individual assents to an agreement to engage in a plan.

(d) Requires the provider, before an individual assents to an agreement, to inform the individual, in a separate record that the individual may keep whether or not the individual assents to the agreement, of certain information.

(e) Authorizes the provider, if a provider is authorized to 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, to comply with Subsection (d) by providing a certain disclosure surrounded by black lines. Sets forth the language of the disclosure.

(f) Authorizes a provider, 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 to comply with Subsection (d) by providing a certain disclosure surrounded by black lines. Sets forth the language of the disclosure.

(g) Authorizes a provider, if a plan contemplates that creditors will settle debts for less than the full principal amount of debt owed, to comply with Subsection (d) by providing a certain disclosure surrounded by black lines. Sets forth the language of the disclosure.

Sec. 394.318. COMMUNICATION BY ELECTRONIC OR OTHER MEANS. (a) Defines "federal act" and "consumer."

(b) Authorizes a provider to satisfy the requirements of Section 394.317, 394.319, or 394.327 by means of the Internet or other electronic means if the provider obtains a consumer's consent in the manner provided by Section 101(c)(1) of the federal act.

(c) Requires that the disclosures and materials required by Sections 394.317, 394.319, and 394.327 be presented in a form that is capable of being accurately reproduced for later reference.

(d) Requires that the disclosure of the information required by Section 394.317(d), with respect to disclosure by means of an Internet website, appear on one or more screens that contain no other information; and the individual must see before proceeding to assent to formation of an agreement.

(e) Requires a provider, at the time of providing the materials and agreement required by Sections 394.317(c) and (d), 394.319, and 394.327, to inform the

individual that on electronic, telephonic, or written request, it will send the individual a written copy of the materials, and requires the provider to comply with a request as provided in Subsection (f).

(f) Requires the provider, if a provider is requested, before the expiration of 90 days after an agreement is completed or terminated, to send a written copy of the materials required by Sections 394.317(c) and (d), or by Section 394.319 or 394.327, to send them at no charge within three business days after the request is received, but provides that the provider need not comply with a request more than once per calendar month or if it reasonably believes the request is made for purposes of harassment. Requires the provider, if a request is made more than 90 days after an agreement is completed or terminated, to send within a reasonable time a written copy of the materials requested.

(g) Requires a provider that maintains an Internet website to disclose certain information on the home page of its website or on a page that is clearly and conspicuously connected to the home page by a link that clearly reveals its contents.

(h) Authorizes a provider, subject to Subsection (i), if a consumer who has consented to electronic communication in the manner provided by Section 101 of the federal act withdraws consent as provided in the federal act, to terminate its agreement with the consumer.

(i) Requires a provider, if it wishes to terminate an agreement with a consumer pursuant to Subsection (h), to notify the consumer that it will terminate the agreement unless the consumer, within 30 days after receiving the notification, consents to electronic communication in the manner provided in Section 101(c) of the federal act. Authorizes the provider, if the consumer consents, to terminate the agreement only as permitted by Section 394.319(a)(6)(F) (relating to requiring an agreement to disclose that the provider is authorized to terminate the agreement for good cause).

Sec. 394.319. FORM AND CONTENTS OF AGREEMENT. (a) Requires that an agreement be in a record; be dated and signed by the provider and the individual; include the name of the individual and the address where the individual resides; include the name, business address, and telephone number of the provider; be delivered to the individual immediately on formation of the agreement; and disclose certain information.

(b) Provides that, for purposes of Subsection (a)(5) (relating to requiring an agreement to be delivered to the individual immediately on formation of the agreement), delivery of an electronic record occurs when it is made available in a format in which the individual may retrieve, save, and print, and the individual is notified that it is available.

(c) Authorizes the provider, if the administrator supplies the provider with certain information required under Subsection (a)(6)(I) (relating to the disclosure of the address, telephone number, and Internet address or website of the administrator), to comply with that requirement only by disclosing the information supplied by the administrator.

(d) Requires that an agreement provide that:

(1) the individual has a right to terminate the agreement at any time, without penalty or obligation, by giving the provider written or electronic notice, in which event the provider will refund all unexpended money that the provider or its agent has received from or on behalf of the individual for the reduction or satisfaction of the individual's debt; with respect to an agreement that contemplates that creditors will settle debts for less than the principal amount of debt, the provider will refund 65 percent of any portion of the set-up fee that has not been credited against the settlement

fee; and all powers of attorney granted by the individual to the provider are revoked and ineffective;

(2) the individual authorizes any bank in which the provider or its agent has established a trust account to disclose to the administrator any financial records relating to the trust account; and

(3) the provider will notify the individual within five days after learning of a creditor's decision to reject or withdraw from a plan and that this notice will include the identity of the creditor; and the right of the individual to modify or terminate the agreement.

(e) Authorizes an agreement to confer on a provider a power of attorney to settle the individual's debt for not more than 50 percent of the outstanding amount of the debt owed at the time of settlement. Prohibits an agreement from conferring a power of attorney to settle a debt for more than 50 percent of that amount, but authorizes an agreement to confer a power of attorney to negotiate with creditors of the individual on behalf of the individual. Requires that an agreement provide that the provider will obtain the assent of the individual after a creditor has assented to a settlement for more than 50 percent of the outstanding amount of the debt owed at the time of settlement.

(f) Prohibits an agreement from:

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

(2) except as permitted by Section 2 of the Federal Arbitration Act, 9 U.S.C. Section 2, containing a provision that modifies or limits otherwise available forums or procedural rights, including the right to trial by jury, that are generally available to the individual under law other than this subchapter;

(3) containing a provision that restricts the individual's remedies under this subchapter or law other than this subchapter; or

(4) containing a provision that limits or releases the liability of any person for not performing the agreement or for violating this subchapter; or indemnifies any person for liability arising under the agreement or this subchapter.

(g) Provides that all rights and obligations specified in Subsection (e) and Section 394.320 exist even if not provided in the agreement. Provides that a provision in an agreement which violates Subsection (d), (e), or (f) is void.

Sec. 394.320. CANCELLATION OF AGREEMENT; WAIVER. (a) Authorizes an individual to cancel an agreement before midnight of the third business day after the individual assents to it, unless the agreement does not comply with Section 394.319(b) or Section 394.328, in which event the individual is authorized to cancel the agreement within 30 days after the individual assents to it. Requires the individual, to exercise the right to cancel, to give notice in a record to the provider. Provides that notice by mail is given when mailed.

(b) Requires that an agreement be accompanied by a form that contains certain language in bold-faced type, surrounded by bold black lines. Sets forth the language of the form.

(c) Authorizes an individual, if a personal financial emergency necessitates the disbursement of an individual's money to one or more of the individual's creditors before the expiration of three days after an agreement is signed, to waive the right to cancel. Requires an individual, to waive the right, to send or deliver a signed,

dated statement in the individual's own words describing the circumstances that necessitate a waiver. Requires that the waiver explicitly waive the right to cancel. Provides that a waiver by means of a standard form record is void.

Sec. 394.321. **REQUIRED LANGUAGE.** Requires that the disclosures and documents required by this subchapter be in English unless the finance commission, by rule, provides otherwise. Requires the provider, if a provider communicates with an individual primarily in a language other than English, to furnish a translation into the other language of the disclosures and documents required by this subchapter.

Sec. 394.322. **TRUST ACCOUNT.** (a) Provides that all money paid to a provider by or on behalf of an individual pursuant to a plan for distribution to creditors is held in trust. Requires the provider, within two business days after receipt, to deposit the money in a trust account established for the benefit of individuals to whom the provider is furnishing debt management services.

(b) Provides that money held in trust by a provider is not property of the provider or its designee. Provides that the money is not available to creditors of the provider or designee, except an individual from whom or on whose behalf the provider received money, to the extent that the money has not been disbursed to creditors of the individual.

(c) Requires a provider to:

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

(2) disburse money paid by or on behalf of the individual to creditors of the individual as disclosed in the agreement, except that the provider may delay payment to the extent that a payment by the individual is not final; and if a plan provides for regular periodic payments to creditors, the disbursement must comply with the due dates established by each creditor; and

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

(d) Prohibits a provider from commingling money in a trust account established for the benefit of individuals to whom the provider is furnishing debt management services with money of other persons.

(e) Requires that a trust account at all times have a cash balance equal to the sum of the balances of each individual's account.

(f) Requires a provider, if a provider has established a trust account pursuant to Subsection (a), to reconcile the trust account at least once a month. Requires that the reconciliation compare the cash balance in the trust account with the sum of the balances in each individual's account. Requires that each trust account be individually reconciled if the provider or its designee has more than one trust account.

(g) Requires a provider, if the provider discovers, or has a reasonable suspicion of, embezzlement or other unlawful appropriation of money held in trust, to immediately notify the administrator by a method approved by the administrator. Requires the provider, within five days thereafter, to give notice to the administrator describing the remedial action taken or to be taken unless the finance commission by rule provides otherwise.

(h) Requires a provider, if an individual terminates an agreement or it becomes reasonably apparent to a provider that a plan has failed, to promptly refund to the individual all money paid by or on behalf of the individual which has not been paid to creditors, less fees that are payable to the provider under Section 394.323.

(i) Requires the provider, before relocating a trust account from one bank to another, to inform the administrator of the name, business address, and telephone number of the new bank. Requires the provider, as soon as practicable, to inform the administrator of the account number of the trust account at the new bank.

Sec. 394.323. FEES AND OTHER CHARGES. (a) Prohibits a provider from imposing directly or indirectly a fee or other charge on an individual or receiving money from or on behalf of an individual for debt management services except as permitted by this section.

(b) Prohibits a provider from imposing charges or receiving payment for debt management services until the provider and the individual have signed an agreement that complies with Sections 394.319 and 394.328.

(c) Prohibits a provider, if an individual assents to an agreement, from imposing a fee or other charge for educational or counseling services, or the like, except as otherwise provided in this subsection and Section 394.328(d). Authorizes the administrator to authorize a provider to charge a fee based on the nature and extent of the educational or counseling services furnished by the provider.

(d) Requires that fees and other charges, subject to adjustment of dollar amounts pursuant to Section 394.332(f), meet the following requirements:

(1) Authorizes a provider, if an individual assents to a plan that contemplates that creditors will reduce finance charges or fees for late payment, default, or delinquency, to charge a fee not to exceed \$50 for consultation, obtaining a credit report, setting up an account, and the like; and a monthly service fee, not to exceed \$10 times the number of accounts remaining in a plan at the time the fee is assessed, but not more than \$50 in any month.

(2) Authorizes a provider, if an individual assents to a plan that contemplates that creditors will settle debts for less than the principal amount of the debt, to charge, (A) subject to Section 394.319(d), a fee for consultation, obtaining a credit report, setting up an account, and the like, in an amount not to exceed the lesser of \$400 or four percent of the debt in the plan at the inception of the plan; and (B) a monthly service fee, not to exceed \$10 times the number of accounts remaining in the plan at the time the fee is assessed, but not more than \$50 in any month.

(3) Prohibits a provider from imposing or receiving fees under both Subdivisions (1) and (2).

(4) Authorizes a provider, except as otherwise provided in Section 394.328(d), if an individual does not assent to an agreement, to receive for educational and counseling services it provides to the individual a fee not to exceed \$100 or, with the approval of the administrator, a larger amount. Authorizes the administrator to approve a fee in an amount greater than \$100 if the nature and extent of the educational and counseling services warrant the larger fee.

(e) Requires the provider, if, before the expiration of 90 days after the completion or termination of educational or counseling services, an individual assents to an agreement, to refund to the individual any fee paid pursuant to Subsection (d)(4).

(f) Prohibits compensation for services in connection with settling debt, except as otherwise provided in Subsections (c) and (d), if an agreement contemplates

that creditors will settle an individual's debts for less than the principal amount of the debt, from exceeding one of the following applicable settlement fee limits in Subdivision (1) or (2), the terms of which shall be clearly disclosed in the agreement.

(1) Prohibits the total aggregate amount of fees charged to any individual under this chapter, with respect to agreements in which a flat settlement fee is charged based on the overall amount of included debt, including fees charged under Subsections (d)(2)(A) and (B), from exceeding 17 percent of the principal amount of debt included in the agreement at the agreement's inception. Requires that the flat settlement fee authorized under this subchapter be assessed in equal monthly payments over not less than half of the length of the plan, as estimated at the plan's inception, unless voluntarily accelerated by the individual in a separate record and offers of settlement by creditors have been obtained on at least half of the outstanding debt included in the agreement.

(2) Prohibits a settlement fee, with respect to agreements in which fees are calculated as a percentage of the amount saved by an individual, from exceeding 30 percent of the excess of the outstanding amount of each debt over the amount actually paid to the creditor, as calculated at the time of settlement. Requires that settlement fees authorized under this subsection to become billable only as debts are settled, and provides that the total aggregate amount of fees charged to any individual under this subchapter, including fees charged under Subsections (d)(2)(A) and (B), may not exceed 20 percent of the principal amount of debt included in the agreement at the agreement's inception.

(3) Prohibits a provider from imposing or receiving fees under both Subdivisions (1) and (2).

(g) Authorizes a provider, subject to adjustment of the dollar amount pursuant to Section 394.332(f), if a payment to a provider by an individual under this subchapter is dishonored, to impose a reasonable charge on the individual, not to exceed the lesser of \$25 or the amount permitted by law other than this subchapter.

Sec. 394.324. **VOLUNTARY CONTRIBUTIONS.** Prohibits a provider from soliciting a voluntary contribution from an individual or an affiliate of the individual for any service provided to the individual. Authorizes a provider to accept voluntary contributions from an individual but, until 30 days after completion or termination of a plan, the aggregate amount of money received from or on behalf of the individual is prohibited from exceeding the total amount the provider may charge the individual under Section 394.323.

Sec. 394.325. **VOIDABLE AGREEMENTS.** (a) Authorizes the individual, if a provider imposes a fee or other charge or receives money or other payments not authorized by Section 394.323 or 394.324, to void the agreement and recover as provided in Section 394.335.

(b) Provides that if a provider is not registered as required by this subchapter when an individual assents to an agreement, the agreement is voidable by the individual.

(c) Provides that if an individual voids an agreement under Subsection (b), the provider does not have a claim against the individual for breach of contract or for restitution.

Sec. 394.326. **TERMINATION OF AGREEMENTS.** (a) Authorizes the provider, if an individual who has entered into an agreement fails for 60 days to make payments required by the agreement, to terminate the agreement.

(b) Requires a provider, if the provider or an individual terminates an agreement, to immediately return to the individual any money of the individual held in trust for the benefit of the individual; and 65 percent of any portion of the set-up fee received pursuant to Section 394.323(d)(2) which has not been credited against settlement fees.

Sec. 394.327. PERIODIC REPORTS AND RETENTION OF RECORDS. (a) Requires a provider to provide the accounting required by Subsection (b) on cancellation or termination of an agreement, and before cancellation or termination of any agreement at least once each month, and within five business days after a request by an individual, but provides that the provider does not need to comply with more than one request in any calendar month.

(b) Requires a provider, in a record, to provide each individual for whom it has established a plan an accounting of the following information the amount of money received from the individual since the last report; the amounts and dates of disbursement made on the individual's behalf, or by the individual on the direction of the provider, since the last report to each creditor listed in the plan; the amounts deducted from the amount received from the individual; the amount held in reserve; and if, since the last report, a creditor has agreed to accept as payment in full an amount less than the principal amount of the debt owed by the individual the total amount and terms of the settlement, the amount of the debt when the individual assented to the plan, the amount of the debt when the creditor agreed to the settlement, and the calculation of a settlement fee.

(c) Requires a provider to maintain records for each individual for whom it provides debt management services for five years after the final payment made by the individual and produce a copy of the records to the individual within a reasonable time after a request for them. Authorizes the provider to use electronic or other means of storage for the records.

Sec. 394.328. PROHIBITED ACTS AND PRACTICES. (a) Prohibits a provider from, directly or indirectly:

- (1) misappropriating or misapplying money held in trust;
- (2) settling a debt on behalf of an individual for more than 50 percent of the outstanding amount of the debt owed a creditor unless the individual assents to the settlement after the creditor has assented;
- (3) taking a power of attorney that authorizes it to settle a debt, unless the power of attorney expressly limits the provider's authority to settle debts for not more than 50 percent of the actual outstanding balance of the debt owed a creditor;
- (4) exercising or attempting to exercise a power of attorney after an individual has terminated an agreement;
- (5) initiating a transfer from an individual's account at a bank or with another person unless the transfer is a return of money to the individual; or before termination of an agreement, properly authorized by the agreement and this subchapter, and for payment to one or more creditors pursuant to a plan or payment of a fee;
- (6) offering a gift or bonus, premium, reward, or other compensation to an individual for executing an agreement;
- (7) offering, paying, or giving a gift or bonus, premium, reward, or other compensation to a person for referring a prospective customer, if the person making the referral has a financial interest in the outcome of debt

management services provided to the customer, unless neither the provider nor the person making the referral communicates to the prospective customer the identity of the source of the referral;

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

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

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

(11) settling a debt or leading an individual to believe that a payment to a creditor is in settlement of a debt to the creditor unless, at the time of settlement, the individual receives a certification by the creditor that the payment is in full settlement of the debt or is part of a payment plan, the terms of which are included in the certification, that on completion will lead to full settlement of the debt;

(12) making a representation that the provider will furnish money to pay bills or prevent attachments; payment of a certain amount will permit satisfaction of a certain amount or range of indebtedness; or participation in a plan will or may prevent litigation, garnishment, attachment, repossession, foreclosure, eviction, or loss of employment;

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

(14) representing in its agreements, disclosures required by this subchapter, advertisements, or Internet website that it is a nonprofit entity unless it is organized and properly operating as a nonprofit entity under the laws of the state in which it was formed; or a tax-exempt entity unless it has received certification of tax-exempt status from the Internal Revenue Service and is properly operating as a nonprofit entity under the laws of the state in which it was formed;

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

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

(b) Prohibits a provider, if the provider furnishes debt management services to an individual, from, directly or indirectly or through an affiliate:

(1) purchasing a debt or obligation of the individual;

(2) receiving from or on behalf of the individual a promissory note or other negotiable instrument other than a check or a demand draft or a post-dated check or demand draft;

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

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

(5) except as permitted by federal law, disclosing the identity or identifying information of the individual or the identity of the individual's creditors, except to the administrator or the attorney general, on proper demand; a creditor of the individual, to the extent necessary to secure the cooperation of the creditor in a plan; or the extent necessary to administer the plan;

(6) except as otherwise provided in Section 394.323(f), providing the individual less than the full benefit of a compromise of a debt arranged by the provider;

(7) charging the individual for or providing credit or other insurance, coupons for goods or services, membership in a club, access to computers or the Internet, or any other matter not directly related to debt management services or educational services concerning personal finance, except to the extent such services are expressly authorized by the administrator;

(8) furnishing legal advice or perform legal services, unless the person furnishing that advice to or performing those services for the individual is licensed to practice law; or

(9) receiving compensation for referring, directing, or negotiating a loan or extension of credit on behalf of the individual.

(c) Provides that this subchapter does not authorize any person to engage in the practice of law.

(d) Prohibits a provider from receiving a gift or bonus, premium, reward, or other compensation, directly or indirectly, for advising, arranging, or assisting an individual in connection with obtaining an extension of credit or other service from a lender or service provider, except for educational or counseling services required in connection with a government program or as expressly approved by the administrator.

(e) Prohibits a provider from purchasing goods, services, or facilities, unless a person supplies goods, services, or facilities generally and supplies them to the provider at a cost not greater than the cost the person generally charges to others, from the person if an employee or a person that the provider should reasonably know is an affiliate of the provider owns more than 10 percent of the person, or is an employee or affiliate of the person.

Sec. 394.329. NOTICE OF LITIGATION. Requires the provider, not later than 30 days after a provider has been served with notice of a civil action for violation of this subchapter by or on behalf of an individual who resides in this state at either the time of an agreement or the time the notice is served, to notify the administrator in a record that it has been sued.

Sec. 394.330. ADVERTISING. (a) Requires the provider, if the agreements of a provider contemplate that creditors will reduce finance charges or fees for late payment, default, or delinquency and the provider advertises debt management services, to disclose, in an easily comprehensible manner, that using a debt management plan may make it harder for the individual to obtain credit.

(b) Requires the provider, if the agreements of a provider contemplate that creditors will settle for less than the full principal amount of debt and the provider advertises debt management services, to disclose, in an easily comprehensible manner, the information specified in Sections 394.317(d)(3) (relating to requiring a provider to inform an individual that establishment of a plan may adversely affect the individual's credit rating or credit scores) and (4) (relating to requiring a provider to inform an individual the nonpayment of debt may lead creditors to increase finance and other charges).

Sec. 394.331. **LIABILITY FOR CONDUCT OF OTHER PERSONS.** Provides that if a provider delegates any of its duties or obligations under an agreement or this subchapter to a third-party agent, including an independent contractor, the provider is liable for the person's conduct which, if done by the provider, would violate the agreement or this subchapter.

Sec. 394.332. **POWERS OF ADMINISTRATOR.** (a) Authorizes the administrator to receive complaints, act on its own initiative or in response to complaints, take action to obtain voluntary compliance with this subchapter, and seek or provide remedies as provided in this subchapter or Chapter 14 (Consumer Credit Commissioner).

(b) Authorizes the administrator or the administrator's representative to investigate and examine, in this state or elsewhere, by subpoena or otherwise, the activities, books, accounts, and records of a person that provides or offers to provide debt management services, or a person to whom a provider has delegated its obligations under an agreement or this subchapter, to determine compliance with this subchapter. Prohibits information that identifies individuals who have agreements with the provider from being disclosed to the public. Authorizes the administrator, in connection with the investigation, to charge the person the reasonable expenses necessarily incurred to conduct the examination; require or permit a person to file a statement under oath as to all the facts and circumstances of a matter to be investigated or examined; and seek a court order authorizing seizure from a bank at which the person maintains a trust account required by Section 394.322, any or all money, books, records, accounts, and other property of the provider that is in the control of the bank and relates to individuals who reside in this state.

(c) Authorizes the finance commission to adopt rules to implement this subchapter in accordance with Chapter 2001, Government Code.

(d) Authorizes the administrator to enter into cooperative arrangements with any other federal or state agency having authority over providers and may exchange with any of those agencies information about a provider, including information obtained during an examination of the provider.

(e) Requires the finance commission by rule to establish reasonable fees to be paid by providers for the expense of administering this subchapter.

(f) Requires the administrator to compute and publish the dollar amounts instead of those specified in Sections 394.302, 394.305, 394.309, 394.313, 394.323, 394.333, and 394.335 to reflect inflation, as measured by the United States Bureau of Labor Statistics Consumer Price Index for All Urban Consumers or, if that index is not available, another index adopted by finance commission rule. Requires the administrator to adopt a base year and adjust the dollar amounts, effective on July 1 of each year, if the change in the index from the base year, as of December 31 of the preceding year, is at least 10 percent. Requires that the dollar amount be rounded to the nearest \$100, except that the amounts in Section 394.323 must be rounded to the nearest dollar.

(g) Requires the administrator to notify registered providers of any change in dollar amounts made pursuant to Subsection (f) and make that information available to the public.

(h) Provides that information obtained under an examination is confidential.

Sec. 394.333. **ADMINISTRATIVE REMEDIES.** (a) Provides that for purposes of enforcing this subchapter, the administrator has the powers granted to the administrator under Chapter 14; is authorized to exercise those powers in the same manner as those powers may be exercised under Chapters 14 and 392 (Debt Collection) and Subtitle B

(Loans and Financed Transactions), Title 4 (Regulation of Interest, Loans, and Financed Transactions); and has any authority granted to the administrator by other law.

(b) Authorizes the administrator to enforce this subchapter and rules adopted under this subchapter by taking one or more of the following actions: ordering a provider or a director, employee, or other agent of a provider to cease and desist from any violations; ordering a provider or a person that has caused a violation to correct the violation, including making restitution of money or property to a person aggrieved by a violation; subject to adjustment of the dollar amount pursuant to Section 394.332(f), imposing against a provider or a person that has caused a violation a civil penalty in an amount not to exceed \$10,000 for each violation; prosecuting a civil action to enforce an order or obtain restitution or an injunction or other equitable relief, or both; or intervening in an action brought under Section 394.335.

(c) Authorizes the administrator, subject to adjustment of the dollar amount pursuant to Section 394.332(f), if a person violates or knowingly authorizes, directs, or aids in the violation of a final order issued under Subsection (b)(1) (relating to ordering a provider or a director, employee, or other agent of a provider to cease and desist from any violation) or (2) (relating to ordering a provider or a person that has caused a violation to correct the violation), to assess an administrative penalty in an amount not to exceed \$20,000 for each violation.

(d) Authorizes the administrator to maintain an action to enforce this subchapter in any county at the administrator's sole discretion.

(e) Authorizes the administrator to recover the reasonable costs of enforcing this subchapter under Subsections (b) and (d), including attorney's fees based on the hours reasonably expended and the hourly rates for attorneys of comparable experience in the community.

(f) Requires the administrator, in determining the amount of an administrative penalty to impose under Subsection (b) or (c), to consider the seriousness of the violation, the good faith of the violator, any previous violations by the violator, the deleterious effect of the violation on the public, the net worth of the violator, and any other factor the administrator considers relevant to the determination of the penalty.

Sec. 394.334. SUSPENSION, REVOCATION, OR NONRENEWAL OF REGISTRATION. (a) Defines "insolvent."

(b) Authorizes the administrator to suspend, revoke, or deny renewal of a provider's registration if a fact or condition exists that, if it had existed when the registrant applied for registration as a provider, would have been a reason for denying registration; the provider has committed a material violation of this subchapter or a rule or order of the administrator under this subchapter; the provider is insolvent; the provider or an employee or affiliate of the provider has refused to permit the administrator to make an examination authorized by this subchapter, failed to comply with Section 394.332(b)(2) (relating to authorizing an administrator to require or permit a person to file a certain statement under oath) within 15 days after request, or made a material misrepresentation or omission in complying with Section 394.332(b)(2); or the provider has not responded within a reasonable time and in an appropriate manner to communications from the administrator.

(c) Authorizes the administrator, if a provider does not comply with Section 394.322(f) or if the administrator otherwise finds that the public health or safety or general welfare requires emergency action, to order a summary suspension of the provider's registration, effective on the date specified in the order.

(d) Authorizes the administrator, if the administrator suspends, revokes, or denies the renewal of the registration of a provider, to seek a court order authorizing seizure of any or all of the money in a trust account required by Section 394.322, books, records, accounts, and other property of the provider that are located in this state.

(e) Authorizes the provider, if the administrator suspends or revokes a provider's registration, to appeal and request a hearing pursuant to Chapter 2001, Government Code.

Sec. 394.335. PRIVATE ENFORCEMENT. (a) Authorizes an individual, in addition to the recovery under Subsection (b)(3), if the individual voids an agreement under Section 394.325(a) or (b), to recover in a civil action all money paid or deposited by or on behalf of the individual under the agreement, other than amounts paid to creditors.

(b) Authorizes an individual, with respect to whom a provider violates this subchapter or a rule adopted under this subchapter or commits any unfair or deceptive act to recover in a civil action from the provider and any third party that caused the violation or committed the act or practice, not including a provider's officers, directors, employees, or investors actual damages for injury caused by the violation or conduct; punitive damages not to exceed three times actual damages only upon a finding of unconscionable conduct relating to a violation of this subchapter or a rule adopted under this subchapter; and reasonable attorney's fees and costs.

(c) Authorizes an individual, in addition to the remedy available under Subsection (b), if a provider violates an individual's rights under Section 394.320, to recover in a civil action all money paid or deposited by or on behalf of the individual under to the agreement, except for amounts paid to creditors.

(d) Provides that a provider is not liable under this section for a violation of this subchapter if the provider proves that the violation was not intentional and resulted from a good faith error, notwithstanding the maintenance of reasonable procedures adopted to avoid the error. Provides that an error of legal judgment with respect to a provider's obligations under this subchapter is not a good faith error. Provides that if, in connection with a violation, the provider has received more money than authorized by an agreement or this subchapter, the defense provided by this subsection is not available unless the provider refunds the excess amount not later than the seventh calendar day after the date of learning of the violation.

(e) Requires the administrator to assist an individual in enforcing a judgment against the surety bond or other security provided under Section 394.313 or 394.314.

(f) Requires that an administrative penalty or fine under this title or federal law that is assessed by or agreed to with an administrative agency or the attorney general be considered and applied as a bar or credit to recovery of further fines, penalties, or enhanced damages for substantially the same act, practice, or violation in a suit or other proceeding brought by a private litigant under this title, the Business & Commerce Code, or other applicable law of this state. Provides that this subsection and Subsection (g) do not apply to a claim for restitution for unreimbursed actual damages.

(g) Provides that a suit or other proceeding by a private litigant does not affect or restrict any state or federal agency from pursuing a person for any administrative remedy, including an administrative penalty. Requires an administrative agency of this state, however, to consider as a mitigating factor any relief recovered in a private suit or proceeding when the agency determines an administrative remedy.

Sec. 394.336. VIOLATION OF DECEPTIVE TRADE PRACTICES ACT. Prohibits an individual, if an act or practice of a provider violates both this subchapter and Chapter 17 (Deceptive Trade Practices), Business & Commerce Code, from recovering under both for the same act or practice.

Sec. 394.337. STATUTE OF LIMITATIONS. (a) Requires that an action or proceeding brought pursuant to Section 394.333(a), (b), or (c), be commenced within four years after the conduct that is the basis of the administrator's complaint.

(b) Requires that an action brought under Section 394.335 be commenced within two years after the latest of the individual's last transmission of money to a provider; the individual's last transmission of money to a creditor at the direction of the provider; the provider's last disbursement to a creditor of the individual; the provider's last accounting to the individual pursuant to Section 394.327; the date on which the individual discovered or reasonably should have discovered the facts giving rise to the individual's claim; or termination of actions or proceedings by the administrator with respect to a violation of this subchapter.

(c) Provides that the period prescribed in Subsection (b)(5) (relating to the date on which the individual discovered or reasonably should have discovered the facts giving rise to the individual's claim) is tolled during any period in which the provider or, if different, the defendant has materially and wilfully misrepresented information required by this subchapter to be disclosed to the individual, if the information so misrepresented is material to the establishment of the liability of the defendant under this subchapter.

Sec. 394.338. UNIFORMITY OF APPLICATION AND CONSTRUCTION. Requires that in applying and construing this subchapter, consideration be given to the need to promote uniformity of the law with respect to the subject matter of this subchapter among states that have enacted a law substantially similar to this subchapter.

Sec. 394.339. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. Provides that this subchapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede 15 U.S.C. Section 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

SECTION 2. Repealer: Subchapter C (Consumer Debt Management Services), Chapter 394 (Debtor Assistance), Finance Code.

SECTION 3. Provides that a transaction entered into before the effective date of this Act and the rights, duties, and interests resulting from the transaction may be completed, terminated, or enforced as required or permitted by a law amended, repealed, or modified by this Act as though the amendment, repeal, or modification had not occurred.

SECTION 4. Effective date: January 1, 2010.