

HOUSE No. 4074

The Commonwealth of Massachusetts

In the Year Two Thousand Twelve

An Act relative to the licensing and supervision of debt management services in the Commonwealth.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to protect consumer debtors from debt management services providers, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 180 of the General Laws is hereby amended by striking out
2 section 4A, as appearing in the 2010 of the Official Edition, and inserting in place thereof the
3 following section:--

4 Section 4A. Credit counseling services as used in this chapter shall mean (a) the
5 providing of financial and budgetary advice and judgment to individuals in connection with the
6 creation of a budgetary plan; or (b) the creation of a plan whereby an individual turns over an
7 agreed amount of his income to a nonprofit credit counseling corporation which distributes it to
8 his creditors in accordance with a plan which they have approved and which may provide for
9 smaller payments or a longer term than the original contract; or (c) the providing of educational
10 services relating to the use of credit; or (d) any combination of these. An attorney authorized to
11 practice law in the commonwealth may render those credit counseling services specified in

clause (b), within the attorney-client relationship. Such attorney may not solicit debt management services business. Each such corporation shall comply with the provisions of section eight F of chapter twelve.

Such corporation shall not engage in the practice of law. If it appears that an individual receiving credit counseling services needs legal advice or counsel, he shall be referred to an attorney of his own choice, the local bar association referral service, or a local legal aid program, whichever course may seem most appropriate.

Any such corporation formed for credit counseling purposes under this chapter which provides debt management services for compensation or gain from or on behalf of the individuals to whom it provides the services or from their creditors shall obtain a license under chapter 255G of the General Laws.

SECTION 2. The General Laws are hereby amended by inserting after chapter 255F the following chapter:--

Chapter 255G.

Regulating Debt Management Services in the Commonwealth.

Section 1. Definitions.

As used in this chapter, the following words have the following meanings, unless the context requires otherwise:

“Agreement” means a contract between a provider and an individual for the performance of debt management services.

“Business address” means the physical location of a business, including the name and number of a street.

“Business day” means a calendar day, except for Sundays and the following holidays: New Year’s Day, Birthday of Martin Luther King, Jr., Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day and Christmas Day.

“Commissioner” means the commissioner of banks for the Commonwealth of Massachusetts.

“Consumer” means an individual who has secured or unsecured debt, which arises out of personal, family or household obligations, and who has executed an agreement with a provider.

“Creditor” means a person that has extended credit to an individual.

“Debt management services” means directly or indirectly receiving an individual’s money to distribute it to 1 or more of an individual’s creditors in partial or full satisfaction of the individual’s secured or unsecured debts; arranging the distribution or assisting an individual in the distribution of an individual’s money to 1 or more of an individual’s creditors in partial or full satisfaction of the individual’s secured or unsecured debts; or acting or offering to act as an intermediary between an individual and 1 or more of the individual’s creditors to reduce, defer, discharge or in any other way modify the terms and conditions of an individual’s obligation to repay secured or unsecured debts.

“Individual” means a natural person.

“Licensee” means a provider that possesses a valid license.

“Provider” means a person that performs debt management services for compensation or gain, or in the expectation of compensation or gain.

“Statement of accounting” means a written or electronic document that a provider prepares for a consumer in accordance with section 16.

“Third party payment processor” means any entity that holds, or has access to, or can effectuate procession of, by any means, the monies of a licensee’s debtors, or distributes, or is in the chain of distribution of such monies, to the creditors of such debtors, pursuant to an agreement or contract with the licensee.

Section 2. License and Bond Required; Terms.

(a) No person shall engage in or advertise for debt management services in Massachusetts unless the commissioner issues it a license.

(b) A provider shall obtain a license for each of its business addresses.

(c) A license shall not be transferable or assignable.

(d) A licensee shall file a surety bond in an amount and form that the commissioner determines before it may conduct business in Massachusetts.

(e) A licensee shall not conduct business in Massachusetts under a business name other than the business name that is listed on its license.

(f) The commissioner shall promulgate regulations to administer and enforce this chapter.

Section 3. Exempt Persons.

The following persons are exempt from this chapter:

(a) A provider's employees who perform debt management services on the provider's behalf in the regular course of their employment.

(b) A person organized under section 501(c) of the Internal Revenue Code that receives no compensation or gain for the debt management services from or on behalf of the individuals to whom it provides the services or from their creditors.

(c) Judicial officers, individuals acting under the direction of a court, or assignees for creditors' benefit.

(d) A bank as defined in section one of chapter one hundred and sixty-seven, a national banking association, a federally chartered credit union, a federal savings and loan association, a federal savings bank, or any subsidiary of the above, or any bank, trust company, savings bank, savings and loan association, or credit union organized under the laws of any other state, or any subsidiary of the above.

(e) Attorneys licensed to practice law in the commonwealth who provide debt management services to consumers with whom the attorney also provides legal services within an attorney-client relationship to, and who do not solicit debt management services business.

(f) Persons that provide bill paying services if those persons do not perform debt management service.

(g) Creditors or the creditors' employees who negotiate debt settlement with individuals or providers, acting on an individual's or consumer's behalf.

(h) Officers or employees of the United States or a state of the United States who perform debt management services for individuals on behalf of the federal government, the Commonwealth of Massachusetts, a Massachusetts municipality or a Massachusetts state agency, and receive compensation solely from these governmental entities.

(i) Certified Public Accountants licensed in Massachusetts who provide debt management services to consumers with whom the Certified Public Accountant also provides accounting services within an accountant-client relationship to, and who do not solicit debt management services business.

(j) A third party payment processor which does not provide debt management services.

Section 4. License Application.

(a) The application for the license and the application for the license renewal shall be in a form that the commissioner shall prescribe, shall be signed under oath and shall contain information as the commissioner shall determine. Applicants shall pay an investigation fee that the commissioner of administration shall determine under chapter 7, section 3B. The commissioner shall evaluate the applicant's financial responsibility, character, reputation, integrity and general fitness to determine whether the applicant will act lawfully, honestly, fairly, soundly and efficiently in the public interest. The license shall be for a period of 1 year as of a date that the commissioner determines. The commissioner of administration shall determine the license fee annually under chapter 7, section 3B.

(b) The commissioner may participate in a multi-state licensing system for the sharing of regulatory information and the licensing and application processes, by electronic or

other means, for entities engaged in the business of debt management services. The commissioner may establish requirements for participation by an applicant in a multi-state licensing system which may vary from the provisions set out in this section and section 2. The commissioner may require a background investigation of each applicant for a license to engage in debt management services by means of fingerprint and state and national criminal history record checks by the Department of Criminal Justice Information Services pursuant to section 172 of chapter 6, and the Federal Bureau of Investigation. If the applicant is a partnership, association, corporation or other form of business organization, the commissioner may require such background investigation by means of fingerprint checks on each member, director, principal officer of such applicant, and any individual acting as a manager of an office location. The applicant shall pay directly to such multi-state licensing system any additional fee relating to participation in such multi-state licensing system.

Section 5. License Issuance or Denial; Timing.

(a) The commissioner may deny a license if:

(1) the applicant does not satisfy the criteria set forth in section 4(c).

(2) the application contains information that is materially erroneous or incomplete;

(3) the applicant fails to provide information that the commissioner may request, in a timely manner;

(4) an officer, director, member or principal of the applicant's business has been (i) convicted of or pled nolo contendere to a felony, or (ii) committed an act involving fraud, deceit or dishonesty;

(5) an officer, director, member or principal of the applicant has had a professional license revoked, suspended or subjected to administrative action in any jurisdiction;

(6) the applicant or any of its officers, directors, members or principals has defaulted in the payment of money collected for others; or

(7) the applicant's license was revoked or suspended in another jurisdiction or the applicant has been issued a regulatory action in another jurisdiction.

(b) On or before the twentieth day after a license application denial, the commissioner shall enter upon the records a written decision and findings containing the reasons supporting a license denial, and shall send a notice to the applicant via certified mail. On or before the thirtieth day after the date of the notice, the applicant may appeal the denial to the superior court for Suffolk County, sitting in equity. The court shall hear the relevant evidence, determine the facts, affirm the denial or order the commissioner to issue the license, as justice and equity may require.

Section 6. Suspension, Revocation, or Non-Renewal of License.

(a) The commissioner may suspend, revoke or deny renewal of a license if:

(1) a licensee has violated this chapter or any rule or regulation adopted hereunder or any other law applicable to the conduct of its business;

(2) a fact or condition exists that, if it had existed when the licensee applied for a license, would have warranted the commissioner refusing to issue a license;

(3) the licensee does not satisfy criteria required under section 4(c);

(4) the licensee has refused to permit the commissioner to examine the licensee's books and records under this chapter, failed to comply with section 13 or made a material misrepresentation or omission in complying with section 13; or

(5) the licensee has not responded within a reasonable time and in an appropriate manner to the commissioner's communications.

(b) If the commissioner suspends, revokes, or denies renewal of a license, the commissioner may seek a court order to seize the licensee's books, records, accounts, property or money in a trust account maintained by the provider.

(c) Except as provided in section 7, a licensee shall receive notice and a hearing under chapter 30A before the commissioner revokes or suspends a license.

(d) A licensee may deliver a written notice to the commissioner to surrender its license, but if a licensee surrenders its license, its civil or criminal liability for acts committed before the surrender is not affected.

Section 7. Commissioner's Order to Cease and Desist from Unlawful Acts or Practices; Prior Notice and Opportunity for Hearing; Temporary Order.

(a) If the commissioner determines, after giving notice of and opportunity for a hearing, that a licensee has acted in a manner that has violated or would violate this chapter, or a rule, regulation or order hereunder, the commissioner may order the licensee to cease and desist from unlawful acts or practices and take affirmative action to enforce this chapter.

(b) If the commissioner finds that delay in issuing an order under subsection (a) will irreparably harm the public interest, the commissioner may issue a temporary cease and desist order. Upon the entry of a temporary cease and desist order, the commissioner shall promptly notify the affected licensee in writing that the order has been entered, the reasons for the order and that on or before the twentieth day after the receipt of a written request from the licensee, the matter will be scheduled for hearing to determine whether or not such temporary order shall become permanent. If the commissioner does not order a hearing and a licensee does not request a hearing, the order shall remain in effect until the commissioner modifies or vacates it. If a hearing is requested or ordered, the commissioner shall vacate, modify or make the order permanent, by written findings of fact and conclusions of law, after giving the licensee subject to the order notice of and opportunity for a hearing.

(c) The commissioner shall not issue an order under this section, except an order issued pursuant to subsection (b), without prior notice of and opportunity for a hearing. The commissioner may vacate or modify an order under this section upon finding that the conditions that required the order have changed and that it is in the public interest to vacate or modify the order.

(d) Any order issued pursuant to this section shall be subject to review as provided in chapter thirty A.

Section 8. Commissioner's Examination; Business Records; Records of Examination.

(a) The commissioner may examine the books and records of a licensee and have full access to the records related to its business. A licensee shall keep and use its business records in a form, at a location and for a retention period as the commissioner shall promulgate in a

199 regulation, which shall enable the commissioner to determine whether the licensee is complying
200 with this chapter and the rules and regulations promulgated hereunder, and any other law, rule or
201 regulation applicable to its business.

202 (b) In connection with the examination, the commissioner may:

203 (1) oblige a licensee to pay expenses on or before the thirtieth day after the licensee
204 receives an invoice, which the Massachusetts Division of Banks incurs in conducting an
205 examination, including expenses for travel outside Massachusetts;

206 (2) require or permit a licensee to file a statement under oath as to the facts and
207 circumstances of a matter to aid in an examination; and

208 (3) seek a court order to seize the following items from the federally insured bank that a
209 licensee maintains its trust account at: money, books, records, accounts and other property that
210 the licensee keeps under the federally insured bank's control.

211 (c) The commissioner shall preserve a full record of a licensee's examination, including a
212 statement of its condition. Examination records and reports, including work papers, information
213 derived from reports or in response to reports and any copies thereof in a licensee's possession
214 shall be confidential and privileged communications, shall not be subject to subpoena and shall
215 not be a public record under chapter 4, section 7, clause 26. For the purpose of this paragraph,
216 examination records and reports shall include examination records and reports that any bank
217 regulatory agency of a state, federal or foreign government conducted, which that agency or
218 government considers confidential, and which are in possession of the commissioner. In any
219 proceeding before a court, the court may issue a protective order to seal the record protecting the
220 confidentiality of a record, other than a record on file with the court or filed in connection with

the court proceeding, and the court may exclude the public from any portion of a proceeding at which a record may be disclosed. The commissioner shall distribute copies of examination reports to a licensee for its use only and the licensee shall not publish these reports to any person or agency without the commissioner's prior written approval. The commissioner may distribute any information, report, examination or statement relating to a licensee to any regulatory or law enforcement agency.

Section 9. Violations of this Chapter; Commissioner Investigations.

The commissioner may investigate the books, accounts, records and files of a person that the commissioner has reason to believe is conducting the business of a provider in Massachusetts, whether the person acts or claims to act as a principal or agent, or under or without the authority of this chapter.

Section 10. Agreements.

(a) A licensee shall complete and furnish a written budget analysis to an individual before an individual may execute an agreement. A licensee shall not execute an agreement unless the budget analysis indicates that an individual can reasonably afford the payments established under the stated agreement. The commissioner shall determine the information that a budget analysis shall require.

(b) A licensee shall not accept compensation or gain, directly or indirectly, for performing debt management services before an individual executes an agreement. The agreement shall contain information that the commissioner shall determine. A licensee shall, at the time the agreement is executed, distribute a copy to the consumer.

(c) In addition to other items as the commissioner may require, the agreement shall:

(1) disclose the debt management services that the licensee will perform;

(2) disclose the fees that the licensee will charge the consumer;

(3) disclose that agreements may not be suitable for all individuals;

(4) if applicable, disclose that the agreement does not cover secured debt; and

(5) disclose the list of debts that the agreement covers and the interest rate of those debts at the time as provided to the licensee by the consumer at the time of the agreement.

Section 11. Rescission

(a) A consumer may rescind an agreement until midnight of the third business day after the consumer executed the agreement by notifying the licensee in writing of his intention to do so. Notice is deemed effective on the date the consumer mails the notice.

(b) A licensee shall furnish a notice of rescission at the time the agreement is signed in a form and shall contain conditions as the commissioner shall determine.

(c) All fees and payments that the consumer made shall be refunded in full on or before the tenth business day after a licensee receives a rescission notice.

Section 12. Termination of Agreement.

(a) If a consumer fails to honor his or her contractual obligations on or before the sixtieth day after the consumer was required to perform under an agreement, then the licensee may terminate the agreement with the consumer. Notwithstanding the foregoing, if a consumer refuses to pay any fee to a licensee after such payment has been earned by the licensee, then the licensee may terminate its agreement with the consumer immediately.

(b) If a licensee terminates an agreement, the licensee shall immediately return to the consumer any money that the licensee held in trust for the consumer.

(c) A consumer may terminate an agreement at any time without a termination penalty.

Section 13. Annual Report; Failure to File; Penalties.

A licensee shall file with the commissioner on an annual or periodic basis a report in a form that the commissioner shall prescribe. The report shall be in writing, under oath, and contain information related to the conduct of a licensee's business. If a licensee neglects to file an annual report or fails to amend the same on or before the fifteenth day after the commissioner provides notice to the licensee, then the licensee shall pay to the Commonwealth of Massachusetts \$50 per day during which the neglect or failure to amend the same continues.

Section 14. Trust Account Required of Providers that Receive Consumer Funds.

(a) A licensee shall maintain a separate trust account at a federally insured bank to hold funds that it receives from consumers. Trust accounts shall comply with regulations that the commissioner promulgates hereunder.

(b) A licensee shall not commingle money collected for a creditor with the licensee's own funds or use any part of a consumer's money in the conduct of the licensee's business.

Section 15. Permissible Fees.

(a) A licensee shall not impose, directly or indirectly, a fee or other charge on a consumer or receive payment from or on behalf of a consumer for performing debt management services except as provided in regulations promulgated by the commissioner. Such regulation shall include the maximum fee that a licensee may charge for debt management services in the commonwealth and may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the commissioner are necessary or proper to carry out the purposes of this chapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

(b) A licensee shall not impose charges or receive payment for debt management services until the licensee and the individual have signed an agreement that complies with section 10 and the regulations promulgated hereunder

Section 16. Statement of Accounting.

(a) A statement of accounting shall contain the following information:

(1) the amount of money that the consumer has paid to the provider since the provider prepared the last statement;

(2) the amounts, dates and creditors that the provider paid on the consumer's behalf, since the provider prepared the last statement;

300 (3) the amounts of money that the provider collected as compensation from the
301 consumer's payments;

302 (4) the amount of money that the provider holds in trust for the consumer;

303 (5) if, since the last statement date, the consumer's creditor accepted a payment from the
304 provider in full or partial satisfaction of the consumer's debt with that creditor:

305 (i) the total amount of money that the provider paid the creditor to settle a consumer's
306 debt;

307 (ii) the amount of the debt at the time the provider and a consumer entered their
308 agreement;

309 (iii) the amount of a debt at the time a consumer's creditor agreed to settle a debt with a
310 provider; and

311 (iv) the amount of compensation that the provider receives to settle a debt.

312 (b) A licensee shall distribute a statement of accounting to a consumer:

313 (1) while an agreement is in effect:

314 (i) at least once per month; and

315 (ii) on or before the fifth business day after a consumer demands a statement of
316 accounting from a licensee; however, a licensee may refuse to comply with more than 1 request
317 for a statement of accounting per month; and

318 (2) on the day on which a consumer or a licensee rescinds or terminates an
319 agreement.

320 (c) Notwithstanding the requirement set forth in clauses (1) and (2) of subsection (b),
321 a provider that enables, or arranges to enable, twenty-four hours a day, seven days a week,
322 electronic access by a consumer to all of the consumer's deposit account transaction information,
323 including but not necessarily limited to all deposit and withdrawal activity, and electronic access
324 by a consumer to debt management account activity, including but not necessarily limited to
325 such settlement information as account status, settlement date(s), settlement amount(s) and fee(s)
326 paid, shall be deemed to have satisfied the statement of account distribution requirements in
327 subsection (b).

328 Section 17. Advertising.

329 (a) A person shall not advertise, announce, broadcast, display, distribute, print, publish,
330 televise or permit any other person to advertise, announce, broadcast, display, distribute, print,
331 publish or televise on its behalf a statement or representation that is deceptive, false or
332 misleading.

333 (b) Advertisements that a licensee authorizes shall clearly state its licensed business name
334 and its Massachusetts license number.

335 Section 18. Liability for the Conduct of Other Persons.

336 If a licensee delegates a duty or obligation that this chapter mandates to another person,
337 including an independent contractor, the licensee is liable for the other person's conduct that
338 violates an agreement, this chapter or any of the Massachusetts Division of Banks' regulations.

Section 19. Criminal Penalties.

A person that violates section 2 or any rule or regulation promulgated thereunder shall: pay a fine of not more than \$2,000, be imprisoned in a house of correction for not more than 2 1/2 years, be imprisoned in state prison for not more than 5 years, or both a fine and imprisonment. Each day a violation occurs or continues shall be deemed a separate offense. This section's penalty provision shall be in addition to, and not in lieu of, the penalty provisions under any other law applicable to providers for violating section 2 or any rule or regulation made thereunder.

Section 20. Civil Penalties; Review.

(a) If the commissioner finds that a person has violated this chapter, a rule or regulation adopted thereunder or any other Massachusetts law applicable to the conduct of a provider, the commissioner may order or impose a penalty upon the person, which shall not exceed \$5,000 per violation of law, rule or regulation, up to a maximum of \$100,000 plus the costs of investigation.

(b) Nothing in this section limits an individual's right to bring an action against a provider that injured the individual to recover damages or restitution in a court of competent jurisdiction.

(c) A finding or order that the commissioner issues under this section shall be reviewable under chapter 30A.

Section 21. Violation of Chapter 93A.

A violation of this chapter is also a violation of chapter 93A, and an aggrieved individual may recover damages from a provider under this chapter and chapter 93A.

360 SECTION 3. Effective Date.

361 This Act shall take effect 180 days after its passage, provided, however, that the authority
362 for the commissioner to promulgate regulations in section 2 of chapter 255G of the General
363 Laws, as appearing in section 2, shall take effect upon passage.