F I S C A L I M P A C T R E P O R T

		ORIGINAL DATE	02/15/13		
SPONSOR	Cervantes	**LAST UPDATED**	02/26/13	**HB**	
SHORT TITLE	Uniform Debt-Management Services Act			**SB**	432
				ANALYST	Martinez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	FY15	Recurring or Non-Rec	Fund Affected
Total			See “Fiscal Implications” on pg. 3	Could Be Substantial	Recurring	General Fund Other State Funds

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Response Received From
Attorney General Office (AGO)
Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of Bill

The Senate Bill 432 enacts the Uniform Debt-Management Services Act (Act) and repeals the Debt Adjuster Statutes, Sections 56-2-1 through 56-2-4 NMSA 1978. The purpose of the Act is to provide guidance and regulation to the consumer credit counseling and debt settlement industries. The Act is a comprehensive statute that provides rules for, among other things, registration requirements, bond requirements, certification requirements, disclosure requirements, and penalties for non-compliance. Banks as regulated entities under other law and legal services are not subject to the Uniform Act, as are other kinds of activities that are incidental to other functions performed. For example, a title insurer that provides bill-paying service that is incidental to title insurance is not subject to it. The Act may be divided into three basic parts; registration of services, service-debtor agreements and enforcement.

Registration

Under the Act, no service may enter into an agreement with any debtor in the state without registering as a consumer debt-management service with the Financial Institutions Division (FID). A debt management service provider must be registered pursuant to the Act; however an employee or agent of the provider does not need to be registered. Registration requires submission of detailed information concerning the service, including its financial condition, the identity of principals, locations at which service will be offered, form for agreements with debtors and business history in other jurisdictions. Registration requires a $500 application fee, a surety bond of $250,000 or other amount as determined by the Administrator of the FID based on the financial condition of the applicant, and an effective insurance policy against fraud, dishonesty, theft and the like in an amount no less than $250,000. Substitutions are allowed for the surety bond such as insurance, letter of credit or bonds held at a bank. A satisfactory application will result in a certificate to do business from the Administrator. Timeframes and appeal processes of denials are established for the approval or denial by the Administrator, of both original and renewal registration applications. A yearly renewal is required and the updates are required within ten days if certain information changes. Subject to a few exceptions, information in the application would be considered public information. Criminal records checks including fingerprints are required of every officer of the applicant and every employee or agent of the applicant who is authorized access to trust accounts.

Agreements

A debt management service provider creates a program or strategy in which the provider furnishes debt-management services to an individual in the form of an "agreement" which includes a schedule of payments to be made on behalf of the individual and used to pay debts owed by the individual. The consumer has the right to terminate the agreement at any time; the provider may terminate for good cause. The Act does not apply to an agreement with an individual if a provider has no reason to know that the individual resides in New Mexico at the time of the agreement. In order to enter into agreements with debtors, there is a disclosure requirement respecting fees and services to be offered, and the risks and benefits of entering into such a contract. The service must offer counseling services from a certified counselor or certified debt specialist and a plan must be created in consultation by the counselor for debt-management service to commence. The contents of the agreements and fees that may be charged are set by the statute. The service may terminate the agreement if required payments are delinquent for at least 60 days. Any payments for creditors received from a debtor must be kept in a trust account that may not be used to hold any other funds of the service. There are strict accounting requirements and periodic reporting requirements respecting funds held.

Enforcement

The Act prohibits specific acts on the part of a service including: misappropriation of funds in trust; settlement of a debt with a creditor without a debtor's consent; gifts or premiums to enter into an agreement; and representation that settlement has occurred without certification from a creditor. Enforcement of the Act occurs at two levels, the Administrator or the Attorney General (AG) and the individual level. The Administrator or the AG has investigative powers, power to order an individual to cease and desist; power to assess a civil penalty/fine, and the power to bring a civil action. An individual may bring a civil action for compensatory damages; including triple damages if a service obtains payments not authorized in the Act, and may seek punitive damages and attorney's fees. A service has a good faith mistake defense against liability. The statute of limitations pertaining to an action by the administrator is four years, and four years for a private right of action depending on when one of the specified triggering acts last occurred.

The bill repeals the New Mexico Debt Adjusters Act, which does not allow for-profit businesses to conduct debt-management services in the state. Parts of the Act are effective Jan. 1, 2012, while the remainder becomes effective Jan. 1, 2015.

FISCAL IMPLICATIONS

The Regulation and Licensing Department (RLD) Comments:

The fiscal impact of enacting this bill cannot be determined. Currently the FID does not license or regulate debt management companies; therefore, there is insufficient data to determine how many entities would need to be registered as providers.

If the number of potential licensees is significant, increase in staffing with the appropriate skill in the debt settlement management industry would be necessary to properly administer the requirements of the bill.

The bill does not contain an appropriation for FID to add staff, equipment and training necessary to implement this bill.

The Attorney General's Office (AGO) Comments:

Other states, with Colorado as an example, who have enacted the Uniform Debt Management Service Act (UDMSA), have incurred significant costs in creating and administering a new regulatory scheme. In addition, some of those states have also had substantial costs in pursuing actions against violators.

SIGNIFICANT ISSUES

In 2010, in part due to substantial abusive and deceptive practices by the providers of debt management services, the Federal Trade Commission amended its Telemarketing Sales Rule (TSR) to address the abusive practice and to create mechanisms to provide greater consumer protection. The amended TSR addressed a variety of issues and most significantly two of the industry's most pervasive and abusive practices; up-front fees and trust accounts controlled by the debt managers or its affiliates.

The UDMSA and SB 432's version of UDMSA attempts to regulate very diverse "debt assistance" industries through comprehensive legislation, however, the consumer protection concerns over these industries has nationally and locally been very divergent. Non-profit credit counseling, CCA's, have long been recognized as a legitimate model of negotiation on behalf of a debtor for an adjustment of terms, such as monthly payment amounts and interest rates, with payments to those creditors beginning immediately.

However, the debt settlement industry, where a debtor has to save money in an escrow like account in order for there to be some future agreement with their creditor to reduce the principal of the debt has been rife with abuse. One of the major abusive practices identified in the debt settlement industry was the collection of up-front fees before the debtor had received an agreement or any benefit from the creditor. Many debtors paid thousands of dollars and ended up with no agreements and in a far worse financial situation then when they had begun.

The debt settlement industries own data provided to the Federal Trade Commission showed that more than three years after entering into a plan over 2/3 of consumers still had a substantial portion of their debt unsettled. During that three year period the amount of the debt is likely to have ballooned due to late fees and charges to include legal fees. Any potential savings from negotiation is easily offset by the growth of the debt. Colorado, one of the first states to enact a version of the UDMSA, had early data showing less than 10 percent of consumers who entered into a debt settlement plan completed the plan.

Because of widespread complaints by consumers of debt settlement services and numerous enforcement actions by Federal and state authorities, including the AGO, the TSR was expanded to encompass most of the services provided by the debt settlement industry and required that providers could not collect any money until they have settled or otherwise resolved at least one of the debts with a creditor, the debtor agreed to the settlement and has made at least one payment under the settlement. The TSR also provides that any trust account a Providers requires a debtor to use will be separate and independent from the Provider and its affiliates.

After the TSR was amended in 2010, the National Conference of Commissioners on Uniform State Laws (NCCUSL) amended the UDMSA in 2011 to attempt to create a state law framework that would comply with the Federal Rule. SB 432 is largely based upon the 2011 UDSMA; however it does have some significant variations discussed below. Incorporating some or the model language from the 2011 UDSMA would provide clarity to SB 432 and provide greater consumer protection.

American Fair Credit Council comments:

I believe it's important to note, for the Committee in particular, that while this bill is styled as a "uniform" bill to regulate the industry it is, in fact, anything but uniform. Please note the following:

- The UDMSA has been enacted in only six states (Colorado; Delaware; Nevada; Rhode Island; Tennessee; and Utah). However, each state has adopted substantial and very material variations from the form adopted in other states. For example, Delaware has a fee cap of 18 percent of enrolled debt, whereas Colorado and Utah have no fee cap at all and Rhode Island has a fee cap of 30 percent of savings. Colorado and Delaware treat the fees charged by third-party service providers as attributable to the provider, whereas the other states do not. There are many other state-specific variations but the point is this: this is not a uniform act.
- The UDMSA tries, and fails, to regulate two completely different businesses, with two completely different business models, in one bulky statute.
- Lawyers are exempted from the UDMSA, which has resulted in the rise of the "legal model," where a lawyer will team up with a debt settlement services provider and circumvent both the UDMSA and the Federal Trade Commission rules.

Since the FTC rules went into effect, no state has introduced the UDMSA. Washington was considering the bill this year but concluded that it was not necessary and tabled the legislation. New Jersey has been considering the UDMSA for the past two years with no legislative action at all. No other state has introduced the UDMSA. Interestingly, in a conversation I had on February 16, 2012, with Nicole Jubal, a staff lawyer with the Uniform Law Commission, I was told that the ULC has decided not to actively promote adoption of the UDMSA. In sum, the FTC action has rendered the UDMSA in its current form obsolete and, it would seem, the ULC agrees.

ADMINISTRATIVE IMPLICATIONS

The Attorney General will be required to administer portions of the statute through January 1, 2017 when the delayed provisions will become effective and will be administered by the Financial Institutions Division as the Administrator. The Administrator will be required to promulgate rules establishing policy and clarifying statutory provisions. Other states that have enacted a version of the UDSMA indicate that it requires significant staff and resources to administer and enforce.

TECHNICAL ISSUES

SB 432 would provide consumer protection and clarity for both the Provider and the debtor by requiring that the Provider always send the debtor a written copy of the disclosures, agreements and accounting. In the alternative, remove the language of "harassment" so that a debtor can receive access to their documents without a subjective determination by the Provider.

The 2011 UDMSA utilizes the language of "a concession" by the creditor rather than the language used in SB 432 of "a change in the terms of a debt." Whereas, a "change in terms" could be a negative consequence to the debtor such as an increased fee or increased interest rate the term "concession" denotes that there has been a change the is beneficial to the debtor.

The prohibition on up-front fees is imprecise in describing situations where the agreement is for multiple debts with multiple creditors and whether obtaining an agreement with one creditor triggers the ability to collect fees calculated based upon that single settlement or more problematically opens the door to the collection of fees for all debts, even those that have not yet been settled. The language could be clarified with an additional paragraph:

(D)(2)(c) The provider is only able to collect fees based upon the services provided on a settled debt as described in (a) and (b) above.

RM/blm:svb