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FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/11
 LAST UPDATED 03/01/11 HB 313/HJCS

SPONSOR HJC

SHORT TITLE Enact "Uniform Debt-Management Services Act" SB _____

ANALYST Wilson

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY13	FY14	FY15		
		\$6.0-\$8.0	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

Duplicates, Relates to, Conflicts with, Companion to

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	FY15	Recurring or Non-Rec	Fund Affected
Total	\$112.0	\$224.0	\$224.0	\$224.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 174

SOURCES OF INFORMATION

LFC Files

Response Received From

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute to House Bill 313 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 \$50,000 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 intrust; 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

This bill sets up a new program within the FID. In order to implement HB 313, FID estimates the following expenses:

Court, Municipal, and License Clerk A	\$ 36,000
Administrative/Operations Manager II	\$ 80,000
Financial Examiner A	\$ 68,000
Operating expenses	\$ <u>40,000</u>
	\$224,000

FID will be required to oversee compliance with all of the provisions of the bill beginning January 1, 2012. Even though licensure does not become mandatory until January 1, 2015. FID will need an appropriation for staffing for one half of fiscal year 2012, and full appropriations yearly thereafter. Revenues will not be realized until the last half of Fiscal year 2015.

RLD notes the bill provides that the Act does not apply to an employee or agent of the provider. There should be some level of certification and fee requirements for employees and agents of the provider or else there will be a significant flaw in consumer protection and the enforceability of this law. Optimistically, renewal licensing fees at currently proposed levels will cover estimated staffing and operational costs only if the population of licensees exceeds 1,120.

The Bill does not identify who the hearing officer will be relevant to hearings regarding denial, renewal, suspension or revocation of a registration. If this is a judicial officer, or if appeal to court follows a negative ruling by an administrative officer, case increase and fiscal impact can be expected.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. Any additional fiscal impact on the judiciary would be proportional to any increased filing of actions pursuant to appeals of application denials by providers or administrative or private enforcement against providers in violation of the Act. AOC is currently working on possible parameters to measure resulting case increase.

SIGNIFICANT ISSUES

New Mexico laws may allow practices that would be prohibited under tighter federal regulations enacted in reaction to the national economic crisis.

The substitute makes technical changes throughout and fleshes out the meaning of “legal services” that are excluded from coverage by the Act to provide that such services are legal services in the traditional sense, in the “ordinary course of the attorney’s business” or bona fide legal services representing the client in relation to the client’s creditors/debt collectors and conforming to all “applicable standards of professional responsibility,” including diligence and obligations relating to fee-sharing with non-lawyers. The substitute makes it clear that the mere fact that a lawyer is involved does not except the activity from the Act if the services are essentially debt management services and if, for example, the real intermediary between the clients and creditors is a non-lawyer.

The substitute clarifies that the Act extends to indirect, as well as direct, debt management services provided to New Mexicans no matter where the provider is located, as well as to lead generators and any delegate of the provider. The “delayed” effective date is Jan. 1, 2015, after which all debt service providers must be registered pursuant to the Act. Before the delayed effective date of the Act, Administrator functions under the Act are to be handled by the AG, not the Administrator. The substitute lays out transition obligations of the AG to the Administrator after the delayed effective date, except that the AG may retain ongoing investigations and related records and bonds if in the public interest. The AG and Administrator shall promulgate rules and procedures to carry out functions under the Act.

The substitute adds language to the application and renewal requirements to include additional requirements, such as a certificate of good standing, for entities formed in a jurisdiction other than New Mexico. The substitute also clarifies what type of civil or criminal pleas, judgments, convictions, litigation or administrative or enforcement actions (including for violations of federal or state securities laws or of this Act) must be disclosed in the application and can be the basis for denial of registration or renewal or for suspension or revocation. The substitute expands bond requirements to cover all periods of time during which debt management services are provided to New Mexicans and raises the required surety bond to \$250,000.

The substitute adds that debt management agreements cannot exclude class actions as a mode of dispute resolution, but removes from the private enforcement section the remedy of a civil action to recover monies paid or deposited on behalf of the individual pursuant to the agreement.

ADMINISTRATIVE IMPLICATIONS

The Administrator will be required to promulgate rules establishing policy and clarifying statute with regard to certain licensing requirements such as bond amounts, application forms, educational or counseling services fees furnished by providers, charges incurred to conduct examinations, expert witness fees and other rules to implement the provisions of the Act.

The AGO will have to receive and maintain notices when a registrant is being sued by an individual.

RELATIONSHIP

The substitute for HB 313 is related to disclosure requirements to debtors in HB 174, the Foreclosure Fairness Act.