

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2682

SPONSOR: Senators Aronberg and Atwater

SUBJECT: Credit Counseling Services

DATE: March 25, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>CM</u>	_____
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 2682 creates part IV of ch. 817, F.S., to provide requirements for credit counseling services in Florida. The bill prohibits a credit counselor or debt manager from accepting an initial consultation fee of over \$50. Subsequently, the credit counselor or debt manager may only charge either additional yearly consultation fees of \$120 or more, or abide by a services fee cap of the greater of 7.5 percent of the monthly payment made by a debtor to the debt manager for disbursement to creditors or \$35 per month. Certain entities are excluded from the provisions of the bill. The bill creates financial auditing and bonding requirements for credit counselors and debt managers. The bill states that violation of the bill's provisions is an unfair or deceptive trade practice as defined in part II of ch. 501, F.S. A violator is subject to the penalties contained in that part. The bill establishes that consumers harmed by a violation of the bill may bring an action for recovery of damages, costs, and attorney's fees. A person convicted of violating any provision of the section commits a third-degree felony punishable as provided in ss. 775.082 and 775.083, F.S.

This bill creates the following sections of the Florida Statutes: 817.801, 817.802, 817.803, 817.804, and 817.805.

II. Present Situation:

Credit counseling organizations generally attempt to assist people with managing their personal debt. Such organizations may attempt to help debtors avoid foreclosure and bankruptcy, reduce interest rates, and lower or consolidate monthly payments. Credit counseling organizations may also offer individual counseling for developing budgets, managing money, using credit, and building a savings plan.

Debt Management Plans are often provided by credit counseling organizations as a way of allowing a debtor to pay down debt through monthly deposits to the credit counseling service, which then distributes these funds to creditors. Credit counseling services often advertise that they work with clients to create a debt repayment plan that minimizes monthly payments, interest and related fees.

Some credit counseling organizations have engaged in practices that are considered harmful to consumers. One such practice is when the counseling organization takes a debtor's first payment(s)—which the debtor thinks will go to his creditors—and keeps most or all of it as an up front “fee” for its services. Unbeknownst to the debtor, his creditors are not receiving payments and defaults or other negative consequences may result.

Credit counseling organizations are not directly regulated in Florida. However, a number of federal and state laws currently exist that have been used to prosecute fraudulent, deceptive, or restrictive practices that some organizations have engaged in.¹ The Federal Credit Repair Organizations Act² (CROA) bans credit counseling organizations from making false or misleading statements, places a ban on advance payment for services, and requires a written contract and right of cancellation for the consumer. The Florida Credit Service Organizations Act³ (FLCSOA) regulates contract provisions, requires written disclosures to consumers, prohibits consumer waivers of the Act, and provides civil and criminal penalties. However, non-profit organizations are exempt from both of these laws. As a result many credit counseling organizations have obtained non-profit status from the Internal Revenue Service (IRS).

Credit counseling services have been granted non-profit status by the IRS usually because they offer consumer education services.⁴ Although these corporations have this status, this does not mean they fail to make money. Many creditors pay recovery fees or “fair share” payments to non-profit credit counselors for providing an alternative means of debt collection. Additionally, such organizations ask that consumers provide them with donations or fees for their services, which provides a second source of income. Non-profit credit counseling organizations can be prosecuted under the Federal Trade Commission Act,⁵ (FTC) which prohibits unfair competition and deceptive practices, and the Florida Deceptive and Unfair Trade Practices Act,⁶ which bans unfair means of competition, and unfair or deceptive trade practices and incorporates many provisions of the FTC Act. Provisions exist in federal and state law to prosecute credit counseling organizations that engage in unfair practices, but currently such businesses are not regulated by any state agency, and there are no laws in Florida that specifically regulate the practices of credit counseling organizations.

¹ Marta Lugones Moakley, *Credit Repair Organizations After Regulation: Wolves in Nonprofit's Clothing?*, THE FLORIDA BAR JOURNAL, July/August 2003, at 28.

² 15 U.S.C. § 1601 *et seq.*

³ Part III of ch. 817, F.S.

⁴ See fn. 1 at pg. 33.

⁵ 15 U.S.C. §45(a)(1)

⁶ Florida Statutes §501.201 *et seq.*

III. Effect of Proposed Changes:

Section 1. Creates part IV of ch. 817, F.S., which consists of sections 817.801, 817.802, 817.803, 817.804, 817.805, and 817.806, for the regulation of credit counseling services in Florida. Definitions of terms (“credit counseling services,” “debt management services,” “person,” and “credit counseling agency”) for purposes of part IV are contained in s. 817.801, F.S.

Provisions regarding unlawful fees and costs are enumerated in s. 817.802, F.S. The bill states that a credit counselor or debt manager may not impose or accept from a debtor residing in Florida a fee or contribution in excess of \$50 for an initial consultation or set up. After the initial consultation or set up, a credit counselor or debt manager may impose or accept additional fees in only one of two ways. The first is by either collecting a maximum \$120 per year for additional consultations. The second is by deducting 7.5 percent of the monthly amount paid by the debtor for purposes of debt management services as defined in s. 817.801(2)(b), F.S. or \$35 per month, whichever is greater. The cap does not prevent additional reasonable charges from being imposed on the debtor for insufficient funds transactions.

Exceptions are provided for various parties in s. 817.803, F.S., which states that part IV does not apply to debt management or credit counseling services provided in the course of the practice of law in this state. The bill also does not apply to persons or entities who incidentally engage in debt adjustment to adjust the debt owed to that person or entity. Also, exemptions are created for the following entities and their subsidiaries: the Federal National Mortgage Association, the Florida Housing Finance Corporation and the Federal Home Loan Mortgage Corporation, as well as public corporations created in s. 420.504, F.S., banks, bank holding companies, trust companies, savings and loan associations, credit unions, credit card banks, or savings banks that are regulated by the federal Comptroller, Office of Thrift Supervision, Federal Reserve, the Federal Deposit Insurance Corporation, the National Credit Union Administration, or the Florida Department of Financial Services.

Financial auditing and insurance requirements are established by s. 807.804, F.S. The section requires any person engaged in debt management to obtain from a certified public accountant an annual audit of all accounts in which the funds of debtors are deposited and from which payments are made to creditors. A second requirement established by the section is that a person engaged in debt management or credit counseling must obtain a fidelity bond for employee dishonesty, depositor’s forgery or computer fraud of at least \$100,000 or 10 percent of the monthly average for the immediately preceding 6 months of the aggregate amount of all deposits made by all debtors with the debt manager or credit counselor, whichever is greater. The amount of the bond is not required to exceed \$500,000. The coverage deductible must not exceed 10 percent of the policy coverage amount. The policy must be issued by a company rated at least “A-” or its equivalent by a nationally recognized rating organization, and the policy must provide for 30 days advance written notice for termination of the policy. A copy of each year’s audit and the insurance policy must be available for public inspection at each branch location, and copies must be made upon written request for any party requesting a copy for a charge not to exceed the cost of the reproduction of documents.

Section 817.805, F.S., requires that any person engaged in debt management or credit counseling services must disburse all funds received from a debtor to the appropriate creditors within 30 days after receiving the funds, minus appropriate fees. Fees received from a creditor by a debt manager or credit counselor must be deposited in a separate trust account.

The section establishes that a violation of the chapter is an unfair or deceptive trade practice as defined in part II of chapter 501, F.S., and subject to the penalties provided therein. Also, a consumer injured by a violation of this part may bring an action for recovery of damages and may recover actual damages (that are no less than the amount paid by the debtor to the credit counseling organization), plus reasonable attorney's fees and costs. Any person who violates any provision of this section commits a third degree felony, punishable as provided in ss. 775.082 and 775.083, F.S.

Section 2. Provides that the act takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill should benefit consumers in this state by placing limitations on the fees they can be charged by credit counseling services. The provisions of the bill providing for criminal and civil penalties should also benefit consumers by helping to ensure that the provisions of the bill are followed by credit counseling organizations.

The bill imposes fee caps for consultations and monthly charges, which may reduce the revenues of some credit counseling services. The bill also requires credit counseling or debt management firms to maintain a fidelity bond and perform financial audits.

C. Government Sector Impact:

The bill will have no fiscal impact on the Office of Financial Regulation (OFR).

VI. Technical Deficiencies:

The provisions of s. 817.805, F.S., created by the bill have inconsistent references. Subsection two states that any violation of the “chapter” is an unfair or deceptive trade practice. The bill also states that consumers injured by this “part” may bring an action against the credit counselor. Finally, violations of this “section” are considered a third degree felony.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.
