

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/CS/SB 2682

SPONSOR: Commerce, Economic Opportunities, and Consumer Services Committee, Banking and Insurance Committee, Senator Aronberg, and others

SUBJECT: Credit Counseling Services

DATE: April 14, 2004 REVISED: _____

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

I. Summary:

Committee Substitute for Committee Substitute for Senate Bill 2682 creates a framework for, among other things, the regulation of the relationship between a consumer and a credit counseling or debt management service. The committee substitute prohibits a credit counselor or debt manager from accepting an initial consultation fee of over \$50. Subsequently, the credit counselor or debt manager may charge additional yearly consultation fees of no more than \$120, or must abide by a service fee cap of 7.5 percent of the monthly payment made by a debtor to the debt manager for disbursement to creditors or \$35 per month, whichever is greater. The committee substitute excludes certain entities from its provisions. The committee substitute requires a credit counseling or debt management service to be audited annually, and also requires a credit counseling or debt management service to obtain insurance coverage for employee dishonesty, depositor's forgery, and computer fraud. A credit counseling or debt management service is required to disburse a consumer's funds to a creditor within 30 days of receipt of those funds. A violation of the committee substitute's provisions is an unfair or deceptive trade practice under the Florida Deceptive and Unfair Trade Practices Act. Consumers harmed by a violation of the committee substitute may bring an action for recovery of damages, costs, and attorney's fees. A person who violates any provision of the committee substitute commits a third-degree felony punishable by not more than 5 years in prison or by a fine of not more than \$5,000.

This committee substitute creates the following sections of the Florida Statutes: 817.801, 817.802, 817.803, 817.804, 817.805, and 817.806.

II. Present Situation:

Credit counseling organizations generally attempt to assist people with managing their personal debt. These organizations may attempt to help debtors avoid foreclosure and bankruptcy, reduce loan interest rates, and lower or consolidate monthly loan 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 those 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.

Credit counseling organizations are sometimes granted non-profit status by the Internal Revenue Service based upon the consumer education services provided by the organization.¹ Non-profit credit counseling organizations use various methods for producing income for the organization. Many creditors pay recovery fees or “fair share” payments to non-profit credit counseling organizations for providing an alternative means of debt collection. Additionally, credit counseling organizations may request donations from consumers or fees for their services.

Some practices engaged in by credit counseling organizations may exacerbate a consumer’s existing financial problems. One example of such a practice is when a credit counseling organization receives a debtor’s initial payment and applies most or all of it to an up front “fee” for services.² The debtor may not realize that his or her creditors have not received payment, which in some cases may result in a default or other negative consequences for the debtor.

Credit counseling organizations are not directly regulated in Florida. However, a number of federal and state laws currently exist that may be used to prosecute fraudulent, deceptive, or restrictive practices engaged in by some organizations. The Federal Credit Repair Organizations Act³ (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 Act⁴ regulates contract provisions, requires written disclosures to consumers, prohibits consumer waivers of the provisions of the act, and provides civil and criminal penalties. However, non-profit credit counseling organizations are exempt from both laws. But, non-profit credit counseling organizations may be prosecuted under the Federal Trade Commission Act,⁵ which prohibits unfair competition and deceptive practices, and under the Florida Deceptive and Unfair Trade Practices Act,⁶ which bans unfair means of competition, and unfair or deceptive trade practices.

¹ Marta Lugones Moakley, “Credit Repair Organizations After Regulation: Wolves in Nonprofits’ Clothing?” *The Florida Bar Journal*, July/August 2003, at 28, 33.

² *Id.* at 30.

³ 15 U.S.C. § 1601 *et seq.* (2000).

⁴ Chapter 817, F.S., part III.

⁵ 15 U.S.C. § 45(a)(1) (2000).

⁶ Chapter 501, F.S., part II.

III. Effect of Proposed Changes:

This committee substitute establishes a framework for, among other things, the regulation of the relationship between a consumer and a credit counseling or debt management service.

Unlawful Fees and Costs

The committee substitute provides that it is unlawful for a credit counselor or debt manager to impose or accept from a debtor a fee or contribution in excess of \$50 for an initial set up or consultation. After the initial set up or consultation, a credit counselor or debt manager may receive additional fees by either charging not more than \$120 per year for additional consultations, or by deducting 7.5 percent of the monthly amount paid by the debtor for disbursement to a creditor or \$35 per month, whichever is greater. The cap does not prevent additional reasonable charges for an insufficient funds transactions.

Disbursement of Funds

The committee substitute 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, less any fees. Fees received from a debtor by a debt manager or credit counselor for disbursement must be deposited in a separate trust account.

Disclosure, Financial Reporting, and Insurance Requirements

The committee substitute requires that any person engaged in debt management or credit counseling must obtain from a certified public accountant an annual audit of all its accounts in which the funds of debtors are deposited and from which payments are made to creditors. Additionally, a person engaged in debt management or credit counseling must obtain insurance coverage for employee dishonesty, depositor's forgery, and computer fraud in an amount not less than \$100,000 or 10 percent of the monthly average of the aggregate amount of all deposits made for distribution to creditors with such person by all debtors for the six months immediately preceding the date of initial application for or renewal of the insurance. The coverage deductible must not exceed 10 percent of the policy coverage amount. 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 provided, upon written request, to any party requesting a copy for a charge not to exceed the cost of the reproduction of documents.

Exceptions

The committee substitute states that its provisions do not apply to debt management or credit counseling services provided in the practice of law in this state. The committee substitute also does not apply to persons who engage in debt adjustment to adjust the debt owed to that person. Also, exemptions are created for the following entities and their subsidiaries: the Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; the Florida Housing Finance Corporation, a public corporation created in s. 420.504, F.S.; or a bank, bank holding company, trust company, savings and loan association, credit union, credit card bank, or savings bank that is regulated by the federal Office of the Comptroller of Currency, the Office of

Thrift Supervision, the Federal Reserve, the Federal Deposit Insurance Corporation, the National Credit Union Administration, or the Florida Department of Financial Services.

Violations

A violation of the committee substitute's provisions is an unfair or deceptive trade practice as defined in part II of ch. 501, F.S., which is the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), and subject to the penalties provided for in FDUTPA. Also, a consumer injured by a violation of the committee substitute's provisions may bring an action for recovery of damages and may be awarded actual damages, which award can be no less than the amount paid by the consumer to the credit counseling agency, plus reasonable attorney's fees and costs. Any person who violates any provision of the committee substitute also commits a third-degree felony, punishable by not more than 5 years in prison or not more than a fine of \$5,000.

Definitions

The committee substitute defines the following:

- "Credit counseling services," which means confidential money management, debt reduction, and financial educational services;
- "Debt management services," which means services provided to a debtor by a credit counseling agency for a fee to:
 - Effect the adjustment, compromise, or discharge of any unsecured account, note, or other indebtedness of the debtor; or
 - Receive from the debtor and disburse to a creditor any money or other thing of value; and
- "Credit counseling agency," which means any organization providing debt management services or credit counseling services.

Effective Date

The committee substitute takes effect July 1, 2004.

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 committee substitute may benefit consumers in this state by placing limitations on the fees that may be charged by credit counseling or debt management services.

The committee substitute imposes fee caps for consultations and monthly charges which may reduce the revenues of some credit counseling services. The committee substitute also requires credit counseling or debt management service firms to obtain insurance and perform financial audits.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.