

Act No. 255
Public Acts of 2000
Approved by the Governor
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**STATE OF MICHIGAN
90TH LEGISLATURE
REGULAR SESSION OF 2000**

Introduced by Senators Johnson, Emmons, Shugars and Dunaskiss

ENROLLED SENATE BILL No. 664

AN ACT to amend 1975 PA 148, entitled "An act to regulate the business of debt management; to require licenses and to fix fees therefor; to prescribe the powers and duties of the department of commerce and its director; to prescribe conditions for debt management contracts; to provide for the disposition of revenues; to provide penalties; and to repeal certain acts and parts of acts," by amending sections 2, 3, 4, 5, 6, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 22 (MCL 451.412, 451.413, 451.414, 451.415, 451.416, 451.418, 451.421, 451.422, 451.423, 451.424, 451.425, 451.426, 451.427, 451.428, 451.429, and 451.432).

The People of the State of Michigan enact:

Sec. 2. As used in this act:

(a) "Business of debt management" means providing or offering to provide debt management to 1 or more residents of this state.

(b) "Counselor" means an employee or agent of a licensee who engages in counseling and budget analysis functions and scheduling of debtor's funds.

(c) "Creditor" means a person for whose benefit money is being collected and disbursed by a licensee. A licensee is not a creditor for purposes of this act.

(d) "Debt management" means the planning and management of the financial affairs of a debtor and the receipt of money from the debtor for distribution to a creditor in payment or partial payment of the debtor's obligations.

(e) "Debtor" means a person from whom money is being collected for the benefit of a creditor of the debtor.

(f) "Department" means the office of financial and insurance services.

(g) "Director" means the commissioner of the department or his or her authorized representative.

(h) "Fees and charges of the licensee" means the total amount of money to be charged a debtor by the licensee, including the \$25.00 initial payment and any charges for advice, materials, or referrals.

(i) "License" means a written certificate or exemption order issued by the director.

(j) "Licensee" means a person licensed under this act to perform debt management services and located inside or outside the boundaries of this state.

(k) "Office" means each location by street name, building number, city, and state where a person engages in the business of debt management.

(l) "Office manager" means an employee or owner charged with the supervision, oversight, or approval of the functions of budget analysis, counseling, or scheduling.

(m) "Person" means an individual, corporation, partnership, association, joint stock company, trust where the interests of the beneficiaries are evidenced by a security, limited liability company, or other legal entity.

(n) "Sweep arrangement" means an arrangement that provides for a temporary or permanent transfer of funds from 1 trust account to another trust account when a predetermined time, account balance, or other condition occurs or is fulfilled.

Sec. 3. (1) Except as provided in subsection (2), a person engaged in the business of debt management is rendering a financial planning service and must obtain a license under this act.

(2) Subsection (1) does not apply to the following when engaged in the regular course of their respective businesses and professions:

(a) An attorney at law, if providing debt management advice incidental to his or her law practice.

(b) A certified public accountant, if providing debt management advice incidental to his or her accounting practice.

(c) A bank, fiduciary, savings and loan institution, or credit union duly authorized and admitted to transact business in this state and performing credit and financial adjusting service in the regular course of its principal business.

(d) A title insurer or abstract company, while doing an escrow business.

(e) An employee or agent of a licensee, acting solely in the capacity of agent for the licensee.

(f) A judicial officer or person acting under court order.

Sec. 4. (1) After January 1, 1976, a person located within or outside of the boundaries of this state shall not engage in the business of debt management without first obtaining a license as required in this act. A contract of debt management as defined by this act made by a person without a license is null and void.

(2) A person who is performing a debt management service and receiving compensation primarily from governmental organizations, governmentally sponsored organizations, charitable trusts, or foundations tax exempt pursuant to section 501(c) of the internal revenue code of 1986, upon a showing of safeguards in the handling of debtor funds, may be granted an exemption from any provision of this act if the exemption is found to be in the public interest.

Sec. 5. (1) An applicant for a license to engage in the business of debt management shall file an application with the director in writing and under oath that includes all of the following:

(a) The name and exact address of the applicant and the name and address of each of the following, as applicable:

(i) If the applicant is a corporation, its officers and directors.

(ii) If the applicant is an association, its officers and directors.

(iii) If the applicant is a partnership, its partners.

(iv) If the applicant is a limited liability company, its manager or managers.

(v) If the applicant is any other legal entity, its manager or other person designated to control the operation of that legal entity.

(b) A copy of a certificate of an assumed name, if applicable.

(c) One or more of the following, as applicable:

(i) If the applicant is a corporation, a copy of the articles of incorporation.

(ii) If the applicant is an association, a copy of the organizational documents of the association.

(iii) If the applicant is a partnership, a copy of the partnership agreement.

(iv) If the applicant is a limited liability company, a copy of the articles of organization.

(2) Upon filing the application, the applicant shall do all of the following:

(a) Pay to the department a license fee of \$50.00 for each office.

(b) Pay to the department an investigation fee of \$50.00.

(c) Furnish a surety bond to the people of the state of Michigan. The amount of the surety bond must equal or exceed the total amount of Michigan clients' funds in the applicant's or licensee's trust account at the time of application for license or renewal, as determined by the department, but in no event shall a surety bond be less than \$25,000.00 or be greater than \$100,000.00. The surety bond shall be conditioned upon the faithful accounting of all money collected upon accounts entrusted to a licensee engaged in the business of debt management or the licensee's employees and agents. The surety bond shall be approved by the department. In lieu of a surety bond, the department may by rule provide for an appropriate deposit of cash or securities, a letter of credit, or the assignment of coverage of other bonds if the department is satisfied that comparable or more extensive coverage results.

(d) File an appointment of the director as the agent of the applicant for service of process in this state.

(3) Service of process upon the director shall be considered service upon an applicant or licensee, including an applicant who complies with or fails to comply with subsection (2)(d).

(4) Unless surrendered, revoked, or suspended, a license issued under this act expires on December 31 of the year for which it is issued. A licensee may renew a license before the expiration date as provided under this act.

(5) A licensee shall create, maintain, and preserve accurate and complete books and records relating to the licensee's business. The books and records shall be maintained according to generally accepted accounting principles. A licensee or an applicant shall notify the department in writing of the address where the books and records are kept. If a licensee changes the location of the books and records, the licensee shall notify the department in writing within 10 business days after the change. The director may prescribe by rule or order the form and contents of books and records relating to a licensee's business.

(6) An applicant shall file a financial statement with an application for a debt management license. The director may require that the financial statement be audited or reviewed by an independent certified public accountant.

(7) If a licensee has a board of directors or the equivalent, the director shall not require that the licensee provide information concerning a member of the board of directors or equivalent, nor require that the member satisfy the examination provisions of this act, if that member does not receive a salary, stock dividend, or other financial benefit from that corporation other than reimbursement of the actual expenses incurred in carrying out the duties of a director of that corporation.

Sec. 6. (1) Upon receiving the application and approving the fees and surety bond, the department shall investigate the applicant's responsibility, experience, character, and general fitness. If the result of the investigation warrants a belief that the business will be operated fairly and honestly within the provisions of this act, the department shall issue a license. The investigation of the applicant shall at least include investigation of the following as applicable:

(a) If the applicant is a corporation, its officers and directors.

(b) If the applicant is a partnership, its partners.

(c) If the applicant is an association, its officers.

(d) If the applicant is a limited liability company, its manager or managers.

(e) If the applicant is any other legal entity, its manager or other person designated to control the operation of that legal entity.

(2) A license shall not be issued if the investigation reveals 1 or more of the following:

(a) That an individual investigated under subsection (1) meets any of the following:

(i) Was ever convicted of a crime involving moral turpitude including forgery, embezzlement, obtaining money under false pretenses, larceny, extortion, conspiracy to defraud, or any other similar offense.

(ii) Violated or failed to comply with this act or a rule promulgated under this act.

(iii) Had a license to engage in the business of debt management revoked or suspended for any reason other than failure to pay licensing fees in this state or another state.

(iv) Defaulted in the payment of money collected for others, including the discharge of debts through bankruptcy proceedings. The director may, at his or her discretion, waive this restriction if provided with evidence of justifiable cause for the bankruptcy, plus convincing evidence of the fitness of the bankrupt party to carry out his or her functions under this act.

(b) An individual applicant is not at least 18 years of age and a citizen of the United States.

(c) An applicant that is a partnership, corporation, limited liability company, association, or other legal entity required by statute to obtain authority to do business in this state has not been granted authority to do business in this state.

(d) The applicant is an employee or owner of a collection agency as defined in section 901 of the occupational code, 1980 PA 299, MCL 339.901, or process serving business or in any manner is affiliated with a collection agency or process

serving business. The director may, in his or her discretion, waive this restriction on a showing of sufficient safeguards in the operation of the collection agency.

(3) An applicant shall pass an examination administered by the director or his or her designee before the director grants a license to the applicant under this act. A counselor shall pass an examination within the first 180 days of employment administered by the director or his or her designee. The examination may be oral or written, or partly oral and partly written, and shall be practical in nature and sufficiently thorough to ascertain the applicant's fitness. Questions on bookkeeping, credit adjusting, business ethics, agency, contracts, debtor and creditor relationships, trust funds, and the provisions of this act and rules promulgated under this act may be included in the examination. The director may charge an examination fee of \$25.00 for administering this examination.

Sec. 8. Before December 1 of each year, a licensee shall file an application with the department for renewal of its license. The application shall be on the form prescribed by the department and shall be accompanied by a fee of \$50.00 for each office together with a surety bond in the same manner as an original application. The application shall cover each branch office that is under the ownership and control of the applying entity. Financial statements shall be filed with the application for renewal of a license. The director may require that the financial statements be audited or reviewed by an independent certified public accountant.

Sec. 11. All of the following apply to a license:

(a) The director shall prescribe the form and size of a license.

(b) A license shall show the name of the licensee and the address at which the business of debt management is to be conducted.

(c) A license shall show the date of expiration of the license as December 31, and show other information prescribed by the director.

(d) While in force, the license shall at all times be conspicuously displayed in the outer office of the licensee or branch office of the licensee.

(e) A license is not transferable or assignable.

(f) A license shall be surrendered to the department within 5 days after the date that the licensee either ceases to engage in the business of debt management or has its license revoked.

Sec. 12. Before a contract is formed between a licensee and a debtor, a thorough and written budget analysis shall be compiled and a copy delivered to the debtor. A licensee shall not accept an account unless a written and thorough budget analysis indicates that the debtor can reasonably meet the requirements required by the budget analysis. The budget analysis shall contain all of the following information about the debtor:

(a) Name and address.

(b) Marital status and number of dependents.

(c) Amount and source of all employment compensation, payments from government programs, child support and alimony payments, and other income.

(d) Number of exemptions claimed on the debtor's most recent federal income tax return.

(e) Gross income per pay period, type and amount of all payroll deductions, and net income per pay period.

(f) Monthly home mortgage or rental payment. If the home mortgage payment does not include an escrow for real estate taxes, the budget analysis shall contain the amount and due dates of the real estate taxes on the property.

(g) Type and amount of all other fixed periodic payments.

(h) Type and amount of food, clothing, utility, vehicle, insurance, and all other living expenses.

(i) List of creditors included in the plan.

(j) A description of and amount owed for any outstanding garnishments and judgments.

(k) Periodic amount available for payment toward a debt management plan.

Sec. 13. (1) Upon establishing a debt management plan for a debtor, a licensee may charge and receive an initial fee of \$25.00. However, unless 51% or more in number and dollar amount of all the debtor's creditors consent to the debt management program within 45 days of establishing the debt management plan, the fee shall be returned to the debtor and the debtor's account closed.

(2) Consent from a creditor shall be recorded on a separate form. The form shall contain all of the following:

(a) A list of all the creditors.

(b) The manner in which consent was sought.

- (c) The date of each contact.
- (d) The name of the person contacted, if applicable.
- (e) The response obtained from the person contacted.
- (f) Any revised or special conditions or arrangements that condition the consent.
- (g) The date on which the required consent was secured.

(3) The consent of a creditor may be sought by sending a notice of a debt management plan to a creditor by an appropriate means including by telephone, facsimile, electronic mail, or first-class mail. If the creditor does not respond within 14 days after the sending of the notice, it may be presumed that the creditor has given consent.

(4) If a payment under the debt management plan is sent to a creditor, acceptance of the payment or plan may be presumed 7 days after sending the payment.

Sec. 14. (1) A contract between a licensee and debtor shall include all of the following:

- (a) Each creditor to whom payments will be made and the amount owed each creditor.
- (b) The total amount of the licensee's charges.
- (c) The beginning and ending dates of the contract.
- (d) The number of months and the total principal amount plus approximate interest charges required to liquidate in full the debts, except mortgage or land contract interest payments, described in the contract.
- (e) The name and address of the licensee and of the debtor.
- (f) Other provisions or disclosures that the director determines are necessary for the protection of the debtor and the proper conduct of business by a licensee.

(2) Unless otherwise approved by the department and except for an amount due for 1 or more monthly fees or a closeout fee, a licensee shall distribute to the creditors of the debtor, at least monthly, all money received from a debtor or on behalf of a debtor.

Sec. 15. (1) Subject to subsection (5), payments received by a licensee from or on behalf of a debtor for the benefit of a creditor shall be held in trust in a separate account maintained for the benefit of the licensee's Michigan clients at a financial institution whose deposits are insured by an agency of the United States government. Disbursements whether to the debtor or to the creditors of the debtor shall be made from the trust account. A payment from a debtor or on behalf of a debtor shall be deposited in the account not later than 2 business days after receipt of the payment. A sweep arrangement may be utilized if the trust account is insured for 100% or more of the balance in the trust account.

(2) The trust account shall be reconciled not less than once a month. The reconciliation shall ascertain the actual cash balance in the account and compare it with the sum of the escrow balances in each debtor's account. The reconciliation may be done electronically or by any other appropriate method and shall be done not more than 45 business days after receipt of the bank statement. An electronic or other appropriate notation of the reconciliation shall be kept as a permanent record of the licensee and shall be considered as in compliance with this section. Each trust account shall be individually scheduled in a licensee's reconciliation records.

(3) The trust account shall at all times have an actual cash balance equal to or greater than the sum of the escrow balances of each debtor's account, and failure to maintain that amount is cause for a summary suspension of the license.

(4) If a trust account fails to contain sufficient funds to cover the debtor escrow balances, the licensee shall immediately upon discovery notify the director by telephone, facsimile, electronic mail, or other method approved by the department. The licensee shall also provide written notice including a description of the remedial action taken.

(5) If the trust account described in subsection (1) is maintained at a financial institution described in subsection (1) located outside of this state, the licensee shall furnish a surety bond or irrevocable letter of credit to the people of the state of Michigan in an amount equal to or exceeding 100% of the average amount of deposits held in the trust account from month to month and in a form approved by the department. This requirement is in addition to an applicant's obligation under section 5(2)(c).

Sec. 16. A licensee shall do all of the following:

- (a) Create and maintain records of the accounts, correspondence, memoranda, papers, books, and other records of the debt management business. If the licensee elects not to retain original records, the licensee may utilize electronic, photocopy, or computerized methods of record keeping. The licensee shall preserve the records created under this subdivision for at least 6 years after they are created.
- (b) Make all the records created and maintained under subdivision (a) available for examination by examiners of the department.
- (c) Upon contracting with a debtor, give a copy of the contract to the debtor.

(d) Deliver a receipt to a debtor upon receiving cash from a debtor or within 3 business days after receiving a noncash payment from a debtor, and at least monthly beginning with the first month after contracting with a debtor deliver a statement that includes the dates and amounts received and disbursed on behalf of the debtor.

(e) Within 5 business days after a request from a debtor, provide a written statement that includes all of the following:

- (i) All transactions concerning the money received from or on behalf of the debtor.
- (ii) The total amount paid to each creditor.
- (iii) The total amount of charges deducted from the payments received.
- (iv) The amount held in reserve.

(f) At least every 90 days after contracting with a debtor, provide a written statement to the debtor that includes all of the following:

- (i) The total amount received from and on behalf of the debtor.
- (ii) The total amount paid to each creditor.
- (iii) The total amount deducted from the payments received.
- (iv) The amount held in reserve.

(g) At least annually, verify or cause the verification of payments to selected creditor accounts and do or designate 1 or more persons to do all of the following:

- (i) Review each debtor's account file.
- (ii) Review checks paid by the licensee.
- (iii) Review procedures used by the licensee for processing checks and handling cash.
- (iv) Review the complaint file maintained by the licensee.
- (v) Verify payments to selected creditor accounts.
- (vi) Review selected counselor records and work papers.

(h) If a contract with a debtor is lawfully sold, transferred, or assigned to a licensee from another licensee, furnish to the debtor a written notice of the sale, transfer, or assignment. The notice shall contain the name and address of the licensee and the name of the counselor authorized by the licensee to manage the contract.

Sec. 17. The department may examine, without notice, the condition and affairs of a licensee. In connection with an examination, the department may examine on oath a licensee and any director, officer, employee, customer, creditor, manager, member, partner, or stockholder of the licensee concerning the affairs and business of the licensee. The department shall ascertain whether the licensee transacts its business in the manner prescribed by this act and the rules promulgated under this act. The licensee shall pay the actual cost of the examination as determined by the department, which fee shall be deposited in the state treasury to the credit of the department. Failure to pay the examination fee within 30 days after receipt of demand from the department shall automatically suspend the license of the licensee until the fee is paid.

Sec. 18. (1) A licensee may charge a reasonable fee under a debt management services contract. The fees and charges of the licensee shall not exceed 15% of the amount of the debt to be liquidated during the express term of the contract. The licensee may require the debtor to make an initial payment of not more than \$25.00, which is part of the fees and charges of the licensee. The initial payment may be deducted from the amount of a subsequent fee that is amortized, if any.

(2) Except for a cancellation described in subsection (3), for which a licensee may not collect the additional fee described in this subsection, in the event of cancellation or default on the performance of the contract by the debtor before its successful completion, the licensee may collect \$25.00 in addition to fees and charges of the licensee previously received. This \$25.00 fee is not subject to the 15% limitation on fees and charges of the licensee in subsection (1).

(3) A contract is in effect when it is signed by the licensee and the debtor and the debtor has made a payment to the licensee. The debtor has the right to cancel the contract until 12 midnight of the third business day after the first day the contract is in effect by delivering written notice of cancellation to the licensee.

(4) If a debtor fails to make a payment to a licensee within 60 days after the date a payment is due under a contract, the contract is considered canceled by the debtor. A debtor may file a letter of continuation of a contract even if the debtor did not make a payment within 60 days after a payment was due. All of the following apply to a letter of continuation of a contract:

- (a) A debtor may file only 1 letter of continuation with a licensee for any contract.

(b) A letter of continuation must contain a detailed explanation of the reason or reasons for the missed payment or payments.

(c) A contract for which a letter of continuation that meets the requirements of this subsection is filed remains in effect and subject to cancellation for any future failure to make a payment or payments as described in this subsection.

(d) A contract between a licensee and a debtor shall clearly provide for 1 letter of continuation by a debtor.

(e) A debtor may not file a letter of continuation with a licensee at the beginning of a contract.

(5) A licensee shall not contract for, receive, or charge a debtor an amount greater than authorized by this act. A person who violates this subsection, except as the result of an inadvertent clerical or computer error, shall return to the debtor the amount of the payments received from or on behalf of the debtor and not distributed to creditors, and, as a penalty, an amount equal to the amount overcharged.

Sec. 19. A licensee shall not do any of the following:

(a) Purchase from a creditor any obligation of a debtor.

(b) Execute a contract or agreement to be signed by the debtor unless the contract or agreement is fully and completely filled in and finished.

(c) Lend money or credit except under a plan approved by the department.

(d) Take a confession of judgment or power of attorney to confess judgment against the debtor or appear as the debtor in a judicial proceeding.

(e) Receive or charge a fee in the form of a promissory note or other promise to pay, or receive or accept a mortgage or other security in real or personal property for a fee, or both.

(f) Take, concurrent with the signing of the contract or as a part of the contract or as part of the application for the contract, a release of an obligation to be performed on the part of the licensee.

(g) Offer, pay, or give any cash, fee, gift, bonus, premiums, reward, or other compensation to a person for referring a prospective customer to the licensee. A payment by the licensee for the lawful sale, transfer, or assignment of a contract to the licensee from another licensee is not subject to this subdivision.

(h) Receive any cash, fee, gift, bonus, premium, reward, or other compensation from a person other than the debtor or a person in the debtor's behalf in connection with the licensee's business of debt management, except under a plan approved by order of the department.

(i) Disclose the debtors who have contracted with the licensee other than to the director or his or her authorized representative, or disclose the creditors of a debtor to anyone other than the debtor, or the director or his or her authorized representative, or another creditor of the debtor and then only to the extent necessary to secure the cooperation of the creditor in a debt management plan.

(j) Use or permit the use of a false, misleading, or deceptive statement or representation with regard to the services or charges of the licensee in any advertisement, display, broadcast, or offer of the licensee's services.

(k) Use an advertisement that gives a telephone number or post office box without identifying the licensee and the licensee's office address.

(l) Use advertisements containing any of the following representations:

(i) That the licensee will provide funds to pay bills or prevent attachments.

(ii) That a certain payment schedule will handle a certain amount or range of indebtedness.

(iii) That garnishment, attachment, repossession, or loss of job will be prevented.

(m) Fail to provide to the debtor the full benefit of a compromise of a debt arranged by the licensee with a creditor.

(n) In connection with the making of a debt management contract or with operation of the debtor's account:

(i) Employ any device, scheme, or artifice to defraud.

(ii) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

(iii) Engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

(o) Conduct the business of debt management without a surety bond, or deposit or assignment satisfactory to the department in lieu of a surety bond, as described in section 5(2), in place.

Sec. 22. (1) The director may promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, make specific decisions, make orders and rulings that include demands and findings, and take other necessary action for the implementation and enforcement of this act.

(2) The director may in his or her discretion provide for electronic filing of any document filed with the director or department under this act.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate.

Sam E. Randall

Clerk of the House of Representatives.

Approved _____

Governor.