

## **BILL ANALYSIS**

C.S.S.B. 1112  
By: Eltife  
Financial Institutions  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Current law does little to address the modern, rapidly growing and changing credit counseling environment. While the related statute has not changed since 1967, the business of debt consolidation is now one of the nation's fastest growing, and largely unregulated, industries.

The Senate Committee on Business & Commerce studied the issue prior to the 79th Legislative Session and recommended that the legislature modernize laws concerning credit counseling and debt management. The committee further recommended that regulations be created with input from the office of the consumer credit commissioner so that consumers are protected from unscrupulous counseling services and misleading, deceptive, and harmful practices.

The purpose of this bill is to modernize the regulatory approach to credit counseling services in Texas by requiring credit counselors to register with the office of the consumer credit commissioner and to maintain certain standards to renew the registration on an annual basis.

C.S.S.B. 1112 provides for the regulation of debt management services.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that rulemaking authority is expressly granted to the Finance Commission in SECTION 1 (Section 394.204, 394.206, and 396.214, Finance Code) of this bill.

### **ANALYSIS**

C.S.S.B. 1112 amends Chapter 394, Finance Code, as follows:

The substitute provides that the purpose of this subchapter is to protect consumers who contract for services with debt management services providers. Requires the subchapter to be liberally construed to accomplish its purpose.

The substitute defines "advertising," "certified counselor," "commissioner," "consumer," "creditor," "debt management service," "debt management service agreement," "finance commission," "person," "provider," "secured debt," "trust account," and "unsecured debt."

The substitute provides that, except as otherwise provided by this subchapter, this subchapter applies to a provider regardless of whether the provider charges a fee or receives consideration for a service. Provides that the business of providing debt management services is conducted in this state if the debt management services provider solicits or contracts with consumers located in this state. Sets forth persons to which this subchapter does not apply. Provides that certain entities are not debt management services for the purposes of this subchapter. Provides that this subchapter applies to a person who seeks to evade its applicability by any device, subterfuge, or pretense.

The substitute prohibits a person, regardless of whether located in this state, from providing debt management service to a consumer in this state unless the person is registered with the consumer credit commissioner (commissioner). Provides that registration expires on December 31 of the year in which the registration occurs and is required to be renewed annually. Requires an application for an initial registration to be in a form prescribed by the commissioner and be accompanied by certain fees and information. Provides that an officer or employee of a person

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registered under this subchapter is not required to be separately registered. Requires the commissioner, unless the commissioner notifies the applicant that a longer period is necessary, to approve or deny an initial registration not later than the 60th day after the date on which the complete application is filed. Requires the commissioner to inform the applicant in writing of the reason for denial. Authorizes a person to renew a registration by paying the appropriate fee and completing all required documents. Authorizes the finance commission, by rule, to establish procedures to facilitate the registration and collection of fees under this section, including rules staggering throughout the year the dates on which fees are due. Authorizes the commissioner to refuse an initial application if the application contains errors or incomplete information. Sets forth reasons for which the commissioner is authorized to deny an initial application.

The substitute provides that, on written request, the applicant is entitled to a hearing, pursuant to Chapter 2001 (Administrative Procedure), Government Code, on the question of the applicant's qualifications for initial registration if the commissioner has notified the applicant in writing that the initial application has been denied. Prohibits a request for a hearing from being made after the 30th day after the date the commissioner mails a notice to the applicant stating that the application has been denied and stating the reasons for the denial. Authorizes the commissioner, in addition to the power to refuse an initial application, to suspend or revoke a provider's registration after notice and hearing if the commissioner finds that certain conditions are met. Requires the commissioner's order revoking a registration to include appropriate provisions to transfer existing clients of the provider to one or more registered providers to ensure the continued servicing of the clients' accounts. Requires the commissioner to maintain a list of registered providers and make the list available to interested persons and to the public.

The substitute requires a provider to keep and use books, accounts, and other records that will enable the commissioner to determine if the provider is complying with this subchapter and maintain any other records as required by the commissioner. Authorizes the commissioner to examine the records at any reasonable time. Requires the records to be kept for at least three years after the date of the last service on a consumer's debt management plan. Requires each provider to file a report with the commissioner at each renewal of the provider's registration. Requires the report, at minimum, to contain certain information in detail and under appropriate headings. Requires the reports to be verified by the oath of affirmation of the owner, manager, president, chief executive officer, or chairman of the board of directors of the provider. Requires the provider to file a blank copy of the agreement described in Section 394.209 and blank copies of the written information required in Section 394.208(a) with the commissioner accompanying the initial registration and each renewal of registration. Requires the commissioner to make the information provided under this section available to interested parties and to the public.

The substitute requires a provider to file a surety bond or evidence that the provider maintains an insurance policy in a form approved by the commissioner at the time the provider files an initial or renewal registration application with the commissioner. Requires the bond or insurance to meet certain requirements. Authorizes the finance commission, by rule, in lieu of a bond or insurance, to establish alternative financial requirements to provide substantially equivalent protection to pay damages and penalties to consumers directly harmed by a violation under this subchapter. Requires the commissioner to adjust the amount of the provider's bond or insurance only when the provider applies for renewal of registration and requests a review of the bond or insurance amount.

The substitute prohibits a provider from engaging in false or deceptive advertising.

The substitute prohibits a provider from enrolling a consumer in a debt management plan unless the provider meets certain requirements. Requires a provider to provide the debt management agreement in any language other than English in which the provider primarily discusses its services with a consumer. Requires a consumer to give at least 10 days' notice to the provider to cancel a debt management services agreement. Requires the provider to cancel a debt management services agreement within 10 days after the date the provider receives the notice from the consumer. Requires the provider to continue making disbursements to the consumer's creditors if money has been paid to the provider under the agreement until the expiration of the 10-day period, unless otherwise agreed in writing by the consumer and the provider. Authorizes a provider to provide the information required by Subsections (a)(2)(B), (E), and (F) through its Internet website if the provider meets certain requirements. Requires a provider,

including a provider that does business only or principally through the Internet, to maintain a telephone system staffed at a level that reasonably permits a consumer to access a counselor during ordinary business hours. Requires a provider to provide each consumer for whom it provides debt management services a written report accounting for certain monies related to the consumer's debt management plan. Requires the provider to provide the report under Sub section (f) on a certain schedule.

The substitute prohibits a debt management services provider from preparing a debt management services agreement before the provider has fully complied with Sections 394.208(a) and (b). Sets forth requirements for each debt management services agreement. Authorizes a debt management services agreement to contain a voluntary consumer arbitration provision or a voluntary mediation provision. Authorizes a provider to deliver the debt management services agreement through the Internet if the provider meets certain requirements. Prohibits the provider, if the provider discusses its services or negotiates with a consumer primarily in a language other than English, from beginning performance of a debt management plan until the provider and consumer sign a copy of the written agreement, provided by the debt management services provider, in that language and a copy is made available to the consumer.

The substitute prohibits a provider from imposing a fee or other charge on a consumer, or receiving payment from a consumer or other person on behalf of a consumer except as allowed under this section. Provides that, for the purposes of this section, fees or charges include both voluntary contributions and any other fees charged to or collected from a consumer on behalf of the consumer. Requires any fee charged by a provider to be fair and reasonable given the value of the products and services provided to the consumer, including consideration of the amount subject to debt management and the number of anticipated payments. Prohibits a fee or a portion of a fee that is specifically related to a debt management plan from being charged until the provider has complied with Sections 394.208(a) and (b) and 394.209. Authorizes a provider to charge a monthly maintenance fee if the fee is fair and reasonable. Requires a fee charged for a service other than a debt management service to be fair and reasonable.

The substitute requires a provider to use a trust account for the management of all money paid by or on behalf of a consumer for disbursement to the consumer's creditor. Prohibits a provider from commingling the money in a trust account established for the benefit of consumers with any operation funds of the provider. Requires a provider to exercise due care to appropriately manage the funds in the trust account. Requires the trust account to, at all times, be materially in balance with and reconciled to the consumers' accounts. Provides that failure to maintain that balance is cause for a summary suspension of registration under Section 394.204. Requires the provider, if a trust account does not contain sufficient money to cover the aggregate consumer balances, and the provider has not corrected the deficiency within 48 hours, to notify the commissioner by telephone, facsimile, electronic mail, or other method approved by the commissioner, and provide written notice including a description of the remedial action taken.

The substitute sets forth prohibitions for a debt management services provider. Provides that a provider does not have a claim for breach of contract against a consumer who cancels an agreement pursuant to this subchapter or in restitution with respect to an agreement that is void under this subchapter. Prohibits a provider from including certain provisions in a disclosure related to debt management services or in a debt management services agreement.

The substitute provides that a provider has a duty to a consumer who receives debt management services from the provider to ensure that client money is managed properly at all times.

The substitute authorizes the finance commission to adopt rules to carry out this subchapter. Authorizes the commissioner to investigate the activities of a person subject to this subchapter to determine compliance with this subchapter and require or permit a person to file a statement under oath and otherwise subject to the penalties of perjury as to all the facts and circumstances of the matter to be investigated. Provides that failure to comply with an investigation under Subsection (b) is grounds for issuance of a cease and desist order. Authorizes the commissioner to receive and act on complaints, take action to obtain voluntary compliance with this subchapter, and refer cases to the attorney general for prosecution. Authorizes the commissioner to enforce this subchapter and rules adopted under this subchapter by certain methods. Requires the commissioner, in determining the amount of an administrative penalty to be imposed under

this section, to consider the seriousness of the violation, the good faith of the violator, the violator's history of previous violations, the deleterious effect of the violation on the public, the assets of the violator, and any other factors the commissioner considers relevant. Authorizes the commissioner, on relation of the attorney general at the request of the commissioner, to bring an action in district court to enjoin a person from engaging in an act or continuing a course that violates this chapter. Authorizes the court to order a preliminary or final jurisdiction.

The substitute provides that an agreement for debt management services between a consumer and a person that is not registered under this subchapter is void. Provides that a consumer is entitled to recover all fees paid by the consumer under a void agreement, costs, and reasonable attorney's fees. Authorizes a consumer who is aggrieved by a violation of this subchapter, a rule adopted by the finance commissioner under this subchapter, or by an unfair, unconscionable, or deceptive act or practice, to recover certain damages in addition to any other remedies provided by this subchapter. Authorizes an aggrieved consumer to sue for injunctive and other appropriate equitable relief to stop a person from violating this subchapter. Provides that the remedies provided in this section are not intended to be the exclusive remedies available to a consumer nor is the consumer required to exhaust any administrative remedies provided under this subchapter or any other applicable law.

The substitute provides a repealer section: Subchapter B (Debt-Pooling Contract), Chapter 394, Finance Code.

The substitute provides that a person is not required to be registered under Section 394.204, Finance Code, as added by this Act, before January 1, 2006.

#### **EFFECTIVE DATE**

September 1, 2005

#### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

C.S.S.B. 1112 modifies the original by adding language that financial institutions are exempt from regulation under this Act.