

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Commerce Committee

BILL: CS/SB 1132

INTRODUCER: Senators Fasano and Bennett

SUBJECT: Credit Counseling Services

DATE: March 27, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Burgess</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Hrdlicka</u>	<u>Cooper</u>	<u>CM</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Credit counseling agencies or credit counseling organizations (CCOs) were initially established to assist consumers in financial difficulty to gain control of their personal finances, repay their credit card debts, and avoid bankruptcy. However, some unscrupulous credit counseling agencies are deceptively marketing their services (i.e., promising the cancellation of debts for pennies on the dollar) or charging egregious fees for debt negotiation services that will never be provided to the consumer. According to the Department of Legal Affairs, the number of consumer complaints related to credit counseling agencies has increased over 200 percent during the last 2 calendar years.¹

Part IV of ch. 817, F.S., governs the regulation of credit counseling agencies, which includes fees, financial reporting, insurance requirements, and penalties for noncompliance. The committee substitute (CS) provides the following additional protections for consumers that engage the services of CCOs:

¹ In 2007, 896 complaints were reported. In 2008, 2,801 complaints were reported.

- Establishes additional prohibited acts for credit counseling organizations, including the receipt of fees prior to the execution of a written contract and the use of false or misleading representations in connection with the offer or sale of the services of the CCO.
- Requires CCOs to maintain a \$100,000 surety bond for the benefit of any consumer who suffers any loss due to any violation of part IV of ch. 817, F.S.
- Specifies disclosures related to the services to be performed that must be included in a CCO's written service contract with the consumer, including the right to cancel within 5 business days after the contract is signed.

This CS creates the following sections of the Florida Statutes: 817.8045. This CS amends 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 assist people with managing their personal debt. These organizations may attempt to help debtors avoid foreclosure and bankruptcy, reduce interest rates on loans, 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. These services can be provided through local offices, the Internet, or the telephone.

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. Consumers provide monthly payments to the credit counseling service and the agency uses the money to pay unsecured loans and other debts in accordance with a payment schedule that has been agreed upon with the debtor and creditor.

The federal bankruptcy law, the Bankruptcy Abuse and Consumer Protection Act of 2005, mandates that a consumer participate in credit counseling services before and after filing for bankruptcy.² The act requires that agencies that counsel bankrupt debtors be nonprofit and approved by the U.S. Trustees, a branch of the federal Department of Justice. Under the act, the consumer pays for this mandatory credit counseling.

Federal and State Regulation of Credit Counseling Services

State and federal laws have been enacted to protect consumers from deceptive and fraudulent practices involving credit counseling and debt repair; however, these laws often provide specific exemptions for credit counseling agencies recognized under Internal Revenue Code as s. 501(c)(3) tax-exempt entities. According to the National Consumer Law Center, in 2004 26 states had enacted laws to require registration or licensing of companies offering credit counseling services.³

² Pub. L. No. 109-8.

³ *Credit Counseling in Crisis Update: Poor Compliance and Weak Enforcement Undermine Laws Governing Credit Counseling Agencies*, National Consumer Law Center. November 2004.

The Federal Trade Commission has jurisdiction to enforce certain federal consumer protection laws through the Federal Trade Commission Act (FTC Act), which prohibits unfair or deceptive trade practices, the Telemarketing and Consumer Fraud Act, and the Credit Repair Organizations Act. However, the provisions of the FTC Act and the Credit Repair Organizations Act do not apply to tax exempt organizations.

Florida Regulation of Credit Counseling Services

In Florida, credit counseling agencies are organizations providing credit counseling services or debt management services.⁴ The term, “credit counseling services,” means confidential money management, debt reduction, and financial educational services. Debt management services generally means services for a fee to adjust or discharge the indebtedness of the debtor.⁵ Persons engaged in credit counseling or debt management services are prohibited from charging fees to any consumer or debtor residing in Florida in excess of amounts prescribed in s. 817.802, F.S. Each person providing credit counseling or debt management services must obtain an annual financial audit and maintain insurance coverage for employee dishonesty, depositor’s forgery, and computer fraud.

Under Florida law, no state agency is charged with enforcing the laws regulating credit counseling agencies. A violation of any provision of part IV of ch. 817, F.S., is an unfair or deceptive trade practice under the Florida Deceptive and Unfair Trade Practices Act.⁶ A consumer harmed by a violation of this act may bring an action for recovery of damages, costs and attorney’s fees. A person who violates any provision of the act commits a third degree felony, punishable by not more than 5 years in prison and a fine of up to \$5,000.

III. Effect of Proposed Changes:

Section 1 revises definitions related to credit counsel organizations in s. 817.801, F.S. The term, “credit counseling agency,” is replaced with the term, “credit counseling organization.” The term, “control person,” is created, and applies to any person who possesses power indirectly or directly to affect the management or policies of the CCO. The definition of the term, “credit counseling services,” is revised to exclude foreclosure-related rescue services, which are subject to the provisions of s. 501.1377, F.S. The definition of the term, “debt management services,” is revised to exclude services related to residential mortgage loan obligations.

Section 2 amends s. 817.802, F.S., to expand the list of prohibited acts for a CCO to include the following: receiving payment for services before the execution of a written service contract, making false or misleading representations, advising a consumer not to contact or communicate with his or her creditor, providing services without the execution of a written contract, failing to provide copies of service documents to a consumer, and failing to comply with s. 817.805, F.S., which includes the failure to disburse all funds received from a consumer to the appropriate creditors. This section also repeals subsection 2 of the statute, which had clarified that the

⁴ Part IV, ch. 817, F.S.

⁵ Section 817.801, F.S.

⁶ Part II, ch. 501, F.S.

prohibitions did not limit a person engaged in debt management or credit counseling services from imposing and receiving a reasonable charge or fee for insufficient funds transactions.

Section 3 amends s. 817.803, F.S., to clarify exemptions or exceptions to the CCO provisions.

Section 4 amends s. 817.804, F.S., relating to audit, insurance, and surety bond requirements. A CCO must maintain a \$100,000 surety bond that will benefit any consumer who suffers any loss or damage by reason of a violation of part IV, ch. 817, F.S.

Section 5 creates s. 817.8045, F.S., which provides minimum disclosures that must be contained in a written service contract between a CCO and a consumer. The top of the service contract must consist of a disclaimer in 12-point uppercase typeface that advises the consumer to contact his or her creditors before signing the contract; that the creditors may be willing to negotiate a payment plan or a restructuring of the consumer's debt free of charge; and that failure to contact the creditors may result in late fees, additional debt, and an adverse credit rating. The contract must include a detailed description of the services to be performed, including all guarantees and promises of full or partial refunds, and the estimated date or length of time required to perform all services. The contract must disclose the terms and conditions of payment, including the payments made by the consumer to the CCO or other person. The contract must include a written disclosure that the consumer has a right to cancel the contract at any time prior to midnight of the fifth business day after the contract was signed. A "Notice of Right to Cancel" must be attached to the contract, which provides written notice that the consumer has the right to cancel within 5 business days after the contract is signed, without incurring any penalty, and the CCO must refund any payments by the consumer within 10 business days after receipt of the signed cancellation notice. The CCO is required to provide the consumer a copy of the completed service contract and all other documents the CCO requires the consumer to sign at the time the documents are signed.

Sections 6 and 7 provide technical, conforming changes to ss. 817.805 and 817.806, F.S.

Section 8 provides an effective date of October 1, 2009.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The CS enhances consumer protections for persons using credit counseling organizations by creating additional prohibited practices.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by the Banking and Insurance Committee on March 10, 2009:**

The CS eliminates the annual OFR registration requirements for credit counseling organizations.

B. Amendments:

None.