AMERICAN BANKERS ASSOCIATION

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Via Electronic Mail and U.S. Mail

May 10, 2005

William C. Hillman, Chair
Drafting Committee on Uniform Consumer Debt Counseling Act
U.S. Bankruptcy Court, Room 1101
10 Causeway St.
Boston, MA 02222

Michael M. Greenfield, Reporter
Drafting Committee on Uniform Consumer Debt Counseling Act
Washington University School of Law
Campus Box 1120
One Brookings Dr.
St. Louis, MO 63130

Re: Draft of Uniform Consumer Debt Counseling Act (April 28, 2005)

Gentlemen:

The American Bankers Association appreciates the opportunity to comment on the referenced draft. The ABA brings together all categories of banking institutions. Its membership – which includes community, regional, and money center banks and bank holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country. These are our initial comments on this latest draft, and we anticipate providing others as the process continues.

We are pleased that some positive changes have been included in this draft. Nevertheless, we continue to have concerns.

Bank Exemption Terminology. At a minimum, in Sec. 3(c) we strongly urge the Committee to substitute respectively "persons" and "person" for "providers" and "provider." This terminology would clarify that a person meeting the definition of "bank" and engaged in the regular course of its business would be exempt. This clarification is especially important in light of the deletion of former Sec. 3 relating to applicability of the Act. As a result of that deletion and related changes, we now know that certain "providers" are exempt, but the extent of the Act's applicability is not clear.

ABA noted the need for this clarification at the last drafting meeting, and at least two Commissioners agreed with our reasoning. A bank engaged in the regular course of its business should not have to guess whether or not it is exempt. It should be absolutely clear. In response to ABA's request for comment on the draft, a bank

attorney concluded that "provider" wording was not appropriate in this situation. As best we can determine, "person" terminology was used in every draft prior to the April 2005 meeting draft, and no one asked that it be changed. In addition, ABA feels this clarification is necessary even if former Sec. 3 relating to applicability of the Act is restored.

ABA encourages the Committee to limit the scope of the Act to problems in the debt-management services industry. This focus also avoids raising opposition from other industries.

Arbitration and Freedom of Contract. Sec. 19(f) is intended to limit freedom of contract and restrict use of arbitration and no-class-action arbitration clauses. We recommend that this subsection be deleted. No evidence was provided that consumers are disadvantaged by contractual arbitration. Indeed, recent studies show just the opposite. For example, an Ernst & Young study released in February establishes that consumers fare better in arbitration than in traditional lawsuits. Based on consumer arbitration data spanning four years from the National Arbitration Forum, this independent study confirms that consumers win 55% of the time in arbitrations against businesses and that consumers find the arbitration process beneficial for resolving legal claims.[1]

We fear that Sec. 19(f) will have the effect of preventing some consumers who desire to have their claims arbitrated from doing so. This is because a provider might understandably be reluctant to test the validity of including an arbitration clause in its agreement due to the severe penalties for being wrong [e.g., see Secs. 19(g) and 31]. Such a result is unfortunate for consumers.

We also note that the arbitration and no-class-action provisions are contrary to the policy decisions reflected in the Revised Uniform Arbitration Act approved by the National Conference of Commissioners on Uniform State Laws in 2000. Including the provisions in this Act would send mixed signals from the Conference.

From a legal standpoint, bans on provisions requiring resolution of disputes by arbitration are contrary to the Federal Arbitration Act (FAA).[2] Numerous United States Supreme Court decisions have held that the FAA preempts state laws that invalidate arbitration agreements or limit the matters that can be arbitrated.[3] This Act should not be used as a tool to undermine the pro-arbitration policies of the FAA.

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[1] See National Arbitration Forum Blog article posted by the National Arbitration Forum on 2/21/05 available at http://arbitration-forum.blogspot.com/2005_02_20_arbitration-forum_archive.html.

[2] 9 U.S.C. Secs. 1 et seq.

[3] See e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

Thank you for the opportunity to comment. We shall appreciate your consideration of our views. ABA is continuing to evaluate other issues, and we look forward to the Pittsburg meeting. Should you have questions or desire to discuss an issue further, I can be reached at (202) 663-5030 or lwilson@aba.com.

Sincerely,

L.H. Wilson
Associate General Counsel