



Ohio Legislative Service Commission

Bill Analysis

Jennifer A. Parker

S.B. 251

129th General Assembly
(As Introduced)

Sens. Beagle and Sawyer, Patton, Hite, Balderson, Daniels, LaRose

BILL SUMMARY

License required

- Prohibits any person from providing debt settlement services for compensation without first having obtained a license from the Director of Commerce.
- Defines "debt settlement services" to mean services as an intermediary between an individual and one or more unsecured creditors of the individual:

--For the purpose of obtaining concessions under which a creditor accepts less than the balance owed as payment in full of the debt; and

--Without receiving money from the individual for distribution of that money to the individual's creditor.

Duty to act in good faith

- Requires a licensee to act in good faith when engaging in the business of debt settlement services.

Surety bond

- Requires a licensee to have a corporate surety bond in a penal sum the Director determines based on the financial condition and business experience of the licensee, the licensee's history of providing debt settlement services, the risk to individuals, and any other factor the Director considers appropriate.
- Specifies that the penal sum of the bond must be at least \$10,000 but not more than \$50,000.

Toll-free communication system

- Requires a licensee to maintain a toll-free communication system, staffed at a level that reasonably permits an individual to speak to a customer service representative during ordinary business hours.

Required documents and disclosures

- Before providing debt settlement services to an individual, requires that a licensee do all of the following:
 - Provide an itemized list of goods and services and the charges for each, as well as a financial analysis with respect to the income and debts of the individual;
 - Inform the individual that, among other things, debt settlement programs are not suitable for everyone; nonpayment of debt may result in increased finance charges or collection activity; specific results cannot be predicted or guaranteed; programs require a certain savings goal be met to maximize settlement results; and the licensee does not make payments to creditors.
- Specifies that an agreement between a licensee and an individual for the provision of debt settlement services must, among other requirements, be in a record; disclose certain information, including that the individual may terminate the agreement at any time by giving written or electronic notice; and be signed by the individual.
- Requires a licensee to provide all documents in English and any other language the licensee will use primarily to communicate with an individual.

Use of electronic technology

- Allows a licensee to satisfy certain requirements of the bill regarding disclosures and materials by utilizing the Internet or other electronic means with the consumer's consent.
- Requires the licensee to provide a written copy of required materials and agreement on request.
- Requires a licensee that maintains a web site to disclose its name and all names under which it does business, and its business address, telephone number, and e-mail address.

Fees for debt settlement services

- Prohibits a licensee from imposing fees or other charges or receiving payment for debt settlement services unless (1) there is a signed agreement and (2) a settlement with a creditor has been executed and at least one payment has been made by the individual pursuant to that settlement.
- Requires that the total amount of fees or other charges for debt settlement services be reasonable, and that each such fee or other charge must:
 - Bear the same proportional relationship to the total fees or other charges for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt balance at the time the licensee and individual signed the agreement; *or*
 - Represent a percentage of the difference between the debt owed the creditor and the amount the creditor has agreed to accept as payment in full of the debt. If the fee or other charge for an individual debt is determined in this manner, the same percentage must be used for all of the other individual debts.
- Prohibits a licensee from soliciting or accepting a voluntary contribution from an individual or on behalf of an individual.

Actions resulting in voidable agreements

- Allows an individual to void an agreement if a licensee imposes a fee or receives payments that are prohibited by the bill or a person provides debt settlement services without a license.
- Prohibits a licensee or person providing debt settlement services without a license from having a claim for breach of contract or restitution against an individual who voids the agreement.

Termination of agreement for failing to set aside savings

- Allows a licensee to terminate an agreement if an individual fails for 60 days to set aside the savings required by the agreement.

Settlements with creditors

- Imposes various requirements regarding settlements, including that a settlement must be in writing, indicate the assent of the creditor through endorsement, and set forth the amount of the debt as well as the amount the creditor has agreed to accept as payment in full of the debt.

- Requires that a debtor's authorization of a settlement be documented in a record.
- Requires licensees to provide an accounting upon request for each settlement.
- Requires licensees to maintain records for each individual to whom it provides debt settlement services for four years after the last payment is made and to provide a copy within a reasonable time after a request is made.

Powers and duties of the Director

- Establishes various powers and duties of the Director regarding the bill's provisions, including authority to adopt implementing rules.
- Requires the Director also to adopt rules to (1) establish reasonable fees to be paid by licensees for the expense of administering the bill's provisions and (2) establish the dollar amounts for license application fees and adjust those fees, as well as the civil penalties imposed for a violation of the bill's provisions, to reflect inflation.
- Requires the Director to publish and maintain a current list of all licensees on the Department of Commerce's web site.
- Allows the Director to enter into cooperative agreements and exchange information with other state and federal agencies regarding licensees.

Prohibited acts; remedies; enforcement

- Prohibits licensees from engaging in certain acts or practices relating to debt settlement, including, for example, employing unfair, unconscionable, or deceptive acts or practices, or making misleading or deceptive statements.
- Authorizes the Director to investigate the records of a licensee; respond to complaints about a licensee; order a licensee to cease and desist from any violation of the bill or to correct a violation, including by making restitution of money or property; impose civil penalties; bring a civil action; and suspend, revoke, or deny renewal of a license under certain circumstances, including if the licensee is insolvent.
- Authorizes a private right of action for individuals.
- States that, if a licensee violates or fails to comply with the bill, an individual may recover damages under the bill or, if the violation or failure is an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act, under that Act, but not both for the same act or practice.

- States that a violation of or failure to comply with the bill's provisions by a person providing debt settlement services without a license is deemed an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act, and that an individual may recover damages under that Act as well as under the bill.
- Provides for enforcement of the bill by the Attorney General under certain circumstances.

Relationship with the Debt Adjusting Law

- Specifies that, for purposes of the current Debt Adjusting Law (R.C. 4710.01 to 4710.04 and 4710.99), "debt adjusting" does *not* include debt settlement services.

TABLE OF CONTENTS

Introduction	6
Debt settlement services	6
License required	7
Contents of license application	7
Reciprocity application	8
Application approval process	9
License renewal	10
Reasons for a license denial	10
Duty to act in good faith	10
Surety bond	11
Toll-free communication system	11
Required documents and disclosures	11
Mandatory disclosures by licensees	11
Dual language disclosures	12
Advertisements	12
Debt settlement services agreements	12
Use of electronic technology	13
Fees for debt settlement services	14
Prerequisites to charging fees	14
Reasonable fee requirement	15
Charges for dishonored checks	15
Bar on voluntary contribution	15
Actions resulting in voidable agreements	15
Termination of agreement for failing to set aside savings	16
Settlements with creditors	16
Settlement requirements	16
Settlement accounting	16
Record retention	17
Powers and duties of the Director	17
Investigation powers	17
Cooperative agreements with other agencies	17
Establishing fees	18
Licensee list	18
Rulemaking authority	18

Prohibited acts; remedies; enforcement	18
Prohibited acts by licensees	18
Enforcement by the Director of Commerce.....	20
Private right of action by individuals	21
Statute of limitations for bringing an action	22
Enforcement by the Attorney General	23
Persons not subject to the bill	23

CONTENT AND OPERATION

Introduction

The bill proposes enactment of the Debt Settlement Services Law, which seeks to alter the regulation of "debt adjusting" under current law by specifically excluding "debt settlement services." Debt settlement services would otherwise likely fall under the definition of debt adjusting, and therefore would be subject to the Debt Adjusting Law requirements.¹ "Debt adjusting" means doing business in debt adjusting, budget counseling, debt management, or debt pooling service. It also includes holding oneself out, by words of similar import, as providing services to debtors in the management of their debts. These services can be provided to either (1) effect the adjustment, compromise, or discharge of any indebtedness of the debtor or (2) receive from the debtor and disburse to the debtor's creditors any money or other thing of value.² The Debt Adjusting Law imposes various requirements on debt adjusters, including maintaining insurance coverage and undergoing annual audits. The bill establishes distinct regulations and requirements for debt settlement services.

Debt settlement services

The bill defines "**debt settlement services**" to mean the services as an intermediary between an individual and one or more unsecured creditors of the individual:

- (1) For the purpose of obtaining concessions under which a creditor accepts less than the balance owed as payment in full of the debt; and
- (2) Without receiving money from the individual for distribution of that money to the individual's creditor.³

¹ R.C. 4710.01 to 4710.04 and 4710.99.

² R.C. 4710.01(B)(1).

³ R.C. 4710.20.

Under the bill, "**settlement**" means an arrangement under which a creditor accepts concessions on an individual's account through a debt settlement services program and money is paid to the creditor. "**Concessions**" means assent to repayment of a debt on terms more favorable to an individual than the terms of the contract between the individual and a creditor. "**Program**" refers to a strategy in which a provider furnishes debt settlement services in contemplation that creditors will settle debts for less than the full amount of debt owed by an individual.⁴

"Debt settlement services" does not include legal services provided by a licensed attorney, accounting services provided by a licensed accountant, or financial planning services provided by a financial planner who holds certification by the Certified Financial Planner Board of Standards.⁵

License required

Contents of license application

The bill prohibits any person from providing debt settlement services for compensation without first having obtained a license from the Director of Commerce.⁶ The bill provides application procedures for original and renewal licenses. The application must be in writing, signed under oath, and in the form prescribed by the Director. It must contain a statement informing the applicant that a false or dishonest answer to a question may be grounds for denial or subsequent suspension or revocation of a license. The application must be accompanied by a license fee as determined by the Director by rule. The application also must contain all of the following:

(1) The applicant's name, principal business address and telephone number, and all of the applicant's other business addresses in Ohio, e-mail addresses, and Internet web site addresses;

(2) All names under which the applicant conducts businesses;

(3) The addresses of each location in Ohio where the applicant will provide debt settlement services or a statement that the applicant does not maintain a physical location in Ohio;

(4) The name and home address of each officer and director of the applicant and each person that owns at least 10% of the applicant's business;

⁴ R.C. 4710.20.

⁵ R.C. 4710.20(F)(1), (2), and (3).

⁶ R.C. 4710.21(A).

(5) A statement describing the extent to which the applicant knows or should know of any material civil or criminal judgment, or material administrative or enforcement action, relating to financial fraud or misuse or of any material violation of state or federal securities laws against the applicant or any of its officers, directors, owners, or agents;

(6) A copy of each form of agreement that the applicant will use with individuals residing in Ohio;

(7) A schedule of fees and charges that the applicant will use with individuals residing in Ohio;

(8) A copy or description of any ownership interest of at least 10% by a director, owner, or employee of the applicant in the applicant's debt settlement services business;

(9) A description of any ownership interest of at least 10% by a director, owner, or employee of the applicant in (a) any affiliate of the applicant (a person controlling, controlled by, or under common control with "the licensee") or (b) any entity that provides products or services to the applicant or any individual relating to the applicant's debt settlement services business;

(10) The identity of each director who is an affiliate of the applicant;

(11) Evidence that the applicant has a resident agent in Ohio recorded with the Secretary of State;

(12) Any other information that the Director reasonably requires, by rule or otherwise, to perform the Director's duties.⁷

The Director also may, upon receipt and review of an application, request additional information from the applicant that the Director reasonably requires to perform the Director's duties.⁸

Reciprocity application

If a person who provides debt settlement services holds a license or certificate of registration in another state for debt settlement services, the person may submit a copy

⁷ R.C. 4710.20(A) and 4710.22(A).

⁸ R.C. 4710.22(B).

of that license or certificate and the application for it instead of the application described above if all of the following apply:⁹

(1) The application in the other state contains information that is substantially similar to or more comprehensive than what is required by the bill;

(2) The application provides the information required by (1), (3), (6), and (7), as described above;

(3) The applicant certifies that the information contained in the application is current, and to the extent that it is not, the applicant supplements the application to make it current.

Application approval process

The Director must approve or deny an initial license within 60 days after the application is filed. If the Director makes a request for additional information, the Director may extend the 60-day period for not more than 45 days.¹⁰

If a licensee has filed a timely and complete application for license renewal, the license will remain in effect until the Director notifies the applicant of the denial.¹¹

Within seven days after issuing the order denying an application, the Director must notify an applicant of a denial, the grounds for the denial, and the applicant's opportunity for a hearing under the Administrative Procedure Act. If the application is denied, the Director must return the license fee.¹²

If the Director denies an application for renewal, a licensee may appeal and request a hearing under the Administrative Procedure Act within 30 days after receiving notice of the denial. While the appeal is pending, the licensee may continue to provide debt settlement services to individuals with whom the licensee has agreements. If the licensee's appeal fails, the licensee may, with the Director's approval, continue to provide debt settlement services to individuals with whom it has agreements to provide such services until the licensee transfers the agreements to another licensee. The

⁹ R.C. 4710.22(D).

¹⁰ R.C. 4710.23(B).

¹¹ R.C. 4710.23(C).

¹² R.C. 4710.23(D).

Director may establish a date by which all transfers must occur and may modify that date at any time.¹³

License renewal

The bill states that the term of a license cannot be more than two years. Licensees who wish to renew their license must submit an application for renewal at least 30 days, but not more than 60 days, before the license expiration date.¹⁴

Reasons for a license denial

The bill requires the Director to issue an original or renewal license unless the Director finds any the following:¹⁵

- (1) The applicant has not complied with the application requirements;
- (2) The application contains information that is materially erroneous or incomplete;
- (3) An officer, director, or owner of the applicant has been convicted of a crime, or suffered a civil judgment, involving dishonesty or the violation of state or federal securities laws;
- (4) The application is not accompanied by the fee established by the Director;
- (5) There is reasonable evidence to support the Director's opinion that the applicant will not provide debt settlement services in a lawful, honest, and fair manner.

Duty to act in good faith

A licensee must act in good faith when engaging in the business of debt settlement services.¹⁶ The bill defines "good faith" to mean honesty in fact and the observance of reasonable standards of fair dealing.¹⁷

¹³ R.C. 4710.20(B) and 4710.23(E).

¹⁴ R.C. 4710.22(C).

¹⁵ R.C. 4710.23(A).

¹⁶ R.C. 4710.25(A).

¹⁷ R.C. 4710.20(H).

Surety bond

A licensee must have a corporate surety bond to conduct a debt settlement services business in Ohio. The bond must be in favor of the Director and in the penal sum the Director determines is warranted. The penal sum must be at least \$10,000, but not more than \$50,000. The Director is to consider the financial condition and business expertise of the licensee, the licensee's history of providing debt settlement services, the risk to individuals, and any other factor that the Director considers appropriate. The term of the bond must coincide with the term of the license. A copy of the bond must be filed with the Director. The bond is to be for the benefit of any individual injured by a licensee or a licensee's employee through a violation of the bill's provisions.¹⁸

Toll-free communication system

The licensee must maintain a toll-free communication system for individuals receiving debt settlement services. This system must be staffed at a level that reasonably permits an individual to speak to a customer service representative during ordinary business hours.¹⁹

Required documents and disclosures

Mandatory disclosures by licensees

The bill requires that before providing debt services, a licensee must do all of the following:²⁰

(1) Provide an itemized list of goods and services and the charges for each, presented in a conspicuous and clear manner.

(2) Prepare a financial analysis with respect to the income and debts of the individual and provide a copy of the financial analysis in a record (information inscribed on a tangible medium or in an electronic medium or other medium, that is retrievable in a perceivable form) that identifies the licensee and that the individual may keep whether or not the individual assents to the agreement.

(3) Inform the individual of the availability of assistance by a toll-free communication system or in person to discuss the financial analysis.

¹⁸ R.C. 4710.24.

¹⁹ R.C. 4710.25(B).

²⁰ R.C. 4710.20(L) and 4710.26.

(4) Inform the individual that debt settlement programs are not suitable for everyone; nonpayment of debt may result in increased finance charges or collection activity; specific results cannot be predicted or guaranteed; programs require a certain savings goal be met to maximize settlement results; the licensee does not make payments to creditors; the licensee does not provide accounting or legal advice to individuals, unless the licensee is professionally licensed to do so; participation in the program may adversely affect the individual's credit rating or credit scores; the name and business address of the licensee; and if a creditor settles for less than the full amount of the debt, the program may result in the creation of taxable income to the individual.

Dual language disclosures

A licensee must provide all disclosures and documents required by the bill in English and any other language the licensee has used or will use primarily to communicate with the individual.²¹

Advertisements

Licensees must list on all written, recorded, or electronic advertisements targeted at customers in Ohio that the licensee is licensed by the Department of Commerce and maintains a surety bond as required by Ohio law.²²

Debt settlement services agreements

The bill requires that the agreement between a licensee and an individual for debt settlement services meet certain conditions. It must be in a record and it must be dated and signed by the individual. The bill defines "sign" to mean, with a present intent to authenticate or adopt a record, to either (1) execute or adopt a tangible symbol or (2) attach to or logically associate with the record an electronic sound, symbol, or process.

The agreement must include the name of the individual and the address where the individual resides, and include the name, telephone number, and business address of the licensee. It must be delivered immediately upon formation of the agreement (with respect to an electronic record, delivery occurs when it is capable of being retrieved, saved, and printed by the individual and the individual is notified of this). The agreement must disclose certain information, including the services to be provided, the amount or method of determining all fees, individually itemized, to be paid by the

²¹ R.C. 4710.25(C).

²² R.C. 4710.25(D).

individual, and that the individual has the right to terminate the agreement at any time by giving the licensee written or electronic notice.²³

Further, the agreement must disclose how the licensee will comply with its obligations to provide an accounting as required by the bill, that the individual may contact the Director of Commerce with any questions or complaints regarding the licensee, and provide the address, telephone number, and Internet address or web site of the Director.²⁴

The agreement may not do any of the following:²⁵

(1) Provide for application of the law of any jurisdiction other than the United States and Ohio;

(2) Contain a provision that modifies or limits otherwise available forums or procedural rights, including the right to trial by jury;

(3) Contain a provision that restricts the individual's remedies under the bill, or other law;

(4) Contain a provision that (a) limits or releases the liability of any person for not performing the agreement or for violating any provision of the bill, or (b) indemnifies any person for liability arising under the agreement or the bill.

Use of electronic technology

A licensee may satisfy requirements of the bill addressing certain mandatory disclosures and materials by utilizing the Internet or other electronic means if the licensee obtains a consumer's consent as required by federal law. The bill defines a "consumer" as an individual who seeks or obtains goods or services that are used primarily for personal, family, or household purposes. The federal law referred to is the "Electronic Signatures in Global and National Commerce Act."

The disclosures and materials required by the bill must be presented in a form that is capable of being accurately reproduced for later reference. With respect to the mandatory disclosures by licensees via the licensee's web site, the information must appear on one or more screens that contain no other information. The individual must

²³ R.C. 4710.20(M) and 4710.28(A), (B), and (D).

²⁴ R.C. 4710.28(A).

²⁵ R.C. 4710.28(E).

indicate that the individual has seen the information before proceeding to assent to the formation of a program.²⁶

When providing materials and the agreement as required by the bill, the licensee must inform the individual that upon electronic, telephonic, or written request, it will send the individual a written copy of the materials. If a licensee is requested, before the expiration of 90 days after a program is completed or terminated, to send a written copy of those materials, the licensee must send them at no charge within three business days after the request is made, but the licensee need not comply with a request more than once per calendar month or if it reasonably believes the request is made for harassment. If the request is made more than 90 days after a program is completed or terminated, the licensee must send a written copy of the materials requested within a reasonable time.²⁷

The bill requires a licensee that maintains a web site to disclose, on the home page of its web site or on a page that is clearly and conspicuously connected to the home page a link that clearly reveals its contents, the name and all names under which it does business, and its principal business address, telephone number, and e-mail address.²⁸

If a consumer who has consented to electronic communication in the manner provided by federal law withdraws consent as provided by that law, a licensee may terminate its agreement with the consumer. If a licensee wishes to terminate an agreement with a consumer for that reason, it must notify the consumer that it will terminate the agreement unless the consumer, within 30 days after receiving the notification, consents to electronic communication in the manner provided by federal law.²⁹

Fees for debt settlement services

Prerequisites to charging fees

The bill states that a licensee cannot impose fees on an individual, or receive payment for debt settlement services from or on behalf of an individual, unless (1) there is a signed agreement that substantially complies with the bill's requirements and (2) a

²⁶ R.C. 4710.27(A) to (D).

²⁷ R.C. 4710.27(E) and (F).

²⁸ R.C. 4710.27(G).

²⁹ R.C. 4710.27(H) and (I).

settlement with a creditor has been executed in the form required by the bill and at least one payment has been made by the individual pursuant to that settlement.³⁰

Reasonable fee requirement

The bill requires that the total amount of fees or other charges for debt settlement services be reasonable. Each fee or charge must:

(1) Bear the same proportional relationship to the total fees or other charges for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt balance at the time the licensee and individual signed the agreement; *or*

(2) Represent a percentage of the difference between the debt owed the creditor and the amount the creditor has agreed to accept as payment in full of the debt. If the fee or other charge for an individual debt is determined in this manner, the same percentage must be used for all of the other individual debts.³¹

Charges for dishonored checks

A licensee may impose a reasonable charge to the individual, plus any amount passed on from a financial institution, for any negotiable instrument (such as a personal check) that has been dishonored or returned for any reason. The terms and conditions upon which these insufficient funds charges are imposed must be set forth in the agreement.³²

Bar on voluntary contribution

A licensee is prohibited from soliciting or accepting a voluntary contribution from an individual or on behalf of an individual.³³

Actions resulting in voidable agreements

If a licensee imposes a fee or other charge or receives money or other payments not authorized under the bill, the individual may void the agreement and bring a civil action for recovery of money and damages (see discussion below).³⁴

³⁰ R.C. 4710.29(A) and (B).

³¹ R.C. 4710.29(C).

³² R.C. 4710.29(D).

³³ R.C. 4710.29(E).

³⁴ R.C. 4710.30(A).

If a person providing debt settlement services is not licensed as required by the bill when the individual assents to the agreement, the agreement is voidable by the individual.³⁵

If an individual voids an agreement, the licensee or person providing debt settlement services without a license does not have a claim against the individual for breach of contract or for restitution.³⁶

Termination of agreement for failing to set aside savings

If an individual who has entered into an agreement fails for 60 days to set aside the savings required by the agreement, a licensee may terminate the agreement.³⁷

Settlements with creditors

Settlement requirements

The bill imposes various requirements for a settlement with creditors. The settlement must be in writing, indicate the assent of the creditor through endorsement, and clearly set forth the amount of the debt and the amount the creditor has agreed to accept as payment in full of the debt. It must also include any other material terms of the settlement. The debtor's authorization of a settlement must be documented in a record.³⁸

Settlement accounting

A licensee must provide an accounting upon request for each settlement. The licensee must document in a record all of the following:³⁹

- (1) The amount the creditor accepts as settlement in full of the debt and any other terms of the settlement;
- (2) The amount of the debt when the creditor agreed to the settlement;

³⁵ R.C. 4710.30(B).

³⁶ R.C. 4710.30(C).

³⁷ R.C. 4710.31.

³⁸ R.C. 4710.33(C).

³⁹ R.C. 4710.33(A) and (B).

(3) The calculation of the fee for licensees using fee agreements that calculate any portion of the fee based on a percentage of savings the individual realizes from a settled debt.

Record retention

A licensee must maintain records for each individual for whom it provides debt settlement services for four years after the final payment made by the individual. The licensee must produce a copy of the records to the individual within a reasonable time after a request is made for them. The licensee may use electronic or other means of storage of the records.⁴⁰

Powers and duties of the Director

Investigation powers

The bill establishes various powers and duties of the Director of Commerce. The Director may act on the Director's own initiative or in response to complaints and may receive complaints regarding, or take action to obtain compliance with, the bill's requirements. The Director may seek or provide enforcement remedies as provided in the bill. The Director, in order to determine compliance with the bill, may investigate and examine, by subpoena or otherwise, the activities, books, accounts, and records of a licensee or any person to which a licensee has delegated its obligations under an agreement. In connection with the investigation, the Director may (1) charge the person reasonable expenses necessarily incurred to conduct the investigation and (2) require or permit a person to file a statement under oath as to the facts and circumstances surrounding the investigation. Information that identifies individuals who have agreements with the licensee shall not be disclosed to the public.⁴¹

Cooperative agreements with other agencies

The Director may enter into cooperative arrangements with any other federal or state agencies having authority over licensees. The Director may exchange with any of those agencies information about a licensee, including information obtained during an examination of the licensee.⁴²

⁴⁰ R.C. 4710.33(D).

⁴¹ R.C. 4710.34(A) and (B).

⁴² R.C. 4710.34(D).

Establishing fees

The bill requires the Director to establish, by rules adopted under the Administrative Procedure Act, reasonable fees to be paid by licensees for the expense of administering the bill's provisions. All fees, charges, and penalties collected under the bill must be paid to the Director and be deposited into the state treasury to the credit of the Debt Settlement Services Fund, which the bill creates. Money in the Debt Settlement Services Fund is to be used for administering the bill.⁴³

The Director must establish the dollar amounts for license application fees. The Director must adjust these fees, as well as the civil penalties imposed for violating the bill's requirements, to reflect inflation, as measured by the consumer price index. The Director is to adopt a base year and adjust the dollar amounts, effective July 1 of each year, if the change in the consumer price index from the base year is at least 10% as of December 31 of the preceding year. The dollar amount is to be rounded to the nearest \$10.⁴⁴

The Director also must notify licensees of any change made in the dollar amounts, and make that information available to the public.⁴⁵

Licensee list

The bill requires that the Director publish and maintain a current list of all licensees on the Department of Commerce's web site.⁴⁶

Rulemaking authority

The Director may adopt rules pursuant to the Administrative Procedure Act to implement the bill's provisions.⁴⁷

Prohibited acts; remedies; enforcement

Prohibited acts by licensees

The bill prohibits licensees from engaging in certain acts or practices. Under the bill, licensees cannot make representations that payment of a certain amount will

⁴³ R.C. 4710.35(B).

⁴⁴ R.C. 4710.35(A) and (C).

⁴⁵ R.C. 4710.35(D).

⁴⁶ R.C. 4710.37.

⁴⁷ R.C. 4710.34(C).

guarantee satisfaction of a certain amount or range of indebtedness. The licensee cannot represent that the licensee will furnish money to pay bills or prevent attachments or that participation in the program may prevent litigation, garnishment, attachment, repossession, foreclosure, eviction, or loss of employment. The licensee cannot represent that he or she is authorized or competent to furnish legal advice or to perform legal services, unless the advice or services is provided by a licensed attorney working with the licensee. The licensee cannot represent that it is (1) a not-for-profit entity, unless it is organized and properly operating as a not-for-profit entity under the laws of Ohio, or (2) a tax-exempt entity, unless it has received certification of tax-exempt status from the Internal Revenue Service.

The licensee also cannot employ an unfair, unconscionable, or deceptive act or practice, which includes the knowing omission of any material information. The licensee cannot make statements that are misleading or deceptive, or purchase a debt or obligation of the individual.

The licensee cannot exercise or attempt to exercise a power of attorney after the individual has terminated an agreement. The licensee cannot take a confession of judgment or power of attorney to confess judgment against an individual. The licensee cannot structure a settlement in a manner that would result in a negative amortization of any of an individual's debts.

The licensee cannot settle a debt or lead an individual to believe that a payment to a creditor is in settlement of a debt to the creditor unless, at the time of settlement, the individual receives a certification or confirmation by the creditor that the payment is in full settlement of the debt, or is part of a payment plan that is in full settlement of the debt. The licensee cannot obtain a mortgage or other security interest from any person in connection with debt settlement services provided to the individual.⁴⁸

Finally, the licensee cannot initiate a transfer of money from an individual's account at a financial institution or with another person, unless the transfer is one of the following:⁴⁹

- (1) A return of money to the individual;
- (2) Before termination of an agreement, properly authorized by the agreement for payment of a fee;

⁴⁸ R.C. 4710.32.

⁴⁹ R.C. 4710.32(B).

(3) In payment of a creditor to fund a negotiated settlement authorized by an individual.

Enforcement by the Director of Commerce

The bill requires the Director of Commerce to enforce the bill's provisions by taking certain actions. This includes ordering a licensee or a director, employee, or agent of a licensee to cease and desist from any violations or to correct a violation or any failure to comply with the bill's requirements, including making restitution of money or property. The Director may also impose civil penalties not exceeding \$1,000 for each violation or failure to comply. The Director may prosecute a civil action to enforce an order or to obtain restitution or an injunction or other equitable relief. If a person violates or fails to comply with, or knowingly authorizes, directs, or aids in the violation of or failure to comply with, a final order by the Director to cease and desist or to correct a violation or failure to comply, the Director may impose an additional civil penalty not exceeding \$1,000 for each violation or failure.⁵⁰

The Director may maintain an action to enforce the bill's requirements in any county. The bill allows the Director to recover the reasonable costs of actions or proceedings brought by the Director, including attorney's fees based on the hours reasonably expended and the hourly rates for attorneys of comparable experience in the community.⁵¹

In determining the amount of civil penalty to impose, the Director must consider the seriousness of the violation or failure, the good faith of the person committing the violation or failure, any previous violations or failures by the person, the deleterious effect of the violation or failure on the public, and any other factor the Director considers relevant to the determination of the civil penalty. The bill states that no enforcement action or adjudication order made by the Director is valid unless an opportunity for a hearing is afforded pursuant to the Administrative Procedure Act.⁵²

Under the bill, the Director may suspend, revoke, or deny renewal of a license under the following circumstances:

(1) A fact or condition exists that, if it had existed when the licensee applied for a license, it would have been a reason for denial;

⁵⁰ R.C. 4710.36(A) and (B).

⁵¹ R.C. 4710.36(C) and (D).

⁵² R.C. 4710.36(E) and (F).

(2) The licensee has committed a material violation of or failure to comply with any provision of the bill or a rule or order of the Director;

(3) The licensee is insolvent (that is, the licensee is not paying his or her debts, is unable to pay debts, or is insolvent under federal bankruptcy law);

(4) The licensee or an employee or affiliate of the licensee has refused to permit the Director to make an examination of the licensee's books, accounts, records, or activities, failed to comply with an order to file a statement of facts and circumstances of a matter being investigated within 30 days after the request, or made a material misrepresentation or omission with regard to that statement;

(5) The licensee has not responded within a reasonable time and in an appropriate manner to communications from the Director.

A licensee may appeal and request a hearing, under the Administrative Procedure Act, regarding any license suspension or revocation.⁵³

Private right of action by individuals

The bill authorizes a private right of action for individuals who void an agreement pursuant to the bill (see above). The individual may recover all money paid by or on behalf of the individual pursuant to the agreement. Additionally, the individual may recover reasonable attorney's fees and costs.

The bill also authorizes a private right of action for individuals against a person who violates or fails to comply with any provision of the bill. The individual may recover compensatory damages for economic injury caused by the violation or failure. An individual also may recover the greater amount of compensatory damages or \$1,000 for certain violations or failures to comply. Additionally, the individual may recover reasonable attorney's fees and costs for violations involving a person providing debt settlement services without a license or a licensee charging unreasonable fees.⁵⁴

In a class action, the minimum damages listed above do not apply.⁵⁵

A licensee is not liable for a violation or failure to comply with any provision of the bill if the licensee proves that the violation or failure was not intentional and resulted from a good-faith error notwithstanding the maintenance of procedures

⁵³ R.C. 4710.38.

⁵⁴ R.C. 4710.39(A) and (B).

⁵⁵ R.C. 4710.39(C).

reasonably adapted to avoid the error. If, in connection with a violation or failure, the licensee has received more money than authorized by an agreement or by the bill's provisions, the good-faith defense is not available unless the licensee refunds the excess within three business days after learning of the violation or failure.⁵⁶

If a licensee violates or fails to comply with any provision of the bill, an individual may recover damages under the bill or, if the violation or failure is an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act, under that Act, but not both for the same act or practice.⁵⁷

If any person providing debt settlement services without a license violates or fails to comply with any provision of the bill, that violation or failure is deemed an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act. A person that is injured by such a violation has a cause of action and is entitled to the same relief available to a consumer under the Act. The person also may recover damages under the bill.⁵⁸

Statute of limitations for bringing an action

An action or proceeding brought by the Director to enforce the bill must be commenced within two years after the conduct that is the basis of the Director's complaint occurs. An action brought pursuant to the Consumer Sales Practices Act by any individual injured by a person providing debt settlement services without a license must be commenced within two years after the latest of the following:

- (1) The individual's last transmission of money to the licensee;
- (2) The date on which the individual discovered or reasonably should have discovered the facts giving rise to the individual's claim;
- (3) Termination of actions or proceedings by the Director with respect to a violation of the bill's provisions.⁵⁹

The period prescribed in (2) above is tolled during any period during which the licensee, or if different, the defendant, has materially and willfully misrepresented information required by the bill to be disclosed to the individual, if the information so

⁵⁶ R.C. 4710.39(D).

⁵⁷ R.C. 4710.39(E)(1).

⁵⁸ R.C. 4710.39(E)(2) and 4710.41.

⁵⁹ R.C. 4710.40(A) and (B).

misrepresented is material to the establishment of the liability of the defendant under the bill.⁶⁰

Enforcement by the Attorney General

If a violation of the bill is an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act, all the powers and remedies available to the Attorney General to enforce that Act are available to the Attorney General to enforce the bill.⁶¹

However, if a licensee violates the bill and that violation is an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act, either the Attorney General may recover civil penalties, damages, or reimbursement under the Act or the Director of Commerce may recover civil penalties, damages, or restitution under the bill, but not both.⁶²

Persons not subject to the bill

The bill does not apply to the following persons or their employees when the person or the employee is engaged in the regular course of the person's business or profession:

- (1) A judicial officer, a person acting under an order of a court or administrative agency, or an assignee for the benefit of creditors;
- (2) A financial institution, bank holding company, or the subsidiary, agent, or affiliate of either;
- (3) A title insurer, escrow company, or other person that provides bill-paying services if the provision of debt settlement services is incidental to the bill-paying services;
- (4) An agent or employee of a licensee.

The bill defines a "financial institution" as any national bank, any bank doing business under authority granted by the Superintendent of Financial Institutions or the regulatory authority of another state of the United States, any federal savings association, any savings and loan association or savings bank doing business under authority granted by the Superintendent or the regulatory authority of another state of

⁶⁰ R.C. 4710.40(C).

⁶¹ R.C. 4710.42.

⁶² R.C. 4710.43.

the United States, or any credit union regulated by a state or federal regulatory authority.⁶³

HISTORY

ACTION	DATE
Introduced	11-08-11

S0251-I-129.docx/jc

⁶³ R.C. 4710.20(G) and 4710.21(B).