



# Ohio Legislative Service Commission

## Bill Analysis

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### Sub. H.B. 173

130th General Assembly

(As Reported by H. Financial Institutions, Housing, and Urban Development)

**Reps.** Terhar and Mallory, Grossman, Brenner, Blair, Beck, Bishoff

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## BILL SUMMARY

### Debt settlement services

- Enacts the Debt Settlement Services Law to regulate debt settlement service providers and excludes debt settlement services from the existing Debt Adjusting Law.
- Defines "debt settlement services" to mean the services as an intermediary between a debtor and one or more unsecured creditors of the debtor for the purpose of obtaining concessions with respect to the debtor's unsecured debt, which concessions may include a reduction in the principal amount of the debt.

### Providing debt settlement services

- Prohibits furnishing debt settlement services to a debtor unless the provider complies with the bill's provisions.

### Submissions to the Department of Commerce

- Requires a provider to submit certain information to the Department of Commerce prior to offering to furnish or furnishing debt settlement services to a debtor.

### Surety bond

- Requires a provider to obtain and maintain in effect at all times a corporate surety bond in the amount of \$50,000.

### Duty to act in good faith

- Requires a provider to act in good faith in all matters relating to the furnishing of debt settlement services.

### **Required documents and disclosures**

- Requires a provider to prepare a financial analysis with respect to the income and debts of the debtor seeking debt settlement services and provide the debtor with a copy of the financial analysis prior to entering into a debt settlement services agreement.
- Requires a provider to disclose, in a clear and conspicuous manner, certain material information to a debtor before the debtor consents to pay the fees for the goods and services offered by the provider.
- Requires all disclosures to be in English and in any other language the provider will use primarily to communicate with a debtor.

### **Material misrepresentations**

- Prohibits a provider from misrepresenting, directly or by implication, any material aspect of the debt settlement services.

### **Charging fees**

- Prohibits a provider from imposing fees or receiving payment for debt settlement services unless the provider meets certain conditions.

### **Use of debtor's funds**

- Prohibits a provider from holding a debtor's funds intended for distribution to creditors.
- Allows a provider to request or require a debtor to place funds in an account to be used for payment of the provider's fees and for payments to creditors in connection with a renegotiation, settlement, reduction, or other alteration of the terms of payment or other terms of debt, if certain conditions are met.

### **Toll-free communication system**

- Requires each provider to maintain a toll-free communication system, staffed at a level that reasonably permits a debtor to speak to a customer service representative, as appropriate, during ordinary business hours.

### **Unfair or deceptive acts or practices**

- States that any violation of the bill's provisions is deemed an unfair or deceptive act or practice in violation of the existing Consumer Sales Practices Act.



- Entitles a debtor injured by such a violation to a cause of action and the same relief available to a consumer under the Consumer Sales Practices Act.
- Makes all powers and remedies available to the Attorney General under the Consumer Sales Practices Act available to the Attorney General to enforce the bill's provisions.

### **Right to void agreement**

- Permits a debtor to void an agreement if a provider enters into a debt settlement services agreement without complying with the bill's provisions.

### **Powers and duties of the Superintendent of Financial Institutions**

- Permits the Superintendent of Financial Institutions to investigate an alleged failure to comply with the bill's provision or any complaints concerning such a failure.
- Permits the Superintendent to investigate and examine the activities and the books, accounts, papers, records, and other documents of a provider or of any person to which a provider has delegated its obligations under an agreement or under the bill.
- Permits the Superintendent to charge the provider the reasonable expenses necessarily incurred to conduct the examination.
- Permits the Superintendent, regarding an investigation, to compel, by subpoena, witnesses to testify in relation to any matter over which the Superintendent has jurisdiction and to require the production of any book, account, paper, record, or other document pertaining to that matter.
- Prohibits examination or investigation information that identifies debtors who have debt settlement services agreements with a provider from being disclosed to the public.
- Permits the Superintendent to take certain actions if the Superintendent determines that, after notice and a hearing conducted in accordance with the Administrative Procedures Act, a person is engaged in or is believed to be engaged in activities that constitute a failure to comply with the bill's provisions.

### **Exempt persons and entities**

- Exempts the following persons or their employees from the bill's provisions 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 an administrative agency, or an assignee for the benefit of creditors;

(2) A title insurer, escrow company, or other person that provides bill-paying services if the furnishing of debt settlement services is incidental to the bill-paying services;

(3) An attorney licensed or otherwise authorized to practice law in Ohio who furnishes debt settlement services directly to a client as part of a lawyer-client relationship and does not have a business relationship with a provider related to furnishing debt settlement services;

(4) A registrant under the Mortgage Loan Law;

(5) A financial institution or an affiliate or agency of a financial institution if the affiliate or agent is subject to examination by a federal or state banking regulatory authority.

## Federal E-Sign Act

- States that the bill's provisions do not modify, limit, or supersede certain provisions of the federal "Electronic Signatures in Global and National Commerce Act" (E-Sign Act) relating to consumer rights regarding the use of electronic records.

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## CONTENT AND OPERATION

### Overview

The bill proposes to regulate debt settlement service providers separately from providers of debt adjusting services by enacting the Debt Settlement Services Law with distinct requirements for such services.

#### The bill – generally

In sum, the bill prohibits the furnishing of debt settlement services unless the provider complies with certain requirements, including the following:

- (1) Submits certain business-related information to the Department of Commerce prior to furnishing debt settlement services;
- (2) Maintains a corporate surety bond in the amount of \$50,000;
- (3) Acts in good faith;
- (4) Provides a debtor with a financial analysis of the debtor's income and debts;
- (5) Discloses certain material information to a debtor;
- (6) Meets certain conditions in order to impose fees and receive payment for debt settlement services;
- (7) Complies with certain conditions regarding the use of a debtor's funds;
- (8) Maintains a toll-free communication system.

#### Relationship with Debt Adjusting Law

The bill specifically excludes debt settlement services from the existing Debt Adjusting Law. Debt settlement services would otherwise likely fall under the definition of debt adjusting and therefore be subject to the Debt Adjusting Law requirements. Under current law, "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. The Debt Adjusting Law imposes various requirements on debt adjusters, including maintaining insurance coverage and undergoing annual audits.<sup>1</sup>

### **Scope of debt settlement services**

The bill defines "debt settlement services" to mean the services as an intermediary between a debtor and one or more unsecured creditors of the debtor for the purpose of obtaining concessions with respect to the debtor's unsecured debt, which concessions may include a reduction in the principal amount of the debt.<sup>2</sup>

"Concessions" means assent to repayment of a debt on terms more favorable to a debtor than the terms of the contract between the debtor and a creditor. "Principal amount of the debt" means the amount of a debt at the time of the execution of a debt settlement services agreement. "Debt settlement services agreement" means an agreement between a provider and a debtor for the furnishing of debt settlement services. "Provider" means a person that furnishes, offers to furnish, or agrees to furnish debt settlement services. A "person" is an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity, but does not include a public corporation, government, or governmental subdivision, agency, or instrumentality. "Debtor" means an individual to whom a provider furnishes debt settlement services.<sup>3</sup>

Debt settlement services do not include (1) accounting services provided in an accountant-client relationship by a certified public accountant licensed to provide accounting services in Ohio, (2) financial planning services provided in a financial planner-client relationship by a licensed member of a financial planning profession, or (3) the collection of debts by a debt collector regulated by the federal "Fair Debt Collection Practices Act."<sup>4</sup>

### **Providing debt settlement services**

The bill states that a provider cannot furnish debt settlement services to a debtor – who the provider reasonably should know resides in Ohio at the time the debt

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<sup>1</sup> R.C. 4710.01 to 4710.04 and 4710.99.

<sup>2</sup> R.C. 4710.20(G)(1).

<sup>3</sup> R.C. 4710.20(B), (E), (F), (K), and (M).

<sup>4</sup> R.C. 4710.20(G)(2).



settlement services agreement is entered into – unless the provider complies with the bill's provisions.<sup>5</sup>

### **Submission to the Department of Commerce**

The bill requires a provider to submit the following to the Department of Commerce prior to offering to furnish or furnishing debt settlement services to a debtor who a provider reasonably should know resides in Ohio at the time the debt settlement services agreement is entered into:

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

(2) Proof of a bond in effect in accordance with the bill's requirement regarding surety bond (see "**Surety bond**" below);

(3) Proof that the provider is authorized by the laws of Ohio to conduct business in Ohio.<sup>6</sup>

### **Surety bond**

The bill requires a provider to obtain and maintain in effect at all times a corporate surety bond in the amount of \$50,000 issued by a bonding company or insurance company authorized to do business in Ohio. The bond must be in favor of the Superintendent of Financial Institutions (who is defined under the bill to include the Deputy Superintendent of Consumer Finance and for the exclusive benefit of any debtor located in Ohio, and of the state for the benefit of any debtor, who is injured by a failure to comply with the bill's provisions. The bill prohibits the bond from being canceled by the provider or by the corporate surety, except upon notice to the Superintendent by certified mail, return receipt requested. The cancellation must not be effective prior to 30 calendar days after the Superintendent receives the notice.<sup>7</sup>

### **Claims against surety bond**

The bill permits any debtor claiming against the bond for a failure to comply with the bill's provisions to maintain an action at law against the provider and against the corporate surety. The aggregate liability of the corporate surety for any and all breaches of the conditions of the bond must not exceed the penal sum of the bond. Whenever the penal sum of the bond is reduced by one or more recoveries or payments,

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<sup>5</sup> R.C. 4710.21(A).

<sup>6</sup> R.C. 4710.22.

<sup>7</sup> R.C. 4710.20(D) and (P), 4710.23(A) and (D).



the bill requires the provider to furnish a new or additional bond, so that the total or aggregate penal sum of the bond or bonds equals \$50,000, or furnish an endorsement executed by the corporate surety reinstating the bond to \$50,000.<sup>8</sup>

### **Duty to act in good faith**

The bill requires a debt settlement services provider to act in good faith in all matters relating to the furnishing of debt settlement services. The bill defines "good faith" to mean honesty in fact and the observance of reasonable standards of fair dealing.<sup>9</sup>

### **Required documents and disclosures**

#### **Financial analysis**

Prior to entering into a debt settlement services agreement, the bill requires a provider to prepare a financial analysis with respect to the income and debts of the debtor seeking the debt settlement services and provide the debtor with a copy of the financial analysis.<sup>10</sup>

#### **Material information**

Before a debtor consents to pay the fees for the goods and services offered by a provider, the bill requires the provider to disclose, in a clear and conspicuous manner, all of the following material information:

(1) A good faith estimate of the amount of time necessary to achieve the represented results and, to the extent that the debt settlement services may include a settlement offer to any of the debtor's creditors, a good faith estimate of the time by which the provider will start to make bona fide settlement offers to the debtor's creditors, and the cost to the debtor for furnishing the debt settlement services;

(2) To the extent that the debt settlement services may include a settlement offer to any of the debtor's creditors, a good faith estimate of the amount of money, or the percentage of each outstanding debt, that the debtor will be required to accumulate before the provider makes a bona fide settlement offer;

(3) To the extent that any aspect of the debt settlement services relies upon or results in the debtor's failure to make timely payments to creditors, that the use of the

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<sup>8</sup> R.C. 4710.23(B) and (C).

<sup>9</sup> R.C. 4710.20(I) and 4710.24(A).

<sup>10</sup> R.C. 4710.25(C).





debt settlement services will likely adversely affect the debtor's creditworthiness, may result in the debtor being subject to collection actions or sued by creditors, and may increase the amount of money the debtor owes due to the accrual of fees and interest;

(4) To the extent that the provider requests or requires the debtor to place funds in an account at a financial institution, that the debtor owns the funds held in the account;

(5) That the debtor may withdraw from the debt settlement services agreement at any time without penalty;

(6) That the use of the debt settlement services may result in the creation of taxable income to the debtor and, if any debt is cancelled, that the debtor will receive from the creditor the United States Internal Revenue Service Form 1099 necessary for the debtor in filing federal taxes.<sup>11</sup>

#### **Dual language requirement**

All disclosures required by the bill must be in English and in any other language the debt settlement services provider will use primarily to communicate with a debtor.<sup>12</sup>

#### **Material misrepresentations**

The bill states that a provider is not to misrepresent, directly or by implication, any material aspect of the debt settlement services, including, but not limited to, any of the following:

(1) The amount of money or the percentage of the debt amount that a debtor may save by entering into the debt settlement services agreement;

(2) The effect of debt settlement services on the debtor's creditworthiness and on the collection efforts of the debtor's creditors;

(3) The percentage or number of debtors who attain the represented results;

(4) Whether debt settlement services are being offered or furnished by a nonprofit entity.<sup>13</sup>

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<sup>11</sup> R.C. 4710.25(A).

<sup>12</sup> R.C. 4710.24(C).

<sup>13</sup> R.C. 4710.25(B).



## **Charging fees**

A provider is not to impose fees or receive payment for debt settlement services unless all of the following conditions are met:

(1) The provider has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt under a debt settlement program;

(2) The debtor has made at least one payment to a creditor in furtherance of a settlement with that creditor;

(3) The fee for settling each individual debt enrolled in a debt settlement program does either of the following:

(a) Bears the same proportional relationship to the total fees for settling the entire debt balance as the individual debt amount bears to the entire debt amount. "Individual debt amount" and "entire debt amount" mean the amounts owed at the time the debt was enrolled in the program.

(b) Represents a percentage of the amount saved as a result of the settlement ("amount saved" means the difference between the amount owed at the time the debt was enrolled in the program and the amount actually paid to satisfy the debt). The percentage charged must not change from one individual debt to another.

"Program" is defined by the bill to mean a program or strategy in which a provider furnishes debt settlement services.<sup>14</sup>

## **Use of debtor's funds**

A provider cannot hold a debtor's funds intended for distribution to creditors. However, this does not prohibit a provider from requesting or requiring the debtor to place funds in an account to be used for payment of the provider's fees and for payments to creditors in connection with a renegotiation, settlement, reduction, or other alteration of the terms of payment or other terms of debt, provided that all of the following conditions are met:

(1) The funds are held in a specifically designated account at a financial institution;

(2) The debtor owns and controls the funds held in the account and is paid accrued interest on the account, if any;

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<sup>14</sup> R.C. 4710.20(L) and 4710.26.



(3) The entity administering the account does not give or accept any money or other compensation in exchange for referrals of business by the provider;

(4) The debtor may terminate the debt settlement services agreement at any time without penalty, and must receive all funds in the account, other than funds earned by the provider in accordance with the bill's provisions, within seven business days after the debtor's request;

(5) The entity administering the account is not owned or controlled by, or an affiliate of, the provider.

An "affiliate" under the bill is (a) a person that controls, is controlled by, or is under common control with a provider, (b) an executive officer or director of a provider or any individual performing functions similar to an executive officer or director, or (c) an executive officer or director of a person described in (a) or any individual performing functions similar to an executive officer or director. "Control" means the right to control at least 10% of the voting power of another person.<sup>15</sup>

### **Toll-free communication system**

The bill requires each provider to maintain a toll-free communication system, staffed at a level that reasonably permits a debtor to speak to a customer service representative, as appropriate, during ordinary business hours.<sup>16</sup>

### **Unfair or deceptive acts or practices**

Any violation of the bill's provisions is deemed an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act. A debtor 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 bill makes all powers and remedies available to the Attorney General under the Act available to the Attorney General to enforce the bill's provisions.<sup>17</sup>

### **Right to void agreement**

The bill permits a debtor to void an agreement if a provider enters into a debt settlement services agreement without complying with the bill's provisions.<sup>18</sup>

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<sup>15</sup> R.C. 4710.20(A) and (C) and 4710.27.

<sup>16</sup> R.C. 4710.24(B).

<sup>17</sup> R.C. 4710.31 and R.C. Chapter 1345., not in the bill.

<sup>18</sup> R.C. 4710.28.



## **Investigatory powers of the Superintendent of Financial Institutions**

The bill permits the Superintendent of Financial Institutions to investigate an alleged failure to comply with the bill's provision or any complaints concerning such a failure. As often as the Superintendent considers necessary, the Superintendent may investigate and examine, in or outside of Ohio, the activities and the books, accounts, papers, records, and other documents of a provider or of any person to which a provider has delegated its obligations under an agreement or under the bill. A "record" is defined as information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form.<sup>19</sup>

### **Investigation fees**

In connection with an investigation, the bill permits the Superintendent to charge the provider the reasonable expenses necessarily incurred to conduct the examination.<sup>20</sup>

### **Compelling of witnesses**

The bill permits the Superintendent to compel, by subpoena, witnesses to testify regarding an investigation and in relation to any matter over which the Superintendent has jurisdiction and to require the production of any book, account, paper, record, or other document pertaining to that matter. If a person fails to file any statement or report, obey any subpoena, give testimony, produce any book, account, paper, record, or other document as required by a subpoena, or permit photocopying of any book, account, paper, record, or other document subpoenaed, the court of common pleas of any county, upon application made to it by the Superintendent, must compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify therein.<sup>21</sup>

### **Debtor identity protection**

Examination or investigation information that identifies debtors who have debt settlement services agreements with a provider cannot be disclosed to the public.<sup>22</sup>

## **Enforcement powers of the Superintendent**

After notice and a hearing conducted in accordance with the Administrative Procedures Act, the bill permits the Superintendent to take any of the following actions

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<sup>19</sup> R.C. 4710.20(N) and 4710.29(A) and (B).

<sup>20</sup> R.C. 4710.29(B).

<sup>21</sup> R.C. 4710.29(C).

<sup>22</sup> R.C. 4710.29(D).



if the Superintendent determines that a person is engaged in or is believed to be engaged in activities that may constitute a failure to comply with the bill's provisions:

(1) Issue a cease and desist order, which is enforceable in the court of common pleas;

(2) Seek and obtain civil penalties in an amount not to exceed \$1,000 for each failure to comply;

(3) Order the person to correct or remedy the conditions resulting from the failure to comply, including by making restitution; the order is to be enforceable in the court of common pleas.<sup>23</sup>

### **Exempt persons and entities**

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 an administrative agency, or an assignee for the benefit of creditors;

(2) A title insurer, escrow company, or other person that provides bill-paying services if the furnishing of debt settlement services is incidental to the bill-paying services;

(3) An attorney licensed or otherwise authorized to practice law in Ohio who furnishes debt settlement services directly to a client as part of a lawyer-client relationship and does not have a business relationship with a provider that is in any way related to the furnishing of debt settlement services;

(4) A registrant under the Mortgage Loan Law (R.C. 1321.51 to 1321.60);

(5) A financial institution or an affiliate or agency of a financial institution if the affiliate or agent is subject to examination by a federal or state banking regulatory authority.

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

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<sup>23</sup> R.C. 4710.30.



Superintendent or the regulatory authority of another state, any trust company, or any credit union regulated by a state or federal regulatory authority.<sup>24</sup>

## Federal E-Sign Act requirements

The bill states that its provisions modify, limit, and supersede the federal "Electronic Signatures in Global and National Commerce Act" (E-Sign Act). The E-Sign Act "provides a general rule of validity for electronic records and signatures for transactions in or affecting interstate or foreign commerce. The E-Sign Act allows the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing, if the consumer has affirmatively consented to such use and has not withdrawn such consent."<sup>25</sup>

The bill, however, states that it does not modify, limit, or supersede the sections of the E-Sign Act that (1) require prior consumer consent to the use of electronic records and require disclosure, prior to consent, of the extensive consumer rights regarding use of electronic records, and (2) exempt certain notices and documents (such as court orders and notices of utility termination, for example) from the use of electronic records.<sup>26</sup>

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## HISTORY

ACTION	DATE
Introduced	05-22-13
Reported, H. Financial Institutions, Housing & Urban Development	11-14-13

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<sup>24</sup> R.C. 4710.20(H) and 4710.21(B).

<sup>25</sup> R.C. 4710.32 and Federal Deposit Insurance Corporation, *Compliance Examination Manual, Chapter X, Other Compliance Issues: The Electronic Signatures in Global and National Commerce Act (E-Sign Act)* (August, 2012), available at <http://www.fdic.gov/regulations/compliance/manual/pdf/X-3.1.pdf>.

<sup>26</sup> R.C. 4710.32 and 15 U.S.C. 7001(c) and 7003(b).

