

STATEMENT OF SCOPE

Department of Financial Institutions Division of Banking

Rule No.: DFI-Bkg 73

SRelating to: Authorizing one or more additional fee structures and establishing maximum fees or charges that may be made thereunder by adjustment service companies; modifying DFI-Bkg 73 to incorporate certain requirements of the federal Telemarketing Sales Rule

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

N/A

2. Detailed description of the objective of the proposed rule:

Section 218.02 of the Wisconsin Statutes requires the licensure and regulation of “adjustment service companies,” a term that includes credit counselors, debt management providers, debt settlement companies, and any others engaged in the business of “negotiat[ing] a reduction or extended payment on behalf of the debtor for the outstanding debt of the debtor.”¹ That statute imposes several legal duties upon the Department of Financial Institutions’ Division of Banking, including duties to “protect debtors from oppressive or deceptive practices of licensees,” to “regulate advertising and solicitation of business by licensees,” to “prevent evasions of this section,” and to “determine and fix by general order”—*i.e.*, administrative rule—“the maximum fees or charges that such companies may make.”²

Since 1991, the Wisconsin Administrative Code has allowed adjustment service companies to charge customers a monthly fee of up to \$120 or 10 percent of the money paid by the customer for distribution to creditors, whichever is less, plus a one-time set-up fee of up to \$50.³

¹ *Morgan Drexen, Inc. v. Wis. Dep’t of Fin. Insts.*, 2015 WI App 27, ¶ 11, 361 Wis. 2d 271, 862 N.W.2d 329 (quoting *JK Harris Fin. Recovery Sys. LLC v. Wis. Dep’t of Fin. Insts.*, 2006 WI App 107, § 15, 293 Wis. 2d 753, 718 N.W.2d 739).

² WIS. STAT. § 218.02(7). *See also* WIS. STAT. § 227.01(13) (defining a “rule” to include a “general order of general application that has the force of law and that is issued by an agency to implement . . . specific legislation enforced or administered by the agency”).

³ WIS. ADMIN. CODE § DFI-Bkg 73.01. An adjustment service company may also accept voluntary contributions in limited amounts from the customer’s creditors, *see id.*, but that practice is atypical for companies engaged in debt settlement.

Due to subsequent changes in federal law, however, some adjustment service companies—namely, debt settlement services that solicit customers by telephone across state lines—can no longer legally operate under that fee structure. In 2010, the Federal Trade Commission modified its Telemarketing Sales Rule to prohibit such companies from accepting any fees for their debt relief services unless and until at least one of the debtor’s debts is successfully settled.⁴ The updated federal rule requires such companies to utilize one of two types of fee structures⁵:

(1) The “percentage of debt” structure. Under this fee structure, upon the settlement of each debt the customer has enrolled with the company, the customer pays a fixed *percentage of the enrolled debt* as a fee to the company for its services in settling the debt. The amount of the fee depends on the balance of the debt at the time the customer enrolled the debt with the company for settlement, rather than the savings achieved for the consumer.

(2) The “percentage of savings” structure. Under this fee structure, upon the settlement of each debt the customer has enrolled with the company, the customer pays the company a fixed *percentage of the savings achieved for the customer*. The savings achieved is the difference between the amount owed at the time the customer enrolled the debt with the company and the amount the customer paid to satisfy the settled debt.

Neither of these alternative fee structures is presently authorized under Wis. Admin. Code ch. DFI-Bkg 73.

The proposed rule would authorize and establish the maximum charges that adjustment service companies may impose under one or both of the fee structures authorized by the Telemarketing Sales Rule. The Division may also consider further revisions to ch. DFI-Bkg 73 to mirror additional consumer protections set forth in the Telemarketing Sales Rule, as well as any necessary or appropriate modifications to the current fee structures and maximum charges authorized for licensees.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Section 218.02(7) of the Wisconsin Statutes sets forth policies that the Division must consider in licensing and regulating adjustment service companies, including “protect[ing] debtors from oppressive or deceptive practices,” regulating the “advertising and solicitation of business” by such companies, determining and fixing “the maximum fees or charges that such companies may make,” and “prevent[ing] evasions” of section 218.02.

The proposed rule serves these purposes by establishing maximum charges for companies that are subject to the Telemarketing Sales Rule. In addition, by authorizing companies to utilize one

⁴ 16 C.F.R. §§ 310.2(o), 310.4(a)(5)(i).

⁵ 16 C.F.R. § 310.4(a)(5)(i)(C).

or both of the alternative fee structures mandated by that federal rule, the proposed rule also reduces the incentive for such companies to evade the licensing requirements of section 218.02. Their licensure also furthers the ability of the Division to regulate their advertising and other practices, to rectify consumer complaints as they arise, and to protect consumers from oppressive or deceptive practices.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

The Division licenses and regulates adjustment service companies pursuant to section 218.02 of the Wisconsin Statutes. The Division has the authority to “make such rules and require such reports as the division deems necessary for the enforcement of this section,” Wis. Stat. § 218.02(9)(a), and it is required to “determine and fix by general order”—*i.e.*, administrative rule⁶—“the maximum fees or charges that such companies may make.”⁷

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

200-400 hours.

6. List with description of all entities that may be affected by the proposed rule:

The rule changes would affect adjustment service companies that are engaged in the business of settling debts for consumers and seek to make their services available in Wisconsin. The proposed changes would allow adjustment service companies doing business under the Telemarketing Sale Rule to become licensed with the Division and lawfully offer their services in Wisconsin, subject to the requirements of Wis. Stat. § 218.02 and Wis. Admin. Code ch. DFI-Bkg 73 (including the maximum fee limitations to be established in this rulemaking).

Because the proposed rule would not eliminate the fee structures presently available under Wisconsin law, at this time the Division does not anticipate that it would have a material impact on current licensees currently doing business under Wis. Admin. Code ch. DFI-Bkg 73. That said, the Division may consider updates to the current authorized fee structures, as well as the adoption of additional consumer protections consistent with the Telemarketing Sales Rule.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

⁶ WIS. STAT. § 227.01(13) (general orders are considered rules subject to chapter 227 rulemaking requirements).

⁷ WIS. STAT. § 218.02(7).

As noted in section 2 above, the federal Telemarketing Sales Rule restricts the nature and timing of fees that certain adjustment service companies may charge to customers. In addition, the Telemarketing Sales Rule identifies and prohibits certain deceptive or abusive acts or practices in the sale of debt relief services.⁸

While the federal rule authorizes two alternative fee structures (the “percentage of debt” and “percentage of savings” models described in section 2 above), it does not establish the maximum fees that may be charged. Such caps are generally established on a state-by-state basis by statute or administrative rule:

States that have authorized companies to utilize the “percentage of debt” model subject to fee maximums include: Louisiana (12 percent cap), New Hampshire (10 to 15 percent, depending on the duration of the plan), Michigan (15 percent), Minnesota (15 percent), Washington (15 percent), Delaware (18 percent), Iowa (18 percent), Idaho (20 percent), Montana (20 percent), and Virginia (20 percent).⁹

States that have authorized companies to utilize the “percentage of savings” model subject to fee maximums include: Connecticut (10 percent), Illinois (15 percent), Maine (15 percent), Iowa (30 percent), Minnesota (30 percent), North Dakota (30 percent), Rhode Island (30 percent), and Virginia (30 percent).¹⁰

In addition, Oregon has authorized a “hybrid” fee structure, allowing companies to charge fees totaling up to 15 percent of the enrolled debt plus up to 7.5 percent of the savings achieved.¹¹

Other states either prohibit for-profit debt settlement services, impose fee structures that predated the Telemarketing Sales Rule, or do not establish a fixed maximum percentage that such companies may charge under a “percentage of debt” or “percentage of savings” model.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

⁸ See generally 16 C.F.R. §§ 310.3, 310.4.

⁹ LA. REV. STAT. § 2592; N.H. REV. STAT. § 399-D:15.V; MICH. COMP. L. § 451.428(1); MINN. STAT. § 332B.09, subdiv. 2(1); WASH. REV. CODE § 18.28.080(1); 6 DEL. CODE § 2423A(d)(2)(C); IOWA CODE § 533A.9.4.b(1); IDAHO CODE § 26-2229(3); MONT. CODE § 30-14-2103; VA. CODE § 6.2-2041.

¹⁰ CONN. GEN. STAT. § 36a-671b(b) & STATE OF CONNECTICUT DEPARTMENT OF BANKING, DEBT NEGOTIATION SCHEDULE OF MAXIMUM FEES, available at <https://portal.ct.gov/DOB/Consumer-Credit-Licensing-Info/Consumer-Credit-Licensing-Information/Debt-Negotiation-Schedule-of-Maximum-Fees>; 225 ILL. COMP. STAT. § 429/125; 32 ME. REV. STAT. § 6174-A.2.B; IOWA CODE § 533A.9.4.b(2); MINN. STAT. § 332B.09, subdiv. 2(2); N.D. CENT. CODE § 13-11-21; R.I. GEN. LAWS § 19-14.8-23(d)(2); VA. CODE § 6.2-2041.

¹¹ ORE. REV. STAT. § 697.692(1)(d, e).

As noted in section 6 above, the proposed rule seeks to authorize additional fee structures that align with the requirements of the Telemarketing Sales Rule, but it would not eliminate or reduce the maximum fees that current licensees may charge under existing fee structures authorized by Wis. Admin. Code ch. DFI-Bkg 73. For that reason, the Division does not anticipate the proposed rule would materially impact existing licensees.

For consumers, updating Wis. Admin. Code ch. DFI-Bkg 73 to allow alternative fee structures subject to fee caps is likely to increase the number of licensees offering debt settlement services, better ensure that such companies will address consumer complaints (because their license may be at risk if they do not), and better safeguard them from being charged unreasonable fees for the services provided.

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