

Clearinghouse Rule 23-___

PROPOSED ORDER OF THE DEPARTMENT OF FINANCIAL INSTITUTIONS, DIVISION OF BANKING CREATING RULES

The Wisconsin Department of Financial Institutions – Division of Banking proposes an order to repeal ss. DFI-Bkg 73.03 (1) (title) and (1) (a); to amend ss. DFI-Bkg 73.01 (1) (a), 73.02 (2) (b)-(d), 73.03 (4)-(5), 73.04 (intro.), and 73.04 (7); to renumber s. DFI-Bkg 73.01 (1) (b) and 73.03 (1) (b); to renumber and amend s. DFI-Bkg 73.03 (3); to repeal and recreate s. DFI-Bkg 73.05; and to create ss. DFI-Bkg 73.01 (1) (c), 73.02 (2) (f)-(j), 73.03 (3) (a)-(b), and 73.04 (10) of the Wisconsin Administrative Code, relating to the authorization of one or more additional fee structures and establishing maximum fees or charges that may be made thereunder by adjustment service companies, and modifying chapter DFI-Bkg 73 of the Wisconsin Administrative Code to incorporate certain requirements of the federal Telemarketing Sales Rule.

The scope statement for this rule was approved by the Governor on May 25, 2023 and published in *Administrative Register* No. 809B on May 30, 2023. A preliminary hearing on the scope statement was held on July 20, 2023. The scope statement was approved by the Division of Banking on October 18, 2023.

ANALYSIS

1. Statutes interpreted:

Section 218.02 of the Wisconsin Statutes.

2. Statutory authority:

Sections 218.02 (7) and (9) (a) of the Wisconsin Statutes.

3. Explanation of agency authority:

Section 218.02 (9) (a) of the Wisconsin Statutes authorizes the Department of Financial Institutions - Division of Banking to “make such rules and require such reports as the division deems necessary for the enforcement of this section,” and section 218.02 (7) (d) requires the

division to “determine and fix by general order”—*i.e.*, administrative rule¹—“the maximum fees or charges that such companies may make.”

4. Related statutes or rules:

Some adjustment service companies (namely, debt settlement services that solicit customers by telephone across state lines) are subject to the requirements of the Federal Trade Commission’s Telemarketing Sales Rule, codified at 16 C.F.R. part 310. That rule prohibits companies that renegotiate, settle, reduce, or otherwise alter debts individually on behalf of customers from accepting fees from a customer unless and until at least one of the customer’s debts is successfully settled,² and it requires them to utilize one of two fee structures (the “percentage of debt” structure or the “percentage of savings” structure).³ Neither of these alternative fee structures is presently authorized under applicable Wisconsin law governing adjustment service companies.

5. Plain language analysis:

The required analysis is set forth in the Division’s May 2024 REPORT AND RECOMMENDATIONS CONCERNING TELEMARKETER-SOLD DEBT RELIEF SERVICES, which is attached.

6. Summary of, and comparison with, existing or proposed federal regulation:

As noted in section 4 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 by telemarketer-sold debt relief services.⁴

7. Summary of comments received during preliminary comment period and at public hearing on the statement of scope:

The Division received written comments from two trade groups representing members of the debt relief services industry (the American Fair Credit Council⁵ and the Consumer Debt Relief Initiative), as well as a company that provides account management services for industry members (Global Holdings, LLC). Their comments are summarized as applicable in Sections II.A through II.E of the Division’s May 2024 REPORT AND RECOMMENDATIONS CONCERNING TELEMARKETER-SOLD DEBT RELIEF SERVICES.

¹ See WIS. STAT. § 227.01 (13) (general orders are considered rules subject to chapter 227 rulemaking requirements).

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

³ 16 C.F.R. § 310.4 (a) (5) (i) (C).

⁴ See 16 C.F.R. §§ 310.3, 310.4.

⁵ The American Fair Credit Council changed its name to the American Association for Debt Resolution on or about August 1, 2023. From 2005 to the 2011, the organization was known as The Association of Settlement Companies.

8. Comparison with rules in adjacent states:

The federal Telemarketing Sale Rule requires telemarketer-sold debt relief services to utilize one of two alternative fee structures, while leaving it to the states to determine which structures are permissible and the maximum fees that such companies may charge their residents. Fee 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).⁶

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).⁷

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.⁸

Other states either prohibit for-profit debt settlement services, impose fee structures that are different than those required by 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.

9. Summary of factual data and analytical methodologies:

The proposed rules are based on (1) the Department’s experience in administering and enforcing section 218.02 of the Wisconsin Statutes and its accompanying regulations; (2) the Department’s knowledge of the rules, practices, and experiences of regulators in other states and federal

⁶ LA. REV. STAT. § 37:2592; 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.

⁷ 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.

⁸ ORE. REV. STAT. § 697.692(1)(d, e).

agencies in administering and enforcing statutes and rules applicable to the business of adjustment service companies; and (3) written comments and feedback provided to the Department in connection with the July 20, 2023 preliminary public hearing for this rule.

10. Analysis and supporting documents used to determine effect on small business:

The proposed changes do not seek to impose new restrictions on licensees doing business under current law, but rather to authorize an additional fee structure subject to appropriate safeguards. Based on the Division's knowledge and experience in administering chapter DFI-Bkg 73, existing licensees that are compliant with the current version of chapter DFI-Bkg 73 will not need to modify their business practices to comply with the revisions proposed herein. The changes seek to clarify the law and to enable those companies that are subject to the Telemarketing Sales Rule to utilize a fee structure contemplated by that rule, subject to consumer protections.

11. Anticipated costs incurred by private sector:

The proposed rule authorizes an additional fee structure that aligns 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 or impose new substantive requirements. 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, while protecting consumers from being charged unreasonable fees for the services provided.

12. Effect on small business:

Small businesses are not affected by these revisions.

13. Agency contact person:

Matthew Lynch
Chief Legal Counsel
Wisconsin Department of Financial Institutions
Matthew.Lynch@dfi.wisconsin.gov

14. Place where comments are to be submitted and deadline for submission:

Comments may be submitted to the contact person shown below no later than the date on which the public hearing on this proposed rule order is conducted. Information as to the place, date and time of the public hearing will be published in the Wisconsin Administrative Register.

By mail: Marc Shovers, Assistant Chief Legal Counsel, Department of Financial Institutions, PO Box 8861, Madison, WI 53708-8861.

By delivery: Marc Shovers, Assistant Chief Legal Counsel, Department of Financial Institutions, 4822 Madison Yards Way, North Tower, Madison, WI 53703.

By e-mail: DFIComments@dfi.wisconsin.gov

Via the department's website: <https://dfi.wi.gov/Pages/About/ProposedRules.aspx>

TEXT OF RULE

SECTION 1. DFI-Bkg 73.01 (1) (a) is amended to read:

(1) ~~Both~~ Either of the 2 alternative fee plans set forth below may be used when contracting services with a debtor:

(a) ~~The maximum~~ A monthly fee charged the debtor, which may ~~shall~~ not exceed 10% of the amount of money paid to the licensee to be distributed to a creditor or creditors or \$120 in any one calendar month, whichever is less.

SECTION 2. DFI-Bkg 73.01 (1) (b) is renumbered DFI-Bkg 73.01 (1m).

SECTION 3. DFI-Bkg 73.01 (1) (c) is created to read:

(1) (c) A performance-based fee charged the debtor as a percentage of the amount saved as the result of the licensee's renegotiation, settlement, reduction, or alteration of a debt enrolled in the licensee's service. The percentage charged cannot change from one individual debt to another and cannot exceed 30 percent of the savings actually negotiated by the licensee on behalf of the debtor. The amount saved is the difference between the amount owed at the time the

debtor agreed to enroll the debt in the licensee's service and the amount the debtor actually paid to satisfy the debt.

SECTION 4. DFI-Bkg 73.02 (2) (b), (c), and (d) are amended to read:

(2) (b) ~~Provide in clear and precise terms payments and time~~ A detailed schedule of payments to be made by the debtor, including the scheduled date and amount of each payment and how it will be applied, which must be based on a reasonable assessment of reasonably within the ability of the debtor to pay.

(c) The licensee's fee as set forth in s. DFI-Bkg 73.01. No other amounts may be charged or collected.

(d) ~~The~~ If the licensee utilizes the fee plan authorized in s. DFI-Bkg 73.01 (1) (c), the amount of each payment debt that the debtor agrees to enroll in the licensee's service to be paid, renegotiated, settled, reduced, or altered by or in on behalf of the debtor, which may not exceed the actual balance that is due and owing from the debtor on each debt as of the date the agreement is signed by the debtor. Following execution of the contract or agreement, a debt may be added to or removed from this list of enrolled debts only upon the separate written agreement of the parties.

SECTION 5. DFI-Bkg 73.02 (2) (f) to (j) are created to read:

(2) (f) If the licensee does not maintain a physical office within the state, the licensee's office hours, which must comply with the requirements of DFI-Bkg 73.03 (1), together with the telephone number and email address at which the licensee will answer customer inquiries.

(g) If the licensee represents in marketing materials or other communications that the licensee's services achieve certain results, the amount of time necessary to achieve the represented results.

(h) If the licensee's services include making a settlement offer to any of the debtor's creditors or debt collectors, the time by which the licensee will make a bona fide settlement offer to each creditor or debt collector and the amount of money that the debtor must accumulate before the licensee will make an offer.

(i) If any aspect of the licensee's services relies upon or results in the debtor's failure to make timely payments to creditors or debt collectors, a statement that the use of the licensee's services will likely adversely affect the debtor's creditworthiness, may result in the debtor being subject to collections or sued by creditors or debt collectors, and may increase the amount of money the customer owes due to the accrual of fees and interest.

(j) If the licensee requests or requires the debtor to place funds in an account at an insured financial institution, the following additional statements:

1. That the debtor owns the funds held in the account.
2. That the debtor may withdraw from the licensee's services at any time without penalty.
3. That if the debtor withdraws from the licensee's services, the debtor will receive all funds in the account, other than fees earned by the licensee in compliance with DFI-Bkg 73.01.

SECTION 6. DFI-Bkg 73.03 (1) (title) and (1) (a) are repealed.

SECTION 7. DFI-Bkg 73.03 (1) (b) is renumbered DFI-Bkg 73.03 (1).

SECTION 8. DFI-Bkg 73.03 (3) is renumbered DFI-Bkg 73.03 (3) (intro.), and, as renumbered, is amended to read:

(3) ~~TRUST FUND~~ DEBTOR FUNDS. A licensee ~~shall~~ may not commingle payments received from debtors with the licensee's own property or funds, but shall ~~maintain a separate account in an approved bank in which all payments received from debtors for the benefit of creditors shall promptly be deposited after receipt thereof and in which all payments shall remain until disbursements are made in his or her behalf or returned to him or her. Said trust account shall be used only for this purpose.~~ ensure that debtor funds are maintained in one of the following ways:

SECTION 9. DFI-Bkg 73.03 (3) (a) and (b) are created to read:

(a) *Trust account*. A licensee may maintain a separate account in an approved bank in which all payments received from debtors for the benefit of creditors shall promptly be deposited after receipt thereof and in which all payments shall remain until disbursements are made on the debtor's behalf or returned to the debtor. The trust account shall be used only for this purpose.

(b) *Debtor-controlled account*. A licensee may request or require a debtor to place funds in an account to be used for the licensee's fees and for payments to creditors or debt collectors, if all of the following apply:

1. The funds are held in an account at a federally insured financial institution.
2. The customer owns the funds held in the account and is paid accrued interest on the account, if any.

3. The entity administering the account is not owned or controlled by, or in any way affiliated with, the licensee.

4. The entity administering the account does not give or accept any money or other compensation in exchange for referrals of business involving the licensee.

5. If the debtor withdraws from the licensee's services, the debtor is entitled to receive all funds in the account, other than fees earned by the licensee in compliance with DFI-Bkg 73.01, within seven business days.

6. Any monthly maintenance or other fees charged to the debtor by the entity administering the account are reasonable and not in excess of market rates for comparable services.

SECTION 10. DFI-Bkg 73.03 (4) and (5) are amended to read:

(4) REMITTANCES. ~~Remittances~~ If the licensee's services include making timely remittances to creditors on a debtor's behalf, such remittances shall be made to creditors within 15 days after receipt of funds from the debtor, unless the debtor requests in writing that funds be held in escrow for specific purposes for a period not to exceed 180 days.

(5) RECEIPT REQUIREMENTS. Whenever a payment is received from a debtor or other person, a ~~receipt~~ record showing the date ~~said~~ the payment was received shall be prepared and a ~~duplicate copy shall be available at all times~~ maintained in the office of the licensee. ~~All receipts must be prepared at least in duplicate, be prenumbered by the printer and filed in consecutive numerical order and shall show the name and account number of the debtor, the name and address of the licensee, the date and amount paid, and the name or initials of the person accepting payment.~~

SECTION 11. DFI-Bkg 73.04 (intro.) is amended to read:

DFI-Bkg 73.04. Prohibited practices. No licensee ~~shall~~may:

SECTION 12. DFI-Bkg 73.04 (7) is amended to read:

(7) Sell insurance or any other item to a customer, except to the extent authorized in s.

DFI-Bkg 73.03 (3) (b).

SECTION 13. DFI-Bkg 73.04 (10) is created to read:

(10) Advise or instruct a debtor to fail to make timely payments to a creditor or debt collector, or to take any other course of action that would cause the debtor to default upon a debt owed to another, unless all of the following apply:

(a) The licensee has verbally disclosed to the debtor the information required by s. 73.02 (2) (i).

(b) The licensee has provided the debtor with the following information verbally and in writing:

(i) How the debtor should notify the licensee that a lawsuit related to the debt has been threatened or commenced against the debtor.

(ii) Whether the licensee will provide legal counsel to represent the debtor in the event of a lawsuit related to the debt.

(iii) Contact information for the state bar association's lawyer referral and information service and at least one nonprofit organization that provides legal resources or other assistance to debtors in court proceedings.

SECTION 14. DFI-Bkg 73.05 is repealed and recreated to read:

DFI-Bkg 73.05 Office records and procedures. (1) A licensee must maintain records of its business practices occurring within this state, including the following:

- (a) Contracts and agreements with debtors.
- (b) Records of activity relating to each debtor, including debtor payments, disbursements to creditors, and licensee fees assessed and collected.
- (c) Reconciliations of trust and operating accounts.
- (d) Communications with debtors relating to the licensee's services, including audio recordings to the extent the licensee records such communications.
- (e) Advertising, brochures, scripts, and promotional materials, as well as any data or findings used to support representations made in those materials.
- (f) All records required to be maintained under applicable state and federal law.

(2) The division may require a licensee to retain additional records, or to maintain them in a different manner, to ensure the safety and soundness of its business practices or to facilitate the division's examination of the licensee under ss. 218.02 (7) (c) and 220.04 (9) (b).

SECTION 15. EFFECTIVE DATE. This rule shall take effect on the first day of the first month commencing after the date of publication in the Wisconsin *Administrative Register* as provided in s. 227.22 (2) (intro.), Stats.

Department of Financial Institutions

Date: June 4, 2024

By: /s/ Marc Shovers

Marc Shovers
Assistant Chief Legal Counsel