

IMPROVING CONSUMER PROTECTION DEBT SETTLEMENT SERVICES

PROPOSALS FOR PUBLIC COMMENT

**Ontario Ministry of Consumer Services
January 4, 2013**

Purpose of this Consultation

The Ministry of Consumer Services is seeking public input on proposals to provide improved protection for consumers who deal with debt settlement services.

You are invited to comment and suggest improvements or alternatives. Providing the reasons behind your views will help us review your input.

More information about how to respond is provided at the end of this paper.

Responses must be received no later than February 25, 2013 in order to receive full consideration.

What Are Debt Settlement Services?

A debt settlement service operator is typically paid to negotiate with creditors to settle a consumer's debts on more favourable terms, in particular for a reduced amount.

Under a typical debt settlement plan, the consumer makes monthly payments into an account until there is enough money to make a settlement offer to creditors and pay fees to the debt settlement company.

Why is the Government Concerned?

Debt settlement activity has grown in the past several years, with increased marketing and advertising that speaks to consumers of significant savings when debt settlement is successful.

Though debt settlement might obtain the claimed outcomes, it cannot guarantee them. There is no assurance a creditor will agree to accept less than they are owed or will deal with a debt settlement company.

While an account is established and monies are being deposited into it, the consumer often makes minimal payments to creditors or stops making payments altogether. In either case the creditor has typically not yet agreed to a settlement offer.

In some cases, consumers may also stop communicating with creditors, with the intention that the debt settlement company handle all communication. Creditors may not be aware of the reason for communication ending.

Consumers who choose to use debt settlement services often find that their situation worsened if a settlement is not reached. This might happen if a creditor is not willing to wait until the debtor has amassed sufficient funds to negotiate, or is unwilling to settle for a reduced amount proposed by the debt settlement service. For example:

- They may still have to pay fees to the debt settlement service despite not obtaining a settlement;
- Their debts have grown as a result of no payments being made while interest and other charges accumulated;
- Not making payments to creditors has also worsened their credit report, with a wide variety of potential negative outcomes; and
- They may be sued by creditors.

We have heard such concerns from consumers and some members of the financial community. These risks have been noted by organizations such as the Financial Consumer Agency of Canada.

Overview of Proposed Direction

Ontario proposes to build on debt settlement reforms implemented in Alberta and Manitoba. Ontario's action could also incorporate measures based on Federal Trade Commission rules governing this sector in the United States.

Practices in the industry vary and some firms already follow a number of the directions under consideration.

Proposed reforms would:

- 1. Define debt settlement services**
- 2. Prohibit advance payment of fees for debt settlement services**
- 3. Limit fees for debt settlement services**
- 4. Ensure set aside funds are under consumer control**
- 5. Require clear disclosure of all key contract terms and a 10 day cooling off right**
- 6. Require mandatory disclosures of consumers' rights and risks**
- 7. Prohibit misleading advertising**
- 8. Establish standards of conduct**
- 9. Provide consumer remedies and enforcement**

The next section sets out the details of these proposals for your comments. The intention of these proposals is to ensure consumers are better informed when deciding

whether or not to use debt settlement services and better protected when they do make that choice.

Details of Proposed Direction

1. Define debt settlement services

The proposed rules would apply to any profit or not-for profit operator that offers to arrange debt settlements for consumers and is otherwise subject to consumer law such as the *Collection Agencies Act* and *Consumer Protection Act, 2002*. These laws currently apply to debt settlement services and would continue to apply.

The rules would also apply to traditional debt management plans offered by credit counselling services that arrange consolidated payment schedules.

The definition proposed for this purpose is:

“debt settlement services” means offering or undertaking to act for a consumer in arrangements or negotiations with the consumer’s creditors or receiving money from a consumer for distribution to the consumer’s creditors, where the services are provided in consideration of a fee, commission or other remuneration that is payable by the consumer.

2. Prohibit advance payment of fees for debt settlement

It is proposed that debt settlement services operators would only be paid for actual results rather than efforts to obtain results.

The proposed rule would not allow any fees until a specific settlement offer is accepted by the debtor and the debtor’s creditor, and at least one payment is made under that agreed settlement.

3. Limit fees for debt settlement services

It is proposed that the total amount of fees chargeable be limited to protect consumers. Ontario would implement fee controls based on those implemented successfully in Alberta and, since that time, adopted by Manitoba.

It is proposed that the fee limits ensure that when settlement agreements cover multiple debts, payment is only made in respect of those debts that are settled.

As is the case in Alberta and Manitoba, fee limits would differentiate between the credit counselling that results in a schedule of payments to creditors and the newer debt settlement model that seeks to negotiate a reduction in debt owing.

The proposed rule would limit fees to be no more than the following amounts:

1. If an operator is not an incorporated full or associate member agency of the Ontario Association of Not-For-Profit Credit Counselling Services and arranges or negotiates a debt repayment agreement between the consumer and a creditor, 10 per cent of the debts that the consumer owed to the creditor at the time that the consumer entered into the debt settlement services agreement with the operator.
2. If the operator is an incorporated full or associate member agency of the Ontario Association of Not-For-Profit Credit Counselling Services and arranges or negotiates a debt repayment agreement between the consumer and a creditor that requires the consumer to make a series of scheduled debt repayments over a period of time, the sum of,
 - i. a one-time administration fee that is not higher than the average monthly scheduled repayment set out in the agreement, and
 - ii. 15 per cent of the amount of each scheduled debt repayment.

For example, a debt settlement provider, who is not a member of the Ontario Association of Not-For-Profit Credit Counselling Services who negotiate a repayment agreement to settle a debt, for example a debt of \$20,000, could charge a fee of not over \$2000 (10% of \$20,000) payable once services are successfully completed.

The rule for members of the Association would reflect the typical repayment plan approach. If the average monthly payment towards debts was \$400, then a one-time fee of not over the same amount of \$400 could be charged. The credit counselling service could also take up to \$60.00 of the monthly payment of \$400 as fees (15% of \$400), leaving no less than \$340.00 to be distributed to creditors.

The only additional charge permitted would be to pass back to a consumer a chargeback fee that an operator incurs from a financial institution for a dishonoured consumer cheque or other payment instrument (e.g., a not-sufficient-funds cheque). Only the actual charge from the financial institution would be permitted to be passed through. Such charges to a business for attempting to deposit such a cheque are typically less than \$10.

4. Ensure set aside funds are under consumer control

It is proposed that if the debt settlement services agreement provides that funds be set aside for the purpose of making settlement offers to creditors, then the funds set aside must be under the consumer's exclusive control.

Rules would require that debt settlement agreements not require consumers to pay monies into an account unless:

- Funds are held in a deposit-insured account with a bank, credit union, trust company;
- The funds are under the consumer's control and the consumer is entitled to any interest on the account;
- The entity holding funds is fully independent of the debt settlement service operator; and
- The consumer may withdraw the funds at any time.

Once a creditor and consumer agree that a particular debt can be settled, funds in respect of that debt could be paid to the debt settlement operator to be placed into a trust account under the debt settlement service operator's control. These funds would be held as trust funds to ensure they are used for their intended purpose.

5. Require clear disclosure of all key contract terms and a 10 day cooling off right

It is proposed that written and signed contracts would be required to set out clearly all fees, services and conditions relating to a debt settlement service.

Disclosure obligations would be similar to those already set out for many agreements under the Consumer Protection Act, 2002 but would be specific to debt settlement services to address the particular issues in such agreements.

The written debt settlement agreement would be required to set out clear, comprehensible and prominent disclosure of information such as:

- a) The names of the consumer, debt settlement operator and any person who dealt with the consumer on the operator's behalf;
- b) All services to be provided under the agreement, including itemized fees for those services;
- c) All fees to be paid by the debtor under the agreement whether for services provided or other matters such as dishonoured cheques;
- d) The details of all debts to which the agreement applies;
- e) The dates by which the operator will approach creditors to notify them of their involvement and, where applicable, by which it estimates settlement offers will be made to creditors;
- f) The amount of money or percentage of each outstanding debt that must accumulate before the operator will make a settlement offer to a creditor; and
- g) All restrictions, limitations, conditions and termination rights under the agreement.

It is proposed that consumers have a 10 day cooling off period to reconsider entering into a debt settlement agreement and to cancel it without any obligations.

It is also proposed that no agreement have a term longer than three years in duration. A consumer and operator could enter into a further agreement, but it would be treated as a new agreement.

6. Require mandatory disclosures of consumers' rights and risks

It is proposed that mandatory statements be included in contracts to inform consumers of the risks involved in using debt settlement services.

Such a statement could be required to appear next to the consumer's signature, or the first page would have to provide a notice of where the statement is found. It would be integrated with mandatory disclosure of the consumer's proposed 10 day cooling off right.

A draft version of the mandatory statement follows:

Legal and Other Consequences of Failing to Make Timely Payments to Creditors

If you do not make timely payments to your creditors, your debts may increase with interest and other charges. Failure to make payment to your creditors could result in your being sued by your creditors. Your credit report will likely be negatively affected and you will face adverse consequences whenever your credit report is used to make decisions about you for credit and other purposes.

Your Rights

You may cancel this agreement at any time during the period that ends ten (10) days after the day you receive a written copy of the agreement. You do not need to give the supplier a reason for cancelling during this 10-day period.

In addition, there are other grounds that allow you to cancel this agreement. You may also have other rights, duties and remedies at law. For more information, you may contact the Ministry of Consumer Services.

To cancel this agreement, you must give notice of cancellation to the supplier, at the address set out in the agreement, by any means that allows you to prove the date on which you gave notice. If no address is set out in the agreement, use any address of the supplier that is on record with the Government of Ontario or the Government of Canada or is known by you.

If you cancel this agreement, the supplier has fifteen (15) days to refund to you any payment you have made.

7. *Prohibit misleading advertising*

Competition and distribution of consumer information through advertising are positive forces in the marketplace but must be based on accurate information.

It is proposed that in addition to the general misrepresentations of material facts, misrepresenting any of the following would be prohibited:

- a) whether the operator is providing the services on a non-profit basis;
- b) whether the operator is approved, licensed or registered or its operations are regulated by the Government of Canada, the Government of Ontario or the government of any other province or territory of Canada;
- c) the amount of money that the consumer must owe or the percentage of each of the consumer's debts that must be outstanding before the operator will initiate attempts with the creditors of the consumer or their debt collectors to negotiate, settle or modify the terms of the consumer's debts;
- d) the amount of time necessary to achieve the results represented by the operator;
- e) the amount of money or the percentage of the consumer's debts that the consumer may save by using the services;
- f) the percentage or number of consumers for whom the operator attains the results represented by the operator;
- g) the effect of the services on the consumer's creditworthiness; and
- h) the effect of the services on collection efforts of the creditors of the consumer or their debt collectors.

8. *Establish standards of conduct*

A number of practices would be prohibited or required:

- a) Restricting a consumer from accessing their credit report from a consumer reporting agency. This is a right given to the consumers under the Consumer Reporting Act and something which all consumers are encouraged to do regularly.
- b) Restricting a consumer from communicating with creditors. Offering to act as intermediary and deal with the creditor would be permitted but forbidding a consumer from communicating with creditors would not be permitted.
- c) Dealing in a name other than the name authorized by registration under the Collection Agencies Act.
- d) Failing to provide written reports on status of their work fulfilling a debt settlement agreement upon request.
- e) Giving any person, directly or indirectly, by implication or otherwise, any false or misleading information or counselling anyone to give false or misleading information.
- f) Receiving any fee in the form of a promissory note or other negotiable instrument other than a cheque or draft;
- g) Offering, paying or giving any gift, bonus, premium, reward or other

- compensation to a consumer for entering into a debt settlement agreement
- h) Directly or indirectly collecting any fee for referring, advising, arranging for or assisting a consumer in obtaining credit. This prohibition would not include obtaining an extension of time to repay an existing debt.;
 - i) Failing to inform affected creditors of their engagement within 15 days.
 - j) Failing to inform a consumer within 15 days after the creditor has notified the debt repayment agency that the creditor has decided not to participate in or has withdrawn from a debt repayment program;
 - k) Communicating information about the debt or the existence of the debt with any person except the consumer, a guarantor of the debt, the consumer's representative or the creditor of the debt.
 - l) Failing to facilitate the consumer obtaining a written record from creditor, where available, that a debt is satisfied by repayment.

9. Remedies and enforcement

Compliance with the proposed rules could be monitored both through consumer complaints and inspections of debt settlement services. Services would have to keep records of all relevant documents regarding consumer agreements, advertising, the receipt and disbursement of funds, trust accounts and dealings with creditors.

It is proposed that businesses that enter into a debt settlement agreement without holding a required registration under the Collection Agencies Act would not be entitled to collect any payment in respect of the agreement.

If the proposed fee limits are adopted and a consumer was charged more than permitted, the agency would be obligated to refund the excess amount to consumers.

If an agency included a prohibited term in its contracts, in addition to this being prohibited conduct subject to a penalty, the term would be unenforceable in the contract.

Your Advice is Important

Please provide the Ministry of Consumer Services with your comments no later than February 25, 2013.

You may send your response by e-mail with “Debt Settlement Consultation” in the subject line, to:

consumerpolicy@ontario.ca

You may also mail a response to:

Debt Settlement Consultation
Consumer Policy and Liaison Branch
Ministry of Consumer Services
5th Floor, 777 Bay Street
Toronto, ON M7A 2J3

Thank you for taking the time to review these proposals and we look forward to your response.

Privacy Statement

Please note that unless requested and agreed otherwise by the Ministry of Consumer Services, all materials or comments received from organizations in response to this consultation will be considered public information and may be used and disclosed by the ministry to assist the ministry in evaluating and revising the proposed regulatory amendments. This may involve disclosing materials or comments, or summaries of them, to other interested parties during and after the request for public comment process.

An individual who provides materials or comments and who indicates an affiliation with an organization will be considered to have submitted those comments or materials on behalf of the organization so identified. Materials or comments received from individuals who do not indicate an affiliation with an organization will not be considered public information unless expressly stated otherwise by the individual. However, materials or comments by individuals may be used and disclosed by the ministry to assist in evaluating and revising the proposed regulatory amendments.

Personal information of those who do not specify an organizational affiliation, such as an individual's name and contact details, will not be disclosed by the ministry without the individual's consent unless required by law. If you have any questions about the collection of this information, please contact consumerpolicy@ontario.ca.