



Proposed Regulatory Amendments to the General
Regulation (O. Reg. 98/09) of the *Payday Loans Act*, 2008

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Consumer Policy and Liaison Branch,
Consumer and Business Policy Unit

Submitted by: The Ontario Bar Association,
Business Law Section



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to comment on the proposed regulatory amendments to the General Regulation (O. Reg. 98/09) of the *Payday Loans Act, 2008* (the “proposed amendments”).

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents 18,000 lawyers, judges, law professors and law students. The OBA is pleased to analyze and assist government with dozens of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was prepared by the OBA’s Business Law Section, with input from the OBA’s Charity and Not-for-Profit Law Section. The OBA Business Law Section has nearly 2000 members, and includes the leading experts in business law issues who would count among their clients a broad range of lenders, lessors, and other entities extending credit to consumers in Ontario.

Overview

The OBA is aware that the Ministry may have concerns about Ontario consumers being offered short-term credit products that may be similar to payday loans but not treated as such by lenders. However, the OBA is strongly of the view that the proposed amendments are overly broad in their reach and go well beyond the specific mischief that the Ministry aims to curb.

For the reasons set out below, the proposed amendments will undoubtedly capture many different categories of lenders and lessors, who are in no way payday loan lenders, and whose conduct the Act was never intended to regulate.

To the extent that the Ministry may subsequently seek to create exemptions for such lenders and lessors, the OBA respectfully believes this is also the wrong approach.

In our view, the very broad range of activity impugned by the proposed amendments makes it virtually impossible for there to be adequate exemptions to allow lenders and lessors who are in no way payday lenders to continue their business models without being subject to the Act.

The OBA’s analysis of the proposed amendments is set out below.



Background

Section 1 of the Act defines “borrower” as follows:

“borrower” means a corporation, partnership, sole proprietor, association or other entity or individual that receives a payday loan or indicates an interest in receiving a payday loan;

As such, the Act applies to regulated loans granted to both consumers and non-consumers.

Section 2(1) of the Act provides that:

2. (1) Subject to the regulations, this Act applies in respect of all payday loans if the borrower, lender or loan broker is located in Ontario when the loan is made or to be made.

As such, the Act applies to lenders (wherever located) that extend credit where some or all of his, her or its borrowers are located in Ontario and to lenders that are located in Ontario and extend credit inside and outside Ontario.

Section 2(2) of the Act further provides that:

2(2) Except for section 32 [capping of returns on payday loans], this Act applies with necessary modifications to those loans, other than payday loans, that are prescribed and in that case the references to payday loans in this Act shall be read as references to those other loans.

The Proposed Regulation

The purpose of this proposed amendment appears to be aimed at payday loan lenders who have created new loan products that are not caught by the definition of “payday loan” in the Act, and as a result are not caught by the capped rates of return on payday loans contained in the Act or its other regulatory provisions.

The proposed regulation would add a new class of loan to be subject to the Act:

Application of Act

1.1 (1) A loan described in subsection (2) [of this draft regulation] is prescribed for the purposes of subsection 2 (2) of the Act.

1.1 (2) Subsection (1) applies to a loan under which a lender extends credit to a borrower so that the borrower may make one or more draws for up to an aggregate amount of principal and to which one of the following criteria applies but does not apply to a loan that is secured against real property:



1. The aggregate amount is \$5,000 or less.
2. The borrower is not entitled to make a draw without first obtaining authorization, approval or permission of any kind from the lender or any other person, whether or not there is a charge for obtaining the authorization, approval or permission.
3. The borrower is required to make repayments of the principal amount of the loan or payments of any other amounts under the loan on a schedule that corresponds to the days on which the borrower is regularly due to receive income.
4. The amount that the borrower is required to pay in any 30-day period under the loan, except for the last such period, includes one or more repayments totalling at least 10 per cent of the principal amount of the loan.

Comments on the Proposed Regulation

As stated above, as drafted the proposed amendments cast too broad a sweep, catching lenders and lessors that are not payday lenders and do not require further regulation. The OBA's concern is that any exemptions to the draft regulation will not be sufficient to exclude parties who should not be subject to licencing and regulation under this Act.

If brought into force, the proposed amendments to the regulation would apply where either the lender or the borrower is located in Ontario, meaning lenders would require a lender's licence, be subject to inspection, have to provide certain mandatory information to borrowers, and other matters. The lender could also be made subject to potential penalties under the Act, which can include substantial fines and possible imprisonment.

The proposed amendments encompass the following who are not the real target of the proposed regulatory regime.

It is important to note that this is not an exhaustive list and is given only to indicate the broad range of entities and activities we believe the Ministry did not intend to regulate under the Act:

a) Loans or leases for \$5,000 or less:

- a credit card is an extension of credit from a store or a financial institution, allows for multiple extensions of credit, and would be caught if the card had a credit limit of \$5,000 or less under. It may also fall under the fourth criteria if the card repayment terms require at least 10% of the sum outstanding paid monthly;



- consumer finance companies who finance uninsured medical services, dental work, and household improvements, often have loan products akin to lines of credit, with multiple draws when services or materials are rendered;
- financing or leasing of small-ticket consumer goods, such as a new lap top or PC or a new set of household appliances. A conditional sale contract/time purchase or lease is an extension of credit and might require 10% of more of the principal repaid monthly;
- a personal loan or line of credit from a credit union or from a family member, if the amount is under \$5,000;
- micro loans made by charities, not for profits, and angel donors to help impoverished people inside or outside Ontario set up small businesses to be self-sufficient;
- a lender caught by the Act could not make a debt consolidation loan, since a payday lender may not have two payday loans outstanding on the same day; and
- a conditional sale debt or other loan with scheduled payments, that could not have more than 10% repaid in one month.

b) Loans or leases of any amount with biweekly payments:

Many consumers set up biweekly or monthly payments for goods and services to correspond to their pay cycles as a matter of convenience. For example car loans and leases for amounts well over \$5,000 are often set up for a biweekly payment schedule to allow payments on paydays. The making of 26 payments a year on a biweekly basis lets the borrower repay the debt faster and with less interest on the outstanding balance, which would be a desirable outcome.

c) Loans requiring 10% repayment in one month:

Credit cards and loans where the borrower wants to repay on a shorter amortization period may have these terms, which ironically go to reduce the party's debt load faster and again, would be a desirable outcome.

d) Loans requiring "any kind of approval" before a draw:

Wholesale and floor planning loans often require checks and approvals before the lender funds the vendor of the inventory being financed. Other types of loans can and do need approvals or advance notice or filing of borrowing base certificates before the borrower can draw funds.



The foregoing types of loans and leases are already well regulated by the following among other matters and do not require additional regulation under the Act:

- a) the *Consumer Protection Act, 2002* (the “CPA”) for cost of credit disclosure, unfair business practices, and advertising;
- b) section 347 of the *Criminal Code* and criminal interest rates;
- c) class actions brought against lenders, lessors and merchants who engage in unfair business practices or who breach the CPA or the *Criminal Code*.

Conclusion

For the reasons set out above, the OBA is strongly of the view that the proposed amendments are overly broad in their reach and make it impossible for lenders and lessors who are in no way payday lenders to continue their business models without being subject to the Act.

The OBA looks forward to an opportunity to assist the Ministry in any further development of the *Payday Loans Act* and its regulations.