



NEW YORK  
CITY BAR

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**REPORT ON LEGISLATION BY THE  
CIVIL COURT COMMITTEE AND CONSUMER AFFAIRS COMMITTEE**

**S.2493**

**Sen. Griffo**

AN ACT to amend the general business law and the banking law, in relation to defining terms related to budget planning and regulating the activities of budget planners.

**THIS BILL IS OPPOSED**

The Civil Court and Consumer Affairs Committees of the New York City Bar Association submit these comments with regard to S.2493. This bill would amend the General Business Law and the Banking Law and: (a) eliminate the provision that permits only Type B nonprofit corporations to become licensed budget planners; (b) require that fees imposed be “fair, reasonable and easily understood;” (c) empower the Attorney General to take proof, issue subpoenas, and seek injunctions for violations of applicable provisions; (d) establish civil penalties for violations of applicable provisions; and, (e) prohibit licensees from charging for goods or services, membership in a club, and access to services not directly related to budget planning services unless pre-approved by the Superintendent.

**BACKGROUND**

Budget planning is another name for a “debt relief service.”<sup>1</sup> The Federal Trade Commission (“FTC”) recognizes several types of debt relief services, including credit counseling, debt negotiation, and debt settlement.<sup>2</sup> In the past decade, for-profit operators frequently called “debt management” companies have also emerged.<sup>3</sup>

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<sup>1</sup> Federal regulation defines “debt relief services” to mean:

any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.

FTC Telemarketing Sales Rule, 16 C.F.R. pt. 310.2(m) (2012).

<sup>2</sup> See FTC 2010 TSR Final Rule Amendments, 75 Fed. Reg. 48,458, 48,459-64 (Aug. 10, 2010). See NEW YORK CITY BAR, PROFITEERING FROM FINANCIAL DISTRESS: AN EXAMINATION OF THE DEBT SETTLEMENT INDUSTRY 9-10 (May 11, 2012), available at <http://www2.nycbar.org/pdf/report/uploads/DebtSettlementWhitePaperCivilCtConsumerAffairsReportFINAL5.11.12.pdf> [hereinafter NYCB 2012 REPORT] (explaining the various types of debt relief models). (Last visited March 7, 2013).

<sup>3</sup> See FTC 2010 TSR Final Rule Amendments, 75 Fed. Reg. at 48,464. The FTC refers to these companies as “debt negotiation” companies. *Id.* Others refer to these operators as “debt management” companies. See FTC, Transcript of

On May 11, 2012, the City Bar issued a comprehensive examination of a particular type of debt relief - debt settlement - titled *Profiteering from Financial Distress: An Examination of the Debt Settlement Industry*.<sup>4</sup> The White Paper provided an overview of the troubled history of the debt relief sector over time for both nonprofit and for-profit entities and delved deeply into debt settlement in the past decade.<sup>5</sup> The Committees concluded that debt settlement did not, as the bill's Justification suggests, "help consumers regain their financial footing," but instead that consumers "experienced net financial loss and lasting financial harm due to their involvement with debt settlement service providers."<sup>6</sup>

While the White Paper focused on debt settlement, the Committees' exhaustive review of the public record revealed abusive, deceptive, and predatory practices by a range of debt relief providers. As with debt settlement, the public record contains substantial evidence of deceptive and harmful practices by debt negotiation (i.e., debt management) and credit counseling providers. The FTC, state attorneys general, and other state enforcement agencies have brought dozens of cases against such operators.<sup>7</sup>

As the Committees noted in the White Paper:

The New York State Legislature adopted legislation banning for-profit "budget planning" in 1956. The record from the legislative history includes this notation:

The Attorney General reports that debt consultants lure the financially distressed by false and deceptive advertising; that they charge excessive fees; and that they derive the bulk of their revenue from the poorly educated and the people in the lower income groups.

The record goes on to include the following observation about debt adjusters: "[i]t appears these practices are too common and widespread in the area affected, that the only feasible way to control them is by prohibiting this type of business . . . ."<sup>8</sup>

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the Consumer Protection and Debt Settlement Industry Workshop 153 (Sept. 25, 2008), [available at http://www.ftc.gov/bcp/workshops/debtsettlement/OfficialTranscript.pdf](http://www.ftc.gov/bcp/workshops/debtsettlement/OfficialTranscript.pdf) [hereinafter FTC 2008 Workshop]. (Last visited March 7, 2013).

<sup>4</sup> NYCB 2012 REPORT, supra note 2.

<sup>5</sup> See, e.g., id. at 11-26 (providing an overview of the history of debt relief operators and the emergence of the modern debt settlement industry).

<sup>6</sup> Id. at 1.

<sup>7</sup> See FTC 2010 TSR Final Rule Amendments, 75 Fed. Reg. 48,458, 48,509 (Aug. 10, 2010) (listing 14 FTC cases brought against credit counseling and debt negotiation operators); see also id. at 48,513-14 (listing 13 state attorney general and state agency enforcement actions against debt negotiation operators), 48,514 (listing 21 state attorney general and state agency enforcement actions against credit counseling operators).

<sup>8</sup> NYCB 2012 REPORT, supra note 2, at 13 (citing N.Y. GEN. BUS. LAW §§ 455-57 (2012) and NEW YORK LEGISLATIVE ANNUAL 451-52 (1955) (Governor's Memoranda on Bills Approved, "budget planning prohibited")).

Whether and how New York’s budget planning law applies to modern-day debt relief operators has been an open question. The statutory definition of budget planning states that a budget planner “distributes, or supervises, coordinates or controls the distribution of, or has a contractual relationship with another person or entity that distributes, or supervises, coordinates or controls such distribution of” “a sum or sums of money” “among certain specified creditors in accordance with a plan agreed upon.”<sup>9</sup> The New York State Banking Department, which has been succeeded by the New York State Department of Financial Services, concluded that current budget planning provisions do not apply to debt settlement operators because such operators did not distribute funds to creditors.<sup>10</sup>

## KEY PROVISIONS OF THE BILL

The key provisions of the bill are outlined below.

1. For the first time in New York State’s history, the bill would allow for-profit entities to obtain licenses to operate as budget planners.
2. The bill eschews meaningful restrictions on fees and instead requires only that “any fees or charges imposed . . . be fair, reasonable and easily understood.”
3. The bill would amend the definition of budget planning to mean payment by the debtor to the budget planner “in accordance with a *periodic payment* plan agreed upon *by the debtor’s creditors at or near the time the contract is entered.*” (The new proposed language is in italics.)
4. The bill empowers the Attorney General to bring an action for injunctive relief to enjoin violations of applicable provisions. The bill grants the Attorney General the authority to “take proof” and to issue subpoenas.
5. The bill provides for civil penalties of not more than \$500 per contract made in violation of the provisions governing budget planning (i.e., Article 12-C of the Banking Law), not to exceed \$100,000.
6. The bill would prohibit licensees from “charg[ing a] debtor for or provid[ing] credit or other insurance, coupons for goods or services, membership in a club, access to computers or the internet, or any other matter not directly related to budget planning services unless pre-approved by the superintendent.”

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<sup>9</sup>N.Y. Gen. Bus. Law § 455.

<sup>10</sup> Press Release, N.Y. State Banking Dep’t, Banking Department Recommends Regulation of Debt Settlement Companies: Amendment of Article 12-C Would Maintain Stronger Consumer Protection Standards (May 14, 2009), available at <http://www.dfs.ny.gov/about/press/pr090514.htm> (last visited May 7, 2012). (Last visited March 7, 2013).

## COMMENTS

**Elimination of Exemption from Licensure of Type B Nonprofit Corporations.** In its White Paper, the Committees recommended a ban of debt relief services for a fee that is more than nominal.<sup>11</sup> The current budget planner statute, by limiting licensure to type B nonprofit corporations, ensures that the fees charged will not be profit making.<sup>12</sup> The New York State Banking Department, on June 4, 2004, issued an industry letter titled *Examination of Budget Planner Activities and Fee Structures*.<sup>13</sup> In the industry letter, the Department noted “[i]t is imperative that the not-for-profit designation not be abused” and that “[a]ccordingly, the activities and fee structure of the licensed budget planner will be examined closely.”<sup>14</sup> The industry letter went on to detail the searching review the Department would conduct to ensure that licensed, nonprofit budget planners did not abuse their tax status through their fee structures.<sup>15</sup>

As noted previously, the Committees do not support licensure of debt relief operators - whether for-profit or nonprofit - that charge more than a nominal fee for debt-relief related services. This bill would allow debt relief operators to enter the New York State market and charge fees that are not only more than nominal, but are without any meaningful protections for consumers under the bill’s current proposed provision. Such a drastic policy shift would expose New Yorkers to debt relief industries whose effectiveness has not been demonstrated<sup>16</sup> and whose practices have been, historically and in the past decade, marred by deceptive, abusive, and fraudulent operators.<sup>17</sup> New York State should not expose people to such unprecedented risks.

**Fee Provisions.** The Committees recommend a ban on any debt relief service—whether debt settlement, debt negotiation (otherwise known as debt management), or credit counseling—for a fee that is more than nominal. Budget planning services are best provided for free, particularly when overseen by government agencies such as the New York City Department of Consumer Affairs through their innovative Financial Empowerment Centers. The bill’s requirement that “any fees or charges imposed must be fair, reasonable and easily understood” does not provide any meaningful protection to New York State consumers against debt relief operators who provide ineffective services, cause financial hardship, and, worse, engage in outright fraud as has been demonstrated

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<sup>12</sup> N.Y. Banking Law § 579 (2012) (“Only a type B not-for-profit corporation as defined . . . shall engage in the business of budget planning . . . [and shall be required to] first obtain[] a license from the superintendent.”).

<sup>13</sup> New York State Department of Financial Services, Industry Letters: Examination of Budget Planner Activities and Fee Structure, available at [http://www.dfs.ny.gov/legal/industry\\_circular/banking/il040604.htm](http://www.dfs.ny.gov/legal/industry_circular/banking/il040604.htm) (last visited June 7, 2012). (Last visited March 7, 2013).

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> NYCB 2012 REPORT, supra note 2, Part 3.c.ii.

<sup>17</sup> Id. Part 3.a.ii.

time and again in the public record. In fact, such a vague definition opens the door to abuses by an industry fraught with illegitimate operators who have a history of gouging consumers.<sup>18</sup>

**Debt Relief Models Covered by the Bill.** The bill does not clarify what kind of debt relief service the budget planner law would cover. The bill’s proposal to amend the definition of budget planning to include payments “in accordance with a *periodic payment* plan agreed upon *by the debtor’s creditors at or near the time the contract is entered*” (proposed new language is in italics) is confusing and not clear. Typically, debt negotiation and credit counseling providers purport to help consumers establish debt management plans that may involve periodic payment plans to creditors;<sup>19</sup> however, debt settlement and hybrid debt relief models are emerging such that debt settlement providers as well may be purporting to arrange for periodic payment plans.<sup>20</sup>

Adding to the confusion is the bill’s reference to both “debt management” and “debt settlement” in its language. The bill, in the “Justification” section, states that “across the country budget planners consist of nonprofit and for-profit providers that offer financial counseling, education, budgeting, and *debt management* products.” (Emphasis added.) The bill, in Section 7, also states that “[t]his act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all *debt settlement* services agreements entered into or offered on or after such date.” (Emphasis added.)

As noted previously, the Committees strenuously oppose licensure of debt settlement operators in New York State - whether for-profit or nonprofit - such that they would be permitted to charge more than nominal fees for their services. The bill should be revised to make clear what kinds of debt relief services are intended to be covered by the amended budgeting planning provisions.

**Enforcement Powers and Civil Penalties.** As a general principle, the Committees support proposals to enhance the powers of the Office of the Attorney General to enforce provisions that protect New York consumers. The bill however makes no provision for a private right of action for violations of the budget planning provisions. As in the White Paper, the Committees recommend that “[w]hatever the statutory framework governing debt settlement [or other debt relief] services, New York State should provide for a private right of action for violations of the law and attorney’s fees.”<sup>21</sup>

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<sup>18</sup> In the White Paper, the Committees noted the far-reaching impact of FTC rule amendments that banned some of the more egregious debt relief practices of the 2000s, including that of advance fees by debt settlement companies. *Id.* Part 4.a. The Committees, however, also noted that debt relief schemes have emerged in the wake of the rule amendments that take advantage of loopholes, such as the “purported attorney model,” *id.* Part 3.d, and operators that snare consumers through face-to-face transactions. *Id.* at 101, 106. The bill does not amend the attorney exemption provision or the attorney obligations currently in effect in the budget planner statute.

<sup>19</sup> See *id.* 9 n.17 (describing different kinds of plans).

<sup>20</sup> FTC 2008 Workshop, *supra* note 3, at 242 (statement by attorney for debt relief industry that there are “pilot projects going on now where the in between is reducing principal somewhat, getting concessions and doing it over a time period”).

<sup>21</sup> NYCB 2012 REPORT, *supra* note 2, at 4.

**Ban on Charges for Services Removed From Budget Planning.** The bill prohibits licensees from “charg[ing consumers] . . . or provid[ing] credit or other insurance, coupons for goods or services, membership in a club, access to computers or the internet, or any other matter not directly related to budget planning services unless pre-approved by the superintendent.” The Committees noted in the White Paper the emergence of new debt relief scheme that included membership and discounts.<sup>22</sup> Along with the other recommendations set out in the White Paper, such a prohibition would be protective of consumers. Alone, however, this proposed reform does not go far enough to protect New York consumers from the abusive and deceptive practices outlined in the White Paper.

Thank you for the opportunity to comment on this bill, S.2493. Should you have any questions, please do not hesitate to contact us.

Respectfully submitted,

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Reissued March 2013

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<sup>22</sup> Id. at 109-10.