S T A T E O F N E W Y O R K

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I N S E N A T E

May 3, 2011

Introduced by Sens. GRIFFO, ZELDIN -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- reported favorably from said committee and committed to the Committee on Banks -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

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

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 455 of the general business law, as amended by chapter 629 of the laws of 2002, subdivisions 1 and 4 as amended by chapter 456 of the laws of 2006, is amended to read as follows:

S 455. Definitions. 1. Budget planning, as used in this article, means the making of a contract between a person [or entity] engaged in the business of budget planning with a particular debtor whereby THE DEBTOR AGREES TO PAY TO SUCH PERSON ANY VALUABLE CONSIDERATION AND (i) the debtor agrees to pay a sum or sums of money in any manner or form and the person [or entity] engaged in the business of budget planning 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, the same among certain specified creditors in accordance with a plan agreed upon [and]; OR (ii) the [debtor agrees to pay to such person or entity, or such other person or entity that distributes, or supervises, coordinates or controls such distribution of, a sum or sums of money, any valuable consideration for such services or for any other services rendered in connection therewith.] PERSON ENGAGED IN THE BUSINESS OF

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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BUDGET PLANNING PROVIDES ADVICE OR SERVICES, OR ACTS AS AN INTERMEDIARY BETWEEN OR ON BEHALF OF A DEBTOR AND ONE OR MORE OF THE DEBTOR'S CREDITORS, WHERE THE PRIMARY PURPOSE OF THE ADVICE, SERVICE, OR ACTION IS TO OBTAIN A SETTLEMENT, ADJUSTMENT, OR SATISFACTION OF THE DEBTOR'S UNSECURED DEBT TO A CREDITOR IN AN AMOUNT LESS THAN THE PRINCIPAL AMOUNT OF THE DEBT OR IN AN AMOUNT LESS THAN THE CURRENT OUTSTANDING BALANCE OF THE DEBT; OR (III) THE PERSON ENGAGED IN THE BUSINESS OF BUDGET PLANNING PROVIDES SERVICES RELATED TO, OR PROVIDES SERVICES ADVISING, ENCOURAGING, ASSISTING, OR COUNSELING A DEBTOR TO, ACCUMULATE FUNDS FOR THE PRIMARY PURPOSE OF PROPOSING, OBTAINING, OR SEEKING TO OBTAIN A SETTLEMENT, ADJUSTMENT, OR SATISFACTION OF THE DEBTOR'S UNSECURED DEBT TO A CREDITOR IN AN AMOUNT LESS THAN THE PRINCIPAL AMOUNT OF THE DEBT OR IN AN AMOUNT LESS THAN THE CURRENT OUTSTANDING BALANCE OF THE DEBT TO PAY TO SUCH PERSON. For the purposes of this article, a person [or entity] shall be considered as engaged in the business of budget planning in New York, and subject to this article and the licensing and other requirements of article twelve-C of the banking law, if such person [or entity] solicits budget planning business within this state and, in connection with such solicitation, enters into a contract for budget planning with an individual then resident in this state.

2. PERSON, AS USED IN THIS ARTICLE, MEANS AN INDIVIDUAL, LIMITED LIABILITY COMPANY, CORPORATION, ASSOCIATION, OR ANY OTHER LEGAL ENTITY.

3. Person, as used in this article, shall not include a person [admitted to practice law in this state.

3. Entity, as used in this article, shall not include a firm, partnership, professional corporation, or other organization, all of the members or principals of which are admitted to practice law in this state.

4. Person or entity as used in this article shall not include a type B not-for-profit corporation as defined in section two hundred one of the not-for-profit corporation law of this state, or an entity incorporated in another state and having a similar not-for-profit status,] licensed by the superintendent[,] to engage in the business of budget planning [as defined in this section] OR EXEMPT FROM LICENSURE AS A BUDGET PLANNER UNDER ARTICLE TWELVE-C OF THE BANKING LAW.

[5. Any attorney licensed to practice law in this state who is engaged in budget planning shall (a) negotiate directly with creditors on behalf of the client; (b) ensure that all moneys received from the client are deposited in the attorney's account maintained for client funds; (c) pay creditors from such account; and (d) offer budget planning services through the same legal entity that the attorney uses to practice law.]

S 2. Section 456 of the general business law, as amended by chapter 456 of the laws of 2006, is amended to read as follows:

S 456. Budget planning prohibited. No person [or entity] shall engage in the business of budget planning as defined in section four hundred fifty-five of this article, except as authorized in article twelve-C of the banking law.

S 3. Section 457 of the general business law, as amended by chapter 629 of the laws of 2002, is amended to read as follows:

S 457. Penalty. Whoever either individually or as officer, director or employee of any person[, firm, association or corporation,] violates any of the provisions of [the preceding] section FOUR HUNDRED FIFTY-SIX OF THIS ARTICLE shall be guilty of a misdemeanor for each such violation.

S 4. Section 579 of the banking law is renumbered section 579-a and a new section 579 is added to read as follows:

S 579. DEFINITIONS. AS USED IN THIS ARTICLE:

1. "PERSON" MEANS AN INDIVIDUAL, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION, ASSOCIATION, OR ANY OTHER LEGAL ENTITY.

2. "PRINCIPAL AMOUNT OF THE DEBT" MEANS THE TOTAL AMOUNT OWED BY A DEBTOR TO ONE OR MORE CREDITORS FOR A DEBT THAT IS INCLUDED IN A DEBT SETTLEMENT PLAN AT THE TIME WHEN THE DEBTOR ENTERS INTO SUCH DSP.

3. "DEBT MANAGEMENT PLAN" OR "DMP" MEANS A CONTRACT BETWEEN A PERSON AND A DEBTOR WHEREBY THE PERSON WILL PROVIDE BUDGET PLANNING THAT CONTEMPLATES THAT CREDITORS WILL REDUCE FINANCE CHARGES OR FEES FOR LATE PAYMENT, DEFAULT OR DELINQUENCY.

4. "DEBT SETTLEMENT PLAN" OR "DSP" MEANS A CONTRACT BETWEEN A PERSON AND A DEBTOR WHEREBY THE PERSON WILL PROVIDE BUDGET PLANNING THAT CONTEMPLATES THAT CREDITORS WILL SETTLE DEBTS FOR LESS THAN THE PRINCIPAL AMOUNT OF THE DEBT.

S 5. Section 579-a of the banking law, as amended by chapter 629 of the laws of 2002 and as renumbered by section four of this act, is amended to read as follows:

S 579-a. Doing business without license prohibited. [Only a type B not-for-profit corporation as defined in section two hundred one of the not-for-profit corporation law of this state, or an entity incorporated in another state and having a similar not-for-profit status,] NO PERSON shall engage in the business of budget planning as defined in subdivision one of section four hundred fifty-five of the general business law of this state except as authorized by this article and without first obtaining a license from the superintendent, EXCEPT:

1. ANY ATTORNEY LICENSED TO PRACTICE LAW IN THIS STATE WHEN ACTING IN THE ORDINARY PRACTICE OF LAW AND THROUGH THE ENTITY USED BY THE ATTORNEY IN THE ORDINARY PRACTICE OF LAW, AND NOT HOLDING HIMSELF OR HERSELF OUT AS A BUDGET PLANNER, AND NOT PROVIDING BUDGET PLANNING SERVICES, EXCEPT AS INCIDENTAL TO LEGAL REPRESENTATION; OR

2. ANY PUBLIC OFFICER WHILE ACTING IN AN OFFICIAL CAPACITY AND ANY PERSON ACTING UNDER COURT ORDER; OR

3. ANY PERSON WHILE PERFORMING SERVICES INCIDENTAL TO THE DISSOLUTION, WINDING UP, OR LIQUIDATING OF A PARTNERSHIP, CORPORATION, OR OTHER BUSINESS ENTERPRISE; OR

4. ANY BANK, TRUST COMPANY, SAVINGS BANK, SAVINGS AND LOAN ASSOCIATION, OR CREDIT UNION, WHETHER INCORPORATED, CHARTERED, OR ORGANIZED UNDER THE LAWS OF THIS STATE OR ANY OTHER STATE OR THE UNITED STATES, OR ANY OPERATING SUBSIDIARY OR AFFILIATE OF ANY SUCH BANK, TRUST COMPANY, SAVINGS BANK, SAVINGS AND LOAN ASSOCIATION OR CREDIT UNION WHICH DOES NOT ENGAGE IN BUDGET PLANNING EXCEPT AS INCIDENTAL TO ITS BANKING SERVICES; OR

5. AN ATTORNEY IN PROVIDING INFORMATION, ADVICE, OR LEGAL REPRESENTATION WITH RESPECT TO FILING A CASE OR PRECEDING UNDER TITLE 11 OF THE UNTIES STATES CODE; OR

6. SUCH OTHER PERSONS AS MAY BE SPECIFICALLY EXEMPTED BY THE SUPERINTENDENT IN HIS OR HER SOLE DISCRETION AND CONSISTENT WITH THE PURPOSES OF THIS ARTICLE AND THE RULES AND REGULATIONS PROMULGATED HEREUNDER.

S 6. Subdivision 4 of section 583-a of the banking law, as added by chapter 142 of the laws of 1992, is amended to read as follows:

4. As used in this section[: (a)], the term ["person" includes an individual, partnership, corporation, association or any other organization, and (b) the term] "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a licensee, whether through the ownership of voting stock of such licensee, the ownership of voting stock of any person which possesses such power or otherwise. Control shall be presumed to

exist if any person, directly or indirectly, owns, controls or holds with power to vote ten per centum or more of the voting stock of any licensee or of any person which owns, controls or holds with power to vote ten per centum or more of the voting stock of any licensee, but no person shall be deemed to control a licensee solely by reason of being an officer or director of such licensee or person. The superintendent may in his discretion, upon the application of a licensee or any person who, directly or indirectly, owns, controls or holds with power to vote or seeks to own, control or hold with power to vote any voting stock of such licensee, determine whether or not the ownership, control or holding of such voting stock constitutes or would constitute control of such licensee for purposes of this section.

S 7. Sections 584-a and 584-b of the banking law are renumbered sections 584-c and 584-d and two new sections 584-a and 584-b are added to read as follows:

S 584-A. DISCLOSURES. BEFORE A DEBTOR SIGNS A CONTRACT WITH A LICENSEE FOR BUDGET PLANNING, THE LICENSEE MUST DISCLOSE TRUTHFULLY, IN A CLEAR AND CONSPICUOUS MANNER, THE FOLLOWING MATERIAL INFORMATION:

1. THE AMOUNT OF TIME NECESSARY TO ACHIEVE THE REPRESENTED RESULTS, AND TO THE EXTENT THAT THE BUDGET PLANNING MAY INCLUDE 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 OF THEM;

2. TO THE EXTENT THAT THE BUDGET PLANNING MAY INCLUDE A SETTLEMENT OFFER TO ANY OF THE DEBTOR'S CREDITORS OR DEBT COLLECTORS, THE AMOUNT OF MONEY OR THE PERCENTAGE OF EACH OUTSTANDING DEBT THAT THE DEBTOR MUST ACCUMULATE BEFORE THE LICENSEE WILL MAKE A BONA FIDE SETTLEMENT OFFER TO EACH OF THEM;

3. TO THE EXTENT THAT ANY ASPECT OF THE BUDGET PLANNING RELIES UPON OR RESULTS IN THE DEBTOR'S FAILURE TO MAKE TIMELY PAYMENTS TO CREDITORS OR DEBT COLLECTORS, THAT THE USE OF THE BUDGET PLANNING WILL LIKELY ADVERSELY AFFECT THE DEBTOR'S CREDITWORTHINESS, MAY RESULT IN THE DEBTOR BEING SUBJECT TO COLLECTION ACTIONS OR SUED BY CREDITORS OR DEBT COLLECTORS, AND MAY INCREASE THE AMOUNT OF MONEY THE DEBTOR OWES DUE TO THE ACCRUAL OF FEES AND INTEREST; AND

4. TO THE EXTENT THAT THE LICENSEE REQUESTS OR REQUIRES THE DEBTOR TO PLACE FUNDS IN AN ACCOUNT AT AN INSURED FINANCIAL INSTITUTION, THAT THE DEBTOR OWNS THE FUNDS HELD IN THE ACCOUNT, THE DEBTOR MAY WITHDRAW FROM THE BUDGET PLANNING AT ANY TIME WITHOUT PENALTY, AND, IF THE DEBTOR WITHDRAWS, THE DEBTOR MUST RECEIVE ALL FUNDS IN THE ACCOUNT, OTHER THAN FEES EARNED BY THE LICENSEE, WITHIN SEVEN BUSINESS DAYS OF THE DEBTOR'S REQUEST.

S 584-B. FEES. A LICENSEE SHALL NOT RECEIVE PAYMENT OF ANY FEE OR CONSIDERATION FOR ANY BUDGET PLANNING UNTIL AND UNLESS:

1. THE LICENSEE HAS RENEGOTIATED, SETTLED, REDUCED, OR OTHERWISE ALTERED THE TERMS OF AT LEAST ONE DEBT PURSUANT TO A DEBT SETTLEMENT PLAN OR DEBT MANAGEMENT PLAN;

2. THE DEBTOR HAS MADE AT LEAST ONE PAYMENT PURSUANT TO THAT DEBT SETTLEMENT PLAN OR DEBT MANAGEMENT PLAN; AND

3. THE FEE OR CONSIDERATION FOR SETTLING EACH INDIVIDUAL DEBT ENROLLED IN A DEBT SETTLEMENT PLAN SHALL NOT EXCEED TWENTY-FIVE PERCENT OF THE DEBT AT THE TIME IT WAS ENROLLED, AND MUST EITHER:

(A) BEAR THE SAME PROPORTIONAL RELATIONSHIP TO THE TOTAL FEE FOR SETTLING THE ENTIRE DEBT BALANCE AS THE INDIVIDUAL DEBT AMOUNT BEARS TO THE ENTIRE DEBT AMOUNT. THE INDIVIDUAL DEBT AMOUNT AND THE ENTIRE DEBT

AMOUNT ARE THOSE OWED AT THE TIME THE DEBT WAS ENROLLED IN THE BUDGET PLANNING; OR

(B) BE A PERCENTAGE OF THE AMOUNT SAVED AS A RESULT OF THE SETTLEMENT. THE PERCENTAGE CHARGED CANNOT CHANGE FROM ONE INDIVIDUAL DEBT TO ANOTHER. THE AMOUNT SAVED IS THE DIFFERENCE BETWEEN THE AMOUNT OWED AT THE TIME THE DEBT WAS ENROLLED IN THE BUDGET PLANNING AND THE AMOUNT ACTUALLY PAID TO SATISFY THE DEBT.

4. NOTHING IN THIS SECTION PROHIBITS REQUESTING OR REQUIRING THE DEBTOR TO PLACE FUNDS IN AN ACCOUNT TO BE USED FOR THE LICENSEE'S FEES AND FOR PAYMENTS TO CREDITORS OR DEBT COLLECTORS, PROVIDED THAT:

(A) THE FUNDS ARE HELD IN AN ACCOUNT AT AN INSURED FINANCIAL INSTITUTION;

(B) THE DEBTOR OWNS THE FUNDS HELD IN THE ACCOUNT AND IS PAID ACCRUED INTEREST ON THE ACCOUNT, IF ANY;

(C) IF THE LICENSEE DOES NOT ADMINISTER THE ACCOUNT, THE ENTITY ADMINISTERING THE ACCOUNT IS NOT OWNED OR CONTROLLED BY, OR IN ANY WAY AFFILIATED WITH, THE LICENSEE;

(D) THE ENTITY ADMINISTERING THE ACCOUNT DOES NOT GIVE OR ACCEPT ANY MONEY OR OTHER COMPENSATION IN EXCHANGE FOR REFERRALS OF BUSINESS BY THE LICENSEE; AND

(E) THE DEBTOR MAY WITHDRAW FROM THE BUDGET PLANNING AT ANY TIME WITHOUT PENALTY, AND MUST RECEIVE ALL FUNDS IN THE ACCOUNT, OTHER THAN FEES EARNED BY THE LICENSEE, WITHIN SEVEN BUSINESS DAYS OF THE DEBTOR'S REQUEST.

S 8. Section 584-d of the banking law, as renumbered by section seven of this act, is amended by adding a new subdivision 3-a to read as follows:

3-A. NO LICENSEE SHALL MISREPRESENT, DIRECTLY OR BY IMPLICATION, ANY MATERIAL ASPECT OF ANY BUDGET PLANNING, INCLUDING, BUT NOT LIMITED TO, THE AMOUNT OF MONEY OR THE PERCENTAGE OF THE DEBT AMOUNT THAT A DEBTOR MAY SAVE BY USING SUCH SERVICE; THE AMOUNT OF TIME NECESSARY TO ACHIEVE THE REPRESENTED RESULTS; THE AMOUNT OF MONEY OR THE PERCENTAGE OF EACH OUTSTANDING DEBT THAT THE DEBTOR MUST ACCUMULATE BEFORE THE BUDGET PLANNER WILL INITIATE ATTEMPTS WITH THE DEBTOR'S CREDITORS OR DEBT COLLECTORS OR MAKE A BONA FIDE OFFER TO NEGOTIATE, SETTLE, OR MODIFY THE TERMS OF THE DEBTOR'S DEBT; THE EFFECT OF THE SERVICE ON A DEBTOR'S CREDITWORTHINESS; THE EFFECT OF THE SERVICE ON COLLECTION EFFORTS OF THE DEBTOR'S CREDITORS OR DEBT COLLECTORS; THE PERCENTAGE OR NUMBER OF DEBTORS WHO ATTAIN THE REPRESENTED RESULTS; AND WHETHER THE BUDGET PLANNING IS OFFERED OR PROVIDED BY A NON-PROFIT ENTITY.

S 9. This act shall take effect on the one hundred eightieth day after it shall have become a law.