

PRELIMINARY DRAFT MODEL BILL¹

TITLE I – HIGHER COST HOME LOAN BORROWERS’ PROTECTION ACT

SEC. 1- 101. – SHORT TITLE

- (a) This title may be cited as the “Higher Cost Home Loan Borrowers’ Protection Act.”

SEC. 1- 102. -- DEFINITIONS

- (a) “Applicant means a person who applies for a higher cost home loan.
- (b) “Annual percentage rate” (“APR”) means the annual percentage rate for the loan calculated according to the provisions of the federal Truth-in-Lending Act (15 U.S.C. section 1601 et. seq.), and the regulations promulgated thereunder by the Federal Reserve Board, as said Act and regulations are amended from time to time.
- (c) “Bridge loan” means temporary or short-term financing with payments of interest only until such time as the entire unpaid principal balance is due and payable.
- (d) “Consummation” means the time that an obligor becomes contractually obligated on a higher cost home loan.
- (e) “Higher cost home loan” when referred to in this Act means a consumer credit mortgage loan transaction involving property located in this state that is considered a “mortgage” under section 152 of the Home Ownership and Equity Protection Act of 1994 (P. L. 103-25, [15 U.S.C. § 1602(aa)]), as the same may be amended from time to time, and regulations adopted pursuant thereto by the Federal Reserve Board, including section 226.32 of Title 12 of the Code of Federal Regulations, as the same may be amended from time to time.
- (f) “Lender” means any individual or entity that in any twelve-month period originates two or more higher cost home loans as defined in this Act. A lender will be deemed to have originated a loan if the lender provides the funds to close the loan whether or not such loan would be reportable by a lender subject to the federal Home Mortgage Disclosure Act or is a modification, extension or consolidation of such a loan.
- (g) “Mortgage broker” means a person (not an employee or exclusive agent of a lender) who brings an obligor and lender together to obtain a higher cost loan, and who renders services as described in the definition of “settlement services” in section 3 of the Real Estate Settlement Procedures Act (P.L. 93-533, 12 U.S.C. § 2602(3) and section 3500.2(b) of Title 24 of the Code of Federal Regulations, as the same may be amended from time to time, and regulations adopted pursuant thereto by the Department of Housing and Urban Development, as the same may be amended from time to time. A loan correspondent approved under Sec. 202.8 of Title 24 of the Code of Federal Regulations, as the same may be amended from time to time, for Federal Housing Administration programs is a mortgage broker for purposes of this definition. *[Note: If state law already defines “mortgage broker” the existing state law definition shall be used.]*

¹ **IMPORTANT NOTE:** This preliminary draft bill is still incomplete and is evolving; additions and deletions will be made as we receive further input. This is only a NHEMA counsel/staff draft that has not been submitted to NHEMA’s Board/Executive Committee for approval. It is anticipated, however, that after further revisions the bill and/or parts thereof will be endorsed by various organizations. Also, it is important to note that the provisions in this bill can, with appropriate technical modifications, be used as either a federal legislative proposal or as a state proposal in states where these issues are being addressed. Ultimately and ideally, all parties----industry groups and consumers----are likely to be best served by having uniform standards on these issues through federal legislation with appropriate preemption provisions. Please email comments and suggestions to Wright Andrews (wandrews@butera-andrews.com), Maury Shevin (Mshevin@sirote.com) and Jeffrey Zeltzer (Jeffzeltzer@mindspring.com). (Comments also may be faxed to Wright Andrews at 202-347-6876)
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- (h) “Ninety (90)-day period” means the period beginning on the day notice is provided under section 102 of this Act and ending at midnight on the ninth (90th) day thereafter.
- (i) “Obligor” means each borrower, co-borrower, co-signer or guarantor obligated to repay a higher cost home loan.
- (j) “Origination value” means the lower of the amount of the sales price or the appraised value at the time of origination.
- (k) “Points and fees” means all charges and items listed in section 226.32(b)(1) of Title 12 of the Code of Federal Regulations, as amended from time to time.
- (l) “Scheduled monthly payments” means the sum of: (1) the monthly installments of the obligor’s debts that are listed on the obligor’s application and/or reported on a nationally recognized consumer credit bureau report provided to the lender prior to origination of the loan, provided: (i) the lender reasonably determined prior to consummation of the loan that such debt is payable in fully amortizing monthly installments pursuant to the contract initially creating such a debt, or (ii) if the lender reasonably determined prior to the consummation of the loan that such debt was a revolving credit account or other type of debt for which fully amortizing monthly installments are not readily determinable by reference to the contract initially creating such debt, an amount equal to the lesser of 5% of such debt, or such lesser monthly payment amount reasonably determined by the lender to have been agreed to between the obligor and the creditor; plus (2) the monthly mortgage payment (principal and interest) due under the higher cost home loan (ignoring any reduction arising from a lower introductory rate); plus (3) one-twelfth of the annual real estate tax on the property securing the higher cost home loan, for the determination of which the lender may rely upon any one of the following (i) a tax statement from the applicable governmental taxing authority; or (ii) evidence of tax amounts provided by the obligor; or (iii) the taxes shown on an appraisal of the property; plus (4) one-twelfth of the annual mortgage insurance, hazard insurance and flood insurance premium payments applicable to the property securing the higher cost home loan. Notwithstanding the foregoing, however, the term “scheduled monthly payments” shall not include any debts that are consolidated with and paid off by the higher cost home loan.
- (m) “Servicer” has the same meaning provided in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974.

SEC. 1- 103. – LIMITATIONS ON HIGHER COST HOME LOAN TERMS

A higher cost home loan shall be subject to the following limitations:

- (a) **No balloon payment.** No higher cost home loan may contain a scheduled final payment that is more than twice as large as the average of earlier scheduled monthly payments if such balloon payment becomes due and payable earlier than 60 months after the loan’s origination. This prohibition does not apply when the payment schedule is adjusted to account for the seasonal or irregular income of the obligor or if the purpose of the loan is a bridge loan made in connection with the acquisition or construction of a dwelling intended to become the obligor’s principal dwelling.
- (a) **No call provision.** No higher cost home loan may contain a call provision that permits the lender, in its sole discretion, to accelerate the indebtedness absent a default by the obligor. This prohibition does not apply when the loan has been accelerated due to a payment default, pursuant to a due-on-sale provision, or pursuant to default in any other provision of the loan agreement such as covenants related to bankruptcy or receivership.
- (a) **No negative amortization.** No higher cost home loan may contain a payment schedule with regular periodic payments that cause the principal balance to increase. This shall not prohibit negative amortization as a consequence of a temporary forbearance sought by the obligor.

- (a) **No increased interest rate.** No higher cost home loan may contain a provision that increases the interest rate after default. This provision does not apply to periodic interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan agreement, provided the change in the interest rate is not occasioned by the event of default or the acceleration of the indebtedness and does not prohibit variable rate plans pursuant to which the initial rate decreases based on an obligor's favorable payment history.
- (a) **No oppressive mandatory arbitration clause.** No higher cost home loan may be subject to a mandatory arbitration clause that does not (i) require the arbitration proceeding to be conducted within the federal judicial district in which the subject property is located or at another location mutually agreed to by the parties; (ii) require the lender to contribute fifty percent (50%) of the amount of any filing fee incurred by the obligor that exceeds \$150.00, up to a maximum lender contribution of \$250.00; and (iii) comply with the rules and regulations set forth by a nationally recognized arbitration organization.
- (a) **No advance payments.** No higher cost home loan may include terms under which more than two periodic payments required under the loan are paid in advance from the loan proceeds provided to the obligor.
- (a) **No modification or deferral fees.** A lender may not charge an obligor any points and fees to modify, renew, extend, or amend a higher cost home loan or defer any payment due under a higher cost home loan if, after the modification, extension or amendment, the loan is still a higher cost home loan or, if no longer a higher cost home loan, the annual percentage rate ("APR") has not been decreased by at least 1.5 percentage points. For purposes of this paragraph, fees do not include periodic interest that is otherwise payable and consistent with the provisions of the loan documents. This provision shall not apply if the existing higher cost home loan is in default and the modification, extension, amendment or deferral is part of a work-out process.
- (a) **No excessive prepayment fees or penalties.** A lender may not charge an obligor any prepayment fees or penalties on a higher cost home loan except during the first 60 months from the consummation of such loan; provided such charge shall not exceed an amount equal to six months' advance interest on the amount prepaid in excess of 20 percent of the original balance. The limitations on prepayment fees and penalties contained in this subsection shall not apply to the extent state law limitations on prepayment fees and penalties are preempted by federal law or regulation.

SEC. 1-104. – PROHIBITED ACTS AND PRACTICES

The following acts and practices are prohibited in the making of a higher cost home loan.

- (a) **No lending without cautionary notice and counseling disclosure.** A lender may not make a higher cost home loan unless the lender or a mortgage broker has given the following Higher Cost Home Loan Cautionary Notice to Applicants ("Notice") in writing to the applicant no later than the time that a loan approval for a higher cost home loan is communicated to the applicant:
- (b)

Higher Cost Home Loan Cautionary Notice to Applicants

If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.

Mortgage loan rates and closing costs and fees vary based on many factors, including your particular credit and financial circumstances, your employment history, the loan-to-value requested, and the type of property which will secure your loan. Higher rates and fees may be justified depending on the individual circumstances of a particular applicant's application. However, some lenders and/or brokers charge excessive rates and/or fees that are not competitive. As an applicant, you should shop around and compare loan rates and fees.

This particular loan has a higher rate and/or total points and fees than most mortgage loans and is subject to the additional disclosure and substantive protections under state law and the federal Home
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Ownership and Equity Protection Act (HOEPA). You should consider consulting a qualified independent credit counselor or other experienced financial advisor regarding the rate, fees and provisions of this mortgage loan before you proceed.

You are not required to complete this loan agreement merely because you have received these disclosures or have signed a loan application.

If you proceed with this mortgage loan, you should also remember that you may face serious financial risks if you use this loan to pay off credit card debts and/or other debts in connection with this transaction and then subsequently incur significant new credit card charges or other debts. If you continue to accumulate debt after this loan is closed and then experience financial difficulties, you could lose your home and any equity you have in it if you do not meet your mortgage loan obligations.

APPLICANT'S ACKNOWLEDGMENT

Obligor(s)

DATE

- (a) **Applicant Confirmation.** The lender shall be conclusively presumed to have met its obligation to provide the Notice required by the preceding subsection (a) if the applicant provides the lender with a signed acknowledgment of receipt of a copy of the Notice.
- (a) **Counselor List.** A list of state approved counselors, if such a list has been published by an authorized state agency, shall be provided in writing to the applicant by the lender or the mortgage broker at the time that the cautionary notice and counseling disclosure is given.
- (a) **No lending without due regard to repayment ability.**
- (1) **Basis for belief in repayment ability.** A lender may not make a higher cost home loan unless: (A) the lender reasonably believes at the time the loan is consummated that the obligor or the obligors (when considered collectively in the case of multiple obligors) will be able to make the monthly payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources (other than the obligor's equity in the dwelling which secures repayment of the loan); or (B) circumstances existed that justified the making of the loan notwithstanding the obligor's apparent lack of capacity to repay the loan based upon the factors stated in (A).
- (1) **Presumption of repayment ability.** An obligor shall be conclusively presumed to be able to make the monthly payments to repay the obligation, if, at the time the loan is originated, the obligor's scheduled monthly payment (based either on the initial payment amount or, in the case of an adjustable rate mortgage with a discounted introductory rate, the expected payment amount as of the first rate adjustment date) does not exceed fifty-five (55%) percent of the obligor's current and expected monthly gross income as verified by the lender relying in good faith on the credit application, the obligor's signed financial statement, a credit report, and any other financial information provided to the lender by or on behalf of the obligor. The lender shall exclude the owner's equity in the dwelling that secures repayment of the loan in making any determination of the obligor's repayment ability.
- (1) **Limitation.** No presumption of inability to make the monthly payments to repay the obligation shall arise solely from the fact that, at the time the loan is consummated, or at the time of the first rate adjustment, in the case of a lower introductory interest rate, the obligor's scheduled monthly payments exceed fifty-five percent (55%) of the obligor's monthly gross income.
- (e) **Financing of points, fees and charges.** In making a higher cost home loan, a lender may not require an obligor to directly or indirectly finance any portion of the points and/or fees and the obligor shall have the option of paying such items by cash, or other good funds at closing. The lender shall be presumed to have complied with

this section if the lender obtains a signed statement by at least one obligor that he or she is aware that the financing of points, fees and charges is not required, and that he or she nevertheless elects to finance the points, fees or charges.

(f) Financing of prepayment fees or penalties. In making a higher cost home loan, a lender may not directly or indirectly finance any prepayment fees or penalties payable by the obligor in a refinancing transaction if the lender or an affiliate of the lender is the originator of the loan being refinanced.

(g) Frequent refinancings of existing higher cost home loans with new higher cost home loans. (i) Except as provided in Section 1-104(g)(ii) of this Title, a lender or mortgage broker may not charge an obligor points and fees in connection with a higher cost home loan if the proceeds of the higher cost home loan are used to refinance an existing higher cost home loan and the last financing was within one year of the current refinancing unless:

- 1) the annual percentage rate of the new higher cost home loan is at least 1.5 percentage points less than the existing higher cost home loan;
 - 1) the new loan amount exceeds the unpaid balance of the existing loan by at least 10 percent and such points and fees are charged only on the amount that is the difference between the new loan amount and the existing loan balance amount; or
 - 1) With respect to a new fixed rate higher cost home loan, when the existing higher cost home loan is an adjustable rate loan that provides for a maximum rate that is higher than the fixed rate charged on the new loan.
- (ii) Notwithstanding the foregoing provisions of this Section, a lender or mortgage broker may charge an obligor the actual and reasonable costs of customary products and services of non-affiliated third parties incurred in connection with the higher cost home loan, including but not limited to appraisals, credit reports; reasonable and customary real estate, tax tracking or flood zone determination services, surveys, termite or other reasonably necessary inspections performed by third parties, reasonable and customary title insurance, title examination, and closing fees of a licensed attorney, title insurance company, or other entity authorized to provide loan closing or escrow services under the laws of this state, and recording taxes and fees charged by governmental entities.

(h) Restrictions on home improvement contracts. A lender shall not pay a contractor under a home-improvement contract from the proceeds of a higher cost home loan other than by an instrument payable to the obligor or jointly to the obligor and the contractor or, at the election of the obligor, through a third-party escrow agent in accordance with terms established in a written agreement signed by the obligor, the lender, and the contractor prior to the disbursement of funds to the contractor.

(i) Limitations on Insurance. If an obligor(s) elects to cancel, within 30 days of the date of the loan, any individual or group debtor/credit life, accident and health, disability or unemployment insurance products purchased in conjunction with a higher cost home loan on which the premium for such insurance was either financed as a part of the higher cost home loan or was paid in full at consummation, the lender who sold the insurance or the insurance company providing the product, shall give the obligor either a full premium refund or a full premium credit to the unpaid loan balance. If the obligor elects to cancel any individual or group debtor/credit insurance purchased in conjunction with a higher cost home loan at any other time, the lender shall determine whether the obligor will receive either an unearned premium refund or a credit to the unpaid loan balance and shall compute the refund or credit based upon a method that is at least as favorable to the obligor as the actuarial method. For purposes of this Title, the term credit life insurance does not include any type of life insurance sold by the lender where the obligor chooses a primary beneficiary other than the lender.

(j) Individual or Group Debtor/Credit Insurance Notice and Cancellation Form. A lender or mortgage broker shall not sell individual or group debtor/credit life, accident and health, disability or unemployment insurance products in conjunction with a higher cost home loan on a prepaid single premium basis without providing, no later than the time of loan closing, a separate disclosure and cancellation notice in a format substantially similar to the language shown below. This separate notice is not required when selling individual or group

debtor/credit life, accident and health, disability or unemployment insurance products with premiums calculated, earned and paid on a monthly or other regular periodic basis.

INSURANCE CANCELLATION FORM AND NOTICE TO OBLIGOR(S)

In conjunction with this mortgage loan, you have elected to purchase the following insurance products:

Credit Life Insurance	\$ _____
Credit Disability Insurance	\$ _____
Credit Involuntary Unemployment Insurance	\$ _____

The cost of the insurance is being prepaid and financed at the interest rate indicated in your loan documents.

THE INSURANCE IS NOT REQUIRED AS A CONDITION OF CLOSING THIS LOAN AND HAS BEEN INCLUDED AT YOUR REQUEST. YOU HAVE THE RIGHT TO CANCEL, AT ANY TIME, ANY OR ALL OF THE INSURANCE PRODUCTS YOU HAVE ELECTED TO PURCHASE. *You may cancel the insurance by signing and returning a copy of this notice directly to the lender or the insurance company providing the product (see your Certificate and/or Policy for the insurance company's name and address).*

If you cancel the insurance within 30 days of the date of your loan, you will receive either a full premium refund or a credit to the unpaid balance of your loan. If you cancel your insurance at any other time, you will receive a refund or credit to the unpaid balance of your loan equal to the unearned insurance premium. The unearned premium refund or credit will be computed using a method that is at least as favorable as the actuarial method.

INSURANCE CANCELLATION

I (we) request that the Lender/Insurance Company cancel the [life, accident and health, disability and/or involuntary unemployment] insurance that I (we) purchased in conjunction with my (our) mortgage loan dated _____.

Date: _____, 200_

Obligor

Obligor

SEC. 1- 105. -- ADDITIONAL REQUIREMENTS

(a) **Reporting to credit bureaus.** The servicer of a higher cost home loan shall report at least annually the payment history of the obligor on a higher cost home loan to a nationally recognized consumer credit bureau.

TITLE II – HOMEOWNERS’ EQUITY RECOVERY ACT

SEC. 2- 101. – SHORT TITLE AND APPLICABILITY

(a) **Short Title.** This title may be cited as the “Homeowners’ Equity Recovery Act”.

(a) **Applicability.** The provisions of this title apply to any higher cost mortgage loan if:

- (1) the total amount outstanding under all mortgage loans secured by the same residential real property does not exceed eighty (80) percent of the origination value of such property as determined by an appraisal performed in connection with the consummation of the higher cost home loan;

- (1) the obligor has not acted in bad faith;
- (1) the obligor is not in bankruptcy;
- (1) the obligor has not negligently caused or permitted waste or damage to the property;
- (1) the property is the obligor's principal dwelling and is owner-occupied at the time notice is required pursuant to section 2-102 of this Act; and
- (1) the obligor has not earlier exercised his or her rights under this Title with respect to the property.

SEC. 2- 102. – PROCEDURES AND NOTICE

- (a) After an obligor's default on a higher cost mortgage loan, and prior to the institution of foreclosure proceedings, the servicer of such loan shall provide or cause to be provided to any obligor to which subsection 2- 101(b) of this Act applies, notice substantially similar to the following:

DATE: _____

NOTIFICATION OF RIGHT TO SELL YOUR PROPERTY UNDER THE HOMEOWNERS' EQUITY RECOVERY ACT

You are in default on your home mortgage loan with us and must take immediate action to bring the mortgage amount and any outstanding interest current in a manner acceptable to us.

Under this state's Homeowners' Equity Recovery Act, you have the right to protect the equity in your property. During the 90-day period beginning on the date of this notice, you have the option of selling the property voluntarily, paying the outstanding debts and costs, and retaining any remaining equity in your home. If you choose to sell your home, you must sell it at a price sufficient to repay the total amount of the indebtedness or at a lesser price agreed to by us.

If you remain in default, we have the right under the terms of your mortgage to sell your property at foreclosure. Under this state's Homeowner's Equity Recovery Act, we may not effect such a sale or other involuntary transfer during the ninety (90) day period from the date of this notice, although we may take steps to prepare for such a sale or transfer.

If you do not wish to sell the property as described above, you may be eligible for other workout options. Not all options are available to all obligors due to various state and federal laws. Please contact us at _____ to discuss these options with regard to your property.

You may wish to consult about these issues with a qualified independent credit counselor.

- (a) The servicer shall forbear from conducting a foreclosure sale or otherwise effecting any involuntary transfer of title with respect to the property during the ninety (90)-day period or such longer period as may be agreed upon in writing.
- (a) The servicer may, at the servicer's expense, obtain a new appraisal on the property.
- (a) During the ninety (90)-day period, the obligor may, but is not required to, sell the property provided that the sale price is at an amount sufficient to repay the total amount outstanding under all mortgage loans or, at the servicer's sole option, some lesser amount.
- (a) If the total amount outstanding under all mortgage loans is not repaid within the ninety (90)-day period, or such other extended period as has been agreed to, the servicer may proceed with the foreclosure sale or other involuntary transfer, or may extend the ninety (90)-day period for such time as the servicer deems appropriate.

SEC. 2- 103. -- WAIVER

An obligor may voluntarily waive his rights under this Title in writing.

TITLE III -- ENFORCEMENT AND REMEDIES

SEC. 3- 101. – ENFORCEMENT

The Attorney General, the [list any other appropriate state regulatory official such as the Banking Department head], or any party to a higher cost home loan may enforce the provisions of this Act. The prevailing party may recover damages and attorneys' fees as set forth in SEC. 3- 104 of this Act.

SEC. 3-102 – CIVIL LIABILITY

- (a) **Damages for Material Violations.** – In any suit instituted by a higher cost home loan obligor in which the defendant is found to have materially violated this Act, the court shall award the obligor actual damages sustained by the obligor, and may, in its discretion, award the obligor an amount not to exceed \$5,000.00.
- (a) **Damages for Bad Faith, Wanton or Reckless Material Violations.** – In any suit instituted in which the defendant is found to have violated this Act, and in which the acts or practices which constituted the violation were, when committed, in bad faith or with wanton or reckless disregard for the requirements of this Act, the court shall award the obligor any actual damages sustained by such obligor as a result of such violation, and may, in its discretion, award the obligor an amount not to exceed the sum of all finance charges and fees paid by the obligor. Where there are multiple obligors in any loan subject to this Act, there shall be no more than one recovery of damages under this Section for a violation of this Act.
- (a) **Damage considerations.** In determining the amount of the award, the court shall consider all relevant circumstances, including, but not limited to acts or omissions by the obligor, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the defendant, whether corporate or individual, and any corrective action taken by the defendant.
- (a) **Class actions.** – In the case of a class action, damages shall be set at such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$500,000.00, or one per cent (1%) of the net worth of the creditor. In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the lender, the resources of the lender, the number of persons adversely affected, and the extent to which such violation was committed in bad faith or with wanton or reckless disregard for the requirements of this Act.
- (a) **Limitation.** – Any action for a violation of this Act shall be brought within one year of the date of the occurrence of such violation.

SEC. 3-103. – CORRECTIONS OF VIOLATIONS

A lender in a higher cost home loan who materially fails to comply with this Act, will not be deemed to have violated this Act if the lender establishes that either:

- 1) Within 90 days of the loan closing and prior to the institution of any action under this Act, the obligor is notified of the compliance failure, appropriate restitution is made (if the failure involves monetary amounts), and adjustments as necessary are made to the loan to either, at the choice of the lender, (i) make the higher-cost home loan satisfy the requirements of this Act, or (ii) change the terms of the loan so that the loan will no longer be considered a higher cost home loan subject to the provisions of this Act; or
- 1) The compliance failure resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, and within 90 days after the discovery of the compliance failure and prior to the institution of any action under this Act or the receipt of written notice of the compliance failure, the obligor is notified of the compliance failure, appropriate restitution is made (where monetary restitution is required), and adjustments as necessary are made to the loan to either, at the choice of the lender, (i) make the higher cost home loan satisfy the requirements of this Act, or (ii) change the terms so that the loan will no longer be considered a higher-cost home loan subject to the provisions of this Act. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors.

SEC. 3-104. – ATTORNEYS’ FEES

In any suit instituted by a person who alleges that the defendant violated this Act, the presiding judge may, in his or her discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

- 1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
- 1) The party instituting the action knew, or should have known, the action was frivolous or malicious.

TITLE IV – EFFECTIVE DATE

This Act shall become effective one hundred eighty (180) days after the date of enactment, and shall apply only to loans consummated after the effective date of this Act.