

Bill No. CS for SB 2262

Amendment No. Barcode 652100

<u>Senate</u>	CHAMBER ACTION	<u>House</u>
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Senator Holzendorf moved the following **amendment to amendment** (052916):

Senate Amendment (with title amendment)
Delete everything after the enacting clause

and insert:

Section 1. Short title; purposes.--

(1) This act may be cited as the "Florida Fair Lending Act."

(2)(a) The Legislature finds that abusive mortgage lending has become a problem in this state. One of the most common forms of abusive lending is the making of loans that are equity-based rather than income-based. The financing of points and fees in these loans provides immediate income to the originator and encourages creditors to repeatedly refinance home loans. As long as there is sufficient equity in the home, an abusive creditor benefits even if the borrower is unable to make the payments and is forced to refinance. The financing of high points and fees causes the loss of equity in each refinancing and often leads to foreclosure.

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1 (b) Abusive lending has threatened the viability of
2 many communities and caused decreases in home ownership. While
3 the marketplace appears to operate effectively for
4 conventional mortgages, too many homeowners find themselves
5 victims of overreaching creditors who provide loans with
6 unnecessarily high costs and terms that are unnecessary to
7 secure repayment of the loan. The Legislature finds that as
8 competition and self-regulation have not eliminated the
9 abusive terms from home-secured loans, the consumer protection
10 provisions of this act are necessary to encourage fair
11 lending.

12 Section 2. Definitions.--As used in this act, the
13 term:

14 (1) "Borrower" means any natural person obligated to
15 repay the loan, including, but not limited to, a coborrower,
16 cosigner, or guarantor.

17 (2) "Creditor" means a person who extends consumer
18 credit that is subject to a finance charge or is payable by
19 written agreement in more than four installments, and to whom
20 the obligation is payable at any time. The term does not
21 include any entity chartered by the Congress of the United
22 States and engaging in secondary market mortgage transactions
23 as assignee or in another capacity.

24 (3) "High-cost home loan" means a home loan the terms
25 of which meet or exceed one or more of the thresholds defined
26 in subsection (7).

27 (4) "Home loan" means a loan, including an open-ended
28 credit plan, other than a reverse mortgage transaction, where
29 the loan is secured by:

30 (a) A mortgage or deed of trust on real estate in this
31 state upon which there is located or there is to be located a

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1 structure or structures designed principally for occupancy of
2 from one to four families which is or will be occupied by a
3 borrower as the borrower's principal dwelling; or

4 (b) A security interest on a manufactured home which
5 is or will be occupied by a borrower as the borrower's
6 principal dwelling,

7
8 and where the loan refinances an existing home loan or is a
9 subordinate lien following one or more existing loans, or
10 where the property securing the mortgage was, prior to the new
11 mortgage, owned free and clear by the borrower.

12 (5) "Points and fees" means:

13 (a)1. All items listed in 15 U.S.C. s. 1605(a)(1)
14 through (4), except interest or the time-price differential;
15 or

16 2. All items required to be disclosed under s.
17 226.4(a) and (b) of Title 12 of the Code of Federal
18 Regulations, as amended from time to time, except interest or
19 the time-price differential.

20 (b) All compensation paid directly or indirectly to a
21 mortgage broker, including a broker that originates a loan in
22 its own name in a table-funded transaction.

23 (c) The cost of all premiums financed by the creditor,
24 directly or indirectly, for any credit life, credit
25 disability, credit unemployment, or credit property insurance,
26 or any other life or health insurance, or any payments
27 financed by the creditor directly or indirectly for any debt
28 cancellation or suspension agreement or contract, except that
29 insurance premiums calculated and paid on a monthly basis
30 shall not be considered financed by the creditor.

31 (d) All prepayment fees or penalties that are charged

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1 the borrower if the loan refinances a previous loan made by
2 the same creditor or an affiliate of the creditor.

3 (e) For open-ended loans, the sum of the total fees
4 charged at closing plus the maximum additional fees which can
5 be charged pursuant to the loan documents during the term of
6 the loan.

7 (6) "Rate" means the interest rate charged on the home
8 loan based on an annual simple interest yield.

9 (7) "Threshold" means:

10 (a)1. "Rate threshold," which means:

11 a. For a first lien mortgage loan, the trigger rate
12 equals or exceeds 8 percentage points more than the average
13 yield of United States Treasury securities having a comparable
14 length to maturity; or

15 b. For a subordinate mortgage lien or a mortgage
16 secured solely by a security interest in a manufactured home,
17 the trigger rate equals or exceeds 10 percentage points more
18 than the average yield of United States Treasury securities
19 having a comparable length to maturity.

20 2. The trigger rate is calculated as follows:

21 a. For fixed-rate loans in which the interest rate
22 will not vary during the term of the loan, the trigger rate is
23 the rate as of the date of closing.

24 b. For loans in which the interest rate varies
25 according to an index, the trigger rate is the sum of the
26 index rate as of the date of loan closing plus the maximum
27 margin permitted at any time under the loan agreement.

28 c. For all other loans in which the interest rate may
29 vary at any time during the term of the loan, the trigger rate
30 is the maximum rate that may be charged during the term of the
31 loan.

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1 payment fee except as provided in this subsection:

2 (a) A late payment fee may not be in excess of 5
3 percent of the amount of the payment past due.

4 (b) A late payment fee may only be assessed for a
5 payment past due for 15 days or more.

6 (c) A late payment fee may not be charged more than
7 once with respect to a single late payment. If a late payment
8 fee is deducted from a payment made on the loan and such
9 deduction causes a subsequent default on a subsequent payment,
10 no late payment fee may be imposed for such default. If a
11 late payment fee has been imposed once with respect to a
12 particular late payment, no such fee shall be imposed with
13 respect to any future payment which would have been timely and
14 sufficient, but for the previous default.

15 (d) A late payment fee may not be charged unless the
16 creditor notifies the borrower within 45 days following the
17 date the payment was due that a late payment fee has been
18 imposed for a particular late payment. No late payment fee may
19 be collected from any borrower if the borrower informs the
20 creditor that nonpayment of an installment is in dispute and
21 presents proof of payment within 45 days after receipt of the
22 creditor's notice of the late payment fee.

23 (4) FEE FOR BALANCE.--No creditor may charge a fee for
24 informing or transmitting to any person the balance due to pay
25 off a home loan or to provide a release upon prepayment.
26 Payoff balances shall be provided within a reasonable time but
27 in any event no more than 7 business days after the request.

28 (5) A home loan may not be made as a direct result of
29 a potential or future creditor, or its representative,
30 offering or selling a home loan at the residence of a
31 potential borrower without a prearranged appointment or the

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1 expressed invitation of the potential borrower.

2 Section 4. Limitations and prohibited acts and
3 practices for high-cost home loans.--A high-cost home loan
4 shall be subject to the following additional limitations and
5 prohibited acts and practices:

6 (1) FINANCING OF FEES OR CHARGES.--No creditor making
7 a high-cost home loan shall directly or indirectly finance any
8 points or fees that exceed 3 percent of the total amount of
9 the loan.

10 (2) BALLOON PAYMENT.--No high-cost home loan may
11 contain a scheduled payment that is more than twice as large
12 as the average of earlier scheduled payments. This provision
13 does not apply when the payment schedule is adjusted to the
14 seasonal or irregular income of the borrower.

15 (3) NEGATIVE AMORTIZATION.--No high-cost home loan may
16 include payment terms under which the outstanding principal
17 balance will increase at any time over the course of the loan
18 because the regular periodic payments do not cover the full
19 amount of interest due. This prohibition does not apply to a
20 bridge loan. As used in this subsection, the term "bridge
21 loan" means a loan having a maturity of less than 18 months
22 which requires only payments of interest until the time at
23 which the entire unpaid balance is due and payable.

24 (4) INCREASED INTEREST RATE.--No high-cost home loan
25 may contain a provision that increases the interest rate after
26 default. This provision does not apply to interest rate
27 changes in a variable rate loan otherwise consistent with the
28 provisions of the loan documents, provided the change in the
29 interest rate is not triggered by the event of default or the
30 acceleration of the indebtedness.

31 (5) ADVANCE PAYMENTS.--No high-cost home loan may

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1 include terms under which more than two periodic payments
2 required under the loan are consolidated and paid in advance
3 from the loan proceeds provided to the borrower.

4 (6) ARBITRATION CLAUSE.--No high-cost home loan may be
5 subject to an arbitration clause that limits in any way the
6 right of the borrower to seek relief through the judicial
7 process for any claims and defenses the borrower may have
8 against the creditor, broker, or other party involved in the
9 loan transaction.

10 (7) LENDING WITHOUT HOMEOWNERSHIP COUNSELING.--A
11 creditor may not make a high-cost home loan without first
12 receiving certification from an independent counselor approved
13 by the regulatory agency that has jurisdiction over the
14 creditor that the borrower has received counseling on the
15 advisability of the loan transaction.

16 (8) LENDING WITHOUT DUE REGARD TO REPAYMENT
17 ABILITY.--A creditor may not make a high-cost home loan
18 without due regard to repayment ability. If a creditor makes a
19 loan for which the debt-to-income ratio is less than 50
20 percent (with debt including monthly payments, including
21 payments for taxes and insurance, whether paid through the
22 mortgage or not, plus other required homeowner's payments such
23 as condominium or homeowner's fees, plus any other long-term
24 obligations), and the borrower will have sufficient residual
25 income to meet basic needs, as determined by the
26 residual-income guidelines established with regard to Veterans
27 Administration loans and found in 38 C.F.R. s. 36.4337(e) and
28 VA Form 26-6393, the creditor shall benefit from a rebuttable
29 presumption that the creditor made the loan with due regard to
30 repayment ability.

31 (9) HOME IMPROVEMENT CONTRACTS.--A creditor may not

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1 pay a contractor under a home improvement contract from the
2 proceeds of a high-cost home loan unless the instrument is
3 payable to the borrower or jointly to the borrower and the
4 contractor or, at the election of the borrower, through a
5 third-party escrow agent in accordance with terms established
6 in a written agreement signed by the borrower, the creditor,
7 and the contractor prior to the disbursement.

8 (10) MODIFICATION OR DEFERRAL FEES.--A creditor may
9 not charge a borrower any fees or other charges to modify,
10 renew, extend, or amend a high-cost home loan or to defer any
11 payment due under the terms of a high-cost home loan on a
12 minimum of one modification, renewal, extension, or deferral
13 per each 12 months of the length of the loan.

14 (11) FLIPPING.--No creditor may engage in flipping a
15 high-cost home loan. The term "flipping" means making a home
16 loan to a borrower that refinances an existing home loan when
17 the new loan does not have reasonable, tangible, net benefits
18 to the borrower considering all of the circumstances,
19 including, but not limited to, the terms of both the new and
20 refinanced loans, the cost of the new loan, and the borrower's
21 circumstances. In addition, the following home loan
22 refinancing conditions shall be presumed to be flipping:

23 (a) The primary tangible benefit to the borrower is an
24 interest rate lower than any interest rate on debts satisfied
25 or refinanced in connection with the home loan and it will
26 take more than 4 years for the borrower to recoup the costs of
27 the points and fees and other closing costs through savings
28 resulting from the lower interest rate.

29 (b) The new loan refinances an existing home loan that
30 is a special mortgage which is originated, subsidized, or
31 guaranteed by or through a state, tribal, or local government,

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1 or nonprofit organization, which bears a below-market interest
2 rate at the time the loan was originated or has nonstandard
3 payment terms beneficial to the borrower, such as payments
4 that vary with income or are limited to a percentage of
5 income, or where no payments are required under specified
6 conditions and where, as a result of the refinancing, the
7 borrower will lose one or more of the benefits of the special
8 mortgage.

9 (12) REQUIRED NOTICE TO PURCHASERS AND
10 ASSIGNEES.--Each high-cost home loan shall contain the
11 following notice:

12 Notice: This is a mortgage subject to the provisions of
13 the Florida Fair Lending Act. Purchasers and assignees of this
14 mortgage could be liable for all claims and defenses with
15 respect to the mortgage which the borrower could assert
16 against the creditor.

17 (13) SEVENTY-TWO-HOUR DISCLOSURE.--For a high-cost
18 home loan, the creditor must deliver all contracts,
19 agreements, disclosures, and other documents and instruments
20 of lending required for executing the loan to the borrower no
21 less than 72 hours before the closing, signing, or agreement
22 to any terms of that loan.

23 (14) CALL PROVISION.--No high-cost home loan may
24 contain a provision that permits the creditor, in its sole
25 discretion, to call or accelerate the indebtedness. This
26 provision does not prohibit acceleration of the loan in good
27 faith due to the borrower's failure to abide by the terms of
28 the loan.

29 Section 5. Right to cure high-cost home loans.--

30 (1) RIGHT TO REINSTATE.--If a creditor asserts that
31 grounds for acceleration exist and requires the payment in

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1 full of all sums secured by the security instrument, the
2 borrower, or anyone authorized to act on the borrower's
3 behalf, shall have the right, during the 45-day period set
4 forth in subsection (2), to cure the default and reinstate the
5 home loan by tendering the amount or performance as specified
6 in this section. Cure of default as provided in this section
7 shall reinstate the borrower to the same position as if the
8 default had not occurred and shall nullify, as of the date of
9 the cure, any acceleration of any obligation under the
10 security instrument or note arising from the default.

11 (2) GROUNDS FOR REINSTATEMENT.--Before any action
12 filed to foreclose upon the home or other action is taken to
13 seize or transfer ownership of the home, a notice of the right
14 to cure the default must be delivered to the borrower at the
15 address of the property upon which any security exists for the
16 home loan by postage prepaid certified United States mail,
17 return receipt requested, which notice is effective upon
18 deposit in the United States mail, and shall inform the
19 borrower:

20 (a) Of the nature of default claimed on the home loan
21 and of the borrower's right to cure the default by paying the
22 sum of money required to cure the default. If the amount
23 necessary to cure the default will change during the 45-day
24 period after the effective date of the notice due to the
25 application of a daily interest rate or the addition of late
26 payment fees, as allowed by this act, the notice shall give
27 sufficient information to enable the borrower to calculate the
28 amount at any point during the 45-day period.

29 (b) Of the date by which the borrower shall cure the
30 default to avoid acceleration and initiation of foreclosure or
31 other action to seize the home, which date shall not be less

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1 than 45 days after the date the notice is effective, and the
2 name and address and telephone number of a person to whom the
3 payment or tender shall be made.

4 (c) That if the borrower does not cure the default by
5 the date specified, the creditor may take steps to terminate
6 the borrower's ownership of the property by requiring payment
7 in full of the home loan and commencing a foreclosure
8 proceeding or other action to seize the home.

9 (d) Of the name and address of the creditor and the
10 telephone number of a representative of the creditor whom the
11 borrower may contact if the borrower disagrees with the
12 creditor's assertion that a default has occurred or the
13 correctness of the creditor's calculation of the amount
14 required to cure the default.

15 (3) FEES.--To cure a default under this section, a
16 borrower shall not be required to pay any charge, fee, or
17 penalty attributable to the exercise of the right to cure a
18 default as provided for in this section, other than the fees
19 specifically allowed by this section. The borrower shall not
20 be liable for any attorney's fees or costs relating to the
21 borrower's default that are incurred by the creditor prior to
22 or during the 45-day period set forth in paragraph (2)(b).

23 Section 6. Preservation and enforcement of claims and
24 defenses; administrative penalties.--

25 (1) CLAIMS AGAINST SELLERS.--Notwithstanding any other
26 provision of law, if a home loan has been made, arranged, or
27 assigned by a person performing home improvements to the
28 dwelling of a borrower, the borrower may assert all
29 affirmative claims and any defenses that the borrower may have
30 against the home improvement contractor against the creditor
31 or any assignee, holder, or servicer in any capacity if the

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1 claims and defenses relate exclusively to the loan
2 transaction.

3 (2) ADMINISTRATIVE PENALTIES.--

4 (a) The Department of Banking and Finance may, after
5 appropriate notice and opportunity for hearing, levy
6 administrative penalties against a person who violates this
7 act, in the amount of not more than \$5,000 for each violation.
8 Any hearing must be held in accordance with chapter 120,
9 Florida Statutes, the Administrative Procedure Act, and the
10 Department of Banking and Finance shall have all the powers
11 granted under that act.

12 (b) Any person who willfully and knowingly violates
13 any provision of this act is liable for a civil penalty of not
14 more than \$25,000 for each violation, which penalty must be
15 assessed and recovered in a civil action brought in the name
16 of the people of the State of Florida by the Department of
17 Banking and Finance or the Attorney General in any court of
18 competent jurisdiction.

19 (3) LIABILITY OF ASSIGNEES IN FORECLOSURE

20 ACTION.--Notwithstanding any other provision of law, a
21 borrower may assert a violation of this act:

22 (a) As an original action; or

23 (b) As a defense or counterclaim to an action to
24 collect amounts owed or to obtain possession of the home
25 secured by the home loan.

26 (4) SUBTERFUGE.--Any person who in bad faith attempts
27 to avoid the application of this act by:

28 (a) Dividing any loan transaction into separate parts
29 for such purpose; or

30 (b) Any other such subterfuge with the intent of
31 evading the provisions of this act

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commits a violation of this act.

Section 7. Enforcement.--

(1) CIVIL.--

(a) A borrower may be granted injunctive, declaratory, and such other equitable relief as the court deems appropriate in an action to enforce compliance with this act.

(b) Any person or the agent, officer, or other representative of any person violating the provisions of this act shall forfeit the entire interest charged in the home loan or contracted to be charged or received, and only the principal sum of such home loan can be enforced in any court in this state, either at law or in equity.

(c) The remedies provided in this section are not intended to be the exclusive remedies available to a borrower, nor must the borrower exhaust any administrative remedies provided under this act or any other applicable law before proceeding under this section.

(2) CRIMINAL.--Any person who knowingly violates this act commits a misdemeanor of the first degree, punishable as provided in section 775.082 or section 775.083, Florida Statutes.

(3) CORRECTIONS AND UNINTENTIONAL VIOLATIONS.--A creditor in a home loan who, when acting in good faith, fails to comply with the provisions of this act shall not be deemed to have violated this act if the creditor establishes that within 60 days after receiving any notice from the borrower of the compliance failure, which compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, the borrower has been notified

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1 of the compliance failure, appropriate restitution has been
2 made to the borrower, and appropriate adjustments are made to
3 the loan. Bona fide errors shall include, but not be limited
4 to, clerical, calculation, computer malfunction and
5 programming, and printing errors. An error of legal judgment
6 with respect to a person's obligations under this section is
7 not a bona fide error.

8 (4) CUMULATIVE.--The remedies provided in this section
9 are cumulative.

10 Section 8. Powers and duties of the Department of
11 Banking and Finance; investigations; injunctions; orders.--

12 (1)(a) The Department of Banking and Finance is
13 responsible for the administration and enforcement of this
14 act.

15 (b) The department may adopt rules pursuant to
16 sections 120.536(1) and 120.54, Florida Statutes, to implement
17 this act. The department may adopt rules to allow electronic
18 submission of any forms, documents, or fees required by this
19 act.

20 (2)(a) The department may conduct an investigation of
21 any person whenever the department has reason to believe, upon
22 complaint or otherwise, that any violation of this act has
23 occurred.

24 (b) Any person having reason to believe that a
25 provision of this act has been violated may file a written
26 complaint with the department setting forth the details of the
27 alleged violation.

28 (3)(a) The department may bring an action, through its
29 own counsel in the name and on behalf of the state, against
30 any person who has violated or is about to violate any
31 provision of this act, or any rule or order of the department

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1 issued under the act, to enjoin the person from continuing in
2 or engaging in any act in furtherance of the violation.

3 (b) In any injunctive proceeding, the court may, on
4 due showing by the department, issue a subpoena or subpoena
5 duces tecum requiring the attendance of any witness and
6 requiring the production of any books, accounts, records, or
7 other documents and materials that appear necessary to the
8 expeditious resolution of the application for injunction.

9 (4) The department may issue and serve upon any person
10 an order to cease and desist and to take corrective action
11 whenever the department has reason to believe that the person
12 is violating, has violated, or is about to violate any
13 provision of this act, any rule or order of the department
14 issued under this act, or any written agreement between the
15 person and the department. All procedural matters relating to
16 issuance and enforcement of cease and desist orders are
17 governed by chapter 120, Florida Statutes, the Administrative
18 Procedure Act.

19 Section 9. Severability.--The provisions of this act
20 shall be severable, and if any phrase, clause, sentence, or
21 provision is declared to be invalid or is preempted by federal
22 law or regulation, the validity of the remainder of this act
23 shall not be affected thereby. If any provision of this act is
24 declared to be inapplicable to any specific category, type, or
25 kind of loan or points and fees, the provisions of this act
26 shall nonetheless continue to apply with respect to all other
27 loans and points and fees.

28 Section 10. General rule.--All political subdivisions
29 of this state, including home-rule municipalities, are
30 prohibited from enacting and enforcing ordinances,
31 resolutions, and rules pertaining to the financial or lending

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1 activities of persons who:

2 (1) Are subject to the jurisdiction of the Department
3 of Banking and Finance, including for activities subject to
4 this chapter;

5 (2) Are subject to the jurisdiction of the Office of
6 Thrift Supervision, the Office of the Comptroller of the
7 Currency, the National Credit Union Administration, the
8 Federal Deposit Insurance Corporation, the Federal Trade
9 Commission, or the United States Department of Housing and
10 Urban Development; or

11 (3) Originate, purchase, sell, assign, securitize, or
12 service property interests or obligations created by financial
13 transactions or loans made, executed, or originated by persons
14 referred to in subsection (1) or subsection (2) to assist or
15 facilitate such transactions.

16
17 The requirements of this section apply to all ordinances,
18 resolutions, and rules pertaining to financial lending
19 activities, including ordinances, resolutions, or rules
20 disqualifying persons from doing business with a political
21 subdivision based on the lending interest rates or imposing
22 reporting requirements or any other obligations upon persons
23 regarding financial services or lending practices. This
24 subsection does not prohibit a requirement of compliance with
25 the terms of this act as a condition of doing business with a
26 county, municipality, or other political subdivision of the
27 state.

28 Section 11. This act shall take effect October 2,
29 2002.

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1 ===== T I T L E A M E N D M E N T =====

2 And the title is amended as follows:

3 Delete everything before the enacting clause

4

5 and insert:

6 A bill to be entitled

7 An act relating to the Florida Fair Lending

8 Act; providing a short title; providing

9 legislative findings; providing purposes;

10 providing definitions; specifying certain

11 prohibited acts and practices relating to

12 creditors making home loans under certain

13 circumstances; providing limitations and

14 prohibiting certain activities or conditions

15 relating to creditors making high-cost home

16 loans; providing a right to reinstate a loan

17 under certain circumstances; specifying grounds

18 for reinstatement; proscribing certain fees,

19 charges, or penalties under certain

20 circumstances; prohibiting foreclosure

21 proceedings under certain circumstances;

22 providing for preservation and enforcement of

23 certain claims and defenses by borrowers;

24 providing for liability of assignees and other

25 holders under certain circumstances;

26 proscribing subterfuge; providing for civil and

27 criminal enforcement; providing penalties;

28 providing for damages, costs, and attorney's

29 fees; specifying certain loan agreements as

30 void and unenforceable under certain

31 circumstances; protecting borrowers' remedies;

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1 providing exceptions for corrections and
2 unintentional violations; providing criteria;
3 specifying certain rights and remedies as
4 cumulative; providing powers and duties of the
5 Department of Banking and Finance; providing
6 severability; prohibiting certain regulation of
7 financial or lending activities by local
8 governments; providing an effective date.
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