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Predatory Lending: A Comparison of State Laws to the Federal Home Ownership and Equity Protection Act

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Predatory Lending: A Comparison of State Laws to the Federal Home Ownership and Equity Protection Act

Summary

Since the early 1990s, sub-prime mortgage lending has exploded in America, increasing the availability of credit to segments of the population that traditionally did not qualify for loans, given their income, savings, and credit profile. With this explosion has also come the growth of predatory mortgage lending practices. "Predatory lending" describes situations in which unscrupulous lenders prey on borrowers — usually sub-prime borrowers — by including onerous terms and conditions in the loan agreement, often leading to foreclosure or repeated refinancing.

Currently, the Home Ownership Equity Protection Act (HOEPA) provides federal prohibitions on certain predatory lending practices, while more than twenty-five states have enacted similarly-styled statutes that sometimes offer much broader protections. This report gives a general background on predatory lending and summarizes the various statutes' provisions with respect to common predatory lending practices.

This report will be updated as warranted.

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Predatory Lending: A Comparison of State Laws to the Federal Home Ownership and Equity Protection Act

Introduction and Background

Obtaining a loan can be an intimidating and confusing process for the vast majority of people who participate in it, particularly when one is mortgaging his or her home. To negotiate the attendant maze of loan terms, fees, and financing documents, most Americans are forced to put a large amount of trust in the bank or other entity lending them the money. This creates the potential for abuse by the unscrupulous lender, who can take advantage of a borrower's unfamiliarity with the process and add terms and fees to a loan agreement that, while onerous to the borrower, create a financial windfall for the lender. Some of these "predatory" lenders can also create loan terms so onerous that the borrower will never be able to repay, allowing the lenders to foreclose on mortgages and take borrowers' homes.

Market forces protect most borrowers from predatory mortgage practices, because most mortgage lending takes place in the "prime market," where borrowers have good credit and are therefore considered less risky. As lower risk customers, prime borrowers are the subjects of competition among lenders. This competition creates an incentive for lenders to offer the best loan terms possible, reducing the danger of predatory lending.[1] Further, prime borrowers tend to have more experience with complex financial transactions, and so are more likely to identify and avoid predatory loan terms. Finally, mortgage lenders often try to fit prime loans into the industry-standard debt ratios and loan-to-value ratios set by secondary mortgage giants like Fannie Mae and Freddie Mac, so that those organizations will purchase the loans.[2]

Sub-prime borrowers, on the other hand, tend to be less experienced with complex financial transactions, have low income and bad credit, and generally have little besides their home equity to put up as collateral for loans.[3] Sub-prime borrowers are considered riskier customers by lenders, and so competition for sub-prime mortgage loans is not nearly as robust as the market for prime loans. Because

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[1] *See* National Predatory Lending Task Force, *Curbing Predatory Home Mortgage Lending: A Joint Report*, by the United States Department of Housing and Urban Development and the United States Department of the Treasury, 17 (June 2000) (hereinafter "Joint Report"); available at [http://www.hud.gov:80/pressrel/treasrpt.pdf] (last visited February 11, 2005).

[2] *Id.*

[3] *Id.*

sub-prime loans are generally considered riskier, lenders seek higher interest rates and other fees, partially to protect themselves in case of default.

Despite the higher rates and fees, sub-prime borrowers often need to take out second mortgages on their homes to finance debt consolidation or home repairs, and the sub-prime market has grown to meet this need. While the sub-prime mortgage market is small when compared to the prime market, it grew to $160 billion by 1999, making up 13% of the American mortgage market.[4] As sub-prime mortgage lending has grown, however, so has predatory lending.

Drawing the line between sub-prime lending and predatory lending has proven to be a very difficult task.[5] At what point do the higher interest rates and fees that generally attend legitimate sub-prime lending become predatory? This is the fundamental question for those who wish to curb predatory lending practices because the vast majority of predatory lending takes place in the sub-prime market. If restrictions on such practices go too far, the strictures could make the risk of sub-prime lending seem too high to lenders and dry up the availability of credit for those who desperately need it. On the other hand, if the restrictions are too loose, then many sub-prime borrowers may lose the equity in their homes to unscrupulous lenders.

Reports of predatory lending practices increased dramatically in the early 1990s, and Congress responded in 1994 by passing the Home Ownership and Equity Protection Act (HOEPA), restricting some of the tactics commonly used by predatory lenders with respect to loans covered by the act.[6] This legislation utilizes the "threshold" or "trigger" approach in which certain home loans are classified as "high-cost home loans" because of their high annual percentage rates (APRs) or points and fees. As such, these loans trigger certain prohibitions and/or disclosures meant to protect subprime borrowers from predatory lending practices.

Many have argued that while HOEPA is helpful, it does not go far enough.[7] In 1999, North Carolina enacted its own predatory lending statute, conceptually modeled after HOEPA, but more inclusive in the loans covered and with restrictions on additional practices. Some states have followed by enacting specific statutes broadly aimed at restricting a wide array of predatory lending practices, while other states have fewer provisions regulating far fewer practices. Currently, at least thirty

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[4] *Id.* at 2.

[5] Indeed, commentators have had a difficult time even coming up with a definition of "predatory lending." The Joint Report offered this definition: "In a predatory lending situation, the party that initiates the loan often provides misinformation, manipulates the borrower through aggressive sales tactics, and/or takes unfair advantage of the borrower's lack of information about the loan terms and their consequences. The results are loans with onerous terms and conditions that the borrower often cannot repay, leading to foreclosure or bankruptcy." Joint Report, at 17.

[6] Subtitle B of Title I of the Riegle Community Development and Regulatory Improvement Act, P.L. 103-325 (1994). HOEPA is codified at 15 U.S.C. § 1601 et seq.

[7] *See, e.g.,* Margot Saunders, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. Banking Inst. 111, 112-113 (2002).

states, the District of Columbia, and roughly a dozen municipalities have enacted either comprehensive statutes or other limited statutory protections aimed at predatory lending practices, some addressing a specific practice, some generally tracking HOEPA, and others going far beyond it.

The differences among the various state statutes and between the state and federal statutes reflect the difficulty in striking the appropriate balance, i.e., discouraging predatory terms and conditions without also discouraging sub-prime lending in general. These differences have come under increasing scrutiny since the Office of the Comptroller of the Currency (OCC) determined that HOEPA and its regulations preempt the application of state predatory lending statutes to nationally-chartered[8] banks and their subsidiaries.[9]

Even with their differences, predatory lending statutes tend to confront a combination of ten basic issues:

- asset-based lending;
- prepayment penalties;
- balloon payments;
- negative amortization;
- loan flipping;
- loan counseling;
- mandatory arbitration clauses;
- loan packing;
- no call provisions; and
- financing of points and fees.[10]

This report describes what loans are covered under HOEPA and the state statutes, then lists how each statute deals (if at all) with the ten basic issues mentioned above.

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[8] The United States has a dual-banking system, according to which a bank can be chartered under federal law or the law of an individual state.

[9] On August 5, 2003, the OCC issued a Preemption Determination and Order (OCC Docket No. 03-17, 68 *Fed. Reg*. 46,264) preempting the Georgia Fair Lending Act for national banks and their Georgia subsidiaries. The OCC subsequently issued more detailed regulations that appear to generally preempt state predatory lending laws with respect to national banks and their subsidiaries (69 Fed. Reg. 1904 (amending 12 C.F.R. Parts 7 and 34)). *See* CRS Report RS22057, *Preemption of State Law for National Banks and Their Subsidiaries by the Office of the Comptroller of the Currency: A Sketch*, by M. Maureen Murphy; *see also* C. Bailey King, Jr., *Preemption and the North Carolina Predatory Lending Law*, 8 N.C. Banking Inst. 377 (2004).

[10] For more detailed discussion of these issues, *see generally* Joint Report.

Comparison of Provisions

Covered Loans

One of the most important features of a predatory lending statute is how it defines loans covered under the statute and therefore subject to its protections and restrictions. HOEPA, for example, does not include mortgages where the home being purchased is used as collateral for the loan (hereinafter "purchase money mortgages"), while the majority of state statutes protect such mortgages in their predatory lending statutes. A loan is covered if it crosses one of the statutory thresholds, of which there are generally two: one for the Annual Percentage Rate (APR) of the loan, and one for the total points and fees paid by the borrower in connection with the loan. Statutory definitions of "points and fees" differ, but generally include finance charges, compensation paid to mortgage brokers, premiums or other charges for credit insurance, application fees, late payment/default charges, overdraft charges, credit plan fees, seller's points, interest forfeited due to legally required interest reduction on a time deposit used to secure the loan, and real estate related fees (e.g., title examination, preparation of documents, notary, etc.).[11] Listed below are the various statutory definitions of loans covered under the respective statutes. Unless otherwise noted, all of the definitions below refer to loans secured by the borrower's principal dwelling.

HOEPA. Mortgages secured by consumer's principal dwelling (other than a residential mortgage transaction,[12] a reverse mortgage transaction, or a transaction under an open-end credit plan) where either (1) the APR will exceed by more than 10%[13] the yield on Treasury securities with comparable periods of maturity; or (2) the total points and fees payable at or before closing exceed the greater of 8% of the total loan amount or $400.[14]

Arkansas. Non-business mortgages (other than purchase money mortgages, and bridge and construction loans) that do not exceed $150,000 where the APR is such that the loan would be covered under HOEPA; or the total points and fees (not including certain discount points paid by the borrower to reduce the interest rate or time-price differential) exceed (1) 5% of the total loan amount for loans of $75,000 - $150,000; (2) 6% for loans of $20,000 - $75,000; and (3) 8% for loans less than $20,000. Not included are mortgages that, within sixty days of consummation, are sold to/securitized for a government agency or government-sponsored enterprise (e.g., Fannie Mae, Freddie Mac, etc.).[15]

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[11] *See, e.g.,* 12 C.F.R. § 226.4.

[12] A "residential mortgage transaction" is, in essence, a purchase money mortgage. 15 U.S.C. § 1602(w).

[13] The Board of Governors of the Federal Reserve has the power to adjust this percentage from 10% to anywhere between 8% and 12%. *Id.* at § 1602(aa)(2).

[14] *Id.* at § 1602(aa)(1).

[15] Ark. Code Ann. § 23-53-103(5). In 2005, Arkansas also enacted the Reverse Mortgage (continued...)

California. Loans secured by borrower's principal dwelling — not including reverse mortgages, open lines of credit, or bridge loans — in which the original principal balance of the loan does not exceed the most current conforming limit for a single family first mortgage loan established by the Federal National Mortgage Association (for mortgages or deeds of trust),[16] that cross either the APR or points and fees threshold. A mortgage or deed of trust crosses the APR threshold when the APR is more than 8% that of Treasury securities with comparable periods of maturity. Home loans cross the second threshold where the total points and fees exceed 6% of the total loan amount.[17]

Colorado. Covered loans include mortgages under HOEPA, except that the points and fees threshold is 6% of the total loan amount.[18]

Connecticut. Non-commercial mortgages on borrower's principal dwelling in which the APR will exceed that of Treasury securities with comparable periods of maturity by the percentage set under HOEPA and its regulations.[19]

District of Columbia. "Covered loans" include mortgages (not including reverse mortgages or those insured/guaranteed by a state, local, and certain federal authorities) that cross one or more of two thresholds: (1) the APR on the loan exceeds by more than 6 percentage points the yield on Treasury securities with comparable periods of maturity for first mortgages or, for second mortgages, 7 percentage points; or (2) the points and fees exceed 5% of the total loan amount. This definition does not apply to loans made or purchased by Fannie Mae, Freddie Mac, or any federally regulated financial institutions. Those loans are only "covered loans" if they are covered under HOEPA and its regulations.[20]

Florida. Mortgages covered under HOEPA.[21]

Georgia. Mortgages — not including reverse mortgages, bridge loans, and commercial mortgages — that cross one of two thresholds: (1) the APR is such that the loan is covered under HOEPA and its regulations; or (2) total points and fees (excluding no more than two bona fide discount points paid by the borrower to reduce the interest rate) exceed 5% of the total loan amount if that amount is $20,000

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[15] (...continued)
Protection Act, Ark. Code Ann. § 23-54-101 *et seq.,* to regulate reverse mortgage transactions.

[16] Cal. Fin. Code § 4970(b).

[17] Id.

[18] Colo. Rev. Stat. § 5-3.5-101(2).

[19] Conn. Gen. Stat. § 36a-746a(4).

[20] D.C. Code Ann. § 26-1151.01(7).

[21] Fla. Stat. Ann. § 494.0079(7).

or more or, if this amount is less than $20,000, then 8% of the total loan amount or $1,000, whichever is lesser.[22]

Illinois. "High risk home loans" include mortgages — not including open-end credit plans, purchase money mortgages, or loans for business purposes unrelated to the residence — that cross either the APR or points and fees threshold. The APR threshold is crossed for a first lien mortgage when the APR is more than 6% greater than the yield on Treasury securities with comparable periods of maturity, while for a junior mortgage, the figure is 8%. The points and fees threshold is crossed when the total points and fees exceed 5% of the total loan amount or $800, whichever is greater.[23]

Indiana. A "high-cost home loan" is a mortgage — other than a open-end credit plan or a reverse mortgage — covered under HOEPA or that exceeds a points and fees threshold. The loan crosses the points and fees threshold when the points and fees exceed 5% of the total loan amount for loans of $40,000 or more, or 6% of the total loan amount for loans of less than $40,000.[24] These dollar amounts are subject to change in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers compiled by the Bureau of Labor Statistics.[25]

Kentucky. "High-cost home loans" are between $15,000 and $200,000 and "mortgages" under HOEPA.[26]

Maine. Mortgages covered under HOEPA.[27]

Maryland. Mortgages covered under HOEPA, except that the APR comparison percentage with respect to Treasury securities is one percentage point less than that of HOEPA (as adjusted).[28]

Massachusetts. Mortgages on principal dwelling (not including reverse mortgages) that cross either the APR or points and fees threshold. The APR threshold is crossed where the APR exceeds by more than 8 percentage points that of Treasury securities with comparable periods of maturity for first mortgage liens, or 9 points for subordinate liens. The points and fees threshold is crossed where the

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[22] Ga. Code Ann. § 7-6A-2(17).

[23] 815 Ill. Comp. Stat. 137/10. The $800 figure is changed every year according to the percentage change in the Consumer Price Index (CPI) for all urban consumers for all items published by the Department of Labor. *Id.* To further explore the issue of predatory lending, the Illinois Legislature amended its Residential Real Property Disclosure Act and established a predatory lending database pilot program within Cook County to start no later than September 2006. *See* 765 Ill. Comp. Stat. 77/20.

[24] Ind. Code § 24-9-2-8.

[25] *See* Ind. Code § 24-9-2-8(b).

[26] Ky. Rev. Stat. Ann. § 360.100(1)(a).

[27] Me. Rev. Stat. Ann. tit. 9-A, § 8-103(F-1).

[28] Md. Code Ann., Comm. § 12-127(a)(2).

points and fees (excluding conventional prepayment penalties or up to two bona fide discount points paid by the borrower to reduce the interest rate or time-price differential) exceed 5% of the total loan amount or $400,[29] whichever is greater.[30]

Michigan. Mortgages on principal dwellings, not including purchase money mortgages, reverse mortgages, or open-end credit plans.[31]

Nevada. Mortgages under HOEPA.[32]

New Jersey. Mortgages — not including reverse mortgages — the principal of which do not exceed $350,000[33] where one or more of two thresholds is crossed. The first threshold is crossed when the mortgage is covered under HOEPA. The second threshold is crossed when the total points and fees due at or before closing (excluding conventional prepayment penalties or up to two bona fide discount points) exceed (1) if the total amount of the loan is less than $20,000, the lesser of 6% of the total loan amount or $1,000; (2) if the total loan amount is between $30,000 and $40,000, 6% of the total loan amount; or (3) 4.5% of the total loan amount if that amount is $40,000 or more.[34]

New Mexico. Covered loans include home loans — other than reverse mortgages and bridge loans — that cross one of four thresholds: (1) for covered loans less than $20,000, the total points and fees (excluding certain bona fide discount points paid by the borrower to reduce the interest rate) exceed 8% of the total loan amount or $1,000, whichever is lesser; (2) for covered loans equal to or greater than $20,000, the total points and fees are equal to or greater than 5% of the total loan amount; (3) for a first lien mortgage, the interest rate is seven percentage points higher than that of Treasury securities with comparable periods of maturity; or (4) for a subordinate mortgage lien, the interest rate is nine percentage points higher than that of comparable Treasury securities.[35]

New York. The New York statute does not exclude open end credit plans or residential mortgage transactions from its definition of "high-cost home loan." A "high-cost home loan" is any loan, other than a reverse mortgage transaction, in which the borrower is a natural person and the debt is incurred by the borrower.[36] In addition the loan must exceed at least one of two thresholds. The loan reaches the first threshold when, for a first lien mortgage loan, the APR exceeds eight percentage

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[29] This $400 figure must be adjusted every year to reflect changes in the CPI.

[30] Mass. Gen. Laws ch. 183C, § 2.

[31] Mich. Comp. Laws § 445.1632(d).

[32] Nev. Rev. Stat. § 598D.040.

[33] The statute calls for this amount to be adjusted annually according to the New York-New Jersey listing in the CPI.

[34] N.J. Stat. Ann. § 46:10B-24.

[35] N.M. Stat. Ann. § 58-21A-3(H); N.M. Stat. Ann. §58-21A-3(L), (N).

[36] N.Y.Banking Law § 6-l(D), (E) (McKinney 2002).

points over the yield on Treasury securities with comparable periods of maturity. For a subordinate mortgage lien, the threshold is an APR of nine percentage points over the Treasury securities yield.[37] The loan surpasses the second threshold if the total points and fees (not including certain discount points paid by the borrower to reduce the interest rate or time-price differential) exceed either 5% of the total loan amount if that amount is $50,000 or more; 6% if the total loan amount is $50,000 or more and the loan is a purchase money loan guaranteed by the Federal Housing Administration or the Veterans Administration[Department of Veteran Affairs]; or the greater of 6% or $1,500 if the total loan amount is less than $50,000.[38]

North Carolina. A covered loan must cross one of three thresholds. The terms cross the first North Carolina threshold if the loan is not a reverse mortgage or open end credit plan and the APR of the loan is such that the loan is covered under HOEPA.[39] The loan exceeds another North Carolina threshold if the total points and fees payable by the borrower (not including certain discount points paid by the borrower to reduce the interest rate or time-price differential) exceed 5% of the total loan amount if that amount is $20,000 or more, or if it is less than $20,000, then the lesser of 8% of the total loan amount or $1,000.[40] The final threshold is that, for a closed-end loan, the loan documents permit the lender to charge or collect prepayment fees or penalties more than thirty months after the loan closing or which exceed 2% of the amount prepaid; or, if the loan is an open end credit plan, the loan documents permit the lender to charge or collect prepayment fees or penalties (I) more than thirty months after the loan closing if the borrower has no right or option to repay all or any of the portion of the outstanding balance of the credit plan at a fixed rate over a specified period of time; or (ii) if the borrower has the aforementioned option, more than thirty months after the date the borrower voluntarily exercises the option, or (iii) which exceed 2% of the amount prepaid.[41]

Ohio. Mortgages covered under HOEPA.[42]

Oklahoma. "Subsection 10" mortgages are those secured by the consumer's principal dwelling — not including purchase money mortgages, reverse mortgages, and open-end credit plans - that cross one of two thresholds. The loan crosses the first threshold where the APR is (1) 8 percentage points greater than that of Treasury securities with comparable periods of maturity for first lien mortgages; or (2) ten percentage points greater for subordinate liens (Oklahoma officials are authorized to adjust both of these differentials within certain limits). The loan crosses the second

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[37] New York Banking Law § 6-l(1)(G)(I) (If the terms of the home loan offer any initial or introductory period, and the APR is less than that which will apply after the end of that period, then the APR for the purpose of the statute is the one that applies after the introductory period).

[38] N.Y. Banking Law § 6-l(1)(G)(II) (McKinney 2002).

[39] N.C. Gen. Stat. § 24-1.1E(a)(6)(a) (2002).

[40] N.C. Gen. Stat. § 24-1.1E(a)(6)(b) (2002).

[41] N.C. Gen. Stat. § 24-1.1E(a)(6)(c) (2002).

[42] Ohio Rev. Code Ann. § 1349.25(D).

threshold where the total points and fees exceed 8% of the total loan amount or $400, whichever is greater. The $400 amount is required to be adjusted every year according to the annual percentage change in the CPI.[43]

Pennsylvania. Mortgages covered under HOEPA for which the original principal balance is less than $100,000.[44]

Rhode Island. "High-cost home loans" are loans secured by a mortgage or deed of trust on the borrower's principal dwelling[45] (including open-ended credit plans, other than reverse mortgage transactions) in which the terms of the loan meet or exceed one or more of two thresholds.[46] The first threshold is for a first lien mortgage home loan with an interest rate equal to eight percentage points of Treasury securities with comparable periods of maturity and nine percentage points for subordinate mortgage liens.[47] The loan crosses the second threshold when the total points and fees exceed 5% of the total loan amount when the total loan amount is $50,000 or more and 8% when the total loan amount is less than $50,000.[48] For open-ended loans, the total loan amount is calculated using the total line of credit allowed under the home loan at closing.[49] The provisions of this chapter do not apply to federal savings banks, national banks, their subsidiaries, or state and federal housing agencies.[50]

South Carolina. Non-business related mortgages of borrower's principal dwelling or property on which such is located. To be covered, the principal of the loan must not exceed the conforming loan size limit as established by Fannie Mae. In addition, the loan must cross either the APR or points and fees threshold. The loan crosses the APR threshold if the APR is such that the loan would be covered under HOEPA. If the loan is a non-real estate manufacturing housing lien, then the threshold is crossed if the APR of the loan is greater than 10 percentage points greater than that of Treasury securities with comparable maturities. The loan crosses the points and fees threshold if the total points and fees (not including conventional prepayment penalties and certain discount points paid by the borrower to reduce the interest rate) exceed (1) for loans of $20,000 or more, 5% of the total loan amount; (2) for loans of less than $20,000, the lesser of $1,000 or 8% of the total loan amount; or (3) for non-real estate secured manufactured housing transactions of $20,000 or more, 3% of the total loan amount.[51]

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[43] Okla. Stat. Tit. 14A, § 1-301(10).

[44] 63 Pa. Cons. Stat. § 456.503.

[45] R.I. Gen. Laws § 34-25.2-4(l), (m)(1), (2).

[46] Id. § 34-25.2-4(l).

[47] Id. at § 34-25.2-4(r)(1)(I), (ii).

[48] Id. at § 34-25.2-4(r)(2)(I), (ii).

[49] Id. at § 34.25.2-4(s).

[50] Id. at § 34-25.2-11.

[51] S.C. Code Ann. §§ 37-23-20(9), (15).

Tennessee. "High-cost home loans"are loans secured by a mortgage or deed of trust on the borrower's principal dwelling[52] primarily for personal, family or household purposes (not including open ended credit loans, reverse mortgages, residential mortgage transactions, construction loans, or loans insured or guaranteed by a government agency) in which the principal amount of the loan does not exceed the lesser of the conforming loan size limit for a single family dwelling as established by the Federal National Mortgage Association or $ 350,000 and the terms of the loan must meet or exceed one of two thresholds.[53] The first threshold is crossed when the mortgage is covered under HOEPA.[54] The second threshold is crossed when the total points and fees (excluding no more than two bona fide discount points) to be paid by the borrower at or before the loan closing exceed the greater of (1) 5% of the total loan amount or (2) $2,400 if the total loan amount is more than $30,000 or 8% of the total loan amount if the total loan amount is $30,000 or less.[55]

Texas. Mortgage (other than a reverse mortgage or an open-end credit plan) with a principal that is no higher than half of Fannie Mae's maximum conventional loan amount and that is covered under the HOEPA regulations.[56] Unlike the HOEPA regulations, however, a purchase money mortgage is covered under Texas law if the total loan amount is more than $20,000 and the APR or total points and fees exceed the applicable limits in the HOEPA regulations.[57]

Utah. Mortgages that cross either the APR threshold or the points and fees threshold. The APR threshold is crossed where the rate exceeds by more than 8 percentage points the rate on Treasury securities with comparable periods of maturity for first lien mortgages, and ten percentage points for junior/subordinate mortgages. The points and fees threshold is crossed where the total points and fees exceed 8% of the total loan amount or $400, whichever is greater.[58]

Wisconsin. Non-commercial mortgages (other than reverse mortgages and open-end credit plans) covered under HOEPA or where the total points and fees exceed 6% of the total loan amount.[59]

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[52] Tenn. Code § 47-20-102(10)(A)-(D).

[53] Id at § 47-20-102(9), (15), (17).

[54] Id. at § 47-20-102(15).

[55] Id. at § 47-20-102(12), (17).

[56] 12 C.F.R. § 226.32.

[57] Tex. Fin. Code Ann. § 343.201(1).

[58] Utah Code § 61-2d-102(3). The $400 figure is adjusted every year in accordance with parallel HOEPA regulations. *Id.*

[59] Wis. Stat. § 428.202(2).

Asset-Based Lending

Most creditors extend mortgage loans with the expectation that the borrower will be able to meet the scheduled payments. There is a concern, however, that some predatory lenders make loans with the opposite desire. These lenders make loans based on the value of the borrower's asset (i.e., the home) without considering the lender's ability to repay the loan. It is also alleged that some lenders make loans knowing that borrowers will be unable to repay, thereby allowing the lenders to obtain borrowers' houses through foreclosure.[60] Statutes combat this practice by requiring lenders to consider the borrower's repayment ability when extending certain high-risk loans.

HOEPA. Prohibits extension of covered loans based on collateral without regard to the consumer's ability to repay.[61]

Arkansas. Prohibits extension of covered loans based on collateral without regard to the consumer's ability to repay.[62]

California. Lender may not make a covered loan without a reasonable belief that the borrower will be able to make the scheduled payments. Rebuttable presumption that loan satisfies this requirement where the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than 55% of the consumer's monthly income. However, the statute prohibits lenders from imposing a presumption that the consumer will be unable to pay merely because the consumer does not pass this test.[63]

Colorado. Lender may not make a covered loan based on collateral without regard to borrower's repayment ability. The lender is presumed to have violated this provision if the lender engages in a pattern of extending loans subject to federal regulations regarding certain closed-end mortgages on principal dwellings[64] without verifying and documenting the borrower's ability to repay. For stated income loans, lenders may not rely simply on the borrower's income as stated by the borrower.[65]

Connecticut. Prohibits extension of covered loans without a reasonable belief that the borrower will be able to repay. Rebuttable presumption that loan satisfies this requirement where the consumer's total monthly indebtedness (including

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[60] *See* Joint Report, at 76-77.

[61] 15 U.S.C. § 1639(h).

[62] Ark. Code Ann. § 23-53-104(l).

[63] Cal. Fin. Code § 4973(f).

[64] 12 C.F.R. § 226.32.

[65] Colo. Rev. Stat. § 5-3.5-103(1)(b).

monthly payments under the proposed mortgage) is less than half the consumer's monthly income.[66]

District of Columbia. Prohibits extension of covered loans to borrowers who cannot reasonably be expected to make the monthly payments. This prohibition only applies to covered loans to borrowers who make 120% or less of the gross median family income, as determined by HUD.[67]

Florida. Prohibits "engaging in a pattern or practice" of extending covered loans based on collateral without regard to the consumer's ability to repay.[68]

Georgia. Lender may not make a covered loan unless a reasonable lender would believe the borrower would be able to make the payments. Rebuttable presumption that loan satisfies this requirement where the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income and the lender followed the federal residual income guidelines.[69]

Illinois. Prohibits extension of covered loans based on collateral without a belief in the consumer's ability to repay. Rebuttable presumption that the consumer will be able to repay if the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income.[70]

Indiana. Prohibits extension of covered loans without regard to repayment ability. Rebuttable presumption that this requirement has been satisfied where lender followed commercially acceptable practices (e.g., used federal debt-income ratio and residual income guidelines). There is also a rebuttable presumption that the borrower's statement of income provided to the lender is accurate.[71]

Kentucky. Prohibits extension of covered loans without a reasonable belief that the borrower will be able to repay. Rebuttable presumption that loan satisfies this requirement where the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income. However, the statute prohibits lenders from imposing a presumption that the consumer will be unable to pay merely because the consumer does not pass this test.[72]

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[66] Conn. Gen. Stat. § 36a-746e(5).

[67] D.C. Code Ann. § 26-1152.02.

[68] Fla. Stat. Ann. § 494.00791(6).

[69] Ga. Code Ann. § 7-6A-5(8).

[70] 815 Ill. Comp. Stat. 137/15.

[71] Ind. Code § 24-9-4-8.

[72] Ky. Rev. Stat. Ann. § 360.100(2)(i).

Maine. Prohibits "engaging in a pattern or practice" of extending covered loans based on collateral without regard to the consumer's ability to repay.[73]

Maryland. Prohibits extension of covered loans without due regard to repayment ability for borrowers who make 120% or less of the monthly median family income in the borrower's metropolitan area. Rebuttable presumption that loan satisfies this requirement where the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than 45% of the consumer's monthly income.[74]

Massachusetts. Prohibits extension of covered loans without reasonable belief that the borrower will be able to make the scheduled payments. Presumption arises that the borrower can make the payments where the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income and the borrower can meet federal residual income guidelines after paying his or her monthly debt.[75]

Michigan. No provision.

Nevada. Prohibits extension of covered loans based solely on borrower's equity, rather than on the borrower's ability to repay the loan.[76]

New Jersey. No provision.

New Mexico. Prohibits extension of covered loans without due regard to repayment ability. Rebuttable presumption that lender has satisfied this requirement if lender complies with state debt-to-income and residual income guidelines.[77]

New York. Prohibits extension of covered loans based on collateral without regard to the consumer's ability to repay. Rebuttable presumption that loan satisfies this requirement where the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income and the lender followed the federal residual income guidelines.[78]

North Carolina. Prohibits extension of covered loans based on collateral without reasonable belief in the consumer's ability to repay. Rebuttable presumption that the consumer will be able to repay if the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income. However, the statute prohibits lenders from imposing

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[73] Me. Rev. Stat. Ann. tit. 9-A, § 8-206-A(12).

[74] Md. Code Ann., Comm. § 12-127(b).

[75] Mass. Gen. Laws ch. 183C, § 4.

[76] Nev. Rev. Stat. § 598D.100(b).

[77] N.M. Stat. Ann. § 58-21A-5(H).

[78] N.Y. Banking Law § 6-l(2)(K) (McKinney 2002).

a presumption that the consumer will be unable to pay merely because the consumer does not pass this test.[79]

Ohio. Prohibits "engaging in a pattern or practice" of extending covered loans based on collateral without regard to the consumer's ability to repay.[80]

Oklahoma. Prohibits "engaging in a pattern or practice" of extending covered loans based on collateral without regard to the consumer's ability to repay. Presumption that this provision has been violated where lender engages in a pattern or practice of extending covered loans without verifying/documenting the borrower's repayment ability. Presumption that borrower will be able to make the scheduled payments where the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than 55% of the consumer's monthly income. However, the statute prohibits lenders from imposing a presumption that the consumer will be unable to repay merely because the consumer does not pass this test.[81]

Pennsylvania. Prohibits extension of covered loans based on collateral without reasonable belief in the consumer's ability to repay. Rebuttable presumption that the consumer will be able to repay if the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income. However, the statute prohibits lenders from imposing a presumption that the consumer will be unable to pay merely because the consumer does not pass this test. This prohibition does not apply to borrowers whose income is greater than 120% of the states's median family income.[82]

Rhode Island. Prohibits extension of high-cost home loans to borrowers unless a reasonable creditor would believe at closing time of the loan that the borrower(s) will be able to make the scheduled payments associated with the loan. Rebuttable presumption that the borrower is able to make the scheduled payments if at the time that the loan is consummated, the borrower's total monthly indebtedness (including amounts under the loan) is less than 50% of the borrower's monthly gross income as verified by tax returns, payroll receipts and other third party income verification.[83]

South Carolina. Prohibits extension of covered loans based on collateral without reasonable belief in the consumer's ability to repay. Rebuttable presumption that the consumer will be able to repay if the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income. However, the statute prohibits lenders from imposing

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[79] N.C. Gen. Stat. § 24-1.1E(c)(2) (2002).

[80] Ohio Rev. Code Ann. § 1349.27(D).

[81] Okla. Stat. Tit. 14A, § 3-410(2)(d).

[82] 63 Pa. Cons. Stat § 456.512(b).

[83] R.I. Gen. Laws §34-25.2-6.(h). In assessing the borrower's ability to repay, the factors to be considered are the borrower's: current and expected income, current obligations, employment status and other financial resources, other than the borrower's equity in the collateral that secures the repayment of the loan.

a presumption that the consumer will be unable to repay merely because the consumer does not pass this test.[84]

Tennessee. Lenders may not make a high-cost loan unless the lender reasonably believes that the borrower(s) will be able to make scheduled payments to repay the loan based on consideration of their current and expected income, current obligations, employment status and other financial resources that do not include the borrower's equity in the dwelling that secures repayment of the loan.[85] Borrowers are deemed able to make their scheduled payments when their total monthly indebtedness (including amounts owed under the loan) is less than or equal to 50% of the borrower's monthly gross income.[86]

Texas. Prohibits "engaging in a pattern or practice" of extending covered loans based on collateral without regard to the consumer's ability to repay.[87]

Utah. No provision.

Wisconsin. Lender may not make a covered loan based on collateral without regard to borrower's repayment ability. The lender is presumed to have violated this provision if the lender engages in a pattern of extending covered loans without verifying and documenting the borrower's ability to repay.[88]

Prepayment Penalties

Prepayment of loans often takes place as a result of relocation or refinancing. Some lenders, particularly those in the sub-prime market, charge fees for prepayment that are intended to cover the lender for losses incurred due to such prepayments. With the prevalence of these prepayment fees in the sub-prime market, some have expressed concern over whether sub-prime borrowers even know that they have the option to obtain loan products without prepayment penalties. In addition, prepayment penalties can sometimes hinder a borrower's ability to refinance a high-cost loan with a lower-cost loan, causing the lender to be locked into the original loan.[89] Consequently, predatory lending statutes typically address one or both of these concerns.

HOEPA. Prohibits prepayment penalties after the first five years of the covered loan where the consumer has a total monthly indebtedness (including monthly

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[84] S.C. Code Ann. § 37-23-40(2).

[85] Tenn. Code Ann. § 47-20-103(6)(A).

[86] Id. at § 47-20-103(6)(B). Monthly gross income is to be verified by the credit application, the borrower's financial statements, tax returns, payroll receipts or third party income verification and as underwritten in accordance with the lender's underwriting guidelines and methodology.

[87] Tex. Fin. Code Ann. § 343.204(b).

[88] Wis. Stat. § 428.203(6).

[89] *See* Joint Report, at 93-94.

payments under the proposed mortgage) greater than half the consumer's monthly income. This prohibition does not apply to funds obtained from refinancing the mortgage with the creditor.[90]

Arkansas. No provision.

California. No prepayment penalties after three years of covered loan. The lender may charge prepayment penalties in the first three years of the covered loan where (1) the lender has offered the borrower another product without prepayment fees; (2) the lender has provided a written disclosure to the borrower on the differences between products with prepayment fees and those without; (3) the prepayment fees is equal to no more than six-months, advance interest on the amount prepaid in any 12-month period in excess of 20% of the original principal amount; (4) the loan has not been accelerated due to default; and (5) the lender will not finance a prepayment penalty with a new loan.[91]

Colorado. Prepayment fees only allowed where a lender other than the original one (not pursuant to a sale) refinances a loan with a covered loan, and even then only within the first three years of the covered loan. Also, in order to charge prepayment fees, the lender must first offer the borrower another product without such fees, and the covered loan must be a first mortgage, deed of trust, or security interest to refinance an existing loan financing the construction/acquisition of a dwelling.[92]

Connecticut. Prepayment penalties only allowed in the first three years of the covered loan and may not exceed (1) during the first year, 3% of the amount prepaid; (2) during the second year, 2% of the amount prepaid; and (3) during the third year, 1% of the amount prepaid. Prepayment fees are prohibited if the source of the prepayment is a refinancing by the lender or if, at the time of consummation, the borrower's total monthly debts (including those under the proposed loan) are greater than half the borrower's monthly income.[93]

District of Columbia. Prepayment penalties subject to Washington, D.C.'s general usury restrictions.[94]

Florida. No prepayment penalties for covered loans after three years. Within first three years, prepayment penalties legal if the consumer has been offered another product without prepayment penalties and the consumer has been given a disclosure statement three days prior to consummation.[95]

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[90] 15 U.S.C. § 1639(c).

[91] Cal. Fin. Code § 4973(a).

[92] Colo. Rev. Stat. § 5-3.5-102(1)(g).

[93] Conn. Gen. Stat. § 36a-746c(6).

[94] D.C. Code Ann. § 26-1152.12.

[95] Fla. Stat. Ann. § 494.00791(1).

Georgia. No prepayment fees or penalties after two years of covered loan. During first two years, no prepayment fees that exceed in the aggregate: (1) in the first year after closing, more than 2% of the loan prepaid; or (2) in the second year after closing, more than 1% of the loan prepaid.[96]

Illinois. Prepayment penalties prohibited after three years. During the first three years of the loan, no prepayment penalties for payments that are: more than 3% of the total loan amount in the first year; more than 2% in the second year; and more than 1% in the third year.[97]

Indiana. Prepayment fees only allowed during first two years of loan, and lender charging prepayment fees must also offer a product without prepayment fees to the borrower. Prepayment fees may not exceed 2% of the total amount prepaid during the first two years after closing.[98]

Kentucky. No prepayment penalties after three years. During the first three years of the loan, prepayment penalties are subject to the following ceilings: 3% of the amount prepaid in the first year; 2% in the second year; and 1% in the third year.[99]

Louisiana. Prepayment penalties are allowed as long as they do not exceed 5% of the unpaid principal balance if the loan is prepaid in the first year, 4% in the second year, 3% in the third year, 2% in the fourth year, and 1% in the fifth year.[100] Prepayment penalties not allowed in instances where all or part of the outstanding loan balance is paid from proceeds in satisfaction of claims made under policies of insurance insuring against casualty, flood, or other losses to property when it is being prepared in connection with a gubernatorially declared disaster.[101]

Maine. Prepayment penalties for covered loans prohibited after five years of loan. Prepayment penalties during first five years unless the consumer's total monthly indebtedness (including monthly payments under the proposed mortgage) is less than half the consumer's monthly income, and this income is verified by specific sources. Further, the prepayment penalty can only apply to payments made with funds not provided by the lender in a refinancing.[102]

Maryland. No provision.

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[96] Ga. Code Ann. § 7-6A-5(1).

[97] 815 Ill. Comp. Stat. 137/30.

[98] Ind. Code §§ 24-9-4-1(2)-(4).

[99] Ky. Rev. Stat. Ann. § 360.100(2)(a).

[100] La. Rev. Stat. Ann. 6:1096(E)(2).

[101] Id.. 6:1096(E)(3).

[102] Me. Rev. Stat. Ann. tit. 9-A, §§ 8-206-A(6), (7).

Massachusetts. No prepayment penalties in covered loans.[103]

Michigan. No provision.

Minnesota. No prepayment penalties in residential mortgage loans for any partial prepayment of the loan; any prepayment of the loan upon the sale of property or interest in property that secured the loan; any prepayment that is made more than 42 months after the date of the note or other agreement for the loan; or if the total amount of prepayment penalties, fees, and other charges exceed the lesser of an amount equal to 2% of the unpaid principal balance at the time of prepayment or the amount totaling sixty days, interest at the rate effective at the time of prepayment, on the unpaid principal balance at the time prepayment.[104]

Nevada. No provision.

New Jersey. No provision.

New Mexico. No prepayment fees for covered loans.[105]

New York. No provision.

North Carolina. No prepayment fees for *any* home loan for $150,000 or less where the borrower is a person (as opposed to a corporation); the debt is incurred for personal/household purposes; and the loan is secured by a first mortgage on a structure designed for occupancy by one to four families that will be the borrower's principal residence.[106]

Ohio. No prepayment penalties for covered loans. Prohibition does not apply to a prepayment penalty allowed under HOEPA.[107]

Oklahoma. Prohibits prepayment penalties after two years. No prepayment penalties in the first two years unless (1) the borrower's total monthly indebtedness (including under the proposed loan) is less than 50% of the borrower's monthly income and that income is verified; (2) the prepayment does not apply to funds obtained through a refinancing with the lender; and (3) the aggregated penalty does not exceed 2% of the loan amount prepaid in the first year or 1% in the second year.[108]

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[103] Mass. Gen. Laws ch. 183C, § 5.

[104] Minn. Stat. § 58.137(a). A residential mortgage originator offering or making residential mortgage loans with prepayment penalties exceeding the amount allowed in this section must make a clear disclosure to the potential borrower.

[105] N.M. Stat. Ann. § 58-21A-5(O).

[106] N.C. Gen. Stat. § 24-1.1A(b)(1) (2002).

[107] Ohio Rev. Code Ann. § 1349.27(A)(1).

[108] Okla. Stat. Tit. 14A, § 3-309.4(3)(b).

Pennsylvania. Prepayment fees only allowed in the first 60 months of the covered loan where the lender has made available an alternative product without any prepayment fees. Under no circumstances can a lender charge prepayment fees on a covered loan that refinances another covered loan held by the lender.[109]

Rhode Island. No prepayment penalties or fees are allowed for high-cost home loans.[110]

South Carolina. Borrower may prepay in full *any* consumer home loan of $150,000 or less.[111]

Tennessee. Borrowers may not be charged prepayment fees or penalties (also not allowed in the loan documents) for a high-cost loan exceeding an aggregate of 2% of the loan prepaid, in the first two years following the loan closing.[112] Furthermore, prepayment penalties or fees are not allowed if a lender or a lender's affiliate is refinancing a high-cost home loan of which they are the original note holder.[113]

Texas. Prohibits prepayment penalties in covered loans.[114]

Utah. No prepayment penalties after three years, and prepayment penalties must not be greater than the interest paid at 80% of the preceding six scheduled payments. If prepayment does not pay full balance of loan, then the prepayment penalty must be reduced by a percentage equal to the percentage of the balance unpaid before the prepayment. In addition, no prepayment penalties where the prepayment is paid with funds from a new loan by the same lender.[115]

West Virginia. Allows prepayment penalties of no more than 1% of the original principal within the first three years.[116] In any event, prepayment penalties are not allowed on refinancing within one year from the date of the prior loan.[117]

Wisconsin. No prepayment penalties after three years or when refinancing a covered loan held by the refinancing lender. During first three years, no prepayment

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[109] 63 Pa. Cons. Stat. § 456.511(f).

[110] R.I. Gen. Laws § 34-25.2-6(b).

[111] S.C. Code Ann. § 37-23-80.

[112] Tenn. Code Ann. § 47-20-103(9)(A).

[113] Id. at § 47-20-103(9)(B).

[114] Tex. Fin. Code Ann. § 343.205.

[115] Utah Code § 61-2d-103.

[116] W. Va. Code § 46A-3-110(2).

[117] Id.

penalties unless the lender has also offered the consumer an alternative product with no prepayment penalty. This offer must be initialed by the borrower.[118]

Balloon Payments

Balloon payments occur at the end of the loan term when the scheduled payments do not fully amortize the principal. Balloon payments tied to high-cost loans with short terms can be particularly difficult for sub-prime borrowers to make, forcing them to refinance (sometimes repeatedly) with another high-cost loan.[119] Most statutes prohibit payments that are more than twice as high as the average of earlier payments.

HOEPA. Covered loans of less than five years may not include terms under which the aggregate amount of the regular periodic payments would not fully amortize the outstanding principal balance.[120]

Arkansas. Covered loans of less than ten years may not include terms under which regular periodic payments would not fully amortize the outstanding principal balance. This prohibition does not apply where the change in payment schedule reflects the borrower's seasonal/irregular income or the loan is a bridge loan for the acquisition/construction of borrower's principal dwelling.[121]

California. Covered loans of less than five years may not include terms under which regular periodic payments would not fully amortize the principal. When the payment schedule is adjusted to account for the borrower's seasonal income, the total installments in any year may not exceed the amount of one year's worth of payments on the loan. This prohibition does not apply to bridge loans.[122]

Colorado. Covered loans may not, within first ten years, have any scheduled payments twice as large as the average of earlier payments, unless the change reflects the borrower's seasonal/irregular income or the loan is a bridge loan for the construction/acquisition of the borrower's principal dwelling.[123]

Connecticut. Covered loans may not, within the first seven years, include terms under which the regular periodic payments would not fully amortize the outstanding principal balance. This loan does not apply to bridge loans of under one year.[124]

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[118] Wis. Stat. § 428.207.

[119] *See* Joint Report, at 96.

[120] 15 U.S.C. § 1639(e).

[121] Ark. Code Ann. § 23-53-104(f). This provision does not apply to reverse mortgage transactions.

[122] Cal. Fin. Code § 4973(b).

[123] Colo. Rev. Stat. § 5-3.5-102(1)(a).

[124] Conn. Gen. Stat. § 36a-746c(1).

District of Columbia. Covered loans may not, within the first seven years, include terms under which the regular periodic payments would not fully amortize the outstanding principal balance, unless the payment schedule reflects the seasonal/irregular income of the borrower or the loan is a bridge loan.[125]

Florida. Covered loans of less than ten years may not include terms under which regular periodic payments would not fully amortize the principal, unless such terms reflect the borrower's seasonal/irregular income or the loan is a bridge loan.[126]

Georgia. Covered loans may not have any scheduled payments twice as large as the average of earlier payments, unless the change reflects the borrower's seasonal/irregular income.[127]

Illinois. No provision.

Indiana. Covered loans may not have any scheduled payments twice as large as the average of earlier payments during first ten years of loan, unless the change reflects the borrower's seasonal/irregular income or the loan is a bridge loan for the construction/acquisition of borrower's principal dwelling.[128]

Kentucky. Covered loans may not have any scheduled payments twice as large as the average of earlier payments, unless the change reflects the borrower's seasonal/irregular income.[129]

Maine. Covered loans with terms of less than five years may not include a payment schedule that would not fully amortize the outstanding principal balance.[130]

Maryland. No provision.

Massachusetts. Covered loans may not have any scheduled payments twice as large as the average of earlier payments, unless the change reflects the borrower's seasonal/irregular income.[131]

Michigan. Covered loans with terms of less than five years (but not including bridge loans of less than one year) may not include a payment schedule that would not fully amortize the outstanding principal balance.[132]

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[125] D.C. Code Ann. § 26-1152.13.

[126] Fla. Stat. Ann. § 494.00791(3).

[127] Ga. Code Ann. § 7-6A-5(2).

[128] Ind. Code § 24-9-4-3.

[129] Ky. Rev. Stat. Ann. § 360.100(2)(c).

[130] Me. Rev. Stat. Ann. tit. 9-A, § 8-206-A(9).

[131] Mass. Gen. Laws ch. 183C, § 8.

[132] Mich. Comp. Laws § 445.1635.

Nevada. No provision.

New Jersey. Covered loans may not have any scheduled payments more than twice as large as the average of earlier payments, unless the change reflects the borrower's seasonal/irregular income.[133]

New Mexico. Covered loans may not have any scheduled payments more than twice as large as the average of earlier payments, unless the change reflects the borrower's seasonal/irregular income.[134]

New York. The New York statute prohibits scheduled payments that are more than twice as large as the average of earlier payments, unless such payments become due at least fifteen years after the loan's consummation. This provision does not apply when the payment schedule is adjusted to reflect the borrower's seasonal/irregular income.[135]

North Carolina. Prohibits scheduled payments that are more than twice as large as the average of earlier payments, unless the payment schedule is adjusted due to the borrower's seasonal/irregular income.[136]

Ohio. Covered mortgages of less than five years may not include terms under which the aggregate amount of the regular periodic payments would not fully amortize the outstanding principal balance. Prohibition does not apply to "bridge loans" connected with construction of borrower's principal dwelling, where such loans have less than one year maturity.[137]

Oklahoma. For all consumer loans (except for those which are parts of revolving loan accounts), where any scheduled payment is more than twice the average of earlier payments, the borrower has the right to refinance that payment at the time it is due without penalty. This does not apply where the change reflects the borrower's seasonal/irregular income.[138]

Pennsylvania. Covered loans may not have any scheduled payments more than twice as large as the average of earlier payments during the first ten years of the loan, unless the change reflects the borrower's seasonal/irregular income or the loan is a bridge loan.[139]

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[133] N.J. Stat. Ann. § 46:10B-26(a).

[134] N.M. Stat. Ann. § 58-21A-5(B).

[135] N.Y. Banking Law § 6-l(2)(B) (McKinney 2002).

[136] N.C. Gen. Stat. § 24-1.1E(b)(2) (2002).

[137] Ohio Rev. Code Ann. § 1349.27(C).

[138] Okla. Stat. Tit. 14A, § 3-402.

[139] 63 Pa. Cons. Stat. § 456.511(a).

Rhode Island. High-cost home loans may not contain a scheduled payment that is more than twice as large as the average of earlier payments, unless the payment schedule is adjusted to the seasonal or irregular income of the borrower.[140]

South Carolina. Covered loans may not have any scheduled payments twice as large as the average of earlier payments, unless the change reflects the borrower's seasonal/irregular income or the loan is a bridge loan.[141]

Tennessee. High-cost home loans may not contain scheduled payments that are more than twice as large as the average of the earlier scheduled payments.[142]

Texas. Covered loans may not have any scheduled payments twice as large as the average of earlier payments during the first five years. This prohibition does not apply to payment schedules that reflect the borrower's seasonal/irregular income or the loan is a bridge loan for the acquisition/construction of borrower's principal dwelling.[143]

Utah. No provision.

Wisconsin. Covered loans may not have any scheduled payments more than twice as large as the average of earlier payments, unless the change reflects the borrower's seasonal/irregular income or the loan is a bridge loan with a maturity of less than one year.[144]

Negative Amortization

Negative amortization refers to payment schedules that do not cover the full amount of interest due, causing the outstanding principal balance to increase, rather than decrease, as would normally be the case. The borrower actually loses equity under such a payment scheme,[145] which is why it is usually prohibited with respect to covered loans.

HOEPA. Covered mortgages may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.[146]

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[140] R.I. Gen. Laws § 34-25.2-6(c).

[141] S.C. Code Ann. § 37-23-30(2).

[142] Tenn. Code Ann. § 47-20-103(10). This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of a borrower.

[143] Tex. Fin. Code Ann. § 343.202.

[144] Wis. Stat. § 428.203(1).

[145] *See* Joint Report, at 91.

[146] 15 U.S.C. § 1639(f).

Arkansas. Covered mortgages may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.[147]

California. Prohibits payment schedules for covered loans under which principal balance will increase, unless the loan is a first mortgage and the lender discloses to the borrower that the negative amortization provision may add to the principal.[148]

Colorado. A covered loan may not include a regular payment schedule that will cause the outstanding principal balance to increase, although negative amortization is allowed where it is the result of temporary forbearance sought by the borrower.[149]

Connecticut. Prohibits covered loans with scheduled payments that cause the principal balance to increase.[150]

District of Columbia. A covered loan may not include a regular payment schedule that will cause the outstanding principal balance to increase.[151]

Florida. Identical to HOEPA.[152]

Georgia. Covered loans may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.[153]

Illinois. Covered mortgages (but not including reverse mortgages) may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due, unless the negative amortization is the result of temporary forbearance sought by the borrower.[154]

Indiana. Covered mortgages may not include terms under which the outstanding principal balance will increase at any time over the course of the loan

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[147] Ark. Code Ann. § 23-53-104(g). This provision does not apply to reverse mortgage transactions.

[148] Cal. Fin. Code § 4973(c).

[149] Colo. Rev. Stat. § 5-3.5-102(1)(c).

[150] Conn. Gen. Stat. § 36a-746c(2).

[151] D.C. Code Ann. § 26-1152.15.

[152] Fla. Stat. Ann. § 494.00791(4).

[153] Ga Code Ann. § 7-6A-5(3).

[154] 815 Ill. Comp. Stat. 137/65.

because the regular periodic payments do not cover the full amount of interest due. Prohibition does not apply to temporary forbearance requested by the borrower.[155]

Kentucky. Covered loans may not contain scheduled payments that cause the principal balance to increase.[156]

Maine. Covered mortgages may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.[157]

Maryland. No provision.

Massachusetts. Covered loans may not contain scheduled payments that cause the principal balance to increase.[158]

Michigan. No provision.

Nevada. No provision.

New Jersey. Covered mortgages may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.[159]

New Mexico. Covered loans may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.[160]

New York. No covered loan may contain a payment schedule with regular periodic payments that cause the principal balance to increase.[161]

North Carolina. No covered loan may contain a payment schedule with regular periodic payments that causes the principal balance to increase.[162]

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[155] Ind. Code § 24-9-4-4.

[156] Ky. Rev. Stat. Ann. § 360.100(2)(d).

[157] Mass. Gen. Laws ch. 183C, § 10.

[158] Ky. Rev. Stat. Ann. § 360.100(2)(d).

[159] N.J. Stat. Ann. § 46:10B-26(b).

[160] N.M. Stat. Ann. § 58-21A-5(C).

[161] New York Banking Law § 6-l(2)(C) (McKinney 2002).

[162] N.C. Gen. Stat. § 24-1.1E(b)(3) (2002).

Ohio. Covered loans may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.[163]

Oklahoma. Covered mortgages may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.[164]

Pennsylvania. Unless the borrower makes more than 150% of the median family income, no covered loan may contain a payment schedule with regular periodic payments that causes the principal balance to increase. Prohibition does not apply to temporary forbearance or restructure agreed to by the borrower.[165]

Rhode Island. High-cost home loan may not contain payment terms under which the outstanding principal balance or accrued interest will increase at any time over the course of the loan, because the regularly scheduled periodic payments do not cover the full amount of the interest due.[166]

South Carolina. No covered loan may contain a payment schedule with regular periodic payments that causes the principal balance to increase.[167]

Tennessee. Lenders may not make high-cost home loans containing payment schedules with regular periodic payments that cause the principal balance to increase.[168]

Texas. No covered loan may contain a payment schedule with regular periodic payments that causes the principal balance to increase, unless the schedule is the result of a temporary forbearance/restructure requested by the borrower, or the loan is a bridge loan.[169]

Utah. All covered loans must have a payment schedule sufficient to cover all interest owed and a portion of the principal for each payment, and to cover the full amount owed during the loan term (unless late fees or other charges incurred).[170]

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[163] Ohio Rev. Code Ann. § 1349.27(A)(2).

[164] Okla. Stat. Tit. 14A, § 3-309.4(6).

[165] 63 Pa. Cons. Stat. § 456.511(c).

[166] R.I. Gen. Laws § 34-25.2-6(d).

[167] S.C. Code Ann. § 37-23-30(3).

[168] Tenn. Code Ann. § 47-20-103(11).

[169] Tex. Fin. Code § 343.203.

[170] Utah Code § 61-2d-104.

West Virginia. Regulated consumer lender may not require or contain terms of repayment that do not result in continuous monthly reduction of the original principal amount of the loan.[171]

Wisconsin. No covered loan may contain a payment schedule with regular periodic payments that cause the principal balance to increase, unless the schedule is the result of a temporary forbearance requested by the borrower.[172]

Loan Flipping

Loan flipping is the practice of refinancing (often repeatedly) one loan with a high-cost loan. The borrower may get a lower interest rate by refinancing, but the total points and fees associated with doing so actually make the refinancing a bad option for the borrower.[173] Most state statutes restrict this practice in some way.

HOEPA. No provision.

Arkansas. Prohibits loan flipping, which is defined as refinancing an existing home loan with a covered loan, where doing so does not provide a reasonable, tangible net benefit to the consumer. Presumption of loan flipping where (1) the primary benefit is a lower interest rate as a result of refinancing but it will take the borrower more than four years to realize this benefit due to the points and fees associated with the refinancing; or (2) the new loan refinances certain existing special mortgages subsidized by government or non-profit entities.[174]

California. No refinancing of consumer loans with covered loans for the purposes of refinancing, debt consolidation, or cash out, where the new loan does not provide an identifiable benefit to the borrower.[175]

Colorado. Lenders may not refinance one covered loan held by that lender into another covered loan within the first year of loan unless it is in the borrower's interest to do so.[176] In addition, a lender may not replace or consolidate zero-interest loans or certain low-interest rate loans with a covered loan within ten years of the original loan unless the holder of the original loan consents in writing.[177]

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[171] W. Va. Code § 46A-4-109(5)(E). Does not apply to reverse mortgages, open-ended lines of credit or bridge loans.

[172] Wis. Stat. § 428.203(3).

[173] *See* Joint Report, at 75-76.

[174] Ark. Code Ann. § 23-53-104(b).

[175] Cal. Fin. Code § 4973(j).

[176] Colo. Rev. Stat. § 5-3.5-103(1)(c).

[177] *Id.* at § 5-3.5-103(1)(d).

Connecticut. Prohibits covered loans that refinance existing loans unless doing so provides a benefit to the borrower.[178]

District of Columbia. No provision.

Florida. No refinancing of a covered loan within the first 18 months when the refinancing does not have a reasonable benefit to the consumer.[179]

Georgia. Prohibits loan flipping for *all* home loans, not just covered loans. Loan flipping is defined as refinancing an existing home loan with another one within five years, even though the new loan does not reasonably benefit the borrower.[180] Presumption of loan flipping where the new loan refinances a loan consummated within previous five years, and that is a special mortgage subsidized by government or non-profit entities.[181]

Illinois. No refinancing of covered loan where such refinancing brings additional points and fees within the first year of loan, unless the refinancing results in a tangible net benefit to the borrower.[182]

Indiana. No provision.

Kentucky. Lender may not refinance, replace or consolidate zero-interest loans or certain low-interest rate loans made by a government or non-profit lender with a covered loan.[183]

Maine. No provision.

Maryland. No provision.

Massachusetts. No provision.

Michigan. No provision.

Nevada. No provision.

New Jersey. No provision.

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[178] Conn. Gen. Stat. § 36a-746e(8).

[179] Fla. Stat. Ann. § 494.00791(9).

[180] Ga. Code Ann. § 7-6A-4(a).

[181] *Id.* at § 7-6A-4(b). This presumption does not apply to refinancings of home loans purchased/guaranteed by the Georgia Housing and Finance Authority. *Id.*

[182] 815 Ill. Comp. Stat. 137/45.

[183] Ky. Rev. Stat. Ann. § 360.100(2)(m).

New Mexico. Prohibits loan flipping for *all* home loans, not just covered loans. Loan flipping is defined as refinancing an existing home loan with another one, even though the new loan does not reasonably benefit the borrower.[184]

New York. Prohibits loan flipping for covered loans. Loan flipping is defined as refinancing an existing home loan where the refinancing does not have a tangible net benefit to the consumer considering all of the surrounding circumstances.[185] Also requires that borrowers first get loan counseling before lenders extend covered loans that refinance certain special mortgages originated, subsidized, or guaranteed by or through state, tribal, or local governments, or nonprofit organizations.[186]

North Carolina. Prohibits loan flipping for all consumer home loans except reverse mortgages. Loan flipping is defined as refinancing an existing home loan where the refinancing does not have a tangible net benefit to the consumer considering all of the surrounding circumstances.[187]

Ohio. Prohibits refinancing a covered loan into another covered loan within one year of consummation unless doing so is in the consumer's interest.[188] In addition, borrowers may not replace or consolidate zero-interest and certain low-rate loans made by a government or non-profit lender within the first ten years of the original loan without the lender's written consent.[189]

Oklahoma. Within first year of a covered loan, lender may not refinance that loan with another covered loan unless it is in the borrower's interest to do so.[190] In addition, lender may not consolidate or replace a zero interest loan or certain low rate loans issued by a governmental or non-profit lender with a covered loan within the first ten years of the original loan without the borrower's written consent.[191]

Pennsylvania. Lender may not charge points when refinancing one covered loan with another one when the last financing was within the previous year.[192] In addition, borrowers may not replace or consolidate zero-interest and low-rate loans (i.e., loans carrying interest rates 2% or more below that of comparable Treasury

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[184] N.M. Stat. Ann. § 58-21A-4(B).

[185] New York Banking Law § 6-l(2)(I)

[186] New York Banking Law § 6-l(2)(J) (McKinney 2002).

[187] N.C. Gen. Stat. § 24-10.2(a), (c) (2002).

[188] Ohio Rev. Code Ann. § 1349.27(G)(1).

[189] *Id.* at § 1349.27(J).

[190] Okla. Stat. Tit. 14A, § 3-410(2)(d).

[191] *Id.* at § 3-410(2)(a).

[192] 63 Pa. Cons. Stat. § 456.512(c).

securities) made by a government or non-profit lender within the first ten years of the original loan without the lender's written consent.[193]

Rhode Island. Creditors must not engage in the making of a home to a borrower that refinances an existing home loan that was consummated within the prior sixty months when the new loan does not have a reasonable and tangible net benefit to the borrower.[194] All circumstances are to be considered in making this determination including the terms of both the new and refinanced loans, the cost of the new loan, the borrower's circumstances, and any other pertinent factors.

South Carolina. Prohibits loan flipping with respect to *all* consumer home loans. Loan flipping is defined as refinancing one consumer home loan with another within three-and-a-half years of the original loan where doing so would not provide a reasonable, tangible benefit to the borrower. The statute lists several events that give rise to a presumption that the refinancing *does* benefit the borrower, including where the borrower's monthly debt (including the proposed loan) does not exceed 50% of the borrower's net income. On the other hand, flipping is presumed to have occurred where a loan refinances certain special mortgages originated, subsidized, or guaranteed by or through state, tribal, or local governments, or nonprofit organizations.[195]

Tennessee. Lenders may not make high-cost home loans that refinance within thirty months an existing home loan or high-cost home loan of the borrower when the new loan does not reasonably benefit the borrower.[196]

Texas. Lender may not consolidate or replace certain low rate loans issued by a governmental or non-profit lender in the first seven years unless the new loan has a lower interest rate and points and fees, or the loan is being restructured to avoid foreclosure.[197]

Utah. No provision.

Virginia. Prohibits mortgage lender and brokers from engaging in the act or practice of "loan flipping." Loan flipping is defined as refinancing a mortgage loan

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[193] 63 Pa. Cons. Stat. § 456.512(d).

[194] R.I. Gen. Laws § 34-25.2-5(b). "Tangible net benefit" means at the time of refinancing of a home loan(s), the new home loan meets, at a minimum, one of six statutorily enumerated factors. *See* R.I. Gen. Laws § 34-25.2-4(q).

[195] S.C. Code Ann. §§ 37-23-70(A), 37-23-20(8).

[196] Tenn. Code Ann. § 47-20-103(4)(A). In determining if a reasonable benefit to the borrower exists, all circumstances including; the terms of both the new and refinanced loan, the economic and non-economic factors, the cost of the new loan, and the borrower's circumstances must be considered.

[197] Tex. Fin. Code Ann. § 343.101.

within 12 months of originating the loan unless refinancing is in the borrower's best interest.[198]

Wisconsin. No refinancing of a covered loan with another covered loan in the first year unless it is in the borrower's interest to do so.[199] In addition, lender may not consolidate or replace a zero interest loan or certain low rate loans issued by a governmental or non-profit lender with a covered loan within the first ten years of the original loan without the borrower's written consent.[200]

Credit Counseling

As mentioned in the introduction, a predatory lender relies on the borrower's unfamiliarity with typical loan practices and terms. In many instances, for example, borrowers who agree to sub-prime terms and conditions could qualify for prime loans, but they don't realize it. Recognizing the role that knowledge plays in curbing predatory lending, there is a movement among some advocates to require borrowers, before agreeing to a high-cost loan, to seek loan counseling.[201]

HOEPA. No requirement to encourage the consumer to get counseling.

Arkansas. No extension of covered loan unless the borrower receives loan counseling from a counselor certified by HUD or other state or federal government regulatory bodies.[202]

California. Required disclosure statement contains a recommendation that the borrower consider seeking loan counseling.[203]

Connecticut. No provision.

Colorado. No provision.

District of Columbia. Lender must inform borrower of right to obtain counseling in connection with a covered loan.[204]

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[198] Va. Code Ann. § 6.1-422.1(a), (b). Provides several examples of the factors to be addressed in determining whether refinancing is in the borrower's best interest.

[199] Wis. Stat. § 428.203(7).

[200] *Id.* at § 428.203(8m).

[201] *See* Joint Report,. at 60-61.

[202] Ark Code Ann. § 23-53-104(k).

[203] Cal. Fin. Code § 4973(k)(1).

[204] D.C. Code Ann. § 26-1152.19.

Florida. Required disclosure statement contains a recommendation that the borrower consider seeking loan counseling.[205]

Georgia. No covered loan can be made without certification from a third-party nonprofit recognized by the U.S. Department of Housing and Urban Development (HUD) or the Georgia Housing and Finance Authority that the borrower has received counseling on the loan.[206]

Illinois. Required disclosure statement contains a recommendation that the borrower seek loan counseling.[207] In addition, if a covered loan becomes delinquent by more than thirty days, then lender is required to notify borrower that borrower may want to consider loan counseling.[208]

Indiana. Before making a covered loan, lenders must first provide information on federal and state loan counseling to the borrower.[209]

Kentucky. Required disclosure statement contains a recommendation that the borrower consider seeking loan counseling.[210] In addition, lender is required to make available to the borrower an audio or video tape approved by the Kentucky Department of Financial Institutions explaining the borrower's rights with respect to covered loans.[211]

Maine. No provision.

Maryland. Lender of a covered loan must provide borrower with written recommendation to seek loan counseling and a list of approved counseling agencies.[212]

Massachusetts. No covered loan can be made without certification from a third-party nonprofit recognized by certain federal or state government entities that the borrower has received counseling on the loan.[213]

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[205] Fla. Stat. Ann. § 494.00792(1)(a).

[206] Ga. Code Ann. § 7-6A-5(7).

[207] 815 Ill. Comp. Stat. 137/95.

[208] 815 Ill. Comp. Stat. 137/100.

[209] Ind. Code § 24-9-4-7.

[210] Ky. Rev. Stat. Ann. § 360.100(2)(h).

[211] *Id.* at § 360.100(2)(o).

[212] Md. Code Ann., Comm., § 12-409.1(c)(2).

[213] Mass. Gen. Laws ch. 183C, § 3.

Michigan. Lender of covered loan must provide borrower with written notice on the benefits of loan counseling and a list of HUD-approved counseling agencies.[214]

Nevada. No provision.

New Jersey. Required disclosure statement contains a recommendation that the borrower seek loan counseling.[215]

New Mexico. No covered loan can be made without certification from a third-party nonprofit recognized by the U.S. Department of Housing and Urban Development (HUD) or similar state authority that the borrower has received counseling on the loan.[216]

New York. Upon receiving an application for a covered loan, lenders must encourage applicants to consider loan counseling and provide a copy of the New York State Banking Department's list of loan counselors.[217]

North Carolina. No covered loan can be made unless borrower provides certification from a counselor approved by the North Carolina Housing Finance Agency that the borrower has received counseling on the loan.[218]

Ohio. No provision.

Oklahoma. No provision.

Pennsylvania. Required disclosure statement contains a recommendation that the borrower consider seeking loan counseling.[219]

Rhode Island. Creditors may not make high-cost home loans without receiving certification from a third-party nonprofit organization counselor, approved by HUD, that the borrower has received counseling on the advisability of the loan transaction.[220]

South Carolina. Lenders may not make covered loans without receiving certification from the State Housing Finance and Development Authority that the borrower has received loan counseling.[221]

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[214] Mich. Comp. Laws § 445.1637.

[215] N.J. Stat. Ann. § 46:10B-26(f).

[216] N.M. Stat. Ann. § 58-21A-5(G).

[217] New York Banking Law § 6-l(2)(L)(i) (McKinney 2002).

[218] N.C. Gen. Stat. § 24-1.1E(b)(1) (2002).

[219] 63 Pa. Cons. Stat. § 456.512(a).

[220] R.I. Gen. Laws § 34-25.2-6(g).

[221] S.C. Code Ann. § 37-23-40(1).

Tennessee. Requires a disclosure statement recommending that the borrower seek loan counseling.[222] Lenders must also provide borrowers with notice of the availability of third-party non-profit counselors approved by HUD or other state housing agencies, and this notice must also provide a list of such counselors in the borrower's county or a list of agencies with toll-free numbers and website information identifying such counselors.[223]

Texas. No provision.

Utah. No provision.

Wisconsin. Required disclosure statement contains a recommendation that the borrower consider seeking loan counseling.[224]

Mandatory Arbitration Clauses

Mandatory arbitration clauses require parties to a loan agreement to resolve their differences in arbitration, rather than in court. These clauses can be onerous to the borrower — and therefore discourage valid claims — in that they sometimes require the borrower to pay arbitration costs or to travel far from home.[225]

HOEPA. No provision.

Arkansas. No covered loan may be subject to a mandatory arbitration clause that limits in any way the borrower's right to seek relief through the judicial process.[226]

California. No provision.

Colorado. Arbitration clauses in covered loans must comply with the rules of a nationally recognized arbitration organization (e.g., American Arbitration Association) and require the arbitration to be conducted in the federal district in which the property is located, in the nearest city in which a federal district court is located, or some other location mutually agreed upon by the parties. Arbitration clauses in covered loans must require lenders to pay at least 50% of the filing fees and at least the first day's standard daily arbitration fees.[227]

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[222] Tenn. Code Ann. § 47-20-103(16).

[223] Id. at § 47-20-103(21).

[224] Wis. Stat. § 428.208.

[225] *See* Joint Report, at 98-99.

[226] Ark. Code Ann. § 23-53-104(j).

[227] Colo. Rev. Stat. § 5-3.5-102(e).

Connecticut. Prohibits mandatory arbitration clauses.[228]

District of Columbia. Prohibits mandatory arbitration clauses in covered loans that are oppressive, unfair, unconscionable, or substantially in derogation of the rights of the consumer. The Mayor of Washington, D.C., is empowered to promulgate guidelines for arbitration clauses (which must be in line with the guidelines of a nationally recognized arbitration forum, such as the American Arbitration Association), compliance with which creates a presumption that the clause is valid.[229]

Florida. No provision.

Georgia. Any provision of a covered loan that requires suit in a forum that is "less convenient, more costly, or more dilatory" than a state judicial forum is unconscionable and void.[230]

Illinois. Prohibits mandatory arbitration clauses in covered loans that are oppressive, unfair, unconscionable, or substantially in derogation of the rights of the consumer.[231]

Indiana. Mandatory arbitration clauses unconscionable and void.[232]

Kentucky. Prohibits mandatory arbitration clauses in covered loans that are oppressive, unfair, unconscionable, or substantially in derogation of the rights of the consumer. Arbitration clauses conforming to the standards of the National Consumer Dispute Advisory Committee of the American Arbitration Association are presumed not to violate this prohibition.[233]

Maine. No provision.

Maryland. No provision.

Massachusetts. Any provision of a covered loan that requires suit in a forum that is "less convenient, more costly, or more dilatory" than a state judicial forum or limits in any claim or defense the borrower may raise is unconscionable and void.[234]

Michigan. No provision.

Nevada. No provision.

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[228] Conn. Gen. Stat. § 36a-746c(7).

[229] D.C. Code Ann. § 26-1152.18.

[230] Ga. Code Ann. § 7-6A-5(6).

[231] 815 Ill. Comp. Stat. 137/130.

[232] Ind. Code § 24-9-4-12.

[233] Ky. Rev. Stat. Ann. § 360.100(2)(p).

[234] Mass. Gen. Laws ch. 183C, § 13.

New Jersey. Any provision of a covered loan that requires suit in a forum that is "less convenient, more costly, or more dilatory" than a state judicial forum is unconscionable and void.[235] In addition, covered loan lenders must use New Jersey courts to foreclose.[236]

New Mexico. Any provision of a covered loan that requires suit in a forum that is "less convenient, more costly, or more dilatory" than a state judicial forum is unconscionable and void.[237]

New York. Prohibits mandatory arbitration clauses in covered loans that are oppressive, unfair, unconscionable, or substantially in derogation of the rights of the consumer.[238]

North Carolina. No provision.

Ohio. No provision.

Oklahoma. Arbitration clauses in covered loans must comply with the rules of a nationally recognized arbitration organization (e.g., American Arbitration Association) and require the arbitration to be conducted in the federal district in which the property is located, the nearest city in which a federal district court is located, or some other location mutually agreed upon by the parties. Arbitration clauses in covered loans must require lenders to pay at least 50% of the filing fees and at least the first day's standard daily arbitration fees.[239]

Pennsylvania. No provision.

Rhode Island. Home loans may not contain provisions allowing a party to require that borrowers assert claims and defenses in forums less convenient, more costly, or dilatory for the resolution of a dispute than a judicial forum established within the state where the borrower may otherwise properly assert a claim or defense.[240] Also, borrowers must not be limited in regards to any claim or defense that they may have.[241]

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[235] N.J. Stat. Ann. § 46:10B-26(e).

[236] N.J. Stat. Ann. § 46:10B-26(k).

[237] N.M. Stat. Ann. § 58-21A-5(F).

[238] New York Banking Law § 6-l(2)(G) (McKinney 2002).

[239] Okla. Stat. Tit. 14A, § 3-410(2)(f).

[240] R.I. Gen. Laws § 34-25.2-5(e).

[241] Id.

South Carolina. The loan agreement may not contain a choice of law provision naming a state other than South Carolina, unless otherwise allowed under federal law.[242]

Tennessee. No provision.

Texas. No provision.

Utah. Arbitration clauses in covered loans must comply with the standards in the Utah Uniform Arbitration Act or the Federal Arbitration Act,[243] or any successor acts.[244]

West Virginia. Regulated consumer lenders may not require compulsory arbitration that does not comply with federal law.[245]

Wisconsin. No provision.

Loan Packing

There are several types of credit insurance that cover various loan payments in case of the borrower's inability to pay, including credit life, credit accident, credit disability, credit unemployment, and credit property insurance. Oftentimes with high-cost loans, the premiums for credit insurance (or other types of insurance) coverage are folded into a single premium and financed all at once by the loan. In essence, this single premium becomes part of the principal, thereby increasing the finance charges due.[246] To combat this practice, many states prohibit covered loans that finance (or "pack" into the loan) single premium credit insurance.

HOEPA. No provision.

Arkansas. Prohibits covered loans that finance (directly or indirectly) any credit insurance or other health or life insurance. This prohibition does not include premiums and fees calculated and paid on a monthly basis.[247]

California. No provision.

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[242] S.C. Code Ann. § 37-23-30(7).

[243] 9 U.S.C. § 1 et seq.

[244] Utah Code § 61-2d-106.

[245] W. Va. Code § 46A-4-109(5)(F).

[246] *See* Joint Report, at 89-90.

[247] Ark. Code Ann. § 23-53-104(a).

Colorado. Prohibits covered loans that finance (directly or indirectly) premiums on credit insurance, or other health or life insurance. This prohibition does not include premiums and fees calculated and paid on a monthly basis.[248]

Connecticut. If a covered loan lender offers credit life, disability, health, accident, or unemployment insurance on a single premium basis, then the lender must also offer the insurance on a monthly premium basis. If the borrower purchases any such insurance, then the borrower has the right to cancel any such insurance product at any time and get a refund of any unearned premiums paid.[249]

District of Columbia. Prohibits lenders of covered loans from selling prepaid single premium credit life, health, unemployment, or accident insurance in connection with a covered loan. Other forms of credit insurance must be accompanied by a disclosure informing the lender that credit insurance is not required.[250]

Florida. No provision.

Georgia. Prohibits *all* home loans that finance (directly or indirectly) any credit insurance that provides for the cancellation of all or part of the borrower's debt in the case of death, injury, etc. The prohibition does not include insurance premiums and fees calculated and paid on a monthly basis.[251]

Illinois. Prohibits covered loans that finance (directly or indirectly) single premium credit insurance or any other health or life insurance. The prohibition does not include insurance premiums and fees calculated and paid on a monthly basis.[252]

Indiana. Prohibits *all* home loans that finance (directly or indirectly) any credit insurance. The prohibition does not include insurance premiums and fees calculated and paid on a monthly basis.[253]

Kentucky. Lenders may not finance single premium credit life, accident, health, disability, or loss-of-income insurance in connection with a covered loan.[254]

Louisiana. Mortgage lenders may not finance or include in the loan amount for a residential mortgage loan the amount of any single premium credit life, dismemberment, involuntary unemployment, collateral protection, debt cancellation,

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[248] Colo. Rev. Stat. § 5-3.5-103(1)(f).

[249] Conn. Gen. Stat. § 36a-746f.

[250] D.C. Code Ann. § 26-1152.03.

[251] Ga. Code Ann. § 7-6A-3(1)(A).

[252] 815 Ill. Comp. Stat. 137/40.

[253] Ind. Code § 24-9-3-1.

[254] Ky. Rev. Stat. Ann. § 360.100(2)(n).

health and accident, mortgage life and disability insurance sold in connection with a residential mortgage loan transaction.[255]

Maine. If a covered loan lender offers credit life, health, accident, disability, or unemployment insurance on a single premium basis, then the lender must also offer the insurance on a monthly premium basis. If the borrower purchases credit insurance, then the borrower has the right to cancel such insurance at any time and get a refund of any unearned premiums paid.[256] Also, all underwriters or processors of mortgage loans on residential real estate property who engage in the business of private mortgage insurance must disclose this fact to all loan applicants at the time of application.[257]

Maryland. Prohibits covered loans that finance single premium credit health, life, or unemployment insurance, unless in connection with a mobile home.[258]

Massachusetts. No provision.

Michigan. Prohibits covered loans that finance credit life, disability, or unemployment insurance.[259]

Montana. Lenders are restricted in the amount of insurance that they may require a borrower to maintain on a loan secured by real property.[260]

Nebraska. Prohibits financing (directly or indirectly) in connection with a mortgage loan: any credit life, credit accident, credit health, credit personal property, or credit loss-of-income insurance debt suspension coverage or debt cancellation coverage that provides for cancellation of all or part of a borrower's liability in the event of loss of life, health, personal property, income, or in the case of accident.[261]

Nevada. Prohibits covered loans that finance (directly or indirectly) any credit insurance.[262]

New Jersey. Prohibits *all* home loans that finance (directly or indirectly) any credit insurance that provides for the cancellation of all or part of the borrower's debt

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[255] La. Rev. Stat. Ann. 6:1096(G)(3). Mortgage lenders are not prohibited from the financing of private mortgage insurance paid on a single premium basis in connection with a residential mortgage loan transaction.

[256] Me. Rev. Stat. Ann. tit. 9-A, § 8-206-A(13-C).

[257] Me. Rev. State. Ann. tit. 33, § 507.

[258] Md. Code Ann., Comm., § 12-312(d)(5).

[259] Mich. Comp. Laws § 445.1634(b)(2)..

[260] Mont. Code Ann. 32-5-306.

[261] Neb. Rev. Stat. § 45-714(m).

[262] Nev. Rev. Stat. § 598D.100(1)(d).

in the case of death, injury, etc. The prohibition does not include insurance premiums and fees calculated and paid on a monthly basis.[263]

New Mexico. Prohibits *all* home loans that finance (directly or indirectly) any credit insurance that provides for the cancellation of all or part of the borrower's debt in the case of death, injury, etc. The prohibition does not include insurance premiums and fees calculated and paid on a monthly basis.[264]

New York. Prohibits covered loans that finance (directly or indirectly) any credit insurance that provides for the cancellation of all or part of the borrower's debt in the case of death, injury, etc. The prohibition does not include insurance premiums and fees calculated and paid on a monthly basis.[265]

North Carolina. No provision.

Ohio. Prohibits financing into a covered loan credit life and credit disability insurance (not including a contract issued by government of private mortgage insurance company to insure lender against default) within thirty days of loan's consummation. The prohibition does not include insurance premiums and fees calculated and paid on a monthly basis.[266]

Oklahoma. No provision.

Pennsylvania. Prohibits lenders from selling single-premium credit life, accident, health, or unemployment insurance in connection with a covered loan unless the lender provides the borrower with a separate disclosure stating, among other things, that purchasing the insurance is not required.[267]

Rhode Island. Prohibits creditors making homes loans from financing (directly or indirectly) any credit insurance that provides for the cancellation of all or part of the borrower's debt in the case of death, injury, etc.[268] The prohibition does not include insurance premiums and fees calculated and paid on a monthly basis.[269]

South Carolina. Prohibits lenders in *all* consumer home loans from financing (directly or indirectly) any credit insurance or other health or life insurance. This

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[263] N.J. Stat. Ann. § 46:10B-25(a).

[264] N.M. Stat. Ann. § 58-21A-4(A).

[265] New York Banking Law § 6-l(2)(H) (McKinney 2002).

[266] Ohio Rev. Code Ann. § 1349.27(I).

[267] 63 Pa. Cons. Stat. § 456.512(f).

[268] R.I. Gen. Laws § 34-25.2-5(a).

[269] Id.

prohibition does not include premiums and fees that are calculated and paid on a monthly basis.[270]

Tennessee. Lenders may not make high-cost loans that finance (directly or indirectly) any single premium credit life insurance, or credit insurance product (such as credit accident, credit disability, credit unemployment, etc.), or any payments (directly or indirectly) for any debt cancellation or suspension agreement or contract, unless (1) the total benefits payable under all such policies or contracts issued in connection with the loan do not exceed $50,000, (2) the principal amount of the financed premiums for such policy or contract are repayable during the term of the policy or contract, or (3) the amount payable under such credit life insurance policies is never more than 103% of the then unamortized principal balance of the loan.[271] This prohibition does not include premiums and fees paid on a monthly basis or in connection with bona fide credit property insurance required by a federal agency in a single premium to that particular agency.[272]

Texas. For *all* home loans, lenders may not offer single premium credit disability, life, or unemployment insurance without providing a disclosure stating, among other things, that the borrower also has the option to buy credit insurance on a monthly premium basis.[273]

Utah. Covered loan may not include a debt cancellation/suspension agreement or single premium credit, death, illness, unemployment, accident, or disability, insurance.[274]

Wisconsin. A lender may not, within thirty days of making a covered loan, finance credit life, accident, health, disability or unemployment insurance (not including a contract issued by government of private mortgage insurance company to insure lender against default) on a prepaid single premium basis. This prohibition does not include premiums and fees that are calculated and paid on a monthly or other periodic basis.[275]

No Call

Some sub-prime loans allow the lender to unilaterally accelerate the loan payments and the amount due. While such actions can be justified — e.g., where the borrower has failed to abide by the terms of the loan agreements — they can also be

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[270] S.C. Code Ann. § 37-23-70(B).

[271] Tenn. Code Ann. § 47-20-103(5). In this section, "credit property insurance" means property insurance written in connection with credit transactions under which the lender is the primary beneficiary.

[272] Id.

[273] Tex. Fin. Code Ann. § 343.104.

[274] Utah Code § 61-2d-107.

[275] Wis. Stat. § 428.203(8g).

predatory, in that they increase the chance of default. For this reason, most states with predatory lending statutes prohibit such practices.

HOEPA. No provision.

Arkansas. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. Acceleration acceptable where the borrower fails to abide by the material terms of the loan.[276]

California. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply to acceleration in accordance with loan's terms due to the borrower's default, a due-on-sale provision, or the misrepresentation/fraud on the part of the borrower.[277]

Colorado. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply to acceleration in accordance with loan's terms due to the borrower's default, a due-on-sale provision, the misrepresentation/fraud on the part of the borrower, or the borrower does something that adversely affects the lender security in the loan. In addition, covered loans can provide for acceleration where the lender in good faith feels materially insecure or that the prospect of future payments has become materially impaired.[278]

Connecticut. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply when acceleration is due to bona fide default, a due-on-sale provision, or another provision not related to the payment schedule.[279]

District of Columbia. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply when acceleration is due to bona fide default or another provision of the loan agreement not related to the payment schedule.[280]

Florida. Prohibits provisions in covered loans that allow lender, in lender's sole discretion, to call or accelerate indebtedness. Acceleration acceptable where there has been fraud/misrepresentation by the borrower or the borrower fails to abide by the terms of the loan.[281]

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[276] Ark. Code Ann. § 23-53-104(d).

[277] Cal. Fin. Code § 4973(i).

[278] Col. Rev. Stat. § 5-3.5-102(1)(b).

[279] Conn. Gen. Stat. § 36a-746c(8).

[280] D.C. Code Ann. § 26-1152.14.

[281] Fla. Stat. Ann. § 494.00791(8).

Georgia. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply to good faith acceleration due to the borrower's failure to abide by the material terms of the loan.[282]

Illinois. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply to good faith acceleration due to the borrower's failure to abide by the material terms of the loan.[283]

Indiana. Bars *all* home loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness without material cause. This prohibition does not apply to good faith acceleration due to the borrower's failure to abide by the material terms of the loan.[284]

Kentucky. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply when acceleration is due to bona fide default, a due-on-sale provision, or another provision not related to the payment schedule.[285]

Maine. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply when acceleration is due to bona fide default, a due-on-sale provision, or another provision not related to the payment schedule.[286]

Maryland. No provision.

Massachusetts. Prohibits demand features that allow the lender to terminate the loan and demand repayment or the entire balance, except where there has been fraud/misrepresentation by the borrower; the borrower has failed to abide by the terms of the loan after being informed in writing and given a reasonable chance to pay according to the loan agreement; or there has been a bona fide action/inaction by the borrower adversely affecting lender's security in the loan.[287]

Michigan. No provision.

Nevada. No provision.

New Jersey. Prohibits provisions in covered loans that allow lender, in lender's sole discretion, to call or accelerate indebtedness. Acceleration acceptable where

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[282] Ga. Code Ann. § 7-6A-5(14).

[283] 815 Ill. Comp. Stat. 137/90.

[284] Ind. Code § 24-9-3-5.

[285] Ky. Rev. Stat. Ann. § 360.100(2)(b).

[286] Me. Rev. Stat. Ann. tit. 9-A, § 8-206-A(16-B).

[287] Mass. Gen. Laws ch. 183C, § 9.

there has been fraud/misrepresentation by the borrower or the borrower fails to abide by the terms of the loan.[288]

New Mexico. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply to good faith acceleration due to the borrower's failure to abide by the material terms of the loan.[289]

New York. New York bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply to good faith acceleration due to the borrower's failure to abide by the material terms of the loan.[290]

North Carolina. North Carolina's statute bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness. This prohibition does not apply when acceleration is due to provisions in the loan document - such as a due-on-sale provision - not related to the payment schedule.[291]

Ohio. Prohibits covered loans that allow the lender to terminate the loan and demand repayment before the maturity date, unless there has been fraud by the consumer, the consumer fails to meet the terms of the loan, or the consumer's actions adversely affect the lender's security in the loan.[292]

Oklahoma. Prohibits covered loans that allow the lender to terminate the loan and demand repayment before the maturity date, unless there has been fraud by the consumer, the consumer fails to meet the terms of the loan, or the consumer's actions adversely affect the lender's security in the loan.[293]

Pennsylvania. Bars covered loans that allow a lender, in the lender's sole discretion, to accelerate the indebtedness, unless repayment accelerated due to: default; due-on-sale provision; borrower's fraud/misrepresentation; consumer's actions that adversely affect the lender's security in the loan.[294]

Rhode Island. Prohibits home loans from containing provisions that permit the creditor, in its sole discretion, to accelerate the indebtedness.[295] This provision does

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[288] N.J. Stat. Ann. § 46:10B-25(e).

[289] N.M. Stat. Ann. § 58-21A-5(N).

[290] N.Y. Banking Law § 6-l(2)(A) (McKinney 2002).

[291] N.C. Gen. Stat. § 24-1.1E(b)(1) (2002).

[292] Ohio Rev. Code Ann. § 1349.27(F).

[293] Okla. Stat. Tit. 14A, § 3-410(1).

[294] 63 Pa. Cons. Stat. § 456.511(b).

[295] R.I. Gen. Laws § 34-25.2-5(d).

not apply where acceleration is done in good faith due to the borrower's failure to abide by the material terms of the loan.[296]

South Carolina. Bars covered loans that allow the lender, in the lender's sole discretion, to accelerate the indebtedness, unless repayment accelerated due to default, a due-on-sale, provision, or some other provision not related to the payment schedule.[297]

Tennessee. Lenders may not make high-cost home loans that contain provisions permitting the lender, in its sole discretion, to accelerate the indebtedness.[298] This provision does not apply when repayment of the loan has been accelerated by default in the terms of the note or deed of trust.[299]

Texas. No provision.

Utah. No provision.

Virginia. Prohibits licensed lenders and brokers from constructing agreements with borrowers that include acceleration clauses (not based on breach of the agreement, failure to perform under the agreement, failure to pay on time, or the submission of false information).[300]

Wisconsin. Prohibits covered loans that allow the lender to terminate the loan and demand repayment before the maturity date, unless there has been fraud by the consumer, the consumer fails to meet the terms of the loan, the consumer's actions adversely affect the lender's security in the loan, or the loan agreement provides for such acceleration where the property securing the loan has been sold.[301]

Financing of Points and Fees

When lenders finance up-front points and fees into the loan, it can disguise the actual cost of the loan to the borrower and create financial gain for the lender at closing. Because the lender does this each time a loan is closed, it is in the lender's interest to have the borrower agree to another loan, i.e., refinance the original loan. Of course, one way that the lender can ensure that the borrower will refinance is to make the original loan have terms/payments that the borrower will not be able to

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[296] Id.

[297] S.C. Code Ann. § 37-23-30(1).

[298] Tenn. Code. Ann. § 47-20-103(12).

[299] Id.

[300] Va. Code Ann. § 6.1-422(a)(5).

[301] Wis. Stat. § 428.203(2).

meet. In other words, allowing lenders to finance up-front points and fees can encourage unscrupulous lenders to write loans with unfair terms.[302]

HOEPA. No provision.

Arkansas. No provision.

California. No provision.

Colorado. No provision.

Connecticut. No provision.

District of Columbia. Where a covered loan is used to refinance another loan held by the same lender and secured by the same property, the new loan may not finance points and fees in excess of 3% of the principal or $400, whichever is greater.[303]

Florida. No provision.

Georgia. No provision.

Illinois. Prohibits extension of covered loans that finance points and fees in an amount exceeding 6% of the principal.[304]

Indiana. Lender making a covered loan may not finance points and fees.[305]

Kentucky. Where a covered loan is used to refinance another covered loan held by the same lender, the new loan may not finance points and fees that total more than 4% of the principal.[306]

Maine. No provision.

Maryland. No provision.

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[302] *See* Joint Report, at 99-101; *see also* Margot Saunders, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. Banking Inst. 111, 121-122 (2002).

[303] D.C. Code Ann. § 26-1152.04. The Mayor of Washington, D.C. is authorized to adjust these limits within certain parameters. *Id.*

[304] 815 Ill. Comp. Stat. 137/55.

[305] Ind. Code § 24-9-4-1.

[306] Ky. Rev. Stat. Ann. § 360.100(2)(j). Real estate-related fees (title examination, notary, etc.) are not included in the definition of "points and fees" with respect to this prohibition. *Id.*

Massachusetts. Prohibits extension of covered loans that finance points and fees in an amount exceeding 5% of the principal or $800, whichever is greater.[307]

Michigan. No provision.

Minnesota. Residential mortgage originators making or modifying residential mortgage loans to borrowers in the state may not include in the principal amount of the residential mortgage loan any portion of any lender fee that exceeds 5% of the loan amount.[308]

Nevada. No provision.

New Jersey. Prohibits the extension of covered loans that finance points and fees unless a federally-approved non-profit loan counselor certifies that the borrower has received credit counseling.[309] In connection with a covered loan, the creditor may not charge points and fees to borrowers where the proceeds of the new loan are being used to refinance an existing loan held by the same creditor.[310]

New Mexico. Prohibits extension of covered loans that finance points and fees in an amount exceeding 2% of the principal.[311]

New York. Prohibits extension of covered loans that finance points and fees in an amount exceeding 3% of the principal.[312]

North Carolina. Prohibits financing of points and fees with a covered loan.[313]

Ohio. No provision.

Oklahoma. No provision.

Pennsylvania. Prohibits charging points in connection with a covered loan if the proceeds of the covered loan are used to refinance an existing covered loan.[314]

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[307] Mass. Gen. Laws ch. 183C, § 6.

[308] Minn. Stat. § 58.137.

[309] N.J. Stat. Ann. § 46:10B-26(g).

[310] Id. at § 46: 10B-26(j).

[311] N.M. Stat. Ann. § 58-21A-5(A).

[312] N.Y. Banking Law § 6-l(2)(M) (McKinney 2002).

[313] N.C. Gen. Stat. § 24-1.1E(c)(3).

[314] Pa. Cons. Stat. 63 § 456.512(c).

Rhode Island. In a high-cost home loan, creditors may not (directly or indirectly) finance any points or fees that total more than 5% of the total loan amount or $800, whichever is greater.[315]

South Carolina. Prohibits financing of points and fees in an amount exceeding 2.5% of the principal.[316]

Tennessee. In high-cost loans, lenders may not finance points and fees (directly or indirectly) exceeding 3% of the total loan amount or $1,500 if the total loan amount is more than $30,000 or equal to 5% of the total loan amount if the total loan amount is $30,000 or less.[317]

Texas. No provision.

Utah. No financing of points and fees exceeding 8% of the total loan amount without providing a written disclosure of the potential dangers of the loan.[318]

Wisconsin. No provision.

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[315] R.I. Gen. Laws § 34-25.2-6(a).

[316] S.C. Code Ann. § 37-23-40(3)(b).

[317] Tenn. Code. Ann. § 47-20-103(7). However, registrants under Tenn. Code Ann. §45-5 may finance points and fees not exceeding the charges allowed under § 45-5-403(a)(1)(A) on loans made under the provisions of § 45-5.

[318] Utah Code § 61-2d-105.