

~~PROPOSED~~ AMENDMENTS TO 209 CMR 32.32 HIGH COST MORTGAGE LOAN PROVISIONS

209 CMR 32.00 is hereby amended by striking out Section 32.32 and inserting in place thereof, the following:-

32.32: Requirements for Certain Closed-End Home Mortgages

(1) Coverage.

(a) Except as provided in 209 CMR 32.32(1)(b), the requirements of 209 CMR 32.32 apply to a consumer credit transaction that is secured by the consumer's principal dwelling, and in which either:

1. a. For a first mortgage, the annual percentage rate at consummation will exceed by more than 8-eight percentage points the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor;

b. For a junior mortgage, the annual percentage rate at consummation will exceed by more than 9-nine percentage points the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor;

c. When calculating the annual percentage rate for adjustable rate loans, the creditor shall use the interest rate that would be effective once the introductory rate has expired;

d. The commissioner may, if economic conditions require, authorize by order or directive the use of an index other than the yield on Treasury securities for the purposes of 209 CMR 32.32(1)(a) and (b); or

2. the total points and fees payable by the consumer at or before loan closing will exceed the greater of 5-percent-% of the total loan amount, or \$400; the \$400 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1; provided, however that *bona fide* loan discount points payable by the borrower in connection with the loan transaction may be excluded from the calculation of the total points and fees payable by the borrower for purposes of 209 CMR 32.32(1)(a)2.

(b) 209 CMR 32.32 does not apply to the following:

1. a reverse-mortgage transaction subject to 209 CMR 32.33.
2. an unsecured open-end credit plan subject to 209 CMR 32.00.

(2) Definitions. For purposes of 209 CMR 32.32, the following definitions apply:

(a) For purposes of 209 CMR 32.32(1)(a)2., points and fees Points and Fees means:

1. all items required to be disclosed under 209 CMR 32.04(1) and 32.04(2), except interest or the time-price differential;
2. all compensation paid to mortgage brokers; and
3. all items listed in 209 CMR 32.04(3)(g) (other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor.

(b) Affiliate means any company that controls, is controlled by, or is under common control with another company. Control shall mean ownership of ten-10percent-% or more of any

class of outstanding capital stock of the company or the power to direct or cause the direction of the management and policies of the company.

(c) ~~Bona fide~~ ~~Fide~~ ~~H~~Loan ~~e~~Discount ~~p~~Points means loan discount points paid for the purpose of reducing, and which in fact result in a *bona fide* reduction of, the interest rate or time-price differential applicable to the loan, provided the amount of the interest rate reduction purchased by the discount points is reasonably consistent with established industry norms and practices for secondary mortgage market transactions. For purposes of ~~this section~~ 209 CMR 32.32, it shall be presumed that a point is a *bona fide* loan discount point if it reduces the interest rate by a minimum of 35 basis points or 3/8 of a point provided all other terms of the loan remain the same.

(d) ~~High e~~Cost ~~h~~Home ~~L~~Loan means any transaction covered under 209 CMR 32.32(1).

(e) ~~Scheduled m~~Monthly ~~p~~Payments means minimum sums required to be paid with respect to all of the borrower's debts that are reported on a nationally recognized consumer credit bureau report and the monthly mortgage payment due under the high cost home loan (ignoring any reduction arising from a lower introductory rate) plus ~~one twelfth~~ 1/12 of the annualized cost of real estate tax and insurance premium payments during the immediately preceding twelve months. Scheduled monthly payments shall not include any debts that are consolidated with or paid off by the high cost home loan.

(3) Disclosures. In addition to other disclosures required by 209 CMR 32.00, in a mortgage subject to 209 CMR 32.32 the creditor shall disclose the following:

(a) Notices. The following statement: "You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan."

(b) Annual pPercentage ~~r~~Rate. The annual percentage rate.

(c) Regular pPayment. The amount of the regular monthly (or other periodic) payment.

(d) Variable rRate. For variable-rate transactions, a statement that the interest rate and monthly payment may increase, and the amount of the single maximum monthly payment, based on the maximum interest rate required to be disclosed under 209 CMR 32.30.

(e) Application. 1. The following statement must appear in at least 12 point type directly above the borrower's signature line on the application: "The loan which will be offered to you is not necessarily the least expensive loan available to you and you are advised to shop around to determine competitive interest rates, points, and other fees and charges." In the event that the creditor does not know whether the borrower's application is a high cost home loan application, such disclosure must be made as soon as the creditor determines that it is a high cost home loan application, but in any event, at least three days prior to the closing no later than 24 hours after such determination is made.

2. At or prior to taking an application, a creditor must also deliver, place in the mail, fax or electronically transmit to the borrower a statement in substantially the following form: "Although your aggregate monthly debt payment may decrease, the high cost home loan may increase both

~~(a)~~ a. your aggregate number of monthly debt payments and

~~(b)~~ b. the aggregate amount paid by you over the term of the high cost home loan"

if such are likely the case.

The above disclosure may be combined with disclosures required under M.G.L. c. 184, s§-17D. In the event that the creditor does not know whether the borrower's application is a high cost home loan application, such disclosure must be made as soon as the creditor determines that it is a high cost home loan application, but in any event, no later than 24 hours after such determination is made. at least three days prior to the closing.

(4) Limitations. A mortgage transaction subject to 209 CMR 32.32 may not provide for the following terms:

(a) 1. Balloon pPayment. For a loan with a term of less than seven years, a payment schedule with regular periodic payments that when aggregated do not fully amortize the outstanding principal balance.

2. Exception. The limitations in 209 CMR 32.32(4)(a)1, do not apply to loans with maturities of less than one year, if the purpose of the loan is a “bridge” loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling.

(b) Negative aAmortization. A payment schedule with regular periodic payments that cause the principal balance to increase.

(c) Advance pPayments. A payment schedule that consolidates more than two periodic payments and pays them in advance from the proceeds.

(d) Increased iInterest rRate. An increase in the interest rate after default.

(e) Rebates. A refund calculated by a method less favorable than the actuarial method (as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 USC 1615(d)), for rebates of interest arising from a loan acceleration due to default.

(f) Prepayment pPenalties. Except as allowed under 209 CMR 32.32(4)(g), a penalty for paying all or part of the principal before the date on which the principal is due. A prepayment penalty includes computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992.

(g) Prepayment-penalty eException. A mortgage transaction subject to 209 CMR 32.32 may provide for a prepayment penalty otherwise permitted by law ~~(including a refund calculated according to the rule of 78s)~~ if:

1. the penalty can be exercised only for the first three years following consummation;

2. the source of the prepayment funds is not a refinancing by the creditor or an affiliate of the creditor; and

3. at consummation, the consumer's total monthly debts (including amounts owed under the mortgage) do not exceed ~~50-percent%~~ fifty percent50% of the consumer's monthly gross income, as verified by the credit application, the obligor's financial statement, a credit report, financial information provided to the lender by or on behalf of the obligor, or any other reasonable means.

(5) Prohibited aActs and pPractices. A creditor extending mortgage credit subject to 209 CMR 32.32 may not:

(a) Repayment ability. Make a high cost home loan unless the creditor reasonably believes at the time the loan is consummated that the obligor or the obligors (when considered collectively in the case of multiple obligors) will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources (other than the borrower's equity in the dwelling which secures repayment of the loan). An obligor shall be presumed to be able to make the scheduled payments to repay the obligation, if, at the time the loan is consummated, or at the time of the first rate adjustment in the case of a lower introductory interest rate, the obligor's scheduled monthly payments do not exceed ~~fifty percent~~ 50% of the obligor's monthly gross income as verified by the credit application, the obligor's financial statement, a credit report, financial information provided to the lender by or on behalf of the obligor, or any other reasonable means. The requirement 209 CMR 32.32(5)(a) shall apply only to obligors whose income, as reported on the loan application which the lender relied

upon in making the credit decision, is no greater than 120% of the median family income for the Metropolitan Statistical Area (MSA) (as defined by the Director of the U.S. Office of Management and Budget), in which the property to be secured is located. For loans secured by properties that are not located within an MSA, the requirement shall apply only to obligors whose incomes do not exceed 120% of the non-metropolitan median family income for Massachusetts. For purposes of 209 CMR 32.32, the median family income shall be derived from the most recent estimates made available by the U.S. Department of Housing and Urban Development, at the time the application is received. For purposes of determining median income, only the income of the borrower(s) shall be considered.

(b) Home-improvement eContracts. Pay a contractor under a home-improvement contract from the proceeds of a mortgage covered by 209 CMR 32.32, other than:

1. by an instrument payable to the consumer or jointly to the consumer and the contractor; or
2. at the election of the consumer, through a third-party escrow agent in accordance with terms established in a written agreement signed by the consumer, the creditor, and the contractor prior to the disbursement.

(c) Notice to Assignee. Sell or otherwise assign a mortgage subject to 209 CMR 32.32 without furnishing the following statement to the purchaser or assignee: “Notice: This is a mortgage subject to special rules under the federal Truth in Lending Act. Purchasers or assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor.”

(6) Unfair High Cost Home Loan Practices. It is an unfair act or practice for a creditor to engage in any of the following for any transaction subject to 209 CMR 32.32:

~~(1) — It is an unfair act or practice for a creditor to engage in any of the following for any transaction subject to 209 CMR 32.32:~~

(a) Financing of pPoints, fFees or eCharges. Requiring a borrower to directly or indirectly finance any portion of the points and/or fees nor, in any case, directly or indirectly finance points and fees payable to the creditor or charges payable to third parties (other than appraisal fees, credit report fees, mortgage recording tax, fire and miscellaneous property insurance, voluntary credit, disability, unemployment and/or life insurance, title report and title insurance charges), in an amount that exceeds ~~five percent~~5% of the principal amount of a closed end high cost home loan, or of the maximum line of credit amount for open end high cost home loans, for loans other than refinancings. For refinancings, a creditor may not finance such points, fees or charges in an amount that exceeds ~~five percent~~5% of the additional proceeds received by the borrower in connection with the refinancing other than appraisal fees, credit report fees, mortgage recording tax, fire and miscellaneous property insurance, voluntary credit, disability, unemployment and/or life insurance, title report and title insurance charges. In making a high cost home loan, a creditor may not finance voluntary unemployment insurance unless the underwriting for the loan is predicated on the borrower’s W-2 or 1099 income statement. In making a high cost home loan, with regard to obligors subject to the provisions set forth in in 209 CMR 32.32(5)(a), a creditor may not finance fire and miscellaneous property insurance and/or voluntary credit, disability, unemployment and/or life insurance in addition to the ~~five percent~~5% limit set forth in ~~this subdivision~~209 CMR 32.32(6)(a) unless the obligor’s scheduled monthly payments do not exceed ~~fifty percent~~50% of the obligor’s monthly gross income as verified by the credit application, the obligor’s financial statement, a credit report, financial information provided to the creditor by or on behalf of the obligor, or any other reasonable means. In making a high cost home loan, a creditor may not directly or indirectly finance any prepayment fees or

penalties payable by the borrower in a refinancing transaction if the lender or an Affiliate of the creditor is the originator of the loan being refinanced. For purposes of 209 CMR 32.32(6)(a), “additional proceeds” for a closed end loan is the amount over and above the current principal balance of the existing high cost home loan. For an open end loan, “additional proceeds” is the amount by which the line of credit on the new loan exceeds current principal balance of the existing high cost home loan;

(b) Frequent Refinancing of Existing High Cost Home Loan with New High Cost Home Loan. Charging a borrower points and fees in connection with a high cost home loan if the proceeds of the high cost home loan are used to refinance an existing high cost home loan and the last financing was within two years of the current refinancing. 209 CMR 32.32(6)(b) shall not prohibit a creditor from charging points and fees in connection with any additional proceeds received by the borrower in connection with the refinancing, provided that the points and fees charged on the additional sum must reflect the creditor’s typical point and fee structure for high cost refinance loans. 209 CMR 32.32(6)(b) shall apply only in those instances in which the existing high cost home loan was made by the creditor or an Affiliate of the creditor, provided that the new high cost home loan does not involve the use of a mortgage broker, and to all existing high cost home loans in which the new high cost home loan involves the use of a mortgage broker. For purposes of 209 CMR 32.32(6)(b), “additional proceeds” for a closed end loan is the amount over and above the current principal balance of the existing high cost home loan. For an open end loan, “additional proceeds” is the amount by which the line of credit on the new loan exceeds the current principal balance of the existing high cost home loan.

(c) “Packing” high cost home loans; that is, the practice of selling credit life, accident and health, disability or unemployment insurance products or unrelated goods or services in conjunction with a high cost home loan without the informed consent of the borrower under circumstances where:

1. the creditor solicits the sale of such insurance, goods or services;
2. the creditor receives direct or indirect compensation for the sale of such insurance, goods or services; and
3. the charges for such insurance, goods or services are prepaid with the proceeds of the loan and financed as part of the principal amount of the loan.

Provided, however, it shall not constitute the practice of “packing” if the creditor, at least three business days before the loan is closed, makes a separate oral and a separate clear and conspicuous written disclosure in at least twelve-12 point type to the borrower containing the following information: a. the cost of the credit insurance or other goods and services; b. the fact that the insurance, goods, or services will be prepaid and financed at the interest rate provided for in the loan; and c. that the purchase of such insurance, goods or services is not required to obtain the mortgage loan; provided further, that insurance premiums shall not be considered financed as part of the loan transaction if insurance premiums are calculated, earned and paid on a monthly or other regular, periodic basis. In addition, the written disclosure shall contain a signed and dated acknowledgment by the obligor(s) that the oral disclosure was made and a signed and dated acknowledgment by the creditor that the oral disclosure was made. In addition to the disclosures required under 209 CMR 32.32(6)(c) a creditor shall comply with the requirements of 209 CMR 52.02(1) and (3) as well as 209 CMR 52.03 for credit life insurance or credit accident and health insurance.

(d) Recommending or Encouraging Default or further default by a borrower on an existing loan or other debt, prior to the closing of a high cost home loan that refinances all or any portion of such existing loan or debt.

(e) Advertising. Advertising that refinancing pre-existing debt with a high cost home loan

will reduce a borrower's aggregate monthly debt payment without also disclosing, if such are likely the case, that the high cost home loan will increase both

1. ~~1.~~ a borrower's aggregate number of monthly debt payments and
2. ~~2.~~ the aggregate amount paid by a borrower over the term of the high cost mortgage loan.

(f) ~~(f)~~ Unconscionable Rates and Terms.

1. ~~1.~~ Making a high cost home loan with rates or fees that violate 940 CMR 8.06, if applicable, or otherwise charge interest rates or fees in a high cost loan transaction that significantly deviate from industry standards or that are otherwise unconscionable.
2. ~~2.~~ It shall be the creditor's burden to demonstrate that interest rates or fees charged are based upon generally accepted credit worthiness, sound underwriting and other risk related standards or otherwise conform to 209 CMR 32.32(6)(f)1.

(g) ~~(g)~~ Unreasonable Charges. Making high cost home loans in which the creditor charges and retains fees paid by the borrower

1. ~~1.~~ for services that are not actually performed, or
2. ~~2.~~ for which the fees bear no reasonable relationship to the value of the services actually performed, or ~~3.~~
3. ~~3.~~ which are otherwise unconscionable.

(h) Oppressive Mandatory Arbitration Clause or Waiver of Participation in Class Action Suits. Requiring a mandatory arbitration clause or waiver of participation in class action lawsuits that is oppressive, unfair, unconscionable, or substantially in derogation of the rights of consumers. Arbitration clauses that comply with the standards set forth in the Statement of Principles of the National Consumer Dispute Advisory Committee shall be presumed not to violate ~~this regulation~~ [209 CMR 32.00](#).

(i) Failure to Report for Credit Histories. Failing to report both the favorable and unfavorable payment history of the borrower to a nationally recognized consumer credit bureau at least annually if the creditor regularly reports information to a credit bureau.

(j) Single-Premium Credit Insurance. [Notwithstanding the provisions of 209 CMR 32.32\(6\)\(c\),](#) ~~m~~ Making a high cost home loan which contains single-premium credit insurance, including credit life, debt cancellation, and debt suspension.

(k) Call Provision. A call provision that permits the creditor, in its sole discretion, to accelerate the indebtedness. This prohibition does not apply when repayment of the loan has been accelerated by *bona fide* default, pursuant to a due-on-sale provision, or pursuant to some other provision of the loan agreement unrelated to the payment schedule such as bankruptcy or receivership.

(l) Modification or Deferral Fees. Making a high cost home loan with any fees to modify, renew, extend, or amend a high cost home loan or defer any payment due under a high cost home loan if, after the modification, renewal, extension or amendment, the loan is still a high cost home loan or, if no longer a high cost home loan, the [Annual Percentage Rate](#) has not been decreased by at least two percentage points.

1. ~~1.~~ For purposes of 209 CMR 32.32(6)(l), fees do not include interest that is otherwise payable and consistent with the provisions of the loan documents.

2. ~~2.~~ 209 CMR 32.32(6)(l) shall not prohibit a creditor from charging points and fees in connection with any additional proceeds received by the borrower in connection with the modification, renewal, extension or amendment (over and above the current principal balance of the existing high cost home loan) provided that the points and fees charged on the additional sum must reflect the creditor's typical point and fee structure for high cost home loans.

3. ~~3.~~ 209 CMR 32.32(6)(l) shall not apply if the existing high cost home loan is in default or is ~~sixty~~ [60](#) or more days delinquent and the modification, renewal, extension,

amendment or deferral is part of a work-out process.

(m) Counseling ~~d~~Disclosure and ~~l~~List of eCounselors.

1. ———A creditor must deliver, place in the mail, fax or electronically transmit the following notice in at least ~~twelve~~12 point type to the borrower at the time of application: “You should consider financial counseling prior to executing loan documents. The enclosed list of counselors is provided by the Division of Banks ~~and or the~~ Executive Office of Elder Affairs”. In the event that the creditor does not know whether the borrower’s application is a high cost home loan application, such disclosure must be made as soon as the creditor determines that it is a high cost home loan application, but in any event, at least three days prior to the closing. In the event of a telephone application, the disclosures must be made immediately after receipt of the application by telephone, but in any event, at least three days prior to the closing. Such disclosure shall be on a separate form. In order to utilize an electronic transmission, the creditor must first obtain either written or electronically transmitted permission from the borrower. A list of approved counselors, available from the Division of Banks or the Executive Office of Elder Affairs, shall be provided to the borrower by the creditor or the mortgage broker at the time that this disclosure is given.

2. ~~In the case of any borrower sixty years of age or more, a creditor shall not make a high cost home loan subject to 209 CMR 32.32 until the prospective borrower has completed a counseling program which shall include instruction on high cost home loans and which shall be approved by the Executive Office of Elder Affairs or the Division of Banks. At or prior to closing, the creditor shall either obtain evidence that the borrower has conducted financial counseling or if the borrower has chosen not to seek financial counseling, a waiver, signed by the borrower, indicating that the borrower was advised of his rights to seek financial counseling but has chosen not to exercise that right.~~

(7) Bona Fide Errors

It shall not constitute a violation of 209 CMR 32.32(5) or 209 CMR 32.32(6), if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error. A bona fide error includes, but shall not be limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this chapter, or rule or regulation issued thereunder, is not a bona fide error.

(8) Effective Date. 209 CMR 32.32 shall become effective on January 22, 2001.

~~**PROPOSED HIGH COST LOAN AMENDMENTS TO 209 CMR 40.00**~~
~~**(Unfair and Deceptive Practices in Consumer Transactions)**~~

~~209 CMR is hereby amended by inserting the following new regulation, 209 CMR 40.00 et seq.,~~

209 CMR 40.00: UNFAIR AND DECEPTIVE PRACTICES IN CONSUMER TRANSACTIONS

Section

- 40.01: Authority, Purpose, and Scope
- 40.02: Definitions
- 40.03: Violations of Truth in Lending
- 40.04: High Cost Home Loan Disclosures
- 40.05: High Cost Home Loan Limitations
- 40.06: Prohibited High Cost Home Loan Acts and Practices
- 40.07: Unfair High Cost Home Loan Practices
- ~~40.08: Bona Fide Errors~~
- ~~40.09: Unfair Credit Practices~~
- ~~40.10: Administrative Enforcement~~

40.01: Authority, Purpose, and Scope

- (1) Authority. ~~This regulation~~ 209 CMR 40.00 is issued pursuant to M.G.L. c. 167, s. 2A.
- (2) Purpose. Unfair or deceptive acts or practices in or affecting consumer transactions are unlawful under M.G.L. c. 167, s. 2A.
- (3) Scope. ~~This regulation~~ 209 CMR 40.00 applies to any bank, any Massachusetts or out-of-state branch, any association or corporation chartered and authorized to do a banking business by a state of the United States other than the commonwealth, by the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or by a country other than the United States, or a national banking association, federal savings and loan association, federal savings bank or federal credit union, which has its main office located in the commonwealth or in any other jurisdiction named herein.

40.02: Definitions

For the purposes of 209 CMR 40.00, the following definitions apply:

Affiliate, means any company that controls, is controlled by, or is under common control with another company. Control shall mean ownership of 10% or more of any class of outstanding capital stock of the company or the power to direct or cause the direction of the management and policies of the company.

“Bank”, any association or corporation chartered by the commonwealth under the provisions of M.G.L. c. 168, 170, 171, or 172 or any individuals, association, partnership or corporation incorporated or doing a banking business in the commonwealth, subject to the supervision of the commissioner.

“Bona fide Loan Discount Points” means loan discount points paid for the purpose of reducing, and which in fact result in a *bona fide* reduction of, the interest rate or time-price differential applicable to the loan, provided the amount of the interest rate reduction purchased by the discount points is reasonably consistent with established industry norms and practices for secondary mortgage market transactions. For

purposes of ~~this section~~ 209 CMR 40.00, it shall be presumed that a point is a *bona fide* loan discount point if it reduces the interest rate by a minimum of 35 basis points or 3/8 of a point provided all other terms of the loan remain the same.

“Commissioner”, the commissioner of banks.

“Consumer”, means a natural person who seeks or acquires goods, services, or money for personal, family, or household use other than for the purchase of real property.

“Consumer Transaction”, means a transaction between a financial institution and a consumer, in which the money, property or services are primarily for personal, family or household purposes.

“Cosigner”, means

(a) a natural person who assumes liability for the obligation of a consumer without receiving goods, services, or money in return for the obligation, or, in the case of an open-end credit obligation, without receiving the contractual right to obtain extensions of credit under the account.

(b) “Cosigner” includes any person whose signature is requested as a condition to granting credit to a consumer, or as a condition for forbearance on collection of a consumer's obligation that is in default. The term does not include a spouse whose signature is required on a credit obligation to perfect a security interest pursuant to state law.

(c) A person who meets the definition in this paragraph is a “cosigner,” whether or not the person is designated as such on the credit obligation.

“Earnings”, means compensation paid or payable to an individual or for the individual's account for personal services rendered or to be rendered by the individual, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension, retirement, or disability program.

“Federal Bank”, a national banking association, savings and loan association or savings bank which exists by authority of the United States, the main office of which is located in the commonwealth.

“Federal Branch”, a branch in the commonwealth of any out-of-state federal bank.

“Federal Credit Union”, a credit union organized under the provisions of the Federal Credit Union Act.

“Financial Institution” means a bank, a federal bank, a Massachusetts branch, a federal branch, an out-of-state branch, or a federal credit union.

“High Cost Home Loan” means

(a) a consumer credit transaction that is secured by the consumer's principal dwelling, and in which either:

___ 1. a. ——— For a first mortgage, the annual percentage rate at consummation will exceed by more than 8-eight percentage points the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor;

b. ——— For a junior mortgage, the annual percentage rate at consummation will exceed by more than 9-nine percentage points the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor;

c. —When calculating the annual percentage rate for adjustable rate loans, the creditor shall use the interest rate that would be effective once the introductory rate has expired;

~~d. —The commissioner may, if economic conditions require, authorize by order or directive the use of an index other than the yield on Treasury securities for the purposes of calculating if a loan is a high cost home loan; or~~

~~(2.)~~ the total points and fees payable by the consumer at or before loan closing will exceed the greater of ~~5 percent~~ 5% of the total loan amount, or \$400; the \$400 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1; provided, however that *bona fide* loan discount points payable by the borrower in connection with the loan transaction may be excluded from the calculation of the total points and fees payable by the borrower for purposes of this paragraph.

(b) —a high cost home loan does not include the following:

~~(1.)~~ a reverse-mortgage transaction subject to 209 CMR 32.33 or 12 CFR 226.33.

~~(2.)~~ an unsecured open-end credit plan subject to 209 CMR 32.00 or Subpart B of 12 CFR 226.00.

~~“Household goods” means clothing, furniture, appliances, linens, china, crockery, kitchenware, and personal effects of the consumer and the consumer’s dependents. The term “household goods” does not include —~~

~~(1) —works of art;~~

~~(2) —electronic entertainment equipment (other than one television and one radio);~~

~~(3) —items acquired as antiques; that is, items over one hundred years of age, including such items that have been repaired or renovated without changing their original form or character; and~~

~~(4) —jewelry (other than wedding rings).~~

~~“Massachusetts bBank”~~, any bank, other than an association or corporation chartered pursuant to M.G.L. c. 171.

~~“Massachusetts bBranch”~~, a branch in the commonwealth of any out-of-state bank.

~~“Obligation”~~ means an agreement between a consumer and a creditor.

~~“Out-of-sState bBank”~~, any association or corporation authorized to do a banking business the main office of which is located outside the commonwealth and which exists by authority of any state of the United States other than the commonwealth.

~~“Out-of-sState bBranch”~~, a branch of any Massachusetts bank located outside the commonwealth.

~~“Out-of-sState fFederal bBank”~~, a national banking association, savings and loan association or savings bank which exists by authority of the United States the main office of which is located outside the commonwealth.

~~“Person”~~ means an individual, corporation, or other business organization.

~~“Scheduled mMonthly pPayments”~~ means minimum sums required to be paid with respect to all of the borrower’s debts that are reported on a nationally recognized consumer credit bureau report and the monthly mortgage payment due under the high cost home loan (ignoring any reduction arising from a lower introductory rate) plus ~~one twelfth~~ 1/12 of the annualized cost of real estate tax and insurance premium payments during the immediately preceding ~~twelve~~ 12 months. Scheduled monthly payments shall not include any debts that are consolidated with or paid off by the high cost home loan.

40.03: Violations of Truth in Lending

It is an unfair act or practice for a financial institution subject to 209 CMR 32.00 *et seq.* to make a high cost home loan in violation of 209 CMR 32.32.

40.04: High Cost Home Loan Disclosures

~~(1)~~—It is an unfair act or practice for a financial institution, except a financial institution subject to 209 CMR 40.03, to fail to disclose any of the following in a high cost home loan transaction:

~~(a1)~~ Notices. The following statement: “You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.”

~~(b2)~~ Annual ~~p~~Percentage ~~r~~Rate. The annual percentage rate.

~~(e3)~~ Regular ~~p~~Payment. The amount of the regular monthly (or other periodic) payment.

~~(d4)~~ Variable ~~r~~Rate. For variable-rate transactions, a statement that the interest rate and monthly payment may increase, and the amount of the single maximum monthly payment, based on the maximum interest rate required to be disclosed under 209 CMR 32.30.

~~(e5)~~ Application.

~~(a)1.~~—The following statement must appear in at least 12 point type directly above the borrower’s signature line on the application: “The loan which will be offered to you is not necessarily the least expensive loan available to you and you are advised to shop around to determine competitive interest rates, points, and other fees and charges.” In the event that the creditor does not know whether the borrower’s application is a high cost home loan application, such disclosure must be made as soon as the creditor determines that it is a high cost home loan application, no later than 24 hours after such determination is made, but in any event, at least three days prior to the closing.

~~2.(b)~~—At or prior to taking an application, a creditor must also deliver, place in the mail, fax or electronically transmit to the borrower a statement in substantially the following form: “Although your aggregate monthly debt payment may decrease, the high cost home loan may increase both (i) your aggregate number of monthly debt payments and (ii) the aggregate amount paid by you over the term of the high cost home loan” if such are likely the case. The above disclosure may be combined with disclosures required under M.G.L. c. 184, s. § 17D. In the event that the creditor does not know whether the borrower’s application is a high cost home loan application, such disclosure must be made as soon as the creditor determines that it is a high cost home loan application, but in any event, no later than 24 hours after such determination is made at least three days prior to the closing.

40.05: High Cost Home Loan Limitations

~~(1)~~—It is an unfair act or practice for a financial institution, except a financial institution subject to 209 CMR 40.03, to extend a high cost home loan that provides for any of the following terms:

~~(1) (a) 1.~~—Balloon ~~p~~Payment. For a loan with a term of less than seven years, a payment schedule with regular periodic payments that when aggregated do not fully amortize the outstanding principal balance.

~~(b)2.~~—Exception. The limitations in 209 CMR 40.05~~(a)(1)~~~~(a)~~ do not apply to loans with maturities of less than one year, if the purpose of the loan is a “bridge” loan connected with the acquisition or construction of a dwelling intended to become the consumer’s principal dwelling.

~~(b2)~~—Negative ~~a~~Amortization. A payment schedule with regular periodic payments that cause the principal balance to increase.

~~(e3)~~ Advance pPayments. A payment schedule that consolidates more than two periodic payments and pays them in advance from the proceeds.

~~(d4)~~ Increased iInterest rRate. An increase in the interest rate after default.

~~(e5)~~ Rebates. A refund calculated by a method less favorable than the actuarial method (as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 USC 1615(d)), for rebates of interest arising from a loan acceleration due to default.

~~(f6)~~ Prepayment pPenalties. Except as allowed under 209 CMR 40.05(~~g7~~), a penalty for paying all or part of the principal before the date on which the principal is due. A prepayment penalty includes computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992.

~~(7g)~~ Prepayment-pPenalty eException. A high cost home loan may provide for a prepayment penalty otherwise permitted by law (~~including a refund calculated according to the rule of 78s~~) if:

~~(a)1.~~ —the penalty can be exercised only for the first three years following consummation;

~~(b)2.~~ —the source of the prepayment funds is not a refinancing by the financial institution or an affiliate of the financial institution; and

~~(c)3.~~ —at consummation, the consumer's total monthly debts (including amounts owed under the mortgage) do not exceed ~~50-percent%~~ of the consumer's monthly gross income, as verified by the credit application, the obligor's financial statement, a credit report, financial information provided to the lender by or on behalf of the obligor, or any other reasonable means.

40.06: Prohibited High Cost Home Loan Acts and Practices

~~(1)~~ In connection with the extension of a high cost home loan, it is a deceptive act or practice for a financial institution, except a financial institution subject to 209 CMR 40.03, to engage in any of the following:

~~(a1)~~ Repayment aAbility. Make a high cost home loan unless the creditor reasonably believes at the time the loan is consummated that the obligor or the obligors (when considered collectively in the case of multiple obligors) will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources (other than the borrower's equity in the dwelling which secures repayment of the loan). An obligor shall be presumed to be able to make the scheduled payments to repay the obligation, if, at the time the loan is consummated, or at the time of the first rate adjustment in the case of a lower introductory interest rate, the obligor's scheduled monthly payments do not exceed ~~fifty percent~~50% of the obligor's monthly gross income as verified by the credit application, the obligor's financial statement, a credit report, financial information provided to the lender by or on behalf of the obligor, or any other reasonable means. The requirement of 209 CMR 40.06(~~a1~~) shall apply only to obligors whose income, as reported on the loan application which the lender relied upon in making the credit decision, is no greater than 120% of the median family income for the Metropolitan Statistical Area (MSA) (as defined by the Director of the U.S. Office of Management and Budget), in which the property to be secured is located. For loans secured by properties that are not located within an MSA, the requirement shall apply only to obligors whose incomes do not exceed 120% of the non-metropolitan median family income for Massachusetts. For purposes of 209 CMR ~~32.3240.00~~, the median family income shall be derived from the most recent estimates made available by the U.S. Department of Housing and Urban Development, at the time the application is received. For purposes of determining median income, only the income of the borrower(s) shall be considered.

~~(b2)~~ Home-improvement eContracts. Pay a contractor under a home-improvement contract from the proceeds of a high cost home loan, other than:

~~1-(a)~~ —by an instrument payable to the consumer or jointly to the consumer and the contractor; or

~~2-(b)~~ at the election of the consumer, through a third-party escrow agent in accordance with terms established in a written agreement signed by the consumer, the creditor, and the contractor prior to the

disbursement.

(e3) Notice to Assignee. Sell or otherwise assign a high cost home loan without furnishing the following statement to the purchaser or assignee: “Notice: This is a mortgage subject to special rules under the federal Truth in Lending Act. Purchasers or assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor.”

40.07: Unfair High Cost Home Loan Practices

(+) It is an unfair act or practice for a financial institution, except a financial institution subject to 209 CMR 40.03, to engage in any of the following in a high cost home loan:

(a1) Financing of Points, Fees or Charges. Requiring a borrower to directly or indirectly finance any portion of the points and/or fees nor, in any case, directly or indirectly finance points and fees payable to the creditor or charges payable to third parties (other than appraisal fees, credit report fees, mortgage recording tax, fire and miscellaneous property insurance, voluntary credit, disability, unemployment and/or life insurance, title report and title insurance charges), in an amount that exceeds ~~five percent~~5% of the principal amount of a closed end high cost home loan, or of the maximum line of credit amount for open end high cost home loans, for loans other than refinancings. For refinancings, a creditor may not finance such points, fees or charges in an amount that exceeds ~~five percent~~5% of the additional proceeds received by the borrower in connection with the refinancing other than appraisal fees, credit report fees, mortgage recording tax, fire and miscellaneous property insurance, voluntary credit, disability, unemployment and/or life insurance, title report and title insurance charges. In making a high cost home loan, a creditor may not finance voluntary unemployment insurance unless the underwriting for the loan is predicated on the borrower’s W-2 or 1099 income statement. In making a high cost home loan, with regard to obligors subject to the provisions set forth in 209 CMR 40.06(1)(a), a creditor may not finance fire and miscellaneous property insurance and/or voluntary credit, disability, unemployment and/or life insurance in addition to the ~~five percent~~5% limit set forth in ~~this subdivision~~209 CMR 40.07(1) unless the obligor’s scheduled monthly payments do not exceed ~~fifty percent~~50% of the obligor’s monthly gross income as verified by the credit application, the obligor’s financial statement, a credit report, financial information provided to the creditor by or on behalf of the obligor, or any other reasonable means. In making a high cost home loan, a creditor may not directly or indirectly finance any prepayment fees or penalties payable by the borrower in a refinancing transaction if the lender or an Affiliate of the creditor is the originator of the loan being refinanced. For purposes of 209 CMR 40.07(1)(a), “additional proceeds” for a closed end loan is the amount over and above the current principal balance of the existing high cost home loan. For an open end loan, “additional proceeds” is the amount by which the line of credit on the new loan exceeds the current principal balance of the existing high cost home loan.;

(b2) Frequent Refinancing of Existing High Cost Home Loan with New High Cost Home Loan. Charging a borrower points and fees in connection with a high cost home loan if the proceeds of the high cost home loan are used to refinance an existing high cost home loan and the last financing was within two years of the current refinancing. 209 CMR 40.07(1)(b2) shall not prohibit a creditor from charging points and fees in connection with any additional proceeds received by the borrower in connection with the refinancing, provided that the points and fees charged on the additional sum must reflect the creditor’s typical point and fee structure for high cost refinance loans. 209 CMR 40.07(1)(b2) shall apply only in those instances in which the existing high cost home loan was made by the creditor or an Affiliate of the creditor, provided that the new high cost home loan does not involve the use of a mortgage broker, and to all existing high cost home loans in which the new high cost home loan involves the use of a mortgage broker. For purposes of 209 CMR 40.07(1)(b2), “additional proceeds” for a closed end loan is the amount over and above the current principal balance of the existing high cost home loan. For an open end loan, “additional proceeds” is the amount by which the line of credit on the new loan exceeds the current principal balance of the existing high cost home loan.

(e3) “Packing” high cost home loans; that is, the practice of selling credit life, accident and health,

disability or unemployment insurance products or unrelated goods or services in conjunction with a high cost home loan without the informed consent of the borrower under circumstances where:

- ~~4.~~ (a) the creditor solicits the sale of such insurance, goods or services;
- (b) the creditor receives direct or indirect compensation for the sale of such insurance, goods or services; and
- ~~6.~~ (c) the charges for such insurance, goods or services are prepaid with the proceeds of the loan and financed as part of the principal amount of the loan.

Provided, however, it shall not constitute the practice of “packing” if the creditor, at least three business days before the loan is closed, makes a separate oral and a separate clear and conspicuous written disclosure in at least ~~twelve~~ 12 point type to the borrower containing the following information: a. the cost of the credit insurance or other goods and services; b. the fact that the insurance, goods, or services will be prepaid and financed at the interest rate provided for in the loan; and c. that the purchase of such insurance, goods or services is not required to obtain the mortgage loan; provided further, that insurance premiums shall not be considered financed as part of the loan transaction if insurance premiums are calculated, earned and paid on a monthly or other regular, periodic basis. In addition, the written disclosure shall contain a signed and dated acknowledgment by the obligor(s) that the oral disclosure was made and a signed and dated acknowledgment by the creditor that the oral disclosure was made. In addition to the disclosures required under 209 CMR 40.07(3)(c) a creditor shall comply with the requirements of 209 CMR 52.02(1) and (3) as well as 209 CMR 52.03 for credit life insurance or credit accident and health insurance.

~~(4)(d)~~—Recommending or eEncouraging dDefault or further default by a borrower on an existing loan or other debt, prior to the closing of a high cost home loan that refinances all or any portion of such existing loan or debt.

~~(5e)~~—Advertising. Advertising that refinancing pre-existing debt with a high cost home loan will reduce a borrower’s aggregate monthly debt payment without also disclosing, if such are likely the case, that the high cost home loan will increase both

- ~~(a)1.~~ a borrower’s aggregate number of monthly debt payments and ~~2.~~
- (b) the aggregate amount paid by a borrower over the term of the high cost mortgage loan.

~~(f6)~~ Unconscionable rRates and tTerms. ~~1.~~

- (a) ~~1.~~—Making a high cost home loan with rates or fees that violate 940 CMR 8.06, if applicable, or otherwise charge interest rates or fees in a high cost loan transaction that significantly deviate from industry standards or that are otherwise unconscionable. ~~2.~~
- (b) ~~1.~~—It shall be the creditor’s burden to demonstrate that interest rates or fees charged are based upon generally accepted credit worthiness, sound underwriting and other risk related standards or otherwise conform to 209 CMR 40.07(~~1~~)(~~f6~~)(a)~~1.~~

~~(g7)~~ Unreasonable Charges. Making high cost home loans in which the creditor charges and retains fees paid by the borrower

- (a)~~1.~~ for services that are not actually performed, or
- (b)~~2.~~ for which the fees bear no reasonable relationship to the value of the services actually performed, or
- (c)~~3.~~ which are otherwise unconscionable.

~~(h8)~~ Oppressive mMandatory Aarbitration eClause or wWaiver of pParticipation in eClass aAction sSuits. Requiring a mandatory arbitration clause or waiver of participation in class action lawsuits that is oppressive, unfair, unconscionable, or substantially in derogation of the rights of consumers. Arbitration clauses that comply with the standards set forth in the Statement of Principles of the National Consumer Dispute Advisory Committee shall be presumed not to violate this regulation.

~~(i9)~~ Failure to rReport for eCredit hHistories. Failing to report both the favorable and unfavorable payment history of the borrower to a nationally recognized consumer credit bureau at least annually if the creditor regularly reports information to a credit bureau.

(j10) Single-premium credit insurance. Notwithstanding the provisions of 209 CMR 40.07(1)(c3), Making a high cost home loan which contains single-premium credit insurance, including credit life, debt cancellation, and debt suspension.

(k11) Call provision. A call provision that permits the creditor, in its sole discretion, to accelerate the indebtedness. This prohibition does not apply when repayment of the loan has been accelerated by *bona fide* default, pursuant to a due-on-sale provision, or pursuant to some other provision of the loan agreement unrelated to the payment schedule such as bankruptcy or receivership

(l12) Modification or deferral fees. Making a high cost home loan with any fees to modify, renew, extend, or amend a high cost home loan or defer any payment due under a high cost home loan if, after the modification, renewal, extension or amendment, the loan is still a high cost home loan or, if no longer a high cost home loan, the Annual Percentage Rate has not been decreased by at least two percentage points.

1.(a) ——— For purposes of 209 CMR 40.07(1)(12), fees do not include interest that is otherwise payable and consistent with the provisions of the loan documents.

2.(b) ——— 209 CMR 40.07(1)(12) shall not prohibit a creditor from charging points and fees in connection with any additional proceeds received by the borrower in connection with the modification, renewal, extension or amendment (over and above the current principal balance of the existing high cost home loan) provided that the points and fees charged on the additional sum must reflect the creditor's typical point and fee structure for high cost home loans.

3.(c) ——— 209 CMR 40.07(1)(12) shall not apply if the existing high cost home loan is in default or is sixty or more days delinquent and the modification, renewal, extension, amendment or deferral is part of a work-out process

(m13) Counseling disclosure and list of counselors.

1.(a) A creditor must deliver, place in the mail, fax or electronically transmit the following notice in at least twelve point type to the borrower at the time of application: "You should consider financial counseling prior to executing loan documents. The enclosed list of counselors is provided by the Division of Banks and or the Executive Office of Elder Affairs". In the event that the creditor does not know whether the borrower's application is a high cost home loan application, such disclosure must be made as soon as the creditor determines that it is a high cost home loan application, but in any event, at least three days prior to the closing. In the event of a telephone application, the disclosures must be made immediately after receipt of the application by telephone, but in any event, at least three days prior to the closing. Such disclosure shall be on a separate form. In order to utilize an electronic transmission, the creditor must first obtain either written or electronically transmitted permission from the borrower. A list of approved counselors, available from the Division of Banks or the Executive Office of Elder Affairs, shall be provided to the borrower by the creditor or the mortgage broker at the time that this disclosure is given.

~~2.(b) ——— In the case of any borrower sixty years of age or more, a creditor shall not make a high cost home loan subject to this section until the prospective borrower has completed a counseling program which shall include instruction on high cost home loans and which shall be approved by the Executive Office of Elder Affairs or the Division of Banks. At or prior to closing, the creditor shall either obtain evidence that the borrower has conducted financial counseling or if the borrower has chosen not to seek financial counseling, a waiver, signed by the borrower, indicating that the borrower was advised of his rights to seek financial counseling but has chosen not to exercise that right.~~

40.08: Bona Fide Errors

It shall not constitute a violation of 209 CMR 40.06 or 40.07, if the creditor shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error. A bona fide error includes, but shall not be limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a

person's obligations under this chapter, or rule or regulation issued thereunder, is not a *bona fide* error.

40.098: Unfair Credit Practices

It is an unfair act or practice for a financial institution to violate 12 CFR 27.00.

40.1009: Administrative Enforcement

- (1) The Commissioner, in his or her discretion, may compromise or settle any claims under any proceeding brought, or to be brought against a financial institution for a violation of 209 CMR 40.00, if he or she determines that such compromise or settlement is in the public interest.
- (2) Nothing in 209 CMR 40.00 shall limit the ability of the Attorney General to enforce the provisions of 209 CMR 40.00, M.G.L. c. 167A, §§2A –2G, or M.G.L. c. 93A.

REGULATORY AUTHORITY

209 CMR 40.00: M.G.L. c. 167A, §2A

PROPOSED HIGH COST LOAN AMENDMENTS TO 209 CMR 42.00
(The Licensing of Mortgage Lenders and Mortgage Brokers)

209 CMR 42.00 is hereby amended by inserting the following new section:-

42.12A: Prohibited Acts and Practices

- (1) It is a prohibited act or practice for a Licensee to make or broker a high cost mortgage loan subject to 209 CMR 32.32, which has rates, fees, terms or features that violate:
 - (a) the disclosure requirements of 209 CMR 32.32(3);
 - (b) the loan limitations set forth in 209 CMR 32.32(4);
 - (c) the prohibited acts and practices provisions of 209 CMR 32.32(5); or
 - (d) the unfair high cost loan practices provisions of 209 CMR 32.32(6).
- (2) It is a prohibited act or practice for a person licensed as a mortgage lender to purchase or to make a high cost loan originated by a mortgage broker that violates the provisions of 209 CMR 32.32 and 209 CMR 42.12A(1).
- (3) A violation of 209 CMR 42.12A(1) or 209 CMR 42.12A(2) shall constitute grounds for the issuance of a cease and desist order under M.G.L. c.255E, §7 and shall constitute grounds for license suspension or revocation under M.G.L. c.255E, §7.
- (4) Effective Date. 209 CMR 42.12A shall become effective on January 22, 2001.**