

Division of Banks
High Cost Home Loan Regulations
2002 Proposed Amendments
[Redlined Copy]

On March 22, 2001, the Division promulgated new High Cost Home Loan regulations to address certain abuses in the high cost mortgage lending industry, commonly referred to as “predatory lending.” The Division amended the Commonwealth’s Truth in Lending regulations found at 209 CMR 32.32. The Division also promulgated additional consumer protections by defining certain unfair and deceptive acts and practices at 209 CMR 40.00 *et seq.* These regulations became effective on March 22, 2001.

The revised 209 CMR 32.32 added the following consumer protections beyond what is covered under the federal provisions:

- Lower interest rate and loan fee thresholds
- Extended high cost home loan regulations to home secured open-end credit
- Prohibited loan “flipping”
- Prohibited balloon mortgages with a term of less than 7 years
- Prohibited loan modification or deferral fees
- Prohibited “packing” of credit insurance and other products
- Prohibited the financing of credit insurance and other products
- Prohibited making loans where the borrower has no reasonable ability or means of repaying based upon “verified” income sources
- Mandated disclosure encouraging financial counseling from approved providers
- Mandated disclosure regarding risks and less costly financing alternatives
- Prohibited failing to report, or selective reporting of, favorable credit information to credit bureaus
- Prohibited oppressive mandatory arbitration provisions
- Prohibited class action participation waiver provisions
- Imposed advertising limitations on high cost home loans
- Prohibited recommending or encouraging default on an existing loan prior to a high cost home loan refinancing

Subsequently, the Board of Governors of the Federal Reserve System (Federal Reserve) issued final changes to the federal Truth in Lending Regulation Z (12 CFR 226.00). Many of the changes to Regulation Z are similar to the Division’s High Cost Home Loan amendments.

Massachusetts maintains an exemption from the provisions of Regulation Z and Truth in Lending due to the fact that the Commonwealth’s Truth in Lending provisions are as protective or more protective to the consumer. Traditionally, the Division has attempted to maintain consistency between 209 CMR 32.00 and Regulation Z whenever possible, in order to avoid unnecessary overlap or conflict with the federal provisions. However, the Division has been willing to adopt different requirements from the federal provisions in cases where there was an overriding consumer protection purpose. That is why the Division amended 209 CMR 32.32 to incorporate additional consumer protections.

The Division has reviewed the Federal Reserve's changes to Regulation Z and is issuing amendments to 209 CMR 32.00 and 209 CMR 40.00. In some cases, the Division has adopted the changes by the Federal Reserve. In other cases, the Division has declined to adopt the Federal Reserve changes because the Division believes that its regulations are more protective to the consumer. The Division invites comments on the proposed amendments.

209 CMR 32.00 is hereby amended by striking out Section 32.01 and inserting in place thereof, the following:-

32.01: Purpose and Scope

(1) The purpose of 209 CMR 32.00 is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. 209 CMR 32.00 also gives consumers the right to cancel certain transactions that involve a lien on a consumer's principal dwelling, ~~and~~ regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes. 209 CMR 32.00 does not govern charges for consumer credit. In addition, 209 CMR 32.00 requires a maximum interest rate to be stated in variable rate contracts secured by the consumer's dwelling, and imposes limitations on home equity plans that are subject to the requirements of 209 CMR 32.05B and mortgages that are subject to the requirements of 209 CMR 32.32. 209 CMR 32.00 prohibits certain acts or practices in connection with credit secured by a consumer's principal dwelling. ~~209 CMR 32.00 does not govern charges for consumer credit.~~

Summary of 209 CMR 32.01

209 CMR 32.01 has been changed slightly to add the last sentence, which was added by the Federal Reserve, and to ensure consistency with Regulation Z.



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, t~~he annual percentage rate at consummation will exceed by more than eight percentage points for first-lien loans, or by more than nine percentage points for subordinate-lien loans, 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 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;~~

~~e.~~ 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;

~~etc.~~ 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% 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.

Summary of 209 CMR 32.32(1) Coverage

In its changes, the Federal Reserve lowered the annual percentage rate threshold for high cost home loans from ten percentage points above Treasury rates to eight percentage points for first lien loans and but kept the threshold at ten percentage points above Treasury rates for subordinate lien loans. In its amendments, the Division previously lowered the thresholds to eight percentage points for first mortgages and nine percentage points for all junior mortgages. The Division proposes to combine 209 CMR 32.32(1)(a)1.a. and b. into one paragraph to maintain similar language to Regulation Z. However, it is not the Division's intention to adopt the Federal Reserve's threshold for subordinate liens. The Division's threshold of nine percentage points above Treasury for subordinate liens has not been changed. The Division asks for comments on what affect, if any, a different threshold for either first or subordinate liens has on the mortgage lending industry and on the number of additional consumers protected by such a difference.



(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** 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 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.

(c) **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 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 Cost Home Loan** means any transaction covered under 209 CMR 32.32(1).

(e) **Scheduled Monthly 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 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.

Summary of 209 CMR 32.32(2)Definitions

The Federal Reserve added premiums for credit life, accident, health, and other insurance to its definition of "points and fees" to address the problem of unnecessary or high cost fees for insurance that are added to the cost of obtaining a mortgage. The Division addressed this issue by banning single premium insurance in its amendments last year. Therefore, the Division declines to adopt the federal changes. However, the Division seeks comments as to the effect on both the mortgage lending industry and on consumers by having a different definition of points and fees.

The Division also continues to maintain its different definition of "affiliate." The Division believes that its definition of affiliate is more inclusive and therefore more protective to consumers.



(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 in conspicuous type size:

(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 Percentage Rate.** The annual percentage rate.

(c) **Regular Payment; balloon payment.** The amount of the regular monthly (or other periodic) payment and the amount of any balloon payment. The regular payment disclosed under this paragraph shall be treated as accurate if it is based on an amount borrowed that is deemed accurate and is disclosed under paragraph (3)(e) of this section.

(d) **Variable 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.

(e) Amount borrowed. For a mortgage refinancing, the total amount the consumer will borrow, as reflected by the face amount of the note; and where the amount borrowed includes premiums or other charges for optional credit insurance or debt-cancellation coverage, that fact shall be stated, grouped together with the disclosure of the amount borrowed. The disclosure of the amount borrowed shall be treated as accurate if it is not more than \$100 above or below the amount required to be disclosed.

(f) 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, 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. your aggregate number of monthly debt payments and

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, §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.

(g) Counseling Disclosure and List of Counselors.

1. A creditor must deliver, place in the mail, fax or electronically transmit the following notice in at least 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 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. 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.

The Division has inserted in 209 CMR 32.32(3)(c) and (e), the two new disclosures for the amount of any balloon payment and the total amount borrowed that were added by the Federal Reserve. These disclosures appear to give consumers useful information when considering a high cost home loan.

The Division has moved the current 209 CMR 32.32(3)(e) Application, to 209 CMR 32.32(3)(f). These disclosure requirements warn consumers of the risks associated with a high cost home loan and encourages borrowers to seek less costly financing alternatives. These disclosure requirements are not contained in the federal provisions.

The Division has also moved the counseling disclosure requirement from 209 CMR 32.32(6)(m) to 209 CMR 32.32(3)(g). In its final regulation last year, the requirement was changed from either recommended or mandatory counseling to a disclosure requirement. This appears better placed at 209 CMR 32.32(3).



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

(a)

1. **Balloon 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.

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 Amortization.** A payment schedule with regular periodic payments that cause the principal balance to increase.

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

(d) **Increased Interest Rate.** 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 Penalties.** 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 Exception.** A mortgage transaction subject to 209 CMR 32.32 may provide for a prepayment penalty otherwise permitted by law 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% 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.

(h) **Due-on-demand clause.** A demand feature that permits the creditor to terminate the loan in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in the following circumstances:

1. There is fraud or material misrepresentation by the consumer in connection with the loan;
2. The consumer fails to meet the repayment terms of the agreement for any outstanding balance; or
3. There is any action or inaction by the consumer that adversely affects the creditor's security for the loan, or any right of the creditor in such security.

Summary of 209 CMR 32.32(4) Limitations

In its amendments last year, the Division changed the limitation on balloon payment mortgages at 209 CMR 32.32(4)(a)1. from five to seven years. The Division believes that banning this costly practice for a longer term is more protective to consumers and declines to adopt the language in the federal regulation.

In last year's amendments, the Division lowered the limitation on prepayment penalties to the first three years (from five years) following the consummation of the high cost home loan. This is similar to the prepayment penalty restrictions for first mortgages in General Laws chapter 183, section 56. The Division's amendments extended this three year limitation to all high cost home loans in order to protect consumers who are often locked into more expensive credit due to costly prepayment penalties. Therefore, the Division declines to revert to the five year restriction in the federal regulations. In addition, the Division seeks comments on the effect of prepayments penalties on both the mortgage lending industry and on consumers.

The Division has added 209 CMR 32.32(4)(h) Due-on-demand clause. This provision added by the Federal Reserve is similar to the restrictions on call provisions added by the Division last year at 209 CMR 32.32(6)(k). The Division believes that adopting the language added by the Federal Reserve will not be any less consumer protective than 209 CMR 32.32(6)(k). It is not the Division's intent to diminish the protections in 209 CMR 32.32 and it therefore seeks comment on the comparative protections between the current 209 CMR 32.32(6)(k) and the proposed 209 CMR 32.32(4)(h).

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209 CMR 32.00 is hereby amended by inserting after Section 32.33, the following new section:-

32.34: ~~(5)~~ Prohibited Acts and Practices in Connection With Credit Secured by a Consumer's Dwelling.

(1) Prohibited Acts and Practices for Loans Subject to 209 CMR 32.32. A creditor extending mortgage credit subject to 209 CMR 32.32 ~~may shall~~ 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 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 Contracts.~~ 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.

~~(e) 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."

~~(c) Refinancings within two-year period.~~ Within two years of having extended credit subject to 209 CMR 32.32, refinance any loan subject to 209 CMR 32.32 to the same borrower into another loan subject to 209 CMR 32.32, unless the refinancing is in the borrower's interest. An assignee holding or servicing an extension of mortgage credit subject to 209 CMR 32.32, shall not, for the remainder of the two-year period following the date of origination of the credit, refinance any loan subject to 209 CMR 32.32 to the same borrower into another loan subject to 209 CMR 32.32, unless the refinancing is in the borrower's interest. A creditor (or assignee) is prohibited from engaging in acts or practices to evade this provision, including arranging for the refinancing of its own loans by affiliated or unaffiliated creditors, or modifying a loan agreement (whether or not the existing loan is satisfied and replaced by the new loan) and charging a fee.

~~(d) 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 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 32.34(1)(d) 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 32.34(1)(d), 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.

Summary of 209 CMR 32.34(1) Prohibited Acts and Practices in Connection With Credit Secured by a Consumer's Dwelling

In adopting its changes to Regulation Z, the Federal Reserve deleted its section 226.32(e) (Prohibited Acts and Practices) and moved the restrictions to a new section 226.34 (Prohibited Acts or Practices in Connection With Credit Secured By a Consumer's Dwelling). To maintain consistent references, the Division is also creating a new 209 CMR 32.34. These changes are discussed below.

(1)(c) Refinancings within two-year period.

Under 209 CMR 32.32(6)(b), the Division had prohibited the charging of points or fees on a refinancing of an existing high cost home loan unless the borrower received additional proceeds. The Federal Reserve has prohibited the refinancing of an existing high cost home loan into another high cost home loan within one year, unless the refinancing is in the "borrower's interest." In changes to the Commentary to Regulation Z, the Federal Reserve comments on what is in the borrower's interest. The Division believes that the intent of the Federal Reserve's changes is similar to the restrictions of 209 CMR 32.32(6)(b). For the purpose of seeking comment, the Division has proposed adopting the language used by the Federal Reserve. However, the Division has changed the restriction from one year to two years from the date of the original high cost home loan. If adopted, the Division would look to the Federal Reserve commentary regarding borrower's interest.

The Division seeks specific comment on whether the Division's current restrictions at 209 CMR 32.32(6)(b) are more or less protective than the proposed provisions. In addition, by adopting the Federal Reserve's more flexible standard of "borrower's interest", can the proposed restriction be too broadly interpreted?

(1)(d) Repayment ability.

In its amendments last year, the Division differed substantially from the federal provisions by eliminating the need to prove a pattern of making high cost home loans to borrowers who cannot afford to repay the loan. The Division established a presumption that a borrower could make the payments on the loan if the borrower's scheduled monthly payments did not exceed 50% of their income as verified by credit reports, financial statements, and other information.

The Federal Reserve has established a presumption that a creditor has violated the regulation if it engages in a “pattern or practice” of making high cost home loans without verifying and documenting a borrower’s ability to repay. The Division believes that its provisions of the regulation are more consumer protective and declines to adopt the federal changes.



(62) 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:

(a) **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 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 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 32.34(1)(d), a creditor may not finance fire and miscellaneous property insurance and/or voluntary credit, disability, unemployment and/or life insurance in addition to the 5% limit set forth in 209 CMR 32.34(2)(a) unless the obligor’s scheduled monthly payments do not exceed 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 32.34(2)(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.~~

(eb) 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 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 32.34(2)(b) 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.

(ec) 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.

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

(fe) Unconscionable Rates and Terms.

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. 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 32.34(2)(e)1.

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

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

(hg) 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 209 CMR 32.34(2)(g).

(ih) 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.

(ii) Single-Premium Credit Insurance. Notwithstanding the provisions of 209 CMR 32.34(2)(b), 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.~~

(ij) 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. For purposes of 209 CMR 32.34(2)(j), fees do not include interest that is otherwise payable and consistent with the provisions of the loan documents.

2. 209 CMR 32.34(2)(j) 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. 209 CMR 32.34(2)(j) shall not apply if the existing high cost home loan is in default or is 60 or more days delinquent and the modification, renewal, extension, amendment or deferral is part of a work-out process.

~~**(m) Counseling Disclosure and List of Counselors.**~~

~~1. A creditor must deliver, place in the mail, fax or electronically transmit the following notice in at least 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 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. 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.~~

Summary of 209 CMR 32.34(2) Unfair High Cost Home Loan Practices

The provisions of section 226.34(b) prohibit the structuring of a home-secured loan as an open-end credit plan in order to evade the requirements of section 226.32. However, 209 CMR 32.32 includes home-secured open-end credit under the definition of a high cost home loan. Therefore, no similar prohibition is present in the proposed changes. However, the Division is moving the former elements of 209 CMR 32.32(6) which are not covered in the federal regulations into 209 CMR 32.34(2), with the exception of paragraphs (b), (k), and (m), which have been moved to other sections. All references have been recodified accordingly. The Division did not amend or curtail any of the protections under the proposed 209 CMR 32.34(2).