

Division of Banks
Proposed Amendments to 209 CMR 40.00
Unfair and Deceptive Practices in Consumer Transactions

The Division’s proposed amendments to 209 CMR 40.00 are intended to complement the proposed amendments to the high cost home loan protections found at 209 CMR 32.00. The primary purpose of the following amendments is to address certain definitional and scope limitations of the Commonwealth’s Truth in Lending Act.

The Commonwealth’s Truth in Lending Act Regulations only apply to state-chartered banks and credit unions and all other non-bank creditors, including mortgage lenders licensed by the Division.¹ The Unfair and Deceptive Practices in Consumer Transactions Act, however, applies to all banks and credit unions operating in the Commonwealth, without regard to whether the entity is state- or federally-chartered.² Therefore, the proposed amendments to 209 CMR 40.00 ensure that the proposed high cost home loan amendments to 209 CMR 32.00 equally apply to all high cost home loan lenders operating in the Commonwealth. As a result, a high cost home loan borrower would have the same consumer protections with all types of lenders.

Please refer to the section by section summary of the proposed amendments to 209 CMR 32.00 for a discussion of the corresponding high cost home loan provisions of 209 CMR 40.00.

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209 CMR 40.02 is hereby amended by striking out the definition of “High Cost Home Loan” and inserting in place thereof, the following:-

40.02: Definitions

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, 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;

¹ See 209 CMR 32.02; G.L. c. 140D, s.1.

² See G.L. c. 167, s. 2A.

~~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 purpose of calculating if a loan is a high cost home loan ~~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 40.02: High Cost Home Loan.

(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.



209 CMR 40.00 is hereby amended by striking out Section 40.04 and inserting in place thereof, the following:-

40.04: High Cost Home Loan Disclosures

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 conspicuous type size in a high cost home loan transaction:

(1) **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."

(2) **Annual Percentage Rate.** The annual percentage rate.

(3) **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.

(4) **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.

(5) **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.

(6) Application.

(a). 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.

(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, §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.

(7) Counseling Disclosure and List of Counselors.

(a) 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.

(b) 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.



209 CMR 40.00 is hereby amended by striking out Section 40.05 and inserting in place thereof, the following:-

40.05: High Cost Home Loan Limitations

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) 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.
 - (b) Exception. The limitations in 209 CMR 40.05(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.

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

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

(4) **Increased Interest Rate.** An increase in the interest rate after default.

(5) **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.

(6) **Prepayment Penalties.** Except as allowed under 209 CMR 40.05(7), 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.

(7) **Prepayment-penalty Exception.** A high cost home loan may provide for a prepayment penalty otherwise permitted by law if:

- (a) the penalty can be exercised only for the first three years following consummation;
- (b) the source of the prepayment funds is not a refinancing by the creditor or an affiliate of the creditor; and
- (c) 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.

(8) **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:

- (a) There is fraud or material misrepresentation by the consumer in connection with the loan;
- (b) The consumer fails to meet the repayment terms of the agreement for any outstanding balance; or
- (c) 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.

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209 CMR 40.00 is hereby amended by striking out Section 40.06 and inserting in place thereof, the following:-

40.06: Prohibited High Cost Home Loan Acts and Practices in Connection With Credit Secured by a Consumer's Dwelling.

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:

- (1) ~~**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 high cost home loan, other than:

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

~~(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.~~

~~(e2) 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."

~~(3) Refinancings within two-year period.~~ Within two years of having extended a high cost home loan, refinance any high cost home loan to the same borrower into another high cost home loan, unless the refinancing is in the borrower's interest. An assignee holding or servicing a high cost home loan, shall not, for the remainder of the two-year period following the date of origination of the credit, refinance any high cost home loan to the same borrower into another high cost home loan, 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.

~~(4) 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 40.06(4) 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 40.06(4), 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.

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209 CMR 40.00 is hereby amended by striking out Section 40.07 and inserting in place thereof, the following:-

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:

(1) **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 40.06(1), 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 40.07(1) 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 40.07(1), "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;

~~(2) **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.~~

~~(3) **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:~~

- ~~(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~~
- ~~(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 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(2)(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.~~

~~(43) **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.~~

~~(54) **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) a borrower's aggregate number of monthly debt payments and~~
- ~~(b) the aggregate amount paid by a borrower over the term of the high cost mortgage loan.~~

~~(65) **Unconscionable Rates and Terms.**~~

- ~~(a) 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.~~
- ~~(b) 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(5)(a).~~

~~(76) **Unreasonable Charges.** Making high cost home loans in which the creditor charges and retains fees paid by the borrower~~

- ~~(a) for services that are not actually performed, or~~

- (b) for which the fees bear no reasonable relationship to the value of the services actually performed, or
- (c) which are otherwise unconscionable.

(87) 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 40.00.

(98) 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.

(409) Single-Premium Credit Insurance. Notwithstanding the provisions of 209 CMR 40.07(2), making a high cost home loan which contains single-premium credit insurance, including credit life, debt cancellation, and debt suspension.

~~(11) 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.~~

(120) 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.

- (a) For purposes of 209 CMR 40.07(120), fees do not include interest that is otherwise payable and consistent with the provisions of the loan documents.
- (b) 209 CMR 40.07(120) 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.
- (c) 209 CMR 40.07(120) 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.

~~(13) Counseling Disclosure and List of Counselors.~~

~~(a) 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.~~

~~(b) 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.~~