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Thomas J. Curry, Commissioner
Commonwealth of Massachusetts
Division of Banks
One South Station
Boston, MA 02110

RE: Written Response to Proposed Changes
Massachusetts High Cost Mortgage Loan Regulations [209 CMR 32.32]

Thank you for the opportunity to provide comments on Massachusetts' proposed amendments to its regulations governing high cost mortgage loans. Your request for comments on the proposal indicates the Commonwealth's interest in making funds available to all creditworthy borrowers at financial terms that are fair to both lenders and borrowers.

Who We Are:

Irwin Home Equity ("IHE") is a subsidiary of Irwin Financial Corporation, an Indiana state chartered bank holding company. IHE originates home equity loans and lines of credit, which are funded by its affiliate, Irwin Union Bank and Trust Company ("IUB"), an Indiana state chartered bank and a member of the Federal Reserve System. IHE offers its products in 28 states and is subject to regulatory oversight in each of them.

We operate from our primary facility in San Ramon, California and a loan production center in Carson City, Nevada. We currently fund approximately $1 billion in new loans annually and have close to $1.5 billion in assets under management.

Our home equity loans are generally secured by a second mortgage on the borrower's residence. However, contrary to the general perception that subprime and home equity lenders are in the business of repossessing properties for profit and thus predators, we are not. We are not predators, we are not subprime lenders, and we are certainly not in the foreclosure business. In fact, since the inception of our business six years ago, we have originated over 50,000 loans, yet completed the foreclosure process on only 34. Furthermore, we do not profit on our foreclosures. In fact our total losses due to foreclosures approximates $370,000.

We take great pride in knowing that IHE makes responsible loans and helps creditworthy borrowers improve their overall financial situation.

Who Our Customers Are:

Our borrowers generally have A+ or A credit and are never lower than B+. While their credit histories evidence an ability to manage credit, their outstanding credit balances and the associated monthly payments are often approaching points at which that debt management becomes comparatively more difficult. They come to us in need of assistance in consolidating their debt and improving their cash flow.

Additionally, for various reasons, our borrowers tend to have less available equity in their homes. Because of the combination of less available equity and high levels of unsecured revolving debt and other credit, they are most interested in high LTV loans. Consequently, our customers often have lower credit scores than the average retail bank loan customer and are therefore precluded from obtaining credit from such conventional home equity sources (refer to Attachment A). Due to the tax and cash flow benefits, they view the high LTV option as more attractive than their existing financial circumstances.

About our Products:

IHE is a direct response lender, providing customized, high LTV financing to creditworthy, but otherwise underserved, borrowers. As a debt consolidation lender our home equity loans and lines of credit enable our borrowers to consolidate and pay off credit card and other high rate debt with lower rate, real estate secured, and often tax-advantaged credit. The costs associated with funding these loans are comparable to that of any other mortgage loan and run from $3,000 to $4,000.

As noted previously, IHE works with borrowers who are generally unable to obtain credit from more conventional home equity sources. While we have identified our borrowers as capable debt managers, we must acknowledge the additional risk associated with high LTV, junior lien lending. Accordingly, this risk is reflected in the pricing of our loans. If the customer wants a lower rate, we offer them the opportunity to reduce their interest rate through such loan features as discount points and prepayment agreements.

IHE provides borrowers the opportunity to enhance their credit score and improve their cash flow. Our experience indicates that if we do our job well, our borrowers will soon be able to re-enter the conventional credit market within three to four years.

Reactions to the Proposal:

We share the concerns expressed by the Commonwealth over the issue of predatory lending; we also want the Division to understand that there are firms, like IHE, that are using fair and responsible methods to make credit available to a previously underserved market. We are extremely concerned about the inherent bias in the proposal towards higher income, higher home equity, and higher loan amount borrowers. In fact, if this proposal is implemented as presented, we are concerned that Massachusetts residents could face the same exodus of lenders as occurred in North Carolina when that state implemented restrictive lending practices without taking into account distinctions between predatory lenders and responsible lenders, such as IHE.

Our research has revealed that, since the July 1, 2000 implementation of the North Carolina predatory lending legislation and directly subject to its provisions, at least two lenders have ceased operations in that state. Furthermore, in its testimony at the Charlotte, North Carolina Federal Reserve hearing, Bank of America stated that because it does not make loans covered under HOEPA, as HOEPA triggers are adjusted to cover more loans, it would be precluded from providing credit to those borrowers whose loans would be covered under the revised triggers. They estimated that the lower triggers would result in some $500 million in credit that would no longer be available from that institution nationwide. The question that North Carolina now faces is who is left to serve the needs of this segment of the market.

To avoid a similar situation in Massachusetts we offer the following observations and suggestions regarding this proposal.

Coverage – §32.32(1): New Triggers for Defining a High Cost Loan

This section proposes two changes to the current definition of a high cost loan; (1) lowering the APR triggers (i.e., from 10 to 8 percentage points over the treasury rate for first mortgages and from 10 to 9 percentage points for second mortgages), and (2) lowering the points and fees trigger (i.e., from 8 percent of the total loan amount to 5 percent of the total loan amount).

Lowering the APR Triggers:
While we appreciate the state's acknowledgement that there is a difference between the interest rate structure for senior and junior liens, the one point spread provided in the proposed regulation does not adequately address the additional risk associated with lending in a junior lien position.

The second mortgage lender's subordinated position requires these lenders to rely more heavily on the borrower's credit quality and cash flow for repayment than first mortgage lenders who have the security of the real property collateral. Home equity lenders, particularly high LTV home-equity lenders, do not profit from repossessions. In a default situation the severity of the loss is frequently 100%, meaning no recoverability. The market has historically addressed this risk differential by setting interest rates for junior lien mortgages 3-5% points above those for first lien mortgages. We suggest that the regulation provide for a spread that is more in line with these industry numbers.

Lowering the Points and Fees Trigger:
Using a percentage of the loan amount to set the points and fees trigger favors lenders who extend larger loans. Nationally, the average first mortgage loan is approximately $100,000, whereas the average second mortgage loan is approximately $30,000. Applying a standard fee maximum, based on a percentage of the loan amount, allows for the collection of significantly different fees in real dollars. For example, four points collected on a $100,000 first mortgage loan is $4,000 while four points collected on a $30,000 second mortgage loan is $1,200. In order for the second mortgage lender to collect this same $4,000 in fees, it would need to collect in excess of 13 points.

The cost of marketing, underwriting, and processing a second mortgage is comparable to that of a first mortgage. The process is equally labor-intensive, and third-party costs are arguably higher for second mortgage lenders since it is customary for the second mortgage lender to absorb the third party costs on behalf of the borrower. In general, the total cost of originating any mortgage loan runs between $3,000-$4,000. Under the proposed regulation, lenders offering higher loan amounts would often be able to recover these costs without triggering the high-cost loan provisions. However, those offering smaller loans would not. It is our opinion that this provision would create a disincentive to junior lien lenders in your state, thereby substantially limiting the availability of credit to that already underserved market.

Looking at the issue from the consumers' viewpoint, those with the greatest need for rate reductions associated with certain loan features (e.g., financed discount points and prepayment agreements), will not have them available.

We suggest that, rather than a maximum based on a percentage of the loan amount, the Division consider setting a fixed maximum fee amount in dollars. This number could take into consideration other cost recovery features of the loan (e.g., prepayment agreement).

We also suggest that the final version of the regulation include a definition of "points and fees" that is clearer than that provided in HOEPA. The issue of redefining points and fees in the federal regulation was raised as a change being contemplated by the Federal Reserve. They are considering inclusion of all fees associated with the loan. We would support such changes and associated adjustment to the point and fee trigger

Prohibited Acts and Practices - §32.32(5):
There are two proposed changes to this section of the regulation with which we are concerned (1) the elimination of the pattern or practice requirement, and (2) the means by which the repayment ability safe harbor is applied.

Pattern or practice
While the changes proposed for this section of the regulations provide much appreciated clarity in determining whether a borrower meets repayment requirements, we oppose the

elimination of the "pattern or practice" requirement. IHE's management takes pride in its compliance with both the letter and spirit of the laws and regulations under which we operate. However, unintentional mistakes are made from time to time and should not be considered reflective of the lender's overall performance. The proposed punishment, a possible cease and desist order or loss of license or registration, seems excessive for a single occurrence of such inadvertent errors.

Safe Harbor
The safe harbor provision is a welcome amendment to the existing regulation. However, the means by which the calculations are done and the parties to whom it is applied are disconcerting. Because our loan products are intended to improve our borrowers' cash flow and overall financial position, many do not understand our need to validate income. We have responded to this issue, for applicants whose credit scores reflect an exceptional ability to manage their current debt load, by implementing programs that allow borrowers to bring income documents to closing. We review these documents during the rescission period to ensure that they confirm the income disclosed by the borrower during the application process. In other instances, we accept a borrower's stated income.

The provisions for safe harbor provide that income verification must be completed by the time a loan is "consummated" which we interpret as the time at which a borrower signs loan documents. This eliminates our ability to offer either of the aforementioned processes. Furthermore, your proposal to waive this requirement for consumers whose income exceeds 120% of median family income for the MSA further supports our concern over the inherent bias in the proposal towards higher income borrowers.

Unfair Practices - §32.32(6):
IHE has held for some time that loan features, by themselves, are not predatory. Rather, it is the practices of some lenders and loan brokers that are predatory. Furthermore, we have found that our borrowers are pleased to have such features as points and prepayment agreements available to them as mechanisms for arriving at the interest rate that best fits their financial needs. To this end, we wish to make the following comments regarding the "unfair practices" noted in this proposed addition to the current regulation.

Financing of points and fees
Because our loans are primarily used for debt consolidation purposes, it is unlikely that our borrowers would have liquid assets available to pay any portion of their loan fees out-of-pocket. Therefore, the prohibition or limitation on financing such fees is severely detrimental to our borrowers' ability to obtain the credit necessary to improve their financial condition.

For example, using the previously referenced average loan amounts (i.e., $100,000 for first lien mortgages and $30,000 for second lien mortgages), if a first mortgage lender were to recover the $4,000 origination cost through points and fees, the result would be 4 points ($4,000/$100,000), yet the same cost recovery on a second mortgage results in 13.33 points ($4,000/$30,000). A 5 point limit for the secondary market is clearly insufficient to cover the lender's $4,000 origination costs on the $30,000 average second mortgage loan. ($30,000 x 5points = $1,500). Limiting the points and fees to only $1,500 does not make the $2,500 shortfall disappear. If the borrower is unable to finance the $2,500 through additional points, the borrower must either pay it with cash or use a different financing vehicle, like a credit card.

Limitations to financing certain fees and prepayment penalties in a "refinance" and Prohibition on points and fees when refinancing a high cost loan that is less than two years old and was originally funded by the lender or an affiliate
We clearly understand the state's desire to limit the practice of refinancing loans to the point where the borrower's equity has been stripped away. However, this amendment does not achieve that. Instead, it makes refinancing less convenient to the borrower who must still cover the risk and cost of the loan. This is especially evident in an environment of dropping interest rates. Assume that interest rates drop 2 percentage points. If points and fees cannot be charged to cover the cost of refinancing a loan, those costs must be made up through the interest rate. Consequently, the borrower is unable to enjoy the full rate reduction.

We agree that the act of loan flipping is reprehensible and should be prohibited. To this end, we suggest a period of fact finding in which states and or the Federal Reserve provide for mandatory data collection regarding each lender's volume of refinancing and foreclosure. We have proposed this concept to the Federal Reserve and would be happy to elaborate on our ideas with the staff at the Division of Banks at your convenience.

Prohibition on charging fees that exceed the customary charges as to be unconscionable
This is not the first time that the industry has seen this sort of language in the text of the Massachusetts banking regulations. As in the past, the terms "customary" and "unconscionable" are not defined and are, therefore, left to the subjective discretion of the Division of Banks. Given the penalties associated with even a single violation of this regulation, it would seem only proper that the Division set absolute limits.

Reduction in maximum prepayment term to three years
This limitation change decreases the maximum prepayment agreement period from five years to less than three years. We appreciate the option of having a prepayment agreement as it benefits both the borrower and the lender. It offers the borrower the opportunity to significantly buy down the interest rate and offers the lender the chance to recover the steep origination costs associated with the loan. Under the current five year regulations, IHE allows borrowers to buy down the interest rate by 1 ½ to 2 percentage points per year. We recommend retaining the five year maximum for the following reasons: (1) five years represents the average life of a second mortgage loan, and (2) lenders do not typically recover their origination costs until three to four years.

We suggest that, as an alternative, the regulation require that the lender evidence a benefit to the borrower in the form of a reduced interest rate when they agree to a prepayment term that exceeds three years.

Closing Comments:

In closing, we wish to express our agreement with Federal Reserve Governor Gramlich, who stated in his comments at the recent Federal Reserve hearings that he believes that competition is what keeps this industry strong and in check. It is this same competition that has resulted in the loan features made available to today's borrowers.

HOEPA, in its federal form and, we fear, in the form being proposed by a number of states, is being shown to have a negative impact on competition in the marketplace. Furthermore, due to the reputational risk and the pass-through liability associated with all forms of "high cost" lending, the availability of financing on Wall Street is also waning. This is not good for the industry and, moreover, this is not a positive step for consumers.

We enclose, for your consideration, a proposal that we provided to the Federal Reserve at its recent hearings in San Francisco on the matter of Predatory Lending. We are dedicated to resolving this issue and are happy to discuss our thoughts and ideas with your staff in more detail.

Once again, we thank you for this opportunity.

Sincerely,

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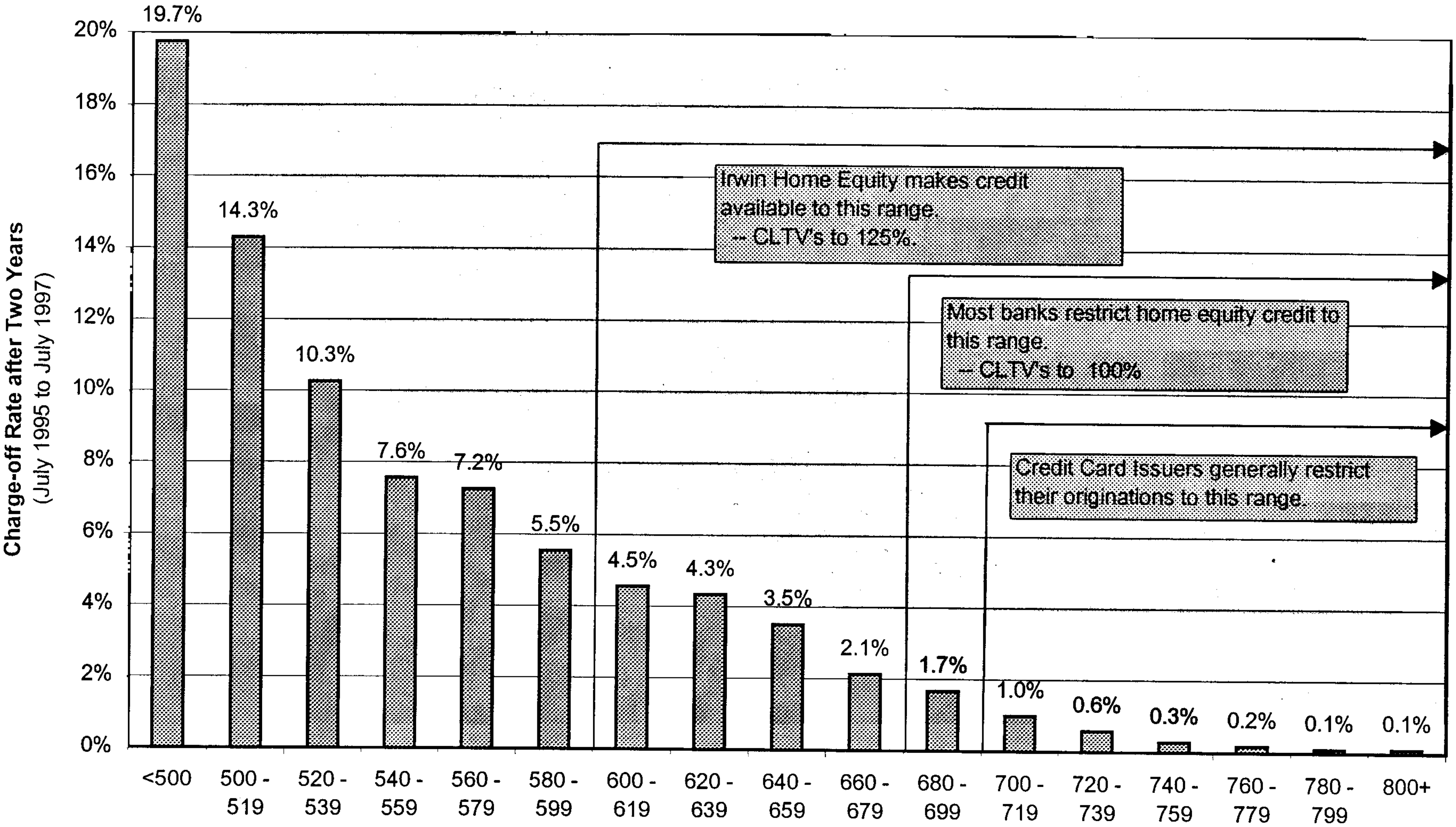
Attachments

Attachment A

Charge-off Rates of Real Estate Loans by Beacon Score



(Beacon scores are developed by Fair, Isaac and marketed through Equifax.

IRWIN HOME EQUITY PROPOSAL

Predatory Lending means targeting less sophisticated borrowers with the intent of making loans to them with a high likelihood of default. These lenders expect to profit through the repossession and sale of the borrower's property. Predatory lenders also generate fees through repeated refinancings (flipping) combined with high costs, fees and pre-payment penalties. In the extreme cases, predatory lending involves deceptive lending practices, bait and switch tactics and high pressure sales.

The actual effect of HOEPA has been to drive legitimate lenders out of the market which adversely effects the ability of higher risk borrower's to obtain credit. Lowering the triggers will only further restrict the availability of credit. The best antidote to predatory lending is to increase the consumer's choices not restrict them.

HOEPA targets loans based merely on the rate or fees associated with the loan. In addition, expanding HOEPA to restrict or eliminate certain loan terms such as pre-payment penalties, points and fees will only serve to reduce the options that are available to the borrower. For example, it is not uncommon for a lender to offer a rate reduction in exchange for a prepayment penalty. This practice should not be prohibited.

The majority of loans covered by HOEPA are not of a predatory nature and we believe that using HOEPA as a proxy for predatory lending misses the mark. We are suggesting that a solution be fashioned that targets the specific abuses associated with predatory lending.

It would be extremely advantageous if the Federal Reserve and other agencies developed an arsenal of data to validate what have heretofore been anecdotal stories. These data should include information relative to status of homeownership and home equity.

To this end we offer the following proposal

A. Target asset based lending by:

Creating a test to identify asset based lending which takes into consideration certain borrower characteristics such as: CLTV, DSR, income and other assets.

Require an annual standardized tracking of foreclosures and other type of repossessions by every lender to identify lenders who have an excessive number of foreclosures.

B. Improve the consumers level of sophistication by creating a more meaningful and understandable disclosure process. Towards this end we propose that the current HOEPA disclosure be replaced with a new plain English disclosure which contains certain critical elements of the loan transaction which would be provided along with every notice of right to cancel.

C. Target loan flipping by placing restrictions on the ability of a lender to charge or finance points or collect a pre-payment penalty on loans that are refinanced with that same lender or its affiliate.

D. Unscrupulous lending practices such as deceptive practices or bait and switch are already illegal under state laws. These can be adequately dealt with under those laws.

We recognize that the above proposal represents a general framework on which to structure a final solution. We are providing this as a starting point to open discussion on ways to combat predatory lending. We would like to be involved in this process of identifying a final solution to this issue. Predatory lending casts a negative light on all legitimate lenders and should be eliminated.