

360.100 Predatory lending -- Definitions -- Limitations on high-cost home loans -- Conditions -- Penalties.

(1) The following definitions apply for the purposes of this section:

(a) "High-cost home loan" means a loan other than an open-end credit plan or a reverse mortgage transaction in which:

1. The principal amount of the loan is greater than fifteen thousand dollars (\$15,000) and does not exceed two hundred thousand dollars (\$200,000);
2. The borrower is a natural person;
3. The debt is incurred by the borrower primarily for personal, family, or household purposes;
4. The loan is secured by a mortgage on residential real property or secured by collateral which has a mortgage lien interest in residential real property, which is or will be occupied by the borrower as the borrower's principal dwelling; and
5. The terms of the loan exceed either or both of the following thresholds:
 - a. Without regard to whether the loan transaction is or may be a "residential mortgage transaction" as defined in 12 C.F.R. 226.2(a)(24), as amended from time to time, the loan at the time the loan is consummated is such that the loan is considered a "mortgage" under section 152 of the Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 15 U.S.C. sec. 1602(aa), as the same may be amended from time to time, and regulations adopted pursuant thereto by the Federal Reserve Board, including 12 C.F.R. 226.32, as the same may be amended from time to time; or
 - b. The total points and fees payable by the borrower at or before the loan closing exceed the greater of three thousand dollars (\$3,000) or six percent (6%) of the total loan amount as shown as the amount financed on the final Truth-in-Lending Statement;

(b) "Lender" means any person who funds or negotiates the terms of a high-cost home loan or acts as a mortgage broker or lender, finance company, or retail installment seller with respect to a high-cost home loan. However, any person who purchases or is otherwise assigned a high-cost home loan shall be subject to an action for violation of this section only if the violation for which the action or proceeding is brought is apparent on the face of the disclosure or the underlying promissory note;

(c) "Material change" means any of the following:

1. A change in the type of loan being offered, such as a fixed or variable rate loan or a loan with a balloon payment;
2. A change in the term of the loan, as reflected in the number of monthly payments due before a final payment is scheduled to be made;

3. An increase in the interest rate of more than one-quarter of one percent (0.25%), or an equivalent increase in the amount of discount points charged;
 4. A change regarding the requirement of escrow for taxes and insurance; and
 5. A change regarding the requirement or payment, or both, of private mortgage insurance; and
- (d) 1. "Total points and fees payable by the consumer at or before the loan closing" means all amounts payable by a borrower at or before the closing of a home loan, excluding any interest or time-price differential due at closing on the loan proceeds and includes:
- a. All mortgage broker fees, including fees paid by the consumer directly to the broker, fees paid by the consumer to the creditor for delivery to the broker, and yield spread premiums paid by the creditor to the broker;
 - b. Any amount payable under an add-on or discount system of additional charges;
 - c. Service, transaction, activity, and carrying charges that exceed similar charges on a noncredit account;
 - d. Points, loan fees, assumption fees, finder's fees, and similar charges;
 - e. Appraisal, investigation, and credit report fees when service is provided by the lender or an affiliate and not by a third party;
 - f. Charges imposed on a creditor by another person for purchasing or accepting the borrower's obligation, if the borrower is required to pay the charges in cash, as an addition to the loan obligation, or as a deduction from loan proceeds;
 - g. Premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage, whether or not the debt-cancellation coverage is insurance under applicable law; or
 - h. Closing agent fees charged by a third party, but only if the lender requires the particular services for which the borrower is charged and the lender requires the imposition of the charge or the lender retains a portion of the charge.
2. "Total points and fees payable by the consumer at or before the loan closing" does not include real estate related fees paid to third parties if 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. Real estate related fees include:
- a. Fees for title examination, abstract of title, title insurance, property survey, and similar purposes;

- b. Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents;
- c. Notary and credit report fees;
- d. Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest infestation and flood hazard determinations; and
- e. Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

(2) A high-cost home loan shall be subject to the following limitations:

- (a) 1. No lender may make, provide, or arrange a high-cost home loan with a prepayment penalty unless the lender offers the borrower a loan without a prepayment penalty, the offer is in writing, and the borrower initials the offer to indicate that the borrower has declined the offer. The lender shall disclose the discount in rate received in consideration for a high-cost home loan with the prepayment penalty; and
- 2. If a borrower declines an offer required in paragraph (a)1. of this subsection, the lender may include a prepayment penalty schedule. No prepayment penalty shall be assessed against the borrower following the third anniversary date of the mortgage or sixty (60) days prior to the date of the first interest rate reset, whichever is less. No prepayment penalty shall exceed three percent (3%) for the first year, two percent (2%) for the second year, and one percent (1%) for the third year of the outstanding balance of the loan; but in no event shall a prepayment penalty be assessed against a borrower refinancing with the mortgage loan company that funded the mortgage;
- (b) A high-cost home loan may not contain a provision which permits the lender, in its sole discretion, to accelerate the indebtedness. This provision does not apply when repayment of the loan has been accelerated by default, pursuant to a due-on-sale provision, or pursuant to some other provision of the loan documents unrelated to the payment schedule;
- (c) A high-cost home loan may not contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower;
- (d) A high-cost home loan may not contain a payment schedule with regular periodic payments that cause the principal balance to increase;
- (e) A high-cost home loan may not contain a provision which increases the interest rate after default. This provision does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness;
- (f) A high-cost home loan may not include terms under which more than two (2)

periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower;

- (g) A lender may not charge a borrower any fees to modify, renew, extend, or amend a high-cost home loan or to defer any payment due under the terms of a high-cost home loan, unless the fees are less than one-half (1/2) of any fees that would be charged for a refinance or unless the borrower is in default and it is in the borrower's best interest;
- (h) A lender may not make a high-cost home loan unless the borrower has been provided the following notice or a substantially similar notice, in writing, not later than the time that notice provided by 12 C.F.R. 226.31(c), as amended from time to time, is required:

NOTICE TO BORROWER

IF YOU OBTAIN THIS LOAN, THE LENDER WILL HAVE A MORTGAGE ON YOUR HOME. YOU COULD LOSE YOUR HOME AND ANY MONEY YOU PUT INTO IT IF YOU DO NOT MEET YOUR OBLIGATIONS UNDER THE LOAN.

MORTGAGE LOAN RATES AND CLOSING COSTS AND FEES VARY BASED ON MANY FACTORS, INCLUDING YOUR PARTICULAR CREDIT AND FINANCIAL CIRCUMSTANCES, YOUR EMPLOYMENT HISTORY, THE LOAN-TO-VALUE REQUESTED AND THE TYPE OF PROPERTY THAT WILL SECURE YOUR LOAN. THE LOAN RATE AND FEES COULD ALSO VARY BASED ON WHICH LENDER OR BROKER YOU SELECT. YOU SHOULD SHOP AROUND AND COMPARE LOAN RATES AND FEES.

YOU SHOULD ALSO CONSIDER CONSULTING A QUALIFIED INDEPENDENT CREDIT COUNSELOR OR OTHER EXPERIENCED FINANCIAL ADVISOR REGARDING THE RATE, FEES, AND PROVISIONS OF THIS MORTGAGE LOAN BEFORE YOU PROCEED. YOU SHOULD CONTACT THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT FOR A LIST OF CREDIT COUNSELORS AVAILABLE IN YOUR AREA.

YOU ARE NOT REQUIRED TO COMPLETE THIS LOAN AGREEMENT MERELY BECAUSE YOU HAVE RECEIVED THESE DISCLOSURES OR HAVE SIGNED A LOAN APPLICATION.

REMEMBER, PROPERTY TAXES AND HOMEOWNER'S INSURANCE ARE YOUR RESPONSIBILITY. NOT ALL LENDERS PROVIDE ESCROW SERVICES FOR THESE PAYMENTS. YOU SHOULD ASK YOUR LENDER ABOUT THESE SERVICES.

ALSO, YOUR PAYMENTS ON EXISTING DEBTS CONTRIBUTE TO YOUR CREDIT RATINGS. YOU SHOULD NOT ACCEPT ANY ADVICE TO IGNORE YOUR REGULAR PAYMENTS TO YOUR EXISTING CREDITORS;

- (i) A lender may not make a high-cost home loan unless the lender reasonably

believes at the time the loan is consummated that one (1) or more of the borrowers, when considered individually or collectively, will be able to make the scheduled payments to repay the loan based upon a consideration of their current and expected income, current obligations, current employment status, and other financial resources, other than the borrower's equity in the dwelling which secures repayment of the loan. A borrower shall be presumed to be able to make the scheduled payments to repay the loan if, at the time the loan is consummated:

1. The borrower's total monthly debts, including amounts owed under the loan, do not exceed fifty percent (50%) of the borrower's monthly gross income as verified by the credit application, the borrower's financial statement, a credit report, financial information provided to the lender by or on behalf of the borrower, or any other reasonable means;
 2. The loan has been approved by an automated underwriting service offered by FNMA or Freddie MAC;
 3. The lender verifies and documents that the borrower has liquid assets equal to fifty percent (50%) of the principal loan amount; or
 4. The borrower has sufficient residual income as defined in the guidelines established in 38 C.F.R. 36.4337(e) and United States Department of Veterans Affairs form 26-6393;
- (j) If the proceeds of the high-cost home loan are used to refinance an existing high-cost home loan held by the same lender as noteholder, the lender may not directly or indirectly finance:
1. Any prepayment fees or penalties payable by the borrower; or
 2. Points and fees, excluding those provided for in 12 C.F.R. 226.4(c)(7), which in the aggregate are in excess of four percent (4%) of the total amount financed;
- (k) A lender or mortgage loan broker may not, within one (1) year of the consummation of a high-cost home loan, charge 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 on which points were charged. A lender may not, at any time, charge a borrower points and fees in addition to those allowed by 12 C.F.R. 226.4(c)(7) if the proceeds of the high-cost home loan are used to refinance an existing high-cost home loan, on which points were charged, held by the same lender as noteholder. However, points and fees in accordance with this section may be charged on any proceeds of a high-cost home loan which are in excess of the amount refinanced on the existing high-cost home loan;
- (l) A lender may not pay a contractor under a home-improvement contract from the proceeds of a high-cost home loan other than by an instrument payable to the borrower or jointly to the borrower and the contractor, or at the election of the borrower, through a third-party escrow agent in accordance with terms established in a written agreement signed by the borrower, the lender, and the

contractor prior to the disbursement;

- (m) A lender shall not refinance, replace, or consolidate a zero interest rate or low interest rate loan made by a governmental or nonprofit lender with a high-cost home loan. For purposes of this paragraph, a low interest rate loan is defined as a loan that carries a current interest rate that is two (2) percentage points or more below the current yield on United States Treasury securities with a comparable maturity;
- (n) A lender shall not finance single premium credit life, credit accident, credit health, credit disability, or credit loss of income insurance in connection with a high-cost home loan;
- (o) A lender shall not make a high-cost home loan unless the lender has made available to the borrower a videotape, or other similar audio-video media format such as DVD or CD, approved by the Department of Financial Institutions, which explains the borrower's rights and responsibilities with regard to this section or high-cost home loans. A lender shall have available for viewing at least one (1) copy of the video in the principal office and each branch office of the lender;
- (p) A lender shall not make a high-cost home loan subject to a mandatory arbitration clause 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 of the American Arbitration Association in effect on June 24, 2003, shall be presumed not to violate this subsection;
- (q) A lender shall not charge a late payment fee on a high-cost home loan except in accordance with the following:
 - 1. The late payment fee may not be in excess of five percent (5%) of the amount of the payment past due or ten dollars (\$10), whichever is greater;
 - 2. The loan documents must specifically authorize the late payment fee;
 - 3. The late payment fee may only be assessed for a payment past due fifteen (15) days or more; and
 - 4. The late payment fee may only be charged once with respect to a single late payment;
- (r) A lender may not charge a borrower a fee for the first request of each calendar year for a written payoff calculation. Thereafter, for each subsequent request in a calendar year, the lender may charge a reasonable fee not to exceed in excess of ten dollars (\$10) or actual costs, whichever is greater, per request for a written payoff calculation on a high-cost home loan by a borrower in a calendar year;
- (s) A lender shall not initiate a foreclosure or other judicial process to terminate a borrower's interest in residential real property subject to a high-cost home loan without first providing the borrower, at least thirty (30) days prior to the

initiation of any process, written notice of default and of the borrower's right to cure. The notice shall include a statement of the amount needed to be paid by the borrower in order to cure the default and the date by which the payment is due to cure the default. If the amount needed to be paid will change during the thirty (30) day notice period, the notice shall provide information sufficient to enable a calculation of the daily change;

- (t) A lender shall not recommend or encourage default on an existing loan or other debt in connection with the closing of a high-cost home loan that refinances all or a portion of the existing loan or debt;
- (u) A lender shall not make a high-cost home loan that does not require an escrow account for taxes and insurance;
- (v) A lender shall not process the application to make a high-cost home loan if the proceeds shall be used, in whole or in part, to repay the principal of an existing loan secured by the borrower's principal dwelling that is not a high-cost home loan, without first requiring the borrower to obtain housing counseling by a HUD-approved counselor;
- (w) A lender shall not make a high-cost home loan that allows the borrower, for any part or all of the term of the loan, to make payments that are applied only to interest and not to principal;
- (x) A lender shall provide timely notice to the borrower of any material change in the terms of a high-cost home loan if the change is made after an application has been taken but before the closing of the loan. Notice shall be deemed timely if given not later than three (3) days after the lender has learned of the change or twenty-four (24) hours before the high-cost home loan is closed, whichever is earlier. If the lender discloses a material change more than three (3) days after learning of the change but still twenty-four (24) hours before the high-cost home loan is closed, it will not be liable for penalties or forfeitures if the lender cures in time for the borrower to avoid any damage;
- (y) A lender shall not make a high-cost home loan without verifying the borrower's income and financial resources through tax returns, payroll receipts, bank records, or other similarly reliable documents, whether provided directly by the borrower or through a third party with the borrower's permission; and
- (z) A lender shall not make a high-cost home loan without verifying the borrower's reasonable ability to pay all scheduled payments of principal, interest, real estate taxes, homeowner's insurance, and mortgage insurance premiums, as applicable. For loans in which the interest rate may vary, the reasonable ability to repay shall be determined based upon the following:
 - 1. In the case of a high-cost home loan in which the rate of interest varies solely in accordance with an index, the interest rate determined by adding the index rate in effect on the date of consummation of the transaction to the maximum margin permitted at any time during the loan agreement; or

2. In the case of a high-cost home loan in which the rate may vary at any time during the term of the loan for any reason other than in accordance with an index, the interest charged on the loan at the maximum rate that may be charged during the term of the loan.
- (3) Except as provided in paragraph (e) of subsection (2) of this section, the making of a high-cost home loan which violates any provisions of subsection (2) of this section is usurious, subject to the penalties of this chapter, and unlawful as an unfair and deceptive act or practice in or affecting commerce in violation of the provisions of KRS 367.170. The provisions of this section shall apply to any person who in bad faith attempts to avoid the application of this section by:
 - (a) The structuring of a loan transaction as an open-end credit plan for the purpose and with the intent of evading the provisions of this section when the loan would have been a high-cost home loan if the loan had been structured as a closed-end loan; or
 - (b) Dividing any loan transaction into separate parts for the purpose and with the intent of evading the provisions of this section; or
 - (c) Any other such subterfuge.

The Attorney General, the commissioner of the Department of Financial Institutions, or any party to a high-cost home loan may enforce the provisions of this section. Any person seeking damages or penalties under the provisions of this section may recover damages under either this chapter or KRS Chapter 367, but not both.

- (4) A lender of a high-cost home loan who, when acting in good faith, fails to comply with subsection (2) of this section, will not be deemed to have violated this section if the lender establishes that either:
 - (a) Within thirty (30) days of the loan closing the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made, at the choice of the borrower, to the loan to either:
 1. Make the high-cost home loan satisfy the requirements of subsection (2) of this section; or
 2. Change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home loan subject to the provisions of this section; or
 - (b) The compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such errors, and within sixty (60) days after the discovery of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the borrower, make the high-cost home loan satisfy the requirements of subsection (2) of this section or change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home loan subject to the provisions of this section. Examples of a bona fide error include clerical, calculation, computer

malfunction and programming, and printing errors.

- (c) For purposes of this subsection, "appropriate restitution" means the reimbursement by the lender of any points, fees, interest, or other charges made by the lender and received from the borrower necessary to put the borrower in the same position as he or she would have been had the loan, as adjusted in accordance with paragraphs (a) and (b) of this subsection, been originally made in accordance therewith.
- (5) For purposes of this section, any extension of credit shall be deemed to have been made in the Commonwealth of Kentucky, and therefore subject to the provisions of this section, if the lender offers or agrees in Kentucky to lend money to a borrower, who is a resident of Kentucky, on real property located within the Commonwealth of Kentucky, or if such borrower accepts or makes the offer in Kentucky to borrow, regardless of the situs of the contract as specified therein. Any oral or written solicitation or communication to lend originating outside of Kentucky, but forwarded to and received in Kentucky by a borrower who is a resident of Kentucky, shall be deemed to be an offer or agreement to lend in Kentucky and, therefore, subject to this section. Any oral or written solicitation or communication to borrow originating within Kentucky, from a borrower who is a resident of Kentucky, but forwarded to and received by a lender outside of Kentucky, shall be deemed to be an acceptance or offer to borrow in Kentucky. Any oral or written offer, acceptance, solicitation, or communication to lend or borrow, made in Kentucky to, or received in Kentucky from, a borrower who is not a resident of Kentucky, shall be subject to the provisions of this section, applicable federal law, law of the situs of the contract, or law of the residence of the borrower, as the parties may elect. The provisions of this section shall be severable and if any phrase, clause, sentence, or provision is declared to be invalid, the validity of the remainder of this section shall not be affected thereby.

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