

**SUMMARY OF
TENNESSEE HOME LOAN PROTECTION ACT OF 2006
(HB 3597, substituted for SB 3989)**

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The Act covers only “high-cost home loans.” A high-cost home loan is a home loan which exceeds either the rate threshold or the total points and fees threshold.

“Home loan” is defined as a loan in which the principal balance does not exceed the lesser of: the Fannie Mae conforming loan size limit for a single-family dwelling or \$350,000, the debt is for personal, family or household purposes and the mortgage is secured by real estate in Tennessee that is a 1-4 family residence which will be occupied by the borrower as a principal residence.

- Excluded from the definition of “home loan” (and thus the Act) are “residential mortgage transactions” under Regulation Z, open-end credit plans, reverse mortgages, construction loans AND any loan insured or guaranteed by, securitized for or sold to a government agency, including HUD, VA, Tennessee Housing Development Agency or USDA.

The Act does not apply to the extent it is preempted by, or is in conflict with or inconsistent with, federal banking law and regulations (as interpreted by the courts) applicable to banks, savings institutions, trust companies, credit unions or operating subsidiaries of same.

“High-cost home loan” means a home loan exceeding one of the following “thresholds”:

- “Rate threshold” is the same as federal HOEPA law. Thus, it is equal to 8% (first mortgages) or 10% (subordinate mortgages) above comparable U.S. Treasury yield measured as of 15th day of month immediately preceding month that loan application received by the lender.
- “Points and fees threshold” is greater of 5% of the total loan amount or \$2,400 is the total loan amount is more than \$30,000 OR 8% of the total loan amount for loans of

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\$30,000 or less. “Total loan amount” is the same as defined in 12 CFR §226.32 (and the corresponding official staff commentary)

“Points and fees” defined by reference to Section 32, but excludes -

- Up two (2) “bona fide loan discount points”,
- Charges listed in §226.4(c)(7) if the charge is paid to an affiliate of the lender and the amount is reasonably consistent with the amounts charged for comparable services by a non-affiliated party.

The Act does *not* impose any prohibitions or limitations on non high-cost home loans.

Prohibitions on high-cost home loans include:

- Encouraging or recommending default on any loan or debt prior to or in connection with any closing or planned closing of a home loan that refinances such loan or debt.
- Charging a fee to provide a release upon prepayment of a high-cost home loan except for the actual cost paid to record the release
- “Flipping a home loan,” which is refinancing a home loan within thirty (30) months when the new high-cost loan does not have “reasonable benefit” to the borrower under all of the circumstances.” Reasonable benefit is not defined.
- Financing of credit insurance premiums or any other health or life insurance premiums or debt cancellation charges.
- The lender must reasonably believe that the borrower can repay the loan; there is a safe harbor in the statute whereby if debts don’t exceed 50% of monthly gross income, then repayment ability is presumed
- Financing cannot be financed in excess of the greater of 3% of the total loan amount or \$1,500 for loans of more than \$30,000 or 5% of the total loan value for loans of \$30,000 or less
- Charging points and fees for a lender who refinances a loan with themselves or one of their affiliates; except for additional proceeds amounts
- Prepayment penalties in excess of 2% of the loan amount prepaid during the first 24 months after closing.

- Balloon payments
- Negative amortization
- Clauses that permit acceleration in creditor's sole discretion (but no prohibition on acceleration of the loan in good faith due to borrower's failure to abide by the material terms of the loan).
- Interest rate increases after default
- Terms that permit more than 2 periodic payments to be consolidated and paid in advance from the loan proceeds
- Late fees that do not comply with restrictions on the amount and timing of late fees
- Materially different interest rates at closing
- Encouragement to borrower to sign documents that reflect incomplete loan terms

Requirements for high-cost home loans

- The lender or servicer must provide to the borrower, upon request, 2 pay-off statements within any 12 month period, free of charge. The statement will be valid for a minimum of 15 days.
- Must contain a prominent disclosure as provided in the statute
- Must display on the mortgage or deed of trust "This instrument secures a high-cost home loan as defined in Tennessee Code Annotated, Title 45."
- Must report quarterly on the favorable and unfavorable payment history information
- Must provide to borrower, in a separate document, the availability of credit counselors

Assignee liability –

- "Any person who purchases or is otherwise assigned a high-cost home loan" is liable for all affirmative claims and defenses that the borrower could assert against the original creditor, *provided* that there is no assignee liability if the purchaser or assignee demonstrates by a preponderance of the evidence that it exercised reasonable due diligence at the time of purchase or assignment of high-cost home loans (or reasonable time thereafter) intended to prevent purchase or assignment of high-cost home loans.

- Assignee liability -
 - may be asserted by the borrower acting only in an individual capacity,
 - may not exceed the sum of the amount required to reduce the borrower's liability so that it is no longer a high-cost home loan (plus reasonable costs, including attorney's fees), and
 - must be brought within three (3) years from the date of the occurrence of a violation of the Act, but may be asserted by the borrower as a defense to collection of the debt brought more than one (1) year from the date of the occurrence of the violation based on recoupment or set-off except as otherwise provided by law.
- Assignee liability *shall not apply* if the purchaser or assignee has exercised such due diligence by demonstrating:
 - That it has in place, at the time of the purchase or assignment, policies that expressly prohibit the purchase or acceptance of assignment, of any high-cost home loan containing violations of the Act;
 - The applicable purchase contract contains the following representations and warranties:
 - The seller or assignor will not sell or assign to the purchaser or assignee any high-cost home loan containing such violations; or
 - The seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect, and thus; the purchaser or assignee is a beneficiary of the prior representation and warranty; and
 - The purchaser or assignee exercises reasonable due diligence at or before the time of the purchase or assignment of home loans; or within a reasonable time thereafter, undertaken to prevent the purchaser or assignee from receiving any high-cost home loans *containing such violations. This due diligence may be done by sampling- loan-by-loan review is not required.*

Note: unlike a number of other state laws, this provision is aimed against purchase of high-cost home loans that contain violations of the state predatory lending law, rather than the acceptance of *any* high-cost home loans.

Borrower remedies are extensive, and include actual damages and the potential for punitive damages for malicious or reckless behavior. Bad faith “structuring” of loan transactions (subterfuge) or other evasions may constitute violations of the Act. The Act also addressed false advertising in connection with loans or any other related products or services.

The Act contains limited “cure” opportunities. A creditor in a home loan who, when acting in good faith, fails to comply with the Act may be relieved of liability –

- if the creditor within 30 days of discovery (and prior to institution of any action under this Act) notifies the borrower of the compliance failure, the lender or servicer makes appropriate restitution to the borrower, and the lender or servicer makes any necessary adjustments (including refunds) to the loan to ensure that none of the prohibitions are violated or that it is no longer a high-cost home loan.
- if the compliance failure was unintentional, resulted from bona fide error and occurred notwithstanding the maintenance of compliance procedures reasonably adapted to avoid such error, the creditor effectuates cure within 60 days of discovery of the error (but prior to the institution of any action); examples of “bona fide error” are limited to clerical errors, errors in calculation, computer malfunction and programming and printing errors, but do not include errors in legal judgment. The borrower must be notified of the compliance error, the lender must make appropriate restitution, and appropriate adjustments or refunds must be made.

The Commissioner of the Tennessee Department of Financial Institutions is empowered to promulgate rules and regulations under the Act.

The Commissioner also is granted broad additional examination and enforcement powers, including subpoena, hearings and orders.

The effective date of the Act is keyed to any loan “applied for and closed on or after” the effective date of January 1, 2007; if a loan application is taken before the effective date and closed later, then the Act should not apply.