

# Butera & Andrews

1301 Pennsylvania Ave., NW  
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## SUMMARY COMPARISON OF MAJOR FEDERAL “PREDATORY LENDING” LEGISLATION

CONCEPT <sup>i</sup>	LaFalce/Sarbanes H.R. 4250/S. 2415	Schumer S. 2404	Ney H.R. 4213	Schakowsky H.R. 3901
<b>Expand or Change Key HOEPA (a/k/a Section 32) “Trigger” Definitions<sup>ii</sup></b>				
Annual Percentage Rate Trigger (HOEPA = APR > T-bill + 10%)	X (APR > T-bill + 6% for first liens or 8% for subordinate liens)	X (APR > T-bill + 8%)	X (APR > T-bill + 8% for first liens or 9% for subordinate liens)	X (APR > T-bill + 5%).
Change Point & Fee Definitions or Include More/Different Items in Than HOEPA so Trigger May Be Reached More Often (HOEPA = points & fees > greater of 8% of total loan amount or \$451)	X (points & fees > 5% or \$1,000) (all point and fees except escrow payments for taxes and insurance included in HOEPA trigger)	X (points & fees > 4% for loans over \$20,000 and 5% for loans under \$20,000) (Bona fide points as defined not included in definition for loans under \$20,000)	X (points & fees > 6% for first liens and 7% for subordinate liens)	X (includes variable rate loans “ that can reasonably be expected to increase beyond the threshold” or that are not tied to a publicly available index) (includes mortgage broker fees but excludes a number of enumerated fees, e.g. taxes, filing fees, etc., flood and pest inspections, appraisal and inspections fees) (expands definition of “creditor” under TILA to include mortgage brokers.
<b>Restrictions on Loan Terms</b>				
No Negative Amortization		X ( all HOEPA loans)		X (all conforming [GSE eligible] loans)
No Balloons (seasonal/irregular income adjustments typically OK)	X (all HOEPA loans)	X (all HOEPA loans)		
Closing Costs			X (HOEPA refinance in first year of mortgage may only include points and fees based on new funds, unless refinance rate is 2 percentage points lower than the original rate)	

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No Call Provision (Debt Acceleration)	X (all HOEPA loans except for cases of bona fide default)	X (all HOEPA loans except for cases of bona fide default, but permits due-on-sale clause)		X (all HOEPA loans except for cases of bona fide default)
No Consolidated Payments		X (No more than 2 payments may be consolidated and paid in advance from loan proceeds)	X (Periodic payments on HOEPA loans may not be included in loan principal)	
No Modification or Deferral Fees	X (disallows lender from charging fees to modify, extend, or amend a HOEPA loan or to defer any payment except if consumer would benefit and fee is less than .5% of the loan.	X (disallows lender from charging fees to modify, extend, or amend a HOEPA loan or to defer any payment.		X (disallows lender from charging fees to modify, extend, or amend a HOEPA loan or to defer any payment.
No (or Very Limited) Prepayment Fees or Penalties	X (applies to HOEPA loans after 24 months. Penalty permitted in first 24 months if borrower financed at under three points including fees. Prepayment penalties reduce the amount of points and fees that may be financed.	X (all loans)	X (Prepayment penalties capped for HOEPA loans at 3% of total loan in first year; 2% in second year; 1% in third year.) (Reduces from 5 years to 3 years the period during which penalties may be imposed.	X (all conforming loans)
No Increased Interest Rate After Default		X (all loans)		
No Mandatory Arbitration Limiting Judicial Relief	X (HOEPA loans)	X (HOEPA loans)		X (HOEPA loans)
Open-End Credit Plans	X (HOEPA expanded to include open-end mortgage transactions)	X (lender subject to FTC Act penalties if it structures HOEPA loan as open-end credit)	X (HOEPA expanded to include open-end mortgage transactions)	X (HOEPA expanded to include open-end mortgage transactions)
No Enforcement if Blank Contract Items				X (all conforming loans)

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<b>Limitation on Sales &amp; Marketing</b>				
No Lending Without Prior Credit Counseling	X (requires lender to provide names of approved debt counseling programs)	X (consumer must receive debt counseling)		X(credit counseling required for HOEPA loans)
No Loan “Flipping”				X (any loan)
No Lending Without Due Regard for Repayment Ability (HOEPA applies only in “pattern & practice” cases)	X (lender must determine borrower will be able to pay HOEPA loan as agreed without taking equity into account)	X (Borrower’s total monthly not to exceed 50% of gross income) (applies to HOEPA loans)		X (Prohibits extending credit unless borrower can repay from income or other financial resources) (applies to all conforming loans)
No Recommending or Encouraging Default on Existing Loan	X (prohibits lender from making any statement, taking other action or failing to take any action that has the effect of encouraging a borrower to default on existing loan) (applies to HOEPA loans)	X (prohibited for all loans)	X (prohibits lender from recommending a consumer default on an existing loan) (applies to HOEPA loans)	X (prohibited for all conforming loans)
No Compensating, Coercing or Intimidating Appraiser to Influence Judgment on Property Value				X ( all conforming loans)
Credit Insurance and Debt Cancellation	X(Single -premium credit insurance may not be required or allowed for a HOEPA loan, whether or not the premium is financed. Same rule applies to debt cancellation agreements)	X(Financing any credit insurance prohibited for all loans, unless paid monthly and can be cancelled)		

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Unfair or Deceptive Acts or Practices		X (lender deemed to have engaged in unfair or deceptive practice under the FTC Act if intentionally 1) structures HOEPA loan as open-end loan; 2) provides misleading information or engages in fraud; or 3) engages in subterfuge or misrepresentation of terms)		
<b>Point &amp; Fee &amp; Financing Limitations</b>				
No Financing of Points & Fees or Other Charges Payable to 3 <sup>rd</sup> Parties or of Prepayment Fees or Penalties	X(financing of point and fees limited to 3% of total loan amount, but that amount reduced by the amount of any required prepayment penalty)	X(lender may not finance prepayment fees or penalties in a HOEPA loan if the lender is an affiliate of the original lender or is itself the original lender. HOEPA loan may not finance any points or fees or charges payable to 3 <sup>rd</sup> parties)		
Refinancing Existing Loan	X(prohibits lender in connection with HOEPA loan from financing prepayment fees/penalties or points and fees in connection with refinancing a HOEPA loan the lender or affiliate financed)	X(prohibits refinancing for all loans unless there is “tangible net benefit to the consumer) (prohibits lender from charging points, fees or other charges in connection with refinancing a HOEPA loan that the lender originated.		X(prohibited for all conforming loans unless there is a “reasonable, tangible net benefit to the borrower)
No Financing of Credit Insurance		X(all residential mortgages)		X (all conforming loans)

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<b>Additional Disclosures</b>				
Broker Compensation Disclosure			X(Yield spread premiums paid to brokers do not have to be disclosed. Special Information Booklet modified to explain that mortgage brokers may be compensated by direct borrower payments, by yield -spread premiums, or a combination)	X(broker fees included in definition of points and fees)
Document Translation Requirements				X( for all conforming documents must be provided in language in which discussions were conducted)
Stronger HOEPA Disclosures	X(requires new disclosures for a HOEPA loan, stating that the interest rate is “much higher than most people pay” and suggesting counseling)		X(requires a good-faith estimate warning borrowers that “you could lose your home... if you do not meet your obligations under the loan”)	
<b>Enforcement &amp; Liability</b>				
Prohibition of Evasions and Penalties	X(prohibits lender from circumventing or evading any requirement of HOEPA/TILA and increases TILA violation penalties from \$2,000 to \$10,000 and from 1% of a lender’s net worth to 2%)	X(HOEPA violations subject to penalties of Sections 8 (a)(b) of the Bank Holding Company Act)		X(current TILA penalty plus any lender that violated HOEPA or new restrictions on conforming loans may be liable to the borrower for the total amount of principal and finance charge)
CRA Assessment		X(HOEPA loan may not be considered for assessing CRA compliance)		
Home Improvement Contracts	X(provides that consumer retains all claims and defenses in connection with a HOEPA loan made to finance home improvements, regardless of who holds them)	X(Home Improvement contracts proceeds must be payable jointly to borrower and contractor or, at borrower’s option, to a third party escrow agent)		

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Profits on Foreclosures			X(lender “shall not profit monetarily” from foreclosure sale involving a HOEPA loan”)	
Securitization –Due Diligence		X(Purchaser of a HOEPA loan must exercise due diligence to determine if HOEPA requirements have been met)		X(issuer of mortgage pool may not knowingly include a HOEPA loan or a conforming loan that violates the new restrictions in the bill)
Opportunity to Cure			X(lender may change terms of loan to reflect the terms disclosed when those terms are more favorable to the borrower than the actual terms of the agreement)	X(provides lender 30 days after closing to correct good-faith failure to comply and 60 days after discovering an unintentional, bona fide error to make corrections providing that legal misjudgments are not considered a bona fide error)
Right of Rescission	X(applies to all actions, omissions, or requirements that violate HOEPA. 3— year statute of limitation not intended to prevent assertion of right of rescission at any time as a defense in foreclosure)			

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Other Provisions				
Credit Reporting	X(HOEPA lenders must report to a national consumer reporting agency the complete payment history favorable and unfavorable, of the borrower)		X(HOEPA lenders must report to a national consumer reporting agency the complete history of the borrower)	
HMDA Amendments				X(APR of mortgage loans and home improvement loans must be reported by census tract, income level, racial characteristics and gender except for a \$30 million asset bank exemption whereby all HMDA exemptions are ended)
Payoff Statement			X(requires lender to provide written statement of payoff amount for HOEPA loans within 3 days)	
State Law Preemption			X(complete preemption of state law “with respect to the subject matter covered by the amendments made by this Act”)	
Findings			X(“Congress finds that – especially vulnerable consumers are not adequately protected ...additional legislation is necessary”)	

<sup>i</sup> Note that this chart is designed to give the reader a general comparison of the major concepts in key bills. Not every concept in every bill is highlighted, and the descriptions contained herein may be simplified and not necessarily complete or fully precise. The reader should use this document only as a rough guide and should carefully read the details of each bill. All bills covered herein can be found on the NHEMA website (<http://www.nhema.org>). Also, other pending state bills or regulations exist that may be of interest. In particular, West Virginia has proposals that are not included in this chart because we understand that the current bill is being fundamentally changed. The West Virginia legislation (S.B. 392) may be included in a subsequent version of this document.

<sup>ii</sup> Although not expressly noted in the text of this chart, the reader should be aware that many of the state proposals often fail to define key terms or to do so adequately.