

BUTERA & ANDREWS

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2001 SUMMARY COMPARISON OF MAJOR STATE AND LOCAL “PREDATORY LENDING” LEGISLATION - Part 1

09/19/02 Version

CONCEPTⁱ	NHEMA Staff Draft Concepts	Alabama HB 103	Alabama HB 529	Arkansas HB 1545	California AB 489 (as amended by AB 344)	California SB 608	Oakland Ordinance 12361	Oakland Ordinance 12362	Oakland Resolution 01-62	San Francisco Ordinance 012004	San Francisco Ordinance 012005	Colorado SB 27	Colorado HB 1122	Colorado HB 1099	Colorado SB 28
Date of Introduction (i), Current Status, or Date of Enactment (e)		02/06/01(i) dead	03/06/01(i) dead	02/01/01(i) dead	AB489: 02/21/01(i), 09/13/01(e) AB344: 02/16/01(i), 09/14/01(e)	02/22/01(i) 04/03/01 – amended to include prohibition of certain predatory lending practices; currently dead	06/05/01(i) 10/02/01(e)	06/05/01(i) 10/02/01(e)	06/05/01(i) 07/26/01(e)	11/05/01(i) 04/26/02 (signed by Mayor)	11/05/01(i) dead	01/10/01(i) 04/20/01(e)	01/12/01(i) dead	01/10/01(i) 03/09/01(e)	01/10/01(i) 04/20/01(e)
Summary of Bills Only Related to Predatory Lending		Broker licensing bill establishing license application and renewal procedures, fees, criteria for license approvals, and circumstances for denial or revocation						An ordinance requiring lenders to certify that neither they nor their affiliates engage in predatory lending practices.	A resolution requiring financing institutions seeking to participate in development projects financed by the Agency to certify that neither they nor their affiliates engage in predatory lending practices.	An ordinance approving a pilot consumer counseling and educational program in the Department of Aging and Adult Services, including distribution of educational materials on predatory lending.		Consumer protection bill requiring a notice prior to foreclosure.		Amending, repealing, and clarifying various statutory provision of the “Uniform Consumer Credit Code.”	Requiring mortgage brokers to file a \$50,000 fidelity bond with attorney general to be used in cases of fraud or conversion of purchaser’s funds or other defalcation by the broker.

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Types of Loans Covered by Act					Consumer loans (applied for on or after July 1, 2002) in which the principal balance does not exceed \$250,000 (to be adjusted every five years in accordance with CA CPI).	Home loans (including an open end credit plant, other than a reverse mortgage transaction) where the principal amount not exceeding the conforming loan size limit for a single-family dwelling (as established by Fannie Mae), borrower is a natural person, the debt is primarily for personal, family, or household purposes, and the loan is secured by a mortgage or deed of trust on real estate upon which a structure principally designed for occupancy by 1-4-families is located.	Home loans (including an open end credit plant, other than a reverse mortgage transaction) where the principal amount not exceeding the conforming loan size limit for a single-family dwelling (as established by Fannie Mae), borrower is a natural person, the debt is primarily for personal, family, or household purposes, and the loan is secured by a mortgage or deed of trust on real property within the City of Oakland containing 1-4 residential units or individual residential units of condo or coop and one of these units will be				Home loans (including an open end credit plant, other than a reverse mortgage transaction) where the principal amount not exceeding the conforming loan size limit for a single-family dwelling (as established by Fannie Mae), borrower is a natural person, the debt is primarily for personal, family, or household purposes, and the loan is secured by a mortgage or deed of trust on real property within the City of San Francisco containing 1-4 residential units or individual				

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							occupied by a borrower and his principal dwelling)				residential units of condo or coop and one of these units will be occupied by a borrower and his principal dwelling)				
Triggers															
Annual Percentage Rate Trigger (HOEPA = APR > T-bill + 10%)	(like HOEPA)		(like HOEPA)	X (APR > T-bill + 5%, or if variable, reasonably expected to exceed this, or rate changes not per standard market index)	X (APR > T-bill + 8%)	X (APR > 90-day standard mandatory delivery commitment for a reasonably comparable loan from Fannie Mae or Freddie Mac + 1.5%)	X (APR > 90-day standard mandatory delivery commitment for a first mortgage loan from Fannie Mae or Freddie Mac + 3% for first mortgages, or + 5% for junior mortgages)				X (APR > 90-day standard mandatory delivery commitment for a first mortgage loan from Fannie Mae or Freddie Mac + 3% for first mortgages, or + 5% for junior mortgages)		X (APR > T-bill + 6.5%; disregard any rate during the initial or introductory period if lower than rate applicable at the end of the period).		
Points and Fees Trigger (HOEPA = points & fees > greater of 8% of total loan amount or \$400)	(like HOEPA)		X (points & fees > 5% of total loan amount if loan >\$20,000, or lesser of 8% of \$1,000 if loan amount <\$20,000)	X (points & fees > 5% of total loan amount; some bona fide loan discounts points excludable)	X (fees & points > 6% of the total loan amount)		X (point & fees => 5% of the total loan amount or \$800, whichever is greater)				X (point & fees => 5% of the total loan amount or \$800, whichever is greater)				
Other															

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Triggers															
Restrictions on Loan Terms							No home loan may violate TILA as amended by HOEPA.				No home loan may violate TILA as amended by HOEPA.				
No Negative Amortization	X		X	X	X (unless the covered loan is a first mortgage and the person who originates the loan discloses a neg. amortization provision to the consumer)								X		
No Negative Equity															
No Balloons (seasonal/irregular income adjustments typically OK)	X		X (only if it is more than twice as large as the average of earlier scheduled payments)	X (only if it is more than twice as large as the average of earlier scheduled payments)	X (for a covered loan with a term of 5 years or less; if adjusted for seasonal/irregular income, the total installments in any year cannot exceed the amount of one year’s worth of payments of the loan) Does not apply to bridge loans.								X (only if it is more than twice as large as the average of earlier scheduled payments)		
No Call Provision (Debt Acceleration)	X		X (except when repayment accelerated)	X (except when repayment accelerated)	X (except when repayment accelerated by default, pursuant		X				X		X (except when repayment accelerated)		

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			by default)	by default)	to a due-on-sale provision, or due to fraud or material misrepresentation by a consumer in connection with the loan or the value of the security for the loan)								by default)		
No Advance Payments	X		X (if only two periodic payments consolidated - OK)	X (if only two periodic payments consolidated - OK)	X		X (if only two periodic payments consolidated - OK)				X (if only two periodic payments consolidated - OK)		X (if only two periodic payments consolidated - OK)		
No Modification or Deferral Fees	X		X	X			X (unless after the modification, HL is no longer HCHL and APR decreased by 2%)				X (unless after the modification, HL is no longer HCHL and APR decreased by 2%)		X		
No (or Very Limited) Prepayment Fees or Penalties	X (use CA statute model – no fees except during 1 st 60 mo. & charge not > 6 mo. advance interest on amount prepaid in excess of 20%)		X (not allowed if loan = \$150,000 – any home loan)	X (not allowed if > 3% of total loan amount if prepaid within 1 st year, >2% in 2 nd year, >1 in 3 rd year).	X (no prepayment penalty after the first 36 months; penalty allowed within the first 36 months only if: consumer has been offered a choice of another product without prepayment	X (any home loan) (no prepayment penalty for longer than 3 years, or that is greater than 3% of the loan amount in the first year, 2% in the second year,	X (any home loan) (no prepayment penalty for longer than 3 years, or that is greater than 3% of the loan amount in the first year, 2% in the second year,				X (any home loan) (no prepayment penalty for longer than 3 years, or that is greater than 3% of the loan amount in the first year, 2% in the second year,		X (any high-cost home loan that is not a consumer loan; except as allowed by the Alternative Mortgage Transactions		

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	of original balance)				penalty; the terms of penalty, rates, points, and fees are disclosed at least 3 days before consummation; prepayment penalty is limited to 6 months' advance interest on the amount prepaid in any 12 month period in excess of 20% of original principal balance; no penalty if covered loan accelerated due to default; no financing of penalty through a new loan originated by the same person)	and 1% in the third year)	and 1% in the third year) X (NO PP ALLOWED FOR HCHL)				and 1% in the third year) X (NO PP ALLOWED FOR HCHL)		Parity Act of 1982).			
No Increased Interest Rate After Default	X		X	X	X		X				X		X (except as allowed by the Alternative Mortgage Transactions Parity Act of 1982).			
No Mandatory Arbitration Limiting	X (clause must require proceeding to be in			X			X (any home loan)									

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Judicial Relief	property’s federal judicial district, or as agreed by parties; lend to pay 50% of filing fees over \$150, up to max. of \$250; & comply with rules of nationally recognized arbitration organization														
Restrictions on APR															
No Bad Faith Avoidance of Restrictions as by Structuring as Open-End Credit Plan			X (or by dividing any loan transaction into separate payments)	X (or by dividing any loan transaction into separate parts)	X (or by dividing any loan transaction into separate parts)								X (only dividing any loan transaction into separate parts prohibited)		
No Enforcement if HCL Contract Leaves Blanks to be Filled In													X (any home loan)		
No waiver of a Violation of															

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Predatory Lending Bill															
Adjustable Rate Mortgages Must Be Tied to Nationally Recognized Lending Rate															
Borrower Cannot Be Required to Provide Property Insurance on Improvements if Insurance Exceeds Their Reasonable Replacement Value															
Limitation on Sales & Marketing															
No Lending Without Prior Credit Counseling	X (lender must give strong cautionary notice, saying should consider counseling, & give state-approved list of counselors)		X	X			X (lender must receive a certification that borrower received counseling; the counseling option may be waived)				X (lender must receive a certification that borrower received counseling; the counseling option may be waived)				

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No Lending Without Consumer’s Own Attorney															
No Loan “Flipping”	X (handled by limiting financing of points/fees on refinancing within 12 mo.)			X		X (any home loan)									
No Refinancing if No Reasonable, Tangible Net Benefit to Obligor					X		X (borrower is presumed to receive benefit if: (1) reduction in monthly payments and it will continue for 36 months, (2) reduction in APR and it will not take more than 5 years to recoup p&f, (3) borrower received cash proceeds but p&f do not exceed 5% of the cash proceeds received by borrower, or cash proceeds => 15% of the total				X (borrower is presumed to receive benefit if: (1) reduction in monthly payments and it will continue for 36 months, (2) reduction in APR and it will not take more than 5 years to recoup p&f, (3) borrower received cash proceeds but p&f do not exceed 5% of the cash proceeds received by borrower, or cash proceeds		X		

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							loan amount or the new loan or \$12,000, or (4) new home loan is necessary to prevent default) NO REFINANCING OF SPECIAL MORTGAGES				=/> 15% of the total loan amount or the new loan or \$12,000, or (4) new home loan is necessary to prevent default) NO REFINANCING OF SPECIAL MORTGAGES					
No Lending Without Due Regard for Repayment Ability (HOEPA applies only in “pattern & practice” cases)	X (Presumption can repay if monthly payments do not exceed 55% of gross monthly income; no presumption of inability solely by exceeding 55%)		X (Presumption can repay if total monthly debts < 50% of gross monthly income; no presumption of inability solely by exceeding 50%; lender must have a reasonable belief that repayment is possible)	X	X (Presumption can repay if monthly payments do not exceed 55% of gross monthly income, no presumption of inability to repay solely by exceeding 55%) Reasonable belief of repayment ability may be based on the income stated by the consumer and other info in the originator’s possession.	X (Rebuttable presumption that lender made the loan with due regard to repayment ability if the lender considers the borrower’s current and expected income, current obligations, employment status, and other financial resources. If the debt-to-income ratio is greater than 50%, the loan may be approved, but a full justification	X (Presumption can repay if debt-to-income ratio does not exceed 50%; if the ration exceeds 55%, lender must fully justify the decision to approve the loan in written statement provided to borrower)				X (Presumption can repay if debt-to-income ratio does not exceed 50%; if the ration exceeds 55%, lender must fully justify the decision to approve the loan in written statement provided to borrower)		X (No presumption of inability to repay solely because debts exceed 50% of gross income; lender must have a reasonable belief that repayment is possible)			

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						by the lender is required) A person or entity involved in the origination of a home loan shall not aid, assist, or counsel a borrower to misstate income for purposes of getting a home loan.									
No Recommending or Encouraging Default on Existing Loan					X	X(any home loan) (no encouraging default on an existing loan or debt in connection with the closing of a home loan that refinances all or any portion of the existing loan or debt)	X(any home loan) (no encouraging default on an home loan or debt in connection with the closing of a home loan that refinances all or any portion of the existing loan or debt)				X (any home loan) (no encouraging default on an home loan or debt in connection with the closing of a home loan that refinances all or any portion of the existing loan or debt)				
No Compensating, Coercing or Intimidating Appraiser to Influence Judgment on Property Value															

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No Making or Causing to Make Any False, Deceptive or Misleading Statement or Representation					X (no steering, counseling, or directing a prospective consumer to accept a loan with a risk grade less favorable than the risk grade the consumer would qualify for; or to accept a loan product at a higher cost than that for which the consumer would qualify)	X (similarly situated borrowers shall have access to the same loan products at the same rates for all affiliated lender and holding companies, without regard to which affiliate or lender the borrower approaches or is approached by)									
No Lending if loan + other liens exceed 80% of Property Value															
No Lending Without Borrower being Able To Seek Independent Review of the Loan Terms															
No “Packing” – Selling Unrelated Products in															

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Conjunction with HCL															
Lender Can Charge or Receive Money, Thing of Value, or Other Consideration Only if Pledged as Security or Collateral															
Point & Fee & Financing Limitations															
No Financing of Points & Fees or Other Charges Payable to 3 rd Parties or of Prepayment Fees or Penalties			X	X (prohibits only financing of points and fees > 3% of the loan amount or \$600, whichever is less).	<i>No amendment of this section by AB 344; therefore this provision from AB 489 remains good law.</i> X (no financing of p&f in excess of 6% of the original principal balance less p&f or \$1,000, whichever is greater)		X (prohibits financing of p&f >5% of the total loan amount or \$800, whichever is greater)				X (prohibits financing of p&f >5% of the total loan amount or \$800, whichever is greater)		X (prohibits only financing of points and fees > 3% of the loan amount of \$600, whichever is less).		
No Points & Fees if HCL Refinances Lender's or Affiliate's HCL	X		X										X		

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No Financing of Credit Insurance (except monthly premium)	(Gives 30 day right to cancel with full refund and later right to cancel with refund computed so as to at least = actuarial method; also, can not sell without separate notice it's not required purchase and right to cancel)				X (any consumer loan) (no financing of any credit life, credit disability, credit property, credit unemployment, debt cancellation or suspension agreement fees)	X (any home loan) (no financing of any credit life, credit disability, credit unemployment, credit property, or any other life or health insurance, or any debt cancellation or suspension agreement or contract)	X (any home loan) (no financing of any credit life, credit disability, credit unemployment, credit property, or any other life or health insurance)				X (any home loan) (no financing of any credit life, credit disability, credit unemployment, credit property, or any other life or health insurance)					
Limit Broker Fees and/or Total Charges																
No Charging Fee Where Product or Service Not Actually Provided & No Misrepresenting Amount Charged By or Paid to 3 rd Party for Product or Service																

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No Fees & Points for Interest Rate Reduction Not Reasonably Consistent with Industry “Customs & Practices” or Otherwise Made in Bad Faith or Unconscionable															
No Late Fees for Later Payments				X (any home loan - no late payment charge 4% of the payment past due or for any payment which is less than 15 days past due, or more than once with respect to a single payment)											
No Fee For Balance															

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Additional Disclosures																
Exact Monthly payments: mortgage insurance, real estate taxes, hazard insurance, principal/interest/mortgage insurance, etc.					X (the consumer must be provided with “Consumer Caution and Home Ownership Counseling Notice” (the language is specified in the Act) no later than 3 days before closing) (Rebuttable presumption that notice was provided if a signed acknowledgment is obtained from a consumer)								X (also disclosure regarding the value of receiving housing counseling and a list of the nearest housing counseling agencies)			
Debt Consolidation Loans - Notice At or Prior to Application that Aggregate Amount & Number of Payments May Increase																
Notice at																

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Application that Loan Not Necessarily Least Expensive & Should Shop Around															
Translate Certain Loan Documents into Language Other Than English (if another language used during discussions)															
Notice At or Before Application Whether Loan Will Be Sold & If So, To Whom (or Can Not Sell loan for 180 Days)															
Additional Notices When Foreclosing	X (new Homeowners' Equity Recovery Act, HERA, provisions that give both strong notice											X			

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	& new borrower’s right to sell during 90-day period and recovery remaining equity after paying debt.)														
Notice That In Business of Arranging Loans for Fees, What Fee Will Be Charged and How Calculated + Borrower Should Receive His Credit Report															
Other Provisions															
Home Improvement Contract Proceeds Must Be Payable Jointly to Borrower & Contractor, or at Borrower’s Option to	X		X	X	X								X		

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agreed upon 3 rd Party Escrow Agent															
Various Other Restrictions on Home Improvement Lending / Contracting					X (No payment to an escrow account or jointly to a consumer or contractor unless the consumer signs and dates completion certificate)	X (no payment from the proceeds of a sub-prime loan unless (1) the consumer signs and dates completion certificate, and (2) the instrument is payable to the borrower, jointly to the contractor and the borrower, or to a third-party escrow agent)									
Required Reporting to Credit Bureaus	X														
Additional Governmental Reporting Requirements					X (upon request by the licensing agency or the consumer: documentation that clearly demonstrates whether a loan is a covered loan,	X (the Attorney General shall create a standard form to be used by consumers to details their complaints against sub-prime home loan									

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					original principal balance, APR, points and fees)	lenders. The form shall be made available by all regulatory bodies. AG shall make the data from these forms available to law enforcement entities in the state.									
Broker Deemed to be Lender's Agent															
Lender May Not Make Investments Backed By Loans That Violate Statute															
Enforcement & Liability															
Violations Deemed Unfair & Deceptive Acts & Practices			X (can recover damages under the Deceptive Trade Practices Act or this act, but not both)			X									
Subsequent					No amendment of	X (subsequent	X				X		X		

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Purchasers or Assignees Liable on All Claims (e.g. Secondary Market)					<i>this section by AB 344; therefore this provision from AB 489 remains good law.</i> X (No licensed person or subsequent assignee (except for a broker) shall have administrative, civil, or criminal liability for a violation of this section)	purchasers or assignees are subject to all affirmative claims and defense with respect to the loan that the borrower could assert against the creditor or broker; but assignees may not be held liable for punitive damages)									
Special Affirmative Pleading Requirements for Lenders & Various Affirmative Defenses for Borrowers															
Any Payments Collected in Excess of the Statutorily Permitted Amounts Must Be Refunded to Borrower															

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Substantial Monetary Penalties	X			X (e.g., punitive damages, forfeiture of all principal & interest – only in cases of intentional violation)	X (claims brought by the licensing agency: administrative penalties not to exceed \$2,500 or civil penalty not to exceed \$25,000 for willful violation; costs (including reasonable attorney’s fees are also recoverable; claims brought by the consumer: actual damages, attorneys’ fees and cost, or the greater of actual damages, attorneys fees and cost or \$15,000 for willful violation; in case of conviction, the license may be suspended (6 moths – 3 years); in case of a subsequent conviction, the license may be revoked) The consumer does not have to exhaust administrative remedies prior to	X (A person found to have violated this division shall be liable to the borrower for: (1) actual damages (including consequential and incidental, loans fees and finance costs); (2) statutory damages = 10% of the amount financed; (3) punitive damages in case of fraud, malice, or oppression (must be shown by clear and convincing evidence); (4) court costs. A borrower may be granted injunctive, declaratory, and equitable relief and does not have to exhaust any administrative remedies. A regulatory	X ((1) actual damages, (2) exemplary damages in the amount of p&f + 10% of the total loan amount, (3) costs and attorney fees. Court may issue various injunctions and award punitive damages. Court may impose civil penalties of not less than \$500 and not more than \$50,000)				X ((1) actual damages, (2) exemplary damages in the amount of p&f + 10% of the total loan amount, (3) costs and attorney fees. Court may issue various injunctions and award punitive damages. Court may impose civil penalties of not less than \$500 and not more than \$50,000)		X (any remedies “available under law” allowed)		

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					bringing a civil action. Punitive damages may be awarded.	body responsible for the regulation of the person or entity responsible for the loan may initiate disciplinary action, including the revocation of the license.									
Limited Right to Cure, etc.	X		X (No violations deemed if appropriate restitution made after compliance failure notification and failure not intentional (e.g. bona fide error))	X (No violations deemed if appropriate restitution made after compliance failure notification and failure not intentional (e.g. bona fide error))	X (no violation if bona fide errors corrected within 45 days after receipt of the complaint or discovery of the error)	X (no violation if, within 30 days of the loan closing and prior to commencement of any legal action, a borrower is notified and appropriate restitution is made and the terms of a sub-prime L are changed to satisfy this act, or the sub-prime L is changed to non-sub-prime L; if failure to comply was not intentional and resulted from a bona fide error, all of the above	X (no violation if, within 30 days of the loan closing and prior to commencement of any legal action, a borrower is notified and appropriate restitution is made and the terms of the home loan are adjusted in a manner beneficial to the borrower to make it in compliance with this ordinance)				X (no violation if, within 30 days of the loan closing and prior to commencement of any legal action, a borrower is notified and appropriate restitution is made and the terms of the home loan are adjusted in a manner beneficial to the borrower to make it in compliance with this ordinance)		X (No violations deemed if appropriate restitution made after compliance failure notification and failure not intentional (e.g. bona fide error))		

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						applies, except the time period is changed to 60 days)									
If Violation Found, Foreclosure Prohibited, Except by Judicial Order															

ⁱ 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.