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Proposal for Strengthening the  
Home Ownership and Equity Protection Act  
(HOEPA)

*I. Strengthen the Rescission Provision of HEOPA*

The Federal Reserve could strengthen the Home Ownership and Equity Protection Act (HOEPA) and the Truth-In-Lending Act and by clarifying the rules governing the debtor's obligation to make restitution in rescission. Various violations of the statute give debtors the right to rescind for a period of up to three years, but this remedy has been severely weakened by confusion over how a debtor can make restitution in rescission. After loan funds are disbursed, they are usually transferred immediately to the debtor's existing creditors to satisfy the obligations the debtor is refinancing, leaving the debtor with no funds to effect restitution in a lump sum. There are many courts that deny debtors the ability to rescind when they are not able to effect restitution in a lump sum. Decisions such as these gut the effectiveness of the Truth-In-Lending Act because they deprive debtors of the Act's most powerful remedy. One of the effects is that financial institutions are able to commit violations of the act and escape the consequences.

It is clear from the language of the Truth-In-Lending Act, specifically the language in 15 U.S.C. § 1635(b), that Congress intended the rules governing restitution to be flexible so as to assure the viability of the remedy. When a debtor is not able to return the exact property the debtor received the Act states, "except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value." There are few decisions, however, that interpret the meaning of reasonable value.

Although most debtors cannot give back the loan funds they received, most debtors can transfer property that is reasonably equivalent to the value they received in the form of a new mortgage. We would urge the Board to enact rules that would permit this. Specifically, debtors who are not able to effect restitution in a lump sum, which is just about all consumer debtors, should be permitted to propose to make restitution by transferring to the lender a new note and mortgage on commercially reasonable terms that the lender could then keep or assign. The lender should be entitled to a small amount of interest on the new mortgage, but only in an amount calculated to protect the lender against inflation. The lender will thus receive present value, but not a profit, which is the penalty the Truth-In-Lending Act, seeks to impose.

## *II Expand the Loans Covered by HOEPA?*

Debtors whose loans do not meet the HOEPA threshold leave a substantial number of homeowners without protection. Moreover, lenders clearly understand that their fees and rates should not exceed the limit and usually the loan does not exceed the limit. The HOEPA rate and fee thresholds need to be lowered to allow additional homeowners to be protected by the Act. The fee threshold should be lowered to 5%.

## *III Eliminate Mandatory Arbitration Clauses in High Cost Mortgages*

Unsophisticated borrowers sign documents without fully understanding the implications of certain provisions. The Mandatory Arbitration Clause is one that is often not understood by the consumer and often overlooked as being important during a review of the documents. Borrowers, who can least afford to pay, are required by these clauses to pay the high cost of arbitration and may be denied the right to litigate legitimate claims. Arbitration Clauses make it difficult to seek an acceptable remedy for a home owner seeking to avoid foreclosure or to remedy harm.