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May 14, 2025

The Honorable Donna Bailey, Senate Co-Chair
The Honorable Kristi Mathieson, House Co-Chair
Members of the Committee on Health Coverage, Insurance and Financial Services
Committee

Dear Co-Chairs Bailey and Mathieson and Members of the Committee

I speak in support of LD 1901, An Act to Regulate Shared Appreciation Agreements Relating to Residential Property.

I have practice law in Maine for over 54 years. For 30 years I represented Maine banks in loan transactions, bankruptcy cases and bank litigation cases. For the past 15 years I have devoted my legal work to pro bono representation of low-income Maine homeowners. Over these last 15 years, I have devoted over two million dollars of my legal services to pro bono work in protecting Maine homeowners from the abuse of the national mortgage servicers. I have seen firsthand how Maine's low-income homeowners can be taken advantage of. I support LD 1901 because I want to protect these good Maine people from further abuse by the financial industry.

This bill offers the Maine Legislature an opportunity to get ahead of a new predatory lending scheme which has so far spread to 32 states and will likely become an issue for Maine homeowners soon if this bill is not enacted.

The common features of these Shared Appreciation Agreements are that:

- They offer the homeowner an upfront payment of a substantial sum of cash;
- The homeowner signs an agreement which says the homeowner will not have to make any monthly payments;
- At the end of the contract (usually 10 years), or when the homeowner wants to sell or refinance the house, the homeowner pays a much larger sum based upon a the increase in value of the home over the term of the contract. In the one-page example attached to this testimony, that homeowner, trying to repay after only 5 years, had to repay over 250% of the cash advance made to her;
- The contract documents are hugely complex and long (97 pages in one case), and unreadable by a non-lawyer.

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- No upfront disclosures of the true costs of these deals are provided to homeowners and indeed, the actual payoff amounts cannot even be known until the time of repayment.

These loans are offered to homeowners who almost always have first mortgages but who also have developed significant equity in their properties above the amounts owned on those first mortgages. The financial industry has been marketing these loan products to homeowners who are often elderly, or low income, or in financial distress due to credit card debt default issues on their first mortgages.

Homeowners are not made aware that, if they enter into one of these shared appreciation mortgages to get the "fast cash," they will be contracting away their right to refinance those first mortgages if interest rates come down, or to obtain loan modifications of those first mortgages if they encounter financial hardships. Also, homeowners are not informed that, if when it comes time to pay off the loan created by one of these shared appreciation agreements, the payment amount required of them will likely be far higher than would be the case if they had borrowed the same amount of money on a traditional mortgage.

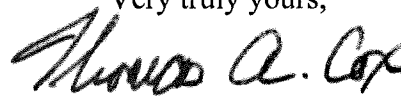
Even though these deals all involve advances of cash to a borrower, and a borrower obligation to pay back that money and a lot more, these companies claim that these deals are not loans and therefore are not subject to truth-in-lending laws or other consumer protection laws.

These shared appreciation mortgages are so complex that I cannot possibly describe their details in my allotted time to testify. Attached to my testimony is a National Consumer Law Center Issues brief describing how these loans work. Also attached is a one-page example of how one of these deals ended up forcing a 67-year-old single and disabled woman into bankruptcy. Her package of loan documents was 97 pages long and is impossible for any non-lawyer to understand.

LD 1901 will ensure that these shared appreciation agreements are treated as loans under the Maine Consumer Credit Code and other consumer protection laws. The bill will also limit the kinds of predatory terms which have been seen in such transactions, and which are presently the subject of a lawsuit filed three months ago by the Massachusetts Attorney General.

I urge you to support the passage of LD 1901 as a means to protect Maine's low-income homeowners from further abuses by the financial industry.

Very truly yours,



Thomas A. Cox

Enclosures

Example of a Real Shared Appreciation Agreement In Litigation

In December 2018, Unison Agreement Corp offered Deborah Stone of Evans, Colorado a shared appreciation loan. She is a 61-year-old single, disabled woman with a high school education and no experience with complex financial transactions. She already had a first mortgage. The package of Unison loan documents comprised 97 pages which are extremely difficult to understand.

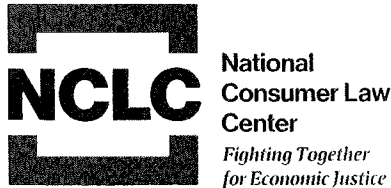
The Unison documents provided for Ms. Stone to sell Unison an option to purchase a 70% interest, called the “Investor Percentage,” in her home at any time over the next 30 years for a “Unison Purchase Price” of \$140,000. Only \$35,000 of that sum, called the “Unison Investment Payment” was paid to her in 2018, with the \$105,000 balance, called the “Unison Purchase Price Balance,” to be paid when Unison exercised the option years in the future. Ms. Stone was required to give Unison a mortgage on her house. That took away her ability to ever refinance her first mortgage or to obtain a loan modification. She never understood this agreement and thought she had obtained a regular second mortgage loan.

In 2023, Ms. Stone decided that she needed to sell her home to get the remaining equity in it, and to move in with her daughter. She expected to be able to sell her house for \$270,000. It was only at that point, when she told Unison she wanted to sell her house and pay off her loan, that Unison told her what she had to pay. After receiving only \$33,635—the \$35,000 Unison advance minus a “Unison Transaction Fee”—in 2018, now in 2023 she had to pay Unison \$84,000. This is almost 250% more than Unison paid her! This would have been an effective annual interest rate of almost 21% from the deal closing in 2018 to the time of the intended sale in 2023. Conventional mortgage rates in 2018 were around 5%.

Under the terms of the Unison deal, this is how her repayment was calculated:
70% (Investor Percentage) of \$270,000 house sale price equals \$189,000
\$189,000 minus Unison Purchase Price balance of \$105,000 equals \$84,000

The tremendous increase in the money owed to Unison in 2023 made it impossible for Ms. Stone to sell her house, because the sale price would not have been enough to pay the \$84,000 demanded by Unison and to pay off her first mortgage. She was trapped in her house and no way to sell it or pay off loans.

The result of this nightmare for Ms. Stone has been that she has had to file for bankruptcy and may well lose her home.



Home Equity Investment Loans Are Subprime Mortgages:

Federal and State Policymakers Should Update Rules to Protect Consumers

October 2024

Summary:

- Home equity investment (HEI) loans work the same way as traditional home equity loans and reverse mortgages, so they are subject to the same consumer protections as traditional mortgage loans.
- To the extent that any federal or state laws are ambiguous, regulators should issue guidance clarifying that HEIs are covered.
- Industry claims that these contracts are not loans are deceptive statements based on overly complex fine print that attempts to mask how these transactions truly operate.
- Enforcement of consumer protection laws is essential to protecting homeowners, families, and the economy from the financial shock that will result from unscrupulous HEI companies' exploitation of the country's \$35 trillion home equity market.

Homeowners in the United States collectively have trillions of dollars of equity in their homes. Most plan to use it for a wide range of goals, including paying for retirement or at-home care, leaving money to their children, paying down debts, paying for college, making home repairs, starting a business, and other nonpurchase reasons.

The traditional tools for accessing this equity are highly regulated home equity loans (including reverse mortgages). But some people who want to access their equity without selling the home lack the income or credit to qualify for a traditional mortgage.

In recent years, new business models have emerged offering products that purport to help people access their equity without a loan. These products come in different forms, but the basic transaction provides homeowners with a cash advance in exchange for a share of the future value of their home. For-profit companies market these products in various ways, calling them "shared appreciation contracts," "option contracts," or home equity sharing agreements.¹ Wall Street calls them "home equity investments."² Some have also called it "home equity stealing."³ For the purposes of this issue brief, we will refer to these contracts as home equity investment loans, or "HEIs."

Whatever this product is called, it is a loan masquerading as obligation-free cash. The companies that market and sell them often use deception to lure financially struggling consumers into unconscionable, high-priced loans. The time has come for policymakers to protect homeowners from the risks this product poses and those who may abuse it. HEI loans are really just another form of mortgage and should be regulated like other forms of mortgage credit.

It's the details of an HEI loan that matter. If the contract requires the homeowner to turn over too much of their equity or home value, it's not a wealth-building product. While some products may expand cash-out or home-retention opportunities, they may also prevent homeowners from refinancing when interest rates go down, and they almost always result in unaffordable balloon payments.

HEI loans are structured differently from traditional loans but are just old wine in new bottles.

In a traditional “forward” mortgage loan, a lender provides the homeowner cash up front, and the homeowner agrees to repay it in predictable installments, no matter what happens to the value of the home. Even with adjustable-rate mortgages, the payments are relatively predictable, and honest lenders won't make a loan unless they reasonably believe the borrower can afford the payments. If the homeowner defaults, the lender can foreclose and recover the amount owed by selling the home. In some states, the lender can also sue the borrower for any remaining balance. Laws regulating consumer mortgages protect homeowners from certain unfair lending practices, and many states regulate foreclosures carefully.

Reverse mortgages are also subject to important consumer protections, such as mandatory HUD-approved counseling before closing and certain disclosures. Most importantly, reverse mortgage borrowers have the right to stay in their homes indefinitely, as long as they remain current on their property insurance and taxes.

HEI loans offer homeowners money up front in return for a share of the home's future value.⁴ HEI loan borrowers are usually not required to make any payments to the company until the earlier of a maturity date specified in the contract or when they transfer the property.⁵ Then they must make a balloon payment calculated as a percentage of the home's value. If they do not pay by maturity, they face foreclosure. Some companies offer HEI loans to help buy a home, while others are offered to existing homeowners who might otherwise seek a traditional home equity loan or reverse mortgage. In this paper, we only focus on the kind of HEI loan offered to existing homeowners by for-profit companies.

HEI loans are confusing and complex. Most are designed to look like option agreements where the company claims to buy an option to purchase a share of the consumer's house in the future. Companies point out that if they never exercise the option, the consumer will not owe anything on the contract. Based on this premise, the company claims it is not making a loan—just buying an option. But, in reality, the company almost always exercises the “option.” When it does so, it becomes a co-owner of the home.

When the company exercises the option, the homeowner must put the house up for sale (if the homeowner has not already done so) or buy the company's share back. By this time, the company's share will typically be worth far more than what the homeowner originally received for it—typically tens or hundreds of thousands of dollars more. This substantially reduces the homeowner's share of the equity in their own home.

Understanding the cost and benefits of an HEI loan is sometimes made even more difficult by contract terms that discount the initial value of the house.⁶

Companies often advertise that the transaction is not a loan and that the homeowner will not owe anything if the home loses value. But companies use sophisticated projection models

to predict home values and securitization to insulate themselves from bearing any risk.
In practice, these companies will almost always get repaid.

As with other mortgages, if homeowners can't make their payments, they lose their home.

When the time comes (at the end of the term or sooner), the homeowner must pay the company a share of what the house is worth. Most people will do so in one of three ways: by selling the home, by using money from savings, or by getting a traditional mortgage. If the homeowner does not, or cannot, do any of these, the contract may authorize the company to sell the home out from under the borrower. **Because these contracts do not treat the transaction as a loan, the company might not follow state foreclosure laws.** For the homeowner, however, the end result is the same as a foreclosure—the homeowner gets evicted.

There are no clear limits on how much equity a company can take.

The percentage the company takes, and how much cash it is willing to offer the homeowner, vary and are usually determined by the investor's analysis. Homeowners may be attracted by a large payment now in return for an unspecified bill in the distant future. But when the time comes, that may leave the homeowner owing far more than they originally received. One court refused to void a 50-year contract transferring 100% of the future increase in value.⁷ And another court enforced a contract that gave the funder a 2,000% return on the amount initially paid to the homeowner.⁸ Such unconscionable contract terms take advantage of loopholes in the law and prevent the homeowner from using their equity as they originally planned.

Imagine a 10 or 30 year mortgage with only one payment that's due at the end, but nobody can tell you what the interest rate is or what the payment will be until it comes due.

That's what you get when you sign a home equity investment contract.

Do existing consumer protections or disclosure requirements apply?

Yes. Many states have consumer protection laws against unfair and deceptive acts and practices that apply to HEI loans, as well as lending and disclosure laws that should apply. In truth, HEIs are mortgage loans. But companies offering HEI loans claim they are not making loans and that mortgage laws do not apply. They claim the terms and conditions in their contracts place them beyond the reach of disclosure and lending laws.

Despite such claims, it is important to analyze these transactions based on how they function, rather than what they purport to be.

Because mortgage loans are complicated and put a consumer's home at risk, state and federal laws require lenders to provide disclosures that summarize and emphasize the most important terms. This helps consumers understand how much the loan will cost, how long it will last, and whether they can get a better deal somewhere else. There are also extensive federal and state laws restricting certain abusive loan terms and lending practices.

Without the application of mortgage laws, consumer protections for HEI loans are far more limited, despite the extreme complexity and risk in these transactions. Homeowners may even be prevented from defending their home in court, because these contracts often include forced-arbitration clauses—something that would be prohibited if these contracts were treated as mortgages.⁹

In reality, home equity investment contracts are subprime mortgage loans.

Some companies claim these transactions are not loans because the company is not obligated to exercise the option. They say the consumer might not owe anything if the property value goes down. But in reality, companies only offer these products for homes that are almost certain to increase in value. And the contract terms are often structured in a way that almost guarantees that the company will get its original payment to the consumer back.

As a result, it is almost certain that the consumer *will* have an obligation to pay. Industry participants argue that they do not always exercise the option, and they do sometimes lose money. But, while there is little public data, available evidence suggests that this is very rare. Instead, industry losses on HEI loans are probably comparable to defaults on mortgages. And nobody would argue that a mortgage isn't a loan just because the lender sometimes loses money.

From the consumer's perspective, HEIs are loans—the consumer gets money upfront and the lender expects repayment later.

Three states have already recognized this. Connecticut,¹⁰ Illinois,¹¹ and Maryland¹² have passed laws declaring that these equity products are, in fact, loans. As explained in our recommendations, other states should too.

Option-based equity products are unfair to homeowners.

HEI loans have the potential to be grossly unfair to homeowners. While the contracts vary widely, problems include:

- **Hidden, subprime effective interest rates.** Although the contract does not specify an interest rate, like a traditional loan, the difference between the balloon payment and the upfront payment to the borrower acts like interest. As a result, a rapid increase in property values becomes a double-edged sword for the homeowner. Yes, the homeowner gets more equity, but they have to pay more to the investor, resulting in what is effectively a hidden subprime interest rate.
- **Borrowers cannot predict what they will owe.** There's no way for the borrower to predict what they will owe, and companies don't accurately disclose their own projections to borrowers.
- **Companies do not provide information for comparison to traditional mortgages.** Because companies claim their products are unregulated, they do not disclose an annual percentage rate (APR). As a result, consumers cannot compare the cost to traditional mortgage financing, which is normally much cheaper and comes with consumer protections.
- **Home equity investments are asset-based lending.**¹³ The transaction is based solely on the value of the property. There is no underwriting for whether the homeowner can

afford the balloon payment at maturity. Instead, the investor expects the homeowner to pay by selling or mortgaging the house. **Asset-based mortgage lending has long been recognized as a form of predatory lending.** It is prohibited by the Home Ownership and Equity Protection Act (HOEPA)¹⁴ and has contributed to many foreclosures.¹⁵

- **HEI loans include restrictions on using your own home.** HEI loans usually restrict what consumers can do with their home during the contract term. They may be prohibited from renting the home out if they decide to move. Their ability to use the property for a business may be limited. And they usually cannot get a traditional second mortgage for home improvements, repairs, or any other purpose without the company's permission. Refinancing to a lower interest rate is also nearly impossible because it would require paying out a portion of the equity.
- **HEI loans are very hard to understand.** HEI loans involve legal and economic concepts that are not easily explained to someone without experience in the law or finance. Understanding the range of what the consumer will potentially owe on the contract requires making economic predictions that professional economists struggle with, including the future value of real estate appreciation and the rate of inflation a decade in advance.
- **Companies mislabel the product as an “option contract.”** The typical consumer understands what a loan is. But very few have experience with so-called option contracts. As a result, they are at the mercy of a financially sophisticated counter-party that will have targeted them using complex mathematical models to maximize their profit. Moreover, because the company almost always exercises the option, labeling it as an option hides the truth—that the contract is really a mortgage loan.
- **Contracts often restrict access to justice.** Many HEI loans restrict the homeowner's ability to protect their rights in a court of law by using forced-arbitration clauses that would be prohibited by the federal Truth in Lending Act (TILA) if these contracts were recognized as mortgages.
- **There is no standardized HEI loan form** (as there is for traditional mortgages), so it is necessary to read every word of the deal documents to know what the consumer's obligations are. But the typical contract and associated agreements can be more than 100 pages long. These transactions also exploit aspects of consumer psychology that can trap even financially sophisticated people.¹⁶

Recommendations For Federal and State Policymakers

Caveat emptor will not work here. These contracts are so complex that consumers cannot spot the risks or unfair terms. Because the cost of these contracts is so hard for consumers to predict, and because of basic human psychology, most consumers will under-estimate how much they will owe in the future and will be shocked when the bill comes due. The cost of these contracts will rob homeowners of their most valued asset—the equity in their home. State and federal policymakers should take the following steps to protect buyers:

States should:

- Clarify that HEI loans are mortgage loans, that create a debt, and that they are subject to the same state laws as other residential mortgages, including state foreclosure laws and other mortgage protections, as well as state usury caps.
- Impose limits on contract terms:
 - Limit the maximum term for HEI loans to 10 years, to limit home equity loss.
 - Require all HEI loans to include a contractual cap, limited by statute to a reasonable amount, on how much the homeowner will be required to pay when payment is due.¹⁷
 - Declare that a contract shall be automatically void if it lacks a cap or exceeds the statutory cap.
- Require the consumer to be represented by an independent attorney of the consumer's choice and at the lender's expense at closing.
- Require the lender to pay all closing costs.
- Require the lender to give the homeowner a new, market-rate mortgage at the end of the contract term if the homeowner cannot otherwise repay the debt without selling the property.
- Specify that any violation of the HEI loan protections recommended here constitutes a violation of the state deceptive practices statute.
- Ramp up state investigations and enforcement actions against companies when they fail to comply with consumer protection and other applicable laws.

The Consumer Financial Protection Bureau (CFPB) should:

- Clarify that HEI loans are mortgage loans and a form of credit that is subject to the same federal laws as other mortgage loans, including:
 - The Truth in Lending Act (TILA) (including its ban on forced arbitration in residential mortgages and the Home Ownership and Equity Protection Act);
 - The Real Estate Settlement Procedures Act; and
 - The Garn-St. Germain Act (which allows heirs to assume loans on the family home).
- Issue guidance stating that an HEI loan is unfair and abusive¹⁸ if it lacks a cap on how much the consumer must pay under the contract;
- Amend TILA's Regulation Z by:
 - clarifying that the definition of credit includes HEI loans;
 - amending the commentary to Reg. Z § 1026.2(a)(14) by eliminating the exemption for option contracts secured by a consumer's residence; and

- requiring HEI loan transactions to be disclosed according to a new model disclosure that is based on the following assumptions:
 - the loan amount is the amount paid to the consumer at origination;
 - the amount financed is the loan amount, plus any borrower-paid closing costs excluded from the finance charge under Regulation Z;
 - a balloon payment will be required at maturity, amounting to the lesser of the maximum amount allowed by the cap stated in the contract or state law;
 - the lender exercises any option provision in the contract;
 - the total finance charge should be the difference between the amount financed and the balloon payment, plus any other charges required by the creditor;
 - the annual percentage rate will be calculated assuming the transaction is a single-advance, single-payment loan.
- Issue guidance clarifying that HEI loans are unfair, abusive, and deceptive where they do not provide protections, such as those discussed here, to promote informed decision making.

For further discussion, please contact National Consumer Law Center Senior Attorney Andrew Pizor at apizor@nclc.org.

Endnotes

1. See, e.g., Sujeet Indap, Financial Times, Private credit's latest contraption (Oct. 4, 2024), available at <https://www.ft.com/content/ca1b67a0-c95f-40f3-8dd1-ca6a583a14c6>; Washington Dep't of Fin. Inst., Home Equity Sharing Agreement Inquiry Report (Sept. 12, 2024), available at <https://dfi.wa.gov/news/press/dfi-issues-report-home-equity-sharing-agreement-inquiry> (hereinafter "Wash. DFI Report").
2. Morningstar DBRS press release, Morningstar DBRS Assigns Provisional Credit Ratings to Unison Trust 2024-1 (May 24, 2024), <https://dbrs.morningstar.com/research/433261/morningstar-dbrs-assigns-provisional-credit-ratings-to-unison-trust-2024-1>.
3. Senate Bill Rpt SB 5968, Wash. Sen. Business, Financial Services, Gaming & Trade (Jan. 25, 2024), available at <https://lawfilesexxt.leg.wa.gov/biennium/2023-24/Pdf/Bill%20Reports/Senate/5968%20SBR%20BFGT%20OC%2024.pdf>.
4. Wash. DFI Report at 4-5.
5. Contracts may have other triggers too, such as death of the owner or failure to comply with the contract terms.
6. Wash. DFI Report at 5, 10 ("Many HESA products include provisions discounting the starting value of the property by applying a risk adjustment"); Sujeet Indap, Financial Times, Private credit's latest

contraption (Oct. 4, 2024), available at <https://www.ft.com/content/ca1b67a0-c95f-40f3-8dd1-ca6a583a14c6>.

7. Foster v. EquityKey Real Estate Investments, 2017 WL 1862527, at *2 (N.D. Cal. May 9, 2017).
8. Comstock v. Steinbergh, 2004 WL 3120554 (Mass. Super. Dec. 16, 2004).
9. 15 U.S.C. § 1639c.
10. Conn. Gen. Stat. Ann. § 36a-485(27) (“Residential mortgage loan’ means any loan, including a shared appreciation agreement, primarily for personal, family or household use that is secured by a mortgage, deed of trust or other equivalent consensual security interest on a dwelling or residential real estate upon which is constructed or intended to be constructed a dwelling”); Conn. Gen. Stat. Ann. § 36a-485(30) (defining “Shared appreciation agreement”).
11. Ill. Gen. Assembly, Public Act 103-1015, § 5 (eff. Jan. 1, 2025) (amending 205 ILCS 635/1-4(f)) (“Mortgage loan’, ‘residential mortgage loan’, or ‘home mortgage loan’ includes a loan in which funds are advanced through a shared appreciation agreement.”); *id.* (amending 205 ILCS 635/1-4(ccc) to define “Shared appreciation agreement”).
12. Md. Code Ann., Fin. Inst. § 11-501(m)(2) (“Mortgage loan” includes a loan in which funds are advanced through a shared appreciation agreement.”); Md. Code Ann., Fin. Inst. § 11-501(r) (defining “Shared appreciation agreement”).
13. Morningstar DBRS, Rating and Monitoring U.S. Reverse Mortgage Securitizations at 24 (July 2023) (“Like reverse mortgage loans, the HEI underwriting approach is asset-based, meaning there is greater emphasis placed on the value of the underlying property than on the credit quality of the homeowner.”).
14. 15 U.S.C. § 1639(h).
15. See Hasa A. Kingo, Preying on the American Dream: The Argument for Hoepa Reform Amidst Predatory Lending’s Dire Effects on the Elderly Poor, 17 Geo. J. on Poverty L. & Pol’y 335, 353 (2010) (“asset-based lending is among the most harmful of predatory lending practices. . . . [L]oans based on borrowers’ equity in their homes and not their ability to repay are more likely to result in foreclosures, which directly injure homeowners being displaced, and indirectly hurt their surrounding communities.”).
16. Specifically, these contracts exploit hyperbolic discounting, “the tendency to overweight the immediate consequences of a decision and to underweight those that will occur in the future, mak[ing] it difficult for consumers to make rational disclosure decisions.” Ari Ezra Waldman, Cognitive Biases, Dark Patterns, and the “Privacy Paradox,” 31 Current Opinion in Psychology 105, 106 (2020).
17. This requirement is similar to the existing federal requirement that adjustable rate mortgages have an interest rate cap. See 12 U.S.C. 3806(a).
18. Pursuant to 12 U.S.C. § 5531(d)(1) and (2)(A)-(B).