

GAP REFUND REQUIREMENT BY STATE

Updated September 2020

GAP waivers are often assigned to a financial institution as an addendum to a retail installment contract (RIC). This is often referred to as an **indirect GAP waiver**. Upon assignment of the RIC, the obligations of the indirect GAP waiver are transferred to the assignee creditor who assumes the ultimate legal responsibility to honor its terms. This responsibility includes honoring the refund terms of the waiver by both ensuring that a refund is provided and that it is correctly calculated.

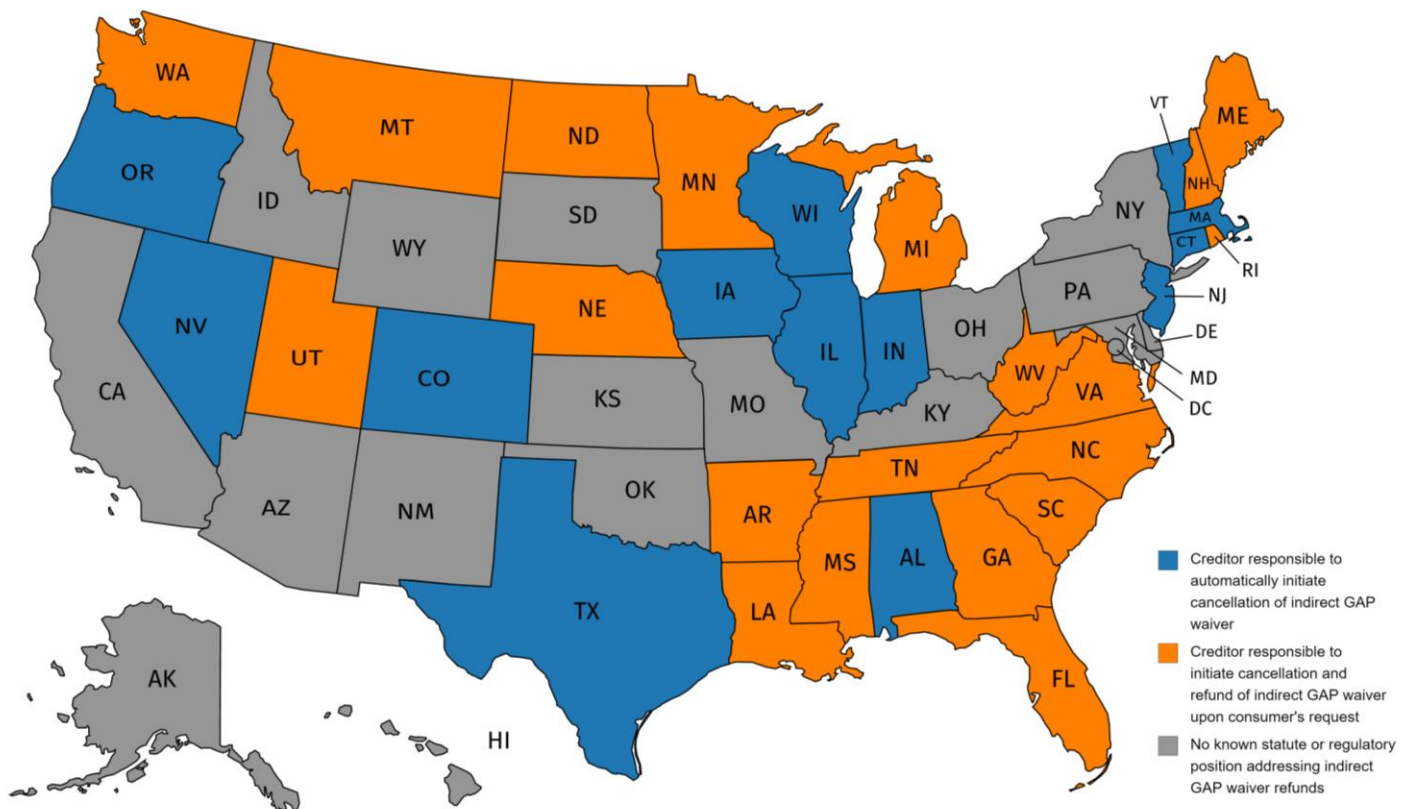
Because the ultimate refund responsibility often lies with the creditor, it is of utmost importance that the creditor has a consistent, accurate, and thorough process that ensures that the consumer receives the financial benefit of the early termination of all indirect GAP waiver refunds. While we recognize that outside GAP administrators are capable of facilitating voluntary cancellations and refunds, refunds that are owed as a result of the early termination of the RIC are often best handled by the creditor directly.

The early termination of the RIC (e.g. due to early payoff) automatically terminates the indirect GAP waiver addended to it. From a process perspective, refunds due to early termination of the RIC can be especially problematic because the creditor is often the only entity with notice the RIC has terminated. A GAP administrator and dealer won't know RIC has been terminated and won't initiate the cancellation of the GAP waiver unless the creditor gives them notice. Because the borrower is often seen as the less sophisticated party, regulators and legislators are increasingly taking the position that they should not be required to submit a request to cancel a GAP waiver

Regulators and legislators are increasingly taking the position that borrowers should not be required to submit notice of cancellation.

when the RIC has been terminated early, instead placing the burden, of initiating and providing a refund upon early termination of the finance agreement lies with the creditor.

States are reacting to this issue in a number of ways and this resource divides states into three groups based on how each state treats this issue. The first group (highlighted below in blue) is comprised of states that have taken the position that the burden for refunds is on the creditor or that have made clear that the creditor should provide a refund without requiring the borrower to provide a cancellation request. The second group (highlighted below in orange) are those states that do not address early termination refunds directly; however, these states are perhaps more susceptible to regulators and trial lawyers asserting the two-party nature of GAP waiver to conclude that the creditor has the responsibility for refunds upon early termination. Finally, the last group (highlighted below in gray) is comprised of states that have passed laws that are silent as to what entity actually provides the refund but only requires those refunds after the customer has provided notice of the early termination of the finance agreement.



State by State Survey

STATES WHERE CREDITOR IS RESPONSIBLE TO REFUND CANCELLED PRODUCT AUTOMATICALLY UPON TERMINATION OF THE RIC

Of primary concern are the states that either place the ultimate responsibility for the refund on the creditor or require the refund to be initiated without a cancellation request from the consumer. Some of these states do both. Included here are states that both explicitly place these burdens on the creditor and states where there is a strong indication that state regulators require as much. It is important, therefore, that refunds in these states be initiated, managed, and confirmed and recorded by the creditor taking assignment of the underlying retail installment sales contract.

Alabama: The express requirements for indirect GAP in Alabama can be found in Ala. Code §8-37-6(b) which provides, “[i]n the event of cancellation of the GAP waiver due to early termination of the finance agreement, the creditor shall provide, or cause the administrator or retail seller to provide, within 60 days of termination, any refund due to a borrower without requiring the borrower to request cancellation of the waiver.”

Colorado: Colorado does not have an explicit requirement that a refund be made even where no request for one has been made by a consumer. However, market participants have indicated that during examinations the Attorney General’s office has taken the position that automatic refunds upon early termination are required. Furthermore, a recent class action filed in Colorado makes the argument that the language of 4 CCR 902-1:8 requires a refund be made proactively, without regard to a consumer request, because it conditions the creditors request for a refund on the loan being prepaid prior to maturity or the vehicle no longer being in the consumer's possession. For this reason, Allied Solutions’ guidance is that Colorado cancellations be treated as requiring proactive cancellation.

Connecticut: This state has no statute or regulation directly on point to GAP waiver refunds; however, industry participants have indicated that conversations with regulators has revealed they will take the position that the creditor has the duty to provide a refund upon early termination.

Illinois: The law surrounding the treatment of ancillary products in the context of retail installment sales contracts is sparse and can be found at Ill. Comp. Stat. 375/9.03-10. These sections are silent on the treatment of GAP refund; however, market participants have indicated that regulators may believe that a creditor has a duty to refund upon early termination. We believe this information is strong enough to recommend treatment of GAP refunds in Illinois as requiring creditor responsibility for proactive cancellation upon termination of the finance agreement.

Indiana: Indiana treats GAP refunds in a unique way in that it expressly puts the responsibility for issuing the refund on the seller of the GAP agreement. IC 24-4.5-2-202(4). The Department of Financial Services indicated that they placed this requirement on the seller because they felt they did not have jurisdiction over the assignee lender. However, the Department also expressed that other parties may facilitate the refund. A refund is to be provided either when canceled by the consumer (for GAP agreements where the charge exceeded \$400) or upon prepayment in full of the underlying consumer credit sale. It is important to note that the statute states that upon prepayment, the GAP coverage is “automatically” terminated. Because coverage must be automatically terminated, requiring the borrower to request the cancellation and refund would be inappropriate. The creditor is the only party in the position to know that the finance agreement has been prepaid and therefore that a GAP refund is owed. It is the only party that can automatically trigger the refund. Accordingly, Allied Solutions’ guidance for Indiana is that creditors should initiate the GAP refund process in circumstances in which there is an early termination of the debt.

Iowa: In 2003 the Iowa attorney general issued an informal advisory opinion that remains the best treatment of this issue. It expressly puts the responsibility for issuing a GAP refund on the creditor but is silent on whether a borrower is required to request a refund as a prerequisite to this obligation. This advisory opinion used Colorado's treatment of GAP waiver as an example for how the GAP product should be offered, which potentially indicates Iowa's willingness to view Colorado's actions as indicative of how GAP waiver should be regulated. The absence of language expressly requiring a customer's request, and in light of both Colorado's position in regards to refunds after early termination of the finance agreement and the recent litigation mentioned above, Allied Solutions' guidance is that refunds in Iowa be initiated by the creditor. (See Iowa Consumer Credit Code Informal Advisory # 92, June 24, 2003, https://www.iowaattorneygeneral.gov/media/cms/92_9C29AE6D1AA4A.pdf).

Massachusetts: There is no Massachusetts law addressing GAP; however, we have heard from market participants that during examinations the Massachusetts regulator has asserted that an automatic early termination refund is required. We therefore recommend that the finance company initiate and process refunds proactively.

New Jersey: New Jersey expressly requires the creditor to automatically refund upon early termination of the finance agreement. "(T)he creditor shall provide, or cause the administrator or retail seller to provide, the borrower any refund due pursuant to this section within 60 days of the event terminating the finance agreement, without requiring the borrower to request the refund." N.J. Rev. Stat. §17:16BB-6.

Nevada: The law in Nevada places the burden for providing refunds solely on the creditor. While the law does require notice from the borrower, it differs from the majority of similar states in that it does not directly authorize designated parties to provide refunds on behalf of the creditor. N.R.S. 69OD.200.

Oregon: While Oregon law does not directly state that the creditor shall provide the refund, it does require a refund upon the early termination of the finance agreement “without requiring the borrower to apply or submit a claim for the refund.” Because the borrower is not required to request a refund, the assignee creditor is the only party capable of initiating the refund upon early termination of the finance agreement. Accordingly, it is Allied Solutions’ recommendation that the creditor initiate and process the refund upon early termination of the finance agreement. O.R.S. § 646A.781.

Texas: Texas law provides that the creditor shall refund or cause to be refunded unearned GAP premium where the finance agreement is terminated early. The Office of the Consumer Credit Commissioner has taken action against assignee creditors for failing to make, or cause to be made, GAP refunds automatically. Accordingly, creditors should be automatically providing or facilitating refunds in Texas. See Tx Fin. Code. §354.007; OCCC Bulletin B16-2 (6/30/17).

Vermont: In Vermont, a refundable GAP contract may be cancelled at any time for any reason and, accordingly, if the underlying debt contract is cancelled, the creditor must initiate cancellation and refund the creditor any unearned premium. There is a strong implication in this language that the responsibility is on the creditor to proactively cancel the GAP agreement when the debt agreement terminates. See V. Stat. Ann. §10405(c)(11).

Wisconsin: Wisconsin Statutes state that upon cancellation or termination of the GAP waiver, the creditor shall make an appropriate refund or cause an appropriate refund to be made. Terminating events include prepayment and repossession. While Wisconsin is technically silent on whether notice by the consumer is required for a refund to be made, there is a strong implication from the conditional language of the statute that the creditor is required to make or to cause the appropriate party to make, the refund upon termination of the debt agreement. See Wis. Stat. Ann. § 218.0148(4)(g).

STATES WITH NO CURRENT REGULATION ON GAP REFUNDS

Of secondary concern are those states that have no statute, and no known regulatory position, addressing indirect GAP waiver refunds. While the silence in these states has historically allowed the GAP waiver industry to facilitate refunds on behalf of the creditor, that same silence is now increasing both regulatory and class action risk associated with failing to provide, or incorrectly providing, those refunds. The lack of a law or published regulatory position creates a vacuum where regulators or trial lawyers are able to assert that the creditor should, upon early termination of the finance agreement, automatically provide the refund. The failure of creditors to provide this refund had the potential to become the basis for additional class action lawsuits and actions by both federal and state regulators. Furthermore, state legislators appear to be trending towards including these requirements in the laws applicable to GAP waiver. Alabama and New Jersey recently passed laws requiring automatic refunds upon early termination of the finance agreement. The Wyoming legislature is currently considering draft legislation that will expressly require the creditor to provide a refund upon prepayment of the finance agreement. States where there is currently no law or rule addressing GAP refunds include:

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| Alaska | Idaho | New York |
| Arizona | Kansas | Ohio |
| California | Kentucky | Oklahoma |
| Delaware | Maryland | Pennsylvania |
| District of Columbia | Missouri | South Dakota |
| Hawaii | New Mexico | Wyoming |

STATES WHERE CREDITOR IS RESPONSIBLE TO REFUND CANCELLED PRODUCT UPON CONSUMER REQUEST

The final category includes the states that require indirect GAP waiver refunds be made only where the consumer has requested a refund. While liability still exists for failing to provide a refund even after such notice is provided, in these circumstances liability presents itself largely in the accuracy with which the refund is calculated.

This category includes the following states:

Arkansas: Ark. Code. Ann. §4-90-801 et seq.

Florida: Fla. Stat. §520.02(7) and §520.07(11)

Georgia: GA. Code Ann. §33-63-1 et seq. and GA ADC 120-2-102-.01 et seq.

Louisiana: La. Rev. Stat. §969.51 et seq. and LAC 46:V.7701

Maine: Me. Rev. Stat. Ann. §1500-H

Michigan: Mich. Comp. Laws Ann. §492.21 et seq.

Minnesota: Minn. Code §59D.01 et seq.

Mississippi: §83-52-1 et seq, Miss Code.

Montana: Mont. Code Ann. §30-14-151 et seq.

Nebraska: Neb. Rev. Stat. §45-1101 et seq. and Bulletin CB-109

New Hampshire: N.H. Rev. Stat. §361-E:1 et seq.

North Carolina: N.C. Gen. Stat. Ann. §66-440 et seq.

North Dakota: N.D.C.C § 26.1-57-01 et seq.

Rhode Island: 19 R.I. Gen. Laws §19-31-1 et seq.

South Carolina: S. C. Code Ann. §37-30-100

Tennessee: Tenn. Conde Ann. §56-59-101 et seq.

Utah: Utah Code Ann. §31A-6b-101

Washington: Wash. Rev. Code Ann. §48.160.001 et seq.

West Virginia: §33-4-22 et seq, WV Code.

Virginia: §38.2-6400 et seq, VA Code

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