



Office of the Attorney General
Financial Litigation Division
Memorandum

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TO: Shannon Phillips
TEXAS DEPARTMENT OF BANKING

FROM: Jack Hohengarten
Deputy Division Chief

DATE: September 12, 2006

CASE: No. 03-06-00273-CV; *The Finance Commission of Texas and the Credit Union Commission of Texas vs. Association of Community Organizations for Reform Now (ACORN)*, et al; In the Third Court of Appeals; Austin, TX

Attached for your information is the following document:

1. Brief of Appellant, Texas Bankers Association

If you have any questions regarding the attached document, please contact me or my secretary, Judy Burgess, at 475-4303

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Via Hand Delivery

Diane O'Neal, Clerk
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Re: Case No. 03-06-00273-CV; *Texas Bankers Association, et al. v. Association of Community Organizations for Reform Now (ACORN), et al.*; In the Third Court of Appeals, Austin, Texas

Dear Ms. O'Neal:

Enclosed please find the original and eight (8) copies of Brief of Appellant, Texas Bankers Association. Please file the original with the court and return a file-stamped copy with the awaiting courier.

Thank you for your assistance in this matter.

Sincerely,



Alex S. Valdes

ASV:lh
Enclosures

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CASE NO. 03-06-00273-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

TEXAS BANKERS ASSOCIATION, FINANCE COMMISSION OF TEXAS, AND
CREDIT UNION COMMISSION OF TEXAS,
Appellants,

v.

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW
(ACORN), VALERIE NORWOOD, ELSIE SHOWS, MARYANN ROBLES-
VALDEZ, BOBBY MARTIN, PAMELA COOPER, AND CARLOS RIVAS,
Appellees.

*On Appeal from the 126th District Court
Travis County, Texas*

BRIEF OF APPELLANT, TEXAS BANKERS ASSOCIATION

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I. STATEMENT OF THE CASE

Appellees sued the Finance Commission of Texas and Credit Union Commission of Texas (the "Commissions") seeking a declaration that interpretations promulgated by the Commissions are invalid because they conflict with the Texas Constitution (the "Constitution"). Appellant Texas Bankers Association ("TBA") intervened as a party-defendant and all parties moved for summary judgment.

The trial court granted in part and denied in part the cross-motions for summary judgment, finding that seven of the nine interpretations challenged by Appellees were invalid. The court stayed its judgment for thirty days and denied all other requested relief. This appeal followed. During the pendency of this appeal, the Commissions repealed three of the seven invalidated interpretations. The Commissions and TBA challenge the declaration of invalidity as to the remaining four interpretations.

TBA has also filed an Emergency Motion for Determination Regarding Status of Interpretations on May 12, 2006, seeking confirmation that the interpretations that have not been repealed remain in effect pending the exhaustion of appellate remedies. In considering TBA's motion, this Court has extended the trial court's stay until September 8, 2006.

II. ISSUES PRESENTED

When interpreting the Constitution, a court must begin with the text and give effect to its plain language.¹ While it may seem tempting to give undue weight to a policy argument or isolated comments from a single floor debate, courts "are not free . . . to 'stretch' the meaning of unambiguous words to achieve a result [a court] might consider to be more desirable, or even better public policy."² Here, the trial court invalidated interpretations that allegedly conflict with the Constitution.

Issue 1: **The Constitution exempts "any interest" from being included in the cap on the amount of fees a homeowner may be charged, but does not define "interest." The Commissions interpreted interest to mean interest as defined in the Texas Finance Code (compensation for the use, forbearance, or detention of money) and as interpreted by the courts. Because the Commissions gave effect to the plain language of the Constitution by using a definition the Texas legislature and Texas courts have used for over one hundred years, the trial court erred in invalidating the interpretation.**

Issue 2: **Under the Constitution, a homeowner must submit an "application" and the lender must provide a prescribed notice before a twelve-day waiting period begins to run. The Constitution does not limit the manner in which an application may be submitted. Because the Commissions gave effect to the plain language of the Constitution by interpreting "application" to include oral applications, the trial erred in invalidating the interpretation.**

Issue 3: **The Constitution permits home equity lines of credit ("HELOCs"), but prohibits advances made by credit card, debit card, preprinted solicitation check, or similar devices.**

A. Because the Commissions gave effect to the plain language of the Constitution by interpreting "preprinted solicitation check" to mean a check, not requested by the borrower, containing at least one preprinted key payment term, provided for purposes of

¹ *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

² *Dawkins v. Meyer*, 825 S.W.2d 444, 448 (Tex. 1992).

originating a HELOC or soliciting an advance, the trial court erred in invalidating the interpretation.

- B. Because the Commissions gave effect to the plain language of the Constitution by identifying direct contact by the borrower, telephonic fund transfers, electronic fund transfers, prearranged drafts, convenience checks, and written transfer instructions as permissible HELOC advance methods, the trial court erred in invalidating the interpretation.
- C. The Commissions' interpretation clarified the Constitution by identifying permissible HELOC advance methods and defining the term "preprinted solicitation check" and, therefore, the trial court erred in declaring the interpretation void for vagueness.

Issue 4: The Constitution requires a lender to provide, at the time an extension of credit is made, copies of all documents signed by the owner related to the extension of credit. Because the Commissions' interpretation, which requires the lender to provide copies of all documents signed at closing in connection with the home equity loan, gives effect to the plain language of the Constitution, the trial court erred in invalidating the interpretation.

III. STATEMENT OF FACTS

The Constitution is amended to permit home equity lending

In 1997, Texas citizens approved an amendment to the Texas Constitution ("Constitution") allowing home equity lending.³ In amending the Constitution, Texas became the fiftieth state in the United States to permit home equity lending.⁴ As amended, the Constitution allows homeowners with equity in their homestead to obtain a loan secured by the homestead, provided all outstanding debts against the homestead do not exceed eighty percent of the homestead's value.⁵ This right to borrow against equity is not unlimited, however. The Constitution contains a number of provisions designed to protect consumers—including a waiting period before a loan may close, required disclosures, loan requirements, and other limitations on the practices lenders may employ during the home equity loan process.⁶ Ultimately, the end result is a home equity lending scheme more stringent than any other in the United States in terms of consumer protection.⁷

The Commissions are granted the power to interpret the Constitution

While the 1997 constitutional amendments outlined, in broad terms, home equity lending practices and prohibitions, there was a lack of guidance for lenders trying to determine whether a particular action or provision would violate the Constitution and

³ *Spradlin v. Jim Walter Homes, Inc.* 34 S.W.3d 578, 579 (Tex. 2000); TEX. CONST. art. XVI, § 50(a)(6).

⁴ Bill Analysis, HOUSE RESEARCH ORGANIZATION, 5 (May 9, 1997) HJR 31.

⁵ TEX. CONST. art. XVI, § 50(a)(6)(B); *see also Doody v. Ameriquest*, 49 S.W.3d 342, 343 (Tex. 2001).

⁶ *See* TEX. CONST. art. XVI, § 50(a)(6).

require them to forfeit the principal and interest on a loan.⁸ Ultimately, the uncertainty led to higher interest rates for all home equity loans as lenders raised rates to cover the increased market risk.⁹

To address the lack of guidance, the legislature passed Senate Joint Resolution 42. Senate Joint Resolution 42 proposed a constitutional amendment that would authorize the legislature to delegate to "one or more state agencies the *power to interpret* Subsections (a)(5)-(a)(7), (e)-(p), and (t), of [Section 50]."¹⁰ The amendment further provided that a lender's act or omission:

does not violate a provision included in those subsections if the act or omission conforms to an interpretation of the provision that is: (1) in effect at the time of the act or omission; and (2) made by a state agency to which the power of interpretation is delegated as provided by this subsection or by an appellate court of this state or the United States.¹¹

Two-thirds of the voters in the special election held on September 13, 2003 voted in favor of the constitutional amendment, and the Constitution was amended to permit the legislature the authority to delegate the power to interpret specific home equity loan provisions of the Constitution.¹²

⁷ Bill Analysis, HOUSE RESEARCH ORGANIZATION, 4 (May 23, 2003) SJR 42 ("Texas is more stringent than any other state in terms of home equity consumer protections.").

⁸ *Id.*

⁹ *Id.*

¹⁰ Proposition 16 – September 16, 2003. The text of the proposition may be found at the Secretary of State's website: www.sos.state.tx.us/elections/voter/2003sepconsamend.shtml.

¹¹ *Id.*

¹² Proposition 16 Election Results – see elections.sos.state.tx.us/elchist.exe.

During the same 2003 legislative session, the legislature also enacted Senate Bill 1067 which delegated interpretive power to the Texas Finance Commission and the Texas Credit Union Commission.¹³ Section 11.308 of the Texas Finance Code provides:

Interpretation of Home Equity Lending Law – The finance commission may, on request of an interested person or on its own motion, issue interpretations of Sections 50(a)(5)-(7), (e)-(p), (t), and (u), Article XVI, Texas Constitution. An interpretation under this section is subject to Chapter 2001, Government Code, and is applicable to all lenders authorized to make extensions of credit under Section 50(a)(6), Article XVI, Texas Constitution, except lenders regulated by the Credit Union Commission. The finance commission and the Credit Union Commission shall attempt to adopt interpretations that are as consistent as feasible or shall state justification for any inconsistency.

Section 15.413 of the Texas Finance Code contains an identical grant of authority to the Credit Union Commission.¹⁴ Unlike most agency delegations that simply involve a delegation of the legislature's power, the interpretive power delegated to the Finance Commission and the Credit Union Commission is derived from the Constitution itself and is unique in that it gives the Commissions the "power to interpret" the Constitution—a power normally possessed by the judicial branch of government.¹⁵

The Commissions interpret the Constitution

Under the grant of authority in the Finance Code, the Commissions in 2003 began drafting interpretations in accordance with Chapter 2001 of the Texas Government Code. To comply with Section 2001.029 of the Government Code, which requires an agency to give all interested persons a reasonable opportunity to submit data, views, or arguments,

¹³ TEX. FIN. CODE §§ 11.308, 15.413.

¹⁴ *Id.* § 15.413.

¹⁵ *See* Op. Tex. Att'y Gen. No. DM-495, p.2 (1998).

orally or in writing, the proposed interpretations were filed with the Office of the Secretary of State and published in the Texas Register.¹⁶ At the time of publication, all interested persons were invited to review the interpretations and submit data, views, or arguments to the Commissions.¹⁷ Numerous persons and entities submitted comments both orally and in writing.¹⁸ After receiving comments, the Commissions made non-substantive changes in order to correct typographical errors and to clarify and simplify the interpretations.¹⁹ The Commissions then adopted the interpretations, which were published and became effective.²⁰

ACORN sues and asks the court to declare the interpretations "invalid"

Apparently unhappy with the adopted interpretations, Appellees the Association of Community Organizations for Reform Now and six homeowners who allegedly each "took out a home equity loan" (collectively "ACORN") filed suit.²¹ ACORN challenged numerous interpretations and alleged broadly that "on information and belief, the new rules and interpretations were in fact the result of 'negotiations' between Defendants' staff and lenders."²² ACORN later amended its pleadings to include claims that the interpretations were "arbitrary and capricious" and that the Commissions did not provide

¹⁶ CR 121-132.

¹⁷ CR 123.

¹⁸ For example, Robert Doggett, counsel for the individual Plaintiffs/Appellees, submitted oral comments on behalf of borrowers at a public hearing on the proposed interpretations. CR 136.

¹⁹ CR 121-159.

²⁰ CR 121-159.

²¹ CR 2-22.

²² CR 9-21.

a "reasoned justification" for the interpretations.²³ ACORN eventually dropped its allegations that the interpretations were the result of secret negotiations and the procedural challenge to the interpretations.

The parties move for summary judgment and TBA intervenes

In March 2005, ACORN filed a motion for summary judgment.²⁴ The Commissions filed a cross-motion for summary judgment two months later.²⁵ The competing motions for summary judgment were heard in October 2005. In anticipation of a ruling in ACORN's favor on a majority of the issues, the parties discussed a proposed form of order granting ACORN's motion for summary judgment. During these discussions, the Commissions learned that ACORN was seeking a judgment invalidating numerous subparts of one interpretation—7 TEX. ADMIN. CODE § 153.5—despite the fact that ACORN had challenged only one specific subpart of the interpretation in its pleadings.²⁶ Surprised by this expanded request for relief, the Commissions filed special exceptions to ACORN's motion for summary judgment.²⁷

To resolve any discrepancy between the judgment sought by ACORN and the pleadings on file, the parties entered into a Rule 11 agreement on November 3, 2005.²⁸ Under the Rule 11 agreement, the parties would have another opportunity to submit

²³ CR 48-49.

²⁴ CR 54-108.

²⁵ CR 356-406.

²⁶ CR 573-578.

²⁷ CR 573-578.

²⁸ CR 600-601.

amended motions for summary judgment on all issues—including any challenge to the subparts of Section 153.5.²⁹ The agreement contained the following key points:

- ACORN would be permitted to file its Fourth Amended Petition;
- ACORN would file an "amended motion for summary judgment" by November 18, 2005; and
- the Commissions would file a cross-motion and response within thirty days of the filing of ACORN's amended motion for summary judgment.³⁰

On December 27, 2005, TBA intervened as a defendant in the lawsuit.³¹ TBA's intervention was the result of a growing awareness that lenders did not have an exact alignment of interests with any party to the litigation.³² For instance, the Finance Commission is a diverse board of private citizens appointed by the Governor of Texas, consisting of one state banker, one state savings and loan executive, one consumer credit executive, one mortgage broker, and five public members (one of whom must be a certified public accountant).³³ In addition to the balance of lender/consumer interests on the board, in drafting interpretations, the Finance Commission sought input from all interested persons—not simply lenders.³⁴ This balance of interests on the Finance Commission, coupled with the fact that the case was being prosecuted by a consumer group and individual consumers and defended by the Commissions without any lender

²⁹ CR 600-601.

³⁰ CR 600-601.

³¹ CR 774-778.

³² CR 776.

³³ TEX. FIN. CODE § 11.102.

³⁴ CR 123.

representation, led TBA to intervene. TBA intervened as a defendant to support the challenged interpretations on behalf of its members who extend home equity credit under the interpretations and are protected by the safe harbors that the interpretations provide. TBA also intervened to provide information regarding the effect the interpretations have had on lenders.

The court grants summary judgment and subsequently three interpretations are repealed

ACORN asked the court to declare nine interpretations invalid.³⁵ The trial court invalidated seven interpretations and denied ACORN's request to invalidate two others.³⁶ The court's Final Summary Judgment and Temporary Stay Order was signed on April 29, 2006.³⁷ All parties filed notices of appeal.³⁸ While this appeal was pending, the Commissions repealed the following three interpretations:

Good Cause/Fee Variance Interpretation (7 TEX. ADMIN. CODE § 153.13(4)) - Interpreting the term "good cause" as it relates to how soon a loan may close after an itemized disclosure of the fees, points, interest, costs and charges is provided to the homeowner.

Debt Consolidation Interpretation (7 TEX. ADMIN. CODE § 153.18(3)) - Pertaining to debt consolidation.

Blank Spaces Interpretation (7 TEX. ADMIN. CODE § 153.20) - Pertaining to blank spaces in any instrument signed by the homeowner.

³⁵ CR 612-655.

³⁶ CR 1106-1107.

³⁷ CR 1106-1107.

³⁸ CR 1108-1116.

Accordingly, any appeal of the court's ruling regarding these interpretations has been rendered moot.³⁹ TBA appeals the court's declaration that the following four interpretations are invalid:

Three Percent Fee Cap Interpretation (7 TEX. ADMIN. CODE §§ 153.1(11), 153.5(3), (4), (6), (8), (9), and (12)) - Interpreting the term "interest" and describing fees that may not exceed, in the aggregate, three percent of the original principal amount of the home equity loan.

Oral Application Interpretation (7 TEX. ADMIN. CODE § 153.12(2)) - Interpreting "application" to include oral and electronic applications.

Home Equity Line of Credit (HELOC) Access Interpretation (7 TEX. ADMIN. CODE § 153.84(1)) - Identifying methods by which a borrower may obtain an advance on a HELOC.

Document Copy Interpretation (7 TEX. ADMIN. CODE § 153.22) - Interpreting documents "related to the extension of credit" to mean "documents that are signed at closing in connection with the equity loan."

IV. SUMMARY OF THE ARGUMENT

If the Commissions were required to issue interpretations that please all, no interpretations would ever be issued. That, however, is not the mandate of the Commissions. Rather, the Commissions have been granted the power to interpret home equity loan provisions in the Constitution and they are required to give effect to the plain language of the Constitution.⁴⁰ While it may be tempting to speculate about the positive and negative attributes of home equity lending in general and attempt to "improve" the

³⁹ *Methodist Hosp. of Dallas v. Texas Workers' Compensation Comm'n*, 874 S.W.2d 144, 150 (Tex. App.—Austin 1994, no writ) (holding that challenge to rules was moot because the challenged rules expired and were not reenacted); *James v. City of Round Rock*, 630 S.W.2d 466, 468 (Tex. App.—Austin 1982, no writ) ("[A] case can become moot by reason of new legislation or acts which supersede existing legislation.").

Constitution or to "fix" perceived deficiencies to bring the Constitution in line with snippets of legislative history, the Commissions are not free to do so. Instead, the Commissions must issue interpretations that are consistent with the plain language of the Constitution and, like courts, they must refrain from questioning the wisdom of the Constitution or stretching the meaning of unambiguous words to achieve a result that might be more desirable.⁴¹

The Commissions have issued interpretations according to their grant of power from the legislature. ACORN claims these interpretations run afoul of the Constitution. When stripped to the quick, however, ACORN's arguments are centered around a belief that the interpretations do not adequately protect consumers. The opportunity to draft the home equity loan amendments has passed. If ACORN wishes to curtail home equity lending, it must do so through the legislative process and the vote of Texas citizens—not through the courts. In the trial court, the question was "whether each interpretation is consistent with the language and intent of the [Constitution] and nothing more."⁴² Because the Commissions' interpretations were consistent with the plain language of the Constitution, the trial court erred in invalidating the interpretations.

⁴⁰ *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995) ("To interpret our Constitution, we give effect to its plain language.").

⁴¹ *Dawkins v. Meyer*, 825 S.W.2d 444, 448 (Tex. 1992).

⁴² CR 51 (ACORN has argued that the relevant inquiry "is whether each interpretation is consistent with the language and intent of the Homestead Provision and nothing more.").

V. ARGUMENT

The Constitution "is the fundamental law under which the people of this state have consented to be governed."⁴³ In interpreting the Constitution, courts are not free to question the wisdom of the Constitution,⁴⁴ but are to rely heavily on the Constitution's literal text and give effect to its plain language.⁴⁵ Courts are not authorized to thwart the will of the people by reading into the Constitution language not contained therein, or by construing it differently from its plain meaning.⁴⁶ While a court may consider the intent of the people who adopted the constitutional amendments, intent should be considered "in construing the *language*" of the Constitution.⁴⁷ The language of the Constitution must be presumed to have been carefully selected.⁴⁸

TBA appeals the court's declaration that four interpretations are invalid: (1) the three percent fee cap interpretation found at 7 TEX. ADMIN. CODE §§ 153.1(11), 153.5(3), (4), (6), (8), (9), and (12); (2) the oral application interpretation found at 7 TEX. ADMIN. CODE § 153.12(2); (3) the HELOC advance interpretation found at 7 TEX. ADMIN. CODE § 153.84(1); and (4) the document copy interpretation found at 7 TEX. ADMIN. CODE § 153.22. A comparison of the interpretations with the constitutional provisions they interpret reveals that the interpretations are entirely consistent with the Constitution, they

⁴³ *Dawkins*, 825 S.W.2d at 448.

⁴⁴ *Id.*

⁴⁵ *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342, 344 (Tex. 2001).

⁴⁶ *Cramer v. Sheppard*, 167 S.W.2d 147, 154 (Tex. 1943).

⁴⁷ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989) (emphasis added).

⁴⁸ *Id.*

provide necessary guidance to borrowers and lenders, and the trial court erred in invalidating the interpretations.

ISSUE 1: The Constitution exempts "any interest" from being included in the cap on the amount of fees a homeowner may be charged, but does not define "interest." The Commissions interpreted interest to mean interest as defined in the Texas Finance Code (compensation for the use, forbearance, or detention of money) and as interpreted by the courts. Because the Commissions gave effect to the plain language of the Constitution by using a definition the Texas legislature and Texas courts have used for over one hundred years, the trial court erred in invalidating the interpretation.

Introduction to the three percent fee cap

The Constitution contains a fee cap that limits certain fees that are not interest to three percent of the original principal amount of the credit. Specifically, Section 50(a)(6)(E) provides that an owner⁴⁹ may not be required to pay, "in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit."⁵⁰

By carving out interest, the Constitution confirms that fees may be interest

Importantly, Section 50(a)(6)(E) does not simply limit all fees. If limiting fees were the sole intent of Section 50(a)(6)(E), there would be no reason to even refer to "any interest" or to describe the type of fees subject to the limitation. Section 50(a)(6)(E) would simply state that "fees may not exceed three percent of the principal." Instead, the Constitution acknowledges that there are fees that can also constitute interest by

⁴⁹ The Constitution, in many cases, refers to an "owner or the owner's spouse." For ease of reference, TBA's briefing contains references only to an "owner."

identifying interest as a charge that should be carved out entirely when determining whether a charge is a fee subject to the cap. Accordingly, to determine whether a charge is subject to the three percent cap, one must begin by examining whether the charge is interest. If the charge is interest, it is excluded from the fee cap. If the charge does not constitute interest, one must then determine whether the charge is a fee required to be paid to a person to originate, evaluate, maintain, record, insure, or service the extension of credit. If so, the charge is subject to the fee cap.

The Commissions interpret interest as compensation for the use, forbearance, or detention of money

Although Section 50(a)(6)(E) uses the term "any interest," the term "interest" is not defined in the Constitution. In 2003, the Commissions drafted interpretations defining interest and clarifying the scope of Section 50(a)(6)(E).⁵¹ The Commissions defined interest as follows:

⁵⁰ TEX. CONST. art. XVI, § 50(a)(6)(E).

⁵¹ **153.1(11) Interest** - Interest as defined in the Texas Finance Code § 301.002(4) and as interpreted by the courts; **153.5(3) Charges that are Interest** - Charges an owner or an owner's spouse is required to pay that constitute interest under the law, for example per diem interest and points, are not fees subject to the three percent limitation; **153.5(4) Charges that are not Interest** - Charges an owner or an owner's spouse is required to pay that are not interest are fees subject to the three percent limitation; **153.5(6) Charges to Originate** - Charges an owner or an owner's spouse is required to pay to originate an equity loan that are not interest are fees subject to the three percent limitation; **153.5(8) Charges to Evaluate** - Charges an owner or an owner's spouse is required to pay to evaluate the credit decision for an equity loan, that are not interest, are fees subject to the three percent limitation. Examples of these charges include fees collected to cover the expenses of a credit report, survey, flood zone determination, tax certificate, title report, inspection, or appraisal; **153.5(9) Charges to Maintain** - Charges paid by an owner or an owner's spouse at the inception of an equity loan to maintain the loan that are not interest are fees subject to the three percent limitation. Charges that are not interest that an owner pays at the inception of an equity loan to maintain the equity loan, or that are customarily paid at the inception of an equity loan to maintain the equity loan, but are deferred for later payment after closing, are fees subject to the three percent limitation; **153.5(12) Charges to Service** - Charges paid by an owner or an owner's spouse at the inception of an equity loan for a party to service the loan that are not interest are fees subject to the three percent limitation. Charges that are not interest that an owner pays at the inception of an equity loan to service the equity loan, or that are customarily paid at the inception of an equity loan to

153.1(11) Interest - Interest as defined in the Texas Finance Code § 301.002(4) and as interpreted by the courts.

The Commissions' definition of the broad term "any interest" in Section 50(a)(6)(E) of the Constitution as "interest" as defined in Section 301.002(4) of Texas Finance Code and as interpreted by the courts is entirely consistent with Section 50(a)(6)(E). Section 50(a)(6)(E) does not define "interest" but simply refers broadly to "any interest" in explaining what charges should be excluded when calculating fees. Because the term "interest" in Section 50(a)(6)(E) is not limited to any particular type of interest, the interest referred to should be construed to refer to *any and all* interest. As well, any attempt to limit the broad term "interest" requires the addition of limiting words that are simply not present in Section 50(a)(6)(E) and contradict the plain language of the Constitution.

Section 301.002(4) of the Finance Code defines interest as "compensation for the use, forbearance, or detention of money." This definition is hardly novel or unique. In 1901, the Supreme Court in the case of *Galveston & Houston Investment Co. v. Grymes*,⁵² defined "interest" as "the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money." Over one hundred years later, in its opinion in *Carl J. Battaglia, M.D., P.A. v. Alexander*,⁵³ the Supreme Court stated:

service the equity loan, but are deferred for later payment after closing, are fees subject to the three percent limitation.

⁵² 63 S.W. 860, 861 (Tex. 1901).

⁵³ 177 S.W.3d 893, 907 (Tex. 2005) (emphasis added).

"Interest" has long been defined by the Legislature as "*compensation for the use, forbearance, or detention of money.*" TEX. FIN. CODE § 301.002(a)(4); accord Act of May 24, 1997, 75th Leg., R.S., ch. 1008, § 1, 1997 Tex. Gen. Laws 3091, 3420 (former TEX. FIN. CODE § 301.002(a)) ("Interest is the compensation allowed by law for the use, forbearance, or detention of money."), amended by Act of April 23, 1999, 76th Leg., R.S., ch. 62, § 7.16, 1999 Tex. Gen. Laws 127, 222; Act of Jan. 18, 1840, 4th Leg., R.S., ch. 1, § 1, 1840 Tex. Gen. Laws 3, 8, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1838-1846, at 182 (Austin, Gammel Book Co. 1898) (as amended) (former TEX. REV. CIV. STAT. art. 3097 (1895)) ("Interest" is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money.").

In interpreting the term "interest," the Commissions used the well-established definition of interest that has governed lending transactions in Texas since the nineteenth century. Given the fact that the legislature and the courts defined interest as the compensation for the use, forbearance, or detention of money long before the home equity loan amendments to the Constitution were drafted, it was reasonable for the Commissions to assume that when the legislature used the term "any interest" in the Constitution, this unrestricted and broad language would have the same meaning as the definition of interest contained in the Finance Code and as interpreted by the courts.⁵⁴

ACORN seeks to establish a new category of interest that only applies to home equity loans

Without citing any authority, and contrary to the plain language of Section 50(a)(6)(E), ACORN argued in the trial court that the "commonly understood meaning" of the term "interest" is interest that is "described in the promissory note and is generally specified as a percentage rate to be applied to the remaining, unpaid principal." If

⁵⁴ *McBride v. Clayton*, 140 Tex. 71, 166 S.W.2d 125, 128 (1942) (holding that the legislature is presumed to act with full knowledge of the existing condition of the law and with reference to it).

ACORN's definition is adopted, charges that are "interest" for purposes of a purchase money loan secured by the homestead, a home improvement loan, a car loan, and virtually every type of consumer credit transaction would not constitute interest in a home equity loan transaction, but would be a fee. ACORN's interpretation ignores the presumption that the legislature acts with knowledge of existing laws and would require courts to examine whether a charge constitutes interest on a case-by-case, ad hoc basis instead of examining whether the charge is compensation for the use, forbearance, or detention of money. ACORN's interpretation also renders the term "any" meaningless, and adds words of limitation that are not found in the Constitution.

In contrast, the Commissions' definition of interest is entirely consistent with the "commonly understood" definition of interest. Interest is commonly defined as "*a charge for borrowed money generally a percentage of the amount borrowed.*" WEBSTER'S NEW COLLEGIATE DICTIONARY (9th ed. 1988) (defining "interest" as "a charge for borrowed money generally a percentage of the amount borrowed"); AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed., 1997) (defining "interest" as "a charge for a loan, usually a percentage of the amount loaned"); BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "interest" as "the compensation fixed by agreement or allowed by law for the use or detention of money"). The statutory definition of interest used in the Commissions' interpretation is consistent with the dictionary definition of interest because "compensation for use" is a "charge." Accordingly, "interest," as defined in Section 301.002(4) of the Finance Code, constitutes "*a charge for borrowed money*" and the

Commissions' interpretations are consistent with Section 50(a)(6)(E) and the commonly understood definition of interest.

ACORN's argument that the Constitution distinguishes "interest" from "points" ignores the fact that the Constitution also distinguishes "points" from "fees"

In the trial court, ACORN argued that the itemized disclosure provision found at Section 50(a)(6)(M)(ii) of the Constitution is at odds with the Commissions' definition of "interest." Section 50(a)(6)(M)(ii) states that a home equity loan may not be closed less than "one business day after the date that the owner of the homestead receives a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing."⁵⁵ In Texas, courts have consistently held that points are interest.⁵⁶ Relying on this precedent, ACORN reasoned that, because Section 50(a)(6)(M)(ii) lists interest, points, and fees separately, points are something other than interest.

This argument cuts both ways because Section 50(a)(6)(M)(ii) also lists *fees* and *points* separately. If ACORN's argument is applied to the distinction between fees and points, one must also conclude that points are not fees subject to the fee cap. The fact of the matter is that Section 50(a)(6)(M)(ii) lists every item that must be disclosed on the HUD-1 Settlement Statement form and was not designed to distinguish categories of charges or to address the issue of whether a charge that is labeled a "fee" is really compensation for the use, forbearance or detention of money ("interest").

⁵⁵ TEX. CONST. art. XVI, § 50(a)(6)(M)(ii).

⁵⁶ See *Southwestern Invest. Co. v. Hockley County Seed and Delinting, Inc.*, 516 S.W.2d 136, 137 (Tex. 1974); *Tarver v. Sebring Capital Corp.*, 69 S.W.3d 708, 713 (Tex. App.—Waco 2002, no pet.).

ACORN's position is inconsistent with existing case law

ACORN relied on a United States District Court opinion—*Thomison v. Long Beach Mortgage*⁵⁷—which was vacated at the parties' request following a settlement. In *Thomison*, the borrowers were charged a "loan origination fee" that was paid to the mortgage broker,⁵⁸ as well as a "loan discount" charge.⁵⁹ The court held the loan origination fee was a fee subject to the three percent limit in Section 50(a)(6)(E), concluding that "when the lender denominates a line item charge on a Section 50(a)(6) extension of credit as a fee, a fee it shall be."⁶⁰ The court did not decide the issue of whether the "loan discount" charge was a fee because the court's finding regarding the "origination fee" caused the aggregate fees to exceed the three percent limit.⁶¹

Contrary to *Thomison*, it is well-settled Texas law that the label assigned to a charge is not determinative and that the court must look past the label to the charge itself to determine whether the charge is interest.⁶² This proposition is echoed in the comments in the Preamble to Title 7, Chapter 153 of the Texas Administrative Code:

Texas case law is replete with illustrations of the proposition that the name of a particular fee or charge is irrelevant. The true inquiry must be whether

⁵⁷ 176 F. Supp.2d 714 (W.D. Tex. 2001).

⁵⁸ The court's opinion in *Thomison* does not specify whether the origination fee was paid to the lender or the mortgage broker. However, the record in the district court contains a purported copy of the borrowers' settlement statement, which reveals that the origination fee was paid to the mortgage broker.

⁵⁹ See *id.* at 716.

⁶⁰ *Id.* at 717.

⁶¹ *Id.* at 716 n.2.

⁶² *First USA Manag., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997); *First Bank v. Tony's Tortilla Factory*, 877 S.W.2d 285, 287 (Tex. 1994); *Gonzalez County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976).

or not the item constitutes interest. If it is in fact interest, the name is of no consequence.⁶³

Notwithstanding this established precedent, the court's determination in *Thomison* that the origination charge was a fee was based solely on the label the lender had assigned to the charge.⁶⁴ Presumably, based on *Thomison*, if the lender had charged the borrower a fee to reimburse the lender for recording fees paid to record the deed of trust but the lender chose to call the charge "ancillary interest," "upfront interest," or something other than a fee, the *Thomison* court would have honored the lender's description of the charge and concluded the charge fell within the scope of "any interest" and, therefore, should be excluded from the three percent limit.

In contrast, in *Tarver v. Sebring Capital Corp.*, the Waco Court of Appeals held that discount points—which would not be "interest" per ACORN's narrow definition—were interest and should have been excluded from the three percent fee limit calculation.⁶⁵ In *Tarver*, borrowers sued a lender claiming that discount points paid in exchange for a lower interest rate were fees subject to the fee limit.⁶⁶ The court rejected this argument, instead holding that the points are a form of consideration paid by a borrower to a lender for the use of money and, therefore, "are a form of 'interest' and not subject to the three-percent limitation."⁶⁷

⁶³ 29 Tex. Reg. 87 (Jan. 2, 2004).

⁶⁴ *Thomison*, 176 F. Supp.2d at 717-18.

⁶⁵ 69 S.W.3d 708, 713 (Tex. App.—Waco 2002, no pet.) ("We hold that 'points' as defined herein are 'interest,' not 'fees,' under Section 50(a)(6)(E) of the Texas Constitution.").

⁶⁶ *Id.* at 710-11.

⁶⁷ *Id.* at 712.

ACORN attempted to discredit *Tarver* by arguing that the court in *Tarver* merely cited pre-interpretation regulatory commentary as the sole authority on the issue of whether charges constituting interest are excluded from the fee cap. While the court in *Tarver* did draw from numerous statutory and administrative definitions of and references to interest that expressly or impliedly included points as interest, the court's holding that the fee cap excluded "interest charged on the loan" was based on the plain language of Section 50(a)(6)(E).⁶⁸

Moreover, at the time *Tarver* was briefed and argued, the Texas Supreme Court had already confirmed that pre-interpretation regulatory commentary may be considered by courts when faced with questions requiring interpretation of the home equity loan provisions in the Constitution.⁶⁹ In *Stringer*, the Court pointed out that the regulatory commentary relied on by the *Tarver* court was "advisory" and "represent[ed] four Texas administrative agencies' interpretations of the Home Equity Constitutional Amendment."⁷⁰ The Court further stated that "[t]he commentary's purpose is to provide guidance to lenders and consumers about the regulatory views and the meaning and effect of art. XVI, Section 50."⁷¹ Accordingly, the court in *Tarver* properly held that points—that would not be considered "interest" under ACORN's limited definition—are interest as a matter of law and are excluded from the three percent limit. The Commissions'

⁶⁸ *Id.* at 709 (stating "[b]y the express wording of [Section 50(a)(6)(E)] the fee limit does not include interest charged on the loan").

⁶⁹ *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353 (Tex. 2000).

⁷⁰ *Id.* at 357.

⁷¹ *Id.*

interpretation of "any interest" is consistent with the definition in the Finance Code, more than one hundred years of interpretive authority by Texas courts, the commonly understood dictionary definition, and the plain language of the Constitution. Accordingly, the trial court erred in invalidating the Commissions' interpretation.

ISSUE 2: Under the Constitution, a homeowner must submit an "application" and the lender must provide a prescribed notice before a twelve-day waiting period begins to run. The Constitution does not limit the manner in which an application may be submitted. Because the Commissions gave effect to the plain language of the Constitution by interpreting "application" to include oral applications, the trial erred in invalidating the interpretation.

Under Section 50(a)(6)(M)(i) of the Constitution, a home equity loan may not close before the twelfth day after the later of: (1) the date that the owner of the homestead submits "an application" to the lender for the extension of credit; or (2) the date that the lender provides the owner a copy of the notice prescribed by Section 50(g). The Constitution does not limit the application to any particular type, but simply requires submission of an application. In 2003, the Commissions issued the following interpretation:

Closing Date: An equity loan may not be closed before the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure. For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the date the lender provides the owner a copy of the required consumer disclosure is the first day of the 12-day waiting period. The equity loan may be closed at any time on or after the 12th calendar day after the date the consumer disclosure is provided to the owner.

(1) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender.

*(2) A loan application may be given orally or electronically.*⁷²

The twelve-day waiting period in Section 50(a)(6)(M)(i) is one of three waiting periods that apply to the home equity loan process. First, under Section 50(a)(6)(M)(i), a loan may not be closed before the twelfth day following the later of the date an application is submitted or the date the required disclosure statement is provided. Next, under Section 50(a)(6)(M)(ii), a home equity loan may not be closed less than "one business day after the date that the owner of the homestead receives a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing."⁷³ Finally, once the extension of credit has been made, under Section 50(a)(6)(Q)(viii), the owner has three days to rescind the loan without penalty or charge.

The twelve-day waiting period in Section 50(a)(6)(M)(i) is triggered by submission of "an application" and the Constitution does not restrict the application that must be submitted to any particular type (oral, written, or electronic). Accordingly, the Commission's interpretation—which merely recognizes that an application may be submitted orally or electronically as well as in writing—in no way conflicts with the general language found in Section 50(a)(6)(M)(i).

To support its argument that the court should read "application" to mean "written application," ACORN made the unsupported assertion that all home equity lenders use a loan application known as the Uniform Residential Loan Application ("URLA

⁷² 7 TEX. ADMIN. CODE § 153.12 (emphasis added).

⁷³ TEX. CONST. art. XVI, § 50(a)(6)(M)(ii).

application") form.⁷⁴ This is simply not true. To rebut this claim, TBA submitted affidavits from JPMorgan Chase Bank, N.A. and Wells Fargo & Company which established that, contrary to ACORN's representations, lenders do not require a URLA application in every home equity loan transaction.⁷⁵ It is not uncommon for lenders to accept oral applications from prospective borrowers and, in such cases, the twelve-day period begins after the oral application is submitted and the required disclosure statement has been provided.

ACORN also argued that the twelve-day period could begin if a homeowner simply responds to a telemarketer's call.⁷⁶ This potential for abuse, however, would exist even if the Constitution is construed to require a "written application" in order to trigger the twelve-day period. For instance, a lender could just as easily treat a postcard with the borrower's name and phone number as a written application. Or a lender could consider a URLA application with only the borrower's signature a submitted written application, because the Constitution does not specify what information must be included in an application in order for the application to be considered complete. In truth then, the narrow interpretation that ACORN advocates neither finds support in the plain language of the Constitution nor cures the harm ACORN seeks to avoid. Regardless, ACORN's argument ignores the relevant inquiry—whether the Commissions' interpretation is consistent with the Constitution.

⁷⁴ CR 633.

⁷⁵ CR 858-862.

⁷⁶ CR 633.

ACORN further argued that, because the notice provision in Section 50(g) refers to a "written application," Section 50(a)(6)(M)(i)'s reference to "an application" should be construed to require the submission of a written application. The Supreme Court addressed a similar argument in the case of *Stringer v. Cendant Mortgage Corp.*⁷⁷—a case involving a conflict between a home equity loan provision in the Constitution that governed the use of proceeds and the disclosure provision found in Section 50(g). In resolving the conflict, the Supreme Court held that the notice provisions in Section 50(g) confer no rights or obligations on borrowers or lenders and are not controlling.⁷⁸ The Court further held that any substantive rights and obligations are provided by the provisions found in Section 50(a)(6) and the loan documents themselves.⁷⁹ Following *Stringer*, the prescribed notice in Section 50(g) was amended to provide: "YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE." Accordingly, the Section 50(g) notice confers no rights or obligations on borrowers or lenders and provides no guidance regarding the issue of whether an application may be submitted orally.

Because Section 50(a)(6)(M)(i) simply refers to the submission of "an application," an interpretation that identifies types of applications—including an oral application—that may be submitted for purposes of the twelve-day rule is consistent with

⁷⁷ 23 S.W.3d 353, 357 (Tex. 2000).

⁷⁸ 23 S.W.3d 353, 357 (Tex. 2000).

⁷⁹ *Id.*

Section 50(a)(6)(M)(i). Accordingly, the trial court erred in invalidating the oral application provision found at 7 TEX. ADMIN. CODE § 153.12(2).

ISSUE 3: The Constitution permits home equity lines of credit ("HELOCs"), but prohibits advances made by credit card, debit card, preprinted solicitation check, or similar devices.

Under Section 50(t)(3), a borrower has the option to take out a home equity line of credit ("HELOC"). A HELOC is a form of open-end home equity credit account that may be debited from time to time in amounts in excess of \$4,000. HELOCs provide borrowers with additional flexibility to manage their home equity loans without being forced to borrow the entire amount of a traditional home equity loan. For instance, a homeowner making semi-annual college tuition payments would not have to take out multiple loans or take out a large loan in anticipation of payments that might not be due for months or even years.⁸⁰

Section 50(t)(3) does not state the permissible methods for advances to be made, but expressly prohibits the use of "a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance." The Commissions issued the following interpretation:

Restrictions on Devices and Methods to Obtain a HELOC Advance

A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which an owner is prohibited from using a credit card, debit card,

⁸⁰ A Special Report issued by the Texas Comptroller of Public Accounts in March 2003 details the benefits of HELOCs. The report estimates that, as of March 2003, it was estimated that \$12.7 billion in higher-cost non-tax deductible loans could be supplanted by HELOCs—resulting in annual savings of \$741 million for Texas consumers. "Home Equity Lending Gaps in Texas," Special Report, March 2003, Texas Comptroller of Public Accounts.

preprinted solicitation check, or similar device to obtain a HELOC advance.

(1) A lender may offer one or more non-prohibited devices or methods for use by the owner to request an advance. Permissible methods include contacting the lender directly for an advance, telephonic funds transfers, and electronic funds transfers. Examples of devices that are not prohibited similar devices include prearranged drafts, convenience checks, or written transfer instructions.

....

(4) A preprinted solicitation check, which is a prohibited device under Section 50(t)(3), is a check that:

(A) is provided to an owner for the purpose of originating a HELOC or to a borrower for the purpose of soliciting additional advances on an existing HELOC;

(B) contains at least one preprinted key payment term, such as the amount or payee; and

(C) is not requested by the borrower or owner.⁸¹

Section 50(t)(3) prohibits a lender from offering a borrower an advance through the use of a credit card, debit card, preprinted solicitation check, or similar device. Section 50(t)(3) does not otherwise prohibit advances. To protect borrowers, HELOCs are subject to the same requirements as traditional home equity loans, such as the 12-day waiting period, the opportunity to rescind the loan, and the required notice that lenders must provide.⁸² In addition, any single debit or advance on a HELOC must be greater than \$4,000.⁸³ While Section 50(t)(3) prohibits the use of a credit card, a debit card, preprinted solicitation check or any similar device to obtain an advance, Section 50(t)(3) does not expressly prohibit, among others, prearranged drafts, convenience checks, or

⁸¹ 7 TEX. ADMIN. CODE § 153.84.

⁸² TEX. CONST. art. XVI, § 50(t)(2).

written transfer instructions.⁸⁴

When interpreting the Constitution, one must begin with the plain language of the Constitution.⁸⁵ The plain language of Section 50(t)(3) specifically identifies prohibited HELOC advance methods (credit cards, debit cards, preprinted solicitation checks and similar devices). Accordingly, the Commissions' interpretation, which identifies permissible HELOC advance methods that are not similar to the prohibited devices, is consistent with the Constitution.

A. Because the Commissions gave effect to the plain language of the Constitution by interpreting "preprinted solicitation check" to mean a check, not requested by the borrower, containing at least one preprinted key payment term, provided for purposes of originating a HELOC or soliciting an advance, the trial court erred in invalidating the interpretation.

The Commissions' interpretation of the term "preprinted solicitation check" is consistent with the Constitution. Section 50(t)(3) does not prohibit all "checks." Rather, Section 50(t)(3) prohibits preprinted solicitation checks. The Constitution, however, does not define the term preprinted solicitation checks. Called upon to interpret the Constitution and provide guidance to parties engaging in home equity transactions, the Commissions interpreted "preprinted solicitation check" to mean a check that is provided to an owner for the purpose of originating a HELOC or to a borrower for the purpose of soliciting additional advances on an existing HELOC, contains at least one preprinted key payment term, and is not requested by the borrower or owner. Each element of the

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

Commissions' interpretation of the term preprinted solicitation check coincides with a term used in the express language of the Constitution:

| Term Used in the Constitution | Interpretation |
|------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------|
| "Preprinted" | Containing at least one preprinted key payment term |
| "Solicitation" | Provided for the purpose of originating a HELOC or additional advances on a HELOC, and is not requested by the borrower or owner |
| "Check" | A check |

Accordingly, the Commissions have interpreted the term preprinted solicitation check in a manner consistent with Section 50(t)(3) and the Court erred in invalidating the Commissions' interpretation.

B. Because the Commissions gave effect to the plain language of the Constitution by identifying direct contact by the borrower, telephonic fund transfers, electronic fund transfers, prearranged drafts, convenience checks, and written transfer instructions as permissible HELOC advance methods, the trial court erred in invalidating the interpretation.

The HELOC advance methods identified by the Commissions are not prohibited by the Constitution. Under the Commissions' interpretation, a borrower may obtain a HELOC advance through one of several ways: (1) contacting the lender directly for an advance; (2) telephonic fund transfers; (3) electronic fund transfers; (4) prearranged drafts; (5) convenience checks; or (6) written transfer instructions. Temporarily setting aside discussion of convenience checks, the other five HELOC advance methods are not

credit cards, debit cards, or preprinted solicitation checks and there is no remotely colorable argument that they should be classified as such.

The question then becomes whether direct contact, telephonic or electronic transfers, prearranged drafts and written transfer instructions are devices "similar" to credit cards, debit cards, or preprinted solicitation checks. The answer is no. The only similarity between any of these methods and credit cards, debit cards, or preprinted solicitation checks is that they are all methods by which funds may be transferred. If, however, all methods by which funds may be transferred constitute devices "similar" to credit cards, debit cards, or preprinted solicitation checks, the exception would swallow the rule. Any such construction strays far from the language of the Constitution. Accordingly, there was no basis for the trial court to invalidate the Commissions' interpretation allowing advances through direct contact with the lender, telephonic fund transfers, electronic fund transfers, prearranged drafts, and written transfer instructions.

Moreover, convenience checks are not similar to credit cards, debit cards, or preprinted solicitation checks. Section 50(t)(3) does not generally prohibit the use of checks to obtain a HELOC advance. To the contrary, Section 50(t)(3) only prohibits "preprinted solicitation checks." The Commissions interpreted "preprinted solicitation check" to mean a check provided to an owner for the purpose of originating a HELOC or to a borrower for the purpose of soliciting additional advances on an existing HELOC, containing at least one preprinted key payment term, that is not requested by the borrower or owner. The Commissions then identified "convenience checks" as a permissible method of obtaining a HELOC advance. While the Commissions did not define the term

"convenience check," one can infer that a convenience check is a check that is not a preprinted solicitation check.⁸⁶ In addition, there is no constitutional requirement that a statute define all words or terms used.⁸⁷

In the trial court, ACORN argued that the permissible HELOC advance methods identified by the Commissions are actually prohibited similar devices under Section 50(t)(3). In support, ACORN argued that under the principle of *ejusdem generis*, which restricts the meaning of general words to the particular designation, Section 50(t)(3) prohibits any device that would "provide advances easily." *Ejusdem generis* does not support such an interpretation, and ACORN's interpretation is inconsistent with the plain language of Section 50(t)(3). First, *ejusdem generis* "provides that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation."⁸⁸

In this case, the particular designation in the Constitution specifically prohibits credit cards, debit cards, or preprinted solicitation checks. Therefore, under *ejusdem generis*, the "similar device" prohibition must mean devices similar to credit cards, debit cards, or preprinted solicitation checks. *Ejusdem generis* does not permit a court to arbitrarily select a single characteristic common to all of the listed items and make that

⁸⁶ *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (holding that where a term is employed in one section of a statute and excluded in another, the term should not be implied where excluded).

⁸⁷ *Rooms With a View, Inc. v. National Mortgage Ass'n*, 7 S.W.3d 840, 845 (Tex. App.—Austin 1999, no pet).

⁸⁸ *Stanford v. Butler*, 181 S.W.2d 269, 272 (Tex. 1944).

the sole focus of the general term. Instead, the focus must remain on devices like credit cards, debit cards, or preprinted solicitation checks, rather than devices that "provide advances easily." Accordingly, the HELOC advance methods identified by the Commissions are not devices similar to credit cards, debit cards, and preprinted solicitation checks, and are not prohibited under Section 50(t)(3).

C. The Commissions' interpretation clarified the Constitution by identifying permissible HELOC advance methods and defining the term "preprinted solicitation check" and, therefore, the trial court erred in declaring the interpretation void for vagueness.

ACORN did not assert a vagueness challenge to the Constitutional provisions identifying prohibited HELOC advance methods. Rather, ACORN asserted a vagueness challenge to the Commissions' interpretation—which clarified the prohibited HELOC advance methods by identifying permissible methods. The sole basis for ACORN's vagueness challenge was the claim that "undefined exceptions [to the prohibition on credit cards, debit cards, preprinted solicitation checks, and similar devices] make this part of the rule unconstitutionally vague."⁸⁹

A statute is unconstitutionally vague if it does not give fair notice of what conduct may be punished and invites arbitrary and discriminatory enforcement by its lack of guidance for those charged with its enforcement.⁹⁰ A statute is not unconstitutionally vague simply because the statute does not define all words or terms used.⁹¹ If words or terms are not defined, they are to be given their plain meaning and read in the context in

⁸⁹ CR 654.

⁹⁰ *Rooms With a View*, 7 S.W.3d at 845.

⁹¹ *See id.*

which they are used.⁹² In this case, the conduct for which a party may be punished is found in the Constitution, not the interpretations issued by the Commissions. Section 50(t)(3) of the Constitution expressly prohibits HELOC advances through "a credit card, debit card, preprinted solicitation check, or similar device." To provide information as to the conduct prohibited under Section 50(t)(3), the Commissions clarified the prohibited devices by defining the term "preprinted solicitation check" and providing specific examples of HELOC advance methods that are not devices similar to credit cards, debit cards, or preprinted solicitation checks. The Commissions' interpretation provides fair notice of what conduct is prohibited by the Constitution by clarifying the Constitution and by providing examples of acceptable HELOC advance methods. Accordingly, the Commissions have provided the type of guidance called for under their constitutional grant of interpretive authority and the interpretation found at 7 TEX. ADMIN. CODE § 153.84(1) is not unconstitutionally vague.

ISSUE 4: The Constitution requires a lender to provide, at the time an extension of credit is made, copies of all documents signed by the owner related to the extension of credit. Because the Commissions' interpretation, which requires the lender to provide copies of all documents signed at closing in connection with the home equity loan, gives effect to the plain language of the Constitution, the trial court erred in invalidating the interpretation.

Under Section 50(a)(6)(Q)(v), a lender must, "at the time the extension of credit is made, provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit." Unlike the broad language found in constitutional provisions pertaining to the fee cap ("any interest") and the 12-day waiting period ("an

⁹² *Griffin Industries v. State*, 171 S.W.3d 414, 418 (Tex. App.—Corpus Christi 2005, no pet.).

application"), the requirement that a lender provide "all documents signed by the owner" is expressly limited to documents "related to the extension of credit." The Commissions interpreted Section 50(a)(6)(Q)(v) as follows:

At closing, the lender must provide the owner with a copy of all documents that are signed at closing in connection with the equity loan. The lender is not required to give the owner copies of documents that were signed by the owner prior to closing, such as those signed during the application process. Because of their nature some documents, for example, a notification of the election of an owner or an owner's spouse not to rescind under the right of rescission must be signed after the date of closing. The lender must provide the owner copies of documents signed after the date of closing within three business days.⁹³

This interpretation is consistent with the Constitution because it requires lenders to provide copies of all documents signed at closing in connection with the equity loan—which are the documents that contain the rights and obligations of the parties to the loan transaction and, therefore, are documents related to the extension of credit.⁹⁴

This interpretation is also consistent with the Fifth Circuit Court of Appeals' interpretation of Section 50(a)(6)(Q)(v). In *Pelt v. U.S. Bank Trust National Association*,⁹⁵ two plaintiffs sued a lender seeking forfeiture of principal and interest on a loan, claiming the lender failed to comply with Section 50(a)(6)(Q)(v) because the lender provided unsigned copies of the loan documents. The case went to trial and the issue

⁹³ 7 TEX. ADMIN. CODE § 153.22.

⁹⁴ In support of its challenge to the oral application interpretation, ACORN argued that the term "application," used in Section 50(a)(6)(M)(i), meant a written application because the prescribed notice in Section 50(g) refers to a "written application." This argument, however, supports the Commissions' interpretation that the documents signed at closing in connection with the equity loan are the "documents signed by the owner related to the extension of credit" because the notice in Section 50(g) states "LOANS DESCRIBED BY SECTION 50(a)(6) . . . MUST . . . PROVIDE THAT YOU RECEIVE A COPY OF ALL DOCUMENTS YOU SIGN AT CLOSING."

regarding the lender's compliance with Section 50(a)(6)(Q)(v) was submitted to the jury.⁹⁶ While deliberating, the jury asked the court whether the Constitution required *signed* copies.⁹⁷ In response, the court instructed the jury that "[the Constitution] does not state that the owner be provided a 'signed copy.'"⁹⁸ The jury ultimately concluded the plaintiffs did not establish a violation of Section 50(a)(6)(Q)(v) and the plaintiffs appealed, arguing that the court erred by instructing the jury that unsigned copies were acceptable under Section 50(a)(6)(Q)(v).⁹⁹

On appeal, the Fifth Circuit Court of Appeals affirmed the district court's judgment. In doing so, the court commented that "the phrase 'signed by the owner' simply identifies which—of the numerous documents *presented at the closing of the home equity loan*—must be copied and given to the borrower."¹⁰⁰ This interpretation by the Fifth Circuit Court of Appeals is similar to the Commissions' interpretation—an interpretation that construes the Constitution in a manner that both provides guidance for lenders and ensures that borrowers receive meaningful information about their loans. Accordingly, the trial court erred in invalidating the Commissions' interpretation.

⁹⁵ 359 F.3d 764 (5th Cir. 2004).

⁹⁶ *Id.* at 766.

⁹⁷ *Id.* at 767.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added).

CONCLUSION

The basis for the Constitution's grant of interpretive authority to the Commissions is well-summarized in the House Research Organization's report on the 2003 home equity loan constitutional amendments:

Home equity lenders in Texas often are uncertain about whether a particular action would violate the Constitution and require them to forfeit the principal on a loan SJR 42 would solve the problem by giving the Finance and Credit Union Commissions the responsibility of clarifying home equity law Another reason for giving interpretive authority to a state agency, as proposed by SJR 42, is to allow the more minor details to be established outside of the Constitution without making that document more unwieldy than necessary.¹⁰¹

The interpretations at issue are consistent with the Constitution and serve to clarify Texas home equity law. Consequently, the trial court erred in invalidating the interpretations and this Court should reverse the judgment of the trial court.

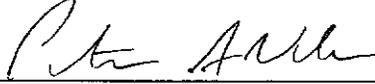
PRAYER

WHEREFORE, Appellant Texas Bankers Association requests that the Court reverse the judgment of the trial court and render judgment for Appellants, the Finance Commission of Texas, the Credit Union Commission of Texas and Texas Bankers Association. Texas Bankers Association further prays for all other relief to which it may be entitled.

¹⁰¹ Bill Analysis, HOUSE RESEARCH ORGANIZATION, 4 (May 23, 2003) SJR 42.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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APPENDIX

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EXHIBIT 1

No. GN 400269

ASSOCIATION OF COMMUNITY)
ORGANIZATIONS FOR REFORM NOW)
(ACORN), VALERIE NORWOOD,)
ELSIE SHOWS, MARYANN)
ROBLES-VALDEZ, BOBBY MARTIN,)
PAMELA COOPER, and CARLOS RIVAS,)

PLAINTIFFS,)

VS.)

FINANCE COMMISSION of TEXAS, and)
CREDIT UNION COMMISSION of TEXAS,)

DEFENDANTS,)

VS.)

TEXAS BANKERS ASSOCIATION,)

DEFENDANT-INTERVENOR.)

IN THE DISTRICT COURT

Filed In The District Court
of Travis County, Texas
on 5-01-06
at 11:51 A.M. *af*
Amalia Rodriguez-Mendoza, Clerk

OF TRAVIS COUNTY, TEXAS

126th JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT AND TEMPORARY STAY ORDER

Plaintiffs challenge the validity of rules adopted by Defendants Finance Commission of Texas and Credit Union Commission of Texas which purport to interpret Article XVI, Section 50(a)(6) of the Texas Constitution. Defendants along with Intervenor Texas Bankers Association defended the rules. There are no genuine issues of material fact, and the parties are entitled to judgment as a matter of law. The Court has considered all pleadings, motions, cross motions, responses, replies and other materials filed with the Court. After consideration of these materials and considering arguments of counsel, the Court ORDERS and declares the following rules invalid or denies Plaintiffs relief:

- 1. Rules 7 TAC 153.1(11), 153.5(3), (4), (6), (8), (9), and (12) are invalid;



2. Rule 7 TAC 153.12(2) is invalid as to orally submitted applications, and not invalid as to electronically submitted applications;

3. Rule 7 TAC 153.13(4) is invalid;

4. Plaintiffs' challenge to Rules 7 TAC 153.15(2) and (3) is denied;

5. Rule 7 TAC 153.18(3) is invalid;

6. Rule 7 TAC 153.20 is invalid;

7. Rule 7 TAC 153.22 is invalid;

8. Plaintiffs' challenge to Rules 7 TAC 153.51(1) and (3) is denied; and

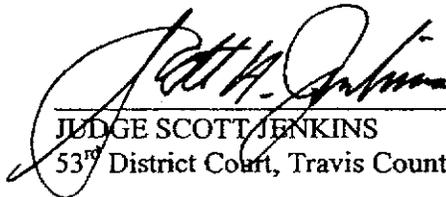
9. Rule 7 TAC 153.84(1) is invalid.

It is further ORDERED that this judgment is stayed in all respects for thirty days, and the rules declared to be invalid by this judgment remain in effect during that time regardless of whether this judgment is superseded by the posting of a bond, filing a notice of appeal or other action of a party.

All other relief requested by any party is denied. Costs are taxed against Defendants.

This order disposes of all claims and all parties and is final and appealable.

Signed this 29th day of April, 2006.



JUDGE SCOTT JENKINS
53rd District Court, Travis County, Texas

EXHIBIT 2

The Texas Constitution

Article 16 - GENERAL PROVISIONS

Section 50 - HOMESTEAD; PROTECTION FROM FORCED SALE; MORTGAGES, TRUST DEEDS, AND LIENS

- (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:
- (1) the purchase money thereof, or a part of such purchase money;
 - (2) the taxes due thereon;
 - (3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding;
 - (4) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;
 - (5) work and material used in constructing new improvements thereon, if contracted for in writing, or work and material used to repair or renovate existing improvements thereon if:
 - (A) the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead;
 - (B) the contract for the work and material is not executed by the owner or the owner's spouse before the fifth day after the owner makes written application for any extension of credit for the work and material, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing;
 - (C) the contract for the work and material expressly provides that the owner may rescind the contract without penalty or charge within three days after the execution of the contract by all parties, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing; and
 - (D) the contract for the work and material is executed by the owner and the owner's spouse only at the office of a third-party lender making an extension of credit for the work and material, an attorney at law, or a title company;
 - (6) an extension of credit that:
 - (A) is secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner's spouse;
 - (B) is of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made;
 - (C) is without recourse for personal liability against each owner and the spouse of each owner, unless the owner or spouse obtained the extension of credit by actual fraud;
 - (D) is secured by a lien that may be foreclosed upon only by a court order;
 - (E) does not require the owner or the owner's spouse to pay, in addition to any interest, fees

to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit;

(F) is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time unless the open-end account is a home equity line of credit;

(G) is payable in advance without penalty or other charge;

(H) is not secured by any additional real or personal property other than the homestead;

(I) is not secured by homestead property designated for agricultural use as provided by statutes governing property tax, unless such homestead property is used primarily for the production of milk;

(J) may not be accelerated because of a decrease in the market value of the homestead or because of the owner's default under other indebtedness not secured by a prior valid encumbrance against the homestead;

(K) is the only debt secured by the homestead at the time the extension of credit is made unless the other debt was made for a purpose described by Subsections (a)(1)-(a)(5) or Subsection (a)(8) of this section;

(L) is scheduled to be repaid:

(i) in substantially equal successive periodic installments, not more often than every 14 days and not less often than monthly, beginning no later than two months from the date the extension of credit is made, each of which equals or exceeds the amount of accrued interest as of the date of the scheduled installment; or

(ii) if the extension of credit is a home equity line of credit, in periodic payments described under Subsection (t)(8) of this section;

(M) is closed not before:

(i) the 12th day after the later of the date that the owner of the homestead submits an application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by Subsection (g) of this section;

(ii) one business day after the date that the owner of the homestead receives a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the date of closing; and

(iii) the first anniversary of the closing date of any other extension of credit described by Subsection (a)(6) of this section secured by the same homestead property, except a refinance described by Paragraph (Q)(x)(f) of this subdivision;

(N) is closed only at the office of the lender, an attorney at law, or a title company;

(O) permits a lender to contract for and receive any fixed or variable rate of interest authorized under statute;

(P) is made by one of the following that has not been found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the applicants for the loans reside or the property proposed to secure the loans is located in a certain area:

(i) a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States;

(ii) a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans;

(iii) a person licensed to make regulated loans, as provided by statute of this state;

(iv) a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase;

(v) a person who is related to the homestead property owner within the second degree of affinity or consanguinity; or

(vi) a person regulated by this state as a mortgage broker; and

(Q) is made on the condition that:

(i) the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender;

(ii) the owner of the homestead not assign wages as security for the extension of credit;

(iii) the owner of the homestead not sign any instrument in which blanks are left to be filled in;

(iv) the owner of the homestead not sign a confession of judgment or power of attorney to the lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding;

(v) the lender, at the time the extension of credit is made, provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit;

(vi) the security instruments securing the extension of credit contain a disclosure that the extension of credit is the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution;

(vii) within a reasonable time after termination and full payment of the extension of credit, the lender cancel and return the promissory note to the owner of the homestead and give the owner, in recordable form, a release of the lien securing the extension of credit or a copy of an endorsement and assignment of the lien to a lender that is refinancing the extension of credit;

(viii) the owner of the homestead and any spouse of the owner may, within three days after the extension of credit is made, rescind the extension of credit without penalty or charge;

(ix) the owner of the homestead and the lender sign a written acknowledgment as to the fair market value of the homestead property on the date the extension of credit is made;

(x) except as provided by Subparagraph (xi) of this paragraph, the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply by:

(a) paying to the owner an amount equal to any overcharge paid by the owner under or related to the extension of credit if the owner has paid an amount that exceeds an amount stated in the applicable Paragraph (E), (G), or (O) of this subdivision;

(b) sending the owner a written acknowledgement that the lien is valid only in the amount that the extension of credit does not exceed the percentage described by Paragraph (B) of this subdivision, if applicable, or is not secured by property described under Paragraph (H) or (I) of this subdivision, if applicable;

(c) sending the owner a written notice modifying any other amount, percentage, term, or other provision prohibited by this section to a permitted amount, percentage, term, or other provision and adjusting the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by this section and is not subject to any other term or provision prohibited by this section;

(d) delivering the required documents to the borrower if the lender fails to comply with Subparagraph (v) of this paragraph or obtaining the appropriate signatures if the lender fails to comply with Subparagraph (ix) of this paragraph;

(e) sending the owner a written acknowledgement, if the failure to comply is prohibited by Paragraph (K) of this subdivision, that the accrual of interest and all of the owner's obligations under the extension of credit are abated while any prior lien prohibited under Paragraph (K) remains secured by the homestead; or

(f) if the failure to comply cannot be cured under Subparagraphs (x)(a)-(e) of this paragraph, curing the failure to comply by a refund or credit to the owner of \$1,000 and

offering the owner the right to refinance the extension of credit with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original extension of credit with any modifications necessary to comply with this section or on terms on which the owner and the lender or holder otherwise agree that comply with this section; and

(xi) the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the extension of credit is made by a person other than a person described under Paragraph (P) of this subdivision or if the lien was not created under a written agreement with the consent of each owner and each owner's spouse, unless each owner and each owner's spouse who did not initially consent subsequently consents;

(7) a reverse mortgage; or

(8) the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property, including the refinance of the purchase price of the manufactured home, the cost of installing the manufactured home on the real property, and the refinance of the purchase price of the real property.

(b) An owner or claimant of the property claimed as homestead may not sell or abandon the homestead without the consent of each owner and the spouse of each owner, given in such manner as may be prescribed by law.

(c) No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section, whether such mortgage, trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

(d) A purchaser or lender for value without actual knowledge may conclusively rely on an affidavit that designates other property as the homestead of the affiant and that states that the property to be conveyed or encumbered is not the homestead of the affiant.

(e) A refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)-(a)(5) that includes the advance of additional funds may not be secured by a valid lien against the homestead unless:

(1) the refinance of the debt is an extension of credit described by Subsection (a)(6) of this section; or

(2) the advance of all the additional funds is for reasonable costs necessary to refinance such debt or for a purpose described by Subsection (a)(2), (a)(3), or (a)(5) of this section.

(f) A refinance of debt secured by the homestead, any portion of which is an extension of credit described by Subsection (a)(6) of this section, may not be secured by a valid lien against the homestead unless the refinance of the debt is an extension of credit described by Subsection (a)(6) or (a)(7) of this section.

(g) An extension of credit described by Subsection (a)(6) of this section may be secured by a valid lien against homestead property if the extension of credit is not closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument:

"NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

"SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:

"(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER'S SPOUSE;

- “(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;
- “(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;
- “(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;
- “(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 3 PERCENT OF THE LOAN AMOUNT;
- “(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME UNLESS IT IS A HOME EQUITY LINE OF CREDIT;
- “(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;
- “(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;
- “(I) THE LOAN MAY NOT BE SECURED BY AGRICULTURAL HOMESTEAD PROPERTY, UNLESS THE AGRICULTURAL HOMESTEAD PROPERTY IS USED PRIMARILY FOR THE PRODUCTION OF MILK;
- “(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;
- “(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;
- “(L) THE LOAN MUST BE SCHEDULED TO BE REPAYED IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;
- “(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A WRITTEN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING DATE OF THE OTHER LOAN;
- “(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;
- “(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;
- “(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;
- “(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:
- “(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT EXCEPT A DEBT THAT IS SECURED BY YOUR HOME OR OWED TO ANOTHER LENDER;
 - “(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;
 - “(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS LEFT TO BE FILLED IN;
 - “(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN

A LEGAL PROCEEDING ON YOUR BEHALF;

“(5) PROVIDE THAT YOU RECEIVE A COPY OF ALL DOCUMENTS YOU SIGN AT CLOSING;

“(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

“(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;

“(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

“(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

“(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER’S OBLIGATIONS UNLESS THE LENDER CURES THE FAILURE TO COMPLY AS PROVIDED BY SECTION 50(a)(6)(Q)(x), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND

“(R) IF THE LOAN IS A HOME EQUITY LINE OF CREDIT:

“(1) YOU MAY REQUEST ADVANCES, REPAY MONEY, AND REBORROW MONEY UNDER THE LINE OF CREDIT;

“(2) EACH ADVANCE UNDER THE LINE OF CREDIT MUST BE IN AN AMOUNT OF AT LEAST \$4,000;

“(3) YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, SOLICITATION CHECK, OR SIMILAR DEVICE TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT;

“(4) ANY FEES THE LENDER CHARGES MAY BE CHARGED AND COLLECTED ONLY AT THE TIME THE LINE OF CREDIT IS ESTABLISHED AND THE LENDER MAY NOT CHARGE A FEE IN CONNECTION WITH ANY ADVANCE;

“(5) THE MAXIMUM PRINCIPAL AMOUNT THAT MAY BE EXTENDED, WHEN ADDED TO ALL OTHER DEBTS SECURED BY YOUR HOME, MAY NOT EXCEED 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LINE OF CREDIT IS ESTABLISHED;

“(6) IF THE PRINCIPAL BALANCE UNDER THE LINE OF CREDIT AT ANY TIME EXCEEDS 50 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME, AS DETERMINED ON THE DATE THE LINE OF CREDIT IS ESTABLISHED, YOU MAY NOT CONTINUE TO REQUEST ADVANCES UNDER THE LINE OF CREDIT UNTIL THE BALANCE IS LESS THAN 50 PERCENT OF THE FAIR MARKET VALUE; AND

“(7) THE LENDER MAY NOT UNILATERALLY AMEND THE TERMS OF THE LINE OF CREDIT.

“THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE.”

If the discussions with the borrower are conducted primarily in a language other than English, the lender shall, before closing, provide an additional copy of the notice translated into the written language in which the discussions were conducted.

(h) A lender or assignee for value may conclusively rely on the written acknowledgment as to the fair market value of the homestead property made in accordance with Subsection (a) (6)(Q)(ix) of this section if:

(1) the value acknowledged to is the value estimate in an appraisal or evaluation prepared in accordance with a state or federal requirement applicable to an extension of credit under Subsection (a)(6); and

(2) the lender or assignee does not have actual knowledge at the time of the payment of value or advance of funds by the lender or assignee that the fair market value stated in the written acknowledgment was incorrect.

(i) This subsection shall not affect or impair any right of the borrower to recover damages from the lender or assignee under applicable law for wrongful foreclosure. A purchaser for value without actual knowledge may conclusively presume that a lien securing an extension of credit described by Subsection (a)(6) of this section was a valid lien securing the extension of credit with homestead property if:

(1) the security instruments securing the extension of credit contain a disclosure that the extension of credit secured by the lien was the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution;

(2) the purchaser acquires the title to the property pursuant to or after the foreclosure of the voluntary lien; and

(3) the purchaser is not the lender or assignee under the extension of credit.

(j) Subsection (a)(6) and Subsections (e)-(i) of this section are not severable, and none of those provisions would have been enacted without the others. If any of those provisions are held to be preempted by the laws of the United States, all of those provisions are invalid.

This subsection shall not apply to any lien or extension of credit made after January 1, 1998, and before the date any provision under Subsection (a)(6) or Subsections (e)-(i) is held to be preempted.

(k) "Reverse mortgage" means an extension of credit:

(1) that is secured by a voluntary lien on homestead property created by a written agreement with the consent of each owner and each owner's spouse;

(2) that is made to a person who is or whose spouse is 62 years or older;

(3) that is made without recourse for personal liability against each owner and the spouse of each owner;

(4) under which advances are provided to a borrower based on the equity in a borrower's homestead;

(5) that does not permit the lender to reduce the amount or number of advances because of an adjustment in the interest rate if periodic advances are to be made;

(6) that requires no payment of principal or interest until:

(A) all borrowers have died;

(B) the homestead property securing the loan is sold or otherwise transferred;

(C) all borrowers cease occupying the homestead property for a period of longer than 12 consecutive months without prior written approval from the lender; or

(D) the borrower:

(i) defaults on an obligation specified in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property;

(ii) commits actual fraud in connection with the loan; or

(iii) fails to maintain the priority of the lender's lien on the homestead property, after the lender gives notice to the borrower, by promptly discharging any lien that has priority or may obtain priority over the lender's lien within 10 days after the date the borrower receives the notice, unless the borrower:

(a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to the lender;

(b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings so as to prevent the enforcement of the lien or forfeiture of any part of the homestead property; or

(c) secures from the holder of the lien an agreement satisfactory to the lender subordinating the lien to all amounts secured by the lender's lien on the homestead property;

(7) that provides that if the lender fails to make loan advances as required in the loan

documents and if the lender fails to cure the default as required in the loan documents after notice from the borrower, the lender forfeits all principal and interest of the reverse mortgage, provided, however, that this subdivision does not apply when a governmental agency or instrumentality takes an assignment of the loan in order to cure the default;

(8) that is not made unless the owner of the homestead attests in writing that the owner received counseling regarding the advisability and availability of reverse mortgages and other financial alternatives;

(9) that requires the lender, at the time the loan is made, to disclose to the borrower by written notice the specific provisions contained in Subdivision (6) of this subsection under which the borrower is required to repay the loan;

(10) that does not permit the lender to commence foreclosure until the lender gives notice to the borrower, in the manner provided for a notice by mail related to the foreclosure of liens under Subsection (a)(6) of this section, that a ground for foreclosure exists and gives the borrower at least 30 days, or at least 20 days in the event of a default under Subdivision (6)(D)(iii) of this subsection, to:

(A) remedy the condition creating the ground for foreclosure;

(B) pay the debt secured by the homestead property from proceeds of the sale of the homestead property by the borrower or from any other sources; or

(C) convey the homestead property to the lender by a deed in lieu of foreclosure; and

(11) that is secured by a lien that may be foreclosed upon only by a court order, if the foreclosure is for a ground other than a ground stated by Subdivision (6)(A) or (B) of this subsection.

(l) Advances made under a reverse mortgage and interest on those advances have priority over a lien filed for record in the real property records in the county where the homestead property is located after the reverse mortgage is filed for record in the real property records of that county.

(m) A reverse mortgage may provide for an interest rate that is fixed or adjustable and may also provide for interest that is contingent on appreciation in the fair market value of the homestead property. Although payment of principal or interest shall not be required under a reverse mortgage until the entire loan becomes due and payable, interest may accrue and be compounded during the term of the loan as provided by the reverse mortgage loan agreement.

(n) A reverse mortgage that is secured by a valid lien against homestead property may be made or acquired without regard to the following provisions of any other law of this state:

(1) a limitation on the purpose and use of future advances or other mortgage proceeds;

(2) a limitation on future advances to a term of years or a limitation on the term of open-end account advances;

(3) a limitation on the term during which future advances take priority over intervening advances;

(4) a requirement that a maximum loan amount be stated in the reverse mortgage loan documents;

(5) a prohibition on balloon payments;

(6) a prohibition on compound interest and interest on interest;

(7) a prohibition on contracting for, charging, or receiving any rate of interest authorized by any law of this state authorizing a lender to contract for a rate of interest; and

(8) a requirement that a percentage of the reverse mortgage proceeds be advanced before the assignment of the reverse mortgage.

(o) For the purposes of determining eligibility under any statute relating to payments, allowances, benefits, or services provided on a means-tested basis by this state, including supplemental security income, low-income energy assistance, property tax relief, medical assistance, and general assistance:

(1) reverse mortgage loan advances made to a borrower are considered proceeds from a loan and not income; and

(2) undisbursed funds under a reverse mortgage loan are considered equity in a borrower's home and not proceeds from a loan.

(p) The advances made on a reverse mortgage loan under which more than one advance is made must be made according to the terms established by the loan documents by one or more of the following methods:

(1) an initial advance at any time and future advances at regular intervals;

(2) an initial advance at any time and future advances at regular intervals in which the amounts advanced may be reduced, for one or more advances, at the request of the borrower;

(3) an initial advance at any time and future advances at times and in amounts requested by the borrower until the credit limit established by the loan documents is reached;

(4) an initial advance at any time, future advances at times and in amounts requested by the borrower until the credit limit established by the loan documents is reached, and subsequent advances at times and in amounts requested by the borrower according to the terms established by the loan documents to the extent that the outstanding balance is repaid; or

(5) at any time by the lender, on behalf of the borrower, if the borrower fails to timely pay any of the following that the borrower is obligated to pay under the loan documents to the extent necessary to protect the lender's interest in or the value of the homestead property:

(A) taxes;

(B) insurance;

(C) costs of repairs or maintenance performed by a person or company that is not an employee of the lender or a person or company that directly or indirectly controls, is controlled by, or is under common control with the lender;

(D) assessments levied against the homestead property; and

(E) any lien that has, or may obtain, priority over the lender's lien as it is established in the loan documents.

(q) To the extent that any statutes of this state, including without limitation, Section 41.001 of the Texas Property Code, purport to limit encumbrances that may properly be fixed on homestead property in a manner that does not permit encumbrances for extensions of credit described in Subsection (a)(6) or (a)(7) of this section, the same shall be superseded to the extent that such encumbrances shall be permitted to be fixed upon homestead property in the manner provided for by this amendment.

(r) The supreme court shall promulgate rules of civil procedure for expedited foreclosure proceedings related to the foreclosure of liens under Subsection (a)(6) of this section and to foreclosure of a reverse mortgage lien that requires a court order.

(s) The Finance Commission of Texas shall appoint a director to conduct research on the availability, quality, and prices of financial services and research the practices of business entities in the state that provide financial services under this section. The director shall collect information and produce reports on lending activity of those making loans under this section. The director shall report his or her findings to the legislature not later than December 1 of each year.

(t) A home equity line of credit is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which:

(1) the owner requests advances, repays money, and reborrows money;

(2) any single debit or advance is not less than \$4,000;

(3) the owner does not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance;

(4) any fees described by Subsection (a)(6)(E) of this section are charged and collected only at the time the extension of credit is established and no fee is charged or collected in

connection with any debit or advance;

(5) the maximum principal amount that may be extended under the account, when added to the aggregate total of the outstanding principal balances of all indebtedness secured by the homestead on the date the extension of credit is established, does not exceed an amount described under Subsection (a)(6)(B) of this section;

(6) no additional debits or advances are made if the total principal amount outstanding exceeds an amount equal to 50 percent of the fair market value of the homestead as determined on the date the account is established;

(7) the lender or holder may not unilaterally amend the extension of credit; and

(8) repayment is to be made in regular periodic installments, not more often than every 14 days and not less often than monthly, beginning not later than two months from the date the extension of credit is established, and:

(A) during the period during which the owner may request advances, each installment equals or exceeds the amount of accrued interest; and

(B) after the period during which the owner may request advances, installments are substantially equal.

(u) The legislature may by statute delegate one or more state agencies the power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t), of this section. An act or omission does not violate a provision included in those subsections if the act or omission conforms to an interpretation of the provision that is:

(1) in effect at the time of the act or omission; and

(2) made by a state agency to which the power of interpretation is delegated as provided by this subsection or by an appellate court of this state or the United States.

(v) A reverse mortgage must provide that:

(1) the owner does not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance;

(2) after the time the extension of credit is established, no transaction fee is charged or collected solely in connection with any debit or advance; and

(3) the lender or holder may not unilaterally amend the extension of credit. (Amended Nov. 6, 1973, and Nov. 7, 1995; Subsecs. (a)-(d) amended and (e)-(s) added Nov. 4, 1997; Subsecs. (k), (p), and (r) amended Nov. 2, 1999; Subsec. (a) amended Nov. 6, 2001; Subsecs. (a), (f), and (g) amended and (t) and (u) added Sept. 13, 2003; Subsec. (p) amended and (v) added Nov. 8, 2005.)



EXHIBIT 3

Texas Administrative Code

TITLE 7 **BANKING AND SECURITIES**
PART 8 **JOINT FINANCIAL REGULATORY AGENCIES**
CHAPTER 153 **HOME EQUITY LENDING**

Rules

- §153.1 Definitions
- §153.2 Voluntary Lien: Section 50(a)(6)(A)
- §153.3 Limitation on Equity Loan Amount: Section 50(a)(6)(B)
- §153.4 Nonrecourse: Section 50(a)(6)(C)
- §153.5 Three percent fee limitation: Section 50(a)(6)(E)
- §153.7 Prohibition on Prepayment Penalties: Section 50(a)(6)(G)
- §153.8 Security of the Equity Loan: Section 50(a)(6)(H)
- §153.9 Acceleration: Section 50(a)(6)(J)
- §153.10 Number of Loans: Section 50(a)(6)(K)
- §153.11 Repayment Schedule: Section 50(a)(6)(L)(i)
- §153.12 Closing Date: Section 50(a)(6)(M)(i)
- §153.13 Preclosing Disclosures: Section 50(a)(6)(M)(ii)
- §153.14 One Year Prohibition: Section 50(a)(6)(M)(iii)
- §153.15 Location of Closing: Section 50(a)(6)(N)
- §153.16 Rate of Interest: Section 50(a)(6)(O)
- §153.17 Authorized Lenders: Section 50(a)(6)(P)
- §153.18 Limitation on Application of Proceeds: Section 50(a)(6)(Q)(i)
- §153.20 No Blanks in Any Instrument: Section 50(a)(6)(Q)(iii)
- §153.22 Copies of Documents: Section 50(a)(6)(Q)(v)
- §153.24 Release of Lien: Section 50(a)(6)(Q)(vii)
- §153.25 Right of Rescission: Section 50(a)(6)(Q)(viii)
- §153.41 Refinance of a Debt Secured by a Homestead: Section 50(e)
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- §153.82 Owner Requests for HELOC Advance: Section 50(t)(1)
- §153.84 Restrictions on Devices and Methods to Obtain a HELOC Advance: Section 50(t)(3)
- §153.85 Time the Extension of Credit is Established: Section 50(t)(4)
- §153.86 Maximum Principal Amount Extended under a HELOC: Section 50(t)(5)
- §153.87 Maximum Principal Amount of Additional Advances under a HELOC: Section 50(t)(6)
- §153.88 Repayment Terms of a HELOC: Section 50(t)(8)
- §153.91 Adequate Notice of Failure to Comply
- §153.92 Counting the 60-Day Cure Period
- §153.93 Methods of Notification
- §153.94 Methods of Curing a Violation Under Section 50(a)(6)(Q)(x)(a) - (e)

§153.95 Cure a Violation Under Section 50(a)(6)(Q)(x)

§153.96 Correcting Failures Under Section 50(a)(6)(Q)(x)(f)

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TITLE 7

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CHAPTER 153

HOME EQUITY LENDING

RULE §153.1

Definitions

Any reference to Section 50 in this interpretation refers to Article XVI, Texas Constitution, unless otherwise noted. These words and terms have the following meanings when used in this section, unless the context indicates otherwise:

- (1) Balloon--an installment that is more than an amount equal to twice the average of all installments scheduled before that installment.
- (2) Business Day--All calendar days except Sundays and these federal legal public holidays: New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.
- (3) Closed or closing--the date when each owner and the spouse of each owner signs the equity loan agreement or the act of signing the equity loan agreement by each owner and the spouse of each owner.
- (4) Consumer Disclosure--The written notice contained in Section 50(g) that must be provided to the owner at least 12 days before the date the extension of credit is made.
- (5) Cross-default provision--a provision in a loan agreement that puts the borrower in default if the borrower defaults on another obligation.
- (6) Date the extension of credit is made--the date on which the closing of the equity loan occurs.
- (7) Equity loan--An extension of credit as defined and authorized under the provisions of Section 50 (a)(6).
- (8) Equity loan agreement--the documents evidencing the agreement between the parties of an equity loan.
- (9) Fair Market Value--the fair market value of the homestead as determined on the date that the loan is closed.
- (10) Force-placed insurance--insurance purchased by the lender on the homestead when required insurance on the homestead is not maintained in accordance with the equity loan agreement.
- (11) Interest--interest as defined in the Texas Finance Code §301.002(4) and as interpreted by the courts.
- (12) Lockout provision--a provision in a loan agreement that prohibits a borrower from paying the loan early.
- (13) Owner--A person who has the right to possess, use, and convey, individually or with the joinder

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TITLE 7**BANKING AND SECURITIES****PART 8****JOINT FINANCIAL REGULATORY AGENCIES****CHAPTER 153****HOME EQUITY LENDING****RULE §153.5****Three percent fee limitation: Section 50(a)(6)(E)**

An equity loan must not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit.

(1) **Optional Charges.** Charges paid by an owner or an owner's spouse at their sole discretion are not fees subject to the three percent fee limitation. Charges that are not imposed or required by the lender, but that are optional, are not fees subject to the three percent limitation. The use of the word "require" in Section 50(a)(6)(E) means that optional charges are not fees subject to the three percent limitation.

(2) **Optional Insurance.** Insurance coverage premiums paid by an owner or an owner's spouse that are at their sole discretion are not fees subject to the three percent limitation. Examples of these charges may include credit life and credit accident and health insurance that are voluntarily purchased by the owner or the owner's spouse.

(3) **Charges that are Interest.** Charges an owner or an owner's spouse is required to pay that constitute interest under the law, for example per diem interest and points, are not fees subject to the three percent limitation.

(4) **Charges that are not Interest.** Charges an owner or an owner's spouse is required to pay that are not interest are fees subject to the three percent limitation.

(5) **Charges Absorbed by Lender.** Charges a lender absorbs, and does not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the three percent limitation.

(6) **Charges to Originate.** Charges an owner or an owner's spouse is required to pay to originate an equity loan that are not interest are fees subject to the three percent limitation.

(7) **Charges Paid to Third Parties.** Charges an owner or an owner's spouse is required to pay to third parties for separate and additional consideration for activities relating to originating a loan are fees subject to the three percent limitation. Charges those third parties absorb, and do not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the three percent limitation. Examples of these charges include attorneys' fees for document preparation and mortgage brokers' fees to the extent authorized by applicable law.

(8) **Charges to Evaluate.** Charges an owner or an owner's spouse is required to pay to evaluate the credit decision for an equity loan, that are not interest, are fees subject to the three percent limitation. Examples of these charges include fees collected to cover the expenses of a credit report, survey, flood zone determination, tax certificate, title report, inspection, or appraisal.

(9) Charges to Maintain. Charges paid by an owner or an owner's spouse at the inception of an equity loan to maintain the loan that are not interest are fees subject to the three percent limitation. Charges that are not interest that an owner pays at the inception of an equity loan to maintain the equity loan, or that are customarily paid at the inception of an equity loan to maintain the equity loan, but are deferred for later payment after closing, are fees subject to the three percent limitation.

(10) Charges to Record. Charges an owner or an owner's spouse is required to pay for the purpose of recording equity loan documents in the official public record by public officials are fees subject to the three percent limitation.

(11) Charges to Insure an Equity Loan. Premiums an owner or an owner's spouse is required to pay to insure an equity loan are fees subject to the three percent limitation. Examples of these charges include title insurance and mortgage insurance protection.

(12) Charges to Service. Charges paid by an owner or an owner's spouse at the inception of an equity loan for a party to service the loan that are not interest are fees subject to the three percent limitation. Charges that are not interest that an owner pays at the inception of an equity loan to service the equity loan, or that are customarily paid at the inception of an equity loan to service the equity loan, but are deferred for later payment after closing, are fees subject to the three percent limitation.

(13) Secondary Mortgage Loans. A lender making an equity loan that is a secondary mortgage loan under Chapter 342 of the Texas Finance Code may charge only those fees permitted in TEX. FIN. CODE, §§342.307, 342.308, and 342.502. A lender must comply with the provisions of Chapter 342 of the Texas Finance Code and the constitutional restrictions on fees in connection with a secondary mortgage loan made under Chapter 342 of the Texas Finance Code.

(14) Escrow Funds. A lender may provide escrow services for an equity loan. Because funds tendered by an owner or an owner's spouse into an escrow account remain the property of the owner or the owner's spouse those funds are not fees subject to the three percent limitation. Examples of escrow funds include account funds collected to pay taxes, insurance premiums, maintenance fees, or homeowner's association assessments. A lender must not contract for a right of offset against escrow funds pursuant to Section 50(a)(6)(H).

(15) Subsequent Events. The three percent limitation pertains to fees paid or contracted for by an owner or owner's spouse at the inception or at the closing of an equity loan. On the date the equity loan is closed an owner or an owner's spouse may agree to perform certain promises during the term of the equity loan. Failure to perform an obligation of an equity loan may trigger the assessment of costs to the owner or owner's spouse. The assessment of costs is a subsequent event triggered by the failure of the owner's or owner's spouse to perform under the equity loan agreement and is not a fee subject to the three percent limitation. Examples of subsequent event costs include contractually permitted charges for force-placed homeowner's insurance costs, returned check fees, debt collection costs, late fees, and costs associated with foreclosure.

(16) Property Insurance Premiums. Premiums an owner or an owner's spouse is required to pay to purchase homeowner's insurance coverage are not fees subject to the three percent limitation. Examples of property insurance premiums include fire and extended coverage insurance and flood insurance. Failure to maintain this insurance is generally a default provision of the equity loan agreement and not a condition of the extension of credit. The lender may collect and escrow premiums for this insurance and include the premium in the periodic payment amount or principal amount. If the lender sells insurance to the owner, the lender must comply with applicable law concerning the sale of insurance in

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RULE §153.12

Closing Date: Section 50(a)(6)(M)(i)

An equity loan may not be closed before the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure. For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the date the lender provides the owner a copy of the required consumer disclosure is the first day of the 12-day waiting period. The equity loan may be closed at any time on or after the 12th calendar day after the date the consumer disclosure is provided to the owner.

(1) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender.

(2) A loan application may be given orally or electronically.

Source Note: The provisions of this §153.12 adopted to be effective January 8, 2004, 29 TexReg 84

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RULE §153.22

Copies of Documents: Section 50(a)(6)(Q)(v)

At closing, the lender must provide the owner with a copy of all documents that are signed at closing in connection with the equity loan. The lender is not required to give the owner copies of documents that were signed by the owner prior to closing, such as those signed during the application process. Because of their nature some documents, for example, a notification of the election of an owner or an owner's spouse not to rescind under the right of rescission must be signed after the date of closing. The lender must provide the owner copies of documents signed after the date of closing within three business days.

Source Note: The provisions of this §153.22 adopted to be effective January 8, 2004, 29 TexReg 84

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TITLE 7**BANKING AND SECURITIES****PART 8****JOINT FINANCIAL REGULATORY AGENCIES****CHAPTER 153****HOME EQUITY LENDING****RULE §153.84****Restrictions on Devices and Methods to Obtain a HELOC Advance: Section 50(t)(3)**

A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which an owner is prohibited from using a credit card, debit card, preprinted solicitation check, or similar device to obtain a HELOC advance.

(1) A lender may offer one or more non-prohibited devices or methods for use by the owner to request an advance. Permissible methods include contacting the lender directly for an advance, telephonic fund transfers, and electronic fund transfers. Examples of devices that are not prohibited similar devices include prearranged drafts, convenience checks, or written transfer instructions. Regardless of the permissible method or device used to obtain a HELOC advance, the amount of the advance must comply with:

- (A) the advance requirements in Section 50(t)(2);
- (B) the loan to value limits in Section 50(t)(5); and
- (C) the debit or advance limits in Section 50(t)(6).

(2) An owner may, but is not required to, make in-person contact with the lender to obtain a HELOC advance.

(3) A credit card, which is a prohibited device under Section 50(t)(3), is a card that may be used for personal, family, or household use to debit an open-end account.

(4) A preprinted solicitation check, which is a prohibited device under Section 50(t)(3), is a check that:

- (A) is provided to an owner for the purpose of originating a HELOC or to a borrower for the purpose of soliciting additional advances on an existing HELOC;
- (B) contains at least one preprinted key payment term, such as the amount or payee; and
- (C) is not requested by the borrower or owner.

Source Note: The provisions of this §153.84 adopted to be effective March 11, 2004, 29 TexReg 2306

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