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To: Clients and Friends

From: David F. Dulock

Subject: Home Equity Lending Interpretation Amendments Adopted by the Finance Commission of Texas and Texas Credit Union Commission

Effective March 29, 2018, the Finance Commission of Texas and the Texas Credit Union Commission (herein "Commissions") adopted amendments to the following home equity lending Interpretations: §§153.1, 153.5, 153.14, 153.17, 153.84, and 153.86; adopted new §153.45; and adopted the repeal of §153.87. These adopted changes to the Home Equity Lending Interpretations are published in the March 23, 2018, issue of the *Texas Register* (43 TexReg 1839, *click here*).

The main purpose of the Commissions' adopted amendments to the Interpretations noted above is to implement Senate Joint Resolution 60 (SJR 60), passed by the 2017 regular session of the Texas Legislature and adopted by Texas voters at an election held November 7, 2017. SJR 60 amends the following subsections of Section 50, Article XVI, of the Texas Constitution (Section 50): amends subsections 50(a)(6)(E), (P)(i) and (vi), and (Q)(x)((b); repeals subsection 50(a)(6)(I); amends subsections 50(f) and (g); adds subsection 50(f-1); and repeals subsection 50(t)(6). SJR 60 applies to home equity loans made, and existing home equity loans refinanced, on or after January 1, 2018.

The amendments to Section 50 made by SJR 60 are summarized as follows:

1. SJR 60 amends subsection 50(a)(6)(E) by replacing the current three percent fee limitation with a two percent limitation, and specifying that fees for the following items are excluded from the limitation if they meet certain specified conditions: bona fide discount points; appraisal; property survey; mortgagee title insurance; mortgagee title insurance endorsements; and title report.
2. SJR 60 repeals subsection 50(a)(6)(I), which prohibits a home equity loan being secured by homestead property designated for agricultural use.
3. SJR 60 amends subsection 50(a)(6)(P) by adding certain subsidiaries of the named depository institutions to the list of lenders authorized to make home equity loans, and replacing a reference to "mortgage broker" with "mortgage banker or mortgage company" as an authorized lender.
4. SJR 60 amends the home equity cure provision in subsection 50(a)(6)(Q)(x)(b) by deleting the reference to Paragraph (I) to conform to SJR 60's repeal of subsection 50(a)(6)(I).
5. SJR 60 adds subsection 50(f)(2) to allow a home equity loan to be refinanced as a non-home-equity loan under subsection 50(a)(4) if four conditions are met: a one-year timing limitation, a limitation on advance of additional funds, an 80% loan-to-value limitation, and a required disclosure to the homestead owner.
6. SJR 60 adds subsection 50(f-1) providing that an affidavit by the owner or owner's spouse acknowledging that the requirements of amended subsection 50(f) have been met conclusively establishes that the refinanced home equity loan is non-home-equity loan under subsection 50(a)(4).

(15 pages)

7. SJR 60 amends subsection 50(g) to make conforming changes to the required 12-day consumer disclosure required by the amendments to subsection 50(a)(6)(E) and the repeal of subsections 50(a)(6)(I) and 50(t)((6).

8. SJR 60 repeals subsection 50(t)(6) to remove the limitation on additional debits or advances under a home equity line of credit (HELOC) whenever the outstanding principal amount of the HELOC exceeds 50% of the fair market value of the homestead on the date the HELOC was established.

The text of the Commissions' amendments to the home equity lending Interpretations—Texas Administrative Code (7 TAC Chapter 153)—implementing SJR 60's amendments, as noted above, is reprinted in the Addendum attached to this memorandum. These amendments are also summarized below:

In **§153.1(15)**, *Three percent limitation*, the amendment replaces the phrase "three percent limitation" with "two percent limitation."

In **§153.5**, *Section 50(a)(6)(E) fee limitation*, amendments to the introductory paragraph reflect SJR 60's amendments to subsection 50(a)(6)(E) by replacing the phrase "three percent limitation" with "two percent limitation" and by excluding from the two percent limitation the following fees: discount points, appraisal fees, survey fees, title report fees, and mortgagee title insurance and endorsement premiums that satisfy specified requirements.

In **§§153.5(1)** through **(12)** and **(14)** through **(16)**, the amendments also reflect SJR 60's amendment to subsection 50(a)(6)(E) by replacing the phrase "three percent limitation" with "two percent limitation." The following additional amendments are also made:

In **§153.5(3)**, *Charges that are Interest*, amendments to subparagraph (3)(B) replace the phrase "legitimate discount points" with "bona fide discount points," reflecting SJR 60's exclusion of bona fide discount points from the two percent limitation.

In **§153.5(7)**, *Charges Paid to Third Parties*, an amendment moves a sentence providing an example of a third party charge in order to provide better clarity and removes the phrase "mortgage brokers' fees", reflecting SJR 60's removal of the phrase "mortgage broker" from Section 50.

In **§153.5(8)**, *Charges to Evaluate*, amendments reflect SJR 60's amendments excluding fees for appraisals, surveys, and title reports from the two percent limitation and specifically include the fee for appraisal management services as a fee subject to the two percent limitation.

In **§153.5(11)**, *Charges to Insure an Equity Loan*, the amendments also reflect SJR 60's exclusion of title insurance and endorsement premiums from the two percent limitation by reference to new **§153.5(15)**.

Amended **§§153.5(13), (14), (15)** and **(16)** are also renumbered §§153.5(17), (18), (19) and (20), respectively, to accommodate new Interpretations §§153.5(13), (14), (15) and (16) that identify the following fees that may be excluded from the two percent limitation under SJR 60's

amendments to subsection 50(a)(6)(E): appraisal fee, property survey fee, mortgagee title insurance and endorsement premiums, and title report fee.

New **§153.5(13)**, *Exclusion for Appraisal Fee*, provides that an appraisal must be performed by a person who is not an employee of the lender, and that the excludable appraisal fee is limited to the fee paid to the appraiser for completion of the appraisal, not the fee for appraisal management services, which is based on SJR 60's amendment to subsection 50(a)(6)(E)(i) that states the two percent limitation excludes a fee for "an appraisal performed by a third party appraiser." ***Our Comment:*** *(1) New §153.5(13) excludes only the fee paid to the appraiser for the completion of the appraisal from the two percent limitation. Thus, the fee for appraisal management services is included in the two percent limitation. (2) Further, §1104.158, Texas Occupations Code, requires that "[i]n reporting to a client, an appraisal management company shall separately state the fees: (1) paid to an appraiser for the completion of an appraisal; and (2) charged by the company for appraisal management services." In addition, §1104.158 prohibits an appraisal management company from including its fees for appraisal management services in the amount reported as charges for the actual completion of an appraisal by an appraiser. (3) In the preamble to this new Interpretation, the Commissions state that a fee for an evaluation that is not an appraisal is subject to the two percent limitation (43 TexReg 1840). (4) New §153.5(13)'s statement that to be excludable the appraisal fee must be for an appraisal "performed by a person who is not an employee of the lender" should put to rest any concerns that a fee for an appraisal performed by an employee of an affiliate entity of the lender would not be excludable.*

New **§153.5(14)**, *Exclusion for Property Survey Fee*, provides that a fee for a property survey performed by a surveyor licensed or registered under Chapter 1071, Texas Occupations Code, is not a fee subject to the two percent limitation. This new Interpretation is based on SJR 60's amendment to subsection 50(a)(6)(E)(ii), which states that the two percent limitation excludes a fee for "a property survey performed by a state registered or licensed surveyor." ***Our Comment:*** *Unlike amended Subsection 50(a)(6)(E)(i) and new §153.5(13), the registered or licensed surveyor is not required to be a "third party" or "not an employee of the lender."*

New **§153.5(15)**, *Exclusion for Title Insurance Premium*, provides that an excludable premium for title insurance is limited to the applicable basic premium rate for title insurance published by the Texas Department of Insurance (TDI), plus authorized premiums for applicable endorsements, and that rules adopted by TDI govern the applicability of endorsements and the authorized amount for each premium. This new Interpretation is based on SJR 60's amendment to Subsection 50(a)(6)(E)(iii), which states that the two percent limitation excludes a fee for "a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law." ***Our Comment:*** *In regard to the applicability requirement for endorsements in subparagraph (15)(C) of this new Interpretation, the Commission state in the preamble: "The applicability requirement in adopted §153.5(15)(C) is intended to capture the concept that a lender should not charge the property owner a premium for an endorsement that does not apply to the transaction. For example, if the property is not a manufactured home, then the property owner should not be required to pay a premium for a manufactured housing endorsement, Form T-31. Similarly, if the loan is not a home equity line of credit, then the property owner should not be required to pay a premium for a future advance or revolving credit*

endorsement, Form T-35. As stated in paragraph (15), TDI's rules govern the applicability of endorsements." (43 TexReg 1840)

New **§153.5(16)**, *Exclusion for Title Examination Report Fee*, provides that an excludable fee for a title report must be less than the applicable basic premium rate for title insurance published by the TDI, and that the title report fee is not excluded from the two percent limitation if the equity loan is covered by a mortgagee policy of title insurance. This new Interpretation is based on SJR 60's amendment to subsection 50(a)(6)(E)(iv), which states that the two percent limitation excludes a fee for "a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law." ***Our Comment:*** *In the preamble to this new Interpretation, the Commissions state "this fee is intended to be excluded in transactions where the lender obtains a title report instead of a mortgagee policy of title insurance." (43 TexReg 1840)*

In **§153.14**, *One Year Prohibition*, an amendment to subparagraph (2)(D), regarding modification of a home equity loan, replaces the phrase "3% fee cap" with "two percent limitation" as the maximum fee limitation for the home equity loan and modification as a single transaction.

In **§153.17**, *Authorized Lenders*, regarding lenders that are authorized to make home equity loans under subsection 50(a)(6)(P), amendments to the introductory paragraph reflect SJR 60's amendments to subsections 50(a)(6)(P)(i) and (vi) by adding subsidiaries of the named depository institutions as authorized lenders and replacing the words "mortgage broker" with "mortgage banker or mortgage company" as authorized lenders. Likewise, amendments to paragraph 17(3) replace the reference to "mortgage broker" with "mortgage company" licensed under Texas Finance Code, Chapter 156, as an authorized lender and add that a mortgage banker registered under Texas Finance Code, Chapter 157, is an authorized lender.

New **§153.45**, *Refinance of an Equity Loan*, describes the permissible ways in which a home equity loan can be refinanced, in accordance with subsection 50(f) amended by SJR 60. Paragraphs (1) through (4) of new §153.45 describe the four conditions that must be met to refinance a home equity loan as a non-home-equity loan under subsection 50(f)(2) added by SJR 60.

New **§153.45(1)**, *One Year Prohibition*, provides that the refinance of a home equity loan as a non-home equity loan may not be closed before the first anniversary of the closing date of the home equity loan, and that the refinance closing date is the date the owner signs the refinance loan agreement. ***Our Comment:*** *Paragraph (1)'s one year prohibition is based on subsection 50(f)(2)(A) added by SJR 60 and is the same as the one year prohibition required by subsection 50(a)(6)(M)(iii) and §153.14 for refinancing an existing home equity loan as a home equity loan or closing a new home equity loan on the same homestead.*

New **§153.45(2)**, *Advance of Additional Funds*, specifies the limitation on the advance of additional funds to refinance a home equity loan as a non-home-equity loan. Paragraph (2) is based on Section 50(f)(2)(B) added by SJR 60, which provides the following condition that must be met to refinance a home equity loan as a non-home-equity loan: "the refinanced extension of credit [*sic*] does not include the advance of any additional funds other than: (i) funds advanced to refinance a debt described by Subsections (a)(1) through (a)(7) of this section; or (ii) actual costs

and reserves required by the lender to refinance the debt." Subparagraph (2)(A) provides that actual costs must be identifiable, actually required by the lender, and comply with any applicable limitations on costs. Subparagraph (2)(B) provides that reserves (e.g., an escrow account for taxes and insurance) must be actually required by the lender to refinance the debt, and must comply with applicable law. Subparagraph (2)(C) provides that amounts the owner pays before or at closing are not advanced by the lender and are not subject to the limitation on the advance of additional funds. ***Our Comment:*** *In the preamble to subparagraph (2)(B), the Commissions state "that the statement that the reserves 'must comply with applicable law' is appropriate in this provision to ensure that the lender complies with any laws governing reserve accounts, such as the escrow requirements in Regulation X, 12 C.F.R. §1024.17, and Regulation Z, 12 C.F.R. §1026.35(b)." (43 TexReg 1841)*

New **§153.45(3)**, *80 Percent Limitation on Loan Amount*, describes the 80% loan-to-value limitation to refinance a home equity loan as a non-home-equity loan. Paragraph (3) is based on subsection 50(f)(2)(C) added by SJR 60, which provides the following condition that must be met to refinance a home equity loan as a non-home-equity loan: "the refinance of the extension of credit 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 refinance of the extension of credit is made." ***Our Comment:*** *(1) In the preamble to paragraph (3), the Commissions state "[s]ubparagraphs 45(3)(A), (B), and (C) in proposed* [*sic*] *§153.45(3) describe the method of calculating the principal amount of the refinance and the principal balance of other outstanding debt. These subparagraphs are based on current §153.3, which describes the 80% loan-to-value limitation for home equity loans." (43 TexReg 1841) (2) Note, however, that unlike the requirement in subsection 50(a)(6)(Q)(ix) for home equity loans, neither subsection 50(f)(2)(C) added by SJR 60 nor new §153.45 require the owner and lender to sign an acknowledgment of fair market value for a refinance of a home equity loan as a non-home-equity loan. Nevertheless, we recommend this as a prudent practice for lenders to follow for the following reasons. In the preamble, the Commissions also state that "[u]nlike Section 50(h) [the appraisal safe harbor], which applies to home equity loans, Section 50(f)(2) does not identify the specific types of appraisals or value estimates that lenders may rely on to establish the fair market value of the property. For this reason, the commissions decline to adopt an interpretation on this issue at this time. The agencies intend to monitor this issue to determine whether an interpretation is appropriate." (43 TexReg 1842)*

New **§153.45(4)** describes how to satisfy the condition in subsection 50(f)(2)(D) to provide a written disclosure to the owner prior to the refinance of a home equity loan as a non-home-equity loan. Section 50(f)(2)(D) added by SJR 60 includes the text of this required disclosure and provides the following condition that must be met: "the lender provides the owner the following written notice on a separate document not later than the third business day after the date the owner submits the loan application to the lender and at least 12 days before the date the refinance of the extension of credit is closed . . . ."

Subparagraph (4)(A) explains that submission of a loan application to the lender's agent is submission to the lender, and that a loan application may be given orally or electronically. ***Our Comment:*** *The text of subparagraph (4)(A) is the same as the text in current §153.12(1) and (2) relating to home equity loans.*

Subparagraph (4)(B) explains that the application is submitted on the date the owner submits a loan application specifically for a refinance of a home equity loan to a non-home-equity loan and that if the owner initially applies for another type of loan, the application is considered submitted on the earliest of: (1) the date the owner modifies the application to specify that it is for a refinance of a home equity loan to a non-home-equity loan, or (2) the date the owner submits a new application specifically for a refinance of a home equity loan to a non-home-equity loan.

Subparagraph (4)(C) provides guidance in calculating the 12-day waiting period before closing required by subsection 50(f)(2)(D).

Subparagraph (4)(D) provides guidance on the time period for providing the refinance disclosure to comply with the three-business day and 12-day periods in subsection 50(f)(2)(D). Subparagraph (4)(D) states that if a lender mails the refinance disclosure to the owner within the required three-business day period, the lender must allow a reasonable period of time for delivery, and that a period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery. ***Our Comment:*** *(1) In the preamble to subparagraph (4)(D), the Commissions state: "The three-day deadline under adopted §153.45(4)(D) is consistent with the similar deadlines for the loan estimate and appraisal notice under federal law …. [L]enders will be able to mail the refinance disclosure at the same time as the federal disclosures .... Adopted §153.45(4)(D) is also consistent with Rule 21a of the Texas Rules of Civil Procedure, which considers service to occur when a document is placed in the mail. At the same time, by specifying that the disclosure must be* ***delivered*** *at least 12 days before the refinance is closed, adopted §153.45(4)(D) helps ensure that the owner has a full 12 days to consider the important information in the refinance disclosure before closing the refinance. Adopted §153.45(4)(D) helps ensure that the borrower* ***receives*** *the important information in the refinance disclosure promptly after filing a loan application, and that the borrower has a full 12 days to consider this information before closing the refinance. In addition, the owner's ability to rebut the three-day presumption of delivery is consistent with Rule 21a and with the similar rebuttable presumption for home equity loans in current §153.51(1), which was upheld by the Texas Supreme Court in Finance Commission of Texas v. Norwood, 418 S.W.3d 566, 589 (Tex. 2013)." (43 TexReg 1843) (****Emphasis added.****) (2) Based on the text of subparagraph (4)(D) (see attached Addendum) and the above preamble statements, we are concerned that delivering the refinance disclosure by email—which to be effective must comply with the E-Sign Act (Electronic Signatures In Global And National Commerce Act, 15 U.S.C. Chapter 96)—may not be sufficient delivery under subparagraph (4)(D) when an owner does not consent to the delivery and access the email by the third business day after submission of the application. Therefore, for lenders who deliver the refinance disclosure by E-Sign-compliant email, we recommend that if they do not receive notification of consent and access by the third business day that they mail the refinance disclosure on the third business day.*

Subparagraph (4)(E) provides that one copy of the refinance disclosure may be provided to married owners. Subparagraph (4)(F) explains that the refinance disclosure is only a summary of substantive rights governed by the constitution. Subparagraph (4)(G) explains that a lender may rely on an established system of verifiable procedures to evidence compliance with paragraph (4). Subparagraph (4)(H) explains that the Finance Commission will publish a Spanish translation of the refinance disclosure on its website, and that a lender whose discussions with the

owner are conducted primarily in Spanish may provide this Spanish translation to the owner, although a Spanish translation of the refinance disclosure is not required by subsection (50)(f)(2). ***Our Comment:*** *The Commissions have posted the Spanish translation of the refinance disclosure on the Finance Commission's website, click here. The Commissions also have posted this disclosure in English, click here.*

Amended **§153.84**, *Restrictions on Devices and Methods to Obtain a HELOC Advance*, amended **§153.86**, *Maximum Principal Amount Extended under a HELOC*, and repealed **§153.87**, *Maximum Principal Amount of Additional Advances under a HELOC*, implement SJR 60's repeal of subsection 50(t)(6) to remove the 50% limitation on additional debits or advances for a home equity line of credit. The amendments to §153.84 and §153.86 remove references to the 50% limitation in subsection 50(t)(6) while maintaining references to the overall 80% loan-to-value limitation in subsections 50(a)(6)(B) and 50(t)(5), which SJR 60 did not amend. Interpretation §153.87 is repealed because it relates solely to the 50% limitation that SJR 60 removes.

Additional issues not addressed above are discussed below:

1. Cure Provisions. Unlike subsection 50(a)(6), subsection 50(f)(2) does not include any provisions authorizing a cure of a violation. In declining to add cure provisions to new §153.45, the Commissions state in the preamble that "[i]t is outside the intended scope of the interpretations to add a cure method that is not described in the constitution." (43 TexReg 1843)

2. HELOC. In response to a suggestion that the Commissions specify that a HELOC may be refinanced as a non-home-equity loan under subsection 50(f)(2), the Commissions declined, stating in the preamble:

> The commissions believe that this addition is unnecessary. [HELOCs] are a type of home equity loan under Section 50, and are subject to the same requirements as other home equity loans unless the constitution specifies otherwise. Adding the … suggested language could raise other questions about whether [HELOCs] are subject to general requirements for home equity loans. (43 TexReg 1843)

Based on these preamble statements and that under subsection 50(a)(6) a HELOC is "an extension of credit that … (L) is scheduled to be repaid: … (ii) if the extension of credit is a [HELOC], in periodic payments described under Subsection (t)(8) of this section[,]" we believe that a HELOC may be refinanced as a non-home-equity loan under subsection 50(f)(2).

3. Refinance Affidavit. Subsection 50(f-1) added by SJR 60 states "An affidavit executed by the owner or the owner's spouse acknowledging that the requirements of Subsection (f)(2) of this section have been met conclusively establishes that the requirements of Subsection (a)(4) of this section have been met." The Commissions did not promulgate a form for the (f-1) affidavit nor did they adopt an interpretation regarding its content and manner of execution, stating in the preamble that they "intend to monitor this issue to determine whether an interpretation is appropriate." (43 TexReg 1843)

4. Effect of SJR 60 Amendments. SJR 60's temporary provision in Section 2 states that its amendments apply only to home equity loans made on or after January 1, 2018. This means

that existing closed-end home equity loans and HELOCs made before January 1, 2018, that are not refinanced on or after January 1, 2018, are still subject to subsections 50(a), (f), (g), and (t) as they existed before SJR 60's amendments—for example, an existing pre-January 1, 2018, closed-end home equity loan or HELOC made in violation of subsection 50(a)(6)(I) is still subject to that subsection's prohibition on securing the home equity loan or HELOC with homestead property designated for agricultural use; and, a pre-January 1, 2018, HELOC is still subject to subsection 50(t)(6)'s 50% fair market value prohibition on additional debits or advances—even though these provisions in Section 50 were repealed by SJR 60. See the Commissions' preamble statements on this issue: "Subsection (c) of SJR 60's temporary provision explains that SJR 60's changes apply to a home equity loan made on or after January 1, 2018. This means that previous law applies to home equity loans made before January 1, 2018." (43 TexReg 1844)

In order to fully appreciate the legal changes to home equity lending discussed in this memorandum, we recommend that it be read in conjunction with the amendments to the Interpretations reprinted in the attached Addendum and the amendments made by SJR 60 (*click here*).

Attachment: Addendum (Home Equity Interpretation Amendments)

ADDENDUM
(Home Equity Interpretation Amendments)

> ***Our Comment****: Only the text of those parts of the Interpretations amended by the Commissions is reprinted in this Addendum, except as required for clarity. Any Interpretation or part of an Interpretation not reprinted in this Addendum has not been amended. To view the complete text of any Interpretation, whether or not amended, click on the following hyperlink: Home Equity Lending.*

§153.1(15) Two [~~Three~~] percent limitation--the limitation on fees in Section 50(a)(6)(E).

§153.5. Two [~~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 or any bona fide discount points used to buy down the interest rate, any fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, two [~~three~~] percent of the original principal amount of the extension of credit, excluding fees for an appraisal performed by a third party appraiser, a property survey performed by a state registered or licensed surveyor, a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law, or a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law.

(1) Optional Charges. Charges paid by an owner or an owner's spouse at their sole discretion are not fees subject to the two [~~three~~] percent [~~fee~~] limitation. Charges that are not imposed or required by the lender, but that are optional, are not fees subject to the two [~~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 two [~~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 two [~~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 §153.1(11) of this title (relating to Definitions) are not fees subject to the two [~~three~~] percent limitation.

(A) Per diem interest is interest and is not subject to the two [~~three~~] percent limitation.

(B) Bona fide [~~Legitimate~~] discount points are interest and are not subject to the two [~~three~~] percent limitation. Discount points are bona fide [~~legitimate~~] if the discount points truly correspond to a reduced interest rate and are not necessary to originate, evaluate, maintain, record, insure, or service the equity loan. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are bona fide [~~legitimate~~]. This system may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

(4) Charges that are not Interest. Charges an owner or an owner's spouse is required to pay that are not interest under §153.1(11) of this title are fees subject to the two [~~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 two [~~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 under §153.1(11) of this title are fees subject to the two [~~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 an equity loan are fees subject to the two [~~three~~] percent limitation. For example, these charges include attorneys' fees for document preparation to the extent authorized by applicable law. Charges that [~~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 two [~~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 under §153.1(11) of this title, are fees subject to the two [~~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 management services.

(9) Charges to Maintain. Charges paid by an owner or an owner's spouse to maintain an equity loan that are not interest under §153.1(11) of this title are fees subject to the two [~~three~~] percent limitation if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing.

(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 two [~~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 two [~~three~~] percent limitation. Examples of these charges include title insurance and mortgage insurance protection, unless the premiums are otherwise excluded under paragraph (15) of this section.

(12) Charges to Service. Charges paid by an owner or an owner's spouse for a party to service an equity loan that are not interest under §153.1(11) of this title are fees subject to the two [~~three~~] percent limitation if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing.

(13) Exclusion for Appraisal Fee. A fee for an appraisal performed by a third party appraiser is not a fee subject to the two percent limitation. The appraisal must be performed by a person who is not an employee of the lender. The excludable appraisal fee is limited to the amount paid to the appraiser for the completion of the appraisal, and does not include an appraisal management services fee described by Texas Occupations Code, §1104.158(a)(2).

(14) Exclusion for Property Survey Fee. A fee for a property survey performed by a state registered or licensed surveyor is not a fee subject to the two percent limitation. The property

survey must be performed by a person who is licensed or registered under Texas Occupations Code, Chapter 1071.

(15) Exclusion for Title Insurance Premium. A state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law is not a fee subject to the two percent limitation.

(A) The excludable premium is limited to the applicable basic premium rate for title insurance published by the Texas Department of Insurance, plus authorized premiums for applicable endorsements.

(B) Any mortgagee policy for the equity loan must be provided by a company authorized to do business in this state.

(C) If additional premiums for endorsements are charged, the endorsements must be applicable to the mortgagee policy for the equity loan. Rules adopted by the Texas Department of Insurance govern the applicability of endorsements and the authorized amount of the premium for each endorsement.

(16) Exclusion for Title Examination Report Fee. A fee for a title examination report is not a fee subject to the two percent limitation if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law.

(A) The excludable fee must be less than the applicable basic premium rate for title insurance published by the Texas Department of Insurance, not including any additional premiums for endorsements.

(B) The fee for a title examination report may not be excluded from the two percent limitation if the equity loan is covered by a mortgagee policy of title insurance.

(C) The fee must comply with applicable law. If the equity loan is a secondary mortgage loan under Texas Finance Code, Chapter 342, then the fee is limited to a reasonable fee for a title examination and preparation of an abstract of title by an attorney who is not an employee of the lender, or a title company or property search company authorized to do business in this state, as provided by Texas Finance Code, §342.308(a)(1).

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

(18) [~~(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 two [~~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).

(19) [~~(15)~~] Subsequent Events. The two [~~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 two [~~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.

(20) [~~(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 two [~~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 connection with a mortgage loan.

§153.14. One Year Prohibition: Section 50(a)(6)(M)(iii).

(2)(D) The two percent limitation [~~3% fee cap~~] required by Section 50(a)(6)(E) applies to the original home equity loan and any subsequent modification as a single transaction.

§153.17. Authorized Lenders: Section 50(a)(6)(P).

An equity loan must be 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: a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States, including a subsidiary of a bank, savings and loan association, savings bank, or credit union described by this section; a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans; a person licensed to make regulated loans, as provided by statute of this state; a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase; a person who is related to the homestead owner within the second degree of affinity and consanguinity; or a person regulated by this state as a mortgage banker or mortgage company [~~broker~~].

(3) A person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage company [~~broker~~] for purposes of Section 50(a)(6)(P)(vi). A person who is registered under Texas Finance Code, Chapter 157 is a person regulated by this state as a mortgage banker for purposes of Section 50(a)(6)(P)(vi).

§153.45. Refinance of an Equity Loan: Section 50(f).

A refinance of debt secured by the homestead, any portion of which is an extension of credit described by Subsection (a)(6) of Section 50, may not be secured by a valid lien against the homestead unless either the refinance of the debt is an extension of credit described by Subsection (a)(6) or (a)(7) of Section 50, or all of the conditions in Section 50(f)(2) are met.

(1) One Year Prohibition. To meet the condition in Section 50(f)(2)(A), the refinance may not be closed before the first anniversary of the closing date of the equity loan. For purposes of this section, the closing date of the refinance is the date on which the owner signs the loan agreement for the refinance.

(2) Advance of Additional Funds. To meet the condition in Section 50(f)(2)(B), the refinance may not include the advance of any additional funds other than funds advanced to refinance a debt described by Subsections (a)(1) through (a)(7) of Section 50, or actual costs and reserves required by the lender to refinance the debt.

(A) In order to be included in the funds advanced for the refinance, actual costs must be identifiable, must be actually required by the lender to refinance the debt, and must comply with any applicable limitations on costs.

(B) In order to be included in the funds advanced for the refinance, reserves (e.g., an escrow account for taxes and insurance) must be actually required by the lender to refinance the debt, and must comply with applicable law.

(C) Amounts that the owner pays before or at closing (e.g., through cash, check, or electronic funds transfer) are not advanced by the lender, and are not subject to the limitation on the advance of additional funds.

(3) 80 Percent Limitation on Loan Amount. To meet the condition in Section 50(f)(2)(C), the refinance of the extension of credit must be 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 refinance of the extension of credit is made.

(A) The principal amount of the refinance is the sum of the amount advanced and any charges at the inception of the refinance, to the extent these charges are financed in the principal amount of the refinance.

(B) The principal balance of all outstanding debt secured by the homestead on the date the refinance is made determines the maximum principal amount of the refinance.

(C) The principal amount of the refinance does not include interest accrued after the date the refinance is made (other than any interest capitalized and added to the principal balance on the date the refinance is made), or other amounts advanced by the lender after closing as a result of default, including for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney's fees.

(4) Refinance Disclosure. To meet the condition in Section 50(f)(2)(D), the lender must provide the refinance disclosure described in Section 50(f)(2)(D) to the owner on a separate document not later than the third business day after the date the owner submits the loan application to the lender and at least 12 days before the date the refinance of the extension of credit is closed.

(A) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender. A loan application may be given orally or electronically.

(B) For purposes of Section 50(f)(2)(D), the application is submitted on the date the owner submits a loan application specifically for a refinance of a home equity loan to a non-home-equity

loan. If the owner initially applies for another type of loan, then the application is considered submitted on the earliest of:

(i) the date the owner modifies the application, orally or in writing, to specify that it is for a refinance of a home equity loan to a non-home-equity loan; or

(ii) the date the owner submits a new application specifically for a refinance of a home equity loan to a non-home-equity loan.

(C) For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the date that the lender provides the owner a copy of the required refinance disclosure is the first day of the 12-day waiting period. The refinance may be closed at any time on or after the 12th calendar day after the lender provides the owner a copy of the required refinance disclosure.

(D) The lender must deliver the refinance disclosure or place it in the mail no later than the third business day after the owner submits the loan application. The refinance disclosure must be delivered to the owner at least 12 days before the refinance is closed. If a lender mails the refinance disclosure to the owner, the lender must allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

(E) One copy of the required refinance disclosure may be provided to married owners.

(F) The refinance disclosure is only a summary of the owner's rights, which are governed by the substantive terms of the constitution. The substantive requirements prevail regarding a lender's responsibilities in an equity loan or refinance. A lender may supplement the refinance disclosure to clarify any discrepancies or inconsistencies.

(G) A lender may rely on an established system of verifiable procedures to evidence compliance with this paragraph.

(H) The Finance Commission will publish a Spanish translation of the refinance disclosure on its website. A lender whose discussions with the owner are conducted primarily in Spanish may provide the Finance Commission's Spanish translation to the owner, although the Spanish translation is not required by Section 50(f)(2).

§153.84. Restrictions on Devices and Methods to Obtain a HELOC Advance: Section 50(t)(3).

(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 include prearranged drafts, preprinted checks requested by the borrower, 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); and

(B) the loan to value limits in Section 50(t)(5). [~~; and~~]

[~~(C) the debit or advance limits in Section 50(t)(6).~~]

§153.86. Maximum Principal Amount Extended under a HELOC: Section 50(t)(5).

(4) For purposes of calculating the maximum principal balance [~~limits and thresholds~~] under Section 50(t)(5) [~~and (6)~~], the outstanding principal balance of all other debts secured by the homestead is the principal balance outstanding of all other debts secured by the homestead on the date of the closing of the HELOC.

[~~**§153.87.** Maximum Principal Amount of Additional Advances under a HELOC: Section 50(t)(6)~~

~~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 no additional debits or advances can be 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.~~

~~(1) A subsequent advance may be made only when the outstanding principal amount of the HELOC is 50 percent or less of the fair market value.~~

~~(2) A subsequent advance is prohibited if the outstanding principal amount of the HELOC exceeds 50 percent of the fair market value.~~

~~(3) If the outstanding principal amount exceeds 50 percent of the fair market value and then is repaid to an amount equal to or below the 50 percent of the fair market value, subsequent advances are permitted subject to the requirements of Section 50(t)(2) and (5).~~]