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To: Clients and Friends

From: Thomas E. Black, Jr. and Daniel S. Engle

Subject: President Donald Trump's March 13, 2020 Declaration of a National Emergency Permits Waiving of Texas Home Equity Seasoning Periods for "50(a)(6) Loans" **But Not for "F2 Conversion" Loans.**

Under Texas law, there is generally a one-year seasoning period for refinancing an existing loan made under Article XVI, Section 50(a)(6) of the Texas Constitution ("Texas Home Equity Loan") as either a new Texas Home Equity Loan or as a no cash-out rate/term refinance made under Article XVI, Section 50(f)(2) of the Texas Constitution ("F2 Conversion").

On April 1, 2020, the Texas Joint Financial Regulatory Agencies issued informal guidance titled *Home Equity Lending Guidance: Coronavirus Emergency Measures*. This informal guidance included, "[a]n existing home equity loan may be refinanced without regard to the one-year seasoning period if the homestead is located within an area that has been declared a 'disaster' by the Governor or the President of the United States, and if the homeowner on oath requests the closing less than one year from the original closing due to the disaster." (April 1, 2020 Guidance) This was in light of Texas [Governor Greg Abbott's March 13, 2020 declaration of a statewide state of disaster in Texas](#) and was based off of an emergency exception in the Texas Constitution.

The exact language of this "emergency exception" to the seasoning period for making a new Texas Home Equity Loan is from Article XVI, Section 50(a)(6)(M)(iii) of the Texas Constitution:

*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, unless the owner on oath requests an earlier closing due to a **state of emergency that:***

(a) has been declared by the president of the United States or the governor as provided by law; and

(b) applies to the area where the homestead is located;

[emphasis added]

In the Constitution's text, the language used is "state of emergency" not "state of disaster". In our opinion, this is a key difference as Governor Abbott declared a state of disaster pursuant to Chapter 418 of the Texas Government Code instead of declaring a state of emergency pursuant to Chapter 433 of the Texas Government Code. Our opinion is that Governor Abbott's declaration of a state of disaster does not suffice to permit the waiving of seasoning requirements. Further, the guidance by the Texas Joint Financial Regulatory Agencies was informal and does not provide a safe harbor: "This guidance is not an interpretation of the Texas Constitution and is not being issued under Texas Finance Code §11.308 and §15.413. This guidance does not provide any safe harbor to avoid potential civil litigation against a lender." (April 1, 2020 Guidance).

However, on March 13, 2020, President Donald Trump declared a national emergency titled [National Emergency Concerning the Novel Coronavirus Disease \(COVID-19\) Outbreak](#). President Trump's declaration was made pursuant to Sections 201 and 301 of the National Emergencies Act (50 U.S.C. §§ 1601 *et seq.*) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. § 1320b-5). As the Texas Constitution permits either the President of the United States or the Governor of Texas to make the declaration, our opinion is that President Trump's declaration of a nationwide emergency permits waiving of the seasoning period for Texas Home Equity Loans.

Lenders who wish to waive the seasoning period for Texas Home Equity Loans should be advised of the following issues:

1) The owners of the homestead must request an earlier signing date on oath—meaning they must execute an affidavit before a notary public. We would recommend that the affidavit refer to President Trump's March 13, 2020 declaration of a nationwide emergency and reference the "emergency exception" in Article XVI, Section 50(a)(6)(M)(iii).

2) There is a concern that the title insurer will not provide coverage on the T-42 endorsement for paragraph 2(d):

Notwithstanding the specific provisions of paragraph 5 of the Exclusions from Coverage relating to consumer credit protection laws, the Company insures the insured against loss, if any, sustained by the insured under the terms of the policy because of invalidity or unenforceability of the lien of the insured mortgage by reason of the following:

(d) The extension of credit secured by the lien of the insured mortgage closing before the first anniversary of the closing date of any other extension of credit described by Subsection (a)(6) of Section 50 of Article XVI, Texas Constitution, and secured by a valid lien on the land, as set forth in Subsection (a)(6)(M)(iii) of Section 50, Article XVI, Texas Constitution.

Without this coverage, the loan would not be marketable on the secondary market since Fannie Mae and Freddie Mac both require a T-42 endorsement without change or deletion.

3) Lenders will need to monitor the nationwide state of emergency to ensure that the state of emergency exists on the closing date. Our opinion is that in order for the seasoning period to be waived, the state of emergency must continue to be in effect on the closing date.

4) Lenders who do not plan to hold in portfolio will need to check investor guidelines.

5) The waiving of the seasoning period only applies to a new Texas Home Equity loan under Article XVI, Section 50(a)(6) of the Texas Constitution. It does not apply to no cash out rate/term refinances of an existing home equity loan under Article XVI, Section 50(f)(2) of the Texas Constitution (F2 Conversions). The provisions under Section 50(f)(2) do not contain this emergency exception.

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