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To: Clients and Friends

From: David F. Dulock

Subject: Texas Legislative Update IV – Bills Effective September 1, 2019 and Later

This legislative update summarizes bills from the 2019 Legislative Session that are effective on or after September 1, 2019, that we believe are of interest to our clients. Previous to this legislative update, we issued Legislative Update I, summarizing Senate Bill 2330 granting certain individuals temporary authority to act as residential mortgage loan originators in Texas; Legislative Update II, summarizing Senate Bill 614 and House Bill 1442 that continue in existence the Finance Commission of Texas, the Department of Banking, the Savings and Mortgage Lending Department, and the Office of Consumer Credit Commissioner; and Legislative Update III, summarizing bills effective immediately. Legislative Updates I, II and III are found on the Resources page of the firm's website www.bmandg.com.

1. RECORDING BY A COUNTY CLERK OF PAPER COPY OF ELECTRONIC RECORD CONCERNING REAL PROPERTY ([Senate Bill 2128](#), effective September 1, 2019)

Senate Bill 2128 amends subsection (b) of Section 12.0011 of the Property Code authorizing a paper document concerning real or personal property that is a copy of an electronic record to be recorded or serve as notice if the paper copy has been declared to be a true and correct copy of the electronic record as provided by new Section 12.0013 by a notary public or other officer authorized to take an acknowledgment or proof of a written instrument (*see* Section 12.001(b)(3)).

Senate Bill 2128 adds Section 12.0013 to establish a process for requiring county clerks to record a paper copy of an electronic record that is otherwise eligible under state law to be recorded in the real property records, provided the paper copy contains an image of an electronic signature or signatures that are acknowledged, sworn to with a jurat, or proved according to law and the copy has been declared by a notary public or other officer authorized to take an acknowledgment or proof of a written instrument to be a true and correct copy of the electronic record (*see* Section 12.0013(b)).

Senate Bill 2128 authorizes a notary public or other such officer to declare that a paper copy of an electronic record is a true and correct copy of that record by executing and attaching an official seal to a paper declaration under penalty of perjury and affixing or attaching the declaration to the paper copy of the electronic record (*see* Section 12.0013(d)). Senate Bill 2128 requires the form of the declaration to be substantially as the form in subsection (e) of Section 12.0013 (*see* attached Exhibit 1 to this Legislative Update for this form).

Senate Bill 2128 establishes that a document that is a paper copy of an electronic record and that is printed and declared to be a true and correct copy as provided by subsection (d) of Section 12.0013 satisfies any requirement of law that, as a condition for recording, the document (1) be an original or be in writing; (2) be signed or contain an original signature, if the document contains an image of an electronic

(11 pages)

signature of the person required to sign the document; and (3) be notarized, acknowledged, verified, witnessed, made under oath, sworn to with a jurat, or proved according to law, if the document contains an image of an electronic signature of the person authorized to perform that act and all other information required to be included (*see* Section 12.0013(c)).

Senate Bill 2128 adds definitions for “document,” “electronic,” “electronic record,” and “electronic signature” in subsection (a) of Section 13.0013.

Senate Bill 2128 amends subsection (b) of Section 193.003 of the Local Government Code to require the property record index entry for a paper document so recorded to contain the names of the grantors and grantees.

2. WAIVER OF PENALTIES AND INTEREST IF AN ERROR BY A MORTGAGEE RESULTS IN FAILURE TO PAY AN AD VALOREM TAX ([House Bill 1885](#))

House Bill 1885 amends Section 33.011 of the Tax Code by amending subsection (d) and adding subsection (k) as follows:

- House Bill 1885 amends subsection (d) by adding new subsection (k) to the list of subsections under which a taxpayer may request a waiver of penalties and interest provided the request is made before the 181st day after the delinquency date.
- House Bill 1885 adds subsection (k) to permit a taxing unit to waive penalties and interest on a delinquent property tax if: (1) the property for which the tax was owed is subject to a mortgage that does not require the property owner to fund an escrow account for payment of property taxes; (2) the tax bill was mailed or delivered by electronic means to the mortgagee, but the mortgagee failed to mail a copy to the property owner as required by law; and (3) the taxpayer paid the tax not later than the 21st day after the date the taxpayer knew or should have known of the delinquency.

House Bill 1885 takes effective January 1, 2020, and applies only to penalties and interest on a property tax that becomes delinquent on or after that date.

3. ELIGIBILITY OF LAND SECURED BY A HOME EQUITY LOAN TO BE DESIGNATED FOR AGRICULTURAL USE FOR AD VALOREM TAX PURPOSES ([House Bill 1254](#), effective January 1, 2020)

House Bill 1254 amends Section 23.42 of the Tax Code by amending subsection (a) to delete the reference to subsection (a-1) and by repealing subsection (a-1), which prohibits an individual from having land designated for agricultural use if that land secures a home equity loan permitted by Section 50(a)(6), Article XVI, of the Texas Constitution. This amendment to the Tax Code was necessary so that it harmonizes with the 2017 constitutional amendment (SJR 60) amending Section 50(a)(6) to allow home equity loans to be secured by homesteads designated for agricultural use.

4. SELLER’S DISCLOSURE NOTICE FOR RESIDENTIAL PROPERTY REGARDING FLOODPLAINS, FLOOD POOLS, FLOODWAYS, OR RESERVOIRS ([House Bill 3815](#) and [Senate Bill 339](#))

House Bill 3815, without reference to Senate Bill 339, enacts amendments to the Seller’s Disclosure Notice in subsection (b) of Section 5.08, Property Code. Senate Bill 339, without reference to House Bill 3815, enacts the same amendments to the Seller’s Disclosure Notice in subsection (b) of Section 5.08, Property Code. When this legislative mistake occurs, Sections 311.025(b) and 312.014(b), Government Code, separately state, “[i]f amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each.” As these amendments enacted by House Bill 3815 and Senate Bill 339 are identical, no harmonization is required and they will be addressed in this summary as if only one bill enacted the amendments.

The bills amend the Seller’s Disclosure Notice the seller of a residential real property comprising not more than one dwelling unit must give to a purchaser in order to include notice of whether the seller is aware of conditions relating to the property’s present flood insurance coverage, previous flooding due to a failure or breach of a reservoir or a controlled or emergency release of water from a reservoir, or previous water penetration into a structure on the property due to a natural flood event; whether the seller is aware the property is located wholly or partly in a floodplain, floodway, flood pool, or reservoir; whether the seller has ever filed a flood claim for flood damage to the property with any insurance provider; whether the seller has ever received assistance from FEMA or the U.S. Small Business Administration for flood damage to the property; and requires the seller to provide the definitions for the 100-year and 500-year floodplains, flood pool, flood insurance rate map, and reservoir, as defined by the bills, on the Seller’s Disclosure Notice.

To effect the amendments to the Seller’s Disclosure Notice summarized above, the bills amend the list of conditions in subdivision 4; replace existing text in subdivisions 6, 7 and 8 with new text; and renumber the existing text of subdivisions 6, 7 and 8 as new subdivisions 9, 10, and 11, respectively.

House Bill 3815 and Senate Bill 339 take effective September 1, 2019, and apply only to a contract for the sale of real property subject to Section 5.08 entered into on or after September 1, 2019.

5. PERSONAL INFORMATION THAT MAY BE OMITTED FROM CERTAIN RECORDS AND LICENSES ([Senate Bill 73](#), effective September 1, 2019)

Senate Bill 73 amends the definition of “instrument” in subsection (a) of Section 11.008, Property Code, which currently defines “instrument” as a deed or deed of trust. Senate Bill 73 amends the definition of “instrument” to add “or any other record recorded by a county clerk related to real property, including a mineral lease, a mechanic’s lien, and the release of a mechanic’s lien.”

Section 11.008 was enacted to govern the confidentiality of certain personal information from disclosure in instruments filed in the real property or official public records of a county. Subsection (c) of Section 11.008 currently requires a promulgated Notice of Confidentiality Rights to be placed at the top of the first page of an instrument transferring an interest in real property to or from an individual, which notifies the individual that the individual may remove or strike the individual's social security and/or driver's license number from an instrument before it is recorded.

For the purposes of Section 11.008, you are advised that the word "including" in the amended definition of "instrument" does not limit the definition to the named instruments, as section 311.005 of the Code Construction Act (Chapter 311, Government Code) defines "include" and "including" as "terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded ... unless the statute or context in which the word or phrase is used requires a different definition."

6. FILING AN ASSUMED NAME CERTIFICATE BY CERTAIN BUSINESS ENTITIES
([House Bill 3609](#), effective September 1, 2019)

House Bill 3609 amends subsection (a) of Section 71.103, Business & Commerce Code, by repealing the provision requiring a corporation, limited partnership, limited liability partnership, limited liability company, or foreign filing entity to file an assumed name certificate in the office of each applicable county clerk when required to file an assumed name certificate under Section 71.101*. The requirement under Section 71.103(a) for these entities to file an assumed name certificate in the office of the secretary of state remains in effect. House Bill 3609 also repeals subsections (b) and (c) of Section 71.103 [*county clerk filings*] and subsection (b) of Section 71.104 [*execution of certificate filed in county clerk's office*].

**Section 71.101 requires these entities to file an assumed named certificate if the entity regularly conducts business or renders professional services in Texas under an assumed name or is required by law to use an assumed name in Texas to conduct business or render professional services.*

7. ACKNOWLEDGMENT OF WRITTEN INSTRUMENT ON BEHALF OF LIMITED LIABILITY COMPANY OR PARTNERSHIP ([House Bill 1159](#), effective September 1, 2019)

House Bill 1159 amends subsection (b) of Section 121.006, Civil Practice and Remedies Code, to provide for the acknowledgment of a written instrument on behalf of a partnership by an authorized officer or agent acting for the partnership, in addition to a partner or partners, and to provide for the acknowledgment of a written instrument on behalf of a limited liability company by a member, manager, authorized officer, or agent acting for the company, by revising subdivision (b)(3) and adding subdivision (b)(6), respectively. House Bill 1159 also amends subdivision (b) of Section 121.008, Civil Practice and Remedies Code, to revise the partnership short form certificate of acknowledgment in subdivision (b)(3) and to add a short form certificate of acknowledgment for a limited liability company as subdivision (b)(6). (*See attached Exhibit 2 to this Legislative Update for these short form certificates of acknowledgment.*)

8. **AUTHORITY TO TRANSFER REAL PROPERTY IN THE NAME OF AN ENTITY**
([House Bill 1833](#), effective September 1, 2019)

House Bill 1833 amends Chapter 12 of the Property Code by adding Section 12.019 to authorize a domestic or foreign entity, except for a nonprofit exempt from federal taxation, that is a limited liability company, a limited partnership, or a professional entity defined by Section 301.003 of the Business Organization Code, to execute and record an affidavit identifying one or more individuals with authority to transfer on behalf of the entity an estate or interest in real property in the name of the entity and to authorize such an individual to make such a transfer.

House Bill 1833 defines transfer as “a transaction to sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition or consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options concerning, lease or sublet, or otherwise dispose of an estate or interest in real property or a right incident to real property.” House Bill 1833 provides that Section 12.019 does not apply to a transaction involving the transfer of an estate or interest in real property in an amount that exceeds one million dollars.

House Bill 1833 establishes the requirements for the individual who executes the affidavit and the contents of the affidavit. House Bill 1833 requires the affidavit to be recorded with the county clerk in the county in which the real property is located.

House Bill 1833 provides the following protections for persons who act in good faith and without actual knowledge that an affidavit complying with Section 12.019 is materially incorrect:

(1) a person who acts in reliance on an affidavit that has not been terminated or expired under Section 12.019 is not liable to any person for the act and may assume without inquiry the existence of the facts contained in the affidavit; and

(2) a person who enters into a transaction involving the transfer of an estate or interest in real property described in an affidavit that has not been terminated or expired under Section 12.019, and who relies on the affidavit, may enforce the transaction against the entity and the real property as if the representations in the affidavit are correct.

House Bill 1833 provides that Section 12.019 does not limit the rights of an entity owner against the affiant, the entity or individual(s) with transfer authority under the affidavit; does not require an individual to rely on an affidavit; does not require an entity to execute an affidavit in order to effect transfers of real property; does not prohibit an entity from authorizing an individual to transfer a real property estate or interest by any other lawful means; and does not validate a transfer of a real property estate or interest that is void by other law.

House Bill 1833 authorizes an entity to terminate an affidavit’s transfer authority by a termination affidavit containing certain required information, which must be recorded with the county clerk in the county in which the real property is located; and establishes a one year expiration date for an affidavit’s transfer authority that has not been terminated by the entity.

9. FORMS FOR CREATING OR REVOKING A TRANSFER ON DEATH DEED
([Senate Bill 874](#), effective September 1, 2019)

Senate Bill 874 amends subsection (a) of Section 22.020, Government Code, by adding subdivision (3) to read: “(3) ‘Transfer on death deed’ has the meaning assigned by Section 114.002, Estates Code.” Senate Bill 874 also amends subsection (b) of Section 22.020, Government Code, by adding subdivision (2-a), so that subsection (b), in pertinent part, reads: “(b) The supreme court shall, as the court considers appropriate, promulgate: ... (a-2) a form for use to create a transfer on death deed and a form for use to create an instrument of revocation of a transfer on death deed under Chapter 114, Estates Code[.]”

Senate Bill 874 repeals Subchapter D of Chapter 114, Estates Code, which promulgates the forms that may be used to create a Transfer on Death Deed and a Cancellation of Transfer on Death Deed and their respective instructions for completing the forms. Section 4 of Senate Bill 874 provides that its repeal of Subchapter D, Chapter 114, Estates Code, does not affect the validity of a transfer on death deed or a cancellation of a transfer on death deed executed before, on, or after September 1, 2019.

The Senate Research Center’s Bill Analysis of Senate Bill 874 states the following reason for repeal of Subchapter D, Chapter 114, Estates Code:

S.B. 874 is a revision to the already-enacted Transfer on Death Deed (TODD), which was passed by the 84th Legislature. ... After receiving feedback about revisions that could be made to TODD forms, it was deemed prudent to simply remove the forms from the Estates Code and instead have the Texas Supreme Court promulgate them. In this way, each time the forms need to be revised, the legislature will not have to pass a bill.

10. DECEDENTS’ ESTATES, TRANSFER ON DEATH DEEDS, AND MATTERS INVOLVING PROBATE COURTS ([House Bill 2782](#) effective September 1, 2019)

House Bill 2782 also repeals Subchapter D of Chapter 114 of the Estates Code. Section 48(c) of House Bill 2782 provides that its repeal of Subchapter D, Chapter 114, Estates Code, does not affect the validity of a transfer on death deed or a cancellation of a transfer on death deed executed before, on, or after September 1, 2019.

House Bill 2782 and Senate Bill 874, each without reference to the other, repeal Subchapter D, Chapter 114, Estates Code. When this legislative mistake occurs, Sections 311.025(b) and 312.014(b), Government Code, separately state, “[i]f amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each.” As these repeals enacted by House Bill 2782 and Senate Bill 874 are identical, no harmonization is required.

House Bill 2782 also makes the following amendments to Section 114.102 of the Estates Code involving the effect of a subsequent conveyance on a transfer on death deed:

An otherwise valid transfer on death deed is void as to a subsequent grantee of an ~~any~~ interest in real property that is conveyed by the transferor during the transferor's lifetime after the transfer on death deed is executed and recorded if:

(1) a valid instrument conveying the interest or a memorandum sufficient to give notice of the conveyance of the interest is recorded in the deed records in the county clerk's office of the same county in which the transfer on death deed is recorded; and

(2) the recording of the instrument or memorandum occurs before the transferor's death.

House Bill 2782 also makes various other amendments to the Estates Code that are not addressed in this Legislative Update.

11. ENTITLEMENT OF A PERSON WHO IS DISABLED AND ELDERLY TO RECEIVE A DISABLED RESIDENCE HOMESTEAD EXEMPTION FROM AD VALOREM TAXATION FROM ONE TAXING UNIT AND AN ELDERLY EXEMPTION FROM ANOTHER TAXING UNIT ([House Bill 2441](#), effective January 1, 2020)

House Bill 2441 amends subsection (h) of Section 11.13, Tax Code, to authorize an eligible disabled person who is 65 years of age or older to receive in the same year both a residence homestead property tax exemption for a person who is disabled and a residence homestead exemption for a person who is 65 years of age or older provided that the person receives the exemptions with respect to taxes levied by different taxing units.

12. HEARINGS CONCERNING TITLE INSURANCE RATES AND OTHER MATTERS RELATING TO REGULATING TITLE INSURANCE BUSINESS ([House Bill 3228](#), effective September 1, 2019)

House Bill 3228 was enacted due to concerns that consumers have no effective way to participate in the title insurance rate setting process. Subsection (a) of Section 2703.202 prohibits changes to a title insurance premium rate previously fixed by the Commissioner of Insurance ("Commissioner") before the Commissioner holds a public hearing, and subsection (b) requires the Commissioner to order a public hearing to consider changing a premium rate, including fixing a new premium rate, in response to a written request of a title insurance company, an association of title insurance agents and title insurance companies, an association of title insurance agents, or the Office of Public Insurance Counsel. In order to remedy this situation to allow input from other interested persons, House Bill 3228 amends the following Sections of the Insurance Code.

1. Section 2703.202, Insurance Code, is amended by adding subsections (b-1), (b-2), (d-1), and (d-2) and amending subsections (d), (g), (h), (k), and (l). Subsection (b-1) expands the list of persons allowed to submit to the Commissioner a written request for a public hearing to consider changing a premium rate, including fixing a new premium rate, to include an "interested person," which it defines as any Texas resident, a business entity doing business in Texas, a political subdivision of Texas, and a public or private organization, other than a Texas state agency, located in Texas. Subsection (b-2) requires the Commissioner to respond to a request for

a public hearing by an interested person listed in subsection (b-1) not later than the 60th day after submission of the request by either initiating a hearing or denying the request in writing and stating the reasons for the denial. Amended subsection (d) adds the interested persons listed in subsection (b-1) to those listed in subsection (b) allowed to petition the Commissioner that a public hearing to consider a rate change be conducted by the Commissioner as a contested case hearing and requires the petition to state the grounds for the petitioner's request. Subsection (d-1) requires the Commissioner to hold a public hearing not later than the 30th day after receipt of the petition to determine whether the petition is made in good faith and the petition's stated grounds justify conducting the proceeding as a contested case hearing. Subsection (d-2) requires the Commissioner to respond to a petition for a contested case hearing not later than the 60th day after submission of the petition by either granting the petition, or denying the petition in writing and stating the reasons for the denial. House Bill 3228 makes conforming amendments to subsections (g), (h), (k) and (l).

2. House Bill 3228 makes conforming amendments to Section 2703.203 regarding the periodic public hearing required to be held by the Commissioner under Section 203.203.

3. House Bill 3228 makes conforming amendments to Section 2703.204 regarding (a) the parties that must be admitted to a contested case hearing, a periodic hearing, or a hearing ordered by the Commissioner under Section 2703.206, and (b) the removal of a party to a portion of a periodic hearing relating to ratemaking upon a request to the Commissioner made by another party to that portion of the hearing.

13. PROPOSING A CONSTITUTIONAL AMENDMENT PROHIBITING IMPOSITION OF AN INDIVIDUAL INCOME TAX ([House Joint Resolution 38](#))

If, like me, you thought the Texas Constitution prohibited an individual state income tax, you were mistaken. Section 24, Article VIII, of the Texas Constitution allows the Legislature to impose by general law a net income tax on individuals, including an individual's share of partnership and unincorporated association income, only if approved by a majority of the registered voters voting in a statewide referendum held on the question of imposing the tax.

House Joint Resolution 38 is a proposed constitutional amendment that, if approved by Texas voters, would amend Section 1(c), add Section 24-a, and repeal Section 24, Article VIII, of the Texas Constitution to prohibit the Legislature from imposing a net income tax on individuals, including on an individual's share of partnership or unincorporated association income. House Joint Resolution 38 will be submitted to voters at an election to be held on November 5, 2019, and the ballot proposal will read:

The constitutional amendment prohibiting the imposition of an individual income tax, including a tax on an individual's share of partnership and unincorporated association income.

No attempt was made by this legislative update to summarize all the bills effective on and after September 1, 2019, that could affect mortgage lending or mortgage lenders or loan originators. This legislative update is simply an attempt to advise our clients as to those bills that we believe

are of interest to our clients. The above summaries are not complete descriptions of these bills, and you are advised to review the entirety of any bill summarized above that you believe affects your business. You may request copies of these bills from us or you may click on the hyperlink in the title to each bill.

Exhibit 1: Declaration of Authenticity Form - Senate Bill 2128
Exhibit 2: Certificate of Acknowledgment Forms – House Bill 1159

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EXHIBIT 1
(Senate Bill 2128)

DECLARATION OF AUTHENTICITY

State of _____
County of _____

The attached document, _____(insert title), dated _____ and containing __ pages, is a true and correct copy of an electronic record printed by me or under my supervision. At the time of printing, no security features present on the electronic record indicated any changes or errors in an electronic signature or other information in the electronic record after the electronic record's creation or execution. This declaration is made under penalty of perjury.

Signed this ____ day of _____, ____.

_____(signature of notary public or other officer)

(seal of office)

_____(printed name of notary public or other officer)

My commission expires: _____

EXHIBIT 2
(House Bill 1159)

(3) For a partnership acting by one or more partners, an authorized officer, or an agent:

State of Texas
County of _____

This instrument was acknowledged before me on (date) by (name of acknowledging partner, partners, authorized officer, or agent), (partner(s), authorized officer, or agent) on behalf of (name of partnership), a partnership.

(Signature of officer)

(Title of officer)

My commission expires: _____

(6) For a limited liability company:

State of Texas
County of _____

This instrument was acknowledged before me on (date) by (name of acknowledging member, manager, authorized officer, or agent), a (member, manager, authorized officer, or agent) of (name of limited liability company) on behalf of (name of limited liability company), a limited liability company.

(Signature of officer)

(Title of officer)

My commission expires: _____