

RESIDENTIAL REAL ESTATE UPDATE

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Marsha L. Williams is an attorney with Middleberg Riddle & Gianna, a law firm with offices in Dallas, Texas and Baton Rouge, New Orleans, Louisiana and Gulf Port, Mississippi. Her practice at the firm's Dallas office is exclusively related to mortgage banking.

Ms. Williams received her B.A. degree from Oklahoma State University and her J.D. from the University of Oklahoma. She is admitted to practice in Texas and Oklahoma and is a member of the American and Dallas Bar Associations. She is a Life Fellow of the American Bar Foundation and a member of the College of the State Bar of Texas.

Marsha Williams is a Past President of the Dallas Mortgage Bankers Association, having previously served as Vice President, Treasurer and Chair of the Judiciary/Legislative Committee. She received the 1999 Texas Mortgage Bankers Association Distinguished Service Award. Ms. Williams currently chairs the Mortgage Bankers Association's Mortgage Action Alliance Committee, vice chairs its Political Action Committee (MORPAC) and is a member of the State Legislative and Regulatory Committee and the Legal Issues Committee. She is past Chair of the MBA's State Legislative and Regulatory, Education and the State and Local MBA Liaison Committees. Ms. Williams received the 1996 MBA State and Local MBA Service Award, the 2004 and 2008 MORPAC Schumacher-Bolduc Award and was honored at the 2009 MBA Convention for her involvement with MORPAC. She has served on The National Advisory Council of Fannie Mae and has also served on the faculty of the MBA's Mortgage Banking School. She has made numerous presentations related to regulatory compliance at the national Mortgage Bankers Association Convention, to local, state and national trade association conferences and legal seminars and has published articles in various legal and trade journals. Ms. Williams is a co-author of Pratt's State Regulation of Second Mortgages and Home Equity Loans published by A. S. Pratt & Sons. She was a contributing editor for the States of Texas, Oklahoma and Louisiana for the South Central Region Volume of *Residential Mortgage Lending: State Regulation Manual* published by Clark Boardman Callaghan, was contributing editor for the *Regulatory Compliance Manual* and for the *Handbook for Loan Administration*, both published by the Mortgage Bankers Association of America, and was author of "Overview of Residential Mortgage Lending Regulations," Dunnaway, *FIRREA: Law and Practice* and *The Law of Distressed Real Estate*, also published by Clark Boardman Callaghan. She also was a member of the Attorney's Committee of the Texas Conference on Homeowners Rights and the Texas Consumer Credit Commissioner's Plain Language Contract Task Force.

In February, 1999 Ms. Williams was appointed by then Texas Governor George Bush to the Board of the Texas Department of Housing and Community Affairs to represent lending institutions. She has also served on the Board of the National Conference of State Housing Boards.

Currently Ms. Williams serves on the Governing Committee of The Conference on Consumer Finance Law and on the State Bar of Texas Business Law Section's Consumer Financial Services Committee.

## **RESIDENTIAL REAL ESTATE UPDATE**

This is a discussion of relevant developments with regard to residential real estate in Texas which includes Texas legislation, rules and case law as well as the federal laws and regulations affecting residential real estate and residential mortgage lending. Although the content is slanted toward the residential mortgage lending, this discussion is focused on Texas developments primarily with residential real estate.

Please be advised that many states outside of Texas have passed legislation which may indicate trends in residential real estate and mortgage lending. These trends will be listed at the end of this paper for reference.

### **TEXAS LEGISLATION**

#### **HOUSE BILL 10**

The Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009 (the "Act") amends the Finance Code to implement and comply with the Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the "S.A.F.E. Act").

#### **Definitions**

"Clerical or support duties," following the receipt of an application from a consumer, includes:

- The receipt, collection, distribution, and analysis of information related to the processing or underwriting of a residential mortgage loan; and
- Communication with a consumer to obtain the information necessary to process or underwrite a loan, to the extent that the communication does not include offering or negotiating loan rates or terms or counseling consumers about residential mortgage loan rates or terms.

"Credit union" means a state or federal credit union operating in Texas.

"Credit union subsidiary organization" means an agency, association, or company wholly or partly owned by a credit union that is designed primarily to serve or otherwise assist credit operations.

"Depository institution" means any bank or savings institution, including any credit union but does not include a credit union subsidiary organization.

"Dwelling" means a residential structure or mobile home, which contains one to four family housing units, or individual units of condominiums or cooperatives.

"Federal banking agency" means the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Deposit Insurance Corporation.

“Finance Commission” means the Finance Commission of Texas.

“Immediate family member” means a spouse, child, sibling, parent, grandparent, grandchild, stepparent, stepchild, stepsibling, and adoptive relationships.

“Individual” means a natural person.

“License” means a license issued under the laws of Texas to an individual acting as or engaged in the business of a residential mortgage loan originator.

“Loan processor or underwriter” means an individual who performs clerical or support duties as an employee at the direction of and subject to the supervision and instruction of an individual licensed as a residential mortgage loan originator or exempt from licensing.

“Nationwide Mortgage Licensing System and Registry” or “NMLSR” means a mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of state residential mortgage loan originators.

“Nontraditional mortgage product” means a mortgage product other than a 30-year fixed rate mortgage.

“Person” means an individual, corporation, company, limited liability company, partnership, or association.

“Real estate brokerage activity” means an activity that involves offering or providing real estate brokerage services to the public, including:

- Acting as a real estate broker or salesperson for a buyer, seller, lessor, or lessee of real property;
- Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property;
- Negotiating, on a party’s behalf, any provision of a contract relating to the sale, purchase, lease, rental, or exchange of real property, other than a negotiation conducted in connection with providing financing with respect to such a transaction;
- Engaging in an activity for which a person is required to be registered or licensed by Texas as a real estate broker or salesperson; and
- Offering to engage in an activity or to act in the same capacity described above.

“Registered mortgage loan originator” means an individual who is registered with, and maintains a unique identifier through the NMLSR, who meets the definition of mortgage loan originator, and who is an employee of one of the following:

- A depository institution;
- A subsidiary that is owned and controlled by a depository institution and regulated by a federal banking agency; or

- An institution regulated by the Farm Credit Administration.

“Regulatory official” means either the Banking Commissioner of Texas, the Savings and Mortgage Lending Commissioner, the Consumer Credit Commissioner, or the Credit Union Commissioner.

“Residential mortgage loan” means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or residential real estate.

“Residential mortgage loan originator” means an individual who for compensation or gain or in the expectation of compensation or gain takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan. The term does not include:

- An individual who performs solely administrative or clerical tasks on behalf of an individual licensed as a residential mortgage loan originator or exempt from licensure;
- An individual who performs only real estate brokerage activities and is licensed or registered by Texas as a real estate broker or salesperson, unless the individual is compensated by a lender, mortgage broker, or other residential mortgage loan originator or any agent of these;
- An individual licensed under the Occupations Code, unless the individual is directly compensated for arranging financing for activities under the Occupations Code by a lender, mortgage broker, or other residential mortgage loan originator or any agent of these;
- An individual who receives the same benefits from a financed transaction as the individual would receive if the transaction were a cash transaction; or
- An individual who is involved solely in providing extensions of credit relating to timeshare plans.

“Residential real estate” means any real property located in Texas on which a dwelling is constructed or intended to be constructed.

“Rulemaking authority” means the Finance Commission or with respect to credit unions, the Credit Union Commission.

“Unique identifier” means a number or other identifier assigned by protocols established by the NMLSR.

### **Exemption**

The following persons are exempt from the Act:

- A registered mortgage loan originator when acting for a depository institution, a subsidiary that is owned and controlled by a depository institution and regulated by a Federal Banking Agency, or an institution regulated by the Farm Credit Administration;

- An individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual;
- A licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney takes a residential mortgage loan application and offers or negotiates the terms of a residential mortgage loan;
- An individual who:
  - Is an exclusive agent of a registered financial services company;
  - Is exempt from regulation as an agent of a registered financial services company under a written agreement prohibiting the individual from soliciting, processing, negotiating, or placing a mortgage loan with a person other than a registered financial services company or an affiliate of the company; and
  - Is individually enrolled as a mortgage loan originator with the NMLSR.
- An individual who offers or negotiates terms of a residential mortgage loan originator that is secured by a dwelling that serves as the individual's residence; and
- A nonprofit organization providing self-help housing that originates zero interest residential mortgage loans for borrowers who have provided part of the labor to construct the dwelling securing the loan.

### **Administrative Authority and Rulemaking**

A regulatory official has broad authority to administer, interpret, and enforce the Act. The Finance Commission may implement rules necessary to comply with the Act and as required to carry out the intentions of the S.A.F.E. Act. The Act does not limit the authority of a regulatory official to take disciplinary action against a license holder for a violation of the Act or the rules adopted by the regulatory official under the Act. A regulatory official has broad authority to investigate, revoke a license, and inform the property authority when fraudulent conduct or a violation of the Act occurs.

### **Licensing and Registration**

Unless exempt under the Act, an individual may not engage in business as a residential mortgage loan originator with respect to a dwelling located in Texas unless the individual is licensed and complies with the requirements of the Act.

A loan processor or underwriter who is an independent contractor may not engage in the activities of a loan processor or underwriter unless the independent contractor obtains and maintains the appropriate residential mortgage loan originator license and complies with the requirements of the Act

An individual must renew the license annually to be considered licensed under the Act. The regulatory official will provide for annual renewal of licenses for individuals seeking to engage in residential mortgage loan origination activities.

## **NMLSR**

A licensed residential mortgage loan originator must enroll with and maintain a valid unique identifier issued by the NMLSR. A non-federally insured credit union that employs loan originators, as defined by the S.A.F.E. Act, must register those employees with the NMLSR by furnishing the information relating to the employees' identity. Each independent contractor loan processor or underwriter licensed as a residential mortgage loan originator must have and maintain a valid unique identifier issued by the NMLSR.

The regulatory official who administers the law under which a residential mortgage loan originator is licensed will require the residential mortgage loan originator to be enrolled with the NMLSR. For purposes of implementing the Act, the regulatory official may participate in the NMLSR.

### **Application Form**

A regulatory official will prescribe application forms for a license as a residential mortgage loan originator. A regulatory official may change or update an application form as necessary to carry out the purposes of the Act.

### **Criminal and Background Checks**

In connection with an application for a license as a residential mortgage loan originator, the applicant must, at a minimum, furnish in the form and manner prescribed by the regulatory official and acceptable to the NMLSR information concerning the applicant's identity, including:

- Fingerprints for submission to the FBI and any governmental agency or entity authorized to receive such information to conduct a state, national, and international criminal history background check; and
- Personal history and experience in a form prescribed by the NMLSR, including the submission of authorization for the NMLSR and the appropriate regulatory official to obtain:
  - An independent credit report obtained from a consumer reporting agency, except that information on a credit report may not be used as the sole basis for the denial of a mortgage loan originator license; and
  - Information related to any administrative, civil, or criminal findings by any governmental jurisdiction.

### **Issuance of License**

The regulatory official will not issue a residential mortgage loan originator license to an individual unless the regulatory official determines, at a minimum, that the applicant:

- Has not had a residential mortgage loan originator license revoked in any governmental jurisdiction;
- Has not been convicted of or pled guilty or no contest to, a felony in a domestic, foreign, or military court:
  - During the 7-year period preceding the date of the application; or
  - At any time preceding the date of application, if the felony involved an act of fraud, dishonesty, or breach of trust, or money laundering;

- A conviction for which a full pardon has been granted may not be considered a conviction.
- Demonstrates financial responsibility, character, and general fitness so as to command the confidence of the community and to warrant a determination that the individual will operate honestly, fairly, and efficiently as a residential mortgage loan originator. An individual is considered not to be financially responsible if the individual has shown a lack of regard in managing the individual's own financial affairs or condition. A determination that an individual has not shown financial responsibility may include:
  - An outstanding judgment against the individual, other than a judgment imposed solely as a result of medical expenses;
  - An outstanding tax lien or other governmental liens and filings;
  - A foreclosure during the 3-year period preceding the date of the license application; and
  - A pattern of seriously delinquent accounts during the 3-year period preceding the date of the application.
- Provides satisfactory evidence that the applicant has completed pre-licensing education course;
- Provides satisfactory evidence of having passed a written test; and
- Has paid a recovery fund fee or obtained a surety bond as required.

### **Education and Testing Requirements**

An applicant for a residential mortgage loan origination license must complete at least 20 hours of education courses reviewed and approved by the NMLSR, which must include at least:

- 3 hours of federal law and regulations;
- 3 hours of ethics, which must include instruction on fraud, consumer protection, and fair lending issues; and
- 2 hours of training related to lending standards for the nontraditional mortgage product marketplace.

Pre-licensing education courses that are approved by the NMLSR may be provided by the applicant's employer, an entity affiliated with the applicant by an agency contract, or by any subsidiary or affiliate of such employer or entity. The pre-licensing education may be completed in a classroom, online, or by any other means approved by the NMLSR. The pre-licensing education requirements approved by the NMLSR for any state will be accepted as credit toward completion of pre-licensing education requirements in Texas. An applicant who has previously held a residential mortgage loan originator license that meets the requirements of the Act and other appropriate regulatory law, before being issued a new original license, must demonstrate to the appropriate regulatory official that the applicant has completed all continuing education requirements for the calendar year in which the license was last held by the applicant.

If the appropriate federal regulators and the NMLSR establish educational requirements for licensed educational requirements for licensed residential mortgage loan originators,

the rulemaking authority will adopt necessary rules to implement the changes to the educational requirements of the Act.

An applicant for a residential mortgage loan origination must pass a qualified written test, developed by the NMLSR and administered by a test provider approved by the NMLSR, which adequately measures the applicant's knowledge and comprehension in appropriate subject areas, including:

- Ethics;
- Federal and state law and regulations pertaining to mortgage origination; and
- Federal and state law and regulations, including instruction on fraud, consumer protection, the nontraditional mortgage product marketplace, and fair lending issues.

In order to pass a qualified written test, an individual must receive a score of at least 75%. An individual may retake a qualified written test 3 times with each test occurring at least 30 days after the preceding test. If an individual does not achieve a passing score on a qualified written test after the third retake, the individual must wait at least 6 months before retaking the test. An individual who fails to maintain a residential mortgage loan originator license for at least 5 consecutive years or longer must retake the test.

A written test may be administered at the applicant's place of employment, at the location of any subsidiary or affiliate of the applicant's employer, or at the location of any entity with which the applicant holds an exclusive arrangement to conduct the business of a residential mortgage loan originator.

A license to act as a residential mortgage loan originator may be renewed on or before its expiration date if the license holder:

- Continues to meet the minimum requirements for license issuance;
- Pays all required fees for the renewal license; and
- Provides satisfactory evidence that the license holder has completed the continuing education requirements.

To renew a residential mortgage loan originator license, a license holder must annually complete at least 8 hours of education, which must include at least:

- 3 hours of federal law and regulations;
- 2 hours of ethics, which must include instruction on fraud, consumer protection, and fair lending issues; and
- 2 hours of training related to lending standards for the nontraditional mortgage product marketplace.

A license holder must also meet any additional requirements established by the regulatory official.

All continuing education courses and course providers will be reviewed and approved by the NMLSR based on reasonable standards. Nothing precludes any approved education course that is provided by the mortgage loan originator's employer or an entity that is

affiliated with the mortgage loan originator or by an agency contract or any subsidiary or affiliate of the employer or entity.

A licensed mortgage loan originator who is an approved instructor may receive credit toward his or her required annual continuing education hours at the rate of 2 hours of credit for every 1 hour taught.

An individual who has completed the above continuing education requirements for any state will be awarded credit toward completion of continuing education requirements in Texas.

### **Recovery Fee Fund or Surety Bond Requirement**

A regulatory official may not issue a residential mortgage loan originator license unless the official determines that the applicant meets the surety bond requirement or has paid a recovery fund fee, as applicable.

Each regulatory official will adopt rules requiring an individual licensed as a residential mortgage loan originator to obtain a surety bond or pay a recovery fund fee as the official determines appropriate to comply with the S.A.F.E. Act.

### **Rulemaking Authority**

A rulemaking authority may adopt rules establishing requirements as necessary for:

- Conducting background checks by obtaining:
  - Criminal history through fingerprint or other databases;
  - Civil or administrative records;
  - Credit history information; or
  - Any other information as deemed necessary by the NMLSR;
- Payment of fees to apply for or renew licenses through the NMLSR;
- Setting or resetting as necessary, license renewal dates or reporting periods;
- Amending or surrendering a license;
- Any other such activities as a regulatory official considers necessary for participation in the NMLSR; and
- Investigation and examination authority for purposes of investigating a violation or complaint arising under the Act or for purposes of examining, reviewing, or investigating any license holder or individual subject to the Act.

### **Confidentiality**

A requirement under federal or state law regarding the privacy or confidentiality of information or material provided to the NMLSR, and a privilege arising under federal or state law, or under the rules of any federal or state court, continue to apply to the information or material, after the information or material has been disclosed to the NMLSR. The information and material may be shared with all state and federal regulatory officials with mortgage industry oversight authority without the loss of privilege or confidentiality protections provided by federal or state laws.

Information or material that is subject to a privilege or confidentiality is not subject to:

- Disclosure under any federal or state law governing the disclosure to the public of information held by an officer or an agency of the federal government or Texas; or
- Subpoena or discovery, or admission into evidence, in a private civil action or administrative process.

A person who is the subject of information or material in the NMLSR may waive, wholly or partly, any privilege held by the NMLSR with respect to the information or material.

A regulatory official may enter into an agreement or sharing arrangement with another governmental agency, the Conference of State Bank Supervisors, the American Association of Residential Mortgage Regulators, or other associations representing governmental agencies as established by rule of the rulemaking authority or order issued by the regulatory official. The confidentiality and privilege protections also apply to information and material shared under an agreement or sharing arrangement entered into.

The above privilege and confidentiality requirements do not apply to information or material relating to the employment history of, and publicly adjudicated disciplinary and enforcement actions against a residential mortgage loan originator who is included in the NMLSR for access to the public.

### **Mortgage Call Reports**

Each licensed residential mortgage loan originator must submit to the NMLSR a report of condition that is in the form and contains the information required by the NMLSR.

### **Report of Violations and Enforcement Actions**

Subject to the confidentiality requirements under the Act, a regulatory official will report to the NMLSR on a regular basis regarding violations of, enforcement actions under, or information relevant to the Act or the S.A.F.E. Act under the regulatory official's licensure, regulation, or examination of a licensed residential mortgage loan originator or person registered under the S.A.F.E. Act.

The applicable rulemaking authority will by rule establish a process by which licensed residential mortgage loan originators may dispute information submitted by the regulatory official to the NMLSR.

### **Unique Identifier**

The unique identifier of a person originating a residential mortgage loan must be clearly shown on each residential mortgage loan application form, solicitation, or advertisement, including business cards, websites, and any other document required by rule of the rulemaking authority.

### **Representations**

An individual who is engaged exclusively in loan processor or underwriter activities may not represent to the public, through the use of advertising, business cards, stationery, brochures, signs, rate lists, or other means, that the individual can or will perform any

activities of a mortgage loan originator unless the individual is licensed as a residential mortgage loan originator.

### **Prohibited Acts and Practices**

An individual or other person subject to regulation under the Act may not:

- Directly or indirectly employ a scheme, device, or artifice to defraud or mislead borrowers or lenders or to defraud a person;
- Engage in any unfair or deceptive practice;
- Obtain property by fraud or misrepresentation;
- Solicit or enter into a contract with a borrower that provides in substance that the person or individual subject to the Act may earn a fee or commission through “best efforts” to obtain a loan, even though no loan is actually obtained for the borrower;
- Solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at that time;
- Conduct any business regulated by the Act without holding a license;
- Assist, aide, and abet an individual in the conduct of business without a valid license;
- Fail to make required disclosures;
- Fail to comply with the Act or rules adopted under the Act;
- Fail to comply with any other state or federal law, including rules or regulations adopted under that law, applicable to a business or activity regulated by the Act;
- Make, in any manner, a false or deceptive statement or representation;
- Negligently make a false statement or knowingly or willfully make any omission of material fact in connection with any information or reports filed with a governmental agency or the NMLSR or in connection with any investigation conducted by the regulatory official or another governmental agency;
- Make a payment, threat, or promise, directly or indirectly, to a person for purposes of influencing the person’s independent judgment in connection with a residential mortgage loan, or make a payment, threat, or promise, directly or indirectly, to an appraiser of a property, for purposes of influencing the appraiser’s independent judgment with respect to the property’s value;
- Collect, charge, attempt to collect or charge, or use or propose an agreement purporting to collect or charge any prohibited fee;
- Cause or require a borrower to obtain property insurance coverage in an amount that exceeds the replacement cost of the improvements as established by the property insurer; or
- Fail to truthfully account for money belonging to a party to a residential mortgage transaction.

### **Enforcement and Penalties**

To ensure the effective supervision and enforcement of the Act, a regulatory official may:

- Deny, suspend, revoke, condition, or decline to renew a license for a violation of the Act, a rule adopted under the Act, or an order or a directive entered under the Act;

- Deny, suspend, revoke, condition, or decline to renew a license if an applicant or license holder fails to meet the requirements of the Act or withholds information or makes a material misstatement in an application for a license or a renewal of a license;
- Order restitution against a person subject to regulation under the Act for a violation of the Act;
- Impose an administrative penalty on a person subject to regulation under the Act; or
- Issue orders or directives as follows:
  - Order or direct a person subject to regulation under the Act to cease and desist from conducting business, including issuing an immediate temporary order to cease and desist from conducting business;
  - Order or a direct person subject to regulation under the Act to cease a violation of the Act or a harmful activity, including issuing an immediate temporary order to cease and desist;
  - Enter immediate temporary orders against a person subject to regulation under the Act to cease engaging in business under a license if the regulatory official determines that the license was erroneously granted or the license holder is committing a violation of the Act; and
  - Order or direct other affirmative action as the regulatory official considers necessary.

A regulatory official may impose an administrative penalty on a residential mortgage loan originator or other person subject to regulation under the Act, if the official, after notice and opportunity for hearing, determines that the residential mortgage loan originator or other person subject to regulation under the Act has violated or failed to comply with:

- The Act;
- A rule adopted under the Act; or
- An order issued under the Act.

The penalty may not exceed \$25,000 for each violation. The amount of the penalty will be based on:

- The seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;
- The economic harm to property caused by the violation;
- The history of previous violations;
- The amount necessary to deter a future violation;
- Efforts to correct the violation; and
- Any other matter that justice may require.

### **Duties of Regulatory Officials**

The Savings and Mortgage Lending Commissioner will administer and enforce the Act with respect to individuals licensed as mortgage brokers or registered as mortgage bankers.

The Credit Union Commissioner will:

- Examine, inspect, or investigate employees of credit union subsidiary organizations who are licensed to act as residential mortgage loan originators; and
- Enforce compliance by employees of credit union subsidiary organizations with the applicable requirements of the mortgage broker law, the Act, and any applicable rules adopted.

The Consumer Credit Commissioner will administer and enforce the Act with respect to individuals holding licenses under laws regulating consumer loans, manufactured home credit transactions, motor vehicle installment sales, or tax refund anticipation loans.

To the extent permitted or required by the Act and as reasonably necessary for the implementation and enforcement of the S.A.F.E. Act, the Banking Commissioner of Texas (the “Commissioner”) may administer and enforce this Act with respect to a person otherwise under the Commissioner’s jurisdiction.

To fulfill the purposes of the act, a regulatory official may establish a relationship with or contract with the NMLSR or an entity designated by the NMLSR to collect and maintain records and process transaction fees or other fees related to licensed residential mortgage loan originators or other persons subject to registration under the Act.

### **Credit Unions, Mortgage Brokers, Financial Services Companies, and Mortgage Bankers**

The Credit Union Commission may adopt and enforce rules necessary for the Credit Union Commissioner to:

- Examine, inspect, or investigate employees of credit union subsidiary organizations who are licensed to act as residential mortgage loan originators; and
- Enforce compliance by employees of credit union subsidiary organizations with the applicable requirements under laws regulating mortgage brokers and residential mortgage loan originators.

The Credit Union Commissioner will perform all duties relating to the issuance and renewal of licenses for employees of credit union subsidiary organizations who act as residential mortgage loan originators. The Credit Union Commissioner is responsible for the:

- Examination, inspection, or investigation of employees of credit union subsidiary organizations who are licensed to act as residential mortgage loan originators; and
- Enforcement of compliance by employees of credit union subsidiary organizations with applicable requirements.

The Finance Commission may adopt and enforce rules necessary for the intent of or to ensure compliance with the mortgage broker laws, except with respect to employees of credit union subsidiary organizations.

An individual required to be licensed under the mortgage broker laws may not as a residential mortgage loan originator unless:

- The individual’s license otherwise authorizes the individual to act as residential mortgage loan originator;
- The individual is enrolled with the NMLSR; and
- The individual complies with the requirements of the Act and rules adopted under the Act.

An employee of a credit union subsidiary organization may not act as a residential mortgage loan originator unless the employee:

- Is licensed under the mortgage broker laws;
- Is enrolled with the NMLSR; and
- Complies with other applicable requirements under the Act and rules adopted under the Act.

Prior to permitting an exclusive agent to solicit, process, negotiate, or place a mortgage loan, a registered financial services company must submit to the Savings and Mortgage Lending Commissioner such information as the Finance Commissioner may require relating to the exclusive agent. The exclusive agent must have enrolled with the NMLSR as a registered residential mortgage loan originator and provided to the Finance Commissioner the exclusive agent’s unique identifier.

An employee of a mortgage banker may not act in the capacity of a residential mortgage loan originator unless the employee:

- Is licensed under the mortgage banker laws
- Is enrolled with the NMLSR; and
- Complies with other applicable requirements of the Act and rules adopted by the Finance Commission under the Act.

To be eligible to be licensed as a residential mortgage loan originator, an employee of a mortgage banker must also:

- Satisfy the Finance Commissioner as to the employee’s good moral character, including the employee’s honesty, trustworthiness, and integrity;
- Not be in violation of the mortgage banker laws or a rule adopted under the mortgage banker laws; and
- Provide the Savings and Mortgage Lending Commissioner with satisfactory evidence that the employee meets the qualifications provided by the Act.

**State-Licensed Residential Mortgage Loan Originator Recovery Fund**

“Fund” means the state-licensed residential mortgage loan originator recovery fund.

The Banking Commissioner will establish, administer, and maintain a state-licensed residential mortgage loan originator recovery fund as provided by the Act. The Banking Commissioner will hold amounts received by him or her for deposit in the Fund in trust for carrying out the purposes of the Fund.

The Fund will be used to reimburse residential mortgage loan applicants for actual damages incurred because of acts committed by a state-licensed residential mortgage loan

originator when the act was committed. The use of the Fund is limited to reimbursement for out-of-pocket losses caused by an act that constitutes a violation of the Act. Payments from the Fund may not be made to a lender who makes a residential mortgage loan originated by the state-licensed residential mortgage loan originator or who acquires a residential mortgage loan originated by the state-licensed residential mortgage loan originator.

An applicant for an original residential mortgage loan originator license or for renewal of a residential mortgage loan originator license who is licensed under the laws regulating consumer loans, manufactured home credit transactions, motor vehicle installment sales, or tax refund anticipation loans must, in addition to paying the original application fee or renewal fee, pay a fee in an amount determined by the Banking Commissioner. The fee will be deposited in the Fund.

If the balance remaining in the Fund at the end of a calendar year is more than \$2.5 million, the amount of money in excess of that amount will be available to the Banking Commissioner to offset the expenses of participating in and sharing information with the NMLSR.

A person entitled to receive payment out of the Fund is entitled to receive reimbursement of actual, out-of-pocket damages. A payment from the Fund for claims:

- Arising out of the same transaction, including interest, is limited in the aggregate to \$25,000, regardless of the number of claimants; and
- Against a single person licensed as a residential mortgage loan originator licensed under the laws regulating consumer loans, manufactured home credit transactions, motor vehicle installment sales, or tax refund anticipation loans is limited in the aggregate to \$50,000 until the Fund has been reimbursed for all amounts paid.

If there are concurrent claims that exceed the amounts available under the Fund, the Banking Commissioner will prorate recovery based on the amount of damage suffered by each claimant.

The Banking Commissioner may revoke a residential mortgage loan originator license on proof that the Banking Commissioner has made a payment from the Fund of any amount toward satisfaction of a claim against a state-licensed residential mortgage loan originator. The Banking Commissioner may seek to collect from a state-licensed residential mortgage loan originator the amount paid from the Fund on behalf of the originator and any costs associated with investigating and processing the claim against the Fund or with collection of reimbursement for payments from the Fund, plus interest at the current legal rate until the amount has been repaid in full. Any amount, including interest, recovered by the Banking Commissioner will be deposited to the credit of the Fund. The Banking Commissioner may probate an order revoking a license.

A state-licensed residential mortgage loan originator on whose behalf payment was made from the Fund is not eligible to receive a new license until the originator has repaid in full, plus interest at the current legal rate, the amount paid from the Fund on the

originator's behalf, and any costs associated with investigating and processing the claim against the Fund or with collection of reimbursement from the Fund.

The Banking Commissioner may still take disciplinary action against a state-licensed residential mortgage loan originator for a violation of the Act or other licensing laws or rules adopted under the laws. The repayment in full to the Fund of all obligations of a state-licensed residential mortgage loan originator does not nullify or modify the effect of any other disciplinary proceeding.

The Finance Commission may adopt rules on the Banking Commissioner's recommendation to promote a fair and orderly administration of the Fund.

### **Consumer Loans**

Unless exempt under the Act, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a loan subject to the consumer loan laws must:

- Be individually licensed to engage in the making, transacting, or negotiating of a loan;
- Be enrolled with the NMLSR; and
- Comply with other applicable requirements of the Act and rules adopted under the Act.

The Finance Commission will adopt rules establishing procedures for issuing, renewing, and enforcing an individual license. In adopting rules, the Finance Commission will ensure that:

- The minimum eligibility requirements for issuance and renewal of an individual license are the same as the requirements under the Act; and
- The applicant pays:
  - An investigation fee in a reasonable amount determined by the Commissioner; and
  - An annual license fee determined by the Finance Commission.

The Consumer Credit Commissioner may suspend or revoke a license if the Consumer Credit Commissioner finds that the license holder has failed to ensure an individual acting as a mortgage loan originator in the making, transacting, or negotiating of a loan regulated by the consumer loan laws is licensed.

### **Manufactured Home Credit Transactions**

A registered creditor that engages in the activity of originating a residential mortgage loan must meet the surety bond or recovery fund fee requirement, as applicable, of the creditor's residential mortgage loan originator.

Unless exempt under the Act, an individual in the making, transacting, or negotiating of an extension of credit subject to the laws on manufactured home credit transactions must:

- Be individually licensed to engage in the making, transacting, or negotiating of an extension of credit;

- Be enrolled with the NMLSR; and
- Comply with other applicable requirements of the Act and rules adopted under the Act.

The Finance Commission will adopt rules establishing procedures for issuing, renewing, and enforcing an individual license. In adopting rules, the Finance Commission will ensure that:

- The minimum eligibility requirements for issuance and renewal of an individual license are the same as the requirements under the Act; and
- The applicant pays:
  - An investigation fee in a reasonable amount determined by the Consumer Credit Commissioner; and
  - An annual license fee determined by the Finance Commission.

### **Motor Vehicle Installment Sales**

A license holder under the laws on motor vehicle installment sales who engages in the sale of a motor vehicle to be used as a principal dwelling must meet the surety bond or recovery fee fund requirements, as applicable, of the holder's residential mortgage loan originator.

Unless exempt, an individual who acts as a residential mortgage loan originator in the sale of a motor vehicle to be used as a principal dwelling must:

- Be licensed to act as a residential mortgage loan originator in the sale of a motor vehicle to be used as a principal dwelling;
- Be enrolled with the NMLSR; and
- Comply with other applicable requirements of the Act and rules adopted under the Act.

The Finance Commission will adopt rules establishing procedures for issuing, renewing, and enforcing a license. In adopting rules, the Finance Commission will ensure that:

- The minimum eligibility requirements for issuance and renewal of an individual license are the same as the requirements under the Act; and
- The applicant pays:
  - An investigation fee in a reasonable amount determined by the Consumer Credit Commissioner; and
  - An annual license fee determined by the Finance Commission.

The Finance Commission may adopt rules under the consumer loan laws to carry out the intentions of the S.A.F.E. Act.

### **Tax Refund Anticipation Loans**

Unless exempt under the Act, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a property tax loan for a principal dwelling must:

- Be individually licensed to engage in the making, transacting, or negotiating of a property tax loan;

- Be enrolled with the NMLSR; and
- Comply with other applicable requirements of the Act and rules adopted under the Act.

The Finance Commission will adopt rules establishing procedures for issuing, renewing, and enforcing an individual license. In adopting rules, the Finance Commission will ensure that:

- The minimum eligibility requirements for issuance and renewal of an individual license are the same as the requirements under the Act; and
- The applicant pays:
  - An investigation fee in a reasonable amount determined by the Consumer Credit Commissioner; and
  - An annual license fee determined by the Finance Commission.

The Finance Commission may adopt rules under the consumer loan laws to carry out the intentions of the S.A.F.E. Act.

A license holder under the laws for tax refund anticipation loans who engages in the making, transacting, or negotiating of a property tax loan for a principal dwelling must meet the surety bond or recovery fund fee requirements, as applicable, of the holder's residential mortgage loan originator under the Act.

The Consumer Credit Commissioner may suspend or revoke a license if the Consumer Credit Commissioner finds that the license holder has failed to ensure an individual acting as a mortgage loan originator in the making, transacting, or negotiating of a property tax loan for a principal dwelling is licensed.

### **Implementation**

For purposes of implementing an orderly and efficient process for licensing and registering residential mortgage loan originators that meets the requirements of the S.A.F.E. Act, the Act, and the amendments to the Finance Code, the Finance Commission, as soon as practicable, may adopt rules and establish interim procedures for licensing individuals engaging in or conducting the business of a residential mortgage loan originator in Texas and for the approval or denial of applications for licenses authorizing individuals to engage in business as a residential mortgage loan originator. For individuals authorized by state law to engage in residential mortgage loan origination activities immediately before June 19, 2009, the Finance Commission may establish expedited review and licensing procedures.

On application by a person for a license, registration, and unique identifier as a residential mortgage loan originator with the NMLSR, the regulatory official may determine that the applicant meets the pre-licensing education courses and written test requirements of the Act, if the applicant, on June 19, 2009, is acting as a state-licensed residential mortgage loan originator in Texas under the mortgage broker laws. The applicant must be in good standing with the regulatory official to obtain an exemption. The regulatory official may determine an exemption by rule of the Finance Commission. A residential mortgage loan

originator who receives an exemption must still meet the continuing education requirements prescribed the regulatory official and the S.A.F.E. Act.

An individual who is not authorized to engage in residential mortgage loan origination activities in Texas as of July 31, 2009, must comply with the Act and the amendments to the Finance Code by the later of:

- July 31, 2010; or
- A subsequent date that is approved by the United State Department of HUD (“HUD”) under the authority granted under the S.A.F.E. Act.

An individual authorized to engage in residential mortgage loan origination activities in Texas of July 31, 2009, must comply with the Act and the amendments to the Finance Code by the later of:

- July 31, 2011; or
- A subsequent date that is approved by HUD under the authority granted under the S.A.F.E. Act.

### **HOUSE BILL 3857**

This Bill relates to foreclosure of liens on real property and certain personal property owned by members of the military or their dependents. It applies only to a sale, foreclosure, or seizure of property under a judgment in an action filed on or after June 19, 2009 or with respect to which a notice of default is given on or after June 19, 2009. A sale, foreclosure, or seizure under a judgment in an action filed before June 19, 2009 or with respect to which notice of default is given before June 19, 2009, is governed by the law in effect immediately before June 19, 2009.

“Active duty military service” means:

- Service as a member of the United States armed forces; and
- With respect to a member of the Texas National Guard, the National Guard of another state, or a member of a reserve component of the United States armed forces, active duty under an order of the President of the United States.

“Dwelling” means a residential structure or manufactured home that contains one-to-four family housing units.

“Military servicemember” means:

- A member of the United States armed forces;
- A member of the Texas National Guard or the National Guard of another state serving on active duty under an order of the President of the United States; or
- A member of a reserve component of the United States armed forces who is on active duty under an order of the President of the United States.

“Person” includes a corporation, organization, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

The Bill applies only to an obligation:

- That is secured by a mortgage, deed of trust, or other contract lien on real property or personal property that is a dwelling owned by a military servicemember;
- That originates before the date on which the servicemember's active duty military service commences; and
- For which the servicemember is still obligated.

In an action filed during a military servicemember's period of active duty military service or during the 9 months after the date on which that service period concludes to foreclose a lien or otherwise enforce an obligation described above, the court may, after a hearing and on the court's own motion, will on the application by a servicemember whose ability to comply with the obligations of the contract secured by the lien is materially affected by the servicemember's military service:

- Stay the proceedings for a period of time as justice and equity require; or
- Adjust the obligations of the contract secured by the lien to preserve the interests of all parties.

A sale, foreclosure, or seizure of property under a mortgage, deed of trust, or other contract lien may not be conducted during the military servicemember's period of active duty military service or during the 9 months after the date on which that service period concludes, unless the sale, foreclosure, or seizure is conducted under:

- A court order issued before the sale, foreclosure, or seizure; or
- An agreement that complies with the requirements provided below.

A military servicemember may waive the servicemember's rights. The waiver must be:

- In writing in at least 12-point type;
- Executed as an instrument separate from the obligation to which the waiver applies; and
- Made under a written agreement:
  - Executed during or after the servicemember's period of active duty military service; and
  - Specifying the legal instrument to which the waiver applies and, if the servicemember is not a party to the instrument, the servicemember concerned.

A person commits a Class A misdemeanor if the person knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited under the Bill.

On application to a court, a dependent of a military servicemember is entitled to the protections if the dependent's ability to comply with an obligation that is secured by a mortgage, deed of trust, or other contract lien on real property or personal property that is a dwelling is materially affected by the servicemember's military service.

If a surety, guarantor, endorser, accommodation maker, comaker, or other person primarily or secondarily liable on an obligation executes a waiver and then enters active

duty military service, the waiver is not valid after the beginning of the period of the active duty military service unless the waiver was executed by the individual or a dependent during the period beginning on date of receipt of the order for induction.

## **HOUSE BILL 2774**

This Bill addresses amendments to mortgage broker and loan officer laws. This discussion addresses provisions of the Bill effective September 1, 2009.

The Commissioner of Savings and Mortgage Lending (the “Commissioner”) will participate in the NMLSR. The Finance Commission (the “Commission”) may adopt rules as required to carry out the purposes of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the “S.A.F.E. Act”). The Commission on the Commissioner’s recommendation may adopt rules to promote a fair and orderly administration of the Mortgage Broker Recovery Fund (the “Fund”).

A registered financial services company may perform the services of a mortgage broker as if the company were licensed as a mortgage broker. An exclusive agent of a registered financial services company who is exempt from licensure as a mortgage broker or a loan officer is considered an employee of the registered financial services company for purposes of being licensed as a mortgage broker or loan officer.

In addition to other disciplinary action by the Commissioner for violation of the mortgage broker laws, the Commissioner may collect in a fee in an amount not to exceed \$50 for any returned check or credit card charge back.

To be eligible to be licensed as a loan officer a person must:

- Provide the Commissioner with satisfactory evidence that the applicant satisfies one of the following:
  - The person has successfully completed at least 60 hours of education courses approved by the Commissioner;
  - The person has successfully completed 30 hours of education course approved by the Commission if the applicant:
    - Has 18 months or more of experience as a mortgage loan officer as evidenced by documentary proof of full-time employment as a mortgage loan officer with a person exempt from licensure as a mortgage broker or loan officer; or
    - Is a person who meets the qualifications for licensure as a mortgage broker or loan officer; or
  - The person holds an active mortgage broker license.

Financial requirements for holding a mortgage broker or loan office license will be met through participation in the Fund. The surety bond requirements for a mortgage broker have been repealed.

The Commissioner may deny the renewal of a mortgage broker license or a loan officer license if the mortgage broker or loan officer is in default on a student loan administered by the Texas Guaranteed Student Loan Corporation.

The provisions of mortgage broker and loan officer law relating to the term and renewal requirements for mortgage broker and loan officer licenses expire on January 1, 2011.

The Commissioner may require reimbursement in an amount not to exceed \$325 for each examiner a day for on-site examination or investigation of a mortgage broker if records are located outside of Texas or if the review is considered necessary beyond the routine examination process.

The Commissioner, after notice and opportunity for hearing, may impose an administrative penalty on a person licensed as a mortgage broker who violates the mortgage broker laws or rules.

The Commissioner may order disciplinary action after notice and opportunity for hearing against a licensed mortgage broker or a licensed loan officer if the Commissioner becomes aware during the term of the license of any fact that would have been grounds for denial of an original license if the fact had been known by the Commissioner on the date the license was issued.

The Commissioner, after giving notice and an opportunity for hearing, may impose an administrative penalty against a person who violates a cease and desist order in an amount not to exceed \$1,000 for each day of the violation. A hearing of an appeal of an order of suspension will be held not later than the 30<sup>th</sup> day (previously 15<sup>th</sup> day) after the date of receipt of the notice of appeal. The Commissioner may, on not less than 10 days' notice to the person, suspend a person's license without a prior hearing if an indictment or information is filed or returned alleging that a person committed a criminal offense involving fraud, theft, or dishonesty. A person may appeal the suspension.

### **The Mortgage Broker Recovery Fund**

The Fund will be used to reimburse residential mortgage loan applicants for actual damages incurred because of acts committed by a mortgage broker or loan officer who was licensed when the act was committed. The use of the Fund is limited to reimbursement for out-of-pocket losses caused by an act by a mortgage broker or loan officer that is a violation of the mortgage broker or loan officer laws.

The Fund may be used at the discretion of the Commissioner to reimburse expenses incurred to secure and destroy residential mortgage loan documents that have been abandoned by a current or former individual or entity under the regulatory authority of the Texas Department of Savings and Mortgage Lending (the "Department"). Payments from the Fund will be reduced by the amount of any recovery from the mortgage broker or loan officer or from any surety, insurer, or other person or entity making restitution to the applicant on behalf of the mortgage broker or loan officer. The Commissioner, as manager of the Fund, is entitled to reimbursement for reasonable and necessary costs and

expenses incurred in managing the Fund, including costs and expenses incurred with regard to applications filed to recover from the Fund.

If the balance remaining in the fund at the end of a calendar year is more than \$3.5 million, the amount of money in excess of that amount will be available to the Commissioner to offset the expenses of participating in and sharing information with the Nationwide Mortgage Licensing System and Registry (the “NMLSR”). The law previously required licensed mortgage brokers and loan officers to pay a fee to bring the Fund to \$1 million if the Fund was less than \$500,000.

An application for the recovery of actual damages from the Fund may not be filed after the second anniversary of the date of the alleged act or omission causing the actual damages or the date the act or omission should reasonably have been discovered.

A payment for claims from the Fund:

- Arising out of the same transaction, including interest, is limited in the aggregate to \$25,000, regardless of the number of claimants; and
- Against a single person licensed as a mortgage broker or loan officer arising out of separate transactions, including interest, is limited in the aggregate to \$50,000 until the Fund has been reimbursed for all amounts paid.

If there are concurrent claims that exceed the amounts available under the Fund, the Commissioner will prorate recovery based on the amount of damages suffered by each claimant.

The Commissioner may seek to collect from a mortgage broker or loan officer the amount paid from the Fund on behalf of the mortgage broker or loan officer and any costs associated with investigating and processing the claim against the Fund or with collection of reimbursement for payments from the Fund, plus interest at the current legal rate until the amount has been repaid in full. Any amount, including interest, recovered by the Commissioner will be deposited to the credit of the Fund.

A person on whose behalf payment was made from the Fund is not eligible to receive a new license until the person has repaid in full, plus interest at the current legal rate, the amount paid from the Fund on the person’s behalf and any costs associated with investigating and processing the claim against the Fund or with collection or reimbursement for payments from the Fund.

## **HOUSE BILL 3479**

This Bill addresses the filing of instruments conveying real property in certain counties and redemption of property after the foreclosure of certain assessment liens.

### **Instruments Conveying Real Property**

The following applies to the county clerk of a county:

- That:

- Is located on the international border; and
- Has a population of less than 15,000;
- In which a colonia self-help center is located; or
- That is served by a colonia self-help center in another county.

Before accepting an instrument conveying real property for filing, the county clerk may send the instrument to the county attorney for review. Not later than 5 business days after the date the county attorney receives an instrument, the county attorney must:

- Review the instrument to determine whether the platting requirements have been satisfied; and
- Return the instrument to the county clerk with a statement of the county attorney's determination.

The county clerk must immediately notify the party that presented the instrument for recording that:

- The clerk is referring the instrument to the county attorney for review;
- The instrument will not be immediately recorded; and
- The clerk need not file an instrument that the county attorney determines the clerk is not required to file.

### **Property Owners' Association Foreclosure**

A property owner's association that conducts a foreclosure sale of an owner's lot must send to the lot owner and to each lienholder of record, not later than the 30<sup>th</sup> day after date of the foreclosure sale, a written notice stating the date and time the sale occurred and informing the lot owner and each lienholder of record of the right of the lot owner and lienholder to redeem the property.

The notice must be sent by certified mail, return receipt requested, to:

- The lot owner's last known mailing address, as reflected in the records of the property owner's association;
- The address of each lienholder on the property subject to foreclosure evidenced by the most recent deed of trust filed of record in the real property records of the county in which the property is located; and
- The address of each transferee or assignee of a deed of trust who has provided notice to a property owner's association of such assignment or transfer. Notice provided by a transferee or assignee to a property owners' association must be in writing, contain the mailing address of the transferee or assignee, and be mailed by certified mail, return receipt requested, or United States mail with signature confirmation to the property owners' association

If a recorded instrument does not include an address for the lienholder, the association need not notify the lienholder. The lot owner is deemed to have given approval for the association to notify the lienholder.

The owner of property in a residential subdivision or a lienholder of record may redeem the property from any purchaser at a sale foreclosing a property owners' association's

assessment lien not later than the 180<sup>th</sup> day after the date the association mails written notice of the sale to the owner and the lienholder. A lienholder of record may not redeem the property before 90 days after the date the association mails written notice of the sale to the lot owner and the lienholder and only if the lot owner has not previously redeemed the property.

The property is presumed not redeemed if the lot owner or a lienholder who redeemed the property fails to include the name and mailing address of the person who redeemed the property in an affidavit that is filed in the real property records in which the property is located.

## **HOUSE BILL 3945**

A title insurance company affidavit may be used as a release of lien.

“Authorized title insurance agent,” with respect to an Affidavit as Release of Lien, means a person licensed as a title insurance agent and authorized in writing by a title insurance company by instrument recorded in the real property records in the county in which the property to which affidavit relates is located to execute one or more Affidavits as Release of Lien, subject to any terms, limitations, and conditions that are set forth in the instrument executed by the title insurance company.

This Bill only applies to a mortgage on:

- Property consisting exclusively of a 1-to-4 family residence, including a residential unit in a condominium regime; or
- Property other than property described above, if the original face amount of the indebtedness secured by the mortgage on the property is less than \$1.5 million.

An authorized officer of a title insurance company or an authorized title insurance agent (collectively “title insurance company”) may, on behalf of the borrower or a transferee of the borrower who acquired title to the property described in the mortgage, execute an affidavit and record it in the real property records of each county in which the mortgage was recorded.

An affidavit must be in substantially the following form:

### **AFFIDAVIT AS RELEASE OF LIEN**

Before me, the undersigned authority, on this day personally appeared (insert name of affiant) (“Affiant”) who, being first duly sworn, upon his/her oath states:

1. My name is (insert name of affiant), and I am an authorized officer of (insert name of title insurance company or authorized title insurance agent) (“Title Company”).

2. This affidavit is made on behalf of the mortgagor or a transferee of the mortgagor who acquired title to the property described in the following mortgage: (describe mortgage, the name of the mortgagor, and the property described in the mortgage)
3. (Insert name of mortgagee) (“Mortgagee”) provided a payoff statement with respect to the loan secured by the mortgage.
4. Affiant has ascertained that Title Company delivered to Mortgagee payment of the loan secured by the mortgage in the amount and time and to the location required by the payoff statement.
5. The mortgage relates to:
  - a. Property consisting exclusively of a one-to-four family residence, which may include a residential unit in a condominium regime; or
  - b. Property, other than property described above, for which the original face amount of the indebtedness secured by the mortgage on the property is less than \$1.5 million.
6. Pursuant to Section 12.107, Texas Property Code, this affidavit constitutes a full and final release of the mortgage from the property.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_ (signature of affiant)

State of \_\_\_\_\_

County of \_\_\_\_\_

Sworn to and subscribed to before me on \_\_\_\_\_ (date) by  
 \_\_\_\_\_ (insert name of affiant).

\_\_\_\_\_ (signature of notarial officer)

(Seal, if any, of notary)

\_\_\_\_\_ (printed name)

My commission expires: \_\_\_\_\_

On or after the date of the payment to which the affidavit relates, the title insurance company must notify the lender of the location to which the payment is sent that the title insurance company may file for record at any time the affidavit as a release of lien. If the required notice is not provided to the lender, the title insurance company may not file for record the affidavit as a release of lien. The lender may file a separate affidavit describing the mortgage and property and challenging the affidavit by the title insurance company as a release of lien on or before the 45<sup>th</sup> day after the date the lender receives the notice if the lender mails a copy of the lender’s affidavit to the title insurance company within that 45-day period.

An affidavit made by an authorized officer of a title insurance company or an authorized title insurance agent operates as a release of the mortgage described in the affidavit if it:

- Is executed;
- Is recorded; and
- Not challenged by a separate affidavit by the lender.

A person who negligently causes an affidavit with false information be executed and recorded is liable to a party injured by the affidavit for actual damages (previously actual damages or \$5,000, whichever was greater).

A title insurance company that, at any time after payment of the mortgage, files for record an affidavit may use any recording fee collected for the recording of a release of the mortgage for the purpose of filing the affidavit.

The Bill does not affect any agreement or obligation of a lender to execute and deliver a release of mortgage and only applies to an affidavit filed on or after September 1, 2009.

#### **HOUSE BILL 2840**

A person commits mortgage fraud if the person intentionally or knowingly makes a materially false or misleading written statement in providing an appraisal of real property for compensation.

#### **HOUSE BILL 655**

The purchase price in a sale held by a trustee or substitute trustee is due and payable without delay on acceptance of the bid or within such reasonable time as may be agreed upon by the purchaser and the trustee or substitute trustee if the purchaser makes a request for additional time to deliver the purchase price.

#### **HOUSE BILL 3065**

By ordinance a municipality may require the owner of a vacant building to register the building by filing a completed registration form with a designated municipal official not later than the later of the 30<sup>th</sup> day after the date the building becomes vacant or the person becomes the owner of the building.

A building is presumed to be vacant if all lawful residential, commercial, recreational, charitable or construction activity at the building is ceased, or recently appears to have ceased for more than 150 days or the building contains more than 3 units, 75% or more which have not been used lawfully, or reasonably appear not to have been used lawfully, for more than 150 days.

A municipality may exempt certain classifications of buildings as determined reasonable and appropriate by the governing body of the municipality.

The ordinance may provide that a registration expires automatically on the first anniversary of the date that the owner filed a registration form and must be renewed on or before the 30th day before the date the registration expires, unless the building is no longer vacant. The ordinance may prohibit an owner from renewing a registration if a citation issued by the municipality relating to a condition of the building alleged by the municipality to constitute a violation of an ordinance, code or other law has not been paid in full, dismissed or otherwise legally resolved.

An owner is the person that owns the real property according to the real property records of the county in which the property is located or the records of the appraisal district in which the property is located.

An ordinance may require an owner to insure a vacant building in an amount not less than \$250,000 for a building containing more than 2 but fewer than 20 units designed for habitation or not less than \$500,000 for any other building. An ordinance may require the payment of a fee, not to exceed \$250 for registration or renewal.

The owner of a vacant building commits an offense if the owner violates the ordinance which offense is a Class C misdemeanor. Each day the violation continues constitutes a separate offense.

#### **SENATE BILL 1449**

This Bill relates to the appointment of a receiver to remedy hazardous property.

“Eligible nonprofit housing organization” means a nonprofit housing organization that is certified by a home-rule municipality to bring an action.

A home-rule municipality may annually certify one or more nonprofit housing organizations to bring an action after making the following findings:

- The nonprofit housing organization has a record of community involvement; and
- The certification will further the home-rule municipality’s goal to rehabilitate hazardous properties.

A home-rule municipality or an eligible nonprofit housing organization may bring an action in district court against an owner of property that is not in substantial compliance with one or more municipal ordinances regarding:

- The prevention of substantial risk of injury to any person; or
- The prevention of an adverse health impact to any person.

A municipality that grants authority to an eligible nonprofit housing organization to initiate an action has standing to intervene in the proceedings at any time as a matter of right.

The court may appoint a receiver if the court finds that:

- The property is in violation of one or more ordinances of the municipality;

- The condition of the property constitutes a serious and imminent public health or safety hazard; and
- The property is not an owner-occupied, single-family residence.

The following are eligible to serve as a court-appointed receivers:

- An entity with, as determined by the court, sufficient capacity and experience rehabilitating properties; and
- An individual with, as determined by the court, sufficient resources and experience rehabilitating property.

The home-rule municipality or eligible nonprofit housing organization must send by certified mail notice of an ordinance violation alleged to exist on the property on or before the 30<sup>th</sup> day before the date an action is filed to:

- The physical address of the property; and
- The address as indicated on the most recently approved municipal tax roll for the property owner or the property owner's agent.

Each record owner and each lienholder of record of the property must be served with notice of the proceedings or, if not available after due diligence, may be served by alternative means, including publication. Actual service or service by publication on a record owner or lienholder constitutes notice to each unrecorded owner or lienholder.

On a showing of imminent risk of injury to a person occupying the property or present in the community, the court may issue a mandatory or prohibitory temporary restraining order or temporary injunction as necessary to protect the public health or safety.

Subject to control of the court, a court-appointed receiver has all the powers necessary and customary to the powers of a receiver under the laws of equity and may:

- Take possession and control of the property;
- Operate and manage the property;
- Establish and collect rents and income on the property;
- Lease the property;
- Make any repairs and improvements necessary to bring the property into compliance with local codes and ordinances and Texas laws, including:
  - Performing and entering into contracts for the performance of work and the furnishing of materials for repairs and improvements; and
  - Entering into loan and grant agreements for repairs and improvements to the property;
- Pay expenses, including paying for utilities and paying taxes and assessments, insurance premiums, and reasonable compensation to a property management agent;
- Enter into contracts for operating and maintaining the property;
- Exercise all other authority of an owner of the property other than the authority to sell the property unless authorized by the court; and
- Perform other acts regarding the property as authorized by the court.

A court-appointed receiver may demolish a single-family structure on the property on authorization by the court and only if the court finds:

- It is not economically feasible to bring the structure into compliance with local codes and ordinances and Texas laws; and
- The structure is:
  - Unfit for human habitation or is a hazard to the public health or safety;
  - Regardless of its structural condition:
    - Unoccupied by its owners or tenants or other invitees; and
    - Unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children; or
  - Boarded, fenced, or otherwise secured, but:
    - The structure constitutes a danger to the public even though secured from entry; or
    - The means used to secure the structure are inadequate to prevent unauthorized entry or use of the structure.

On demolition of the structure, the court may authorize the receiver to sell the property to an individual or organization that will bring the property into productive use. On completing the repairs or demolishing the structure or before petitioning a court for termination of the receivership, the receiver must file with the court a full accounting of all costs and expenses incurred in the repairs or demolition, including reasonable costs for labor and supervision, all income received from the property, and, at the receiver's discretion, a receivership fee of 10% of those costs and expenses. If the property was sold and the revenue exceeds the total of the costs and expenses incurred by the receiver plus any receivership fee, any net income will be returned to the owner. If the property is not sold and the income produced exceeds the total of the costs and expenses incurred by the receiver plus any receivership fee, the rehabilitated property will be restored to the owner and any net income will be returned to the owner. If the total of the costs and expenses incurred by the receiver plus any receivership fee exceeds the income produced during the receivership, the receiver may maintain control of the property until all rehabilitation and maintenance costs plus any receivership fee are recovered or until the receivership is terminated.

A receiver must have a lien on the property for all of the receiver's unreimbursed costs and expenses, plus any receivership fee.

Any lienholder of record may, after initiation of an action:

- Intervene in the action; and
- Request appointment as a receiver if the lienholder demonstrates to the court an ability and willingness to rehabilitate the property.

A receiver appointed or the home-rule municipality or eligible nonprofit housing organization that filed the action under which the receiver was appointed may petition the court to terminate the receivership and order the sale of the property if an owner has been served with notice but has failed to repay all of the receiver's outstanding costs and

expenses plus any receivership fee on or before the 180<sup>th</sup> day after the date the notice was served.

The court may order the sale of the property if the court finds that:

- Notice was given to each record owner of the property and each lienholder of record;
- The receiver has been in control of the property and the owner has failed to repay all the receiver's outstanding costs and expenses of rehabilitation plus any receivership fee within the required period; and
- No lienholder of record has intervened in the action and tendered the receiver's costs and expenses, plus any receivership fee, and assumed control of the property.

The court may order the property sold:

- To a land bank or other party as the court may direct, excluding, for multifamily residential properties, an eligible nonprofit housing organization that initiated the action; or
- At public auction.

The receiver may bid on the property at public auction and may use a lien that the receiver has on the property as credit toward the purchase.

## **HOUSE BILL 2779**

The Finance Code was amended to address residential mortgage loan originator licensing. The applicable Chapter of the Finance Code is now referred to and cited as the "Mortgage Banker Registration and Residential Mortgage Loan Originator License Act."

### **Definitions**

"Commissioner" is the Savings and Mortgage Lending Commissioner.

"Disciplinary Action" means any order by the Commissioner that requires one or more of the following:

- Suspension or revocation of a residential mortgage loan originator license;
- Probation of a suspension or revocation of a residential mortgage loan originator license on terms and conditions that the Commissioner determines appropriate;
- A reprimand of a person with a residential mortgage loan originator license; or
- An administrative penalty imposed on a person holding a residential mortgage loan originator license.

"Residential mortgage loan" means a debt secured by a lien (previously first lien only) on residential real property designed principally for occupancy by one-to-four families that is secured by a deed of trust, security deed or other security instrument.

### **Employees**

A mortgage banker must file with the Commissioner a statement that contains in addition to previous requirements, a list of employees of the mortgage banker who are residential mortgage loan originators which must be promptly updated to reflect any changes, and the updated list must be submitted to the Commissioner. An employee of a mortgage banker who is not a residential mortgage loan originator is not required to register or to be licensed. The exemptions now also include the State or a government agency, political subdivision or other instrumentality of the State, or an employee of the State or a governmental agency, political subdivision, or instrumentality of the State who is acting within the scope of the person's employment.

### **Revocation of Registration or License**

Actions which may result in the revocation of a registration of a mortgage banker also now includes the mortgage banker engaging in a negligent course of conduct exhibited through pattern or practice.

The Finance Commission is authorized to adopt rules to carry out the intentions of the Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("S.A.F.E. Act").

### **Licenses**

An employee of a mortgage banker may not act in the capacity of a residential mortgage loan originator unless the employee:

- Is licensed and enrolled with the Nationwide Mortgage Licensing System and Registry ("NMLSR"); and
- Complies with other applicable requirements and rules adopted by the Finance Commission.

The Finance Commission may adopt rules to carry out the intentions of the S.A.F.E. Act.

To be eligible to be licensed as a residential mortgage loan originator, an employee of a mortgage banker, in addition to certain requirements must:

- Satisfy the Commissioner as to the employee's good moral character, including the employee's honesty, trustworthiness and integrity;
- Not be in violation of any laws or rules; and
- Provide the Commissioner with satisfactory evidence that the employee meets the qualifications provided by the Texas S.A.F.E. Act.

An application for a residential mortgage loan originator license must be:

- In writing;
- Under oath; and
- On the form prescribed by the Commissioner.

The application must be accompanied by an application fee in an amount not to exceed \$500. An application fee is not refundable and may not be credited or applied to any other fee or indebtedness owed by the person paying the fee.

The Commissioner will issue a residential mortgage loan originator license to an applicant if the Commissioner determines that the applicant meets all requirements and conditions for the license. Each residential mortgage loan originator license must have a unique identifier.

A residential mortgage loan originator license is valid for one year and may be renewed on or before its expiration date. The expiration date will be December 31<sup>st</sup> of each calendar year. An application for a renewal of a residential mortgage loan originator must meet the requirements set forth above. An application for renewal must meet all of the standards and qualifications for license renewal. The Commissioner will issue a renewal residential mortgage loan originator license if the Commissioner finds that the applicant meets all the requirements and conditions for the license. He or she may deny the application for the license for the same reasons and grounds on which he or she could have denied an original application. The Commissioner may deny the renewal application for a residential mortgage loan originator license if:

- The person seeking the renewal is in violation of the law or any applicable rule or order;
- The person seeking the renewal is in default in the payment of any administrative penalty, fee, charge or other indebtedness owed under the law;
- The person seeking the renewal is in default on a student loan administered by the Texas Guaranteed Student Loan Corporation; or
- During the current term of the license, the Commissioner becomes aware of any fact that would have been grounds for denial of an original license if that fact had been known by the Commissioner on the date the license was granted.

A person whose residential mortgage loan originator license has expired may not engage in activities that require a license until such license is renewed. A person whose license has not been renewed before January 1, but who is otherwise eligible to renew a license and does so before March 1, may renew the license by paying the Commissioner a reinstatement fee in an amount that is equal to 150% of the required renewal fee. A person whose residential mortgage loan originator license is not renewed before March 1 may not renew the license. The person must obtain a new license by complying with requirements and procedures for obtaining an original license.

Not later than 60 days before a residential mortgage loan originator license is scheduled to expire, the Commissioner will send a written notice of the impending expiration to the person at the person's last known address.

If the Commissioner declines or fails to issue or renew a residential mortgage loan originator license, the Commissioner will promptly give written notice to the applicant that the application or renewal was denied. Before the applicant or person requesting the renewal may appeal the determination to a district court, the applicant or person must file with the Commissioner, not later than the 10<sup>th</sup> day after the date the notice is received, an appeal of the ruling requesting a time or place for a hearing. A designated administrative law judge will set the time and place for the hearing not later than 90 days after the date on which the appeal is received. The administrative law judge must provide at least 10

days notice of the hearing to the applicant. After the hearing, the Commissioner will enter an order relative to the applicant based on the findings of the facts, conclusions of law, and recommendations of the administrative law judge. If an applicant or person requesting the renewal fails to request a hearing, the Commissioner's refusal to issue or renew a license is final. A person who does request a hearing will be required to pay a deposit to secure the payment of the costs of the hearing in an amount not to exceed \$500. The entire deposit will be refunded if the person prevails in the contested case hearing. If the person does not prevail, any portion of the deposit in excess of the costs of the hearing against that person will be refunded. A person whose application for a license has been denied is not eligible to be licensed for a period of 2 years after the date the denial becomes final.

The Commissioner may issue probationary and provisional licenses, and the Finance Commission may adopt rules determining reasonable terms and conditions for these licenses.

Before the 10<sup>th</sup> day preceding the effective date of an address change, a mortgage banker employee who is a residential mortgage loan originator must notify the Commissioner or authorized designee in writing of the new address. A licensee must notify the Commissioner not later than the 10<sup>th</sup> day after the date of any change in the person's name for the issuance of an amended license.

### **Annual Report**

Each mortgage banker must file an annual call report with the Commissioner on a form prescribed by the Commissioner. The report is a statement of condition of the mortgage banker and the mortgage banker's operations, including financial statements and production activity volumes.

### **Inspection/Investigations**

The Commissioner may conduct an inspection of a person licensed as a residential mortgage loan originator as the Commissioner determines necessary. An inspection may include an inspection of the books, records, documents, operations and facilities of the person. The Commissioner may request the assistance and cooperation of the mortgage banker in providing needed documents and records. The Commissioner may not make a request of the mortgage banker for documents and records unrelated to the person being investigated or inspected.

On the signed written complaint of a person, the Commissioner must investigate the actions and records of a licensee if the complaint, or the complaint and documentary or other evidence presented in connection with the complaint provides a reasonable cause. Before commencing an investigation, the Commissioner will notify the licensed residential mortgage loan originator in writing of the complaint and that the Commissioner intends to investigate the matter. The Commissioner may at any time investigate a person licensed as a residential mortgage loan originator to determine whether the person is complying with requirements. The Commissioner may conduct an undercover or covert investigation only if the Commissioner determines that the

investigation is necessary to prevent immediate harm and to carry out the purposes of the law. The Finance Commission by rule will provide guidelines to govern an inspection or investigation, including rules to:

- Determine the information and records of the licensed residential mortgage loan originator to which the Commissioner may demand access; and
- Establish what constitutes reasonable cause for an investigation.

The Commissioner may share information gathered during an investigation or inspection with any state or federal agency only if the Commissioner determines there is a valid reason for the sharing.

During an investigation the Commissioner may issue a subpoena that is addressed to a peace officer or other person authorized by law to serve a citation or perfect service. If a person disobeys a subpoena or if a person appearing in a deposition in connection with the investigation refuses to testify, the Commissioner may petition a district court in Travis County to issue an order requiring the person to obey the subpoena, testify or produce documents.

### **Penalty/Disciplinary Actions**

The Commissioner, after notice and opportunity for a hearing, may impose an administrative penalty not to exceed \$2,500, and each day a violation continues or occurs is a separate violation for the purpose of imposing a penalty. The amount will be based on:

- The seriousness of the violation;
- The history of previous violations;
- The amount necessary to deter a future violation;
- Efforts to correct the violation; and
- Any other matter that justice may require.

The enforcement of the penalty may be stayed during the time the order is under judicial review if the person pays the penalty to the clerk of the court or files a supersedeas bond with the court in the amount of the penalty.

The Commissioner may order disciplinary action against a licensed residential mortgage loan originator when the Commissioner, after notice and opportunity for a hearing, has determined that the person:

- Obtained a license, including a renewal of a license through a false or fraudulent representation;
- Published or caused to be published an advertisement related to the business of a residential mortgage loan originator that:
  - Was misleading;
  - Was likely to deceive the public;
  - In any manner tended to create a misleading impression;
  - Failed to identify as a licensed residential mortgage loan originator the person having the advertisement published; or
  - Violated federal or state law;

- While performing an act for which a license is required, engaged in conduct that constitutes improper, fraudulent or dishonest dealings;
- Entered a plea of no contest to or was convicted of a criminal offense that is a felony or that involves fraud or moral turpitude in a state or federal court;
- Failed to use a fee collected in advance of closing a residential mortgage loan for a purpose for which the fee was paid;
- Failed within a reasonable time to honor a check issued to the Commissioner after the Commissioner mailed a request for payment by mail to the person's last known business address;
- Induced or attempted to induce a party to a contract to breach the contract so the person could make a residential mortgage loan;
- Published or circulated an unjustified or unwarranted threat of legal proceedings in matters related to the person's actions or services as a residential mortgage loan originator;
- Aided, abetted or conspired with the person to circumvent the requirements of the law;
- Acted in the dual capacity of a licensed residential mortgage loan originator and real estate broker, sales person or attorney in a transaction without the knowledge and written consent of the mortgage applicant or in violation of applicable requirements under federal law;
- Discriminated against a prospective borrower;
- Failed or refused on demand to:
  - Produce a document, book or record concerning a residential mortgage loan transaction conducted by the licensee for inspection by the Commissioner;
  - Give the Commissioner free access to the books or records relating to the residential mortgage loan originator's business;
  - Provide information requested by the Commissioner; or
  - Failed without just cause to surrender, on demand, a copy of a document or other instrument coming into a licensee's possession that was provided to the licensee by another person making the demand or that the person making the demand is entitled to receive;
- Disregarded or violated the law, a rule or an order issued by the Commissioner;
- Provided false information to the Commissioner during the course of an investigation or inspection;
- Paid compensation to a person who is not licensed or exempt; or
- Established an association, by employment or otherwise, with a person not licensed or exempt who was expected or required to act as a residential mortgage loan originator.

The Commissioner may also order disciplinary action against a licensed residential mortgage loan originator, after notice and opportunity for a hearing, if the Commissioner becomes aware of any fact that would have been grounds for the denial of the original license.

If the Commissioner has reasonable cause to believe that a licensed residential mortgage loan originator has violated or is about to violate the law, the Commissioner may issue without notice and hearing an order to cease and desist. An order must contain a reasonably detailed statement of the facts on which the order is made.

If a hearing is not requested, not later than the 30<sup>th</sup> day after the date on which the order is made, the order is considered final and not appealable. The Commissioner may impose against a residential mortgage loan originator who violates a cease and desist order an administrative penalty in amount not to exceed \$1,000 for each day of the violation. If a residential mortgage loan originator fails to pay an administrative penalty that has become final or fails to comply with an order of the Commissioner in addition to any other remedy provided under the law, the Commissioner, on not less than 10 days notice to the residential mortgage loan originator, may without a prior hearing suspend the residential mortgage loan originator's license.

The Commissioner may order a residential mortgage loan originator to make restitution for any amount received by that person in violation of the law.

A residential mortgage loan applicant injured by a violation of the law may bring an action for recovery of actual monetary damages and reasonable attorneys fees and court costs.

### **Mortgage Origination Services**

On disbursement of mortgage proceeds to or on behalf of the residential mortgage loan applicant, the residential mortgage loan originator who assisted the applicant in obtaining the loan is considered to have completed the performance of the loan originator's services for the applicant and owes no additional duties or obligations to the applicant with respect to the loan. This does not limit or preclude the liability of a residential mortgage loan originator for:

- Failing to comply with law or regulations;
- Failing to comply with the provision of or duty arising under an agreement with a residential mortgage loan applicant; or
- Violating any other state or federal law.

A person commits an offense if the person is an employee of a mortgage banker, who is not exempt and acts as a residential mortgage loan originator without first obtaining a license. Such offense is a Class B misdemeanor. A second or subsequent conviction for an offense is a Class A misdemeanor.

If the Commissioner has reasonable cause to believe that a person who is not licensed or exempt has engaged, or is about to engage in an act or practice for which a license is required, the Commissioner may issue, without notice and hearing, an order to cease and desist from continuing a particular action or an order to take affirmative action or both to enforce compliance. The order may assess an administrative penalty in an amount not to exceed \$1,000 per day for each violation and may require a person to pay to a residential

mortgage loan applicant any compensation received by the person from the applicant in violation of the law.

## **TEXAS RULES**

### **28 TAC § 9.40**

The Texas Commissioner of Insurance has adopted new § 9.40 of Title 28 of the Texas Administrative Code, which by reference makes amendments to the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (the “Basic Manual”). These amendments affect procedural rules, rates and forms in the Basic Manual pertaining to mineral interests and were effective November 1, 2009.

New Procedural Rule P-5.1 authorizes a title company to place in a policy or commitment a prescribed exception or exclusion for minerals in either Schedule A or Schedule B respectively.

New Procedural Rule P-50.1 authorizes issuance of new endorsements when such exception or exclusion is used.

The T-19-.2, if requested by the insured and upon payment of the premium of \$50.00 is available on both Loan and Owner policies when the real property involved is one acre or less, improved or intended to be improved for one-to-four family residential use. This endorsement covers loss sustained by damage to improvements (excluding lawns, shrubbery, or trees) resulting from future exercise of existing rights to use the surface of the land for extraction of coal, lignite, oil, gas or other minerals.

If a transaction involves multiple parcels, then both a T-19.2 and T-19.3 can be used as applicable, each covering the appropriate parcel.

An amendment to Rate Rule R-29 increases the minimum premium for the T-19 (Loan policy) and the T-19.1 (Owner policy) endorsements to \$50.00 each.

The Texas Title Insurance Information page was amended as well to add a statement that if a title policy is issued with an exclusion or exception to the minerals then neither the policy nor the optional endorsements insure title to the mineral rights.

## **7 TAC Sections 2.101 – 2.105 Application Procedures**

### **2.101 Definitions**

“Nationwide Mortgage Licensing System and Registry” or “NMLSR” means the mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of state residential mortgage loan originators.

“OCCC” means the Office of Consumer Credit Commissioner of the State of Texas.

“RMLO” means a registered mortgage loan originator under the Texas S.A.F.E. Act.

### **2.102 Registration with the NMLSR**

Individuals applying for a license with the OCCC and who, for actual or expected compensation or gain, take a residential mortgage loan application, or who offer or negotiate the terms of a residential mortgage loan, must register with the NMLSR. Entities licensed or applying for a license with the OCCC to make, transact, or negotiate residential mortgage loans need not register with the NMLSR. An OCCC entity licensee or applicant may elect to register with the NMLSR if desired.

### **2.103 Fingerprint Submissions**

Applicants must submit one legible set of fingerprints to the NMLSR for purposes of application with the OCCC to become a RMLO. The OCCC reserves the right to request additional sets of fingerprints to conduct state and international background checks.

### **2.104 Application and Renewal Fees**

To become a RMLO, an applicant must submit the required fees to the NMLSR at the time of application and at the time of renewal. The fees are nonrefundable. Fingerprint processing fees must also be paid in the amount necessary to recover the costs of investigating the applicant’s fingerprint record (amount required by third party).

The Commission sets the RMLO application fee at \$300 and the RMLO renewal fee at \$300. A third party operates the NMLSR and that third-party operator sets the amount of the required system fees. Applicants and RMLOs must pay all required application and renewal fees, fingerprint processing fees, and any additional amounts required by the third-party operator.

### **2.105 Recovery Fund Fees**

Applicants and RMLOs must pay a non-refundable \$25 recovery fund fee to the OCCC at the time of application and at the time of renewal.

## **7 TAC 80.1 – 80.23 – Texas Residential Mortgage Loan Originator Regulations**

### **80.1 Scope**

Effective January 1, 2011, sections 80.1 – 80.7 will be rescinded and replaced by sections 80.301 – 80.307 (provided below).

### **80.2 Definitions**

“Residential mortgage loan” means a loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real estate and includes new loans and renewals, extensions, modifications, and rearrangements of such loans. The term does not include a loan, which is secured by a structure that is suitable for occupancy as a 1-to-4 family residence, but is used for a commercial purpose such as a professional office, beauty salon, or other non-residential use, and is not used as a residence.

The definition of “mortgage loan” has been deleted.

The term “residential mortgage loan originator” has replaced the term “mortgage broker or loan officer.”

“Dwelling” means a residential structure or mobile home, which contains one to four family housing units, or individual units of condominiums or cooperatives.

“Residential real estate” means real property located in Texas on which a dwelling is constructed or intended to be constructed.

#### **80.12 License Record Changes**

Before the 10<sup>th</sup> day preceding the effective date of any change in address, a licensee (previously mortgage broker) must notify the Commissioner of the Texas Department of Savings and Mortgage Lending (the “Commissioner”) (previously in writing) of the proposed new address by filing a license amendment with the NMLSR together with the payment of any applicable fees. Before the 10<sup>th</sup> day following the effective date of any personal name change, a licensee must notify the Commissioner of the new personal name by filing a license amendment through the NMLSR together with the payment of any applicable fee. Before the 10<sup>th</sup> day preceding the effective date of a new or changed company, organization (previously corporate) or assumed name, a licensee must notify the Commissioner by filing a license amendment through the NMLSR together with the payment of any applicable fees.

#### **80.14 Education Program**

Effective April 2, 2010, pre-licensing and continuing education courses required under the Texas S.A.F.E. Act must be reviewed and approved by the NMLSR.

#### **80.15 Complaints, Administrative Penalties, and Disciplinary and/or Enforcement Actions**

The Commissioner may authorize or direct any employee of the Department to initiate a complaint against a person licensed under the Texas S.A.F.E Act and to conduct appropriate investigation if a payment has been made (previously a court judgment or an administrative claim against that person has been paid) from the Recovery Fund as a result of the person’s actions.

If the Commissioner determines that a person has violated the requirements of the Texas S.A.F.E. Act, the regulations, or any order adopted under the Texas S.A.F.E. Act or the regulations, the Commissioner, after notice and opportunity for hearing, may impose an administrative penalty on that person not to exceed \$25,000 per violation (previously \$2,500 per violation). The amount of the violation is at the Commissioner’s discretion.

In determining the amount of any administrative penalty(ies) for any violation(s) of the Texas S.A.F.E. Act or the regulations, the Commissioner may now consider the economic harm to property caused by the violation and efforts to correct the violation.

### **80.20 Inspections**

The Commissioner, operating through the Department staff and such others as the Commissioner may designate, will conduct periodic inspections of residential mortgage loan originators (previously mortgage brokers and loan officer licensees) as the Commissioner deems necessary.

The Commissioner may require reimbursement in an amount not to exceed \$325 for each examiner a day for on-site examination or investigation of a residential mortgage loan originator (previously mortgage broker) if records are located out of state or if the review is considered necessary beyond the routine examination process.

### **80.23 Annual Reports and Call Reports**

A company or organization who held a license anytime during the reporting year must submit to the NMLSR a report of condition that is in the form and contains the information required by the NMLSR. The Commissioner will prepare and make public a report summarizing the annual reports and call reports provided by the licensee but will treat each individual report and the information contained therein as confidential.

## **7 TAC 80.301 – 80.307 Licensing**

### **80.301 Scope**

These regulations govern the licensing, registration, and conduct of residential mortgage loan originators, mortgage companies, financial services companies, credit union subsidiary organizations, auxiliary mortgage loan activity companies, and independent loan processors and underwriters under the Texas S.A.F.E. Act. The terms “licensed” and “registered” may be used interchangeably.

“Residential mortgage loan originator” means an individual who for compensation or gain, or in the expectation of compensation or gain, takes a residential mortgage loan application or offers or negotiates the terms of a residential mortgage loan application.

The term residential mortgage loan originator does not include:

- An individual who performs solely administrative or clerical tasks for a licensed residential mortgage loan originator;
- An individual who performs only real estate brokerage activities and is a state licensed or registered real estate broker or salesperson, unless the individual is compensated by a lender, mortgage broker, or other residential mortgage loan originator or by an agent of these;
- An individual licensed as a manufactured home salesperson or broker, unless the individual is directly compensated for arranging financing by a lender, mortgage broker, or other residential mortgage loan originator or by an agent of these;
- An individual who receives the same benefits from a financed transaction as the individual would have received if the transaction were a cash transaction; or

- An individual who is involved solely in providing extensions of credit relating to timeshare plans.

“Mortgage company” means any corporation, company, partnership, or sole proprietorship that engages in the business of residential mortgage loan origination.

“Financial services company” means a company that may perform the services of a mortgage broker as if the company were licensed as a mortgage broker through individuals who are the exclusive agents of the registered financial services company.

“Credit union subsidiary organization” means an agency, association, or company wholly or partly owned by a credit union that is designed primarily to serve or otherwise assist credit union operations.

“Auxiliary mortgage loan activity company” means any political subdivision of Texas or any other organization that qualifies for an exemption from Texas franchise and sales taxes by virtue of its status under the Internal Revenue Code that are involved in affordable home ownership programs.

“Independent contractor loan processor/underwriter company” means any corporation, company, partnership, or sole proprietorship that receives compensation as or for an individual performing clerical or support duties as an independent contractor loan processor or underwriter at the direction of a licensed residential mortgage loan originator.

A person must be licensed under the Texas S.A.F.E. Act if:

- The person engages in the business of residential mortgage loan origination on real property located in Texas;
- An individual has a primary residence in Texas and engages in the business of residential mortgage loan origination;
- An individual represents or holds himself out to the public as a “loan officer,” “mortgage consultant,” “mortgage broker,” “loan modification/refinance consultant,” or “residential mortgage loan originator,” or otherwise represents that the individual can or will perform the activities of a residential mortgage loan originator;
- Provides disclosures to a prospective borrower or discusses or explains such disclosures. Disclosures include, but are not limited to:
  - The Residential Mortgage Loan Originator disclosure form;
  - Truth-in-Lending disclosures;
  - The Good Faith Estimate of settlement costs;
  - Affiliated business arrangements; and
  - Disclosures relating to the dual role as a residential mortgage loan originator and real estate broker or sales agent.
    - An individual who prepares a required disclosure under the direction and supervision of a licensed residential mortgage loan originator, but who does not discuss the disclosure with a

prospective borrower will not be deemed to have provided a disclosure;

- Determines the lender(s) or investor(s) to whom the loan will be submitted;
- Issues or signs a prequalification letter or pre-approval letter; or
- The person is a loan processor or underwriter who is an independent contractor.

The following persons are exempt from the Texas S.A.F.E. Act:

- A registered mortgage loan originator when acting for a depository institution, a subsidiary that is owned and controlled by a depository institution and is regulated by a federal agency, or an institution regulated by the Farm Credit Administration;
- A residential mortgage loan originator when acting for a mortgage broker licensed under the Finance Code;
- An individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual;
- A licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney takes a residential mortgage loan application and offers or negotiates the terms of a residential mortgage loan;
- An individual who is an exclusive agent of a registered financial services company and is enrolled as a registered mortgage loan originator with the NMLSR;
- An individual who offers or negotiates terms of a residential mortgage loan secured by the individual's primary residence; or
- An individual who offers terms of a commercial mortgage loan.

### **80.302 Definitions**

“Branch office” means any office that is separate and distinct from the primary office, whether located in Texas or not, which conducts business on residential real estate located in Texas or with Texas consumers.

“Commercial mortgage loan” means a loan primarily for business or other commercial use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on property other than residential real estate.

“Commission” means the Finance Commission of the State of Texas.

“Commissioner” means the Commissioner of the Department of Savings and Mortgage Lending.

“Commissioner's designee” means an employee of the Department performing his or her assigned duties or such other person as the Commissioner may designate in writing. A Commissioner's designee is deemed to be the Commissioner's authorized “personnel or representative.”

“Department” means the Department of Savings and Mortgage Lending.

“Dwelling” means a residential structure or mobile home, which contains one to four family housing units, or individual units of condominiums or cooperatives.

“Employee” means, with respect to an individual working for a business entity, any individual whom the business entity has elected to treat as an employee for federal income tax and FICA withholding purposes.

“Loan processor or underwriter” mean an individual who performs clerical or support duties as an employee at the direction of and subject to the supervision and instruction of an individual licensed as a residential mortgage loan originator or exempt from licensure under the Texas S.A.F.E. Act.

“Mortgage applicant” means any person who is registered under the Texas S.A.F.E. Act.

“Mortgage banker” means a person who is registered under the Texas Finance Code and is:

- Approved or authorized by the United States Department of Housing and Urban Development (“HUD”) as a lender, for residential mortgage loans, with unconditional direct endorsement underwriting authority;
- An approved seller or servicer under the Federal National Mortgage Association (“Fannie Mae”);
- An approved seller or servicer under the Federal Home Loan Mortgage Corporation (“Freddie Mac”); or
- An approved issuer for the Government National Mortgage Association (“Ginnie Mae”).

“Nationwide Mortgage Licensing System and Registry” or “NMLSR” means the mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of state residential mortgage loan originators.

“One-to-four family residential real property” means improved or unimproved real property, or any portion of or interest in any such real property, on which a one-to-four family dwelling, including a manufactured home, is, is being, or is to be constructed or situated.

“Physical office” mean an actual office where the business of mortgage lending/and or the business of taking or soliciting residential mortgage loan applications is conducted. It must have a street address; a post office box or other similar designation does not suffice. It must be accessible to the general public as a place of business and must hold itself open on a regular basis during posted hours. The posted hours of business must be posted in a manner to give effective notice to walk-up traffic as to the hours of opening and closing. Normally, this will require posting of the hours on an exterior door or window of the office. In those instances where a physical office is in a shared office suite or building, the hours may be posted in a common lobby or reception area. During the hours in which

the physical office is open, at least one staff member must be present to assist customers. The physical office of a licensee need not be the location at which such person's required records are maintained, but the location at which such required records are maintained must be accessible to the Commissioner or the Commissioner's designee during normal business hours.

"Recovery Fund" means the Mortgage Broker Recovery Fund established and administered in accordance with the Texas S.A.F.E. Act.

"Residential mortgage loan" means a loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real estate. It includes new loans and renewals, extensions, modifications, and rearrangements of such loans. The term does not include a loan, which is secured by a structure that is suitable for occupancy as a one-to-four family residence, but is used for a commercial purpose such as a professional office, beauty salon, or other non-residential use, and is not used as a residence.

"Residential real estate" means real property located in Texas on which a dwelling is constructed or intended to be constructed.

### **80.303 Licensing – General**

Applications for residential mortgage loan originator licenses and company or organization licensure must be submitted through the NMLSR and must be on the prescribed application forms. An application, notice, or any other filing with the Department will only be deemed submitted if it is complete. A filing is complete only if all required supporting documentation is included and only if all required fees have been received by the Department. If an applicant fails to provide to the Department any information or supplemental documentation within 30 days from the date of request, the application may be deemed withdrawn.

All licenses issued will be valid for a term of not more than one year from the date of issuance and will expire on December 31 of the year issued.

### **80.304 Qualifications for Obtaining Licenses**

In order to be issued a mortgage company license, the applicant must:

- Submit a completed application together with the payment of applicable fees through the NMLSR;
- Designate control persons for the company through the NMLSR;
- Designate an individual licensed by the Department as a residential mortgage loan originator as its qualifying individual;
- Submit a completed branch application through the NMLSR for each branch office that conducts business on real property located in Texas;
- Not be in violation of the Texas S.A.F.E. Act, a rule adopted pursuant to the Texas S.A.F.E. Act, or any order previously issued to the applicant by the Commissioner;

- Have the company name or assumed name properly filed with either the Texas Secretary of State or with the appropriate county clerk's office; and
- Maintain a physical office in Texas.

In order to be issued a credit union subsidiary organization license, an auxiliary mortgage loan activity company license, and independent contractor loan processor/underwriter company license, or a financial services company registration under the Texas S.A.F.E. Act, an applicant must:

- Submit a completed application together with the payment of applicable fees through the NMLSR;
- Designate control persons for the company through the NMLSR;
- Designate an individual licensed by the Department as a residential mortgage loan originator as its qualifying individual;
- Submit a completed branch application through the NMLSR for each branch office that conducts business on real property located in Texas; and
- Not be in violation of the Texas S.A.F.E. Act, a rule adopted under the Texas S.A.F.E. Act, or any order previously issued to the applicant by the Commissioner.

In order to be issued a license as a mortgage company residential mortgage loan originator, a credit union subsidiary organization residential mortgage loan originator, an auxiliary mortgage loan activity residential mortgage loan originator, an independent contractor loan processor/underwriter residential mortgage loan originator, or a financial services company exclusive agent, an individual must submit a completed application through the NMLSR together with the payment of applicable fees and must establish to satisfaction of the Commissioner that:

- The applicant has not had a residential mortgage loan originator license revoked in any governmental jurisdiction;
- The applicant is not in violation of the Texas S.A.F.E. Act, a rule adopted pursuant to the Texas S.A.F.E. Act, or any order previously issued to the applicant by the Commissioner;
- The applicant has not been convicted of, pled guilty or no contest to, a felony in a domestic, foreign, or military court during the 7-year period preceding the date of the application;
- At any time preceding the date of the application, the applicant has not been convicted of, pled guilty or no contest to, a felony in a domestic, foreign, or military court involving fraud, dishonesty, breach of trust, or money laundering;
- The applicant demonstrates the financial responsibility, character, and general fitness required to operate honestly, fairly, and efficiently as a residential mortgage loan originator under the Texas S.A.F.E. Act;
- The applicant has successfully completed at least 20 hours of NMLSR-approved pre-licensing education;
- The applicant has passed both the state component and the national component on a written test that meets the requirements of the Texas S.A.F.E. Act; and
- The applicant has paid a Recovery Fund fee not to exceed \$20 (this does not apply to a financial services company exclusive agent).

### **80.305 Renewals**

A license may be renewed upon:

- The submission of a completed application for renewal through the NMLSR together with the payment of the applicable renewal application fee;
- Determination that the applicant continues to meet the minimum requirements for license issuance; and
- Providing satisfactory evidence to the Commissioner that the license holder has completed the continuing education requirements.

A renewal license may be denied if:

- The license holder has been convicted of, pled guilty or no contest to, a felony in a domestic, foreign, or military court during the term of the license;
- The license holder is in violation of the Texas S.A.F.E. Act, these regulations, or an order of the Commissioner;
- The license holder has engaged in conduct evidencing the licensee's lack of good moral character or financial responsibility;
- The residential mortgage loan originator is in default on a student loan administered by the Texas Guaranteed Student Loan Corporation; or
- On any other ground provided by law or these regulations.

A licensed individual on active military duty serving outside of Texas will be exempt from any late filing penalty fee imposed for renewing after the expiration date of the license, and is entitled to an additional amount of time, equal to the total number of years or parts of years that the individual serves or served on active duty, to complete any continuing education requirements and other requirements related to the renewal of the license.

### **80.306 Sponsorship and Termination**

Companies or organizations affiliating with residential mortgage loan originators are required to sponsor their license in the NMLSR. An applicant for a residential mortgage loan organization license must be sponsored by a licensed company or organization through the NMLSR otherwise the license will be issued as inactive. The company or organization must acknowledge and accept the responsibilities set forth in the Texas S.A.F.E. Act, including responsibility for the actions of the residential mortgage loan originator.

Sponsorship may be removed by either the sponsoring company or the residential mortgage loan originator. If sponsorship of a residential mortgage loan originator is terminated by the sponsoring company, the sponsoring company must immediately notify the Commissioner through the NMLSR that the sponsorship has terminated. If sponsorship is terminated by the residential mortgage loan originator, the residential mortgage loan originator must immediately notify the Commissioner through the NMLSR that the sponsorship has ended. The license will become inactive. Sponsorship of a residential mortgage loan originator remains in effect until the Commissioner has been notified of the termination of the sponsorship. Prior to its scheduled expiration, an

inactive residential mortgage loan originator license may be reactivated upon designation of a new sponsoring company through the NMLSR.

### **80.307 Background Checks**

In connection with each application for a residential mortgage loan originator license under the Texas S.A.F.E. Act, the applicant must provide authorization and fingerprints as prescribed by the NMLSR necessary to conduct a criminal background history check through the FBI. In connection with each application for a residential mortgage loan originator license, the Commissioner may conduct a criminal background check through the Department of Public Safety.

In connection with each application for the issuance of a residential mortgage loan originator license, the applicant must provide authorization for the NMLSR and the Commissioner to obtain an independent credit report from a consumer reporting agency. Each applicant for licensure under the Texas S.A.F.E. Act must provide to the Commissioner and the NMLSR information related to any administrative, civil, or criminal findings by a governmental jurisdiction.

The Commissioner will keep confidential any background information obtained and may not release or disclose the information unless:

- The information is a public record at the time the Commissioner obtains the information; or
- The Commissioner releases the information:
  - Under order from a court;
  - With the permission of the applicant;
  - To a person through whom the applicant is conducting or will conduct business; or
  - A governmental agency.

Criminal history record information obtained from the FBI may be released or disclosed only to a governmental entity or as authorized by federal statute, federal rule, or federal executive order.

An individual considering applying for a license may request a criminal history evaluation letter regarding the person's eligibility for a license. The request must be made on a form promulgated by the Department and include all pertinent court documentation, including certified copies of all court indictments and/or judgments, and orders, and an explanation of the circumstances and events of the criminal action that led to the conviction or sentence, and basis for the person's potential ineligibility. The fee for the process is \$75 per request. Upon receipt of the request, the Department will:

- Investigate the information provided by the individual to determine if there is ground for ineligibility; and
- Notify the individual as to the Department's determination within 90 days of receipt of the individual's request.

## **Home Equity Modification Advisory Bulletin April 2009**

The Texas Office of Consumer Credit Commissioner, the Texas Department of Banking, the Texas Credit Union Department, and the Texas Department of Savings and Mortgage Lending issued an Advisory Bulletin (the “Advisory”) on home equity modifications under Article XVI Section 50(a)(6)(L) of the Texas Constitution. The purpose of the Advisory is to endorse the permissibility of modifying a loan under the Home Equity provisions of the Texas Constitution. The Advisory does not negate the applicability or legality of any other method of modifying a home equity loan.

Article XVI Section 50(a)(6)(L) provides a permissible modification method. It allows a borrower to pay the lender whatever is necessary to bring the home equity loan current on or before the date that the home equity loan is modified. The borrowers’ modified installments must be:

- Substantially equal in amount;
- Successive and periodic; and
- Scheduled to equal or exceed the amount of accrued interest as of the date of the installment.

The amount of the scheduled installment or the remaining term of the loan or both may be changed.

### **Amount of Each Installment**

Each installment must equal or exceed the amount of accrued interest. The lender may have the borrower bring the loan current either before the modification is signed or when it is signed; or the lender could waive the accrued interest as of the date the home equity loan is modified. The lender should schedule the first scheduled payment within 60 days of the modification.

### **Substantially Equal Successive Periodic Installments**

Parties should be able to modify a home equity loan by providing a new schedule of installments so long as the schedule provides for successive periodic installments, no more than every 14 days and not less than monthly.

### **First Installment Due Date**

The parties may schedule the modification where the first payment is due more than two months after the modification. While the Texas Constitution limits the first payment of a home equity loan to begin “no later than two months from the date the extension of credit is made,” this provision applies to the original closing or the refinance of the loan. The date of the modification is not the date that the original extension of credit is made; rather, a modification simply changes certain terms of an existing obligation.

## TEXAS CASES

### *Texas Bankers Association v. Association of Community Organizations for Reform (ACORN)*, No. 04-06-00273-CV (Tex. App. 3<sup>rd</sup> District Austin January 8, 2010.)

An Austin district court's recent ruling has struck down certain regulations issued by the Finance Commission of Texas and the Credit Union Commission (the "Commissions"). The regulations addressed the three percent (3%) limitation on fees that lenders can charge on a Texas home equity loan.

In 2003, the Association of Community Organizations for Reform Now (ACORN) and certain borrowers of home equity loans in Texas sued the Commissions to invalidate certain regulations adopted by the Commissions in the Texas Administrative Code related to home equity lending. The Texas Bankers Association (the "TBA") intervened in the suit, arguing that the Commissions' interpretations were a proper exercise of the Commissions' authority.

The trial court invalidated 9 regulations, including 7 TAC § 153.1(11), which defined "interest" under the home equity lending rules and 7 TAC § 153.5(3), (4), (6), (8), (9), and (12), which provided that certain charges were not interest and therefore were subject to the 3% fee limitation applicable to Texas home equity loans. The Commissions and the TBA argued that the trial court erred in invalidating the Commissions' interpretation of "interest" for purposes of the cap on fees other than interest in the context of a home equity loan.

Section 50(a)(6)(e) of Article XVI of the Texas Constitution states that the owner or the owner spouse's cannot 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, 3% of the original principal amount of the extension of credit. Rule 153.1(11) defined "interest" for purposes of this fee cap as interest defined in the Texas Finance Code § 301.002(4). Section 301.002(4), located in the subtitle governing usury, defines "interest" as "compensation for the use, forbearance, or detention of money."

Rule 153.5 repeats the Constitutional requirement that there is a 3% cap on fees other than interest in the context of a home equity loan. Rule 153.5(3) provides that "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 3% limitation." Rule 153.5(4) provides that "charges an owner or an owner's spouse is required to pay **that are not interest are fees subject to the 3% percent limitation.**" Rule 153.5(6), (8), (9), and (12) respectively provide that charges an owner or an owner's spouse is required to pay to originate an equity loan, evaluate the credit decision for an equity loan, maintain

the loan, or service the loan **that are not interest are fees subject to the 3% limitation** (emphasis added)

ACORN argued that the commonly understood meaning of “interest” is not the broad definition of interest discussed in the usury sections of the Finance Code, but rather the amount of interest described in the promissory note and specified as a percentage rate to be applied to the remaining, unpaid principal. ACORN further argued that the Commissions’ interpretation of “interest” encompasses all fees paid to the lender and therefore allows the “interest” exception to “swallow” the rule limiting fees to 3% of the principal. The TBA and the Commissions argued that the usury definition of interest found in the Finance Code may reasonably be applied to the Constitutional language capping fees “in addition to any interest” because the Legislature is presumed to act with complete knowledge of the existing condition of the law and with reference to it.

The Court followed ACORN’s interpretation of the definition of interest by stating “given the inherent differences between the consumer-protection mechanisms of the usury statutes, which require a broad definition of interest, and the protective purposes of the home equity fee cap, use of the usury definition of interest for purposes of the fee cap fails to preserve the legislative intent.” The Court further stated that “in the home equity lending context, incorporating the extremely broad usury definition of interest would defeat the purpose of the Constitutional provision imposing a fee cap in the first place.”

In citing the “Notice Concerning Extensions of Credit” language in § 50(g)E of Article XVI of the Texas Constitution, which provides that “fees and charges to make the loan may not exceed 3% of the loan amount,” the Court agreed with ACORN that the Legislature considered the 3% cap to be a substantive protection afforded to borrowers. The Court stated “allowing the interest exception to swallow the rule would strip the home equity provisions of this intended protection.”

In affirming the trial court’s judgment invalidating Rules 153.1(11), 153.5(3), (4), (6), (8), (9), and (12), the Court stated that “the plain language of this provision [§ 50(g) of Article XVI of the Texas Constitution] creates a 3% cap on fees other than interest in the context of a home equity loan. The Commissions’ interpretation, which classifies fees charged by the lender as interest, essentially renders this cap meaningless. We cannot conclude that the Legislature, in creating a cap on fees connected with a home equity loan, intended to exclude basically all fees charged by the lender from the cap.”

***Denmon v. Atlas Leasing, et al*, 285 S.W.3d (Tex. App. – 5<sup>th</sup> District 2009)**

In this case, the plaintiff-borrower, Sarah Denmon (“Plaintiff”), sued the defendant-lender, Atlas Mortgage (“Lender”) for wrongful foreclosure of her residence in violation of the Texas Constitution. The Lender argued that the Plaintiff had no homestead rights in the residence. The trial court ruled in favor of the Lender. The appeals court reversed the trial court because the Plaintiff’s former husband (“Husband”), who was married to the Plaintiff when she executed the loan documents, never signed the loan documents, thereby rendering the lien against the property invalid.

At the time the Plaintiff bought her residence, she was married. Her Husband gave her his half of the money from the sale of their prior home to purchase the new residence. The Plaintiff bought the new residence in July of 2003. The Plaintiff's Husband never lived in the residence, although he visited it several times. The Husband bought a trailer in a different city and did not file a homestead exemption on that property until he and the Plaintiff divorced in 2004. In November 2003, the Plaintiff executed a loan, which included a mechanic's lien, a promissory note, and a deed trust with the Lender for her residence. The Plaintiff signed the loan documents when she and her Husband were still married; however, the Husband did not sign the loan documents.

The Plaintiff testified at trial that she told the Lender that she was married prior to signing the loan documents. The Lender's owner testified that he was never informed that the Plaintiff was married. When the Lender conducted a property search on the property, it was listed only in the Plaintiff's name, there was no homestead exemption on file, and the Plaintiff's Husband's name never appeared in the chain of title.

The Plaintiff made her final payment on the residence in March of 2004. After the Plaintiff defaulted on the loan, the Lender did not immediately foreclose in order to allow her the opportunity to refinance. The Lender later foreclosed in October 2004. In December 2005, the Plaintiff brought the suit alleging wrongful foreclosure based on an invalid lien.

The Plaintiff relied on Section 53.245 of the Property Code, which requires the signature of both spouses when fixing a lien on a homestead. The Court provided that the language of *section* 53.254 is clear. To fix a lien on a homestead, the person who is to furnish material or perform labor and the owner must execute a written contract setting forth the terms of the agreement. *TEX. PROP. CODE ANN.* 53.254(a). If the owner is married, the contract must be signed by both parties. § 53.254(c). Because it is undisputed they were married, *section* 53.254 applies if the property was in fact their family homestead.

The Court further provided that:

Texas law recognizes that homestead protection can dissolve if the owners deliberately misrepresent their marital status in order "to defeat the rights of an innocent third party who, in good faith, without notice, for valuable consideration, has acquired valid liens." Such an assertion is an affirmative defense...Lender has never affirmatively asserted that Plaintiff misrepresented herself in order to defeat their rights. In fact, the Plaintiff claimed at trial that she told the Lender that she was married; however, the Lender's owner stated at trial that information, if true, was never relayed to him. Rather, the Lender simply relied on its document review showing the Plaintiff owned the property solely in her name, the Husband's name never appeared anywhere in the chain of title, and the Plaintiff did not file a homestead exemption on her property.

However, it is not necessary for a spouse to be listed on real property documents in order for homestead status to attach. Texas law is clear that possession of a homestead interest

is not dependent upon ownership; a person is permitted to hold homestead rights in his or her spouse's separate property. Likewise, it has been held that no specific writing is needed to claim a homestead; therefore, the fact that the Plaintiff did not file a homestead exemption is not proof that she did not intend it as such. To assert that the homestead protection of the Texas Constitution could be voided by mere failure to designate the property as a homestead for tax purposes would render the constitutional protection meaningless.

Under the facts of the case, the Court concluded that because the Plaintiff and Husband were married at the time that the Plaintiff purchased the residence, the Plaintiff intended it to be the family homestead, and since the Lender never pleaded and proved abandonment of the homestead, the property was also the Plaintiff's Husband's family homestead. The trial court was incorrect in concluding that the lien did not violate the homestead protections under the Texas Constitution. Section 53.254 of the Property Code required the Plaintiff's Husband's signature on the loan documents before a lien could attach that resulted in foreclosure. Since the Husband did not sign the loan documents, the lien on the property and the resulting foreclosure was void.

*Grant v. Clouser, 287 S.W.3d 914 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2009)*

The current cotenant's homestead rights were subordinate to the judgment creditor's right to compel partition by sale. Texas homestead laws do not preclude a partition of sale of property by a cotenant because the right to partition is absolute. The Court noted that Texas homestead laws prevent forced sales when a debtor's homestead is subject to forced sale by a creditor. The cotenant was not the judgment debtor of the creditor. The Court noted that case law established that regardless of how the other cotenant acquired its interest, it does not diminish the right to partition by sale.

## **REGULATION Z**

### **73 Federal Register 44522**

The Housing and Economic Recovery Act of 2008 ("HERA") was enacted July 30, 2008. HERA included the Mortgage Disclosure Improvement Act of 2008 ("MDIA") which amends the Truth in Lending Act ("TILA"). MDIA requires early, transaction-specific disclosures for mortgage loans secured by dwellings other than the consumer's principal dwelling and requires waiting periods between the time when disclosures are given and consummation of the mortgage transaction. If the annual percentage rate provided in the good faith estimate disclosures changes beyond the specified tolerance for accuracy (1/8 of 1 percent for a regular transaction or 1/4 of 1 percent for an irregular transaction), creditors must provide corrected disclosures, which the consumer must receive on or before the third business day before consummation of the transaction.

The MDIA requires creditors to make early disclosures even when the loan is not for the purpose of financing the purchase or initial construction of the consumer's principal dwelling and prohibits the collection of fees before the consumer receives the disclosures,

other than a fee for obtaining a consumer's credit report. MDIA applies these provisions to a loan secured by a dwelling even if it is not the consumer's principal dwelling. For loans secured by a consumer's dwelling, creditors must deliver or mail the early disclosures at least 7 business days before consummation. If the annual percentage rate ("APR") contained in the early disclosures becomes inaccurate, creditors must re-disclose and provide corrected disclosures that the consumer must receive at least 3 business days before consummation. The disclosures also must inform consumers that they are not obligated to complete the transaction simply because disclosures were provided or because a consumer has applied for a loan.

### **Applicability**

This rule does not apply to home equity lines of credit. The rule expands the early disclosure requirements to include loans secured by dwellings other than the consumer's principal dwelling. Creditors must give consumers early disclosures in connection with the dwelling-secured mortgage loan that is subject to RESPA, whether or not the loan is for the purpose of financing the purchase or initial construction of the consumer's principal dwelling.

### **Timing**

This Final Rule adopts MDIA's requirement that a creditor deliver or mail the early disclosures for all dwelling-secured mortgage loans no later than 3 business days after the creditor receives a consumer's application. The early disclosures also must be provided for non-purchase closed-end loans secured by the consumer's principal dwelling (such as a refinance loan). These disclosures must be provided before the consumer pays any fee, other than a bona fide and reasonable fee for obtaining the consumer's credit history. The rule expands the requirements to apply to a mortgage transaction secured by a dwelling other than the consumer's principal dwelling (such as a second home) and makes them effective for loans for which the creditor receives an application on or after July 30, 2009.

A more precise definition of "business day", which is all calendar days except Sundays and specified legal public holidays, applies to the 7-business-day waiting period. The 7-business-day waiting period begins when the creditor delivers or places the early disclosures in the mail, not when the consumer receives or is deemed to receive the early disclosures.

When creditors provide corrected disclosures, the disclosures must state an accurate APR and all changed terms.

The Rule provides that consummation may not occur until 3 business days after the consumer receives any corrected disclosures. The Final Rule also applies the more precise definition of "business day" as all calendar days except Sundays and specified legal public holidays, to the 3-business-day waiting period. The Final Rule provides that if a creditor places corrected disclosures in the mail, the consumer is deemed to receive the corrected disclosures 3 business days after they are mailed.

A creditor need not use the presumption of receipt to determine when the waiting period is required to begin. If a creditor delivers corrected disclosures electronically or delivers disclosures by overnight courier, the creditor may rely on evidence of actual delivery (such as documentation that the disclosure was delivered by certified mail or overnight delivery or email) to determine when the 3-business-day waiting period begins.

### **“Business Day”**

Creditors must use the general definition of “business day” to calculate the 3-business-day period for providing early disclosures. Using the general definition of “business day”, a day on which the creditor’s offices are open to the public for carrying on substantially all of its business functions, maintains consistency between the TILA and the Real Estate Settlement Procedures Act requirements.

The more precise definition of “business day” which is all calendar days except Sundays and specified federal legal public holidays, is used for the purposes of the requirements that creditors deliver or mail the early disclosures no later than the 7<sup>th</sup> business day before consummation and the consumers receive corrected disclosures (if applicable) no later than the 3<sup>rd</sup> business day before consummation.

### **Consumer’s Waiver of Waiting Period**

If a consumer determines that an extension of credit is needed to meet a **bona fide** (emphasis added) personal financial emergency, a consumer may shorten or waive the 7-business-day waiting period or the 3-business-day waiting period after the consumer receives accurate TILA disclosures that reflect the final costs and terms. To shorten or waive a waiting period, the consumer must give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all the consumers who will be primarily liable on the legal obligation. Pre-printed forms may not be used for this purpose.

Although creditors must provide an accurate “final” disclosure before the consumer waives the 7-business-day waiting period and consummates the loan, providing the disclosure by itself does not assure that the APR (or other loan terms) cannot change. If the APR subsequently increases by more than the specified tolerance, the consumer’s previous waiver is no longer effective, and a new final disclosure must be provided. After receiving the new “final” disclosure, a consumer may decide whether to provide another signed waiver statement. Waivers must be handwritten, not preprinted, consistent with regulatory requirements for a waiver of the rescission period. Each consumer who will be primarily liable on the obligation must sign the written statement in order for the waiver to be effective.

### **Disclosure**

The statement: “You are not required to complete this agreement merely because you have received these disclosures or signed a loan application.” must be grouped together with the other required disclosures, such as the APR, Finance Charge, etc. Creditors may also include this notice on the disclosures provided at consummation.

## **Federal Register 23289**

The final rule's goals are to:

- Protect consumers in the mortgage market from unfair, abusive or deceptive lending and servicing practices while preserving responsible lending and sustainable home ownership; and
- Ensure that advertisements for mortgage loans provide accurate and balanced information and do not contain misleading or deceptive representation.

New sections to Regulation Z were added and Sections 32 and 34 were revised. These new rules apply four protections to a newly defined category of “higher-priced mortgage loans” secured by the consumer’s principal dwelling, including a prohibition on lending based on the collateral without regard to the consumer’s ability to repay his or her obligations from income, or from other sources besides the collateral. The revisions apply two new protections to all mortgage loans secured by a consumer’s principal dwelling, including a prohibition on abusive servicing practices.

### **Higher-priced Mortgage Loans (Section 226.35)**

Higher-priced mortgage loans are consumer-purpose, closed-end loans secured by a consumer’s principal dwelling with an annual percentage rate (“APR”) that exceeds the average prime offer rate for a comparable transaction published by the Board by at least 1.5 percentage points for first-lien loans, or 3.5 percentage points for subordinate-lien loans. The average prime offer rate was chosen by the Board because this index more closely tracks rates in the prime mortgage market. The “average prime offer rate” is the annual percentage rate derived from average interest rates, points and other pricing terms offered by a representative sample of lenders for mortgage transactions that have low-risk pricing characteristics. The Board will publish these rates on at least a weekly basis.

For higher-priced mortgage loans and HOEPA loans, the Final Rules:

- Prohibit lenders from extending credit without regard to a consumer’s ability to repay from sources other than the collateral itself;
- Require lenders to verify income and assets they rely upon to determine repayment ability;
- Prohibit prepayment penalties except under certain conditions; and
- Require lenders to establish escrow accounts for taxes and insurance, but permit lenders to allow borrowers to cancel escrows 12 months after loan consummation. (This is effective April 1, 2010.)

Lenders are also prohibited from structuring closed-end mortgage loans as open-end lines of credit for purposes of evading these rules, which do not apply to open-end lines of credit.

### **Consumer Protections**

In connection with closed-end loans secured by a consumer’s principal dwelling, the rules:

- Prohibit any lender or mortgage broker from coercing, influencing or otherwise encouraging an appraiser to provide a misstated appraisal in connection with a mortgage loan; and
- Prohibit mortgage servicers from “pyramiding” late fees, failing to credit payments as of the date of receipt, or failing to provide loan payoff statements upon request within a reasonable time.

The requirement that credit cannot be extended without regard to repayment ability applies to the higher-priced mortgage loans and to HOEPA loans. The ability to repay is to be determined as of consummation. Repayment ability is determined according to current and reasonably expected income, employment, assets other than collateral, current obligations, and mortgage related obligations such as expected property tax and insurance obligations.

The rules are substantially revised for prepayment penalties. Prepayment penalties are prohibited for a higher-priced mortgage loan or a HOEPA loan if payments can change during the 4 year period following consummation. For all other higher-priced mortgage loans and HOEPA loans – loans whose payments may not change for 4 years after consummation – prepayment penalty periods are limited to a maximum of 2 years following consummation. For HOEPA loans, the penalty must be permitted by other applicable law, and must not apply in the case of a refinancing by the same lender or its affiliate. If the consumer’s payment may change during the first four years following consummation, a prepayment penalty is prohibited out right. If the payment is fixed for four years, a prepayment penalty is limited to 2 years, leaving the consumer a penalty-free window of at least 2 years before the payment may increase.

A higher-priced loan that does not comply with the prepayment penalty restrictions, whether or not it is a HOEPA loan, is subject to a 3-year right of rescission.

### **Escrows for Taxes and Insurance**

A lender is prohibited from extending a first-lien higher-priced mortgage loan secured by the principal dwelling without escrowing property taxes, homeowners insurance and other insurance obligations required by the lender. Lenders will have the option to allow for the cancellation of the escrows at the consumer’s request, but no earlier than 12 months after closing of the loan. There is an exemption for loans secured by cooperative shares and a partial exemption for loans secured by condominium units. Such exception is with regard to escrow for homeowners’ insurance premiums for higher-priced mortgage loans secured by condominium units if the only insurance that the lender requires is the association master policy. This Rule is effective for first lien higher-priced mortgage loans for which lenders receive applications on or after April 1, 2010, except for loans secured by manufactured housing which effective date is October 1, 2010.

### **Prohibitions**

A new section was added to the regulation requiring new protections generally for mortgage loans secured by the consumer’s principal dwelling. These prohibitions are:

- Lenders or mortgage brokers coercing, influencing or otherwise encouraging an appraiser to provide a misstated appraisal; and
- Servicers engaging in unfair fee and billing practices.

Examples of prohibited conduct include:

- A lender or broker's exclusion of an appraiser from consideration for future engagement due to the appraiser's failure to report a value that meets or exceeds a minimum threshold; and
- Telling an appraiser a minimum reported value of a consumer's principal dwelling that is needed to approve the loan.

Servicing practices which are prohibited by the Rule are:

- A servicer's failing to credit a payment to the consumer's account as of the date received;
- A servicer's "pyramiding" of late fees by prohibiting a servicer from imposing a late fee on a consumer for making a payment that constitutes the full amount due and is timely, but for a previously assessed late fee; and
- A servicer's failing to provide, within a reasonable time after receiving a request, an accurate statement of the amount currently required to pay the obligation in full, often referred to a payoff statement.

"Servicer" and "servicing" are given the same meanings as in the Real Estate Settlement Procedures Act.

A servicer that receives a payment on or before the due date or within a grace period and does not enter the payment on its books or in its system until after the payment's due date (or expiration of any grace period), does not violate the rule as long as the entry does not result in the imposition of a late charge, additional interest or similar penalty to the consumer, or in the reporting of negative information to a consumer reporting agency.

The court will confirm the sale and order a distribution of the proceeds of the sale in the following order:

- Court costs;
- Costs and expenses, plus a receivership fee, and any lien held by the receiver; and
- Other valid liens.

Any remaining amount will be paid to the owner. If the owner cannot be identified or located, the court will order the remaining amount to be deposited in an interest-bearing account with the district clerk's office in the district court in which the action is pending. The district court will hold the funds.

After the proceeds are distributed, the court will award fee title to the purchaser. If the proceeds of the sale are insufficient to pay all liens, claims, and encumbrances on the property, the court will extinguish all unpaid liens, claims, and encumbrances on the property and award title to the purchaser free and clear.

## **REAL ESTATE SETTLEMENT PROCEDURES ACT (“RESPA”) REGULATION X**

The November 17, 2008 Department of Housing and Urban Development (“HUD”) issuance of the Final RESPA Rule was issued to require more timely and effective disclosures related to mortgage settlement costs for federally related mortgage loans to consumers. These regulatory changes included:

- Improving and standardizing the Good Faith Estimate (GFE) form to make it easier for shopping among settlement service providers;
- Ensuring that the GFE provides a clear summary of the loan terms and total settlement charges so that borrowers can use the GFE to identify a particular loan product and comparison shop among loan originators;
- Providing more accurate estimates of costs of settlement services shown on the GFE;
- Improving disclosures of yield spread premiums (YSPs) to help borrowers understand how YSPs can affect borrower’s settlement charges;
- Facilitating comparison of the GFE and the HUD-1/HUD-1A Settlement Statement (“Settlement Statement”); and
- Ensuring that at settlement borrowers are aware of the final costs as they relate to their particular mortgage loan and settlement transactions.

HUD has issued New RESPA Rule FAQs which can be found at <http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs.pdf>. The FAQs were issued to respond to numerous inquiries from the mortgage and title industries related to the new rule.

### **HUD’s Special Information Booklet**

During the past few years there has been discussion regarding the updating of the Special Information Booklet (“Booklet”) to reflect current industry practices.

The Department of Housing and Urban Development recently issued the Notice of Availability of HUD’s Real Estate Settlement Procedures Act (RESPA) Booklet. The Booklet is required to be provided within 3 days of the borrower’s applying for a mortgage loan.

The Booklet provides information designed to assist individuals seeking to buy a home to become familiar with the home-buying process. It also provides information regarding the purchase contract, how to use the Good Faith Estimate to shop for the best loan, required services to close a loan, and the HUD-1 Settlement Statement. Also included is information regarding interest rates, points, balloon payments, prepayment penalties, and how they can affect mortgage payments. The Booklet now also discusses how to resolve loan servicing problems that will help avoid actions that could lead to foreclosure.

The Booklet is currently available as the top link at [www.hud.gov/respa](http://www.hud.gov/respa).

## **COMMUNITY REINVESTMENT ACT: INTERAGENCY QUESTIONS AND ANSWERS**

The Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“Board”), the Federal Deposit Insurance Corporation (“FDIC”), and the Office of Thrift Supervision (“OTS”), collectively the “Agencies,” recently adopted as final amendments to the Interagency Questions and Answers Regarding Community Reinvestment (“Questions and Answers”) under the Community Reinvestment Act (“CRA”). If you wish to see the Questions and Answers, they can be found on the Federal Financial Institution Examination Council’s (FFIEC) website at <http://www.ffiec.gov/cra/pdf/2010-4903.pdf>.

Q. What are examples of “community development loans”?

A. Examples of “community development” loans include, but are not limited to, loans to borrowers for affordable housing rehabilitation and construction, including construction and permanent financing of multifamily rental property serving low- and moderate-income persons.

Q. If a retail institution that is not required to report under the Home Mortgage Disclosure Act (“HMDA”) makes affordable home mortgage loans that would be HMDA-reportable home mortgage loans if it were a reporting institution, may the institution have these loans considered as community development loans?

A. No. Although some institutions are not required to report or collect information about their home mortgage loans under HMDA, if these institutions are retail institutions, the Agencies will consider in their CRA evaluations the institutions’ originations and purchases of loans that would have been collected or reported as home mortgage loans, had the institution been a collecting and reporting institution under the CRA or the HMDA. Therefore, these loans will not be considered as community development loans, unless the small institution is an intermediate small institution. Multifamily dwelling loans, however, may be considered as community development loans as well as home mortgage loans.

Q. May an intermediate small institution that is not subject to HMDA reporting have home mortgage loans considered as community development loans?

A. Yes. In instances where intermediate small institutions are not required to report HMDA, these loans may be considered, at the institution’s option, as community development loans, provided they meet the definition of “community development.” If the institution opts to be evaluated under the lending, investment, and service tests applicable to large institutions, it may not choose to have home mortgage loans considered as community development loans.

Loans other than multifamily dwelling loans may not be considered under both the lending and the community development test for intermediate small institutions. If an

institution elects to have certain loans considered under the community development test, those loans may not also be considered under the lending test, and would be excluded from the lending test analysis.

Intermediate small institutions may choose individual loans within their portfolio for community development consideration. Examiners will evaluate an intermediate small institution's community development activities within the context of the responsiveness of the activity to the community development needs of the institution's assessment area.

Q. What is meant by the term "primary purpose" as that term is used to define what constitutes a community development loan?

A. A loan has as its primary purpose community development when it is designed for the express purpose of revitalizing or stabilizing low- or moderate-income areas, designated disaster areas, or underserved or distressed non-metropolitan middle-income areas providing housing for low- or moderate-income persons.

Q. What are examples of community development services?

A. Examples of community development services include providing foreclosure prevention programs to low- or moderate-income homeowners who are facing foreclosure on their primary residence with the objective of providing affordable, sustainable, long-term loan modifications and restructurings.

Q. Are home equity loans considered "consumer loans"?

A. Home equity loans made for purposes other than purchase, home improvement, or refinancing home purchase or home improvement loans are consumer loans if they are extended to one or more individuals for household, family, or other personal expenditures.

Q. Does the term "home mortgage loan" include loans other than "home purchase loans"?

A. Yes. "Home mortgage loan" includes "home improvement loan," "home purchase loan," and "refinancing," as defined in Regulation C (HMDA's regulation). This definition also includes multifamily (5-or-more families) dwelling loans, and loans for the purchase of manufactured homes.

Q. May a financial institution receive consideration under the CRA for home mortgage loan modification, extension, and consolidation agreements (MECAs), in which it obtains home mortgage loans from other institutions without actually purchasing or refinancing the home mortgage loans, as those terms have been interpreted under the CRA and HMDA?

A. Yes. In some states, MECAs, which are not considered loan refinancings because the existing loan obligations are not satisfied and replaced, are common. Although these

transactions are not considered to be purchases or refinancings, they do achieve the same results. A small, intermediate small, or large institution may present information about its MECA activities with respect to home mortgages to examiners for consideration under the lending test as “other loan data.”

Q. What are the data requirements regarding consumer loans?

A. There are no data reporting requirements for consumer loans. Institutions may, however, opt to collect and maintain data on consumer loans. If an institution chooses to collect information on consumer loans, it may collect data for one or more of the following categories of consumer loans: motor vehicle, credit card, home equity, other secured, and other unsecured. If an institution collects data for loans in a certain category, it must collect data for all loans originated or purchased within that category. The institution must maintain this data separately for each category for which it chooses to collect data. The data collected and maintained should include for each loan:

- A unique number or alpha-numeric symbol that can be used to identify the relevant loan file;
- The loan amount at origination or purchase;
- The loan location; and
- The gross annual income of the borrower that the institution considered in making its credit decision.

Generally, the guidance given with respect to data collection of small business and small farm loans, including, for example, guidance regarding collecting loan location data, and whether to collect data in connection with refinanced or renewed loans, will also apply to consumer loans.

## **STATES’ TRENDS**

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