

Legal and Compliance Report—August 2020¹

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Proposed Amendments to Home Equity Lending Interpretations

Only July 8, 2020, the Joint Regulatory Agencies (comprised of Savings and Mortgage Lending, Office of Consumer Credit Commissioner (OCCC), Texas Department of Banking, and Texas Credit Union Department) (the “Agencies”) held an online webinar regarding their proposed amendments to home equity interpretations (the “Proposed Amendments”). A video of the webinar is available [here](#).

Background. Beginning with constitutional amendments adopted in 2003, Texas law permits the Legislature to delegate to one or more state agencies the power to interpret the home equity loan law.² These interpretations can be relied upon by qualified home equity loan lenders as a safe harbor when facing legal actions relating to the application of the constitution’s text to specific facts. The legislature delegated this authority to the Finance Commission of Texas and the Texas Credit Union Commission (the “Commissions”).³ Every four years, Texas state agencies are required to review all rules to determine whether the rules should continue to exist and make necessary changes. The Texas home equity interpretations found in 7 Texas Admin. Code Chapters 151-153 are currently due for this rule review process. As a result, the Agencies’ recent webinar was a presentation of their Proposed Amendments to these interpretations.

Timeline. In August 2020, the Agencies will present the Proposed Amendments to the Commissions. An official comment period will follow from approximately September 4, 2020 to October 4, 2020. Afterwards, the Proposed Amendments will be scheduled for final approval and adoption by the Commissions in October and November. If adopted, the Proposed Amendments would be effective in or around late November 2020.

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² Texas Constitution, Art. XVI, § 50(u).

³ Texas Finance Code § 11.308 and § 15.43.

Summary of the Proposed Amendments.

The Proposed Amendments include changes to 7 Tex. Admin. Code Chapters 151 and 153. The Agencies' summary of these changes is copied below, and the Amendments can be found [here](#). Lenders and other stakeholders should review these Proposed Amendments and consider submitting comments during the comment period.

Amendments to Chapter 151. In Chapter 151, the [Proposed Amendments] would simplify the procedures for requesting, proposing, and adopting interpretations. These amendments deal primarily with two issues:

- ***Requesting interpretations:*** Currently, Sections 151.1 through 151.3 describe a procedure for an interested person to submit an interpretation request. In practice, stakeholders have rarely used this procedure. Instead, stakeholders have typically provided suggestions through informal requests, as well as responses to rulemaking actions that have been initiated due to constitutional amendments, litigation, and rule review. To simplify these provisions, the [Proposed Amendments] would replace the current procedure with new language stating that a person may submit an informal request to the agencies, as well as a provision stating that an interested stakeholder may submit a formal petition for rulemaking under the commissions' current rules for petitions for rulemaking. The agencies believe that this approach will preserve stakeholders' ability to provide informal feedback, and will also preserve the important statutory right to file a formal petition for rulemaking.
- ***Proposing and adopting interpretations:*** Currently, Sections 151.4 through 151.7 describe the procedure for the commissions to propose and adopt home equity interpretations. These sections list some (but not all) of the requirements for rulemaking under the Texas Administrative Procedure Act (APA), Texas Government Code, Chapter 2001. Home equity interpretations are subject to the APA under Sections 11.308 and 15.413 of the Texas Finance Code. The [Proposed Amendments] would replace Sections 151.4 through 151.7 with a statement referring to the APA at 151.1(a). The agencies believe that these amendments will simplify Chapter 151, and will prevent the need for future changes to Chapter 151 in response to legislative changes to the APA's rulemaking requirements.

Amendments to Chapter 153. In Chapter 153, the [Proposed Amendments] relate primarily to six issues:

- ***Unnecessary word "or":*** In Section 153.8, the amendments would remove the word "or" in a place where it is unnecessary.
- ***Repayment and modification:*** In Section 153.11, amendments would explain that the constitution's repayment schedule requirements apply at closing, and do not prohibit a lender from agreeing with the borrower to certain modifications. These amendments are based on the Texas Supreme Court's decision in *Sims v. Carrington Mortg. Servs., LLC*, 440 S.W.3d 10 (Tex. 2013), as well as a line of Texas decisions that have cited *Sims* and reached similar conclusions. These amendments are also similar to positions that the agencies have articulated in advisory bulletins responding to Hurricane Harvey and the COVID-19

pandemic.

- ***State of emergency:*** In Section 153.14, amendments would explain the emergency exception in Texas Constitution, Article XVI, Section 50(a)(6)(M)(iii), by stating that a state of emergency includes a national emergency declared by the president of the United States and a state of disaster declared by the governor of Texas.
- ***Closing location:*** In Section 153.15, amendments would explain that a home equity loan may be closed in any area located at the permanent physical address of the lender, attorney, or title company. This is similar to a position that the agencies articulated in an advisory bulletin responding to the COVID-19 pandemic.
- ***Electronic documents:*** In Section 153.22, an amendment would explain that a lender may provide documents electronically in accordance with state and federal law, and would refer to the federal E-Sign Act's requirements for electronic signatures and disclosures.
- ***Acknowledgment of fair market value:*** New Section 153.26 would describe the requirement to sign a written acknowledgment of fair market value under Section 50(a)(6)(Q)(ix), explaining that the lender may sign the written acknowledgment before or at closing, and that an authorized agent may sign on the lender's behalf.
- ***Typographical error with phrase "or (a)(7)":*** In Section 153.41, an amendment would remove the phrase "or (a)(7)," which appears to be a typographical error that incorrectly states the refinance requirement under Section 50(e).