

POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

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To Clients and Friends:

As you are probably aware, on January 31, 2014, the Texas Supreme Court issued its supplemental decision in *The Finance Commission of Texas, et al v. Valerie Norwood, et al*, and held that, in the context of a transaction originated under Article XVI, Section 50a6 of the Texas Constitution (a “Texas Home Equity Loan”) both pre-paid per diem interest and bona fide discount points are “interest” and are NOT fees “necessary to originate, evaluate, maintain, record, insure, or service” the loan and are therefore NOT subject to the 3% fee cap applicable to a Texas Home Equity Loan. In the same decision, the Supreme Court declined to modify the portion of the Court’s June 30, 2013 Order that required that a power of attorney used for the closing of a Texas Home Equity Loan also had to be executed at the office of the lender, a title company or an attorney.

Since that ruling, the Texas Finance Commission has now concluded its work on proposed amendments to the Texas Administrative Code to implement the *Norwood* decision and has now adopted the following changes to the Texas Administrative Code to implement the supplemental decision of the Texas Supreme Court:

§153.1.Definitions.

Any reference to Section 50 in this interpretation refers to Article XVI, Texas Constitution, unless otherwise noted. These words and terms have the following meanings when used in this chapter, unless the context indicates otherwise:

(11) Interest--As used in Section 50(a)(6)(E), “interest” means the amount determined by multiplying the loan principal by the interest rate over a period of time.

§153.5.Three percent fee limitation: Section 50(a)(6)(E).

An equity loan must not require the owner or the owner’s spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit.

(3) Charges that are Interest. Charges an owner or an owner’s spouse is required to pay that constitute interest under §153.1(11) of this title (relating to Definitions) are not fees subject to the three percent limitation.

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

(B) Legitimate discount points are interest and are not subject to the three percent limitation. Discount points are legitimate if the discount points truly correspond to a reduced interest rate and are not necessary to originate, evaluate, maintain, record, insure, or service the loan. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are legitimate.

This system may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

(4) Charges that are not Interest. Charges an owner or an owner's spouse is required to pay that are not interest under §153.1(11) of this title are fees subject to the three percent limitation.

(6) Charges to Originate. Charges an owner or an owner's spouse is required to pay to originate an equity loan that are not interest under §153.1(11) of this title are fees subject to the three percent limitation.

(8) Charges to Evaluate. Charges an owner or an owner's spouse is required to pay to evaluate the credit decision for an equity loan, that are not interest under §153.1(11) of this title, are fees subject to the three percent limitation. Examples of these charges include fees collected to cover the expenses of a credit report, survey, flood zone determination, tax certificate, title report, inspection, or appraisal.

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

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

§153.15.Location of Closing: Section 50(a)(6)(N).

An equity loan may be closed only at an office of the lender, an attorney at law, or a title company. The lender is anyone authorized under Section 50(a)(6)(P) that advances funds directly to the owner or is identified as the payee on the note.

(2) Any power of attorney allowing an attorney-in-fact to execute closing documents on behalf of the owner or the owner's spouse must be signed by the owner or the owner's spouse at an office of the lender, an attorney at law, or a title company. A lender may rely on an established system of verifiable procedures to evidence compliance with this paragraph. For example, this system may include one or more of the following:

(A) a written statement in the power of attorney acknowledging the date and place at which the power of attorney was executed;

(B) an affidavit or written certification of a person who was present when the power of attorney was executed, acknowledging the date and place at which the power of attorney was executed; or

(C) a certificate of acknowledgement signed by a notary public under Chapter 121, Civil Practice and Remedies Code, acknowledging the date and place at which the power of attorney was executed.

(3) The consent required under Section 50(a)(6)(A) must be signed by the owner and the owner's spouse, or an attorney-in-fact described by paragraph (2) of this subsection, at an office of the lender, an attorney at law, or a title company.

§153.51.Consumer Disclosure: Section 50(g).

An equity loan may not be closed before the 12th day after the lender provides the owner with the consumer disclosure on a separate instrument.

(5) If the owner has executed a power of attorney described by §153.15(2) of this title (relating to Location of Closing: Section 50(a)(6)(N)), then the lender may provide the consumer disclosure to the attorney-in-fact instead of providing it to the owner.

Most of our clients had already adopted these changes and so the action of the Texas Finance Commission will simply provide additional comfort that lender's practices are consistent with the guidance contained in the Texas Administrative Code.

Please feel free to contact us with any questions.

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