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To: Clients and Friends of the Firm

From: Polunsky Beitel Green, LLP

Date: February 7, 2018

Subject: Recent Proposed Interpretations Regarding Texas Home Equity Lending

We wish to advise you that the Texas Finance Commission has proposed adoption of certain interpretative guidance regarding home equity lending in Texas. This proposed guidance will be considered for adoption when the Texas Finance Commission meets on February 16, 2018. Please note that, even if approved, it will not become effective until it is considered and approved by the Texas Credit Union Commission when the members of that commission meet in March. The new proposed interpretations, if adopted, should assist Texas mortgage lenders in more easily implementing the recently enacted changes to home equity lending in Texas.

As we have previously indicated, one of the recent changes to the home equity rules in Texas offered the borrower the option to refinance a Texas 50a6 loan to a rate/term refinance. However, the new rule required that the lender provide the borrower a new notice (which some are calling an F2 notice because it is required by Article XVI, Section 50(f)(2) of the Texas Constitution) advising the borrower of the potential loss of certain consumer protections if this option were chosen. Importantly, the initial guidance proposed by the Finance Commission implied that the new notice was required to be provided to the borrower so that it was RECEIVED no later than three business days after application.

This notice posed at least two logistical hurdles for lenders. First, many times the lender would be unaware that the underlying lien that was being refinanced was a home equity loan until the lender received the title commitment, which would often be well after the expiration of the three business day disclosure window. Secondly, the initial interpretation regarding the new timing requirement did not, by its terms, provide that a lender could comply with the rule by placing the required notices in the mail within the three business day window, but instead implied the documents had to be actually RECEIVED during this time frame. Importantly, on federally required upfront disclosures under RESPA/TRID, the lender always had the option to simply place the disclosures in the mail by the end of the third business day and, under the federal mailbox rule, would be deemed to be in compliance with the timing requirement. The interpretative guidance regarding the new Texas rule, as initially proposed, did not appear to have a similar failsafe option.

In response to comments from a number of industry players (including the Texas Mortgage Bankers Association), the Finance Commission has now proposed additional

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interpretative guidance to address these concerns. The guidance has two important changes:

1. First, the Texas Finance Commission proposes that a lender can comply with the new three business day rule for providing the borrower with the new F2 notice by simply placing the notice in the mail no later than the third business day after the lender receives the application. This interpretation will cause the rule to more closely mirror the requirements that the lender has for federally mandated up-front disclosures. The new proposed guidance states as follows:

Section 153.45(4)(D). The lender must deliver the refinance disclosure or place it in the mail no later than the third business day after the owner submits the loan application. The refinance disclosure must be delivered to the owner at least 12 days before the refinance is closed. If a lender mails the refinance disclosure to the owner, the lender must allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

Please note, however, that the Texas definition of “Business Day” still differs from the federal definition that is applicable to federal up-front disclosures in that the Texas definition includes Saturdays as a business day, whereas the federal rule allows Saturdays to be treated as a non-business day if the lender is not open for principally all business activities.

2. Second, the Texas Finance Commission proposes that the three business day clock won't commence until the lender has a specific request for an F2 conversion loan. This guidance was in response to several comments about the significant risk that the lender might not learn about the underlying mortgage being a 50a6 loan until well after the expiration of the three business day window. The new guidance states as follows:

Section 153.45(4)(B). For purposes of Section 50(f)(2)(D), the application is submitted on the date the owner submits a loan application specifically for a refinance of a home equity loan to a non-home-equity loan. If the owner initially applies for another type of loan, then the application is considered submitted on the earliest of:

(i) the date the owner modifies the application, orally or in writing, to specify that it is for a refinance of a home equity loan to a non-home-equity loan; or

(ii) the date the owner submits a new application specifically for a refinance of a home equity loan to a non-home-equity loan.

We believe the guidance is very helpful from an implementation standpoint. The Texas Finance Commission will consider its adoption at its February 16, 2018 meeting, but it

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would not become effective until late March at the earliest, after the Texas Credit Union Commission considers the guidance at its meeting scheduled for March.

If you have any questions regarding this memorandum, please contact any of our firm attorneys or representatives below. We will provide an update regarding the approval (or rejection or modification) of the proposed interpretative guidance after the meeting of the Finance Commission.

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