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MEMORANDUM

TO: CLIENTS AND FRIENDS OF THE FIRM

FROM: Al Alsup

DATE: August 15, 2007

SUBJECT: New Written Form of Mortgage Fraud Notice must be Provided to, and Signed by, each Applicant for a Texas Home Loan at Closings on or after September 1, 2007 Effective Date. Texas Penal Code Amended to Strengthen Mortgage Fraud Prosecutions.

1. New Written Form of Notice of Penalties for Making False or Misleading Written Statement is Required for Home Loans Closing on or after September 1, 2007.

New Section 343.105, Texas Finance Code, requires that lenders, mortgage bankers, and licensed mortgage brokers provide all applicants for a Texas home loan a written notice containing the following or substantially similar language at closings occurring on or after its September 1, 2007:

Warning: Intentionally or knowingly making a materially false or misleading written statement to obtain property or credit, including a mortgage loan, is a violation of Section 32.32, Texas Penal Code, and, depending on the amount of the loan or value of the property, is punishable by imprisonment for life or any term of not less than 2 years or more than 99 years and a fine not to exceed \$10,000.

I/we, the undersigned home loan applicant(s), represent that I/we have received, read, and understand this notice of penalties for making a materially false or misleading written statement to obtain a home loan.

I/we represent that all statements and representations contained in my/our written home loan application, including statements or representations regarding my/our identity, employment, annual income, and intent to occupy the residential real property secured by the home loan, are true and correct as of the date of loan closing.

The notice must be written on a separate document in a font with at least a 14-point type face. A signature line should be provided for each loan applicant/borrower to verify the information referred to in the notice by signing the notice. Exhibit A to this memorandum sets out the completed form as it will appear in loan document packages prepared by our firm for closings occurring on or after September 1.

2. Loan Applicants/Borrowers must Verify that all Statements and Representations Contained in their Home Loan Applications are True and Correct as of the Date of Closing, but Failure to Comply with §343.105 does not Affect the Validity or Enforceability of the Home Loan.

Upon receipt of the notice at loan closing, each loan applicant/borrower must verify the information and execute the notice. We recommend that lenders, mortgage bankers, and licensed mortgage brokers named as the secured creditor in the debt and security instruments amend their closing instructions to require the settlement agent for any Texas home loan to obtain the signature of each loan applicant/borrower on the notice at closing, and that an executed copy of the notice be retained in the permanent loan file as evidence of compliance with these provisions and for the availability and use of the notice as evidence in any subsequent mortgage fraud prosecution that may arise out of the home loan transaction. However, the failure of a lender, mortgage banker, or licensed mortgage broker to provide the notice complying with §343.105 (or, it follows, the failure to obtain the execution of the notice by each loan applicant/borrower) expressly does not affect the validity or enforceability of the home loan by any holder of the loan.

3. New §343.105 Notice Requirements Apply Only to Home Loans Secured on Principal Residences, but Penal Code Provisions Apply to All Residential “Mortgage Loans.”

“Home loans” subject to the notice and verification requirements of new §343.105 are defined in §343.001, Texas Finance Code, to mean consumer loans secured by 1 – 4 family dwellings used or to be used as the borrower’s principal residence:

§ 343.001. DEFINITIONS. In this chapter:

...

(2) "Home loan" means a loan that is:

(A) made to one or more individuals for personal, family, or household purposes;

and

(B) secured in whole or part by:

(i) a manufactured home, as defined by Section 347.002, used or to be used as the borrower's principal residence; or

(ii) real property improved by a dwelling designed for occupancy by four or fewer families and used or to be used as the borrower's principal residence.

Therefore, new §343.105 notice and verification requirements do not apply to mortgage loans secured on the loan applicant/borrower’s vacation or second home or residential investment property. Also, such notice and verification requirements would not apply to reverse mortgages or open-end accounts, such as home equity lines of credit (HELOCs) since those types of loans are expressly excluded from Chapter 343 coverage by §343.002.

However, the penal provisions of §32.32, Texas Penal Code, referenced in the notice more broadly apply to “mortgage loans,” a term that is not expressly defined in the state’s Penal Code, but is defined in the Mortgage Broker License Act, §156.002(10), Texas Finance Code, to mean:

(10) “Mortgage loan” means a debt against real estate secured by a security interest against one-to-four residential real estate created by a deed of trust, security deed, or other security instrument.

Even if ignoring this statutory definition likely intended by the legislature and according the term its “plain meaning” under statutory rules of construction, §32.32 would apply to any “mortgage loan” that is secured by a mortgage lien on real property, regardless of the lien priority of the mortgage or whether the real property securing the mortgage lien is a principal residence, vacation or second home, or an investment property.

4. Intentionally or Knowingly Making a Materially False or Misleading Written Statement to Obtain a Mortgage Loan is Now Punishable as a Second Degree or First Degree Felony.

Section 32.32, Texas Penal Code, as amended clarifies that it is an offense if a person intentionally or knowingly makes a materially false or misleading written statement to obtain property or credit, including a mortgage loan. The offense is a felony of the second degree if the mortgage loan principal amount is \$100,000, or more, but less than \$200,000. Felonies of the second degree are punishable by imprisonment for any term of not more than 20 years or less than 2 years and a fine not exceeding \$10,000. The offense is a felony of the first degree if the principal loan amount is \$200,000, or more, and such offenses are punishable by life imprisonment or any term of not more than 99 years or less than five years and a fine not exceeding \$10,000. Felony indictments under Section 32.32 must be presented within seven years after the date of the offense. Exhibit B to this memorandum sets out the amended language to Section 32.32 enacted as H.B. 716 effective September 1, 2007.

5. Mortgage Fraud Investigations and Prosecutions Strengthened through Establishment of a Residential Mortgage Fraud Task Force of Law Enforcement and Regulatory Agencies and of a Framework for Reporting of Suspected Fraudulent Activities by Lenders and Other Persons.

Residential Mortgage Fraud Task Force. Chapter 402, Texas Government Code, was amended to add new §402.032 requiring that the Office of the Attorney General of Texas establish a task force to form a strategic alliance between various state, federal and local law enforcement and regulatory agencies to better enable them to track and prosecute mortgage fraud statewide. Task force efforts are to be focused in the sharing of information and resources and enforcement of administrative and criminal actions against perpetrators of mortgage fraud. Task force agencies are expressly authorized to share confidential information or information otherwise restricted by law among themselves for investigative purposes. The Office of the Attorney General is charged with oversight of the task force and directed to provide the necessary staff and facilities to assist the task force in performing its duties. In addition to any state funding that may be appropriated for this purpose, the Attorney General is authorized to solicit and accept gifts, grants, and donations on behalf of the state, presumably from the mortgage lending industry, for disbursement to any state agency or local law enforcement agency to aid in the investigation and prosecution of mortgage fraud.

Task force members are expressly directed to assist any federal or state prosecuting attorney in the investigation of an offense under Section 32.32, Texas Penal Code, involving a mortgage loan. Moreover, with the consent of local county or district attorneys, the Attorney General is granted concurrent jurisdiction with local prosecutors to prosecute the offense of mortgage fraud. The task

force must submit an annual report to the governor, lieutenant governor, and speaker of the house of representatives on the progress of each agency within the task force in accomplishing its purposes. Task force members consist of the following persons or their appointees:

- (1) the Attorney General;
- (2) the Consumer Credit Commissioner;
- (3) the Banking Commissioner;
- (4) the Credit Union Commissioner;
- (5) the Commissioner of Insurance;
- (6) the Savings and Mortgage Lending Commissioner;
- (7) the presiding officer of the Texas Real Estate Commission; and
- (8) the presiding officer of the Texas Appraiser Licensing and Certification Board.

Immunity for Reporting of Fraudulent Activities. Chapter 402, Texas Government Code, was amended to add new §402.031 requiring lenders and other persons who determine or reasonably suspect that fraudulent activity has been committed, or is about to be committed, to report that information to the Office of the Attorney General of Texas or another authorized governmental agency set out in the statute. If the fraudulent activity is reported to the Attorney General, the Attorney General must notify and provide the information to each agency member of the task force. No agency in that event may notify any suspected person or other person involved in the suspected fraudulent activity of the filing of the report. In addition to any common law or statutory privilege or immunity that may apply, any person reporting suspected fraudulent activity to an authorized governmental agency in accordance with §402.031 is granted an express immunity against liability to any person, presumably for libel, slander or similar defamation claims, under any state or federal law or regulation for making the report.

THIS MEMORANDUM IS PROVIDED FOR THE GENERAL INFORMATION OF THE CLIENTS AND FRIENDS OF OUR FIRM ONLY AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE. YOU SHOULD NOT PLACE RELIANCE ON THIS GENERAL INFORMATION ALONE BUT SHOULD CONSULT COUNSEL REGARDING THE APPLICATION OF THE LAWS AND REGULATIONS DISCUSSED IN THIS MEMORANDUM TO YOUR SPECIFIC CASE OR CIRCUMSTANCES.

Attachments:

- Exhibit A. Form of Notice of Penalties for Making False or Misleading Written Statement
Exhibit B. Amendments to §32.32, Texas Penal Code

Borrower(s): _____

Loan No. : _____

**NOTICE OF PENALTIES FOR MAKING
FALSE OR MISLEADING WRITTEN STATEMENT**

(Pursuant to Section 343.105, Texas Finance Code)

Warning: Intentionally or knowingly making a materially false or misleading written statement to obtain property or credit, including a mortgage loan, is a violation of Section 32.32, Texas Penal Code, and, depending on the amount of the loan or value of the property, is punishable by imprisonment for life or any term of not less than 2 years or more than 99 years and a fine not to exceed \$10,000.

I/we, the undersigned home loan applicant(s), represent that I/we have received, read, and understand this notice of penalties for making a materially false or misleading written statement to obtain a home loan.

I/we represent that all statements and representations contained in my/our written home loan application, including statements or representations regarding my/our identity, employment, annual income, and intent to occupy the residential real property secured by the home loan, are true and correct as of the date of loan closing.

Borrower/Loan Applicant

Borrower/Loan Applicant

Borrower/Loan Applicant

Borrower/Loan Applicant

EXHIBIT A

AMENDMENTS TO §32.32, TEXAS PENAL CODE

(H.B. 716, 80TH Tex. Leg., Effective September 1, 2007)

§ 32.32. FALSE STATEMENT TO OBTAIN PROPERTY OR CREDIT.

(a) For purposes of this section, "credit" includes:

- (1) a loan of money;
- (2) furnishing property or service on credit;
- (3) extending the due date of an obligation;
- (4) comaking, endorsing, or guaranteeing a note or other instrument for obtaining credit;
- (5) a line or letter of credit; ~~and~~
- (6) a credit card, as defined in Section 32.31 (Credit Card or Debit Card Abuse); and
- (7) a mortgage loan.

(b) A person commits an offense if he intentionally or knowingly makes a materially false or misleading written statement to obtain property or credit, including a mortgage loan~~[for himself or another]~~.

(c) An offense under this section is:

- (1) a Class C misdemeanor if the value of the property or the amount of credit is less than \$50;
- (2) a Class B misdemeanor if the value of the property or the amount of credit is \$50 or more but less than \$500;
- (3) a Class A misdemeanor if the value of the property or the amount of credit is \$500 or more but less than \$1,500;
- (4) a state jail felony if the value of the property or the amount of credit is \$1,500 or more but less than \$20,000;
- (5) a felony of the third degree if the value of the property or the amount of credit is \$20,000 or more but less than \$100,000;
- (6) a felony of the second degree if the value of the property or the amount of credit is \$100,000 or more but less than \$200,000; or
- (7) a felony of the first degree if the value of the property or the amount of credit is \$200,000 or more.

(d) The following agencies shall assist a prosecuting attorney of the United States or of a county or judicial district of this state, a county or state law enforcement agency of this state, or a federal law enforcement agency in the investigation of an offense under this section involving a mortgage loan:

- (1) the office of the attorney general;
- (2) the Department of Public Safety;
- (3) the Texas Department of Insurance;
- (4) the Office of Consumer Credit Commissioner;
- (5) the Texas Department of Banking;
- (6) the credit union department;
- (7) the Department of Savings and Mortgage Lending;
- (8) the Texas Real Estate Commission; and
- (9) the Texas Appraiser Licensing and Certification Board.

(e) With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves a mortgage loan.

EXHIBIT B