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## 2009 TEXAS LEGISLATIVE UPDATE

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The Texas Legislature meets in a regular 140-day legislative session in Austin every two years, convening on the second Tuesday in January of odd-number years. The 81<sup>th</sup> Legislative Session was adjourned on June 1, 2009, having passed 5910 legislative bills filed during the session. Of these, Governor Rick Perry vetoed 38 bills and 11 are joint resolutions proposing amendments to the Texas Constitution that must be approved by a majority of voters on November 3, 2009. On June 25, 2009 Governor Rick Perry called the Texas Legislature back into Special Session beginning July 1 for the purpose of enacting sunset legislation for five state agencies and other important business. This update contains a Quick Reference Schedule for House Bills and Senate Bills passed by the legislature in the regular session that we believe are of particular interest to the home mortgage lending industry and summaries of selected bills have been provided. Full text of these bills may be found on the Texas Legislature Online Website at <http://www.capitol.state.tx.us/>.

### Quick Reference Schedule

BILL NUMBER	RELEVANT SECTION OF TEXAS LAW AFFECTED AND BRIEF DESCRIPTION	EFFECTIVE DATE
<b>CIVIL PRACTICES &amp; REMEDIES CODE</b>		
HB 556	Allows prevailing parties in adverse possession lawsuits to recover costs and reasonable attorney fees in certain circumstances.	9/1/09
HB 669	Provides that persons claiming a Mechanic's, Contractor's or Materialman's lien under Chapter 53, Property Code are not liable for making, presenting, or use of a document or other record in connection with assertion of the claim unless the person has acted with fraudulent intent.	9/1/09
<b>FAMILY CODE</b>		
√ SB 1661	Provides a procedure for releasing child support liens on residential homestead property.	Immediately
<b>FINANCE CODE</b>		
√ HB 10	Adds new Chapter 180, Finance Code to comply with Safe and Fair Enforcement (S.A.F.E.) of Mortgage Licensing Act of 2008 requiring persons originating residential mortgage loans to register with the Nationwide Mortgage Licensing System and Registry, be licensed or registered under Texas Finance Code Chapters 156, 157, or 342, and comply with all requirements of Chapter 180.	Immediately
√ HB 2774	Amends various sections of Chapter 156, Finance Code regarding mortgage broker and loan officer licensing to comply with the Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008.	9/1/09*
√ HB 2779	Amends Chapter 157, Finance Code to require licensing of mortgage banker employees who originate residential mortgage loans under Chapter 157 and to comply with Chapter 180, Texas Finance Code.	4/1/10
√ SB 1620	Relating to examinations by the consumer credit commissioner with regard to the regulation of property tax lenders and certain other lenders and debt management counselors.	9/1/09
<b>GOVERNMENT CODE</b>		
HB 2941	Relating to the disclosure of certain ad valorem tax appraisal information and other confidential information.	Immediately
SB 1655	Relating to the organization, duties, and functions of the Texas Veterans Commission and to providing funding for assistance for veterans through a lottery game.	Immediately

<b>BILL NUMBER</b>	<b>RELEVANT SECTION OF TEXAS LAW AFFECTED AND BRIEF DESCRIPTION</b>	<b>EFFECTIVE DATE</b>
<b><i>INSURANCE CODE</i></b>		
HB 652	Relating to licensing of escrow officers.	9/1/09
√ HB 3073	Authorizes a title company or agency to charge separate from title insurance premiums actual costs incurred in connection with conducting a closing and settlement, including charges by third parties for an ad valorem tax report and electronic filing fees.	1/1/10
HB 3768	Provides for continuation of an owner's title insurance policy coverage of transferred property after January 1, 2010 for heirs, spouses to whom title is transferred upon dissolution of marriage, and beneficiaries of a trust upon the death of the trustor.	9/1/09
HB 4338	Relating to title insurance agents and title insurance companies.	9/1/09
<b><i>LOCAL GOVERNMENT CODE</i></b>		
HB 621	Allows public improvement districts designated by a county or municipalities to levy special assessments that may be paid in periodic installments. The assessment creates a first and prior lien against the property that runs with the land and an assessment payment that is not yet come due is not eliminated by foreclosure of an ad valorem lien.	9/1/09
HB 871	Relating to the method of mailing notice a municipal management district may use to notify a property owner about a scheduled hearing.	9/1/09
<b><i>OCCUPATIONS CODE</i></b>		
HB 2238	Provides that an application for a Statement of Ownership and Location for a used manufactured home not in a retailer's inventory must also include a statement from the tax assessor-collector indicating there are no personal property taxes due.	9/1/09
HB 2591	Relating to regulation of property tax consultants.	9/1/09*
<b><i>PENAL CODE</i></b>		
√ HB 2840	Amends Section 32.32, Penal Code to provide that a person commits an offense if he or she intentionally or knowingly makes a materially false or misleading written statement in providing an appraisal of real property.	9/1/09
<b><i>PROPERTY CODE</i></b>		
√ HB 396	Provides a procedure for expunging a notice of lis pendens.	9/1/09
√ HB 655	Provides that purchase price at a foreclosure sale is due and payable to the trustee without delay or at a reasonable time agreed upon by the purchaser and trustee or substitute trustee.	9/1/09
HB 2685	Requires a governmental or private entity with eminent domain authority to mail a copy of the Landowner's Bill of Rights within 7 days before it makes its final offer or at any time the entity presents to the landowner that it has eminent domain authority.	1/15/10
√ HB 3479	Requires a property owners' association to provide notice to every lienholder of record after foreclosing on the lot of a member of the association.	9/1/09
√ 3857	Allows active duty and non-active duty military service members to either forestay foreclosure proceedings or adjust their contractual obligations.	Immediately
HB 3502	Relating to an acknowledgement required of a purchaser of residential real property in connection with the receipt of a seller's disclosure notice regarding the property.	9/1/09
√ HB 3767	Allows residential homestead property transferred to a qualifying trust by warranty deed to retain its residential homestead designation.	9/1/09
√ HB 3945	Provides a procedure allowing title companies to file an affidavit to release a lien on real property.	9/1/09
SB 1672	Relating to extension or modification of restrictive covenants in certain residential real estate subdivisions.	6/19/09
√ SB 1919	Provides that if a property owner's association fails to file a management certificate, or an amended management certificate, a purchaser, lender, title company or title company agent is not liable for an amount due the property owner's association on the date of transfer and any debt or claim of the association that accrued before the date of transfer.	9/1/09

<b>BILL NUMBER</b>	<b>RELEVANT SECTION OF TEXAS LAW AFFECTED AND BRIEF DESCRIPTION</b>	<b>EFFECTIVE DATE</b>
<i><b>TAX CODE</b></i>		
HB 406	Relating to the disposition of excess proceeds of a tax sale of real property or foreclosure of a tax lien on real property.	9/1/09
HB 770	Provides ad valorem tax relief for owners of property that has become uninhabitable or unusable by a casualty, wind, or water damage and restricts an authority from bringing an action to remove a house partially located on a public beach due to a meteorological event.	1/1/10
HB 986	Relating to the appeal of ad valorem tax determinations.	9/1/09
HB 1038	Relating to the determination of the market value of a residence homestead for ad valorem taxation purposes.	1/1/10
HB 1257	Regarding installment payments of ad valorem taxes owned by a business entity located in a disaster area and the ad valorem taxation of a residence homestead rendered uninhabitable or unusable by casualty or by wind or water damage.	1/1/10
HB 1407	Relating to the redemption of real property sold at an ad valorem tax sale.	9/1/09
HB 1465	Requires taxing units to join a tax lien transferee when it files suit to foreclose its lien for delinquent property taxes.	9/1/09
HB 3613	Relating to the determination of the market value of a residence homestead for ad valorem tax purposes on the basis of the property's value as a residence homestead and to an exemption for ad valorem taxation of the residence homestead of certain totally disabled veteran and to the amount of the exemption from ad valorem taxation to which a disabled veteran is entitled based on disability rating. (Also amends Government Code §403.302).	Approval by voters
SB 562	Relating to the inclusion on the exterior of an ad valorem tax bill of a statement directing the United States Postal Service to return the bill if it is not deliverable as addressed.	9/1/09
SB 771	Relating to the determination of the value of property for ad valorem tax purposes, including appeals through binding arbitration of appraisal review board orders determining protests of property value determinations; providing penalties.	1/1/10
SB 1024	Relating to authority of a school district to mail a tax bill with an adopted rate that is higher than the district's rollback tax rate before the date of a rollback election.	9/1/09
HB 1030	Relating to the protest or appeal of an ad valorem tax matter.	9/1/09
SB 1458	Relating to the authority of certain taxing units to enter into an ad valorem tax abatement agreement.	9/1/09

***MATTERS TO BE ON NOVEMBER 3, 2009 BALLOT***

HJR 36-1	Proposing a constitutional amendment authorizing the legislature to provide for the ad valorem taxation of a residence homestead solely on the basis of the property's value as a residence homestead.
HJR 36-2	Proposing a constitutional amendment authorizing the legislature to authorize a single board of equalization for two or more adjoining appraisal entities that elect to provide for consolidated equalizations.
HJR 116	Authorizes the Veteran's Land Board to issue additional general obligation bonds. The funds from these bonds will be used to provide home and land mortgage loans to Texas veterans.
HJR 102	Proposing a constitutional amendment to Art. I, Tex. Const. by adding Sec. 33 (i) granting to the public the unrestricted right to use, and a right of ingress and egress to and from, a public beach; (ii) dedicating such right as a permanent easement in favor of the public; and (iii) authorizing the legislature to enact laws to protect the right of the public to access and use the public beach and to protect the public beach easement from interference and encroachments.

\* Generally effective 9/1/09

√ Summarized bills

## I. Licensing and Registration

Last year the U.S. Congress passed the Safe and Fair Enforcement (S.A.F.E.) of Mortgage Licensing Act which requires the licensing, regulation and registration of all residential mortgage loan originators operating in the United States by 2010. All states are required to adopt S.A.F.E. provisions and, if they do not comply, the United States Department of Housing and Urban Affairs will preempt state law.

In the 81st Legislative Session the Texas House and Senate passed three bills complying with the minimum requirements of S.A.F.E. House Bill 10 creates Chapter 180, Finance Code, to comply with the licensing, regulation, and registration requirements of S.A.F.E.; House Bill 2779 amends Chapter 157 requiring the licensing of mortgage banker employees originating residential mortgage loans; and House Bill 2774 amends Chapter 156, Finance Code regarding mortgage broker and loan officer licensing and amends Title 2, Finance Code to add Chapter 16 giving the regulatory agencies more control over their budget making process. The details of House Bill 10, House Bill 2779, and House Bill 2774 are discussed below under Sections A, B, and C respectively.

### A. *HOUSE BILL 10 CREATES NEW CHAPTER 180, FINANCE CODE TO COMPLY WITH THE SAFE AND FAIR ENFORCEMENT (S.A.F.E.) OF MORTGAGE LICENSING ACT*

Effective immediately House Bill 10 amends Subtitle E, Title 3, Finance Code to add Chapter 180 prohibiting individuals from engaging in business as a residential mortgage loan originator unless the person is (i) licensed under Chapter 156, 157, 342, 347, 348, or 351 of the Texas Finance Code, (ii) complies with all requirements of new Chapter 180, and (iii) is enrolled and maintains a valid unique identifier issued by the Nationwide Mortgage Licensing System and Registry. Section 180.002(19) defines a residential mortgage loan originator as “an individual who for compensation or gain or in the expectation of compensation or gain: (i) takes a residential mortgage loan application or (ii) offers or negotiates the terms of a residential mortgage loan”. This definition includes mortgage bankers, loan officers, mortgage brokers, and residential loan officers of consumer finance companies. Moreover, Section 180.051 (1)(b) provides that loan processors and underwriters who are independent contractors must also obtain and maintain a residential mortgage loan originator license and comply with all of the requirements of Chapter 180. This definition does not, however, include individuals who perform administrative or clerical tasks performed on behalf of licensed residential mortgage loan originators or individuals who are exempt under Section 180.003, Finance Code.

Importantly the Act requires licensing of mortgage banker employees acting as residential mortgage loan originators

under Chapter 157, Finance Code. Details of the requirements for licensing are discussed below under Section B regarding House Bill 2779.

New Chapter 180, Finance Code provides exemptions from licensing as a residential mortgage loan originator. Specifically Section 180.003 provides that the following individuals are exempt from licensing: 1) depository institutions; 2) subsidiaries that are owned and controlled by a depository institution and regulated by a federal banking agency; 3) an institution regulated by the Farm Credit Administration that is registered with and maintains a unique identifier through the Nationwide Mortgage Licensing System and Registry; 4) individuals offering or negotiating the terms of a residential mortgage loan with or on behalf of that individual’s immediate family member; 5) 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 client representation, unless the attorney takes a residential mortgage loan application; and offers or negotiate the terms of the residential mortgage loan; 6) an exclusive agent of a registered financial services company exempt from regulation under Chapter 156, Finance Code and enrolled as a registered mortgage loan originator with the Nationwide Licensing System and Registry.

House Bill 10 also authorizes regulatory officials to enforce and administer Chapter 180, Finance Code. For individuals subject to regulation under Chapters 156 and 157 of the Texas Finance Code, the regulatory official is the Texas Savings and Mortgage Lending Commissioner. For individuals licensed under Chapter 342, Finance Code the regulatory official is the Texas Consumer Credit Commissioner.

The Act requires that residential mortgage loan originators register with the Nationwide Mortgage Licensing System and Registry and establishes new educational, testing, and other requirements. These requirements are discussed below in detail.

#### 1. *Required registration with the Nationwide Mortgage Licensing System and Registry*

Section 180.052, Finance Code requires individuals licensed as residential mortgage loan originators to enroll and maintain a valid unique identifier issued by the Nationwide Mortgage Licensing System and Registry. Additionally, Section 180.151 requires each licensed residential mortgage loan originator to display the unique identifier clearly on each residential mortgage loan application, form, solicitation or advertisement, including business cards, websites, and any other document required by rules promulgated by the Texas Finance Commission.

#### 2. *Criminal and other background checks*

Under Section 180.054, an applicant for a residential mortgage loan originator license must provide personal identifying information to the regulatory official, in the

prescribed form and manner and acceptable to the Nationwide Mortgage Licensing System and Registry. The personal identifying information is to include: 1) fingerprints to be submitted to the Federal Bureau of Investigation or any government agency or entity with authority to receive the information for purposes of conducting a state, national and international criminal background check; 2) personal history and experience information in a form prescribed by the Nationwide Mortgage Licensing System and Registry along with authorization to obtain a credit report from a consumer reporting agency described by Section 603(p), Fair Credit Reporting Act (15 U.S.C. Section 1681a(p)) and information related to any administrative civil, or criminal findings by a governmental jurisdiction.

### **3. Educational requirements**

Section 180.056, Finance Code requires that applicants for a residential mortgage lending license must complete education courses that satisfy the minimum number of hours and type of courses required by the S.A.F.E. Mortgage Licensing Act. The minimum number of hours of training related to lending standards for the nontraditional mortgage product marketplace required by the S.A.F.E. Mortgage Licensing Act must also be completed. The education courses required by Section 180.056 must be reviewed and approved by the Nationwide Mortgage Licensing System and Registry. Approved courses may be provided by: 1) the applicant's employer; 2) an entity affiliated with the applicant as an agency contract; or 3) a subsidiary or affiliate of the employer or entity. The education courses may be offered in a classroom, online, or by any other means approved by the Nationwide Mortgage Licensing System and Registry.

Chapter 180 provides that applicants completing the educational requirements approved by the Nationwide Mortgage Licensing System and Registry in another state will be given credit toward completion of the educational requirements. Additionally those individuals previously holding a residential mortgage loan originator license complying with the requirements of Chapter 180 and other applicable regulatory law, must demonstrate to the appropriate regulatory authority that he or she has completed all continuing education requirements for the calendar year in which the license was held.

If the appropriate federal regulators and the Nationwide Mortgage Licensing System and Registry establish additional education requirements, the Texas Finance Commissioner will adopt necessary rules to implement the changes to the educational requirements of Chapter 180.

### **4. Qualified written test**

Chapter 180 requires applicants for a residential mortgage loan originator license to pass a qualified written test. Specifically Section 180.057, Finance Code requires applicants for a residential mortgage loan originator license to pass a written test that meets 1) the standards and requirements established by the S.A.F.E. Mortgage Licensing

Act; 2) developed by the Nationwide Mortgage Licensing System and Registry; and 3) administered by a test provider in accordance with the S.A.F.E. Mortgage Licensing Act. The test may be taken at the following locations: 1) the applicant's employer's office; 2) a subsidiary or an affiliate of the applicant's employer; or 3) an entity with which the applicant holds an exclusive arrangement to conduct the business of a residential mortgage loan originator.

The test may be retaken the number of times and within the period prescribed by the S.A.F.E. Mortgage Licensing Act. However, an individual failing to maintain a residential mortgage loan originator license for at least five consecutive years must retake the test.

### **5. Surety Bond or Recovery Fund Fee requirement**

Under Section 180.58, each applicant for a residential mortgage loan originator license must meet the surety bond requirements or pay a recovery fund fee, as applicable, required by the S.A.F.E. Mortgage Licensing Act. Moreover, each regulatory official must adopt rules requiring an individual licensed as a residential mortgage loan originator to obtain a surety bond or pay a recovery fund fee as appropriate to comply with the S.A.F.E. Mortgage Licensing Act.

If an applicant satisfies all of the requirements discussed above, Section 180.055, Finance Code provides that a residential mortgage loan originator license will not be issued unless the regulatory official determines that the applicant: 1) has not had a residential mortgage loan originator license revoked in any jurisdiction; 2) has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court either for a seven-year period preceding or at any time before the application if the felony involved an act of fraud, dishonesty, breach of trust, or money laundering; and 3) 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 within the purposes of Chapter 180 and any other appropriate regulatory law of the state of Texas.

Importantly, an applicant is considered not financially responsible if it is determined that the individual has shown an inability to manage his or her own financial affairs. A determination that the individual has not shown financial responsibility may include: 1) an outstanding judgment against the individual, other than one solely due to medical expenses; 2) an outstanding tax lien or other governmental liens and filings; 3) a foreclosure during the three-year period prior to the date of the application; and 4) a pattern of seriously delinquent accounts during the three-year period preceding the date of the application.

Section 180.059 provides the requirements for renewal of a residential mortgage loan originator license. A residential mortgage loan originator's license may be renewed on or before its expiration date if the license holder: 1) continues to

meet the minimum requirements for license issuance; 2) all the required fees for renewal have been paid; and 3) satisfactory evidence is provided that all of the continuing education requirements of Section 180.060, Finance Code discussed above have been satisfied.

Chapter 180 requires licensed residential mortgage loan originators to make certain reports to the Nationwide Mortgage Licensing System and Registry. Under Section 180.101, Finance Code each licensed residential mortgage loan originator must submit a report of condition to the Nationwide Mortgage Licensing System and Registry in the form and containing the information required by the Nationwide Mortgage Licensing System and Registry.

Section 180.153 specifies prohibited acts and practices that licensed residential mortgage loan originators may not engage in. Additionally Section 180.152 provides that individuals acting exclusively as loan processors or underwriters may not publically represent through advertising, business cards, stationery, brochures, signs, rate lists, or other means that he or she can or will perform residential mortgage loan originator activities unless licensed as residential mortgage loan originator.

The Act provides the Texas Finance Commission and Credit Union Commission with rulemaking authority under Chapter 180. In particular Section 180.061 authorizes the finance commission to adopt rules regarding the following:

1. background checks by obtaining criminal history information through fingerprint or other databases; civil administration records; credit history information; any other information considered necessary by the Nationwide Mortgage Licensing System and Registry;
2. payment of fees for a new or renewal license through the Nationwide Mortgage Licensing System and Registry;
3. setting or resetting license renewal dates or reporting periods;
4. amending or surrendering a license or other activity necessary for participation in the Nationwide Mortgage Licensing System and Registry; and
5. Investigation and examination authority necessary for investigating violations or complaints under Chapter 180 and persons regulated under that chapter.

Regulatory officials have broad authority to enforce Chapter 180. In this regard Section 180.201, Finance Code authorizes the savings and mortgage lending commissioner and consumer credit commissioner to:

- 1) deny, suspend, revoke, condition, or decline to renew a license due to i) a violation of Chapter 180, a rule adopted under it, or an order or directive issued under Chapter 180; ii) a failure to meet the qualification requirements of Subchapter B; or iii) withholding information or making a material misstatement in an application for a license or renewal of a license;
- 2) order restitution against a person subject to regulation under Chapter 180 for a violation of that chapter;

- 3) impose an administrative penalty on a person regulated by Chapter 180, subject to Section 180.202 (Administrative Penalty); and
- 4) issue orders or directives as provided by Section 180.203 (Cease and Desist Orders).

In order to fulfill the purposes of Chapter 180, the Act authorizes the regulatory officials to establish a relationship with the Nationwide Mortgage Licensing System and Registry. The purpose of this relationship is to collect and maintain records and process transaction fees or other fees related to licensed residential mortgage loan originators or other persons subject to regulation under Chapter 180, Finance Code. In this regard Section 180.102, Finance Code requires regulatory officials to report violations of, enforcement actions under, or information relevant to Chapter 180 or the S.A.F.E. Mortgage Licensing Act to the Nationwide Mortgage System and Registry. Additionally Section 180.103 requires that the applicable rulemaking authority establish a process allowing licensed residential mortgage loan originators to dispute information submitted to the Nationwide Mortgage Licensing System and Registry.

The Act provides that the information provided to the Nationwide Mortgage Licensing System and Registry is confidential. Any privileged or confidential information provided to the Nationwide Mortgage Licensing System and Registry is not subject to disclosure under any federal or state law governing the public disclosure of information held by an officer or agency of the federal government or the State of Texas. The privileged or confidential information also is not subject to subpoena, discovery, or admission into evidence in a private civil action or administrative proceeding. The same protections of confidentiality and privilege apply if a regulatory official enters into an information sharing agreement with another governmental agency. However, the protections do not apply to information regarding employment history and publically adjudicated disciplinary and enforcement actions against a residential mortgage loan originator that is included in the Nationwide Mortgage Licensing System and Registry for access by the public.

Lastly, the Act amends Chapter 341, Finance Code to add Subchapter G to establish a state-licensed residential mortgage loan originator recovery fund. Section 341.602, Finance Code directs the commissioner to establish, administer, and maintain a state-licensed residential mortgage loan originator recovery fund to reimburse residential mortgage loan applicants for actual damages due to acts by mortgage loan originators licensed under Chapter 342, 348, or 351 of the Texas Finance Code when the act was committed. The use of the fund is limited to reimbursement of out-of-pocket expenses caused by the act that constituted a violation of Chapter 180. Importantly, Section 341.603, Finance Code requires applicants for a new or renewal residential mortgage loan originator license under Chapters 342, 347, 348, or 351 to pay a fee, in addition to the original application fee, in an amount determined by the commissioner.

**.B. HOUSE BILL 2779 AMENDS CHAPTER 157 OF TEXAS FINANCE CODE TO REQUIRE LICENSING OF MORTGAGE BANKER EMPLOYEES**

House Bill 2779 amends Chapter 157, Finance Code, now titled the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act, by adding Section 157.012 to prohibit mortgage banker employees from acting as a residential mortgage loan originator unless 1) licensed under Chapter 157, Finance Code, 2) enrolled with the Nationwide Mortgage Licensing System and Registry, and 3) complying with all applicable requirements of Chapter 180, Finance Code and the rules adopted by the Texas Finance Commission under that chapter. Importantly, Section 157.002(6), Finance Code provides that residential mortgage loan originator has the same meaning as it does for the purposes of Chapter 180. Equally important, Section 157.031, Finance Code provides that a mortgage banker's employee, not exempt from the requirements of Chapter 157, who engages in residential mortgage loan origination activities without a license has committed an offense under Chapter 157. A first offense is a Class B misdemeanor and a second or subsequent offense is a Class A misdemeanor.

Section 157.004, Finance Code provides exemptions from licensing as a residential mortgage loan originator. Specifically the requirements of Chapter 157 do not apply to: 1) a federally insured bank, savings bank, savings and loan association, Farm Credit System Institution, or credit union; 2) a subsidiary of a federally insured bank, savings bank, savings and loan association, Farm Credit System Institution, or credit union; 3) an authorized lender licensed under Chapter 342; or 4) the state or a governmental agency, political subdivision, or other instrumentality of the state, or an employee of the state or a governmental agency, political subdivision or instrumentality for the state who is acting within the scope of the person's employment.

House Bill 2779 is patterned after the existing provisions of Chapter 156, Texas Finance Code regarding mortgage broker licensing. The sections below discuss the requirements for new and renewal residential mortgage loan originator licensing, denial of a new or renewal application for a residential mortgage loan originator license, the savings and mortgage lending commission's authority to administer and enforce the new requirements under Chapter 157 regarding residential mortgage loan originator licensing, and new requirements for registered mortgage bankers.

**Requirements for a residential mortgage loan originator license**

Section 157.013, Finance Code provides that an application for a new residential mortgage loan originator license must be made in writing under oath on the prescribed form and accompanied by an application fee in an amount determined by the savings and mortgage lending commissioner, but not more than \$500.00. A mortgage banker's employee is eligible for a residential mortgage originator's license if in addition to satisfying the requirements of Chapter 157, Finance Code, the

individual demonstrates to the savings and mortgage lending commissioner that: 1) he or she is of good moral character, including honesty, trustworthiness, and integrity; and 2) is not in violation of Chapter 157, Finance Code or a rule adopted under that chapter. As provided by new Section 157.014, Finance Code a residential mortgage loan originator license will be issued if the savings and mortgage lending commissioner determines that all the conditions and requirements for a license have been satisfied. However, as required by Section 180.052, Finance Code each mortgage banker employee licensed under Chapter 157 must have a unique identifier issued by the Nationwide Mortgage Licensing System and Registry.

**Renewal of residential mortgage loan originator license**

A residential mortgage loan originator license is valid for a year and can be renewed either on or before its expiration date. However, Section 157.015, Finance Code provides that each residential mortgage loan originator license will be renewed for not more than a one-year period expiring on December 31 of each year. Moreover, an application for a renewal license must satisfy all of the requirements for a new license under Section 157.013, Finance Code and Chapter 180, Finance Code. A renewal license will be issued if the applicant meets all of the requirements and conditions for the license.

If a residential mortgage loan originator license has expired, Section 157.016, Finance Code provides that an individual may not engage in activities requiring a license until the license has been renewed. If the license has not been renewed before January 1, the individual is eligible to renew the license on or before March 1 by paying a reinstatement fee in an amount equal to 150 percent of the required renewal fee. However, residential mortgage loan originator licenses may not be renewed after March 1 and an application for a new license is required.

**Denial of new or renewal application**

An application for renewal may be denied for the same reasons and grounds that the savings and mortgage lending commissioner could have denied the original application. The renewal application may also be denied if the savings and mortgage lending commissioner finds that the person applying for the renewal of the residential mortgage loan originator license is: 1) in violation of Chapter 157 or Chapter 180 of the Texas Finance Code, a rule adopted under Chapter 157 or Chapter 180, or an order issued to the person by the savings and mortgage lending commissioner; 2) in default in paying any administrative penalty, fee, charge, or other indebtedness owed under Chapter 157, Finance Code; 3) in default on a student loan administered by the Texas Guaranteed Student Loan Corporation, under Section 57.491, Education Code; or if during the current term of the license, the savings and mortgage lending commissioner becomes aware of any fact that would have been grounds for denying the original license.

If a new or renewal application for a residential mortgage loan originator license is denied, the savings and mortgage lending commissioner will promptly notify the applicant. If the application for a residential mortgage loan originator license is denied, the person is not eligible to be licensed for two years after the denial becomes final. However, this period may be shorter as determined by the savings and mortgage lending commissioner after an evaluation of the specific circumstances of the person's subsequent application.

The savings and mortgage lending commissioner's decision not to issue or renew a license may be appealed to a district court as provided by Subsection 157.026, Finance Code (Hearings and Appeals). However, prior to appealing the decision, the applicant must request a hearing before an administrative law judge designated by the commissioner not later than ten days after receiving the denial notice. If the hearing is not requested by the applicant, the denial of the application is final and not subject to review by the courts,

An applicant requesting a hearing must pay a deposit to secure the payment of the costs of the hearing in an amount to be determined by the savings and mortgage lending commissioner. The amount of the deposit, however, is not to exceed \$500.00. If the person prevails in the hearing, the entire deposit will be refunded. If the applicant does not prevail, any portion of the deposit exceeding the costs of the hearing will be refunded.

Not later than 90 days after the request for a hearing the administrative law judge will set the time and place for the hearing. At least 10 days notice of the hearing will be given to the applicant and the time of the hearing may be continued periodically with the consent of the applicant. After the hearing the savings and mortgage lending commissioner will enter an order based on the finding of fact, conclusions of law, and recommendations of the administrative law judge.

#### **Additional requirements for mortgage banker employees licensed under Chapter 157**

If a licensed residential mortgage loan originator's address or name changes, Chapter 157, Finance Code requires a modification of the license. For address changes Section 157.019(a) requires licensees notify the commission ten days before the address change becomes effective. When the modification involves a name change, Section 157.019(b) requires licensees notify the commission ten days after the name change becomes effective.

House Bill 2779 identifies when a residential mortgage loan originator's service to mortgage loan applicant is completed. As provided by Section 157.030(a), a residential mortgage loan originator has completed his or her service when the mortgage loan proceeds have been disbursed to the residential mortgage loan applicant. When the residential mortgage loan originator's service is completed, he or she owes no additional duties or obligation to the applicant with respect to the loan. However, Section 157.030(b) provides that completion of a the residential mortgage loan originator's service to a

residential mortgage loan applicant does not limit or preclude liability for: 1) failure to comply with Chapter 157 or a rule adopted under it; 2) failing to comply with a provision or duty under an agreement with a residential mortgage loan applicant; or 3) violation of state or federal law.

#### **Administration and enforcement of residential mortgage loan originator licensing**

House Bill 2779 authorizes the Texas Finance Commission to adopt rules under Chapter 157 as necessary to carry out the intentions of the federal Secure and Fair enforcement for Mortgage Licensing Act of 2008. Additionally, Section 341.103(a), Finance Code authorizes the savings and mortgage lending commissioner to regulate persons licensed under Chapter 157 of the Texas Finance Code. In particular Sections 157.021 through 157.025 authorize the commissioner to conduct inspections and investigations, impose administrative penalties, take disciplinary actions, including cease and desist orders, and order restitution.

Importantly Section 157.031(b) authorizes the savings and mortgage lending commissioner to issue a cease and desist order without notice and hearing if the commissioner believes that an unlicensed mortgage banker employee, not exempt under Chapter 157, is engaging in residential mortgage loan originator activity. The order may assess an administrative penalty not exceeding \$1,000.00 per day for each violation. The order may also require the individual to pay the residential loan applicant any compensation received from the applicant in violation of Chapter 157.

#### **New requirements for mortgage bankers**

House Bill 2779 also contains new requirements for mortgage bankers registered under Chapter 157. Specifically, Section 157.003, Finance Code is amended to require mortgage bankers to file a list of employees who are not residential mortgage loan originators with the savings and mortgage lending commissioner. If the list of employees changes, it must be promptly updated and submitted to the commissioner.

Section 157.020 requires each mortgage banker licensed under Chapter 157 to file an annual call report with the commissioner on the prescribed form. The report is a statement of condition of the mortgage banker and its operations, including financial statements and production activity volumes. Information regarding the mortgage loan origination volume and other trade information, however, is confidential and may not be disclosed by the commissioner.

House Bill 2779 is effective April 1, 2010.



**C. HOUSE BILL 2774 AMENDS CHAPTER 156, FINANCE CODE TO COMPLY WITH THE SECURE AND FAIR ENFORCEMENT FOR MORTGAGE LICENSING ACT OF 2008**

House Bill 2774 amends various sections of the Mortgage Broker License Act, Chapter 156, Finance Code, regarding mortgage broker and loan officer licensing to comply with the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008. The Act also removes the Finance Commission, and the regulatory agencies below it, from the Texas Legislature's budget process allowing Texas Finance Commission and the regulatory agencies under it to establish their own budgets.

With the respect to mortgage broker and loan officer licensing, the Act amends Chapter 156 regarding educational requirements, application fees for loan officer licensing and financial services company registration, surety bond requirements for mortgage brokers and loan officers, and the changes to savings and mortgage lending commissioner's authority to take disciplinary actions. Each of these are discussed below.

**Educational requirements for mortgage brokers and loan officers**

House Bill 2774 amends Section 156.102 by adding subsections (a-1) and (b-1) to require that effective January 1, 2011 mortgage brokers and loan officers must comply with the educational requirements of Chapter 180, Finance Code. As discussed above in Section A, Chapter 180, Finance Code requires mortgage brokers and loan officers to annually complete education courses that satisfy the minimum number of hours and type of courses required by the S.A.F.E. Mortgage Licensing Act. The minimum number of hours of training related to lending standards for the nontraditional mortgage product marketplace required by the act must also be completed. The education courses must be reviewed and approved by the Nationwide Mortgage Licensing System and Registry. Credit for courses completed in another state will be given credit toward completion of the educational requirements. Applicants previously licensed in another state, however, must demonstrate to the savings and mortgage lending commissioner that he or she has completed all continuing educational requirements for the calendar year in which the license was held. If additional educational requirements are established by the appropriate federal regulators and the Nationwide Mortgage Licensing System and Registry, the Finance Commission will adopt necessary rules to implement the changes in the educational requirements.

**Eligibility requirements for loan officer licensing**

Effective September 1, 2009, House Bill 2774 amends Subsection 156.204(c)(4) regarding the requirements for loan officer licensing. Specifically, to be eligible for a loan officer license applicants must only provide the savings and mortgage lending commissioner with evidence of one of the following:

1. the applicant has successfully completed at least 60 hours of education courses approved by the commissioner, (Note: providing evidence of the education and experience requirements of Subsection 156.204(a) will no longer be necessary);
2. the applicant has completed 30 hours of education courses approved by the savings and mortgage lending commissioner if the applicant has 18 months or more of experience as mortgage loan officer as evidenced by documentary proof of full-time employment as a mortgage loan officer with a person exempt under Section 156.202 or is a licensed real estate broker or active attorney; or
3. holds an active mortgage broker license under Chapter 156, Finance Code.

The Act provides that the requirements for a loan officer license will change again effective January 1, 2011, after which applicants will have to provide evidence of one of the following:

1. the person has successfully completed at least 60 hours of education courses approved by the commissioner;
2. the person has successfully completed 30 hours of education courses approved by the commissioner under this section if the applicant has 18 months or more of experience as a residential mortgage loan originator as evidenced by documentary proof of full-time employment (Note: employment by a person exempt under Section 156.202 will be no longer required); or
3. the person holds an active license as a residential mortgage loan originator under Chapter 157 and has held that license for a minimum of one year.

**Financial responsibility requirements**

The Act also changes financial responsibility requirements for mortgage broker and loan officer licensing. Currently Section 156.205(b) requires mortgage brokers, as a condition for licensing, to maintain \$25,000.00 in current assets or a surety bond of at least \$50,000.00. The Act amends Section 156.205(b) to eliminate this requirement and replaces it with a requirement that mortgage brokers and loan officers participate in the Mortgage Broker Recovery Fund. In regard to the Mortgage Broker Recovery Fund, amended Section 156.502(a) provides that in addition to the application fee, each applicant shall pay a fee for this fund in an amount determined by the commissioner, but the fee is not to exceed \$20.00.

**Application fees for loan officers and registered financial services companies**

House Bill 2774 also increases the license fees for loan officers and registration fees for registered financial services companies. Section 156.208(b) (1), Finance Code is amended to increase the fees for a loan officer license from \$175.00 to \$275.00. The Act also amends Subsection 56.214(b)(4) changing the annual registration fee for registered financial services companies to a graduated scale that is dependent on

the number of exclusive agents the registered financial services company has operating in this state. The new registration fee are as follows: 1) registered financial services companies with 2,000 or fewer exclusive agents, an amount equal to the lesser of: (i) one-half of the license fee for a loan officer under Section 156.203(c)(1), multiplied by the number of exclusive agents under contract to act for the person in this state; or (ii) \$200,000; 2) financial services companies with at least 2,001 but not more than 2,500 exclusive agents acting in this state, \$225,000; 3) financial services companies with at least 2,501 but not more than 3,000 exclusive agents acting in this state, \$250,000; 4) financial services companies with at least 3,001 but not more than 5,000 exclusive agents acting in this state, \$300,000; and 5) financial services companies with at least 5,001 exclusive agents acting in this state, \$350,000.

### **Disciplinary Actions**

Sections 156.302(a) (Administrative Penalty) and 156.303(a) ((e), (g), (h), and (j) (Disciplinary Action; Cease and Desist Order) have been amended to require notice and an opportunity for a hearing to a mortgage broker or loan officer before imposing an administrative penalty. Additionally Section 156.303 has been amended adding Subsection (a-1) to provide that the commissioner may order disciplinary action against a mortgage broker or loan officer if during the term of the current license the commissioner becomes aware of a fact that would have been grounds for denial of the original license.

The Act also amends Section 156.506 to add Subsection (a-1) authorizing the commissioner to collect from a licensed mortgage broker or loan officer amounts paid from the Mortgage Broker Recovery Fund and any costs in connection with investigating and processing the claim against the fund or with collecting reimbursement for payments from the fund, including interest at the current legal rate until the amount is paid in full.

The Act also adds Section 156.208(j) to provide that commissioner will not renew a mortgage broker or loan officer license if the individual is in default on a student loan administered by the Texas Guaranteed Student Loan Corporation, pursuant to Section 57.491, Education Code.

### **Financial regulatory agencies self-directed and semi-independent status**

In addition to the above amendments for mortgage broker and loan officer licensing, the Act amends Title 2, Finance Code by adding Chapter 16 to remove the Texas Finance Commission and the regulatory agencies under it (Texas Department of Banking, the Department of Savings and Mortgage Lending, the Office of Consumer Credit Commissioner; and the Credit Union Department) from the Texas Legislature's budget process, allowing these agencies to independently establish their own budgets.

## **II. FAMILY CODE AMENDMENTS**

Senate Bill 1661 amends Subchapter G, Chapter 157, Family Code to add Section 157.3171 providing a procedure for releasing child support liens on residential homestead property.

Under new Section 157.3171, a child support lien obligor is considered to be a judgment lien debtor and must comply with Section 52.0012, Property Code (Release of Record Lien on Homestead Property) to release the lien. Specifically a child support lien against homestead property may be released when the obligor files an affidavit in the same manner that a judgment lien debtor may file an affidavit to release a judgment lien against homestead property.

The child support obligor need only send a letter and a copy of the affidavit to the child support lien claimant at the claimant's last known address. The child support lien claimant may dispute the obligor's affidavit by filing a contradicting affidavit as provided by Section 52.0012(e), Property Code.

If the child support lien claimant does not file a contradicting affidavit, the affidavit filed by the obligor serves as a release of the child support lien. However, if the child support lien claimant files a contradicting affidavit, the issue of whether the property is subject to a lien must be resolved in a district court in the county where the property is located.

Senate Bill 1661 is effective immediately but changes in law under this Act apply only to child support lien notices filed on or after the effective date.

## **III. FINANCE CODE AMENDMENTS**

In addition to the Finance Code amendments discussed above, one additional amendment was made by the Texas House and Senate in the 81<sup>st</sup> Legislative Session. Senate Bill 1620 amends Subchapter A, Chapter 351 by adding Sections 351.008 through 351.011 regarding inspection of property tax lender's records.

New Section 351.008 authorizes the commissioner to examine the place of business of each property tax lender and to investigate the lender's transactions. To the extent the transactions and records involve business activities regulated under Chapter 351, Finance Code and sections 32.06 and 32.065, Tax Code, the inspection may include examination of loans, and records, including books, accounts, papers, and correspondence.

During the commissioner's examination, the property tax lender must provide the commissioner unrestricted access to the lender's office, place of business, files, safes, and vaults. The property tax lender must also allow photocopying of the lender's transaction including loans, records, books, accounts, papers, and correspondence.

The Act also authorizes the commissioner to investigate property tax lenders if there is reasonable cause to believe there is a violation of Chapter 351, Finance Code or Section 32.06 or 32.065, Tax Code. The commissioner may investigate the records, including books, accounts, papers and correspondence.

The Act further provides that a property tax lender's refusal to allow an inspection or an examination is a violation of Chapter 351, Finance Code. The failure or refusal is a ground for suspension or revocation of the lender's license under Chapter 351.

Lastly, the Act authorizes the commissioner to verify the net assets of a property tax lender. Specifically, if the commissioner questions the amount of a property tax lender's net assets, the commissioner may require certification by an independent certified public accountant that: 1) the accountant has examined the property tax lender's books, other records, and transactions during the reporting year; 2) the books and records are maintained using generally accepted accounting principles; and 3) the property tax lender meets the net assets requirement of Section 351.153, Finance Code.

Senate Bill 1620 is effective September 1, 2009.

### **III. INSURANCE CODE AMENDMENTS**

House Bill 3073 amends Chapter 2501, Insurance Code to add Section 25.008 regarding third-party charges at closing of a real property transaction. Specifically, the new section authorizes a title company, title insurance agent or a direct operation to charge reasonable estimates of third-party charges for electronic filing fees and ad valorem tax reports.

House Bill 3073 applies only to real property transactions that close on or after the January 1, 2010 effective date of the Act. Closings before the effective date of the Act are governed by the law in effect immediately before the effective date of the Act.

### **IV. PENAL CODE AMENDMENTS**

In 2007 the Texas House and Senate passed H.B. 716 which, in part, amended Section 32.32, Penal Code to include mortgage fraud as a criminal offense. In the 81<sup>st</sup> Legislative Session, the Texas House and Senate passed House Bill 2840 to make a written material false or misleading statement regarding a real property appraisal a criminal offense.

The Act also amends Section 402.032(c) adding the Texas Department of Housing and Community Affairs to the Residential Mortgage Task Force and authorizes this agency to assist in the investigation of an offense involving a residential mortgage loan.

House Bill 2840 is effective September 1, 2009

### **V. PROPERTY CODE AMENDMENTS**

The Texas House and Senate made eight amendments to the Property Code during the 81st Legislative Session, including House Bill 396 amending Section 12.0071, Property Code to provide a procedure for expunging a notice of lis pendens; House Bill 655 requiring the payment of the purchase price at a foreclosure sale to be made to the trustee, or substitute trustee without delay; House Bill 3479 requiring property owners' associations conducting a foreclosure sale to notify all lienholders of record and providing procedures for redemption by the lienholder; House Bill 3857 prohibiting foreclosure of real property owned by military service members and their dependents; House Bill 3767 providing that residential homestead property transferred to a qualifying trust is considered homestead of the settlor or beneficiary under Section 50, Article XVI, Texas Constitution, and Section 41.001, Texas Property Code; House Bill 3945 authorizing a title company to file an affidavit to release a lien; and Senate Bill 1919 providing that if a property owners' association fails to record a management certificate a purchaser, lender, title insurance company or a title insurance agent is not liable for certain amounts due to the association.

#### **A. House Bill 396 provides a procedure for expunging a notice of lis pendens**

House Bill 396 amends the Property Code by adding Section 12.0071 to provide a method of expunging a notice of lis pendens. Specifically, a party to an action in which a notice of lis pendens has been filed may apply to the court to expunge the notice and file evidence, including declarations, with the motion to expunge the notice of lis pendens. Notice of the motion to expunge must be served on each affected party on before the 20th day before the date of the hearing on the motion.

The court will permit evidence on the motion to be received in the form of oral testimony and make any orders it considers just in providing for discovery by a party affected by the motion. The notice of lis pendens will be expunged if the court determines that 1) the pleading on which the notice is based does not contain a real property claim; 2) the claimant failed to establish by a preponderance of the evidence the probable validity of the real property claim; or 3) the person who filed the notice for record did not serve a copy of it on each person with an interest in the real property affected by the notice of lis pendens.

When a certified copy of an order expunging a notice of lis pendens has been recorded, the notice of lis pendens and any information contained in the notice does not: 1) constitute constructive or actual notice of any matter contained in the notice relating to the proceeding; 2) create any duty of inquiry in a person with respect to the property described in the notice; or 3) affect the validity of a conveyance to a purchaser for value or of a mortgage to a lender for value. More importantly, the notice of lis pendens is not enforceable against a purchaser or lender regardless of whether the purchaser or lender knew of the lis pendens action.

House Bill 396 applies only to a notice of lis pendens filed on or after the September 1, 2009 effective date of the Act. A lis pendens filed before the effective date of the Act is governed by the law in effect immediately before that date.

**B. House Bill 655 requires the purchase price in a sale held by a trustee or substitute trustee to be due and payable without delay**

Effective September 1, 2009 House Bill 655 amends Section 51.0075(f), Property Code to require that the purchase price at a foreclosure sale be due and payable without delay on acceptance of the bid or at a reasonable time agreed upon by the purchaser and the trustee or substitute trustee.

**C. House Bill 3479 requires property owners' associations to notify all lienholders of record after foreclosing on a lot and provides a procedure for redemption**

House Bill 3479 amends Section 209.010, Property Code to require property owners' associations conducting a foreclosure sale to notify each lienholder of record of the foreclosure sale. Specifically not later than the 30<sup>th</sup> day after the foreclosure sale property owners' associations must send a written notice to the lienholder informing the lienholder of the date and time the sale occurred and of the right to redeem the property under Section 209.011, Property Code. The notice to the lienholder must be sent by certified mail, return receipt requested to the address evidenced by the most recent deed of trust recorded in the real property records of the county where the property is located. If provided with written notice of the address of a transferee or assignee by certified mail, return receipt requested, the property owners' association must provide notice of foreclosure to a transferee or assignee. Importantly, if a recorded instrument does not include a lienholder's address, the property owners' association does not have a duty to notify the lienholder.

House Bill 3479 also amends Section 209.011, Property Code to provide that a lienholder may redeem property from the purchaser at a sale foreclosing a property owners' association assessment lien not later than the 180<sup>th</sup> day after the association mails written notice of the sale required under Section 209.010, Property Code. However, a lienholder of record may not redeem the property before 90 days after the date the association mails the written notice of the sale under Section 209.010, Property Code and then only if the lot owner has not previously redeemed the property.

If the lienholder redeems the property purchased by the property owners' association at the foreclosure sale, the lienholder must pay the association all the amounts and costs enumerated under Subsection 209.011(d), Property Code. Similarly if the lienholder redeems the property from a person other than the property owners' association, the lienholder

must pay the amounts and costs enumerated under Section 209.011(e), Property Code.

If the lienholder redeems the property, the purchaser at a foreclosure sale shall immediately execute and deliver a deed transferring the property to the lot owner. If before the expiration of the redemption period, the lienholder or lot owner fails to record the deed or an affidavit that the lienholder has redeemed the property, the lienholder's right of redemption as against a bona fide purchaser for value expires after the redemption period.

The lienholder may extend the redemption period by making a written request, by certified mail, return receipt requested, on or before the last day of the redemption period. The lienholder's right of redemption will be extended until the 10<sup>th</sup> day after the association and any third party purchaser provides written notice to the redeeming party of the amounts that must be paid to redeem the property.

House Bill 3479 only applies to foreclosure sales conducted on or after the September 1, 2009 effective date. Foreclosure sales conducted before the effective date of House Bill 3479 are governed by the law in effect immediately before the effective date of the Act.

**D. House Bill 3857 prohibits foreclosure of liens on real property during active duty military servicemembers or non-active duty servicemembers for nine months after the active duty concludes**

Effective immediately House Bill 3857 amends Chapter 51, Property Code to add Section 51.015 allowing active duty servicemembers, or non-active duty servicemembers to stay foreclosure proceedings or adjust their obligations under a contract for a period of nine months after the active duty concludes. New Section 51.015 applies only to an obligation secured by a mortgage, deed of trust, or other contract lien on real or personal property that is a dwelling owned by a military servicemember prior to the commencement of the service member's active duty and for which the service member is still obligated. The Act defines an active duty servicemember as a member of the United States armed forces; the Texas National Guard, the National Guard of another state serving on active duty by order of the president of the United States; or a member of the reserve component of the United States armed forces under active duty by order of the president of the United States.

Importantly, it is a Class A misdemeanor if a person knowingly makes or causes to be made a sale, foreclosure, or seizure of property during a military servicemember's active duty or for nine months after the active duty service has concluded. Moreover, the Act provides that a sale, foreclosure or seizure of property encumbered by a mortgage, deed of trust, or other contract lien may not be conducted unless: 1) a court order issued before the sale, foreclosure or seizure; or 2) the servicemember waives his rights in a writing separate from the obligation that: 1) is in at least 12-

point type; and (2) made under a written agreement: (a) executed during or after the servicemember's period of active duty military service; and (b) specifies the legal instrument to which the waiver applies and, if the servicemember is not a party to the instrument, the servicemember concerned.

In an action brought to foreclose or enforce a mortgage, deed of trust, or other contract obligation during a service member's active duty or for 9 months after the activity duty ends, the servicemember may apply to the court and on the court's own motion after a hearing, the court may 1) stay the proceedings for a period of time as justice and equity require; or 2) adjust the obligations of the contract to preserve the interests of all parties.

House Bill 3857 also applies to military service member's dependants if his or her ability to comply with the obligation is adversely affected by the servicemember's military service.

In addition to the servicemember's dependants, the Act provides protections for persons who are primarily or secondarily subject to the obligation. Subsections 52.015 (h) and 52.015 provides that if a court issues a stay or vacates a judgment or degree, the court may take these actions with respect to surety, guarantor, endorser, accommodation maker, co-maker or other persons who are primarily or secondarily subject to the obligation.

The protections provided by Subsections 52.015(h) and (i) may be waived by a surety, guarantor, endorser, accommodation maker, co-maker, or other person who is primarily or secondarily subject to the obligation. However, the waiver must be on an instrument separate from the obligation and it may not be executed prior to the beginning of the active duty military service. If the waiver is executed prior to entering active duty military service, the waiver is not valid after active duty military service begins.

**E. House Bill 3767 provides that real property may be transferred by warranty deed to a living trust without affecting the homestead protection of the settlor or beneficiary**

House Bill 3767 amends Chapter A, Chapter 41, Property Code by adding Section 41.0021 allowing real property transferred to a qualified trust to retain its homestead protection under Section 50, Article XVI, Texas Constitution and Section 41.001, Property Code (Interests in Land Exempt from Seizure). In particular new Section 41.0021 defines a qualifying trust as an express trust created by an instrument or court order that allows the settlor or beneficiary to:

1. revoke the trust without the consent of another person;
2. exercise an inter vivos general power of appointment over the property that qualifies for the homestead exemption; or

3. allows the settlor or beneficiary to use and occupy the property as a principal residence at no cost, other than payment of taxes and other costs and expenses specified in the instrument or court order: (i) for the life of the settlor or beneficiary, (ii) a shorter period of time specified in the instrument or court order, or (iii) until the trust is revoked by instrument or court order recorded in the real property records of the county where the property is located describing the property with sufficient certainty to identify the property; and
4. the trustee acquires the property in an instrument of title or court order describing the property with sufficient certainty to identify the property and interest acquired that is recorded in the real property records of the county where the property is located.

Under Section 50, Article XVI, Texas Constitution, and Section 41.001, Property Code, the property is considered the homestead of the settlor or beneficiary if he or she occupies and uses it in a manner described above and owns a beneficial interest in it through a qualifying trust.

The Act applies only to transfers on or after the September 1, 2009 effective date of the Act. Transfers before the effective date are governed by the law as it existed immediately before the effective date of the Act.

**F. House Bill 3945 authorizes title insurance agents to file affidavits as a release of lien**

Effective September 1, 2009, House Bill 3945 amends Section 12.017(a), Property Code to authorize title insurance agents licensed under Chapter 2651, Insurance Code (Title Insurance Agents and Direct Operations) to file affidavits on behalf of a mortgagor to release a lien.

For property involving a one-to-four family residence, including a condominium regime or property other than a one-to-four family residence with the original face amount of the indebtedness secured by the mortgage less than \$1.5 million, an authorized title insurance company or authorized title insurance agent may file an affidavit in the real property records of each county where the mortgage is recorded as a release of lien. The affidavit filed by the title insurance company or title insurance agent must be in substantially the following form:

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 by Paragraph (A) 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 12.017, Texas Property Code, this affidavit constitutes a full and final release of the mortgage from the property.

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

\_\_\_\_\_

(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 payment to which the affidavit relates, the title insurance company or authorized title insurance agent must notify the mortgagee, at the location where payment was sent, that the title insurance company or title insurance agent may file the affidavit for record as a release of lien. Within 45 days after receiving the notice from the title insurance agent, the mortgagee may file an affidavit describing the mortgage and property filed and controverting the affidavit filed by the title insurance company or title insurance agent.

An affidavit filed for record by the title insurance company or title insurance agent operates as a release of lien if it is executed, filed for record in the real property records, and is not controverted by a separate affidavit by the mortgagee.

Importantly, a person who negligently causes a false affidavit to be executed and recorded under Section 12.017, Property Code is liable to a party injured by the affidavit for actual damages. Additionally, Section 12.017 doesn't affect any agreement or obligation of a mortgagee to execute and deliver a release.

The changes in the law made by House Bill 3945 only apply to affidavits filed for record on or after the September 1, 2009 effective date of the Act. Those affidavits filed before the effective date are governed the law in effect immediately before the effective date of the Act.

**G. Senate Bill 1919 provides that if a property owners association fails to record a management certificate purchasers and lenders are not liable for amounts due the association on the date of transfer**

Effective September 1, 2009, Senate Bill 1919 amends Section 209.004, Property Code by amending Subsections (a) and (c) and adding Subsections (d), (e), and (f) to provide that if a property owners' association fails to record a management certificate, or an amended management certificate, in the real property records where the subdivision is located, a purchaser, lender, or title insurance company or its agent is not liable to the property owners' association for: 1) amounts due the property owners' association on the date of transfer of a property to a bona fide purchaser; and 2) any debt or claim of the association that accrued before the date of transfer to a bona fide purchaser. Moreover, a lien of a property owners' association that fails to file a management certificate or an amended management certificate is enforceable only for an amount incurred after the effective date of a transfer of a property to a bona fide purchaser.

Importantly, Subsection 209.004(f) defines a bona fide purchaser as: 1) a person who pays valuable consideration without notice of outstanding rights of others and acts in good faith; or 2) a third-party lender acquiring a security interest in the property under a deed of trust.

This change only applies to a transfer of an interest to a bona fide purchaser on or after the September 1, 2009 effective date of the Act. A transfer of an interest to a bona fide purchaser before the effective date of the Act is covered by the law in effect when the transaction occurred.

**VI. Tax Code Amendments**

Effective September 1, 2009, House Bill 1465 amends Subchapter C, Chapter 33, Tax Code by adding Section 33.445 to require that when a taxing unit and a tax lien transferee both possess tax liens on the same property (e.g., for different tax years) a taxing unit in a suit to foreclose a tax lien must join each tax lien transferee of record. After being

joined, a tax lien transferee may file its claim and seek foreclosure in a suit for all amounts owed to it and secured by the transferred tax lien regardless of whether the transfer was recorded or whether the loan amount is delinquent. Alternatively, the tax lien transferee may pay all taxes, penalties, interest, court costs, and attorney's fees owing the taxing unit seeking foreclosure and each other taxing unit that is joined.

If the tax lien transferee elects to pay all taxes or charges of joined taxing units, each of the taxing units must transfer its tax lien to the tax lien transferee. When transfer has occurred, the tax lien transferee may seek to foreclose the tax lien regardless of when the original transfer of tax lien was recorded or whether the original loan secured by the transferred tax lien is delinquent. A foreclosure may include all amounts owed to the tax lien transferee, including any amount secured by the original transfer of the tax lien.

If a tax lien fails to take any of the action discussed above, all liens held by the tax lien transferee are extinguished. and the court's judgment must reflect the extinguishment of the tax liens.

**NOTICE**

**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**