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Mr. Sealy Hutchings, General Counsel
OFFICE OF THE CONSUMER CREDIT COMMISSIONER
2601 North Lamar Boulevard
Austin, Texas 78705 – 4207

Re: Comment on Proposed Rules 7 T.A.C. §§153.13, 153.18, 153.20, and 153.22 as published in the Texas Register on March 3, 2006 (31 Tex. Reg. 1393) and Proposed for Adoption by the Joint Financial Regulatory Agencies (the "Commissions") and Codification to the Texas Administrative Code as part of 7 T.A.C. Chapter 153 HOME EQUITY LENDING (the "Interpretive Rules")

Dear Sealy:

Brown, Fowler & Alsup P.C. is a Houston-based law firm that practices exclusively in the field of residential mortgage banking and real estate law. Our legal services include preparing home mortgage loan documents and counseling our clients in related federal and state regulatory compliance, real estate, title, and closing matters. We represent financial institutions, mortgage bankers, and mortgage brokers in the process of mortgage loan documentation and closings for thousands of Texas home loan transactions each month. I am Board Certified in Residential Real Estate Law by the Texas Board of Legal Specialization and have written and lectured extensively on the subject of Texas homestead and home equity lending laws.

The Commissions have proposed repeal of existing 7 T.A.C. §§153.13, 153.18, 153.20, and 153.22 and the adoption of changes to each such rule in the form of new interpretations. Our comment is directed primarily to new proposed §153.13 that interprets the requirements of Section 50(a)(6)(M)(ii), Article XVI, Texas Constitution, defining a Texas home equity loan in part as an extension of credit that:

> (M) is closed not before:
> . . . .
> (ii) one business day after the date that the owner of the homestead receives a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the date of closing; and . . .

In our experience, the 7 TAC §153.13(4) *de minimis variance* rule first adopted by the Commissions effective January 8, 2004 as a measure of acceptable *good cause* under subsection (M)(ii) has become an important "safe harbor" standard for the Texas mortgage lending industry under which the parties to a home equity loan may avoid unnecessary delays of scheduled closings for days on end because of minor variances that routinely occur in the disclosed amounts of one or more itemized charges. Without tolerances for minor variances in disclosures, such as allowed under the de minimis variance rule, scheduled equity loan closings often would have to be reset to a later day at great inconvenience and some cost to lenders, title companies, and consumers alike when the amount of one or more fees and charges actually charged at closing varies in *any* amount from itemized fees and charges on the preclosing disclosure required under subsection (M)(ii). Often in these cases the only variance is in charges paid by the lender to third parties outside of closing or in the precise amount of the payoff of an existing lien on the homestead property or unsecured debts that the owner intends to payoff with equity loan proceeds to consolidate the owner's debts. Payoffs in particular change each day with the passage of time as they accrue interest. However, it is important to recognize that these payoffs are the owner's own existing debts and the owner uniquely has personal knowledge of the amounts owed and the terms of repayment, including daily accrued interest charges. The Interpretive Rules in our opinion should clarify that payoffs of the owner's existing debts in this manner are not "fees . . . and charges" to the borrower of the type contemplated by subsection (M)(ii) that must be disclosed in advance of the date of closing. Payoffs are itemized as a part of a HUD-1 Settlement Statement that is routinely given to satisfy the preclosing disclosure requirements, but should not have to be precise to satisfy the requirements of subsection (M)(ii). Similarly, fees paid by the lender outside of closing, although disclosed on the HUD-1 Settlement Statement in accordance with RESPA requirements, by definition are not "fees . . . and charges" of the type contemplated by subsection (M)(ii) in our opinion in that they are neither paid by the owner nor paid at closing.

The de minimis variance rule adopted by the Commissions has worked as a standard for the mortgage lending industry because the *good cause* is found in the minor amount of the variance itself, which amount is readily calculable and can be determined objectively. (As an aside, in my opinion the Commissions could have established such a rule as well by interpreting the meaning of the term "actual" as used in subsection (M)(ii) to provide for such a tolerance for accuracy, noting that "actual" and "precise" are not synonymous.) Simply stated, under the de minimis variance rule, if in any case any fee or charge at closing is either less than the amount earlier disclosed or not more than the greater of $100 or 1/8% of the loan amount *and* if all such itemized fees and charges in the aggregate are either less than the amount earlier disclosed or not more than the greater of $100 or 1/8% of the loan amount, the test is met and the subsection (M)(ii) requirements satisfied, allowing the loan to close without delay with the owner's written consent. Under the current de minimis variance rule, there are no further conditions to be met or subjective standards burdening the applicability of the rule.

We are troubled, therefore, to see in the proposed new §153.13 rule the addition of further conditions and subjective standards that we fear will make such a *de minimis plus* rule unworkable in practice. The new rule as proposed would be burdened with additional requirements that the lender first (i) make a subjective determination that a modification of the preclosing disclosure "does not create a material adverse financial consequence" (isn't "de minimis" by definition immaterial?) and that a delay in the closing "would create an adverse consequence" (wouldn't an adverse consequence alone arguably constitute "another good cause" regardless of whether any change in the disclosure of actual fees and charges were "de minimis"?) and then (ii) further justify any minor variance in disclosed fees and charges by determining that the variance results either from "an accidental or bona fide error such as a mathematical error" or "an unanticipated additional fee that is to be paid to a third party." These additional conditions in our view would greatly reduce the utility of the rule and the instances in which the rule may be applied because, as we have seen, many of the variances result simply from additional costs accruing with the passage of time. Moreover, in most cases, rather than a "material consequence," the consequence of postponement of closing is typically measured more in terms of incidental costs (e.g., lost wages of hourly workers, parking fees, baby sitter fees, etc.) and personal annoyance and inconvenience to the parties'having to reschedule the closing for a later date when all have already appeared at the title company offices to close the transaction (often taking time off from work and making other personal arrangements to meet at the appointed hour) and are ready, able, and desirous of closing the transaction as scheduled despite some insignificant variance in disclosed fees and charges. Whether the delay in receiving needed loan proceeds and the incidental costs and personal inconvenience to the parties experienced in a postponement of a scheduled loan closing would satisfy such a "material consequence" standard is highly subjective in any case, and many lenders may be wary of the compliance risk of invoking such a "de minimis variance" rule for that reason.

Furthermore, these additional conditions, if advanced for that purpose, do nothing in our view to bolster the argument in support of the constitutionality of a de minimis variance rule and are unneeded for that purpose in any event. We note that the court in *ACORN et al v. Finance Commission of Texas et al* pending in the 126th Judicial Court of Travis County, Texas, which in part challenges the constitutionality of this rule, does not appear to take issue with the concept of establishing a de minimis variance tolerance per se, but instead observes that, as drafted, §153.13 could be read "to allow for a dramatic increase in the total amount of actual [fees and charges] on the date of closing over the amount in the pre-closing disclosure" if, under subsection (4)(B) of the rule, any one such itemized fee or charge is under the amount in the pre-closing disclosure. Clearly, that is neither the intent of the rule as adopted by the Commissions nor how the rule has been interpreted or applied by the mortgage lending industry in practice. However, it does stress the importance in drafting the new proposed §153.13 to state the de minimis variance rule in certain terms that permit a precise mathematical calculation and sure determination by any lender or owner of a home equity loan that the permitted tolerances for minor variances have been met and the subsection (M)(ii) requirements satisfied. But we note in that regard that, while removing the offending subsection (4)(B) provision complained of by the court, the new proposed §153.13 rule fails to address just what the effect of a decrease in the amount of any fee or charge itemized in the preclosing disclosure would be under the new de minimis variance test.

We also note and are concerned to see in our reading of the proposed new §153.13 the elimination of the minimum variance tolerance of $100 and would urge the Commission to restore the tolerance standard to be the "greater of $100 or 1/8%" since many home equity loans are extended for principal amounts of less than $80,000 (i.e., the loan amount at which amount 1/8% equals $100).A sole 1/8% standard would provide a tolerance of only $62 for a $50,000 home equity loan or $31 for a $25,000 home equity loan, for example. Because many fees for settlement services tend to be fixed at standardized rates regardless of the loan amount, the failure to provide for the $100 floor tolerance for accuracy would require that lenders obtain a comparatively greater degree of accuracy for smaller home equity loans in real dollar terms and arguably would tend to discourage the extension of equity loans to homeowners with smaller homes or with smaller amounts of built-up home equity.

Finally, we ask the Commissions to clarify in new proposed rule §153.13(4) that the reference to "normal business hours" refers to the business hours of the lender's title or other settlement agent conducting the loan closing. The Commissions should further clarify in that regard that the "normal business hours" restriction applies only if the loan closing is conducted on the first business day after delivery of the preclosing disclosure and not if conducted on "any day thereafter." Presumably, the Commissions' purpose in restricting the closing on the first business day after delivery of the preclosing disclosure to normal business hours is to assure that adequate time is given the home owner to coolly reflect on the costs of closing before being asked to consummate the transaction, and restricting the closing to normal business hours would, for example, preclude a lender from delivering the preclosing disclosure to the owner at 11:55 PM on a Sunday evening and conducting a closing 10 minutes later at 12:05 AM on Monday, the first business day thereafter. If the closing occurs on a day after that first business day, however, there should be no reason to restrict the closing to "normal business hours." Title companies often schedule closings and work late into the evenings to accommodate the needs of the lender and home owners to close their loans at month's end or prior to a holiday.

To give effect to and illustrate these several comments and recommendations, proposed new §153.13 could be revised as follows. New text is shown as underlined and deleted text as lined through.

§153.13. Preclosing Disclosures: Section 50(a)(6)(M)(ii). An equity loan may not be closed before one business day after the date that the owner of the homestead receives a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the date of closing.

(1) A lender may satisfy the disclosure requirement of this section by delivery to the borrower of a properly completed Department of Housing and Urban Development (HUD) disclosure Form HUD-1 or HUD-1A. "Fees , points, interest, costs and charges" for this purpose do not include amounts paid by the lender to third-party service providers outside of closing or amounts required to be paid by the owner to other creditors to payoff and discharge existing liens on the homestead or unsecured debts that are to be consolidated by the equity loan even if itemized on the Form HUD-1 or HUD-1A settlement statements.

(2) Bona Fide Emergency.

(A) An owner may consent to receive the preclosing disclosure on the date of closing in the case of a bona fide emergency occurring before the date of the extension of credit. An equity loan secured by a homestead in an area designated by Federal Emergency Management Agency (FEMA) as a disaster area is an example of a bona fide emergency if the homestead was damaged during FEMA's declared incident period.

(B) To document ~~an~~ a bona fide emergency modification, the lender should obtain a written statement from the owner that:

(i) describes the emergency;

(ii) specifically states that the owner consents to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing;

(iii) bears the signature of all of the owners entitled to receive the preclosing disclosure; and

(iv) affirms the owner has received notice of ~~their~~ the owner's right to receive a final itemized disclosure containing all actual fees, ~~costs,~~ points, interest, costs, ~~or~~ and charges one day prior to closing.

(3) Another Good Cause.

(A) An owner may consent to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing if another good cause exists. Good cause to ~~modify~~ receive the preclosing disclosure or ~~to receive~~ a subsequent disclosure modifying the preclosing disclosure on the date of closing may only be established by the owner.

(i) The term "good cause" as used in this section means a legitimate or justifiable reason, such as an adverse financial impact or ~~an~~ other adverse consequence or a de minimis variance as defined by this section.

(ii) The term "de ~~minimus~~ minimis variance" as used in this section means a very small or insignificant amount not exceeding the amount determined under this section by which fees, points, interest, costs and charges itemized on the preclosing disclosure may differ from actual fees, points, interest, costs and charges that will be charged at closing.

(B) At the owner's election, a de ~~minimus~~ minimis variance may be ~~a~~ another good cause ~~standard~~ and may be presumed by the lender to be good cause if:

~~(i) the modification does not create a material adverse financial consequence to the owner;~~

~~(ii)a delay in the closing would create an adverse consequence to the owner;~~

~~(iii)~~ (i) the total of all actual fees, ~~costs,~~ points, interest, costs, ~~or~~ and charges on the date of closing is either less than, or does not exceed in the aggregate, all fees, points, interest, costs and charges itemized on the preclosing disclosure by more than the greater of $100 or 0.125 percent of the principal amount of the loan (e.g., 0.125 percent on an $80,000 principal loan amount equals $100); and ~~from the initial preclosing disclosure;~~

~~(iv)~~ (ii) each of the actual fees, ~~cost,~~ points, interest, costs or charges on the date of closing is either less than, or does not exceed the amount of each such fee, point, interest, cost or charge itemized on the preclosing disclosure by more than the greater of $100 or 0.125 percent of the principal amount of the loan. ~~than the amount disclosed in the initial preclosing disclosure; and~~

~~(v) either:~~

~~(I) the modification is necessary because of an accidental and bona fide error, such as a mathematical computation error, despite control systems that are in place to detect and prevent this type of error; or~~

~~(II) the modification is necessary because of an unanticipated additional fee that is to be paid only to a third party and not to the lender or the mortgage originator.~~

(C) To document a good cause modification of the disclosure, the lender should obtain a written statement from the owner that:

(i) describes the good cause ~~standard~~;

(ii) specifically states that the owner consents to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing;

(iii) bears the signature of all the owners entitled to receive the preclosing disclosure; and

(iv) affirms the owner has received notice of ~~their~~ the owner's right to receive a final itemized disclosure containing all actual fees, ~~costs,~~ points, interest, costs, ~~or~~ and charges one day prior to closing.

(D) Nothing in this section precludes an owner from establishing good cause under independent facts that cause the owner ~~material~~ adverse financial hardship or ~~material~~ other adverse consequences if the equity loan were not allowed to close on the scheduled date of closing.

(4) An equity loan may be closed at any time during normal business hours of the lender or its settlement agent on the next business day following the calendar day on which the owner receives the preclosing disclosure or at any time on any calendar day thereafter.

(5) The owner maintains the right of rescission under Section 50(a)(6)(Q)(viii) even if the owner ~~exercises~~ consents to an emergency or good cause modification of the preclosing disclosure under this section.

One final, but important, comment regarding new proposed rule §153.22 interpreting Section 50(a)(6)(Q)(v) of Article XVI, Texas Constitution, which requires that a lender "at the time an extension of credit is made provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit:" The Commissions propose to interpret Section 50(a)(6)(Q)(v) as requiring in effect that even copies of any documents the owner has signed prior to closing "in the process of evaluating and underwriting the equity loan" must be provided to the owner at closing, presumably because they in the broadest sense "are related to the extension of credit." I would argue instead that the legislature, despite the admittedly ambiguous 50(a)(6)(Q)(v) language, intended merely to require that home owners be given copies of the loan documents they sign "at the time [the] extension of credit is made," (i.e., at closing), and the Commissions accordingly should retain their current §153.22 interpretive rule construing the 50(a)(6)(Q)(v) provision to that effect.

Should the Commissions adopt the proposed §153.22 rule, however, lenders would seem to be required to additionally provide the owner at closing with copies of much of the content of the credit underwriting file for each equity loan, including such documents as the Form 1003 loan application, forms of consents to order a consumer credit report, verify employment and bank deposits, etc., and acknowledgments of receipt of various consumer disclosures such as the so-called 12-Day Notice, Good Faith Estimate, and initial Truth in Lending Disclosure. Typically copies of these loan processing and underwriting documents are provided to loan applicants at the time signed, and in that event lenders should not be required to provide additional copies of the same documents to the owner at loan closing. To do so, in fact, would require a significant and burdensome alteration in equity lenders' and title companies' closing procedures. These processing and underwriting forms are not in the software repository from which forms are drawn to prepare mortgage loan documents and would have to be separately copied and transmitted to the settlement agent to be collated in with documents drawn and separately delivered to the settlement agent by lenders' Texas counsel for distribution to the owner at loan closing. To avoid that burdensome process, we would urge the Commission to amend its proposed §153.22 rule to provide, first of all, that to satisfy the 50(a)(6)(Q)(v) requirements copies may be merely duplicate or counterpart copies of documents signed by the owners and are not required to be photocopies or conformed copies showing actual signatures of the owners; and, secondly, that copies of documents signed by the owner at loan application or in the process of evaluating and underwriting an equity loan do not have to be provided to the owner at closing if copies of such documents have been earlier provided to the owner by the lender at the time signed by the owner or at any time prior to closing.

As always, we appreciate the opportunity to comment on the Commissions' proposed Interpretive Rules and continue to believe that the interpretive guidance provided by the Commissions through its interpretive rulemaking authority and the "reliance on rule" protections the rules provide our clients making a good faith effort to conform their practices to the rules is of great service to the Texas home mortgage lending industry.

Sincerely

J. Alton Alsup