

# BROWN, FOWLER & ALSUP

A Professional Corporation  
Attorneys at Law

8955 Katy Freeway, Suite 305  
Houston, Texas 77024

[www.LoanLawyers.com](http://www.LoanLawyers.com)

Telephone 713/468-0400  
Facsimile 713/468-5235

## TEXAS LEGISLATIVE UPDATE

*Compiled by*

*Carolyn Sherry, Certified Paralegal*



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-numbered years. The 77th Legislative Session was adjourned on May 31, 2001, having passed 1,621 of the 5,712 legislative bills filed during the session. Of these, Governor Rick Perry vetoed 82 bills and 20 others are joint resolutions proposing amendments to the Texas Constitution that go before the voters for approval at the General Election in November. This update contains a Quick Reference Schedule for House Bills and Senate Bills passed by the legislature this session that we believe are of particular interest to the mortgage lending industry and summaries of selected bills. Full text of these bills may be found on the Texas Legislature OnLine Website at <http://www.capitol.state.tx.us/>.

### Quick Reference Schedule

HOUSE BILLS		
H.B.	SYNOPSIS:	EFF. DATE:
16	Permits late application filing by a disabled veteran for ad valorem tax exemption	09/01/01
✓ 370	Records Archive fee by county clerks in counties along the Mexican border	09/01/01
✓ 472	Texas Telemarketing Disclosure and Privacy Act enacted	01/01/02
506	A surviving spouse receiving a homestead exemption for the elderly on school taxes also qualifies for the limitation as it relates to subsequently qualified residential homestead	01/01/02
858	The effect of a deed of conveyance of tax foreclosed property resold by a municipality for urban development purposes	09/01/01
1050	Liens on real property in favor of governmental entities – Lien must contain a legal description of the property	09/01/01
✓ 1083	Effect of bankruptcy proceeding on durable power of attorney	09/01/01
1245	Grants divorcing spouse, under certain circumstances, an equitable lien on property of the other spouse for economic contribution made to the property during the marriage –Such lien would not be superior to a previously recorded lien	09/01/01
✓ 1268	Prohibitions regarding influencing appraisal of real property for lenders	09/01/01
1393	Procedures for a refund of an overpayment or erroneous payment of ad valorem taxes	09/01/01
1408	Requires insurer to promptly refund to a policy holder any unearned premium for the policy	09/01/01
✓ 1493	Mortgage broker license act amended	09/01/01
✓ 1636	Continuation and functions of the Texas Savings and Loan Department	09/01/01
✓ 1763	Continuation and functions of the Texas Finance Commission	09/01/01
1768	Clarification in finance law and regulatory authority and efficient administration by the Texas Finance Commission and the Texas Department of Banking	09/01/01
1869	Acquisition of manufactured homes through financing or other means and to persons associated with those acquisitions	09/01/01
✓ 1883	Duty to inform and account under a durable power of attorney	09/01/01
1891	Insurers' providing a written explanation of certain endorsements to insurance policies	09/01/01
1940	Proration of taxes imposed on a residential homestead in a year in which a residential homestead exemption for an elderly person terminates	01/01/02
1995	Addition to the Texas Property Code of home equity loans and reverse mortgages as valid liens against homestead	09/01/01
2028	Enforcement of a lien by the Texas Workforce Commission for unpaid wages or penalties	09/01/01
2033	Requirement of seller's notice to purchaser of real property in a certificated service area of a utility service provider regarding the cost or availability of water or sewer service (N/A as to transfer of title as a result of foreclosure or deed in lieu of foreclosure)	09/01/01
2168	Granting a property owner in a partition proceeding an access easement in certain circumstances	09/09/01
2185	Regards fees collected by a county assessor-collector for processing certain payments by credit card	06/11/01
2453	Conditions for issuance of revenue bonds by the Veterans Land Board	06/14/01
2557	Allows the clerk of the court to issue a recordable release if the judgment creditor refuses to accept payment	09/01/01
2804	Requires a court or court clerk, upon request, to prepare and certify an abstract of judgment	09/01/01
2832	Requires tax collectors to notify taxpayers of certain overpayments of ad valorem taxes and to issue refunds of duplicate payment of ad valorem taxes	01/01/02
2833	Clarifies that a trustee at a real estate foreclosure sale is not providing a debt collection service covered by the Texas sales tax	07/01/01
3136	Suits for damages caused by an error on surveys must be brought w/i 4 years (now 10) after the date the survey is completed	09/01/01
3349	Provides a means by which abandoned property can be conveyed with clear title to be used for housing for low-income individuals or families	06/14/01
3364	Deferral of ad valorem taxes for medically disabled individuals	06/14/01

<b>3451</b>	Continuation and functions of the Texas State Affordable Housing Corporation	06/15/01
<b>3567</b>	Permitting land mortgages from the Veterans Land Fund	05/24/01
<b>SENATE BILLS:</b>		
<b>S.B.</b>	<b>SYNOPSIS:</b>	<b>EFF. DATE:</b>
✓ <b>11</b>	A detailed set of laws to maintain the privacy of medical records	09/01/01*
<b>141</b>	Requiring disclaimers on certain advertisements that offer home designation services	09/01/01
<b>198</b>	Executory contracts for the conveyance of real property, including requiring the seller to provide tax and insurance information to the buyer and prohibiting any oral agreements between parties	09/01/01
<b>256</b>	Recovery by a taxing unit of certain costs on the resale of property bid off to the unit at a tax foreclosure sale	05/26/01
<b>322</b>	Reauthorization of the continuation of the Texas Department of Housing and Community Affairs	09/01/01
✓ <b>272</b>	Although this bill does not relate to real estate loans, it contains a provision for a study of predatory lending	09/01/01
✓ <b>276</b>	Embossed seal not required on electronically transmitted documents	05/11/01
✓ <b>317</b>	Continues the Office of the Consumer Credit Commissioner until 09/01/13	09/01/01
<b>365</b>	Adoption of residential building code for use in Texas	Various
✓ <b>393</b>	Uniform Electronic Transaction Act ("UETA")	01/01/02
<b>414</b>	A 137-page rewrite of the insurance agent licensing laws	09/01/01
✓ <b>481</b>	Authorizes a survey of state agencies regarding electronic filing of reports	09/01/01
<b>563</b>	Protection of interest of certain innocent property owners in a criminal asset forfeiture proceeding	09/01/01
<b>585</b>	Exemption of a Farm Credit System from the Texas Mortgage Broker Act	09/01/01
<b>626</b>	Liens on certain property related to certain criminal offenses and the effect of forfeiture of that property	09/01/01
✓ <b>707</b>	Collateral protection insurance	09/01/01
<b>723</b>	Deletes the requirement of an applicant's and decedent's SS No. with the application for probate as a muniment of title	09/01/01
<b>1095 &amp; 1737</b>	Property owner's right of access to records and information used in appraising property for property taxation	09/01/01
✓ <b>1707</b>	Title Insurance – area and boundary coverage without new survey	06/13/01
<b>1449</b>	Execution of bonds and the sale of loans by the Veterans Land Board	09/01/01
✓ <b>1581</b>	Predatory lending laws	09/01/01*
<b>MATTERS TO BE ON NOVEMBER, 2001 BALLOT</b>		
<b>H.J.R.</b>	<b>TOPIC:</b>	
✓ <b>HJR 5</b>	Proposes prescribing 5-day cooling off period for a work and materials lien on a residential homestead property and conversion of personal property liens on manufactured home to real property homestead	
<b>HJR 53</b>	Proposes granting the legislature authority to release the state's interest in land that is held by a person in good faith under color of title	
<b>HJR 75</b>	Proposes to clarify, update, and harmonize pertinent provisions of the Texas Constitution regarding the courts and public officials	
<b>HJR 82</b>	Proposes authorizing the Veterans Land Board to issue additional general obligation bonds and to use certain assets in certain funds to provide for veterans' homes and cemeteries and to make payments on revenue bonds	

\* Generally effective 09/01/01

✓ Summarized Bills

**Prohibitions Regarding Appraisal of Real Property for Lenders:**

House Bill 1268 amends the Business & Commerce Code by adding Section 35.56 to provide that a lender commits a Class A misdemeanor offense if, in connection with a mortgage loan transaction, the lender compensates or offers to compensate a person for appraisal services and the compensation is contingent upon a minimum, maximum, or pre-agreed estimate of value of the property securing the loan and interferes with the person's ability or obligation to provide an independent and impartial opinion of the property's value.

**Background:**

Prior to the 77th Legislature, state law attempted to deter the practice of appraisal fixing by providing penalties for appraisers who provided or offered to provide an artificially high or low appraisal in exchange for some derived benefit from the lender requesting their services. However, without similar penalties for lenders who attempt to secure an artificial appraisal, the law only addressed half of the problem. House Bill 1268 is a step to avert fraudulent appraisals in connection with mortgage loans. "Mortgage loans" are defined to mean a loan that is secured by a deed of trust, security deed, or other lien on real property.

[Tex. H.B. 1268, Laws of 2001, Eff. 09/01/01]

**Mortgage Broker License Act – Amended; Texas Savings and Loan Department and Finance Commission Continued:**

The Texas Savings and Loan Department (the "Department") protects the depositors of Texas by ensuring the safe and sound operation of state-chartered savings institutions. In 1999, the Texas Legislature also gave the Department the responsibility for licensing mortgage brokers. *House Bill 1493* amends the Mortgage Broker License Act (the "Act") by adding requirements, among other things, for standard forms and annual reports.

**Standard Forms:**

New Section 156.105, Texas Finance Code, requires the Finance Commission (the "Commission"), by rule, to adopt one or more standard forms for use by a mortgage broker or loan officer in representing that an applicant for a mortgage loan is preapproved or has prequalified for a loan. The Commission is to also adopt rules requiring a mortgage loan broker or officer licensed under the Act to use the adopted forms.

**Continuation of Department:**

The Sunset Advisory Commission's review of the Department began shortly after the 76th Regular Session (1999), and the Commission provided several recommendations relating to the licensing of mortgage brokers, criminal background

information, and routine inspections. *House Bill 1636* continues the Department until year 2013 and applies the recommendations of the Sunset Advisory Commission.

*Person Licensed in Other Jurisdiction:*

The Commissioner of the Department (the “Commissioner”) may waive any prerequisite to obtaining a license for an applicant after reviewing the applicant’s credentials and determining that the applicant holds a license issued by another jurisdiction that has licensing requirements substantially equivalent to those of the State of Texas.

Under the amendments, the Commissioner may issue a provisional license to an applicant currently licensed in another jurisdiction who seeks a license in Texas and who: (i) has been licensed in good standing as a mortgage broker or loan officer for at least two years in another jurisdiction, including a foreign country, that has licensing requirements substantially equivalent to the requirements of the Act; (ii) has passed a national or other examination recognized by the Commissioner relating to mortgage brokers or loan officers; and (iii) is sponsored by a person licensed under the Act with whom the provisional license holder will practice during the time the person holds a provisional license. [NOTE: The Commissioner may waive the requirement of (iii) for an applicant if the Commissioner determines that compliance with that subsection would be a hardship to the applicant.]

A provisional license is valid until the date the Commissioner approves or denies the provisional license holder’s application for a license, and the conditions for this type of license are fully detailed in *H.B. 1636*. The Commission may establish a fee for provisional licenses in an amount reasonable and necessary to cover the cost of issuing the license.

*Notification/Renewal after Expiration of License:*

Not later than 30 days prior to the expiration date, the Commissioner must send a written notice of impending expiration of a license to the person at the person’s last known address.

The Bill prohibits a person whose license has expired from engaging in activities that require a license until the license has been renewed. The Bill provides the fee amounts and the requirements necessary for the renewal of a license after certain periods of time.

*Inspections:*

*H.B. 1636* authorizes the Commissioner to conduct inspections of a licensed person as the Commissioner determines necessary to ascertain whether the person is complying with the applicable rules and provides that inspections may include inspection of the books, records, documents, operations, and facilities of the person and access to any documents. This Bill also authorizes the Commissioner to share evidence of criminal activity gathered during an inspection or investigation with any state or federal law enforcement agency.

*Annual Report:*

Each licensed mortgage broker must file an annual report with the Department, which includes specific information set out in the Bill.

*Confidentiality:*

Information contained in the reports related to loan origination volume or other trade information is confidential and may not be disclosed by the Department. The information obtained by the Commissioner during an inspection or an investigation is confidential *unless* disclosure of the information is permitted or required by other law.

*Finance Commission:*

Texas House Bill 1763, Laws of 2001, continues the Finance Commission of Texas for 12 years and adopts the recommendations of the Sunset Advisory Commission. The Commission is responsible for overseeing and coordinating the Texas Department of Banking, the Texas Savings and Loan Department, and the Office of Consumer Credit Commissioner and serves as the primary point of accountability for ensuring that state depository and lending institutions function as a system, considering the broad scope of the financial services industry. The Commission is the policy-making body for those finance agencies and is not a separate state agency. The Commission is required to function in a manner that protects consumer interests, maintains a safe and sound banking system, and increases the economic prosperity of the state.

This Bill makes conforming changes to the Mortgage Broker License Act.

*Exemptions Expanded:*

Texas Senate Bill 585, Laws of 2001, adds “a Farm Credit System” to the list of entities exempt from the Act.

[**Tex. H.B. 1493, H.B. 1636, H.B. 1763, S.B. 585, Laws of 2001, Eff. 09/01/01**]

*Privacy of Medical Records and Health Information:*

Senate Bill 11 amends the Texas Health and Safety Code by adding Chapter 181 (Medical Records Privacy) and the Texas Insurance Code by adding Chapter 28B, entitled “Privacy of Health Information.” Among other things, this Bill establishes privacy standards to be adopted within medical research, based upon federally adopted guidelines. It also provides the Texas Department of Insurance the authority to promulgate medical privacy rules for the insurance industry operating in Texas and prohibits any attempt to re-identify health information. In addition, the Bill includes enforcement provisions.

The Bill allows a request for authorization and an authorization form to be delivered to a consumer or a customer if the request and the authorization form are clear and conspicuous. It requires a licensee to include delivery of the authorization in a notice to the consumer or customer only if the licensee intends to disclose protected health information.

A licensee may disclose nonpublic, personal health information to the extent that the disclosure is necessary to perform certain functions on behalf of that licensee under the circumstances enumerated in the Bill.

The portion of the Bill adding Chapter 28B to the Texas Insurance Code is effective January 1, 2002; the remainder of the

Bill is effective September 1, 2001. [Tex. S.B. 11, Laws of 2001]

***Additions/Clarifications to Powers of Attorney Provisions:***

***Effect of Bankruptcy Proceeding – H.B. 1083:***

Property owners will frequently grant a power of attorney to a spouse, another family member, or a third party. If a property owner files for bankruptcy, the power of attorney may be subsequently challenged. House Bill 1083 clarifies the statute by adding Section 487A, Texas Probate Code, to provide that a bankruptcy petition does *not* void a durable power of attorney, but stays its use until the bankruptcy is resolved.

***Duty to Inform and Account- H.B. 1883:***

The Adult Protective Services indicated that reports of elderly abuse, neglect, and exploitation had risen by 267% in the last decade. As a result the Texas Legislature passed, and Governor Perry signed into law H.B. 1883, which imposes upon an attorney in fact or agent, as a fiduciary, a duty to timely inform the principal of and to account for, actions taken pursuant to a power of attorney.

As engrossed by the Texas House, the Bill would have required a 11-day waiting period for certain transactions involving an elderly principal and would have required the attorney in fact or agent to file a bond, obtain court approval, or both, prior to completing such a transaction. In addition, special disclosures would have been required. However, H.B. 1883 was rewritten to only add Section 489B to the Texas Probate Code. Section 489B sets out the duties of the attorney in fact or agent to inform the principal of all actions taken on the principal's behalf, to maintain and provide records to the principal, and to deliver an accounting within 60 days (or such longer or shorter time that the principal demands or a court may order).

If the requirements are not met, the principal may file suit to compel the attorney in fact or agent to deliver the accounting, to deliver the assets, or to terminate the power of attorney.

[Tex. H.B.s 1083 and 1883, Laws of 2001, Eff. 09/01/01]

***Force Placement of Collateral Protection Insurance:***

Texas S.B. 707, Laws of 2001, establishes rules for creditors to ensure collateral is insured against loss by creating Chapter 307 of the Texas Finance Code. New Section 307.001 defines "collateral," "credit agreement," "credit transaction," "creditor," "debtor," and "title insurance." "Collateral" as defined in part means property used to secure a credit agreement, including both personal property and real property. And new Section 307.051 sets forth the specific definition of "collateral protection insurance."

***Creditor's Duties and Notice Requirements:***

A creditor who requires collateral protection insurance that is paid for directly or indirectly by a debtor may place collateral insurance if:

- The debtor has entered into a credit transaction with the creditor for which a credit agreement exists;
- The credit agreement requires the debtor to maintain insurance on the collateral; and

- A notice has been included in the credit agreement or a separate document provided to the debtor at the time the credit agreement is executed that states that:
  - The debtor is required to:
    - Keep the collateral insured against damage in the amount equal to the debtor's indebtedness to the creditor;
    - Purchase the insurance from an insurer that is authorized to do business in this state or an eligible surplus lines insurer; and
    - Name the creditor as the person to be paid under the policy in the event of a loss;
  - The debtor must, if required by the creditor, deliver to the creditor a copy of the policy and proof of the payment of premiums; and
  - If the debtor fails to meet any requirement listed immediately above, the creditor may obtain collateral protection insurance on behalf of the debtor at the debtor's expense.

Not later than the 31st day after the date the collateral protection insurance is charged to the debtor, the creditor, by prepaid, first class mail, must mail to *each* debtor at the last known address a notice that states:

- That the creditor has purchased or will purchase collateral protection insurance on behalf of the debtor and at the debtor's expense as provided by the credit agreement;
- The type of insurance that the creditor has obtained or will obtain, the extent of the coverage, and whose interest the policy protects;
- The beginning and ending dates of the policy period;
- The total cost of the policy to the debtor;
- The annual interest rate charged on the cost of insurance if that rate is different from the rate charged in the related credit transaction;
- The manner in which the debtor may pay the cost of insurance, interest, or finance charge relating to the purchase of the collateral protection insurance; and
- At the option of the creditor, other repayment options to which the debtor has agreed in the original credit transaction.

The creditor shall mail the required notice to *each* person who is a cosigner or guarantor to the debt, if the last known address of that person differs from the last known address of the debtor. However, the creditor may delegate the notice requirements to the insurer or the insurer's agent. The notice must be printed in type that is: (i) underlined; (ii) in all capital letters; (iii) in all bold letters; or (iv) otherwise conspicuous.

If the required notice to any debtor, cosigner, or guarantor is returned to the creditor undelivered, the creditor must: (i) locate the person by using the procedures the creditor regularly uses for locating debtors; and (ii) mail a second notice at the time the person is located.

The terms for payment of the costs of the collateral protection insurance, including interest and any other charges actually incurred that the creditor may impose in connection with the

placement of the collateral protection insurance, must include one or more of the following:

- A final balloon payment on or before the 30th day after the date of the last scheduled payment required by the credit agreement;
- Full amortization over the term of the credit transaction, the term of the collateral protection insurance coverage, or the term for which the amortization is used by the creditor; or
- Any other repayment terms agreed to by a debtor in the original credit transaction.

**Amortization of Debt:**

If any form of amortization is used by the creditor, the creditor shall send to each debtor notice of the terms of the amortization and any change in the debtor’s periodic payment.

**Miscellaneous:**

Other sections of Chapter 307 apply to the following topics:

Section:	Topic:
307.054	Cancellation of Collateral Protection Insurance
307.055	Refund of Unearned Premiums
307.056	Choice of Carrier
307.057	Creditor Liability
307.058	Rights of Creditor and Debtor

**[Tex. S.B. 707, Laws of 2001]**

***Predatory Lending Laws Come to Texas; Study of and Report on Predatory Lending; Continuation of the Office of the Consumer Credit Commissioner:***

It is not surprising that Texas has joined a growing number of states and areas that have passed or are considering passing tougher laws to combat so-called “predatory lending” practices. Governor Rick Perry signed Texas S.B. 1581, Laws of 2001, on June 11, 2001, generally effective September 1, 2001. The Act adds a new Chapter 343 to the Finance Code that defines and regulates “home loans,” “low-rate home” loans, and “high-cost” loans in various respects. Generally, new disclosures by lenders in connection with home loans are required when the interest rate is 12% or greater and when the lender offers single premium credit insurance. Refinancing or flipping of low-rate loans directly made by government or non-profit lenders within seven years is prohibited, unless at lower rates and costs. And high-cost home loans (defined to apply to home loans with a principal amount today not exceeding \$137,500 that generally meet the federal HOEPA standards) restrict balloon payments, negative amortization, collateral-based lending, and prepayment penalties. Many of the principal provisions of the Act are summarized in the following sections.

**Definitions:**

Chapter 343 defines a “home loan” as a loan that is:

- Made to one of more individuals for personal, family, or household purposes and secured in whole or in part by a manufactured home used or to be used as the borrower’s principal residence; or

- Real property improved by a dwelling designed for occupancy by one to four families and used or to be used as the borrower’s principal residence.

A “bridge loan” means temporary or short-term financing requiring payment of only interest until the entire unpaid balance is due, and “restructure” means a change in the payment schedule or other terms of a home loan as a result of the borrower’s default.

A “low-rate home loan” is a home loan that at its inception carries an interest rate two percentage points or more below the yield on treasury securities having comparable periods of maturity to the loan maturity, *except* that if the loan’s interest rate is a discounted introductory rate or a rate that automatically steps up over time, the fully indexed rate or the fully stepped-up rate, as appropriate, shall be used instead of the rate at the loan’s inception to determine whether the loan is a low-rate loan.

A “high-cost home loan” means a loan that:

- Is made to one or more individuals for personal, family, or household purposes;
- Is secured in whole or part by:
  - A manufactured home, used or to be used as the borrower’s principal residence; or
  - Real property improved by a dwelling designed for occupancy by one to four families and used or to be used as the borrower’s principal residence;
- Has a principal amount equal to or less than one-half of the maximum conventional loan amount for first mortgages as established and adjusted by Fannie Mae;
- Is a credit transaction described by 12 C.F.R. Section 226.32, as amended, except that the term includes a residential mortgage transaction, as defined by 12 C.F.R. Section 226.2, as amended, if the total loan amount is \$20,000 or more and:
  - The annual percentage rate exceeds the rate indicated in 12 C.F.R. Section 226.32(a)(1)(i), as amended; or
  - The total points and fees payable by the consumer at or before loan closing will exceed the amount indicated in 12 C.F.R. Section 226.32(a)(1)(ii), as amended.

“Points and fees” has the meaning assigned by 12 C.F.R. § 226.32(b), as amended.

*Loan Flipping Prohibited:* A lender may not replace or consolidate a low-rate home loan directly made by a *government or non-profit lender* before the 7th anniversary of the date of the loan *unless* the new or consolidated loan has a lower interest rate and requires payment of a lesser amount of points and fees than the original loan or is a restructure to avoid foreclosure.

***Disclosures/Penalties for Failure to Provide Disclosures:***

For a *home loan* with an interest rate of 12% or more a year, when the lender makes the disclosure required under RESPA for the good faith estimate, or if RESPA does not apply, three business days after the date the application is made, the lender must also provide to the borrower:

- A statement regarding the value of mortgage counseling before taking out a home loan;
- A list of the nearest available housing counseling agencies approved by the HUD;

- A list of other resources where mortgage information can be found, including toll-free telephone numbers and online resources; and
- Other disclosures required by the Finance Commission, including an official notice regarding high-cost home loans.

The disclosure requirements apply to a home loan application received on or after September 1, 2001.

A person who knowingly and willfully violates the disclosure requirements is liable to the aggrieved borrower for: (i) the actual damages caused by the violation; (ii) punitive damages not to exceed \$10,000; and (iii) court costs.

The sections setting out the disclosure requirements and the penalties expire September 1, 2003.

*Restrictions on Single Premium Credit Insurance:*

Section 343.104 prohibits a lender from offering any individual or group credit life, disability, or unemployment insurance on a prepaid single premium basis in conjunction with a *home loan* unless a promulgated notice is provided to each loan applicant by hand delivery or mail not later than the third business day after the date the applicant's application for a home loan is received.

The restrictions on single premium credit insurance apply only to a loan closed on or after the later of January 1, 2002, or the date the Texas Department of Insurance approves a product allowing lenders to offer individual or group credit life or credit disability insurance complying with that section and certifies to the Finance Commission of Texas that this coverage is available.

*Balloon Payment:*

The Bill prohibits a *high-cost* home loan from containing a provision for a scheduled payment that is more than twice as large as the average of earlier scheduled monthly payments, unless the balloon payments becomes due not less than 60 months after the date of the loan. This prohibition does not apply if the payment schedule is adjusted to account for seasonal or otherwise irregular income of the borrower or if the loan is a bridge loan in connection with the acquisition or construction of a dwelling intended to become the borrower's principal dwelling.

*Other Prohibitions:*

Negative amortization terms are prohibited for *high-cost* home loans, except for negative amortization as a consequence of a temporary forbearance, bridge loan, or restructure sought by the borrower.

In addition, the Bill prohibits a lender from engaging in a pattern or practice of extending credit to consumers under high-cost home loans based solely upon the collateral without regard for the borrower's ability to pay (except for home equity loans). And it also prohibits a lender from making a *high-cost* home loan containing a provision for a prepayment penalty.

*Applicability:*

The Chapter does not apply to a reverse mortgage or an open-end account.

*Related Bills:*

Texas Senate Bill 272, Laws of 2001, requires the Texas Finance Commission to instruct the Consumer Credit Commissioner (the "Commissioner") to establish a program to address alternatives to high-cost lending in Texas. The program shall, among other things, study and report on the problem of high-cost lending. The Commissioner's report to the legislature would be due not later than December 1, each year.

Texas Senate Bill 317, Laws of 2001, amends the Texas Finance Code to continue the Office of the Consumer Credit Commissioner until September 1, 2013.

**[Tex. S.B. 1581, Generally Eff. 09/01/01; Tex. S.B.s 272 and 317, Eff. 09/01/01, Laws of 2001]**

***Records Archives Fee May Be Charged by County Clerks in Counties along Mexican Border:***

Beginning September 1, 2001 and ending September 1, 2008, the County Clerk of a county adjacent to an international boundary shall, if the commissioners court of the county adopts the fee as part of the county's annual budget, collect a "Records Archive Fee" (the "fee") of not more than \$5. The fee is to be collected by the County Clerk at the time of filing of a document. The fee may be used only to provide funds for specific records management and preservation, including for automation purposes in those counties in which it is adopted along the Mexican border.

The Bill sets out definitions, authorizes the commissioners court of a county that is adjacent to an international boundary to adopt the fee, and it sets forth guidelines regarding the fee and funds generated from the collection of the fee for the preservation and restoration project.

Texas House Bill 370 amends Sections 118.011 and 118.0216 and adds Section 118.025, Local Government Code.

**[Tex. H.B. 370, Laws of 2001, Eff. 09/01/01]**

***Texas Telemarketing Disclosure and Privacy Act – Enacted:***

Consumers nationwide lose an estimated \$40 billion each year through telemarketing fraud and often complain that telemarketers invade their privacy and irritate them with numerous or aggressive solicitations. Some calls violate the state-mandated, self-imposed, no-call list that is maintained by solicitors, as well as violating the state time restrictions on solicitations.

Hence, the Texas Legislature passed, and Governor Perry signed H.B. 472 that creates Chapter 43 of the Texas Business & Commerce Code as the Texas Telemarketing Disclosure and Privacy Act (the "Act"), effective January 1, 2002. [Tex. Bus. & Com. Code §§ 43.001-43.253.] The purpose of the Act is to set forth provisions to protect consumers from unwanted telemarketing calls, and against false, misleading, abusive, or deceptive practices in the telemarketing business. The Act also includes requirements to penalize telemarketers in violation of the Act. The Act is governed by the Public Utility Commission of Texas (the "Commission"). The principal provisions of the Act are summarized in the following sections.

### *Applicability and Definitions:*

A telemarketing call is an unsolicited telephone call made to:

- Solicit a sale of a consumer good or service (defined in the Act to mean property of any kind that is normally used for personal, family, or household purposes);
- Solicit an extension of credit for a consumer good or service; or
- Obtain information that may be used to solicit a sale of a consumer good or service or to extend credit for the sale.

The Act does *not* apply to a call made:

- By a consumer that is the result of a solicitation by a seller or telemarketer or in response to general media advertising by direct mail solicitations that clearly, conspicuously, and truthfully make all disclosures required by federal or state law;
- In connection with:
  - An established business relationship; or
  - A business relationship that has been terminated, if the call is made before the later of the date that the first Texas no-call list in which the consumer's telephone number appears is published or one year after the date of termination;
- Between a telemarketer and a business, *other than by a facsimile solicitation*, unless the business informed the telemarketer that the business does *not* wish to receive telemarketing calls from the telemarketer;
- To collect a debt; or
- By a state licensee if: (i) the call is not made by an automated telephone dialing system; (ii) the solicited transaction is not completed until a face-to-face sales presentation by the seller and the consumer is not required to pay or authorize payment until after the presentation; and (iii) the consumer has not informed the telemarketer that the consumer does *not* wish to receive telemarketing calls from the telemarketer.

A "telemarketer" means a person who makes or causes to be made a telemarketing call. And, a "telephone call" means a call or other transmission that is made to or received at a telephone number, including" (i) a call made by an automated telephone dialing system; and (ii) a transmission to a facsimile recording device.

### *Prohibitions – Caller I.D.:*

A telemarketer may not, in making a telemarketing call, block the identity of the telephone number from which the telephone call is made to evade devices designed to identify telephone callers or interfere with or circumvent the capability of a caller identification service to access or provide to the recipient of the telemarketing call any information regarding the call that the service is capable of providing. Nor may a telemarketer fail to provide caller I.D.

### *No-Call List:*

The Commission shall establish and provide for the operation of a database to compile a list of names, addresses, and telephone numbers of Texas consumers who object to receiving unsolicited telemarketing or telephone calls. The Commission may contract with a private vendor to maintain the Texas no-call list, *provided* the contractor meets certain criteria.

### *Dates of Publication/Term:*

The Texas no-call list shall be updated and published on January 1, April 1, July 1, and October 1 of each year. An entry on the Texas no-call list expires on the 3rd anniversary of the date the entry is first published on the list. An entry may be renewed for successive three-year periods.

### *Fee for No-Call List:*

The telephone number of the consumer on the Texas no-call list may be deleted from the list upon the consumer's written request or if the telephone number of the consumer is changed. The Commission may charge a person a reasonable amount not to exceed \$3 for a request to place a telephone number on the Texas no-call list or to renew an entry on the list.

### *Form for No-Call List:*

The Commission shall develop and make available a form to be used by customers to request to be on the Texas no-call list and shall provide a toll-free telephone number and Internet mail address that persons may call or write to obtain a copy of the form. A private for-profit publisher of a residential telephone directory that is distributed to the public at minimal or no cost shall include in the directory a prominently displayed toll-free number and Internet mail address established by the Commission through which a person may order a copy of the form.

### *Rules/Administration of the Act:*

The Commission is empowered to adopt rules to administer the Act. The Commission shall adopt rules requiring each local exchange telephone company to inform its customers of the requirements under the Act and to provide for the dissemination of the Texas no-call lists, including electronic formats, commonly used by persons making telemarketing calls, for a fee not to exceed \$75. The Commission may conduct educational programs designed to inform the public of their rights and telemarketers of their obligations under the Act.

Although the Commission will administer the Act, the Department of Information Resources shall assist the Commission in administering the Act upon the request by the Commission.

### *Notice in Facsimile Solicitation:*

In addition to the technical and procedural standards of federal statutes or regulations regarding telephone facsimile machines and transmissions, a person in this state who makes or causes to be made a facsimile solicitation must include in the document transmitted or on a cover page to the document a statement, in at least 12-point type, stating:

- The correct and complete name of the person making the facsimile solicitation and street address of the location of the person's place of business; and
- A toll-free or local exchange accessible telephone number of the person that: (i) is answered in the order in which calls are received by an individual capable of responding to inquiries from recipients of facsimile solicitations at all times between 9:00 a.m.-5:00 p.m. every day *except* Saturday and Sunday [NOTE: Holidays are *not* excluded.]; (ii) or automatically and immediately deletes the specified telephone number of the recipient.

Upon receipt of oral or written notification from a recipient of a facsimile solicitation not to send any further facsimile transmission to one or more telephone numbers, the person making the facsimile solicitation: (i) must within 24 hours send a written acknowledgment of the recipient's notification; and (ii) may not make or cause to be made a transmission to a specified telephone number, *except* for the required written acknowledgment.

*Enforcement/Penalties:*

The Act sets out specific enforcement provisions and provides for civil penalties in an amount not to exceed \$1,000 for each violation. If the court finds that the defendant willfully or knowingly violated the Act, the court may increase the amount of the civil penalty to an amount not to exceed \$3,000 for each violation. In addition, a person may bring a private right of action based upon a violation of the Act.

*Miscellaneous:*

The Act also includes provisions or requirements for: (i) biennial regulatory Reports by the Commission to the legislature; (ii) similar Reports by the Attorney General; (iii) criteria for determination of amount of administrative penalties; and (iv) the stay of penalty while an order imposing a penalty is under judicial review.

[Tex. H.B. 472, Laws of 2001, Eff. 01/01/02]

***Title Insurance: Area and Boundary Coverage Without New Survey:***

Texas Senate Bill 1707 amends the Insurance Code to authorize the Commissioner of Insurance (the "Commissioner") to adopt rules to allow a title insurance company to accept an existing real property survey and not require a new survey when providing area and boundary coverage if the title insurance company is willing to accept evidence of an existing real property survey, and an affidavit verifying the existing survey, as prescribed by the Commissioner, regardless of the age of the survey or the identity of the person for whom the survey was prepared.

The Bill prohibits a title insurance company from discriminating in providing area and boundary coverage in connection with residential real property solely because the real property is platted or unplatted or a municipality did not accept a subdivision plat in relation to the real property before September 1, 1975. The Bill also prohibits a title insurance company from requiring an indemnity from a seller, buyer, borrower, or lender to provide area and boundary coverage.

"Area and boundary coverage" is defined in the Bill to mean title insurance coverage relating to discrepancies, conflicts, or shortages in area or boundary lines, or any encroachment or protrusions, or any overlapping of improvements.

The Commissioner has not yet initiated rulemaking procedures necessary to adopt rules implementing these Insurance Code amendments. [Note: Some title insurance companies have already implemented the practice of deleting the area and boundary exception in the title policies, based upon an old survey, *provided*

that an affidavit is executed by the seller/owner, stating that no improvements have been made since the date of the survey.]

[Tex. S.B. 1707, Laws of 2001, Eff. 06/13/01]

***Uniform Electronic Transaction Act ("UETA") Signed into Law; Embossed Notarial Seal Not Required on Electronically Transmitted Acknowledgment; Study on Electronic Reporting to State Agencies Authorized:***

Current state law does not contain any provisions governing the use of electronic signatures, contracts, and records. Therefore, parties enter into electronic contracts or send electronic records at their own risk. The Electronic Signatures in Global and National Commerce Act, passed by the 106th Congress in 2000, provided that in any transaction affecting interstate commerce an electronic signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form. The federal legislation also authorized states to enact or adopt the Uniform Electronic Transactions Act, as approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws in 1999. A number of states have passed such an act. Senate Bill 393 amends the Business & Commerce Code to create a new Chapter 43 to be cited as the Uniform Electronic Transactions Act (the Chapter) to regulate the use of transactions involving electronic records and electronic signatures [ §§ 43.001 - 43.020, Tex. Bus. & Com. Code, Eff. 01/01/02].

*General Information/Applicability:*

The Chapter provides for the legal recognition and enforceability of electronic records, electronic signatures, and contracts utilizing electronic records. It provides that if a law requires a signature for a record to be in writing, an electronic signature or record satisfies the law. It does *not* apply to a transaction governed by other laws concerning the creation and execution of wills, codicils, or testamentary trusts, or certain sections of the Uniform Commercial Code.

The Chapter applies only to transactions between parties that agree to conduct transactions by electronic means. It provides that if two parties have agreed to conduct a transaction by electronic means and the law requires one party to send information in writing, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient. It also provides that an electronic record is not enforceable against the recipient if a sender inhibits the ability of the recipient to store or print an electronic.

*Effect of Electronic Record and Signature:*

An electronic record or electronic signature is attributable to a person if it was the act of the person. The Bill provides remedies for situations in which errors or changes occur in an electronic record between parties in an electronic transaction who have agreed on security procedures and between an individual and an electronic agent of another person involved in an automated transaction.

***Notarization and Acknowledgment:***

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied



if the electronic signature of the person authorized to perform those acts is attached to or logically associated with the signature or record. [NOTE: Tex. S.B. 276, Laws of 2001, providing that an embossed seal is *not* required on an electronically transmitted acknowledgment, was signed into law effective May 11, 2001.]

*Exemption to Preemption by Federal Electronic Signatures Act:* The Chapter modifies, limits, or supercedes the provisions of the Electronic Signatures in Global and National Commerce Act [15 U.S.C. §§ 7001, *et seq.*] as authorized by Section 102 of that Act [15 U.S.C. § 7002]. [Tex. Bus. & Com. Code § 43.019.] Notwithstanding Section 43.019, Business & Commerce Code, as added, the Chapter does not modify, limit, or supersede the provisions of Section 101(c) or Section 103(b), Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001 and 7003), as amended from time to time, and specifically does not authorize the electronic delivery of any notice of the type described by Section 103(b), Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7003), as amended from time to time, including (among others) any notice of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.

A Texas regulatory agency is authorized by rule or order issued after notice and an opportunity for public comment, to exempt without condition a specific category or type of record from the requirements related to global consent in the federal Electronic Signatures in Global and National Commerce Act, if the exception is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. If a regulatory agency determines after notice and an opportunity for public comment, and publishes a finding, that one or more exceptions are no longer necessary for the protection of consumers, the agency is authorized to extend the application of this bill to the exceptions.

*Filing Recordable Documents:*

Instruments filed electronically that may be accepted by a county clerk are electronic records, and county clerks are authorized to accept any filed electronic record and to electronically record that record if the filing and recording of the record complies with rules adopted by the Texas State Library and Archives Commission. [Loc. Govt. Code §§ 191.009, 195.002, as amended.]

In addition, the Chapter includes provisions on the following topics:

Section*	Topic:
43.012	Retention of Electronic Records; Originals
43.013	Admissibility in Evidence
43.014	Automated Transactions
43.015	Time and Place of Sending and Receipt
43.016	Transferable Records
43.017	Acceptance and Distribution of Electronic Records by Governmental Agencies
43.018	Interoperability
43.020	Applicability of Penal Code

\* Tex. Bus. & Com. Code

***Study of Electronic Filing of Reports with State Agencies:***

Texas S.B. 481, Laws of 2001, authorizes a study of state agencies to determine the costs, problems, and benefits of establishing general electronic filing of reports with state agencies. A report of the study is due no later than September 1, 2002.

[Tex. S.B. 393, Eff. 01/01/02; Tex. S.B. 276, Eff. 05/11/01; and Tex. S.B. 481, Eff. 09/01/01, all Laws of 2001]

***H.J.R. 5: Proposed Amendments to the Texas Constitution to Shorten Current 12-Day “Cooling Off” Period for Home Repair or Renovation Lien Contracts on Homesteads and to Authorize Conversion and Refinance of Personal Property Liens on Manufactured Homes to Real Property Homestead Liens.*** Assuming a majority of voters approve the amendments proposed by H.J.R. 5 at the General Election to be held November 6, 2001, Section 50(a), Article XVI, Texas Constitution, will be amended effective January 1, 2002, to authorize consensual homestead liens under the following revised conditions:

*Repair and Renovation Liens.* Under current law, a lien generally may be fixed on a homestead to finance work and material used in repairing or renovating the homestead improvements if first contracted for in writing with the consent of both spouses, in the case of a family homestead, and if the contract for work and materials (sometimes referred to as a “Mechanic’s & Materialman’s Lien Contract” or “M&M Lien”) is not executed by the homeowner, or the owner’s spouse, before the 12th day after the owner makes written application to finance those costs, the contract for work and materials provides for the right of the owner to rescind the contract without penalty within three days after execution of the contract by all parties, and the contract for work and materials is executed by the homeowner and the owner’s spouse only at the office of a third-party lender, an attorney at law, or a title company. H.J.R. 5 proposes to amend Section 50(a)(5)(B) to reduce the current waiting, or “cooling off,” period from the 12th day to the “fifth day after the owner makes written application for any extension of credit for the work and material.”

*Conversion of Personal Property Lien on Manufactured Home to Real Property Lien.* Under § 62.003, Texas Property Code, when a manufactured home converts to real property (i.e., when the manufactured home is permanently attached to real property, the manufacturer’s certificate of origin or original document of title is surrendered, and a Certificate of Attachment is filed in the county real property records under the provisions of § 2.001) the personal property lien on the manufactured home is converted to a purchase money lien on real property by operation of law and exists independently of any other lien that may be attached to the same real property. However, the Attorney General of Texas in his Opinion No. JC-0357 issued March 27, 2001, concluded that the provisions of § 62.003 authorizing such a lien are unconstitutional and do not create a valid purchase money lien on homestead property. The Attorney General

reasoned that the meaning of homestead *purchase money debt* authorized by the Section 50(a)(1) must be strictly construed and that the term cannot be expanded to encompass a whole new category of debt that is authorized to be secured by a lien on the homestead i.e., the purchase price debt for manufactured homes. H.J.R. 5 proposes to amend Section 50(a) by adding a new subsection 50(a)(8) expressly providing the supporting constitutional authority for the provision

of the existing Section 62.003. Section 50(a)(8) creates as a new category of debt that may be secured by a consensual lien on a homestead: “the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property, including the purchase price of the manufactured home, the cost of installing the manufactured home on the real property, and the refinance of the purchase price of the real property.”

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