

§153.5. Two percent fee limitation: Section 50(a)(6)(E).

An equity loan must not require the owner or the owner's spouse to pay, in addition to any interest or any bona fide discount points used to buy down the interest rate, any fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, two percent of the original principal amount of the extension of credit, excluding fees for an appraisal performed by a third party appraiser, a property survey performed by a state registered or licensed surveyor, a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law, or a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law.

(1) **Optional Charges.** Charges paid by an owner or an owner's spouse at their sole discretion are not fees subject to the two percent fee limitation. Charges that are not imposed or required by the lender, but that are optional, are not fees subject to the two percent limitation. The use of the word "require" in Section 50(a)(6)(E) means that optional charges are not fees subject to the two percent limitation.

(2) **Optional Insurance.** Insurance coverage premiums paid by an owner or an owner's spouse that are at their sole discretion are not fees subject to the two percent limitation. Examples of these charges may include credit life and credit accident and health insurance that are voluntarily purchased by the owner or the owner's spouse.

(3) **Charges that are Interest.** Charges an owner or an owner's spouse is required to pay that constitute interest under §153.1(11) of this title (relating to Definitions) are not fees subject to the two percent limitation.

(A) Per diem interest is interest and is not subject to the two percent limitation.

(B) Bona fide discount points are interest and are not subject to the two percent limitation. Discount points are bona fide if the discount points truly correspond to a reduced interest rate and are not necessary to originate, evaluate, maintain, record, insure, or service the equity loan. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are bona fide. This system may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

(4) **Charges that are not Interest.** Charges an owner or an owner's spouse is required to pay that are not interest §153.1 (11) of this title are fees subject to the two percent limitation.

(5) **Charges Absorbed by Lender.** Charges a lender absorbs, and does not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the two percent limitation.

(6) **Charges to Originate.** Charges an owner or an owner's spouse is required to pay to originate an equity loan that are not interest under §153.1(11) of this title are fees subject to the two percent limitation.

(7) **Charges Paid to Third Parties.** Charges an owner or an owner's spouse is required to pay to third parties for separate and additional consideration for activities relating to originating an equity loan are fees subject to the two percent limitation. For example, these charges include attorneys' fees for document preparation to the extent authorized by applicable law. Charges that third parties absorb, and do not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the two percent limitation.

(8) Charges to Evaluate. Charges an owner or an owner's spouse is required to pay to evaluate the credit decision for an equity loan, that are not interest under §153.1(11) of this title, are fees subject to the two percent limitation. Examples to these charges include fees collected to cover the expenses of a credit report, flood zone determination, tax certificate, inspection, or appraisal management services.

(9) Charges to Maintain. Charges paid by an owner or an owner's spouse to maintain an equity loan that are not interest under §153.1(11) of this title are fees subject to the two percent limitation if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing.

(10) Charges to Record. Charges an owner or an owner's spouse is required to pay for the purpose of recording equity loan documents in the official public record by public officials are fees subject to the two percent limitation.

(11) Charges to Insure an Equity Loan. Premiums an owner or an owner's spouse is required to pay to insure an equity loan are fees subject to the two percent limitation. Examples of these charges include title insurance and mortgage insurance protection, unless the premiums are otherwise excluded under paragraph (15) of this section.

(12) Charges to Service. Charges paid by an owner or an owner's spouse for a party to service an equity loan that are not interest under §153.11(11) of this title are fees subject to the two percent limitation if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing.

(13) Exclusion for Appraisal Fee. A fee for an appraisal performed by a third party appraiser is not a fee subject to the two percent limitation. The appraisal must be performed by a person who is not an employee of the lender. The excludable appraisal fee is limited to the amount paid to the appraiser for the completion of the appraisal, and does not include an appraisal management services fee described by Texas Occupations Code, §1104.158(a)(2).

(14) Exclusion for Property Survey Fee. A fee for a property survey performed by a state registered or licensed surveyor is not a fee subject to the two percent limitation. The property survey must be performed by a person who is licensed or registered under Texas Occupations Code, Chapter 1071.

(15) Exclusion for Title Insurance Premium. A state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law is not a fee subject to the two percent limitation.

(A) The excludable premium is limited to the applicable basic premium rate for title insurance published by the Texas Department of Insurance, plus authorized premiums for applicable endorsements.

(B) Any mortgagee policy for the equity loan must be provided by a company authorized to do business in this state.

(C) If additional premiums for endorsements are charged, the endorsements must be applicable to the mortgagee policy for the equity loan. Rules adopted by the Texas Department of Insurance govern the applicability of endorsements and the authorized amount of the premium for each endorsement.

(16) Exclusion for Title Examination Report Fee. A fee for a title examination report is not a fee subject to the two percent limitation if its cost is less than the state base premium for a

mortgagee policy of title insurance without endorsements established in accordance with state law.

(A) The excludable fee must be less than the applicable basic premium rate for title insurance published by the Texas Department of Insurance, not including any additional premiums for endorsements.

(B) The fee for a title examination report may not be excluded from the two percent limitation if the equity loan is covered by a mortgagee policy of title insurance.

(C) The fee must comply with applicable law. If the equity loan is a secondary mortgage loan under Texas Finance Code, Chapter 342, then the fee is limited to a reasonable fee for a title examination and preparation of an abstract of title by an attorney who is not an employee of the lender, or a title company or property search company authorized to do business in this state, as provided by Texas Finance Code, §342.308(a)(1).

(17) Secondary Mortgage Loans. A lender making an equity loan that is a secondary mortgage loan under Texas Finance Code, Chapter 342 may charge only those fees permitted in Texas Finance Code, §§342.307, 342.308, and 342.502. A lender must comply with the provisions of Texas Finance Code, Chapter 342 and the constitutional restrictions on fees in connection with a secondary mortgage loan made under Texas Finance Code, Chapter 342.

(18) Escrow Funds. A lender may provide escrow services for an equity loan. Because funds tendered by an owner or an owner's spouse into an escrow account remain the property of the owner or the owner's spouse those funds are not fees subject to the two percent limitation. Examples of escrow funds include account funds collected to pay taxes, insurance premiums, maintenance fees, or homeowner's association assessments. A lender must not contract for a right of offset against escrow funds pursuant to Section 50(a)(6)(H).

(19) Subsequent Events. The two percent limitation pertains to fees paid or contracted for by an owner or owner's spouse at the inception or at the closing of an equity loan. On the date the equity loan is closed an owner or an owner's spouse may agree to perform certain promises during the term of the equity loan. Failure to perform an obligation of an equity loan may trigger the assessment of costs to the owner or owner's spouse. The assessment of costs is a subsequent event triggered by the failure of the owner's or owner's spouse to perform under the equity loan agreement and is not a fee subject to the two percent limitation. Examples of subsequent event costs include contractually permitted charges for force-placed homeowner's insurance costs, returned check fees, debt collection costs, late fees, and costs associated with foreclosure.

(20) Property Insurance Premiums. Premiums an owner or an owner's spouse is required to pay to purchase homeowner's insurance coverage are not fees subject to the two percent limitation. Examples of property insurance premiums include fire and extended coverage insurance and flood insurance. Failure to maintain this insurance is generally a default provision of the equity loan agreement and not a condition of the extension of credit. The lender may collect and escrow premiums for this insurance and include the premium in the periodic payment amount or principal amount. If the lender sells insurance to the owner, the lender must comply with applicable law concerning the sale of insurance in connection with a mortgage loan.

Source: The provisions of this §153.5 adopted to be effective January 7, 2004, 29 TexReg 86; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; amended to be effective January 1, 2015, 39 TexReg 10408; reviewed and amended to be effective November 24, 2016, 41 TexReg 9106; reviewed and amended to be effective March 29, 2018, 43 TexReg 1839.