CREDIT UNION DEPARTMENT

DATE: **March 27, 2018**

TO: **State Chartered Credit Unions**

SUBJECT: **Change 50 to Update the Texas Rules for Credit Unions**

The attached pages constitute changes to the Texas Rules for Credit Unions. Your book of rules should be updated as follows:

REMOVE PAGES	**INSERT**	**AMENDMENTS OR NEW RULES**
Index – pages iii and iv	Index – pages iii and iv	Updated Index
Index – pages xi and xii	Index – pages xi and xii	Updated Index
91-79 thru 91-104	91-79 thru 91-108	New Rule **91.1010** Amended Section **91.4001** Amended Section **91.4002** Amended Section **91.5001** Amended Section **91.5005**
93-1 thru 93-16	93-1 thru 91-16	Readopted Section 93.101 thru 93.605 with no changes
153-1 thru 153.20	153-1 thru 153-23	Amended Section **153.1** Amended Section **153.5** Amended Section **153.14** Amended Section **153.17** Amended Section **153.84** Amended Section **153.86** New Section **153.45** Repealed Section 153.87
Regulatory Bulletin 35 thru 38	35 thru 38	Revised RB 2000-04

FOR YOUR RECORDS - Please keep this letter of transmittal behind the **Update Tab** of the Rules Section of your binder as a record to show your rules are up to date.

CHAPTER 91
CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

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CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

CHAPTER 153
Administrative Interpretation of Subsection (a), Section 50, Article XVI, Texas Constitution, (The Home Equity Lending Law)

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(g) Effective date. Once the commissioner has approved the conversion, it shall become effective upon the issuance of a charter or certificate of incorporation from the acquiring state or federal regulatory agency.

Source: The provisions of this §91.1007 adopted to be effective July 2, 2006, 31 TexReg 5077; reviewed and readopted to be effective June 22, 2009, 34 TexReg 4549; reviewed and readopted to be effective June 24, 2013, 38 TexReg 4392; reviewed and readopted to be effective July 14, 2017, 42 TexReg 3807.

§91.1008. Conversion Voting Procedures and Restrictions; Filing Requirements.

(a) Voting procedures. Eligible members may vote on a plan of conversion by written ballot either filed in person at a special meeting held on the date set for the vote or mailed by the member. The vote on a conversion proposal must be by secret ballot. Mail balloting must be conducted in accordance with §91.302 of this Chapter.

(b) Definitions.

(1) "Eligible Member" means a member of a credit union who is approved and fully qualified for membership in accordance with the credit union's bylaws and written policies as of the eligibility record date.

(2) "Eligibility Record Date" means the cut off date for determining eligible members, which shall be deemed to be the last day of the month immediately preceding the date the credit union's board of directors notifies members or the public that it is contemplating a conversion.

(c) Voting ballots. All ballots must include the following:

(1) The name of the credit union and the name of the proposed institution if the conversion is approved. This information may be incorporated into the body of the voting options;

(2) The date and time by which the ballot must be received if mailed; and

(3) The following statements, printed in a manner acceptable to the commissioner:

(A) The conversion will be decided by a majority of credit union members who vote on the issue (unless the bylaws require a higher vote threshold);

(B) Once a vote has been cast, it may not be changed; and

(C) A "yes" vote means the credit union will become a (insert conversion entity type) and a "no" vote means the credit union will remain a (insert state or federal) credit union.

(D) Vote certification. Within ten business days following a vote on a plan of conversion, the credit union shall file with the department a certified copy of a resolution of the board of directors stating that voting on the conversion has been completed in accordance with this section and setting out the following information:

(1) The total number of members eligible to vote;

(2) The number of eligible members who voted (either at the special meeting or by mail); and

(3) The total number of votes cast in favor and against the plan of conversion.

Source: The provisions of this §91.1008 adopted to be effective July 2, 2006, 31 TexReg 5078; reviewed and readopted to be effective June 22, 2009, 34 TexReg 4549; reviewed and readopted to be effective June 24, 2013, 38 TexReg 4392; reviewed and readopted to be effective July 14, 2017, 42 TexReg 3807.

§91.1010. Voluntary Liquidation.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Voluntary liquidation means the dissolution of a credit union with the assets being sold or collected, liabilities paid, and shares/deposits distributed under the direction of the board of directors.

(2) Liquidation date means the date the membership votes to approve liquidation.

(3) Liquidating agent means the person or persons appointed by the board of directors to take possession of, manage, and liquidate the credit union.

(b) Initiating voluntary liquidation process.

(1) Unless the commissioner has issued a liquidation order, the board of directors may, by resolution, recommend the voluntary dissolution of the credit union and direct submission of the question to the members of the credit union.

(2) Within five days after the date the board adopts the resolution, the chairman of the board shall notify the commissioner, in writing, of the reasons for the proposed liquidation including a balance sheet and income statement as of the previous month-end.

(3) The board shall act promptly to obtain the membership's approval in accordance with subsection (f) of this section.

(4) The board's recommendation to dissolve and liquidate the credit union must be approved by the affirmative vote of a majority of members who submit ballots in person at the special membership meeting and by mail. If less than a majority vote to approve, the credit union may, subject to the commissioner's approval, resume normal business, resubmit the question of liquidation to the membership or request the appointment of a conservator under the Act and the rules adopted under it.

(5) After an affirmative vote by the members to dissolve and liquidate the credit union, the board of directors shall be responsible for conserving the assets, for expediting the liquidation, and for fair and equitable distribution of the assets to the members.

(6) Within 5 days after an affirmative vote to dissolve and liquidate the credit union the chairman shall notify the commissioner in writing of the intention to liquidate together with a list of the officers and directors.

(c) Notice of liquidation.

(1) If the vote to dissolve and liquidate the credit union is affirmative, the credit union shall:

(A) File a notice with the Department within five days after the liquidation date; and

(B) Mail a copy of the notice of liquidation to shareholders/depositors, other known creditors, and known claimants of the credit union within ten days after the liquidation date.

(2) A credit union shall publish public notice of liquidation, if so directed, and in the manner directed, by the Department.

(3) Creditors shall be provided at least 30 days after the liquidation date to submit their claims.

(d) Transaction of business during liquidation.

(1) Immediately after notice of the special meeting to consider voluntary liquidation is mailed to the membership, admission of new members shall be suspended. No new extensions of credit shall be funded during the period between the board of directors' adoption of the

resolution recommending voluntary liquidation and the membership meeting called to consider voluntary liquidation, except for the issuance of loans fully secured by a pledge of shares and the funding of outstanding loan commitments approved before adoption of the board resolution. Collection of loans and interest, payments of necessary expenses, clearing of share drafts and credit card charges shall continue.

(2) If the membership votes to dissolve and liquidate the credit union, the credit union shall immediately discontinue payments on shares/deposits, withdrawal of shares/deposits (except for transfer of shares/deposits to loans and interest), transfer of shares/deposits to another share/deposit account, in the same credit union, granting of loans, and making of investments other than short-term investments shall be discontinued. The credit union shall continue to collect on loans with interest and shall continue to pay necessary expenses during the period of liquidation. The credit union shall direct its Members to discontinue the use of share drafts and credit cards, and shall inform Members that on and after the 15th calendar day after the liquidation date, items will no longer be cleared.

(3) Approval of the Department must be obtained prior to consummating any sale of assets which would not provide sufficient funds to pay shareholders/depositors dollar-for-dollar, principal plus any interest accrued or due to the shareholder/depositor, through the liquidation date.

(e) Liquidation Plan. The board of directors shall develop and approve a written plan for the liquidation of the assets and payment of shares/deposits. The liquidation plan shall provide for the liquidation of the credit union within one year of the liquidation date. At a minimum, a credit union's liquidation plan shall address the following areas:

(1) Qualifications and experience of the proposed liquidating agent and the compensation and expenses attributable to the service of such person or persons;

(2) Income and expense items must be projected to determine that sufficient funds will be available to finance the liquidation of the credit union;

(3) Schedule for payment of all debts and liabilities owed by the credit union;

(4) Partial distributions of shares/deposits should be considered as funds become available from the liquidation of assets;

(5) Distribution of the credit union's assets that remain after settlement of debts and liabilities to all persons entitled to them;

(6) Disposition or maintenance of any remaining or unclaimed funds, real or personal property, or other assets;

(7) Surety bond coverage of all persons who will handle or have access to funds of the credit union and the proposed discovery period after final distribution of assets; and

(8) Retention of the credit union's records after liquidation, and in a manner that complies with subsection (j) of this section.

(f) Approval of the liquidation proposal by membership.

(1) Not later than the 10th calendar day before the date of the special membership meeting to consider approval of the liquidation, the credit union shall notify, by first class mail, the Commissioner and each member who is eligible to vote on the proposal. The notice must adequately describe the purpose and subject matter of the vote and clearly inform members that they may vote at a special meeting held on the date set for the vote or by mailing in the ballot. The notice must include a clear and conspicuous disclosure of how the voluntary liquidation may affect the availability of funds on deposit and state the date, time, and place of the meeting. A ballot must be included in the same envelope as the notice.

(2) No director or senior management employee may receive any economic benefit in connection with the voluntary liquidation of the credit union other than compensation and other benefits paid to directors and senior management employees in the ordinary course of business.

(3) A credit union considering the question of liquidation must conduct its membership vote in a fair and legal manner. No inducements may be offered to encourage members to participate in the vote.

(4) A credit union should be careful to conduct its special membership meeting in a manner conducive to accommodating all members wishing to attend, including selecting a meeting location that can accommodate the anticipated number of attendees and is conveniently located. The meeting should also be held on a day and time suitable to most members' schedules.

(g) Distribution of assets.

(1) The liquidating agent shall use the credit union's assets to pay, in the following order:

(A) Secured creditors to the extent of the value of their collateral;

(B) Liquidation expenses, including a surety bond;

(C) Depositors;

(D) General creditors, including secured creditors to the extent that their claims exceed the value of their collateral; and

(E) Distributions to members in proportion to the shares/deposits held by each member.

(2) After all assets of the credit union have been converted to cash or found to be worthless, and all loans and debts owing to it have been collected or found to be uncollectible, and all obligations of the credit union have been paid/settled, except for shares/deposits due its members, the credit union shall close its books and compute the pro rata distribution to its members. The computation shall be based on the total amount in each share/deposit account as of the liquidation date or the date on which all share drafts have cleared, whichever is later.

(3) Payments must be made to members promptly after the pro rata distribution has been computed. The credit union may mail a check to the member's last known address, deliver the check personally to the member, or make the payment by wire or any other electronic means authorized by the member.

(4) Unclaimed share/deposit accounts, unpaid claims, and unpaid claims of members or creditors who failed to cash their final distribution checks shall be escheated in accordance with Texas laws.

(5) The Department shall be notified in writing within five days after the final distribution of assets to the members begins.

(h) Economic benefit. No director or senior management employee may receive any economic benefit in connection with the voluntary liquidation of the credit union other than compensation and other benefits paid to directors and senior management employees in the ordinary course of business.

(i) Continued supervision of voluntary liquidation.

(1) A voluntary liquidation of a credit union shall be conducted only with the continued supervision of the Department. The commissioner may conduct any examinations of the credit union the commissioner considers necessary or appropriate.

(2) The credit union shall submit a report to the Department within 10 business days after the start of liquidation showing the credit union's balance sheet as of the start of liquidation. The liquidating credit union shall submit a report of progress as requested by the Department.

(3) If the commissioner has reason to conclude the voluntary liquidation of a credit union is not being safely or expeditiously conducted, or is being conducted in violation of this section, the commissioner may take possession of the business and property of the credit union in the same manner, with the same effect, and subject to the same rights accorded the credit union as if the commissioner had issued a liquidation order. The commissioner may appoint a new liquidating agent and proceed to liquidate the affairs of the credit union as provided in the Finance Code, Title 3, Subtitle D, Subchapter E.

(j) Retention of records.

(1) The board of directors shall appoint a custodian for the credit union's records that are to be retained after the final distribution of assets.

(2) The custodian shall retain all records of the liquidating credit union that are necessary to establish that the credit union paid creditors, and distributed assets to the members fairly and equitably in accordance with the approved liquidation plan. The custodian shall retain the records for a period of five years following the date the Department cancels the credit union's charter.

(k) Certificate of dissolution and liquidation. Within 120 days after the credit union begins final distribution of assets to members, it shall file with the Department a duly executed Certificate of Dissolution and Liquidation.

(l) Inquiries after liquidation. It will be the responsibility of the custodian for the credit union's records to respond timely to inquiries after liquidation.

Source: The provisions of this §91.1010 adopted to be effective March 29, 2018, 43 TexReg 1837.

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Subchapter K. Credit Union Development Districts

§91.2000. Purpose and Scope.

(a) This subchapter implements Tex. Fin. Code §279.001 et seq. regarding the establishment of credit union development districts.
(b) This subchapter does not affect or circumvent requirements under the Tax Increment Financing Act or the Property Redevelopment and Tax Abatement Act (Tex. Gov. Code, Chapters 311 and 312, respectively), including requirements for designation of an area as a municipal or county reinvestment zone or for authorization to enter into a tax abatement agreement.

Source: The provisions of this §91.2000 adopted to be effective November 8, 2015, 40 TexReg 7666.

§91.2001. Definitions.

Unless the context clearly indicates otherwise, these words and terms, when used in this subchapter, shall have the following meanings:
1. "Credit union" includes state and federal credit unions.
2. "District" means a credit union development district approved under this subchapter.
3. "Local government" means a municipality or county.

Source: The provisions of this §91.2001 adopted to be effective November 8, 2015, 40 TexReg 7666.

§91.2002. Application Requirements to Establish a District.

(a) Basic application. A local government, in conjunction with a credit union, may submit an application to the Commission for the designation of a proposed credit union development district, as provided by §91.2003 of this subchapter (relating to Submission and Processing of Application). The application shall contain the following items to the extent available:
1. the name of the local government, the county in which it is located and evidence of the approval of the application by its governing body;
2. identification of the participating credit union and the location of the proposed credit union or branch by street address;
3. a description of the geographic area comprising the proposed district, including a map indicating the borders of the proposed district;
4. the location, number and proximity of sites where credit union services are available in the proposed credit union development district, including branches of other financial institutions and deposit-taking ATMs other than those located at branches;
5. a compilation and description of consumer needs for credit union services in the proposed district, including population demographics included within the proposed district;
6. a compilation and description of the economic viability and local credit needs of the community in the proposed district, including economic indicators pertinent to the proposed district;
7. a compilation and description of the existing commercial development in the proposed district, including a description of the type and nature of commercial businesses located in the proposed district; and

8. a compilation and description of the impact additional credit union services would have on potential economic development in the proposed district, including significant business developments within the past three years, corporate restructurings, plant closings, other business closings, and recent or proposed business openings or expansions.

(b) Optional information. An application for designation of a credit union development district may also include:

1. a description of other local government and community initiatives proposed to be undertaken and coordinated with establishment of the proposed district;

2. indications of community support or opposition for the application, as evidenced by letters from entities such as local chambers of commerce, local businesses, community-based organizations, non-profit organizations, government officials, or community residents; and

3. such other information that the applicant believes will demonstrate that the proposed district meets the standards set forth in §91.2004 of this subchapter (relating to Criteria for Approval).

Source: The provisions of this §91.2002 adopted to be effective November 8, 2015, 40 TexReg 7666.

§91.2003. Submission and Processing of Application.

(a) The application must be submitted to the Commission in care of the Department, 914 East Anderson Lane, Austin, TX 78752-1699. No filing fee is required.

(b) After the initial application is submitted, the Department shall issue a written notice informing the applicant either that the application is complete and accepted for filing or that the application is deficient and specific additional information is required. The applicant must supply any additional information requested by the Department not later than the 61st day after the date the applicant received written notice from the Department that the application is deficient. Upon a finding of good and sufficient cause, the Department shall grant an applicant additional time to complete the application. Once the deficient application is complete and accepted for filing, the Department shall issue a written notice informing the applicant that the application is complete and accepted for filing.

(c) After the issuance of written notice informing the applicant that the application is complete and accepted for filing, the Department shall evaluate the application to the extent necessary to make a written recommendation to the Commission under the criteria set forth in §91.2004 of this subchapter. The Department shall submit the completed application and the Department's recommendations to the Commission for decision at the next regularly scheduled meeting of the Commission, which must occur not later than the 120th date after the date the completed application is accepted for filing.

(d) If the Commission approves the application, the Department shall notify the interested parties as required by Tex. Fin. Code §279.105(b).

(e) All approved districts shall be posted on the Department's web site.

Source: The provisions of this §91.2003 adopted to be effective November 8, 2015, 40 TexReg 7666.

§91.2004. Criteria for Approval of a District by the Commission.

In determining whether to approve an application for the designation of a credit union development district, the Commission must consider the criteria listed in Tex. Fin. Code § 279.102(b).

Source: The provisions of this §91.2004 adopted to be effective November 8, 2015, 40 TexReg 7666.

§91.2005. Monitoring.

(a) A local government that receives approval for a district under this subchapter shall notify the Department in writing not later than the 21st day after the date:

1. the credit union establishes a branch in the district and the address of such a branch; and
2. the credit union closes a branch in the district.

(b) On behalf of the Commission, the Department may request periodic status reports from the local government or the credit union in order to ensure that the needs of the community located in the district are being met in an appropriate manner.

Source: The provisions of this §91.2005 adopted to be effective November 8, 2015, 40 TexReg 7666.

§91.2006. Rulemaking and Amendment for this Subchapter.

Tex. Fin. Code §279.102(b) requires the Credit Union Department to adopt rules in consultation with the Texas Economic Development and Tourism Office within the Office of the Governor. The Department will develop policies with this office within the Governor's office, outlining the procedures for consultation.

Source: The provisions of this §91.2006 adopted to be effective November 8, 2015, 40 TexReg 7666.

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Subchapter L. Submission of Comments by Interested Parties

§91.3001. Opportunity To Submit Comments On Certain Applications.

(a) An interested party may submit comments to the commissioner on the following matters:

(1) an application for incorporation under the Texas Finance Code, Section 122.001;

(2) an amendment to a credit union's articles of incorporation under the Texas Finance Code, Section 122.011, which includes an amendment to expand the credit union's field of membership; or

(3) an application to merge or consolidate under the Texas Finance Code, Section 122.152.

(b) An interested party is a person or entity that has an interest in particular to the application other than as a member of the general public.

(c) Acceptance of comments under this section does not constitute a determination of standing to protest or otherwise participate in a contested case hearing on the application.

(d) Comments may be made in writing or provided in a meeting with the commissioner or deputy commissioner, as follows:

(1) written comments shall be submitted within 30 days after notice of the application is published in the Texas Register or the department's newsletter, whichever is later;

(2) a meeting to receive comments shall be held upon written request by an interested party or upon the commissioner's direction.

Source: The provisions of this §91.3001 adopted to be effective May 10, 1998, 23 TexReg 4568; readopted to be effective November 19, 2001, 26 TexReg 9934; readopted to be effective June 20, 2005, 30 TexReg 3882; reviewed and readopted to be effective June 22, 2009, 34 TexReg 4549; reviewed and readopted to be effective June 24, 2013, 38 TexReg 4392; reviewed and readopted to be effective July 14, 2017, 42 TexReg 3807.

§91.3002. Conduct Of Meetings To Receive Comments.

(a) Meetings to receive comments under 91.3001 of this title (relating to opportunities to submit comments on certain applications) will be conducted in the following manner:

(1) a written request for a meeting to receive comments must be received by the department within 30 days after publication of the notice of the application and shall contain the following:

(A) the identity of the requestor, including the name of a natural person who represents a business entity or other association, mailing address, daytime telephone number, and a facsimile number if any;

(B) the name of the application and type of application;

(C) a description of the requestor's interest in the application; and

(D) a list of at least three dates and times within 30 days after the date of publication of notice of application, which are available for the meeting.

(2) the meeting will be scheduled and may be rescheduled, if necessary, by the commissioner to occur after at least three business days' notice by telephone, facsimile, or mail;

(3) one meeting may be scheduled to receive comments from more than one interested party, at the discretion of the commissioner;

(4) a limit on the length and other conditions for the conduct of the meeting may be imposed by the commissioner, and the conditions will be stated in the notice of the meeting;

(5) the meeting may be conducted by telephone with the consent of the interested party; and

(6) the department is not required to make a record of the meeting.

(b) An interested party who fails to attend a meeting scheduled for the party's benefit may submit written comments within three days after the date scheduled for the meeting, but the commissioner is not required to schedule another meeting.

(c) The purpose of the meeting is only to receive comments, and no decision, preliminary or otherwise, will be made at the meeting.

Source: The provisions of this §91.3002 adopted to be effective May 10, 1998, 23 TexReg 4568; readopted to be effective November 19, 2001, 26 TexReg 9934; readopted to be effective June 20, 2005, 30 TexReg 3882; reviewed and readopted to be effective June 22, 2009, 34 TexReg 4550; reviewed and readopted to be effective June 24, 2013, 38 TexReg 4392; reviewed and readopted to be effective July 14, 2017, 42 TexReg 3807.

Subchapter M. Electronic Operations

§91.4001. Authority to Conduct Electronic Operations.

(a) A credit union may use, or participate with others to use, electronic means or facilities to perform any function or provide any product or service as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines, automated loan machines, mobile applications, personal computers, the Internet, telephones, and other similar electronic devices.

(b) To optimize the use of its resources, a credit union may market and sell, or participate with others to market and sell, electronic capacities and by-products to others, provided the credit union acquired or developed these capacities and by-products in good faith as part of providing financial services to its members.

(c) If a credit union uses electronic means and facilities authorized by this rule, the credit union's board of directors must require staff to:

(1) Identify, assess, and mitigate potential risks and establish prudent internal controls, and system backup procedures;

(2) Implement security measures designed to ensure secure operations. Such measures should take into consideration:

(A) the prevention of unauthorized access to credit union records and credit union members' records;

(B) the prevention of financial fraud through the use of electronic means or facilities; and

(C) compliance with applicable security device requirements for teller machines contained elsewhere in Chapter 91; and

(3) Employ an incident response plan, which has been subjected to reasonable testing, to minimize the impact of a data breach or other electronic incident while quickly restoring operations, credibility, and security.

(d) All credit unions engaging in such electronic activities must comply with all applicable state and federal laws and regulations as well as address all safety and soundness concerns.

(e) A credit union shall review, on at least an annual basis, its system backup procedures for all electronic activities.

(f) A credit union shall not be considered doing business in this State solely because it physically maintains technology, such as a server, in this State, or because the credit union's product or services are accessed through electronic means by members located in this State.

(g) A credit union that shares electronic space, including a co-branded web site, with a credit union affiliate, or another third-party must take reasonable steps to clearly and conspicuously distinguish between products and services offered by the credit union and those offered by the credit union's affiliate, or the third-party.

Source: The provisions of this §91.4001 adopted to be effective May 11, 2000, 25 TexReg 3953; amended to be effective December 8, 2002, 27 TexReg 11074; amended to be effective March 13, 2006, 31 TexReg 1648; reviewed and readopted to be effective October 19, 2009, 34 TexReg 7657; reviewed and readopted to be effective October 21, 2013, 38 TexReg 7735; reviewed and amended to be effective March 29, 2018, 43 TexReg 1837.

§91.4002. Transactional Web Site Notice Requirement; and Security Review.

(a) A credit union must file a written notice with the commissioner at least 30 days before it establishes a transactional web site. The notice must:

(1) Include an address for and a description of the transactional features of the web site;

(2) Indicate the date the transactional web site will become operational; and

(3) List a contact person familiar with the deployment, operation, and security of the transactional web site.

(b) For the purposes of this chapter a transactional web site is an Internet site that enables users to access an account and conduct financial transactions such as transferring funds, processing bill payments, opening an account, applying for or obtaining a loan, or purchasing other authorized products or services.

(c) Credit unions that have a transactional web site must provide for a review of the adequacy of the web site's security measures annually. The scope of the review should cover the adequacy of physical and logical protection against denial of service attacks and other attack vectors designed to gain unauthorized access to the system. If the credit union outsources this technology platform, it can rely on testing or audits performed for the service provider to the extent it satisfies the scope requirements of this subsection.

Source: The provisions of this §91.4002 adopted to be effective May 13, 1999, 24 TexReg 3475; amended to be effective December 8, 2002, 27 TexReg 11075, amended to be effective March 13, 2006, 31 TexReg 1648; reviewed and readopted to be effective October 19, 2009, 34 TexReg 7657; reviewed and readopted to be effective October 21, 2013, 38 TexReg 7735; reviewed and amended to be effective March 29, 2018, 43 TexReg 1837.

Subchapter N. Emergency or Permanent Closing of Office or Operation

§91.5001. Emergency Closing.

(a) If the officer in charge of a credit union determines that an emergency that affects or may affect one or more of the credit union's offices or operations exists or is impending, the officer may determine:

(1) not to conduct the involved operations or open the offices on any normal business day of the credit union until the emergency has passed; or

(2) if the credit union is open, to close the offices or the involved operations for the duration of the emergency.

(b) Subject to subsection (c) of this section, a closed office or operation may remain closed until the officers determine that the emergency has ended and for any additional time reasonably required to reopen.

(c) A credit union that closes an office or operation under this section shall notify the commissioner of its action by any means available and as promptly as conditions permit. In addition, notice of such closure should be posted on the home page of the credit union's website and on its social media pages. An office or operation may not be closed for more than three consecutive days, excluding days on which the credit union is customarily closed, without the commissioner's written approval.

(d) Each credit union shall maintain on file with the department a report of emergency contact information pertaining to its officers, directors, and committee members in such form as the commissioner may prescribe.

(e) In this chapter, the following words and terms shall have the following meanings:

(1) Emergency – means a condition or occurrence that physically interferes with the conduct of normal business at the offices of a credit union or of a particular credit union operation or that poses an imminent or existing threat to the safety or security of persons, property, or both. The term includes a condition or occurrence arising from:

(A) fire, flood, earthquake, hurricane, tornado, or wind, rain, ice or snow storm;

(B) labor dispute or strike;

(C) disruption or failure of utilities, transportation, communication or information systems and any applicable backup systems;

(D) shortage of fuel, housing, food, transportation, or labor;

(E) robbery, burglary, or attempted robbery or burglary;

(F) epidemic or other catastrophe; or

(G) riot, civil commotion, enemy attack, or other actual or threatened act of lawlessness or violence.

(2) Officer in charge – means the president of the credit union, or a person designated by the president, who shall have the authority to take all necessary and appropriate actions to deal appropriately with the emergency. The president of a credit union shall always have an individual designated as an officer in charge during his/her absence or unavailability.

Source: The provisions of this §91.5001 adopted to be effective August 9, 1999, 24 TexReg 6026; readopted to be effective August 2, 2002, 27 TexReg 6874, amended to be effective March 13, 2006, 31 Tex Reg 1649; reviewed and readopted to be effective October 19, 2009, 34 TexReg 7657; reviewed and readopted to be effective October 21, 2013, 38 TexReg 7735; reviewed and amended to be effective March 29, 2018, 43 TexReg 1838.

§91.5002. Effect of Closing.

A day on which a credit union or one or more of its operations is closed during its normal business hours as provided by §91.5001 of this title (relating to Emergency Closings) shall be deemed a legal holiday for all purposes with respect to any credit union business affected by the closed credit union or credit union operation.

Source: The provisions of this §91.5002 adopted to be effective August 9, 1999, 24 TexReg 6026; readopted to be effective August 2, 2002, 27 TexReg 6874; amended to be effective March 13, 2006, 31 Tex Reg 1649; reviewed and readopted to be effective October 19, 2009, 34 TexReg 7657; reviewed and readopted to be effective October 21, 2013, 38 TexReg 7735; reviewed and readopted to be effective November 3, 2017, 42 TexReg 6523.

§91.5005. Permanent Closing of an Office.

A credit union may permanently close any of its established offices or service facilities. The credit union shall provide notice to its members and the department no later than 60 days prior to the proposed closing. The credit union shall also post a notice to members in a conspicuous manner on the premises of the effected office or service facility and the homepage of the credit union's website and any social media pages at least 30 days prior to the proposed closing.

Source: The provisions of this §91.5005 adopted to be effective March 13, 2006, 31 Tex Reg 1649; reviewed and readopted to be effective October 19, 2009, 34 TexReg 7657; reviewed and readopted to be effective October21, 2013, 38 TexReg 7735; reviewed and amended to be effective March 29, 2018, 43 TexReg 1838.

Subchapter O. Trust Powers

§91.6001. Fiduciary Duties.

A credit union must conduct its trust operations in accordance with applicable law, and must exercise its fiduciary powers in a safe and sound manner. All fiduciary activities shall be under the direction of the credit union's board of directors. In carrying out its responsibilities, the board may assign, by action duly entered in the minutes, any function related to the exercise of fiduciary powers to any director, officer, employee, or committee thereof.

Source: The provisions of this §91.6001 adopted to be effective August 10, 2003, 28 TexReg 6270; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6002. Fiduciary Capacities.

A credit union is subject to this chapter if it acts in a fiduciary capacity. A credit union acts in a fiduciary capacity when it acts in any of the following capacities:

(1) Trustee.
(2) Custodian.
(3) Executor.
(4) Administrator.
(5) Guardian.
(6) Receiver.

Source: The provisions of this §91.6002 adopted to be effective August 10, 2003, 28 TexReg 6270; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6003. Notice Requirements.

(a) Intent. A credit union is required to notify the commissioner in writing of its intent to exercise fiduciary powers, at least 31 days prior to the anticipated commencement date of such fiduciary activities. The notice must contain:

(1) A statement describing the fiduciary powers that the credit union will exercise;

(2) An opinion of counsel that the proposed activities do not violate law, including citations to applicable law;

(3) A statement that the capital of the credit union is not less than the capital required by law of other financial institutions exercising comparable fiduciary powers;

(4) Sufficient biographical information on proposed trust management personnel to enable the Department to assess their qualifications; and

(5) A description of the locations where the credit union will conduct fiduciary activities.

(b) Prior Activity. A credit union that has initiated trust activities prior to the effective date of this rule shall file the notice prescribed in subsection (a) by October 1, 2003.

Source: The provisions of this §91.6003 adopted to be effective August 10, 2003, 28 TexReg 6270; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6004. Exercise of Fiduciary Powers.

(a) Supervisory Review. Unless otherwise notified by the department, a credit union may exercise its fiduciary powers on the 30th day after the credit union receives written confirmation from the Department that the notice required under Section 91.6003 of this title (relating to Notice Requirements) is complete and accepted for filing. The Department will consider the following factors when reviewing such a notice:

(1) The credit union's financial condition.
(2) The credit union's capital and whether that capital is sufficient under the circumstances.
(3) The credit union's overall performance.
(4) The fiduciary powers the credit union proposes to exercise.
(5) The availability of legal counsel.
(6) The experience and expertise of proposed trust management personnel.
(7) The needs of the members to be served.
(8) Any other facts or circumstances that the Department considers appropriate.

(b) Written Notice. Prior to expiration of the 30 day period referred to in subsection (a), the commissioner may give the credit union written notice of denial or consent, subject to certain conditions.

(c) Acceptance of Conditions. Commencement of the exercise of fiduciary powers constitutes confirmation of acceptance of all conditions imposed by the commissioner under subsection (b) and shall be considered an enforceable agreement against the credit union for all purposes.

Source: The provisions of this §91.6004 adopted to be effective August 10, 2003, 28 TexReg 6270; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective on October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6005. Exemption from Notice.

A credit union does not need to provide notice under section 91.6003 (relating to notice requirements) to act as a trustee or custodian of any form of retirement, pension, profit sharing or deferred income accounts for its members, pension funds of self-employed individuals eligible for membership and pension funds of a company or organization whose employees are eligible for membership in the credit union if acting as such will only involve holding the funds on deposit and reporting information to the account holders and government agencies. All contributions to such fiduciary accounts, however, must be initially made to a share or deposit account in the credit union and the credit union may not directly or indirectly provide any investment advice for such fiduciary accounts.

Source: The provisions of this §91.6005 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6006. Policies and Procedures.

A credit union exercising trust powers shall adopt and follow written policies and procedures adequate to maintain its fiduciary activities in compliance with applicable law. Among other relevant matters, the policies and procedures should address, where appropriate, the credit union's:

(1) Brokerage placement practices;

(2) Methods for ensuring that fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security;

(3) Methods for preventing self-dealing and conflicts of interest;

(4) Selection and retention of legal counsel who is readily available to timely review trust instruments or other documents creating the credit union's fiduciary status and advise the credit union and its fiduciary officers and employees on all fiduciary related matters; and

(5) Investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution.

Source: The provisions of this §91.6006 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6007. Review of Fiduciary Accounts.

(a) Pre-acceptance review. Before accepting a fiduciary account, a credit union shall review the prospective account and related instruments and documents to determine whether it can properly administer the account.

(b) Initial post-acceptance review. Upon the acceptance of a fiduciary account for which a credit union has investment discretion, the credit union shall conduct a prompt review of all assets of the account to evaluate whether they are appropriate for the account.

(c) Annual review. At least once during every calendar year, a credit union shall conduct a review of all assets of each fiduciary account for which the credit union has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account.

Source: The provisions of this §91.6007 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6008. Recordkeeping.

A credit union shall adequately document the establishment and termination of each fiduciary account and shall maintain adequate records for all fiduciary accounts. All records pertaining to a fiduciary account shall be separate and distinct from other records of the credit union.

Source: The provisions of this §91.6008 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6009. Audit.

At least once during each calendar year, a credit union shall arrange for a suitable audit by a certified public accountant in accordance with generally accepted standards for attestation engagement. The audit must ascertain whether the credit union's internal control policies and procedures provide reasonable assurance of three things:

(1) The credit union is administering fiduciary activities in accordance with applicable law and the trust instrument or other documents creating the fiduciary responsibility; (2) The credit union is properly safeguarding fiduciary assets; and

(3) The credit union is accurately recording transactions in appropriate accounts in a timely manner.

Source: The provisions of this §91.6009 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6010. Custody of Fiduciary Assets.

(a) A credit union shall place assets of fiduciary accounts in the joint custody or control of not fewer than two the fiduciary officers or employees designated for that purpose by the board of directors.

(b) A credit union shall keep assets of fiduciary accounts separate from the assets of the credit union. Except as otherwise authorized by applicable law and as may be in the best interests of the beneficiaries of the fiduciary account, a credit union shall keep assets of each fiduciary account separate from all other accounts.

Source: The provisions of this §91.6010 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6011. Trust Funds.

All monies received by a credit union as fiduciary on trust business shall be deposited in a specially designated account or accounts, shall not be commingled with any funds of the credit union and shall remain on deposit until disbursed or invested in accordance with powers and duties of the credit union in its capacity as such fiduciary.

Source: The provisions of this §91.6011 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6012. Compensation, Gifts, and Bequests.

A credit union may not permit its directors, officers, or employees to retain any compensation for acting as co-fiduciary with the credit union in the administration of a fiduciary account, except with the specific approval of the board of directors. In addition, a credit union may not permit any fiduciary officer or employee to accept a bequest or gift of fiduciary assets, unless the bequest or gift is directed or made by a relative of the director, officer, or employee or is specifically approved by the board of directors.

Source: The provisions of this §91.6012 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6013. Bond Coverage.

A credit union is required to maintain a bond for protection and indemnity of members, in reasonable amounts against dishonesty, fraud, defalcation, forgery, theft, embezzlement, and other similar insurable losses with an insurance or surety company authorized to do business in this state. Coverage against such losses shall include all agents who do not otherwise provide protection and indemnity for the credit union, directors, officers, and employees of the credit union acting independently or in collusion or combination with any person or persons whether or not they draw salary or compensation.

Source: The provisions of this §91.6013 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6014. Errors and Omissions Insurance.

The credit union shall procure errors and omission insurance of at least five hundred thousand dollars.

Source: The provisions of this §91.6014 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

§91.6015. Litigation File.

A credit union shall keep an adequate record of all pending litigation to which it is a party in connection with its exercise of fiduciary powers.

Source: The provisions of this §91.6015 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672.

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Subchapter P. Other Forms of Equity Capital

§91.7000. Certificates of Indebtedness.

(a) General. No credit union may issue certificates of indebtedness pursuant to this section or amend the terms of such certificates unless it has obtained a written letter from the commissioner stating that the commissioner does not object ("non-objection letter"). All requirements of the provisions of this section must be met before a non-objection letter will be issued.

(b) Form of application; supporting information. Applications must be in the form prescribed by the commissioner and shall include all information and exhibits required by the application instructions.

(c) Requirements as to certificates. Certificates of Indebtedness issued pursuant to this section shall meet all of the following requirements:

(1) Form of certificate. Each certificate evidencing subordinated debt issued by a credit union pursuant to this section shall:

(A) Bear on its face, in bold-face type, the following legends:

(i) "This certificate is not a share account or deposit and it is not insured by the United States or any other insuring organization or fund"; and

(ii) "This certificate is not eligible for purchase by any credit union or a credit union service organization thereof without the prior written approval of the Credit Union Commissioner of the State of Texas."

(B) Clearly state that the certificate –

(i) Is subordinated to all other claims of the credit union's creditors;

(ii) Is totally unsecured; and

(iii) May not be used as collateral for any loan by the issuing credit union.

(C) Shall include within its terms the right of the issuing credit union to prepay the obligation, which shall, at a minimum, include the right to prepay any amount without premium or penalty any time during the fifteen months prior to the maturity date;

(D) Shall contain the following statement:

"Notwithstanding anything to the contrary in this certificate (or in any related documents); (i) if the NCUA or other insuring organization shall be appointed liquidating agent for the issuer of this certificate ("the issuer') and in its capacity as such shall cause the issuer to merge with or into another credit union, or in such capacity shall sell or otherwise convey part or all of the assets of the issuer to another credit union or shall arrange for the assumption of less than all of the liabilities of the issuer by one or more credit unions, the NCUA or other insuring organization shall have no obligation, either in its capacity as liquidating agent or in its corporate capacity, to contract for or to otherwise arrange for the assumption of the obligations represented by this certificate in whole or in part by any credit union or credit unions which results from any such merger or which has purchased or otherwise acquired from the NCUA or other insuring organization as liquidating agent for the issuer, any of the assets of the issuer, or which, pursuant to any arrangement with the NCUA or insuring organization, has assumed less than all of the liabilities of the issuer. To the extent that obligations represented by this certificate have not been assumed in full by a credit union with or into which the issuer may have been merged, as described in this paragraph (A), and/or by one or more credit unions which have succeeded to all or a portion of the assets of the issuer, or which have assumed a portion but not all of the liabilities of the issuer as a result of one or more transactions entered into by the NCUA or other insuring organization as liquidating agent for the issuer, then the holder of this certificate shall be entitled to payments on this obligation in

accordance with the procedures and priorities set forth in any applicable law. (ii) In the event that the obligation represented by this certificate is assumed in full by another credit union, which shall succeed by merger or otherwise to substantially all of the assets and the business of the issuer, or which shall by arrangement with the NCUA or insuring organization assume all or a portion of the liabilities of the issuer, and payment or provision for shall have been made in respect of all matured installments of interests upon the certificates together with all matured installments of principal on such certificates which shall have become due otherwise than by acceleration, than any default caused by the appointment of a liquidating agent for the issuer shall be deemed to have been cured, and any declaration consequent upon such default declaring the principal and interest on the certificate to be immediately due and payable shall be deemed to have been rescinded. (iii) This certificate is not eligible to be purchased or held by any credit union or credit union service organization thereof. The issuer of this certificate may not recognize on its transfer books any transfer made to a credit union or any credit union service organization thereof and will not be obligated to make any payments of principal or interest on this certificate if the owner of this certificate is a credit union or any credit union service organization thereof."

(2) Limitations as to term and prepayment.

(A) No certificate of indebtedness issued by a credit union pursuant to this section shall have an original period to maturity of less than seven years. During the first six years that such a certificate is outstanding, the total of all required sinking fund payments, other required prepayments, and required reserve allocations with respect to the portion of such six years as have elapsed shall at no time exceed the original principal amount or original redemption price, thereof multiplied by a fraction, the numerator of which is the number of years that have elapsed since the issuance of the certificate and the denominator of which is the number of years covered by the original period to maturity.

(B) No voluntary prepayment of principal shall be made and no payment of principal shall be accelerated without the approval of the commissioner if the credit union's net worth ratio is below 6% or, if after giving effect to such payment, the credit union's net worth ratio would fall below 6%.

(d) Offering circular. The credit union shall submit the proposed offering circular to the Department. The offering circular must state the following in bold print:

"These certificates have not been approved by the Texas Credit Union Department nor has the Texas Credit Union Department approved this offering circular."

(e) Supervisory objection. Generally, the commissioner will not issue a non-objection letter where:

(1) The proposed issue fails to transfer risk away from the National Credit Union Share Insurance Fund or other insuring organization and onto the certificate holders.

(2) Information submitted in connection with the application or otherwise available to the Department indicates that the credit union will not be able to service the proposed debt. Evaluation of the issuer's ability to service debt should be prospective, based upon the issuer's business plan.

(3) The ratio of subordinated debt included as equity capital to the credit union's net worth requirements exceeds one-third, after giving effect to the proposed issue.

(4) The proposed deployment of the proceeds of the proposed issue is contrary to the credit union's business plan, is unrealistic in its assumptions, or is inconsistent with the principles of safety and soundness.

(5) The credit union has failed to comply with the terms and conditions imposed upon previous subordinated debt issuances, or has failed to comply with any outstanding enforcement action, written agreement or any other significant supervisory requirement.

(f) Additional requirements. The commissioner may impose on the credit union such requirements or conditions with regard to certificates or the offering or issuance thereof as the commissioner may deem necessary or desirable for the protection of purchasers, the credit union, the National Credit Union Share Insurance Fund, or other insuring organization, as the case may be.

(g) Limitation on offering period. Following the date of the issuance of a non-objection letter, the credit union shall have an offering period of not more than one year in which to complete the sale of the certificates of indebtedness issued pursuant to this section. The commissioner may in his discretion extend such offering period if a written request showing good cause for such extension is filed with the Department not later than 30 days before the expiration of such offering period or any previous extension thereof.

(h) Policies and Procedures. Before any offers or sales of the certificates are made on the premises of the credit union or its credit union service organization, the credit union shall submit to the Department a set of policies and procedures for such sale of certificates that is satisfactory to the Department.

(i) Records. A credit union shall establish and maintain certificate of indebtedness documentation practices and records that demonstrate the credit union appropriately administers and monitors certificate of indebtedness-related activities. The credit union's records should adequately evidence ownership, balances, and all transactions involving each certificate. The credit union may maintain records on certificate of indebtedness activities in any format that is consistent with standard business practices.

(j) Disclosures.

(1) In connection with the purchase of a certificate of indebtedness by a person from the issuing credit union or its credit union service organization, the credit union and/or the credit union service organization must disclose to the person that:

(A) The certificate of indebtedness is not a share or deposit;

(B) The certificate of indebtedness is not insured by the National Credit Union Share Insurance Fund or any other insuring organization;

(C) There is investment risk associated with the certificate of indebtedness, including the possible loss of value; and

(D) The credit union may not condition an extension of credit on a person's purchase of a certificate of indebtedness.

(2) The disclosures required by paragraph (1) above must be provided orally and in writing before the completion of the sale of a certificate of indebtedness. If the sale of a certificate of indebtedness is conducted by telephone, the credit union may provide the written disclosure required by paragraph (1) by mail within three business days beginning the first business day after the sale, solicitation, or offer.

(3) A credit union may provide the written disclosures required by paragraph (1) through electronic media instead of on paper, if the person affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the person may retain or obtain later, for example, by printing or storing electronically (such as by downloading).

(4) The disclosures provided shall be conspicuous and designed to call attention to the nature and significance of the information provided.

(k) Sales Activities. A credit union must, to the extent practicable:

(1) Keep the area where the credit union conducts transactions involving certificate of indebtedness physically segregated from areas where shares and deposits are routinely accepted from members;

(2) Identify the area where certificate of indebtedness activities occur; and

(3) Clearly delineate and distinguish those areas from the areas where the credit union's share- and deposit-taking activities occur.

(l) Referrals. Any person who accepts deposits from members in an area where such transactions are routinely conducted in a credit union may refer a member who seeks to purchase a certificate of indebtedness to a qualified person who sells that product only if the person making the referral receives no additional compensation for making the referral.

(m) Reports. Within 30 days after completion of the sale of the subordinated debt issued pursuant to this section, the credit union shall transmit a written report to the Department stating the number of purchases, the total dollar amount of certificates sold, and the amount of net proceeds received by the credit union. The credit union's report shall clearly state the amount of subordinated debt, net of all expenses that the credit union intends to have counted as equity capital. In addition, the credit union, shall submit to the Department, certification of compliance with all applicable laws and regulations in connection with the offering, issuance, and sale of the certificates.

(n) Equity capital. When a certificate of indebtedness has a remaining maturity of 5 years, the amount of the certificates that may be considered equity capital shall be reduced by a minimum of 20% of the original amount of the certificate per year. The equity capital shall be reduced by a constant monthly amortization to ensure the recognition of subordinated debt is fully amortized when the certificate matures or is prepaid.

(o) Prohibited practices.

(1) A credit union may not engage in any practice or use any advertisement at any office of, or on behalf of, a credit union that could mislead any person or otherwise cause a reasonable person to reach an erroneous belief with respect to:

(A) the fact that a certificate of indebtedness a credit union sells or offers for sale is not insured by the National Credit Union Share Insurance Fund or other insuring organization;

(B) the fact that there is an investment risk, including the potential that principal may be lost and that the certificate may decline in value; or

(C) the fact that the approval of an extension of credit to a person by the credit union or credit union service organization may not be conditioned on the purchase of a certificate of indebtedness from the credit union or credit union service organization.

(2) No credit union shall directly or indirectly:

(A) employ any device, scheme or artifice to defraud,

(B) make any untrue statement of a material fact or omit to state a material fact necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, or

(C) engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any certificate of indebtedness.

Source: The provisions of this §91.7000 adopted to be effective March 14, 2004, 29 TexReg 2638; reviewed and readopted to be effective June 23, 2008, 33 TexReg 5352; reviewed and readopted to be effective July 18, 2012, 37 TexReg 4958; reviewed and readopted to be effective July 31, 2016, 41 TexReg 5448.

Subchapter Q. Access to Confidential Information

§91.8000. Discovery of Confidential Information.

(a) Policy. The legislature has determined that certain information is confidential and, with limited exceptions, should not be disclosed. See Texas Finance Code, §126.002. Non-disclosure under this section protects the stability of credit unions by preventing disclosures that could adversely impact the institutions. Inappropriate disclosures can result in substantial harm to credit unions and to those persons and entities (including other financial institutions) that have relationships with them. For example, the department may criticize a credit union in an examination report for a financial weakness that does not currently threaten the solvency of the credit union. If improperly disclosed, the criticism can lead to adverse impacts such as the possibility of a "run," short-term liquidity problems, or volatility in costs of funds, which in turn can exacerbate the problem and cause the failure of the credit union. These failures lead to reduced access to credit and greater risk to depositors. Further, since specific loans may be criticized in an examination report, confidentiality of the information protects the financial privacy of borrowers. Finally, protecting confidential information from disclosure facilitates the free exchange of information between the credit union and the regulator, encourages candor, and promotes regulatory responsiveness and effectiveness. Information that does not fall within the meaning of confidential information as defined in this section may be confidential under other definitions and controlled by other laws, and is not subject to this section.

(b) Disclosure prohibited. Pursuant to Finance Code §126.002, the department has an absolute privilege against disclosure of its confidential information. Discovery of confidential information from a person subject to §126.002 must comply with subsection (c) of this section. Only a person to whom confidential information has been released pursuant to §126.002 or this rule may disclose that information to another, and only in accordance with that section and this rule.

(c) Discovery of confidential information. A credit union, governmental agency, credit union service organization, service provider, or insuring organization that receives a subpoena or other form of discovery for the release of information that is confidential under §126.002 of the Act shall promptly:

(1) notify the department of the request;

(2) provide the department with a copy of the discovery documentation and, if requested by the department, a copy of the requested information; and

(3) move for a protective order, or its equivalent under applicable rules of procedure.

In addition, prior to the release of confidential information, such credit union, governmental agency, credit union service organization, service provider, or insuring organization must obtain a ruling on its motion in accordance with this section. Confidential information may be released only pursuant to a protective order, or its equivalent, in a form consistent with that set out in this section and only if a court with jurisdiction has found that:

(A) the party seeking the information has a substantial need for the information;

(B) the information is directly relevant to the legal dispute in issue; and

(C) the party seeking the information is unable without undue hardship to obtain its substantial equivalent by other means.

(d) Discretionary filings by department. On receipt of notice under subsection (c) of this section, the department may take action as may be appropriate to protect confidential information. The department has standing to intervene in a suit or administrative hearing for the purpose of filing a motion for protective order and in camera inspection in accordance with this section.

(e) Motion for protective order, or equivalent, and in camera inspection. The movant shall ask the court to enter an order in accordance with this section regarding the release of confidential information. If necessary to resolve a dispute regarding the confidential status or direct relevance of any information sought to be released, the party seeking the order shall move for an in camera inspection of the pertinent information. Until subject to a protective order, or its equivalent, confidential information may not be released, and, if necessary, the party seeking an order shall request the court officer to deny discovery of such confidential information.

(f) Protective order or equivalent. An order obtained pursuant to the terms of this section must:

(1) specifically bind each party to the litigation, including one who becomes a party to the suit after the order is entered, each attorney of record, and each person who becomes privy to the confidential information as a result of its disclosure under the terms of the order;

(2) describe in general terms the confidential information to be produced;

(3) state substantially the following in the body of the order:

(A) absent court order to the contrary, only the court reporter and attorneys of record in the cause may copy confidential information produced under the order in whole or part;

(B) the attorneys of record are custodians responsible for all originals and copies of confidential information produced under the order and must insure that disclosure is limited to those persons specified in the order;

(C) confidential information subject to the order and all information derived there from may be used only for the purposes of the trial, appeal, or other proceedings in the case in which it is produced;

(D) confidential information to be filed or included in a filing in the case must be filed with the clerk separately in a sealed envelope bearing suitable identification, and is available only to the court and to those persons authorized by the order to receive confidential information, and all originals and copies made of such documents and records must be kept under seal and disclosed only in accordance with the term of the protective order;

(E) confidential information produced under the order may be disclosed only to the following persons and only after counsel has explained the terms of the order to the person who will receive the information and provided that person with a copy of the order;

(i) to a party and to an officer, employee, or representative of a party, to a party's attorneys (including other members and associates of the respective law firms and contract attorneys in connection with work on the case) and, to the extent an attorney of record in good faith determines disclosure is necessary or appropriate for the conduct of the litigation, legal assistants, office clerks and secretaries working under the attorney's supervision;

(ii) to a witness or potential witness in the case;

(iii) to an outside expert retained for consultation or for testimony, provided the expert agrees to be bound by the terms of the order and the party employing the expert agrees to be responsible for the compliance by its expert with this confidentiality obligation; and

(iv) to the court or to an appellate officer or body with jurisdiction of an appeal in the case;

(F) at the request of the department or a party, only the court, the parties and their attorneys, and other persons the court reasonably determines should be present may attend the live testimony of a witness or discussions or oral arguments before the court that may include confidential information or relate to such confidential information. The parties shall request the court to instruct all persons present at such testimony, discussions, or arguments that release of confidential information is strictly forbidden;

(G) a transcript, including a deposition transcript, that may include confidential information subject to non-disclosure is subject to the order. The party requesting the testimony of a current or former department officer, employee, or agent shall, at its expense, furnish the department a copy of the transcript of the testimony once it has been transcribed.

(H) Upon ultimate conclusion of the case by final judgment and the expiration of time to appeal, or by settlement or otherwise, counsel for each party shall return all copies of every document subject to the order for which the counsel is custodian to the party that produced the confidential information; and

(I) Production of documents subject to the order does not waive a claim of privilege or right to withhold the documents from a person not subject to the order.

(4) Paragraph (3)(A), (B) and (E) - (H) of this subsection are subject to modification by the court for good cause before the conclusion of the proceeding, after giving the department notice and an opportunity to appear.

Source: The provisions of this §91.8000 adopted to be effective March 14, 2004, 29 TexReg 2638; reviewed and readopted to be effective June 23, 2008, 33 TexReg 5352, amended to be effective July 12, 2009, 34 TexReg 4513; reviewed and readopted to be effective July 18, 2012, 37 TexReg 4958; reviewed and readopted to be effective July 31, 2016, 41 TexReg 5448.

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CHAPTER 93

Subchapter A. Common Terms

§93.101. Scope; Definitions; Severability.

(a) This chapter is applicable to contested cases arising under the Texas Credit Union Act.

(b) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) ADR -- alternative dispute resolution.

(2) ALJ -- administrative law judge employed by the State Office of Administrative Hearings.

(3) Application -- shall have the same definition as in 91.101 (Definitions and Interpretations).

(4) Contested case -- a proceeding in which the legal rights, duties, or privileges of a party are to be determined by the commissioner or the Commission after an opportunity for adjudicative hearing. A contested case at the Department commences upon the filing of a proper and timely request for hearing.

(5) Party -- an applicant, a protestant, a respondent, or department staff, who is admitted as a party.

(6) PFD -- a proposal for decision issued by an ALJ.

(7) SOAH -- the State Office of Administrative Hearings.

(8) TAC -- Texas Administrative Code.

(c) If any section of this chapter is found to be invalid, the invalidity shall not affect the validity of any other provision of this chapter.

Source: The provisions of this §93.101 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5810; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

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Subchapter B. General Rules

§93.201. Party Status.

Party status will be conferred on persons or entities with a legal right, duty, privilege, power or current economic interest that may be directly affected by the outcome of the case. In a contested case, each party is entitled to an opportunity for hearing after reasonable notice of not less than 10 days and to respond and present evidence and argument on each issue involved in the case.

Source: The provisions of this §93.201 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective on February 24, 2003, 28 TexReg 1631; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and readopted to be effective February 22, 2010, 35 TexReg 2021; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.202. Computation of Time.

Unless otherwise required by law, in computing any period of time set forth in this chapter, the date of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a state legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a state legal holiday. Time limits shall be computed using calendar days rather than business days.

Source: The provisions of this §93.202 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5811; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.203. Ex Parte Communications.

(a) Upon receipt of a request for hearing and continuing until the time a motion for rehearing is denied, the time for ruling on such a motion has expired, or the proceeding is otherwise final, the commissioner and members of the commission may not communicate directly or indirectly with any party or a representative of a party in a contested case in connection with any issue of fact or law in the contested case except upon notice and opportunity for each party to participate.

(b) The commissioner and members of the commission may communicate ex parte with employees of the department who did not participate in any hearing in the case in order to utilize special skills or knowledge of the department's staff in evaluating the record in the case. Prohibited ex parte communications shall not include any written communication if the communicator contemporaneously serves copies of the communication on all parties to the contested case.

Source: The provisions of this §93.203 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and readoapted to be effective February 22, 2010, 35 TexReg 2021; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readoapted to be effective March 9, 2018, 43 TexReg 1887.

§93.204. Contested Case Hearing; Informal Disposition.

All hearings in contested cases will be conducted by SOAH pursuant to the Administrative Procedures Act and SOAH's procedural rules (1 TAC Chapter 155). At any time during the proceedings, the commissioner may make an informal disposition of a contested case by stipulation of the parties, agreed settlement, consent order, or default.

Source: The provisions of this §93.204 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5811; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.205. Notice of Hearing.

(a) A notice of hearing shall include:

(1) A statement of the time, place and nature of the hearing;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A reference to the particular sections of the statutes and rules involved, including a specific reference to 1 TAC Chapter 155;

(4) A short, plain statement of the matters asserted; and

(5) A description of the relief requested.

(b) At the discretion of the Commissioner, the following language set forth in bold capital letters may be included: **"IF YOU DO NOT FILE A WRITTEN ANSWER OR OTHER WRITTEN RESPONSIVE PLEADING TO THIS NOTICE OF HEARING ON OR BEFORE THE 10TH DAY AFTER THE DATE ON WHICH YOU WERE SERVED WITH THIS NOTICE, OR IF YOU FAIL TO ATTEND THE HEARING, THE COMMISSIONER MAY DISPOSE OF THIS CASE WITHOUT HEARING AND GRANT THE RELIEF SET FORTH IN THIS NOTICE. THE RESPONSE MUST BE FILED IN AUSTIN, TEXAS, WITH THE STAFF OF THE DEPARTMENT AND WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS".**

(c) If a written response is required, the response must be filed with the department and SOAH, and shall specifically admit or deny each of the assertions contained in the notice of hearing. Any assertion not denied will be deemed to be admitted. Failure of a party to timely file a written response as provided in this subsection shall entitle the department to the remedies relating to default set forth in §93.206 of this title (relating to Default).

Source: The provisions of this §93.205 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5811; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.206. Default.

(a) If the parties in a contested case fail to file a written response as provided in §93.205 of this title (relating to Notice of Hearing), or fail to appear in person or through a legal representative on the date and at the time set for the hearing of the case, the commissioner may make an informal disposition of the case by default.
(b) In a case of default, the ALJ assigned to a contested case shall promptly grant the department's motion for remand for informal disposition.
(c) Prior to issuing a default order, the commissioner must find that notice was properly served on the defaulting party as prescribed by §93.207(a) of this title (relating to Service of Documents on Parties), and that the notice contained the language prescribed in §93.205(b) of this title. The default order may grant the relief requested in the notice of hearing and may deem admitted the matters set forth in the notice.
(d) Upon the motion of a party, the commissioner may, for good cause shown, set aside a default order and reschedule a hearing with SOAH. A motion to set aside a default order shall be filed with the commissioner not later than the 10th day after the date the party is served with the default order. If the commissioner does not, rule on the motion in writing within ten days after the motion is filed, the motion shall be considered denied by operation of law.

Source: The provisions of this §93.206 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg5812; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2017, 43 TexReg 1887.

§93.207. Service of Documents on Parties.

(a) Unless otherwise specified in this chapter, notice to a party or a party's representative in a contested case shall be by hand-delivery, by facsimile transmission, by email if all parties agree, or by regular, certified or registered mail, to the party's last known address. Service by mail shall be complete when the properly addressed document is deposited in a post office or official depository under the care and custody of the United States Postal Service.
(b) A certificate by a party, who files a pleading stating that it has been served on all other parties, is prima facie evidence of service.

Source: The provisions of this §93.207 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5812; reviewed and readopted to be effective February 24, 2014; 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.208. Delegation of Authority.

Unless otherwise provided by law, any duty imposed on the commission or the commissioner may be delegated to a duly authorized representative. The provisions of any rule referring to the commission or the commissioner shall be construed to also apply to the duly authorized representative of the commission or the commissioner.

Source: The provisions of this §93.208 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and readopted to be effective February 22, 2010, 35 TexReg 2021; reviewed and readopted to be effective February 24, 2014; 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.209. Subpoenas.

(a) Any party desiring the issuance of a subpoena to compel the appearance of a witness or the production of documents at any hearing shall file a written request with the commissioner setting forth the name and address of the witness, time and place of appearance, and any documents or tangible things sought to be produced. Each request shall contain a statement of the reasons why the subpoena should be issued.

(b) Upon a finding that a party has shown good cause for the issuance of the subpoena, the commissioner shall issue the subpoena as prescribed by Government Code §2001.089. The party requesting the subpoena shall be responsible for the payment of any fees or expenses as set out in Government Code §2001.103.

(c) Within ten days after service of the subpoena or, if the return date is less than ten days after service, before the return date, the person to whom the subpoena is directed may, serve upon the commissioner, the ALJ, and the attorney or party designated in the subpoena, written objection to the appearance or to the inspection or copying of any or all of the designated material. The party serving the subpoena shall have five days to file a written response to the objection. No oral argument shall be heard on the objection unless the commissioner or ALJ directs.

Source: The provisions of this §93.209 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5812; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.210. Discovery; Protective Orders; Motions To Compel.

Except as modified by SOAH, parties have the discovery rights set out in the Administrative Procedure Act and the Texas Rules of Civil Procedure (TRCP). If a party or witness is asked to produce information that is exempt or privileged under the TRCP, the party, in addition to filing a written objection under .§93.209(c) of this title (relating to Subpoenas), may make a motion with the ALJ for a protective order. The objecting party must request an *in camera* inspection as set out in 1 TAC §155.251(c)(7). The ALJ shall rule on all objections and motions under this section.

Source: The provisions of this §93.210 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5813; reviewed and readoapted to be effective February 24, 2014; 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.211. Administrative Record.

(a) A record of all contested case proceedings shall be made as directed by SOAH. The department may assess costs against one or more parties.
(b) If a decision of the commission is appealed or otherwise taken to district court and the department is required to send to the court an original or certified copy of the record of the proceeding, or any part thereof, the appealing party shall pay all of the costs of preparing the record that is to be sent to the reviewing court. If more than one party appeals the decision, the cost of the preparation of the record shall be divided equally among the appealing parties or as agreed by the parties. The ALJ shall prepare and certify the record on behalf of the department and is responsible for transmitting the certified copy to the commissioner.

Source: The provisions of this §93.211 adopted to be effective August 10, 1999, 24 TexReg 602; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5813; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.212. Proposal for Decision.

(a) Following the hearing, the ALJ shall review the evidence and testimony and prepare a PFD which shall include findings of fact and conclusions of law. The ALJ shall also prepare a proposed final order for the commissioner to sign adopting the PFD.
(b) The ALJ shall serve copies of the PFD and proposed final order on all parties of record within 30 days after conclusion of the hearing. The parties may submit exceptions to the PFD and replies to the exceptions. Exceptions, replies to exceptions, and related briefs must be submitted to the ALJ and to the department and, unless otherwise indicated, must be filed within deadlines established by the ALJ. The ALJ may amend the PFD and proposed final order in response to the exceptions, replies, or briefs submitted. If the ALJ makes substantive revisions, the ALJ shall circulate the amended PFD and proposed final order to the parties for additional exceptions and briefs before submitting the PFD and proposed final order to the commissioner.
(c) The ALJ shall submit the PFD and proposed order together with all materials listed in Government Code §2001.060, to the commissioner for review. No additional briefs may be submitted after the case is under submission to the commissioner for decision unless requested by the commissioner. The commissioner may:
(1) Adopt the PFD and proposed final order, in whole or in part;
(2) Modify and adopt the PFD and proposed final order, in whole or in part;
(3) Decline to adopt the PFD and proposed final order, in whole or in part;
(4) Remand for further proceedings by the ALJ, including for the limited purpose of receiving additional briefing or evidence from the parties on specific issues; or
(5) Take another lawful and appropriate action with regard to the case.
(d) The commissioner shall make a final determination within 30 days of the date of receipt of the PFD and proposed final order.

Source: The provisions of this §93.212 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1631; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexTeg 5813; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.213. Appearances and Representation.

A party may be represented by an attorney or by an authorized representative, if that person observes proper decorum and the instructions of the ALJ. The ALJ may require any person appearing in a representative capacity to provide evidence of authority to appear as the party's representative.

Source: The provisions of this §93.213 adopted to be effective February 24, 2003, 28 TexReg 1632; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5813; reviewed and readoapted to be effective February 24, 2014, TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.214. Recovery of Department Costs.

The ALJ may allocate costs incurred by the department among the parties in accordance with applicable law. Notwithstanding any other provision of this chapter, the ALJ may impose costs that are solely or primarily attributable to a particular party against that party.

Source: The provisions of this §93.214 adopted to be effective July 2, 2006, 31 TexReg 5079; reviewed and readopted to be effective February 22, 2010, 35 TexReg 2021; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

Subchapter C. Appeals of Preliminary Determinations on Applications

§93.301. Finality of Decision; Request for SOAH Hearing; Waiver of Appeal.

(a) The commissioner shall issue a preliminary decision on all applications. Unless a party files a written appeal, the preliminary decision will become final when the time for appeal set out in Finance Code §122.007 or §122.011 expires. If a party submits a written waiver of its right to appeal, the preliminary decision becomes final on receipt of the waiver. If a party files a timely appeal, the commissioner's preliminary decision is withdrawn and the matter will be referred to SOAH. The commissioner may, at the commissioner's sole discretion, refer any matter to SOAH for hearing prior to entering a preliminary decision.

(b) Notwithstanding subsection (a) of this section, if an application is approved without modification, and no protest or comment was received during the notice period, the commissioner may determine that the preliminary decision should become final immediately.

Source: The provisions of this §93.301 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1632; readopted to be effective February 21, 2006, 31 TexReg 1479; amended to be effective July 2, 2006, 31 TexReg 5080; reviewed and amended to be effective July 11, 2010, 35 TexReg 5814; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.302. Referral to ADR.

The commissioner may order the parties to participate in non-binding ADR if the commissioner determines that any two of the following conditions are present:

(1) the parties have not engaged in meaningful negotiation;
(2) the controversy is reasonably susceptible to compromise or resolution; or
(3) ADR may produce cost savings.

Source: The provisions of this §93.302 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and readopted to be effective February 22, 2010, 35 TexReg 2021; reviewed and readopted to be effective February 24, 2014; 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.303. Hearings on Applications.

(a) If ADR is not used or if it fails to resolve the controversy, the commissioner shall furnish to the ALJ all information upon which the preliminary decision was based.

In preparing a PFD, the ALJ shall consider this information along with the testimony and documentary evidence presented at the hearing.

(b) Burden of Proof for Unprotested Applications. The applicant must prove each of the statutory and regulatory requirements for approval by a preponderance of the evidence.

(c) Burden of Proof for Protested Applications. The applicant must prove each of the statutory and regulatory requirements for approval by a preponderance of the evidence. In cases in which

field of membership is at issue, the protestant must establish by a preponderance of the evidence that overlapping fields of membership will unreasonably harm the protestant. For the purposes of this section, to constitute "unreasonable harm" an overlap must threaten the protestant's welfare and stability or its financial viability to such an extent that it would adversely impact its safety and soundness as a credit union.

Source: The provisions of this §93.303 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1633; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5814; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.305. Appeals of All Other Applications for Which No Specific Procedure is Provided by this Title.

If ADR is not used or fails to resolve the controversy, whether the application is protested or unprotested, the applicant has the burden to prove each of the applicable statutory and regulatory requirements for approval by a preponderance of the evidence.

Source: The provisions of this §93.305 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1633; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5815; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

Subchapter D. Appeals of Cease and Desist Orders and Orders of Removal

§93.401. Appeals Of Cease And Desist Orders And Orders Of Removal.

(a) Unless the board of directors or person affected by the order files a timely written appeal, the commissioner's cease and desist order or order of removal becomes final when the applicable statutory time for appeal expires.
(b) If a timely request for appeal is filed, the commissioner shall forward the matter to SOAH to set a hearing.
(c) The hearing on a cease and desist order or order of removal is closed to the public. The orders, correspondence, and records relating thereto, are confidential and cannot be revealed to the public. Parties with access to confidential information during the contested case must sign a confidentiality agreement as provided in §91.8000(f) of this title (relating to Discovery of Confidential Information).
(d) At the hearing, the commissioner must establish a prima facie case that the statutory or regulatory violations or the unsafe or unsound practices justify the cease and desist order or order of removal.

Source: The provisions of this §93.401 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1634; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5815; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.402. Stays.

Where an order by its terms, by statute, or by these rules will become final before a hearing can be held, any aggrieved party who has filed a timely request for hearing under this chapter may file a written request with the commissioner to stay part or all of the order until the matter has been heard and a final decision issued. The commissioner may grant a stay where the respondent has adequately demonstrated a reasonable defense which might result in the respondent prevailing on the merits at the hearing, the respondent will be irreparably injured in the absence of the stay, the stay would not substantially or irreparably harm other interested persons, and the stay would not jeopardize the public interest or contravene public policy.

Source: The provisions of this §93.402 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1634; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5815; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

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Subchapter E. Appeals of Orders of Conservation

§93.501. Appeals of Orders of Conservation.

(a) Unless the credit union's former board of directors files a timely written appeal, the commissioner's order of conservation becomes final when the statutory time for appeal expires.
(b) If a timely request for hearing is filed, the commissioner shall forward the matter to SOAH to set a hearing. The hearing date shall be no earlier than the 11th day and no later than the 30th day after the date on which the appeal is received.
(c) The credit union's former board of directors has the burden to prove by a preponderance of the evidence that the board should regain control of the credit union.
(d) The SOAH hearing on an order of conservation is closed to the public. All orders and correspondence relating thereto are confidential and may not be revealed to the public. Parties with access to confidential information during the contested case must sign a confidentiality agreement as provided in §91.8000(f) of this title (relating to Discovery of Confidential Information).
(e) Parties must file exceptions to the PFD within five days of the date of service of the PFD. Replies to exceptions shall be filed within eight days of the date of service of the PFD.

Source: The provisions of this §93.501 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5816; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.502. Retention of Attorney.

In the event a credit union retains an attorney or hires other persons to assist the credit union in contesting or satisfying the requirements of an order of conservation, the commissioner shall authorize the payment of reasonable fees and expenses for such persons as expenses of the conservatorship. In order for the commissioner to determine the reasonableness of the fees and expenses, the credit union must submit a billing statement showing the billable rate, the number of hours claimed, and a detailed description of services performed and related expenses incurred. The credit union may also submit copies of other bids received for the services, research substantiating the reasonableness of the fees charged, or any other evidence the credit union believes may support the reasonableness of the fees and expenses. Any fees or expenses the commissioner deems unreasonable shall not be authorized for payment.

Source: The provisions of this §93.502 adopted to be effective March 14, 2004, 29 TexReg 2639; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and readopted to be effective February 22, 2010, 35 TexReg 2021; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

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Subchapter F. Appeal of Commissioner's Final Determination to the Commission

§93.601. Appeal to the Commission.

(a) An aggrieved party may appeal the commissioner's final decision to the Commission. The appeal must be in writing and must be filed within the applicable statutory deadline.
(b) The appeal must state the identities and interests of the parties, the particular matters complained of, any specific objections, and the action sought from the Commission.
(c) The Commission shall act on the appeal within the applicable statutory deadline or within sixty days, whichever is earlier.

Source: The provisions of this §93.601 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1634; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5816; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.602. Decision by the Commission.

The Commission shall consider the questions raised in the appeal, as well as any additional matters pertinent to the appeal, whether or not included in the motion for appeal. Decisions by the Commission must be based on testimony and other evidence in the hearing record. The Commission may adopt or decline to adopt, with or without changes, all or part of the commissioner's decision or the ALJ's PFD and the underlying findings of fact and conclusions of law. The Commission may remand the proceeding for further consideration by the commissioner with or without reopening the hearing. The Commission may take any additional actions it considers to be just and reasonable, as permitted by law.

Source: The provisions of this §93.602 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1635; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5816; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.603. Oral Arguments Before the Commission.

Any party wishing to present oral arguments to the Commission must make a written request at least fifteen days before the scheduled Commission meeting. The request must state the length of time the party seeks. The Commission, may grant or deny the request. If the request is granted, the Commission will determine the amount of time allotted and the issues on which oral argument is

allowed. The Commission may deny the request for oral argument but request that the parties be present at the meeting at which the case is to be considered to address any questions that Commission members may have.

Source: The provisions of this §93.603 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1635; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5816; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.604. Motion for Rehearing.

(a) The procedures and deadlines of APA §2001.146 govern the filing of a motion for rehearing with the Commission.

(b) The Commission by written order may shorten the times for filing motions for rehearing and replies and for Commission action or overruling by operation of law, provided all parties agree in writing to the modifications.

Source: The provisions of this §93.604 adopted to be effective August 10, 1999, 24 TexReg 6027; amended to be effective February 24, 2003, 28 TexReg 1635; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5817; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

§93.605. Final Decisions and Appeals.

(a) The Commission's decision is final and appealable:

(1) if a motion for rehearing is not filed on time, upon the expiration of the period for filing a motion for rehearing; or

(2) if a motion for rehearing is filed on time, on the date the order overruling the motion for rehearing is rendered; or the motion is overruled by operation of law.

(b) A person who is aggrieved by a final decision of the Commission in a contested case may seek judicial review of the decision. Judicial review of a final decision is under the substantial evidence rule.

Source: The provisions of this §93.605 adopted to be effective August 10, 1999, 24 TexReg 6027; readopted to be effective November 18, 2002, 27 TexReg 11185; readopted to be effective February 21, 2006, 31 TexReg 1479; reviewed and amended to be effective July 11, 2010, 35 TexReg 5817; reviewed and readopted to be effective February 24, 2014, 39 TexReg 1738; reviewed and readopted to be effective March 9, 2018, 43 TexReg 1887.

Part VIII. Joint Interpretations

Chapter 153. Administrative Interpretation of Subsection (a), Section 50, Article XVI, Texas Constitution, (The Home Equity Lending Law)

§153.1. Definitions.

Any reference to Section 50 in this interpretation refers to Article XVI, Texas Constitution, unless otherwise noted. These words and terms have the following meanings when used in this chapter, unless the context indicates otherwise:

(1) Balloon – an installment that is more than an amount equal to twice the average of all installments scheduled before that installment.

(2) Business Day – All calendar days except Sundays and these federal legal public holidays: New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(3) Closed or closing – the date when each owner and the spouse of each owner signs the equity loan agreement or the act of signing the equity loan agreement by each owner and the spouse of each owner.

(4) Consumer Disclosure – The written notice contained in Section 50(g) that must be provided to the owner at least 12 days before the date the extension of credit is made.

(5) Cross-default provision– a provision in a loan agreement that puts the borrower in default if the borrower defaults on another obligation.

(6) Date the extension of credit is made – the date on which the closing of the equity loan occurs.

(7) Equity loan – An extension of credit as defined and authorized under the provisions of Section 50(a)(6).

(8) Equity loan agreement – the documents evidencing the agreement between the parties of an equity loan.

(9) Fair Market Value – the fair market value of the homestead as determined on the date that the loan is closed.

(10) Force-placed insurance – insurance purchased by the lender on the homestead when required insurance on the homestead is not maintained in accordance with the equity loan agreement.

(11) Interest – As used in Section 50(a)(6)(E), "interest" means the amount determined by multiplying the loan principal by the interest rate over a period of time.

(12) Lockout provision – a provision in a loan agreement that prohibits a borrower from paying the loan early.

(13) Owner – A person who has the right to possess, use, and convey, individually or with the joinder of another person, all or part of the homestead.

(14) Preclosing Disclosure – The written itemized disclosure required by Section 50(a)(6)(M)(ii).

(15) Two percent limitation – the limitation on fees in Section 50(a)(6)(E).

Source: The provisions of this §153.1 adopted to be effective January 7, 2004, 29 TexReg 84; 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 10407; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448; reviewed and amended to be effective March 29, 2018, 43 TexReg 1839.

§153.2. Voluntary Lien: Section 50(a)(6)(A).

An equity loan must be secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner's spouse.

(1) The consent of each owner and each owner's spouse must be obtained, regardless of whether any owner's spouse has a community property interest or other interest in the homestead.

(2) An owner or an owner's spouse who is not a maker of the note may consent to the lien by signing a written consent to the mortgage instrument. The consent may be included in the mortgage instrument or a separate document.

(3) The lender, at its option, may require each owner and each owner's spouse to consent to the equity loan. This option is in addition to the consent required for the lien.

Source: The provisions of this §153.2 adopted to be effective January 7, 2004, 29 TexReg 84; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.3. Limitation on Equity Loan Amount: Section 50(a)(6)(B).

An equity loan must be of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made. For example, on a property with a fair market value of $100,000, the maximum amount of debt against the property permitted by Section 50(a)(6)(B) is $80,000. Assuming existing debt of $30,000, the maximum amount of the equity loan debt is $50,000.

(1) The principal amount of an equity loan is the sum of:

(A) the amount of the cash advanced; and

(B) the charges at the inception of an equity loan to the extent these charges are financed in the principal amount of the loan.

(2) The principal balance of all outstanding debt secured by the homestead on the date the extension of credit is made determines the maximum principal amount of an equity loan.

(3) The principal amount of an equity loan does not include interest accrued after the date the extension of credit is made (other than any interest capitalized and added to the principal balance on the date the extension of credit is made), or other amounts advanced by the lender after closing as a result of default, including for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney's fees.

(4) On a closed-end multiple advance equity loan, the principal balance also includes contractually obligated future advances not yet disbursed.

Source: The provisions of this §153.3 adopted to be effective January 7, 2004, 29 TexReg 84; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21,2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.4. Nonrecourse: Section 50(a)(6)(C).

An equity loan must be without recourse for personal liability against each owner and the spouse of each owner, unless the owner or spouse obtained the extension of credit by actual fraud.

(1) If an owner or the spouse of an owner cosigns an equity loan agreement or consents to a security interest, the equity loan must not give the lender personal liability against an owner or an owner's spouse.

(2) A lender is prohibited from pursuing a deficiency except when the owner or owner's spouse has committed actual fraud in obtaining an equity loan.

(3) To determine whether a lender may pursue personal liability, the borrower or owner must have committed "actual fraud." To obtain personal liability under this section, the deceptive conduct must constitute the legal standard of "actual fraud." Texas case law distinguishes "actual fraud" from "constructive fraud." "Actual fraud" encompasses dishonesty of purpose or intentional breaches of duty that are designed to injure another or to gain an undue and unconscientious advantage.

Source: The provisions of this §153.4 adopted to be effective January 7, 2004, 29 TexReg 85; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§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.

§153.7. Prohibition on Prepayment Penalties: Section 50(a)(6)(G).

An equity loan may be paid in advance without penalty or other charge.

(1) A lender may not charge a penalty to a borrower for paying all or a portion of an equity loan early.

(2) A lockout provision is not permitted in an equity loan agreement because it is considered a prepayment penalty.

Source: The provisions of this §153.7 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; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.8. Security of the Equity Loan: Section 50(a)(6)(H).

An equity loan must not be secured by any additional real or personal property other than the homestead. The definition of "homestead" is located at Section 51 of Article XVI, Texas Constitution, and Chapter 41 of the Texas Property Code.

(1) A lender and an owner or an owner's spouse may enter into an agreement whereby a lender may acquire an interest in items incidental to the homestead. An equity loan secured by the following items is not considered to be secured by additional real or personal property:

(A) escrow reserves for the payment of taxes and insurance;

(B) an undivided interest in a condominium unit, a planned unit development, or the right to the use and enjoyment of certain property owned by an association;

(C) insurance proceeds related to the homestead;

(D) condemnation proceeds;

(E) fixtures; or

(F) easements necessary or beneficial to the use of the homestead, including access easements for ingress and egress.

(2) A guaranty or surety of an equity loan is not permitted. A guaranty or surety is considered additional property for purposes of Section 50(a)(6)(H). Prohibiting a guaranty or surety is consistent with the prohibition against personal liability in Section 50(a)(6)(C). An equity loan with a guaranty or surety would create indirect liability against the owner. The constitutional home equity lending provisions clearly provide that the homestead is the only allowable collateral for an equity loan. The constitutional home equity provisions prohibit the lender from contracting for recourse of any kind against the owner or owner's spouse, except for provisions providing for recourse against the owner or spouse when the extension of credit is obtained by actual fraud.

(3) A contractual right of offset in an equity loan agreement is prohibited.

(4) A contractual cross-collateralization clause in an equity loan agreement is prohibited.

(5) Any equity loan on an urban homestead that is secured by more than ten acres is secured by additional real property in violation of Section (50)(a)(6)(H).

Source: The provisions of this §153.8 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; reviewed and amended to be effective November 24, 2016, 41 TexReg 9106.

§153.9. Acceleration: Section 50(a)(6)(J).

An equity loan may not be accelerated because of a decrease in the market value of the homestead or because of the owner's default under other indebtedness not secured by a prior valid encumbrance against the homestead.

(1) An equity loan agreement may contain a provision that allows the lender to accelerate the loan because of a default under the covenants of the loan agreement. Examples of these provisions include a promise to maintain the property or not remove improvements to the property that indirectly affects the market value of the homestead.

(2) A contractual cross-default clause is permitted only if the lien associated with the equity loan agreement is subordinate to the lien that is referenced by the cross default clause.

Source: The provisions of this §153.9 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; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.10. Number of Loans: Section 50(a)(6)(K).

An equity loan must be the only debt secured by the homestead at the time the extension of credit is made unless the other debt was made for a purpose described by Section 50(a)(1)-(a)(5) or (a)(8).

(1) Number of Equity Loans. An owner may have only one equity loan at a time, regardless of the aggregate total outstanding debt against the homestead.

(2) Loss of Homestead Designation. If under Texas law the property ceases to be the homestead of the owner, then the lender, for purposes of Section 50(a)(6)(K), may treat what was previously a home equity mortgage as a non-homestead mortgage.

Source: The provisions of this §153.10 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 effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.11. Repayment Schedule: Section 50(a)(6)(L)(i).

Unless an equity loan is a home equity line of credit under Section 50(a)(6)(t), the loan must be scheduled to be repaid in substantially equal successive periodic installments, not more often than every 14 days and not less often than monthly, beginning no later than two months from the date the extension of credit is made, each of which equals or exceeds the amount of accrued interest as of the date of the scheduled installment.

(1) The two month time period contained in Section 50(a)(6)(L)(i) begins on the date of closing.

(2) For purposes of Section 50(a)(6)(L)(i), a month is the period from a date in a month to the corresponding date in the succeeding month. For example, if a home equity loan closes on March 1, the first installment must be due no later than May 1. If the succeeding month does not have a corresponding date, the period ends on the last day of the succeeding month. For example, if a home equity loan closes on July 31, the first installment must be due no later than September 30.

(3) For a closed-end equity loan to have substantially equal successive periodic installments, some amount of principal must be reduced with each installment. This requirement prohibits balloon payments.

(4) Section 50(a)(6)(L)(i) does not preclude a lender's recovery of payments as necessary for other amounts such as taxes, adverse liens, insurance premiums, collection costs, and similar items.

Source: The provisions of this §153.11 adopted to be effective January 7, 2004, 29 TexReg 86; reviewed and amended to be effective November 13, 2008, 33 TexReg 9074; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.12. Closing Date: Section 50(a)(6)(M)(i).

An equity loan may not be closed before the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure. One copy of the required consumer disclosure may be provided to married owners. For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure is the first day of the 12-day waiting period. The equity loan may be closed at any time on or after the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure.

(1) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender.

(2) A loan application may be given orally or electronically.

Source: The provisions of this §153.12 adopted to be effective January 7, 2004, 29 TexReg 86; reviewed and amended to be effective November 13, 2008, 33 TexReg 9075; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.13. Preclosing Disclosure: 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 copy of the loan application, if not previously provided, and 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 preclosing disclosure to the owner or the lender may modify the previously provided preclosing disclosure on the date of closing.

(1) For purposes of this section, the "preclosing disclosure" consists of a copy of the loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing.

(2) The copy of the loan application submitted to the owner in satisfaction of the preclosing disclosure requirement must be the most current version at the time the document is delivered. The lender is not obligated to provide another copy of the loan application if the only difference from the version previously provided to the owner is formatting. The lender is not obligated to give another copy of the loan application if the information contained on the more recent application is the same as that contained on the application of which the owner has a copy.

(3) A lender must deliver to the owner a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing.

(A) For a closed-end equity loan, the lender may satisfy this requirement by delivering a properly completed closing disclosure under Regulation Z, 12 C.F.R. Section 1026.19(f) and Section 1026.38.

(B) For a home equity line of credit, the lender may satisfy this requirement by delivering properly completed account-opening disclosures under Regulation Z, 12 C.F.R. Section 1026.6(a).

(4) Bona fide emergency.

(A) An owner may consent to receive the preclosing disclosure or a modification of 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 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 the owner's right to receive a final itemized disclosure containing all actual fees, points, costs, and charges one day prior to closing.

(5) Good cause. 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.

(A) Good cause to modify 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 financial impact or an adverse consequence.

(ii) At the owner's election, a good cause to modify the preclosing disclosure may be established if:

(I) the modification does not create a material adverse financial consequence to the owner; or

(II) a delay in the closing would create an adverse consequence to the owner.

(iii) The term "de minimis" as used in this section means a very small or insignificant amount.

(B) At the owner's election, a de minimis good cause standard may be presumed if:

(i) the total actual disclosed fees, costs, points, and charges on the date of closing do not exceed in the aggregate more than the greater of $100 or 0.125 percent of the principal amount of the loan (e.g. 0.125 percent on a $80,000 principal loan amount equals $100) from the initial preclosing disclosure; and

(ii) no itemized fee, cost, point, or charge exceeds 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.

(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;

(ii) specifically states that the owner consents to receive 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 the owner's right to receive a final itemized disclosure containing all fees, costs, points, or charges one day prior to closing.

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

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

Source: The provisions of this §153.13 adopted to be effective June 29, 2006, 31 TexReg 5080; amended to be effective November 9, 2006, 31 TexReg 9022; reviewed and amended to be effective November 13, 2008, 33 TexReg 9075; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and amended to be effective November 24, 2016, 41 TexReg 9106.

§153.14. One Year Prohibition: Section 50(a)(6)(M)(iii).

An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property.

(1) Section 50(a)(6)(M)(iii) prohibits an owner who has obtained an equity loan from:

(A) refinancing the equity loan before one year has elapsed since the loan's closing date; or

(B) obtaining a new equity loan on the same homestead property before one year has elapsed since the previous equity loan's closing date, regardless of whether the previous equity loan has been paid in full.

(2) Section 50(a)(6)(M)(iii) does not prohibit modification of an equity loan before one year has elapsed since the loan's closing date. A modification of a home equity loan occurs when one or more terms of an existing equity loan is modified, but the note is not satisfied and replaced. A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction.

(A) A modification of an equity loan must be agreed to in writing by the borrower and lender, unless otherwise required by law. An example of a modification that is not required to be in writing is the modification required under the Servicemembers Civil Relief Act, 50 U.S.C. app. Sections 501-597b.

(B) The advance of additional funds to a borrower is not permitted by modification of an equity loan.

(C) A modification of an equity loan may not provide for new terms that would not have been permitted by applicable law at the date of closing of the extension of credit.

(D) The two percent limitation required by Section 50(a)(6)(E) applies to the original home equity loan and any subsequent modification as a single transaction.

Source: The provisions of this §153.14 adopted to be effective January 7, 2004, 29 TexReg 86; reviewed and amended to be effective November 13, 2008, 33 TexReg 9076; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and amended to be effective November 24, 2016, 41 TexReg 9106, reviewed and amended to be effective March 29, 2018, 43 TexReg 1839.

§153.15. Location of Closing: Section 50(a)(6)(N).

An equity loan may be closed only at an office of the lender, an attorney at law, or a title company. The lender is anyone authorized under Section 50(a)(6)(P) that advances funds directly to the owner or is identified as the payee on the note.

(1) An equity loan must be closed at the permanent physical address of the office or branch office of the lender, attorney, or title company. The closing office must be a permanent physical address so that the closing occurs at an authorized physical location other than the homestead.

(2) Any power of attorney allowing an attorney-in-fact to execute closing documents on behalf of the owner or the owner's spouse must be signed by the owner or the owner's spouse at an office of the lender, an attorney at law, or a title company. A lender may rely on an established system of verifiable procedures to evidence compliance with this paragraph. For example, this system may include one or more of the following:

(A) a written statement in the power of attorney acknowledging the date and place at which the power of attorney was executed;

(B) an affidavit or written certification of a person who was present when the power of attorney was executed, acknowledging the date and place at which the power of attorney was executed; or

(C) a certificate of acknowledgement signed by a notary public under Chapter 121, Civil Practice and Remedies Code, acknowledging the date and place at which the power of attorney was executed.

(3) The consent required under Section 50(a)(6)(A) must be signed by the owner and the owner's spouse, or an attorney-in-fact described by paragraph (2) of this subsection, at an office of the lender, an attorney at law, or a title company.

Source: The provisions of this §153.15 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 10409 reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.16. Rate of Interest: Section 50(a)(6)(O).

A lender may contract for and receive any fixed or variable rate of interest authorized under statute.

(1) An equity loan that provides for interest must comply with constitutional and applicable law. Interest rates on certain first mortgages are not limited on loans subject to the federal Depository Institutions Deregulation and Monetary Control Act of 1980 and the Alternative Mortgage Transaction Parity Act. Chapter 342 of the Texas Finance Code provides for a maximum rate on certain secondary mortgage loans. Chapter 124 of the Texas Finance Code and federal law provide for maximum rates on certain mortgage loans made by credit unions. These statutes operate in conjunction with Section 50(a) and other constitutional sections.

(2) An equity loan must amortize and contribute to amortization of principal.

(3) The lender may contract to vary the scheduled installment amount when the interest rate adjusts on a variable rate equity loan. A variable-rate loan is a mortgage in which the lender, by contract, can adjust the mortgage's interest rate after closing in accordance with an external index.

(4) The scheduled installment amounts of a variable rate equity loan must be:

(A) substantially equal between each interest rate adjustment; and

(B) sufficient to cover at least the amount of interest scheduled to accrue between each payment date and a portion of the principal.

(5) An equity loan agreement may contain an adjustable rate of interest that provides a maximum fixed rate of interest pursuant to a schedule of steps or tiered rates or provides a lower initial interest rate through the use of a discounted rate at the beginning of the loan.

Source: The provisions of this §153.16 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; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.17. Authorized Lenders: Section 50(a)(6)(P).

An equity loan must be made by one of the following that has not been found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the applicants for the loans reside or the property proposed to secure the loans is located in a certain area: a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States; including a subsidiary of a bank, savings and loan association, savings bank, or credit union described by this section; a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans; a person licensed to make regulated loans, as provided by statute of this state; a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase; a person who is related to the homestead owner within the second degree of affinity and consanguinity; or a person regulated by this state as a mortgage banker or mortgage company.

(1) An authorized lender under Texas Finance Code, Chapter 341 must meet both constitutional and statutory qualifications to make an equity loan.

(2) A HUD-approved mortgagee is a person approved as a mortgagee by the United States government to make federally insured loans for purposes of Section 50(a)(6)(P)(ii). Loan correspondents to a HUD-approved mortgage are not authorized lenders of equity loans unless qualifying under another provision of Section 50(a)(6)(P).

(3) A person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage company for purposes of Section 50(a)(6)(P)(vi). A person who is registered under Texas Finance Code, Chapter 157 is a person regulated by this state as a mortgage banker for purposes of Section 50(a)(6)(P)(vi).

(4) A person who is licensed under Texas Finance Code, Chapter 342 is a person licensed to make regulated loans for purposes of Section 50(a)(6)(P)(iii). If a person is not described by Section 50(a)(6)(P)(i),(ii),(iv),(v), or (vi), then the person must obtain a license under Texas Finance Code, Chapter 342 in order to be authorized to make an equity loan under Section 50(a)(6)(P)(iii).

Source: The provisions of this §153.17 adopted to be effective January 7, 2004, 29 TexReg 87; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and amended to be effective November 24, 2016, 41 TexReg 9106; reviewed and amended to be effective March 29, 2017, 43 TexReg 1839.

§153.18. Limitation on Application of Proceeds: Section 50(a)(6)(Q)(i).

An equity loan must be made on the condition that the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender.

(1) The lender may not require an owner to repay a debt owed to the lender, unless it is a debt secured by the homestead. The lender may require debt secured by the homestead or debt to another lender or creditor be paid out of the proceeds of an equity loan.

(2) An owner may apply for an equity loan for any purpose. An owner is not precluded from voluntarily using the proceeds of an equity loan to pay on a debt owed to the lender making the equity loan.

Source: The provisions of this §153.18 adopted to be effective June 29, 2006, 31 TexReg 5080; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.20. No Blanks in Any Instrument: Section 50(a)(6)(Q)(iii).

A home equity loan must be made on the condition that the owner of the homestead not sign any instrument in which blanks are left to be filled in.

(1) This Section of the Constitution prohibits the owner of the homestead from signing any instrument in which blanks are "left to be filled in". This Section is intended to prohibit a person other than the owner from completing one or more blanks in an instrument after the owner has signed the instrument and delivered it to the lender, thereby altering a party's obligation created in the instrument. Not all documents or records executed in connection with an equity loan are instruments, and not all blanks contained in an instrument are "blanks that are left to be filled in" as contemplated by this Section.

(2) As used in this Section, the term instrument means a document or record that creates or alters a legal obligation of a party. A disclosure required under state or federal law is not an instrument if the disclosure does not create or alter the obligation of a party.

(3) If at the time the owner signs an instrument, a blank is completed or box checked which indicates the owner's election to select one of multiple options offered (such as an election to select a fixed rate instead of an adjustable rate) and the owner therefore by implication has excluded the non-selected options, the instrument does not contain "blanks left to be filled in" when the non-selected option is left blank.

Source: The provisions of this §153.20 adopted to be effective June 29, 2006, 31 TexReg 5080; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.22. Copies of Documents: Section 50(a)(6)(Q)(v).

At closing, the lender must provide the owner with a copy of the final loan application and all executed documents that are signed by the owner at closing in connection with the equity loan. One copy of these documents may be provided to married owners. This requirement does not obligate the lender to give the owner copies of documents that were signed by the owner prior to or after closing.

Source: The provisions of this §153.22 adopted to be effective January 7, 2004, 29 TexReg 87, reviewed and amended to be effective July 10, 2008, 33 TexReg 5295; reviewed and amended to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.24. Release of Lien: Section 50(a)(6)(Q)(vii).

The lender must cancel and return the note to the owner and give the owner a release of lien or a copy of an endorsement and assignment of the lien to another lender refinancing the loan within a reasonable time after termination and full payment of the loan. The lender or holder, at its option, may provide the owner a release of lien or an endorsement and assignment of the lien to another lender refinancing the loan.

(1) The lender will perform these services and provide the documents required in 50(a)(6)(Q)(vii) without charge.

(2) This section does not require the lender to record or pay for the recordation of the release of lien.

(3) Thirty days is a reasonable time for the lender to perform the duties required under this section.

(4) An affidavit of lost or imaged note, or equivalent, may be returned to the owner in lieu of the original note, if the original note has been lost or imaged.

Source: The provisions of this §153.24 adopted to be effective January 7, 2004, 29 TexReg 87; reviewed and readopted to be effective June 20, 2008 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.25. Right of Rescission: Section 50(a)(6)(Q)(viii).

The owner of the homestead and any spouse of the owner may, within three days after the extension of credit is made, rescind the extension of credit without penalty or charge.

(1) This provision gives the owner's spouse, who may not be in record title or have community property ownership, the right to rescind the transaction.

(2) The owner and owner's spouse may rescind the extension of credit within three calendar days. If the third calendar day falls on a Sunday or federal legal public holiday then the right of rescission is extended to the next calendar day that is not a Sunday or federal legal public holiday.

(3) A lender must comply with the provisions of the Truth-in-Lending Act permitting the borrower three business days to rescind a mortgage loan in applicable transactions. Lender compliance with the right of rescission procedures in the Truth-in-Lending Act and Regulation Z, satisfies the requirements of this section if the notices required by Truth-in-Lending and Regulation Z are given to each owner and to each owner's spouse.

Source: The provisions of this §153.25 adopted to be effective January 7, 2004, 29 TexReg 87; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.41. Refinance of a Debt Secured by a Homestead: Section 50(e).

A refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)-(a)(5) of Section 50 of the Texas Constitution that includes the advance of additional funds may not be secured by a valid lien against the homestead unless: (1) the refinance of the debt is an extension of credit described by Subsection (a)(6) or (a)(7) of Section 50 of the Texas Constitution; or (2) the advance of all the additional funds is for reasonable costs necessary to

refinance such debt or for a purpose described by Subsection (a)(2), (a)(3), or (a)(5) of Section 50 of the Texas Constitution.

(1) Reasonableness and necessity of costs relate to the type and amount of the costs.

(2) In a secondary mortgage loan, reasonable costs are those costs which are lawful in light of the governing or applicable law that authorizes the assessment of particular costs. In the context of other mortgage loans, reasonable costs are those costs which are lawful in light of other governing or applicable law.

(3) Reasonable and necessary costs to refinance may include reserves or impounds (escrow trust accounts) for taxes and insurance, if the reserves comply with applicable law.

Source: The provisions of this §153.41 adopted to be effective January 7, 2004, 29 TexReg 87; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.45. Refinance of an Equity Loan: Section 50(f).

A refinance of debt secured by the homestead, any portion of which is an extension of credit described by Subsection (a)(6) of Section 50, may not be secured by a valid lien against the homestead unless either the refinance of the debt is an extension of credit described by Subsection (a)(6) or (a)(7) of Section 50, or all of the conditions in Section 50(f)(2) are met.

(1) One Year Prohibition. To meet the condition in Section 50(f)(2)(A), the refinance may not be closed before the first anniversary of the closing date of the equity loan. For purposes of this section, the closing date of the refinance is the date on which the owner signs the loan agreement for the refinance.

(2) Advance of Additional Funds. To meet the condition in Section 50(f)(2)(B), the refinance may not include the advance of any additional funds other than funds advanced to refinance a debt described by Subsections (a)(1) through (a)(7) of Section 50, or actual costs and reserves required by the lender to refinance the debt.

(A) In order to be included in the funds advanced for the refinance, actual costs must be identifiable, must be actually required by the lender to refinance the debt, and must comply with any applicable limitations on costs.

(B) In order to be included in the funds advanced for the refinance, reserves (e.g., an escrow account for taxes and insurance) must be actually required by the lender to refinance the debt, and must comply with applicable law.

(C) Amounts that the owner pays before or at closing (e.g., through cash, check, or electronic funds transfer) are not advanced by the lender, and are not subject to the limitation on the advance of additional funds.

(3) 80 Percent Limitation on Loan Amount. To meet the condition in Section 50(f)(2)(C), the refinance of the extension of credit must be of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the refinance of the extension of credit is made.

(A) The principal amount of the refinance is the sum of the amount advanced and any charges at the inception of the refinance, to the extent these charges are financed in the principal amount of the refinance.

(B) The principal balance of all outstanding debt secured by the homestead on the date the refinance is made determines the maximum principal amount of the refinance.

(C) The principal amount of the refinance does not include interest accrued after the date the refinance is made (other than any interest capitalized and added to the principal balance on the date the refinance is made), or other amounts advanced by the lender after closing as a result of default, including for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney's fees.

(4) Refinance Disclosure. To meet the condition in Section 50(f)(2)(D), the lender must provide the refinance disclosure described in Section 50(f)(2)(D) to the owner on a separate document not later than the third business day after the date the owner submits the loan application to the lender and at least 12 days before the date the refinance of the extension of credit is closed.

(A) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender. A loan application may be given orally or electronically.

(B) For purposes of Section 50(f)(2)(D), the application is submitted on the date the owner submits a loan application specifically for a refinance of a home equity loan to a non-home-equity loan. If the owner initially applies for another type of loan, then the application is considered submitted on the earliest of:

(i) the date the owner modifies the application, orally or in writing, to specify that it is for a refinance of a home equity loan to a non-home-equity loan; or

(ii) the date the owner submits a new application specifically for a refinance of a home equity loan to a non-home-equity loan.

(C) For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the date that the lender provides the owner a copy of the required refinance disclosure is the first day of the 12-day waiting period. The refinance may be closed at any time on or after the 12th calendar day after the lender provides the owner a copy of the required refinance disclosure.

(D) The lender must deliver the refinance disclosure or place it in the mail no later than the third business day after the owner submits the loan application. The refinance disclosure must be delivered to the owner at least 12 days before the refinance is closed. If a lender mails the refinance disclosure to the owner, the lender must allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

(E) One copy of the required refinance disclosure may be provided to married owners.

(F) The refinance disclosure is only a summary of the owner's rights, which are governed by the substantive terms of the constitution. The substantive requirements prevail regarding a lender's responsibilities in an equity loan or refinance. A lender may supplement the refinance disclosure to clarify any discrepancies or inconsistencies.

(G) A lender may rely on an established system of verifiable procedures to evidence compliance with this paragraph.

(H) The Finance Commission will publish a Spanish translation of the refinance disclosure on its website. A lender whose discussions with the owner are conducted primarily in Spanish may provide the Finance Commission's Spanish translation to the owner, although the Spanish translation is not required by Section 50(f)(2).

Source: The provisions of this §153.45 adopted to be effective March 29, 2018, 43 TexReg 1839.

§153.51. Consumer Disclosure: Section 50(g).

An equity loan may not be closed before the 12th day after the lender provides the owner with the consumer disclosure on a separate instrument.

(1) If a lender mails the consumer disclosure to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

(2) Certain provisions of the consumer disclosure do not contain the exact identical language concerning requirements of the equity loan that have been used to create the substantive requirements of the loan. The consumer notice is only a summary of the owner's rights, which are governed by the substantive terms of the constitution. The substantive requirements prevail regarding a lender's responsibilities in an equity loan transaction. A lender may supplement the consumer disclosure to clarify any discrepancies or inconsistencies.

(3) A lender may rely on an established system of verifiable procedures to evidence compliance with this section.

(4) A lender whose discussions with the borrower are conducted primarily in Spanish for a close-end loan may rely on the translation of the consumer notice developed under the requirements of Texas Finance Code, §341.502. Such notice shall be made available to the public through publication on the Finance Commission's webpage.

(5) If the owner has executed a power of attorney described by §153.15(2) of this title (relating to Location of Closing: Section 50(a)(6)(N)), then the lender may provide the consumer disclosure to the attorney-in-fact instead of providing it to the owner.

Source: The provisions of this §153.51 adopted to be effective January 7, 2004, 29 TexReg 87; reviewed and amended to be effective November 13, 2008, 33 TexReg 9076; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; amended to be effective January 1, 2015, 39 TexReg 10409; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.82. Owner Requests for HELOC Advance: Section 50(t)(1).

A home equity line of credit (HELOC) is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which the owner requests advances, repays money, and reborrows money. Any owner who is also a named borrower on the HELOC may request an advance. A HELOC agreement may contain provisions that restrict which borrowers may request an advance or require all borrowers to consent to the request.

Source: The provisions of this §153.82 adopted to be effective March 11, 2004, 29 TexReg 2310; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.84. Restrictions on Devices and Methods to Obtain a HELOC Advance: Section 50(t)(3).

A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which an owner is prohibited from using a

credit card, debit card, or similar device, or preprinted check unsolicited by the borrower to obtain a HELOC advance.

(1) A lender may offer one or more non-prohibited devices or methods for use by the owner to request an advance. Permissible methods include contacting the lender directly for an advance, telephonic fund transfers, and electronic fund transfers. Examples of devices that are not prohibited include prearranged drafts, preprinted checks requested by the borrower, or written transfer instructions. Regardless of the permissible method or device used to obtain a HELOC advance, the amount of the advance must comply with:

(A) the advance requirements in Section 50(t)(2); and

(B) the loan to value limits in Section 50(t)(5).

(2) A borrower may from time to time specifically request preprinted checks for use in obtaining a HELOC advance but may not request the lender to periodically send preprinted checks to the borrower. A borrower may use a check reorder form, which may be included with preprinted checks, as a means of requesting a specific number of preprinted checks.

(3) An owner may, but is not required to, make in-person contact with the lender to request preprinted checks or to obtain a HELOC advance.

Source: The provisions of this §153.84 adopted to be effective March 11, 2004, 29 TexReg 2310; reviewed and amended to be effective July 10, 2008, 33 TexReg 5295; reviewed and amended to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448; reviewed and amended to be effective March 29, 2018, 43 TexReg 1839.

§153.85. Time the Extension of Credit is Established: Section 50(t)(4).

(a) A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which fees described in Section 50(a)(6)(E) are charged and collected only at the time the extension of credit is established and no fee is charged or collected in connection with any debit or advance.

(b) For the purpose of this section, the time the extension of credit is established for a HELOC refers to the date of closing.

Source: The provisions of this §153.85 adopted to be effective March 11, 2004, 29 TexReg 2310; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.86. Maximum Principal Amount Extended under a HELOC: Section 50(t)(5).

A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which the maximum principal amount that may be extended under the account, when added to the aggregated total of the outstanding principal balances of all indebtedness secured by the homestead on the date the extension of credit is established, cannot exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made.

(1) At the time the initial or subsequent advance is made, the principal amount of the advance must comply with Section 50(t)(5). The following amounts when added together must be equal to or less than 80 percent of the fair market value:

(A) the amount of the advance;

(B) the amount of the principal balance of the HELOC at the time of the advance; and

(C) the principal balance outstanding of all other debts secured by the homestead on the date of the closing of the HELOC.

(2) An advance under Section 50(t)(5) must meet the requirements of Section 50(t)(2).

(3) The maximum principal balance of the HELOC that may be outstanding at any time must be determined on the date of closing and will not change through the term of the HELOC.

(4) For purposes of calculating the maximum principal balance under Section 50(t)(5), the outstanding principal balance of all other debts secured by the homestead is the principal balance outstanding of all other debts secured by the homestead on the date of the closing of the HELOC.

Source: The provisions of this §153.86 adopted to be effective March 11, 2004, 29 TexReg 2310; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5449; reviewed and amended to be effective March 29, 2018, 43 TexReg 1839.

§153.88. Repayment Terms of a HELOC: Section 50(t)(8).

(a) A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which repayment is to be made in regular periodic installments, not more often than every 14 days and not less often than monthly, beginning not later than two months from the date the extension of credit is established, and during the period during which the owner may request advances, each installment equals or exceeds the amount of accrued interest; and after the period during which the owner may request advances, installments are substantially equal.

(b) Repayment of a HELOC is not required to begin until two months after the initial advance. For example, if an advance is not made at the time of closing, the repayment period is not required to begin until after the first advance. If there is no outstanding balance, then a payment is not required.

(c) Nothing in this section prohibits a borrower from voluntarily making payments on a schedule that is more frequent or earlier than is required by a lender.

Source: The provisions of this §153.88 adopted to be effective March 11, 2004, 29 TexReg 2311; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.91. Adequate Notice of Failure to Comply.

(a) A borrower notifies a lender or holder of its alleged failure to comply with an obligation by taking reasonable steps to notify the lender or holder of the alleged failure to comply. The notification must include a reasonable:

(1) identification of the borrower;

(2) identification of the loan; and

(3) description of the alleged failure to comply.

(b) A borrower is not required to cite in the notification the section of the Constitution that the lender or holder allegedly violated.

Source: The provisions of this §153.91 adopted to be effective November 11, 2004, 29 TexReg 10259; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.92. Counting the 60-Day Cure Period.

(a) For purposes of Section 50(a)(6)(Q)(x), the day after the lender or holder receives the borrower's notification is day one of the 60-day period. All calendar days thereafter are counted up to day 60. If day 60 is a Sunday or federal legal public holiday, the period is extended to include the next day that is not a Sunday or federal legal public holiday.
(b) If the borrower provides the lender or holder inadequate notice, the 60-day period does not begin to run.

Source: The provisions of this §153.92 adopted to be effective November 11, 2004, 29 TexReg 10259; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.93. Methods of Notification.

(a) At closing, the lender or holder may make a reasonably conspicuous designation in writing of the location where the borrower may deliver a written or oral notice of a violation under 50(a)(6)(Q)(x). The designation may include a mailing address, physical address, and telephone number. In addition, the lender or holder may designate an email address or other point of contact for delivery of a notice.
(b) If the lender or holder chooses to change the designated delivery location as provided in subsection (a) of this section, the address change does not become effective until the lender or holder sends conspicuous written notice of the address change to the borrower.
(c) The borrower may always deliver written notice to the registered agent of the lender or holder even if the lender or holder has named a delivery location.
(d) If the lender or holder does not designate a location where the borrower may deliver a notice of violation, the borrower may deliver the notice to any physical address or mailing address of the lender or holder.
(e) Delivery of the notice by borrower to lender or holder's designated delivery location or registered agent by certified mail return receipt or other carrier delivery receipt, signed by the lender or holder, constitutes a rebuttable presumption of receipt by the lender or holder.
(f) If the borrower opts for a location or method of delivery other than set out in subsection (e), the borrower has the burden of proving that the location and method of delivery were reasonably calculated to put the lender or holder on notice of the default.

Source: The provisions of this §153.93 adopted to be effective March 3, 2005, 30 TexReg 1068; reviewed and adopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.94. Methods of Curing a Violation Under Section 50(a)(6)(Q)(x)(a)-(e).

(a) The lender or holder may correct a failure to comply under Section 50(a)(6)(Q)(x)(a) – (e), on or before the 60th day after the lender or holder receives the notice from an owner, if the lender or holder delivers required documents, notices, acknowledgements, or pays funds by:

(1) placing in the mail, placing with other delivery carrier, or delivering in person the required documents, notices, acknowledgements, or funds;

(2) crediting the amount to borrower's account; or

(3) using any other delivery method that the borrower agrees to in writing after the lender or holder receives the notice.

(b) The lender or holder has the burden of proving compliance with this section.

Source: The provisions of this §153.94 adopted to be effective November 11, 2004, 29 TexReg 10259; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.95. Cure a Violation Under Section 50(a)(6)(Q)(x).

(a) If the lender or holder timely corrects a violation of Section 50(a)(6) as provided in Section 50(a)(6)(Q)(x), then the violation does not invalidate the lien.

(b) A lender or holder who complies with Section 50(a)(6)(Q)(x) to cure a violation before receiving notice of the violation from the borrower receives the same protection as if the lender had timely cured after receiving notice.

(c) A borrower's refusal to cooperate fully with an offer that complies with Section 50(a)(6)(Q)(x) to modify or refinance an equity loan does not invalidate the lender's protection for correcting a failure to comply.

Source: The provisions of this §153.95 adopted to be effective November 11, 2004, 29 TexReg 10259; reviewed and amended to be effective November 13, 2008, 33 TexReg 9077; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.

§153.96. Correcting Failures Under Section 50(a)(6)(Q)(x)(f).

(a) To correct a failure to comply under Section 50(a)(6)(Q)(x)(f), on or before the 60th day after the lender or holder receives the notice from the borrower the lender or holder may:

(1) refund or credit the $1,000 to the account of the borrower; and

(2) make an offer to modify or an offer to refinance the extension of credit on the terms provided in Section 50(a)(6)(Q)(x)(f) by placing the offer in the mail, other delivery carrier, or delivering the offer in person to the owner.

(b) To correct a failure to comply under Section 50(a)(6)(Q)(x)(f):

(1) the lender or holder has the option to either refund or credit $1,000; and

(2) the lender or holder and borrower may:

(A) modify the equity loan without completing the requirements of a refinance; or

(B) refinance with an extension of credit that complies with Section 50(a)(6).

(c) The lender or holder has the burden of proving compliance with this section.

(d) After the borrower accepts an offer to modify or refinance, the lender must make a good faith attempt to modify or refinance within a reasonable time not to exceed 90 days.

Source: The provisions of this §153.96 adopted to be effective November 11, 2004, 29 TexReg 10260; reviewed and readopted to be effective June 20, 2008, 33 TexReg 5352; reviewed and readopted to be effective June 21, 2013, 38 TexReg 4393; reviewed and readopted to be effective July 28, 2016, 41 TexReg 5448.