No. 10-0121

In the Supreme Court of Texas

VALERIE NORWOOD, ELISE SHOWS, MARYANN ROBLES-VALDEZ, BOBBY MARTIN, PAMELA COOPER, AND CARLOS RIVAS
Cross-Petitioners,

v.

THE FINANCE COMMISSION OF TEXAS, THE CREDIT UNION COMMISSION OF TEXAS, AND TEXAS BANKERS ASSOCIATION
Cross-Respondents.

On Review from the
Third Court of Appeals in Austin, Texas
No. 03-06-00273-CV

PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	This is an administrative law case. Cross-Petitioners / Respondents challenged the validity of Finance Commission and Credit Union Commission rules interpreting the home equity lending provisions of Article XVI, § 50(a)(6) of the Texas Constitution. **(App., Tab E)**.
Trial Court:	126th District Court, Travis County, Texas; the Honorable Scott Jenkins, presiding.
Trial Court's Disposition:	On cross motions for summary judgment, the trial court invalidated seven of the nine challenged regulations. Of the regulations still at issue, the trial court invalidated the rules relating to the fee cap. 7 TEX. ADMIN. CODE ("TAC") §§ 153.1(11) and 153.5(3), (4), (6), (8), (9), (12), and denied challenges to rules allowing the use of a power of attorney and consent by mail for closing and rules related to providing the loan disclosure information. **(App., Tab A)**. *See* 7 TAC §§ 153.15(2) and (3) and 7 TAC §§ 153.51(1) and (3). **(App., Tab C)**.
Parties in Court of Appeals:	The Finance Commission of Texas and the Credit Union Commission of Texas (Appellants / Cross-Appellees) Texas Bankers Association (Intervenor / Appellant / Cross- Appellee) ACORN, Valerie Norwood, Elise Shows, Maryann Robles-Valdez, Bobby Martin, Pamela Cooper, and Carlos Rivas (Appellees / Cross-Appellants)
Court of Appeals:	The Third District of Texas, Austin, Texas; opinion by Justice Henson, joined by Justice Patterson; Justice Puryear concurred and dissented.

Court of Appeals' Disposition:

The court of appeals affirmed the decision of the trial court regarding the fee cap, power of attorney and disclosure mailing rules, but reversed the judgment on the remaining rule challenges because of changes to the Texas Constitution that occurred during the pendency of the appeal. *Tex. Bankers Ass'n v. Ass'n of Cmty. Orgs. for Reform Now*, 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. filed) **(App., Tab B)**. No motions for rehearing or en banc reconsideration were filed by any party in the court of appeals. Petitioners Commissions and Bankers seek reversal of the court of appeals' decision on the fee cap rule. Respondents bring this cross-petition seeking this Court's reversal of the court of appeals' decision on the rules relating to the constitutional requirement of the location of the closing of a home equity loan and the constitutional requirement of providing the borrower with a notice of the general conditions and terms of the loan.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to Section 22.001(a)(1) of the Texas Government Code, because the justices of the court of appeals disagree on questions of law material to the decision in this case, and pursuant to Section 22.001(a)(6), because the court of appeals committed errors of law concerning constitutional construction that are of such importance to the jurisprudence of the State that such errors require correction.

ISSUES PRESENTED

1. Did the court of appeals err by upholding the Commissions' rules that validate a home equity loan signed by a homeowner anywhere using a power of attorney and the mail instead of the homeowner signing it at the constitutionally-required locations?

2. Did the court of appeals err by upholding the Commissions' rules that validate a home equity loan without requiring the homeowner receive a constitutionally-required notice of the terms and conditions of the loan?

3. Did the court of appeals err by granting the Commissions deference to enact new policy when the agency is constitutionally limited only to "interpretation" of the home equity lending provisions of the Texas Constitution subjecting the rules to *de novo* review?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Cross-Petitioners/Respondents Valerie Norwood, Elise Shows, Maryann Robles-Valdez, Bobby Martin, Pamela Cooper, and Carlos Rivas respectfully file this cross-petition for review.

INTRODUCTION

For over 150 years, Texas protected homeowners from losing their homes for private third party debts other than loans for to purchase or repair them. These homestead protections are in the Texas Constitution, Article XVI, Section 50 (hereinafter referred to as "Section 50" or "the Homestead Provision"), and they prohibit, with only a handful of exceptions, the forced sale of Texas homesteads.[1] In 1997, Texans decided to allow an additional exception to the prohibition against the forced sale of homesteads and approved a constitutional amendment allowing loans for other debts to be secured by Texas homes -- so called "home equity loans."

Because Texas was the last state in the country to authorize these loans, the Texas Legislature had the opportunity to learn from the mistakes made by other states in crafting the Texas structure, process and terms of valid home equity loans. But after passage of the constitutional amendment, lenders claimed they

[1] Section 50 states in part: "(a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for: (1) the purchase money thereof, or a part of such purchase money; (2) the taxes due thereon; (3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding; (4) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of the owner; (5) work and material used in constructing new improvements… ." TEX. CONST. Art. XVI, § 50(a)(1)-(5).

desired more clarity in the meaning of the constitutional language and Texas passed another constitutional change authorizing a state agency to interpret these constitutional provisions creating safe harbors for lenders. It is some of these agency interpretations that are in dispute. Also in dispute is the level of deference courts should grant these agency interpretations upon review.

STATEMENT OF FACTS

In 1997, the 75th Legislature adopted House Joint Resolution 31, adding Section 50(a)(6) to the Homestead Provision of the Texas Constitution and permitting for the first time what is known in Texas as a "home equity loan." The voters of Texas approved H.J.R. 31 and the new law became effective January 1, 1998. Under it, the new law authorized the forced sale of a home, but only where the home equity loan, the lender, and the closing meet the specific conditions of subparts (A) through (Q).[2] Indeed, Section 50(a)(6) details over 30 separate paragraphs of specific requirements that must be fulfilled for a home equity loan to fall within the exception allowing the forced sale of a home. "[M]any of the provisions of the constitutional amendment permitting home equity loans [in Texas] were designed to address the predatory lending problems that borrowers have faced in other states."[3] It is these very same provisions that members of the industry and others believe protected Texans, the Texas real estate market, and its

[2] TEX. CONST. art. XVI, §50(a)(6) (amended 1998).

[3] Julia Patterson Forrester, *Home Equity Loans in Texas: Maintaining the Texas Tradition of Homestead Protection,* 55 SMU L. Rev. 157, 164-165 (Winter 2002).

economy from some of the improvident loans made in other parts of the country in recent years.

In response to the concerns of lenders, voters approved another constitutional amendment in 2003, Section 50(u) of the Homestead Provision, which allowed the Texas Legislature to name one or more state agencies to interpret specific provisions of the Texas Constitution, including 50(a)(6) loans (home equity loans), and to create interpretative "safe harbors" for lenders. The 78th Legislature enacted Senate Bill 1067 authorizing the Finance Commission of Texas and Credit Union Commission of Texas (jointly "Commissions") to interpret the specified provisions of Section 50.[4]

The Legislature did not give the Commissions authority to prescribe law or policy, or implement any constitutional provision. They were also not given the right to enforce home equity provisions. They were given one job—to "interpret" certain sections of the Homestead Provision. *Id*.

However, using their interpretive powers, the Commissions created an exception to the constitutional requirement that a home equity loan must be "closed only at the office of a lender, an attorney at law, or a title company." *See* TEX. CONST. ART XVI, § 50(a)(6)(N). Rather, 7 TEX. ADMIN. CODE § 153.15 allows lenders to accept a power of attorney to execute closing documents, and

[4] Codified as Sections 11.308 and 15.413 of the Texas Finance Code.

allows lenders to accept by mail the written consent to the loan of homeowners not present at the closing.

In addition, the Commissions used their interpretive powers to change the constitutionally required notice of the terms and conditions of the home equity loan when they created an exception to the requirement that the notice be received by the homeowner. TEX. CONST. ART XVI, § 50(g). The Commissions' rule allows lenders to rely on their internal procedures and presume homeowners receive the notice. 7 TEX. ADMIN. CODE § 153.51 ("Rule 153.51"[5]).

Cross-Petitioners/Respondents challenged certain interpretations by the Commissions. On cross-motions for summary judgment, the trial court invalidated seven of the nine challenged rules. The court of appeals affirmed the trial court's invalidation of the fee cap and affirmed the trial court's approval of the power of attorney and disclosure mailing rules. All parties have filed petitions for review.

SUMMARY OF THE ARGUMENT

The court of appeals erred in upholding certain rules promulgated by the Commissions. The Commissions, unlike most agency delegations of power, were not given authority to prescribe law or policy, make new rules, or implement any constitutional provision.[6] Instead the Commissions were given only the job of

[5] This Cross-Petition will refer to the Commissions' interpretations in the form "Rule 153.xx."

[6] TEX. CONST. ART. XVI, § 50(u); TEX. FIN. CODE ANN. §11.308 (Vernon Supp. 2006) ("The finance commission may, on request of an interested person or on its own motion, issue interpretations of Sections 50(a)(5)-(7), (e)-(p), (t), and (u), Article XVI, Texas Constitution. An interpretation under this section is subject to Chapter 2001, Government Code, and is applicable to all lenders authorized to make extensions of credit under Section 50(a)(6), Article XVI, Texas Constitution, except lenders regulated by the Credit Union Commission. The Finance Commission and the Credit Union Commission shall attempt to adopt

interpreting certain sections of the Homestead Provision.[7] Because the agency merely has the power of interpretation, the courts should engage in a de novo review, rather than grant the agency deference.

The rules complained of by Cross-Petitioners are not interpretative but are new policy, which the Commissions have no authority to enact. Moreover, the interpretations are invalid because they contradict the plain meaning and intent of the constitutional provisions. Either way, the Commissions have improperly exceeded their authority to interpret the Texas Constitution and such rules should be invalidated.

ARGUMENT

I. The court of appeals erred in upholding the Commissons' interpretations that contradict the Constitution's loan closing location restriction.

The Texas Constitution's home equity loan provisions restrict the locations where a loan closing may occur. A home equity loan must be "closed only at the office of the lender, an attorney at law, or a title company." TEX. CONST. ART. XVI, § 50(a)(6)(N) **(App., Tab E)**. The Commissions' rules contradict this constitutional limit. Under the Commissions' rules, a homeowner can mail in consent or may use a power of attorney to effectuate a loan closing. *See* Rule

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interpretations that are consistent as feasible or shall state justification for any inconsistency." TEX. FIN. CODE ANN. §15.413 (Vernon Supp. 2006) (identical authority given to credit union commission).

[7] An interpretation and a construction of a written instrument are not the same. A rule of construction either governs the effect of an ascertained intention or points out what the court should do in the absence of express or implied intention. On the other hand, an interpretation governs the ascertainment of the meaning of the maker of the instrument. BLACK'S Law Dictionary 818 (6th ed. 1990) (citing *In re Trust Co.,* 89 Misc. 69, 151 N.Y.S. 246, 249 (1915)).

153.15(3); 153.15(2) **(App., Tab C)**. Neither are authorized by the constitution and contradict §50(a)(6)(N).

A. The closing location restriction protects the homeowner from coercion in the lending process, and the rest of the state from improvident lending.

One main intent of the home equity loan provisions is to protect homeowners. As expressed by Rep. Burt Solomons during his statements from the floor debate of H.J.R. 31, "I believe, as a real estate lawyer with 17 years experience in this business, that if you are going to have these types of [home equity] loans for the first time in the state of Texas, you need to have a very conservative, consumer oriented protection bill . . . .."[8] However, there is little doubt that these very same home equity provisions protect the financial sector, real estate markets and overall economy from pitfalls of improvident lending. In short, the limitations enacted by the Texas Legislature protect us all, and some members of the industry have admitted as much.

The debate over the appropriate restrictions for home equity loans in Texas was resolved by the Texas Legislature. There were very good reasons why legislators wanted consent to these loans to occur at the office of the lender, an attorney at law, or a title company. In describing the protections in H.J.R. 31, Representative Debra Danburg stated that "…[the borrower] cannot sign a lien against their house in those high pressure situations at their kitchen tables, and

[8] Testimony of Rep. Burt Solomons, Floor Debate, Tex. H.J.R. 31, 75th Leg., R.S. (May 29, 1997) (Tape 141, Side B).

that's the real protection of the Barrientos amendment."[9] When asked if it would be necessary for the home equity borrower to execute the loan documents at the financial institution, Rep. Danburg stated that, "[I]f it's a lien that will go on the homestead, there are a number of places in the legislation where they can sign it, but their home is not one of those."[10] There is no exception to the closing location requirement in the constitution.

The Commissions themselves recognize the importance of the closing location restriction. As the Commissions acknowledged, the closing location restriction was intended:

> [T]o prohibit the coercive closing of an equity loan at the home of the owner. The requirement that the closing occur at the physical address of the lender, attorney, or title company eliminates the possibility of the closing occurring at the residence of the owner, and also eliminates confusion on the part of the owner who wishes to rescind an equity loan.

29 Tex. Reg. 90 (Jan. 2, 2004) (Pl.s' Ex. 2, T C.R. Suppl.at 23).

B. The Commissions' rule allowing a homeowner's consent to be delivered by mail contradicts the Texas Constitution's closing location restriction.

The Commissions contradicted the closing location constitutional mandate by adopting a rule that allows a borrower to consent to the loan by mailing in a form. The Texas Constitution requires the written consent to a home equity loan of each owner and each owner's spouse. TEX. CONST. ART. XVI, § 50(a)(6)(A). The Commissions agree that such written consent is part of the home equity loan.

[9] Testimony of Rep. Debra Danburg, Floor Debate, Tex. H.J.R. 31, 75th Leg., R.S. (May 29, 1997) (Tape 231, Side B).
[10] *Id.*

Rule 153.1(8) defines an equity loan agreement as "documents evidencing the agreement between the parties of an equity loan." The closing includes "the act of signing the equity loan agreement by each owner and the spouse of each owner." Rule 153.1(3). Since Section 50(a)(6)(N) of the Homestead Provision requires that a home equity loan must be "closed only at the office of the lender, an attorney at law, or a title company," then the required written consent to a home equity loan *must* be signed at the closing of the loan at the office of a lender, an attorney, or a title company. There is no exception in the Texas Constitution.

Nevertheless, the Commissions created a huge exception to this requirement by allowing consent by mail. Rule 153.15(3) allows that a "lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and not the homestead." This rule allows, in direct contravention of the Texas Constitution, a closing to occur at a location *other than* at the office of a lender, attorney, or title company. The written consent, which is an integral protection of homeowners and a key part of the closing of a home equity loan agreement, can now take place at any unauthorized place, including a kitchen table, barber shop, or card table in a mall. All that is required is that the executed document be sent to the place where the rest of the closing occurs. This is not an interpretation of Section 50(a)(6)(N) It is a revision to the constitution and therefore invalid.

C. Permitting a power of attorney to substitute for the homeowner at closing is contrary to the Texas Constitution's closing location restriction.

The Commissions further contradicted the constitutional mandate that limits the locations for closing a home equity loan by adopting a rule that allows an attorney-in-fact to execute closing documents on the owner's behalf.

The Commissions adopted rules that contradict the constitution's intent to prohibit coercion in the closing of a home equity loan. Under Rule 153.13(2), a "lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner. . . ." Rule 153.15(2). This rule violates the closing location restriction for multiple reasons.

First, with the Commissions' rule, any person, whether lender, broker, or some other person, can obtain, at the homeowner's kitchen table or any other *unauthorized* location, the authority to sign the loan documents on behalf of the homeowner. Since there is no specific law in Texas that regulates who may or may not act as an attorney-in-fact for a homeowner, virtually any person has the capacity to be named to act on behalf of the homeowner. And, there is no guidance from the Commissions about whether there should be requirements that the power of attorney be specific, durable, and granted only to a spouse in exceptional circumstances, or even where the power of attorney should be signed. Instead, with a simple piece of paper, the effective closing of a home equity loan no longer occurs at the office of the lender, title company, or attorney.

A rule allowing a lender to take a lien by securing the homeowner's power of attorney at a kitchen table, barber shop, or card table in a mall can hardly be considered a homeowner protection, and certainly exposes the real estate and financial markets to improvident lending. Home loans are very rarely held by the originating lender. Loans are more typically sold by brokers and others, then pooled and securitized on Wallstreet. The person who sells a loan to a homeowner is often long gone when trouble with a loan might surface. Rule 153.13(2) increases the likelihood of fraud and abuse. It opens the door to the shenanigans of unscrupulous brokers, lenders, title companies, and even family members willing to take advantage of next of kin, leaving homeowners and the markets, and the even tax payers, holding the bag.

Second, that powers of attorney may be commonplace in Texas business transactions does not authorize their use in home equity lending. Nothing in the Texas Constitution permits using a power of attorney to close a home equity loan. The only reference to "power of attorney" in the home equity lending provision is in Section 50(a)(6)(Q)(iv). That section states that home equity lending is permitted only on the condition that "the owner of the homestead not sign a confession of judgment or power of attorney to the lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding." TEX. CONST. ART. XVI, § 50(a)(6)(Q)(iv). The clear intent of this provision, like the rest of the Homestead Provision, is to protect homeowners and the Texas economy from improvident lending secured by Texans homes.

Third, allowing for the use of a power of attorney in the closing of a home equity loan closing creates a large loophole by exempting a homeowner from attending a closing. There is no underlying legitimate need for this exception. There are few places in the world that do not have a law office, title office, or office of the lender. Regardless of the intentions of the Commissions when they drafted this rule and the flexibility the rule may provide in legitimate circumstances, the rule remains directly at odds with the plain language and the intent of the applicable constitutional provision, and is therefore invalid.

II. The court of appeals erred in upholding the Commissions' rule allowing receipt by the borrower to be presumed three days after mailing the required disclosure of the general terms and conditions of the loan.

The Texas Constitution's home equity loan provisions require that a homeowner be "provided" with notice of the terms and conditions of home equity loans twelve days before a home equity loan may be closed. *See* TEX. CONST. ART. XVI, § 50(g)[11]. The Commissions' Rule 153.51 violates this constitutional requirement by requiring only a procedure of mailing the required disclosure, not receipt. The rule defeats the precise language and purpose of the constitution.

A. The "cooling off" period gives the homeowner time to reflect on their decision to obtain a loan after receiving the lender's information.

The Texas Legislature did not intend for Texas homeowners to obtain home equity loans on a whim. The Constitution requires that a home equity loan may

[11] For the version of the 50(g) notice offered by the Office of the Consumer Credit Commissioner, see **Appendix, Tab D**, *available at* http://www.occc.state.tx.us/pages/Legal/disclosures/12Day_disclosure_12-6-07.pdf

not be "closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument." TEX. CONST. ART. XVI, § 50(g). The provision then sets forth the required disclosure language detailing the terms and conditions of valid home equity loans in Texas. *Id.* The Homestead Provision's so-called "twelve-day cooling off period" gives a borrower sufficient time to consider the ramifications of obtaining a home equity loan with the benefit of the lender's description of the basic loan conditions, terms and process. The intent of Section 50(g) was for a homeowner to have both time (twelve days) and information (the lender's disclosure) to evaluate the implications of the loan.

B. The Commissons' rule that presumes notice a reasonable time after mailing without requiring receipt contradicts the Texas Constitution

Notwithstanding the twelve-day "cooling off" period, the Commissions constructed rules beyond interpretation by presuming, rather than requiring, that the borrower receive the notice. This interpretation contradicts the constitutional requirement, because the constitution's clear intent is for the borrower to have an opportunity to reflect on the decision after *receiving* the notice.

In Rule 153.51, the Commissions interpreted the disclosure requirement, stating, in relevant part:

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

7 TEX. ADMIN. CODE § 153.51 (1), (3) (2006) **(App., Tab C)**. This interpretation allows the lender to presume that notice was received by simply showing that it has a mailing procedure, with no confirmation of receipt.[12] No specific method of mail delivery is required, and the lender's "verifiable procedures" are not defined by the rule.

The Commissions themselves agree that the constitutional requirement that a lender "provides" the owner with the notice means actual receipt of the notice:

> One commenter suggested that the constitution does not require each owner to receive the consumer disclosure in Section 153.51 and that this should be specifically stated in the interpretation. The Commissions have considered this suggestion and decline to make this change. **The Commissions believe that the language in the constitution is clear in stating that the consumer disclosure must be received by the owner**, and not "each owner."

29 Tex. Reg. 91 (Jan. 2, 2004) (emphasis added) (Pl.s' Ex. 2, I C.R. Suppl. at 24). Even the Office of Consumer Credit Commissioner, an agency of the Texas Finance Commission (a Petitioner in this lawsuit), states on its website:

> The Texas Constitution requires in Article 16, Section 50 that a 12-day waiting period must lapse from the time an application is taken AND the following consumer rights notice is given to the borrower to the closing. **For example, if a potential borrower submits an application on Monday, but doesn't receive a copy of the consumer rights notice until Wednesday, then the 12-day**

[12] The Commissions' rule appears to be an attempt to emulate procedures for foreclosure notices in Texas. Presently, Texas borrowers who are facing foreclosure do not have to actually receive a notice of foreclosure sale. TEX. PROP. CODE § 51.002; *Hausmann v. Texas Savs. & Loan Ass'n*, 585 S.W.2d 796, 799-800 (Tex. Civ. App.--El Paso 1979, writ ref'd n.r.e.). Under that situation, a lender wishing to foreclose only needs to mail the notice by certified mail to the last known address. In this case, a borrower may intentionally avoid being served in order to avoid or delay the foreclosure. However, a home equity loan is entirely different. The incentive – the ability to get a home equity loan – is much greater under these circumstances. Furthermore, even a foreclosure notice is required to be sent by certified mail, so that there is some proof of mailing and proof of receipt of notice (if it is accepted). TEX. PROP. CODE § 51.002.

> **countdown would begin on Wednesday. Once the waiting period has passed, the loan can be closed.**

Office of Consumer Credit Commissioner, Disclosures Required by Law, *available at* http://www.occc.state.tx.us/pages/Legal/disclosures/discs.htm, updated on March 24, 2008 (emphasis added). These views are consistent with the constitution: the notice must be actually received by the borrower.

In some cases receipt may be sooner than three days from mailing, in others it may be longer. Regardless, the constitutional provision should not be interpreted as the average time it *might* take a homeowner to receive notice. Rather, each loan must comply with the constitution, and the cooling-off period should begin upon actual receipt of notice.

Not only do the Commissions presume receipt by mailing rather than by actual acknowledgment of receipt by the borrower (*e.g.,* certified mail, return receipt requested), the Commissions' interpretation creates a presumption in Rule 153.51(3) that the consumer disclosure was provided if the lender has "verifiable procedures" for mailing the notices in general. (The Commissions declined to define "verifiable procedures," so presumably any verifiable procedure, regardless of its features, will suffice.) Thus, the Commissions do not require any proof that a particular notice was actually mailed.[13] With Rule 153.51(3), the Commissions

[13] The Commissions go even further:

> The Commissions believe that the broker must be an agent of a lender to give the twelve day notice the effect intended in the Constitution. This does not prohibit a lender from meeting the twelve day notice requirement by sending the notice to the borrower by delivering it to the **borrower's broker**.

29 Tex. Reg. 89 (Jan. 2, 2004) (emphasis added) (Pl.s' Ex. 2, I C.R. Suppl. at 22).

created a new rule, and not an interpretation, because the constitutional provision at issue does not provide for any presumption or other evidentiary standard to establish that a lender has provided the owner with notice. The Commissions have no authority to create new policy, so the court of appeals should have invalidated Rule 153.51(3) on this basis alone.

Moreover, when it comes to homeowners giving notice to lenders, the Commissions find that "provide" means "receipt". With few exceptions, if a homeowner claims that a lender violated a home equity provisions, a homeowner must "notify" the lender of the violation and give it 60 days to cure. TEX. CONST. ART. XVI, § 50(6)(Q)(x). In describing this notification requirement, the Commissions find that a homeowner must "provide" notice of the violation to the lender [Rule 153.92(b)], and that the lender must "receive" it [Rule 153.92(a)]. **(App., Tab C)**. A rule requiring a lender to receive a notice of violation before being subject to the penalties of invalid lien is reasonable. It is also consistent to require a homeowner receive a notice describing the general terms, conditions and processes of a home equity loan and allow Texas homeowners an opportunity to make an informed decision before placing their home up as collateral for a loan.

PRAYER

For the foregoing reasons, Respondents/Cross-Petitioners respectfully request that the Court grant Cross-Petitioners' petition, reverse the court of appeals' judgment on the use of a powers of attorney, mailed consent, and disclosure mailing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 7, 2010, a true and correct copy of this Cross-Petition for Review was served by certified mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

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Appendix Index

Appendix

Tab A

No. GN 400269

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN), VALERIE NORWOOD, ELSIE SHOWS, MARYANN ROBLES-VALDEZ, BOBBY MARTIN, PAMELA COOPER, and CARLOS RIVAS,	)	IN THE DISTRICT COURT
PLAINTIFFS,	)	
VS.	)	
FINANCE COMMISSION of TEXAS, and CREDIT UNION COMMISSION of TEXAS,	)	OF TRAVIS COUNTY, TEXAS
DEFENDANTS,	)	
VS.	)	
TEXAS BANKERS ASSOCIATION,	)	
DEFENDANT-INTERVENOR.	)	126th JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT AND TEMPORARY STAY ORDER

Plaintiffs challenge the validity of rules adopted by Defendants Finance Commission of Texas and Credit Union Commission of Texas which purport to interpret Article XVI, Section 50(a)(6) of the Texas Constitution. Defendants along with Intervenor Texas Bankers Association defended the rules. There are no genuine issues of material fact, and the parties are entitled to judgment as a matter of law. The Court has considered all pleadings, motions, cross motions, responses, replies and other materials filed with the Court. After consideration of these materials and considering arguments of counsel, the Court ORDERS and declares the following rules invalid or denies Plaintiffs relief:

1. Rules 7 TAC 153.1(11), 153.5(3), (4), (6), (8), (9), and (12) are invalid;

2. Rule 7 TAC 153.12(2) is invalid as to orally submitted applications, and not invalid as to electronically submitted applications;

3. Rule 7 TAC 153.13(4) is invalid;

4. Plaintiffs' challenge to Rules 7 TAC 153.15(2) and (3) is denied;

5. Rule 7 TAC 153.18(3) is invalid;

6. Rule 7 TAC 153.20 is invalid;

7. Rule 7 TAC 153.22 is invalid;

8. Plaintiffs' challenge to Rules 7 TAC 153.51(1) and (3) is denied; and

9. Rule 7 TAC 153.84(1) is invalid.

It is further ORDERED that this judgment is stayed in all respects for thirty days, and the rules declared to be invalid by this judgment remain in effect during that time regardless of whether this judgment is superseded by the posting of a bond, filing a notice of appeal or other action of a party.

All other relief requested by any party is denied. Costs are taxed against Defendants. This order disposes of all claims and all parties and is final and appealable.

Signed this 29th day of April, 2006.

JUDGE SCOTT JENKINS
53rd District Court, Travis County, Texas

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 3-9-2010.
AMALIA RODRIGUEZ-MENDOZA
DISTRICT CLERK
By Deputy

DISTRICT COURT OF TRAVIS COUNTY TEXAS

Appendix

Tab B

LEXSEE 303 S.W.3D 404

Texas Bankers Association, Finance Commission of Texas, and Credit Union Commission of Texas, Association of Community Organizations for Reform Now (ACORN), Valerie Norwood, Elsie Shows, MaryAnn Robles-Valdez, Bobby Martin, Pamela Cooper, and Carlos Rivas, Appellants, Cross-Appellants v. Association of Community Organizations for Reform Now (ACORN), Valerie Norwood, Elsie Shows, MaryAnn Robles-Valdez, Bobby Martin, Pamela Cooper, and Carlos Rivas, Texas Bankers Association, Finance Commission of Texas, and Credit Union Commission of Texas, Appellees, Cross-Appellees

NO. 03-06-00273-CV

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

303 S.W.3d 404; 2010 Tex. App. LEXIS 105

January 8, 2010, Filed

SUBSEQUENT HISTORY: Petition for review filed by, 03/24/2010

PRIOR HISTORY: [**1]

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT. NO. D-1-GN-04-000269, HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING.

DISPOSITION: Affirmed in part; Reversed and Rendered in part.

COUNSEL: For appellants: Mr. Alex S. Valdes, Winstead, Sechrest & Minick, Austin, TX; Ms. Ann Hartley, Assistant Attorney General, Financial Litigation Division, Austin, TX; Mr. Jack Hohengarten, Deputy Division Chief, Financial Litigation Division, Austin, TX; The Honorable Craig T. Enoch, Winstead PC, Austin, TX.

For appellees: Mr. Bruce E. Priddy, Dallas, TX; Mr. Robert L. Wharton, Nacogdoches, TX; Mr. Stephen Gardner, Dallas, TX; Mr. Nelson H. Mock, Austin, TX; Mr. Robert W. Doggett, Texas Rio Grande Legal Aid, Austin, TX.

JUDGES: Before Justices Patterson, Puryear and Henson [15]. Concurring and Dissenting Opinion by Justice Puryear.

15 Because Chief Justice Law was originally assigned to author this opinion, authoring duties were reassigned as of August 4, 2009. Justice Patterson was subsequently designated to replace Chief Justice Law on the panel. See Tex. R. App. P. 41.1.

OPINION BY: Diane M. Henson

OPINION

[*407] The Association of Community Organizations for Reform Now (ACORN) and a number of individuals who took out home equity loans in Texas filed suit against the Finance Commission of Texas and the Credit Union Commission of Texas (collectively, the Commissions), seeking to invalidate certain regulations adopted by the Commissions in relation to home equity lending. [1] *See* Tex. Gov't Code Ann. § 2001.038 (West

2008) (allowing declaratory-judgment actions to challenge validity of regulation). The Texas Bankers Association (TBA) intervened, arguing that the interpretations were a proper exercise of the Commissions' authority. Both sides filed motions for summary [**2] judgment, and the trial court granted each motion in part, invalidating seven of the nine challenged regulations. TBA and the Commissions appealed, arguing that the trial court erred in invalidating four of the regulations. [2] ACORN cross-appealed, contending that the trial court erred in refusing to invalidate the remaining two regulations. The trial court's judgment was stayed pending resolution of this appeal. We affirm the trial court's judgment in part and reverse and render in part. [3]

1 Because the appellants' interests do not diverge in this appeal, we will refer to them collectively as ACORN.

2 The Commissions repealed the other three invalidated regulations.

3 ACORN's motion for leave to file a supplemental letter brief is hereby granted.

BACKGROUND

In 1997, Texas voters approved an amendment to the Homestead Provision of the Texas Constitution, *see* Tex. Const. art. XVI, § 50, making Texas the last state in the nation to allow homeowners to borrow against their home equity. *Id*. § 50(a)(6); *see also LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 618 (Tex. 2007) ("For over 175 years, Texas has carefully protected the family homestead from foreclosure by limiting the types of liens [**3] that can be placed upon homestead property. Texas became the last state in the nation to permit home-equity loans when constitutional amendments voted on by referendum took effect in 1997.").

The Texas Constitution was amended again in 2003 to authorize the legislature to delegate the authority to issue interpretations of the home equity lending provisions:

> The legislature may by statute delegate to one or more state agencies the power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t), of this section. An act or omission does not violate a provision included in those subsections if the act or omission conforms to an interpretation of the provision that is:
>
> (1) in effect at the time of the act or omission; and
>
> (2) made by a state agency to which the power of interpretation is delegated as provided by this subsection or by an appellate court of this state or the United States.

Id. § 50(u). Pursuant to this amendment, the legislature delegated interpretive authority over the home equity provisions to [*408] the Commissions, *see* Tex. Fin. Code Ann. §§ 11.308, 15.413 (West Supp. 2008), and the Commissions in turn adopted a number of regulations interpreting the home equity provisions, *see* 7 Tex. Admin. Code §§ 153.1-.96 (2009) [**4] (Joint Fin. Regulatory Agencies, Home Equity Lending). [4] The Commissions' interpretations are subject to review under the Administrative Procedure Act (APA). *See* Tex. Fin. Code Ann. §§ 11.308, 15.413; *see also* Tex. Gov't Code Ann. § 2001.038.

4 We will hereinafter refer to the Commissions' interpretations as "Rules 153.1-.96." Where necessary, we will refer to amended regulations as either the current or former rule.

ACORN filed suit against the Commissions under the APA, seeking to invalidate nine of the Commissions' regulations, and TBA intervened in support of upholding the regulations. ACORN argued that the regulations either contradicted the plain meaning and intent of the constitutional provisions or represented new rules that the Commissions had no authority to enact. The trial court granted summary judgment, invalidating seven of the challenged regulations and determining that the remaining two were valid. This appeal and cross-appeal followed.

STANDARD OF REVIEW

Summary judgments are reviewed de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When, as here, both parties move for summary judgment on the same issues, and the trial court grants

one motion [**5] and denies the other, the appellate court considers the summary-judgment evidence presented by both sides, determines all questions presented, and if the reviewing court finds that the trial court erred, renders the judgment the trial court should have rendered. *Id*.

"The validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." Tex. Gov't Code Ann. § 2001.038. Because section 2001.038 of the APA does not prescribe a standard of review, the Texas Supreme Court has held that "[j]udicial review of rules is thus largely unlimited in . . . scope." *Railroad Comm'n v. WBD Oil & Gas Co*., 104 S.W.3d 69, 75 (Tex. 2003).

The parties disagree on the level of deference to be afforded to the Commissions' interpretations of the home equity provisions of the constitution. Typically, "[c]onstruction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language [**6] of the statute." *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993). The guidelines applicable to the construction of statutes are equally applicable to the construction of the Texas Constitution. *See Rooms With a View, Inc. v. Private Nat'l Mortgage Ass'n*, 7 S.W.3d 840, 844 (Tex. App.--Austin 1999, pet. denied). ACORN argues, however, that the constitution and the finance code provide the Commissions with only a limited grant of interpretive authority, as opposed to the broader type of enforcement authority that warrants deference to an agency's interpretation. *See* Tex. Const. art. XVI, § 50(u) (authorizing legislature to delegate to agencies "the power to interpret" home equity provisions of constitution); Tex. Fin. Code Ann. §§ 11.308, 15.413 (providing that Commissions may issue interpretations of home equity provisions). On that [*409] basis, ACORN contends that the Commissions' interpretations are entitled to little or no deference. We disagree with ACORN's contention that the power to interpret portions of the constitution is necessarily a more narrow grant of authority than a state agency's enforcement power over matters within its jurisdiction. In expressly delegating [**7] interpretive authority over the constitution to state agencies, the legislature must have intended to afford the resulting interpretations at least the same level of deference given to an agency's interpretation of a statute it is charged to enforce. As a result, we will defer to the Commissions' interpretations unless they are unreasonable or contrary to the plain language of the constitution. *See Moore*, 845 S.W.2d at 823.

We must presume "that the language of the Texas Constitution is carefully selected," and "construe its words as they are generally understood." *Spradlin v. Jim Walter Homes, Inc*., 34 S.W.3d 578, 580 (Tex. 2000). We must also "strive to give constitutional provisions the effect their makers and adopters intended." *Doody v. Ameriquest Mortgage Co*., 49 S.W.3d 342, 344 (Tex. 2001).

DISCUSSION

Cap on Fees Other Than Interest

In their first issue on appeal, the Commissions and TBA argue that the trial court erred in invalidating the Commissions' interpretation of the meaning of "interest" for purposes of the cap on fees other than interest in the context of a home equity loan. Section 50(a)(6)(E) of article 16 of the Texas Constitution states that the only permissible type [**8] of home equity loan is one that:

> does not require the owner or the owner's spouse to pay, *in addition to any interest*, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit.

Tex. Const. art. XVI, § 50(a)(6)(E) (emphasis added).

This provision limits fees, other than interest, to three percent of the principal amount of the loan. In Rule 153.1(11), the Commissions defined "interest" for purposes of this fee cap as "[i]nterest as defined in the Texas Finance Code § 301.002(4) [sic] and as interpreted by the courts." Rule 153.1(11). Section 301.002(a)(4) of the finance code, located in the subtitle governing usury, defines interest as "compensation for the use, forbearance, or detention of money." Tex. Fin. Code Ann. § 301.002(a)(4) (West 2006). [5] [*410] The Commissions further clarified their interpretation of the meaning of "interest" in Rule 153.5(3), stating, "Charges

an owner or an owner's spouse is required to pay that constitute interest under the law, for example per diem interest and points, are not fees subject to [**9] the three percent limitation." Rule 153.5(3). [6]

5 More specifically, section 301.002(a) states, "[in] this subtitle . . . 'interest' means compensation for the use, forebearance, or detention of money." Tex. Fin. Code Ann. § 301.002(a) (West 2006). The referenced subtitle is subtitle A, Interest, of Title 4, Regulation of Interest, Loans, and Financed Transactions, which generally governs usury and sets maximum interest rates for certain transactions. *See id.* §§ 301.001-339.005 (West 2006 & Supp. 2009). Subtitle A contains general definitions in chapter 301, *see id.* §§ 301.001-.002, generally prohibits the charging of usurious interest in chapter 302, *id.* §§ 302.001-.104, imposes contract interest rate ceilings in chapter 303, *id.* §§ 303.001-.502, sets maximum rates of judgment interest and limits circumstances in which judgment interest may be imposed in chapter 304, *id.* §§ 304.001-.302, imposes liability, penalties, and remedies for usurious interest in chapter 305, *id.* §§ 305.001-.105, and regulates commercial loans, including maximum interest rates and methods of calculating whether interest in a commercial loan is usurious, in chapter 306, *id.* §§ 306.001-.103. The remaining chapters [**10] of the subtitle govern collateral protection insurance, deceptive advertising, and credit card transactions, with minimal references to interest. *See id.* §§ 307.001-339.005.

6 In keeping with its ruling that the Commissions' definition of interest is invalid, the trial court invalidated subsections (4), (6), (8), (9), and (12) of Rule 153.5, because each of these subsections adopts the term "interest" as defined in Rules 153.1(11) and 153.5(3). The Commissions concede that if Rules 153.1(11) and 153.5(3) are invalid, then subsections subsections (4), (6), (8), (9), and (12) of Rule 153.5 are invalid as well. Accordingly, we will limit our review to the validity of Rules 153.1(11) and 153.5(3).

ACORN argues that the commonly understood meaning of "interest" is not the broad definition found in the usury statutes, but the amount of interest described in the promissory note and specified as a percentage rate to be applied to the remaining, unpaid principal. ACORN further contends that the Commissions' interpretation of "interest" encompasses all fees paid to the lender and therefore allows the "interest" exception to swallow the rule limiting fees to three percent of the principal.

TBA and the Commissions [**11] argue that the usury definition of interest found in the finance code may reasonably be applied to the constitutional language capping fees "in addition to any interest" because the legislature is presumed to act with complete knowledge of the existing condition of the law and with reference to it. *See Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). However, the usury provisions of the finance code were enacted "to protect the citizens of Texas from abusive and deceptive practices now being perpetrated by unscrupulous operators, lenders and vendors in both cash and credit consumer transactions . . . and thus serve the public interest of the people of this State." *George A. Fuller Co. v. Carpet Co.*, 823 S.W.2d 603, 604 (Tex. 1992) (quoting Act of May 4, 1967, 60th Leg., R.S., ch. 274, § 1, 1967 Tex. Gen. Laws 608, 609); *see also Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486, 500 (Tex. 1979) (Spears, J., dissenting) (stating that purpose behind "labels rule," which states that labels assigned to charge are not determinative in determining whether it is interest, "is to prevent a lender from collecting usurious interest by labeling the charge something other than [**12] interest"). Given the inherent differences between the consumer-protection mechanisms of the usury statutes, which require a broad definition of interest, and the protective purposes of the home equity fee cap, use of the usury definition of interest for purposes of the fee cap fails to preserve the legislative intent. [7]

7 The parties do not dispute that the home equity provisions were drafted with an intent to protect consumers. As TBA acknowledges in its brief, the home equity provisions of the constitution include so many protective measures that "the end result is a home equity lending scheme more stringent than any other in the United States in terms of consumer protection." *See also Herman Iken & Co. v. Olenick*, 42 Tex. 195, 198 (1874) ("The leading and fundamental idea connected with a homestead is unquestionably associated with that of a place of residence for the family, where the independence and security of a home may be

> enjoyed, without danger of its loss, or harassment and disturbance by reason of the improvidence or misfortune of the head or any other member of the family.")

The Commissions further argue that the finance code's definition of interest represents [*411] a technical [**13] meaning of the word "interest," and that we must construe the interest exception to the fee cap accordingly. *See* Tex. Gov't Code Ann. § 311.011(b) (West 2005) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 464 (Tex. 2009) ("The Legislature often supplies its own dictionary, and where it provides a precise definition, courts must honor that substituted meaning."). The finance code definition of interest, however, represents the technical definition of interest only as it applies in the usury context, pursuant to the intent to protect borrowers from usurious lending practices. [8] In the home equity lending context, incorporating the extremely broad usury definition of interest would defeat the purpose of the constitutional provision imposing a fee cap in the first place. "[C]onstitutional provisions should not be given a technical construction which would defeat their purpose." *Cramer v. Sheppard*, 140 Tex. 271, 167 S.W.2d 147, 154 (Tex. 1942).

> 8 The finance code definition of interest was created pursuant to section 11 of article 16 of the Texas Constitution, [**14] which provides that "[t]he Legislature shall have authority to define interest and fix maximum rates of interest." Tex. Const. art. XVI, § 11. Section 11 is titled, "Usury; Rate of Interest in Absence of Legislation," and as the supreme court pointed out in *Sage Street Associates v. Northdale Construction Co*., 863 S.W.2d 438, 439 (Tex. 1993), was enacted "for effective regulation of commercial lending" in response to a historical "period of lending abuse." *See also id*. at 439 n.1 ("During the Constitutional Convention of 1875, this provision was referred to as 'the section which provides for usury laws.' *There is no indication that the framers intended the section to govern anything but commercial usury*.") (internal citation omitted) (emphasis added).
>
> Like section 11 governing usury, the home equity provisions of the constitutions were enacted to regulate commercial lending and prevent credit abuses. However, the definition of interest included in the usury provisions of the finance code, enacted pursuant to the grant of authority in section 11 and applicable only to usury, plays a much different role in the regulation of commercial lending than interest as defined for purposes of the [**15] home equity fee cap. As such, section 11 does not preclude a determination that application of the usury definition of interest to the fee cap is inconsistent with the home equity provisions of the constitution.

ACORN points to the required consumer disclosure notice set forth in section 50(g), which includes the following language: "FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 3 PERCENT OF THE LOAN AMOUNT." Tex. Const. art. XVI, § 50(g). According to ACORN, this language is indicative of the legislature's intent to include fees imposed by the lender in the fee cap. We note that language included in the required notice is not necessarily dispositive, as the notice language in section 50(g) also includes the following statement: "THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE." *Id.; see also Stringer v. Cendant Mortgage Co*., 23 S.W.3d 353, 357 (Tex. 2000) ("[S]ection 50(g)'s notice provisions do not independently establish rights or obligations for the extension of credit."). However, we agree that the notice language does at least indicate that the legislature [**16] considered the three-percent fee cap to be a substantive protection afforded to borrowers. Allowing the interest exception to swallow the rule would strip the home equity provisions of this intended protection.

In interpreting the fee cap provision of the constitution, "we rely heavily on [*412] its literal text and must give effect to its plain language." *Doody*, 49 S.W.3d at 344. The plain language of this provision creates a three-percent cap on fees other than interest in the context of a home equity loan. *See* Tex. Const. art. XVI, § 50(a)(6)(E). The Commissions' interpretation, which classifies fees charged by the lender as interest, essentially renders this cap meaningless. [9] We cannot

conclude that the legislature, in creating the cap on fees connected with a home equity loan, intended to exclude basically all fees charged by the lender from the cap. *See Spradlin*, 34 S.W.3d at 580 ("We avoid constructions that would render any constitutional provision meaningless or nugatory."). Even applying a deferential standard of review, the Commissions' definition of interest is contrary to the intent and plain meaning of the constitution. As a result, we affirm that portion of the trial court's [**17] judgment invalidating Rules 153.1(11), 153.5(3), (4), (6), (8), (9), and (12). [10]

9 At the summary-judgment hearing, the Commissions acknowledged that any fee paid to a lender, other than amounts simply reimbursing the lender for charges paid to a third party or amounts, such as an application fee, that are charged for a "distinct service," would constitute interest under the usury definition and would not be subject to the cap. When the trial court expressed concern that such a broad definition would allow an origination fee, for example, to be classified as interest, the Commissions confirmed that such a charge would not be subject to the fee cap as long as it is paid to the lender.

10 The parties disagree on whether specific types of "points," such as "origination points" paid to originate the loan, should qualify as interest or fees for purposes of the fee cap. ACORN does, however, concede in its reply brief that true "discount points," charged by the lender in exchange for a lower interest rate, should qualify as interest. At any rate, the only question properly before us in this appeal is whether the trial court erred in invalidating the Commissions' regulations as being inconsistent [**18] with the plain language of the constitution. Having determined that it did not, we are not in the position to provide a substitute definition of interest or to definitively categorize "discount points," "origination points," or any other charges that might be imposed by a lender as either "interest" or "fees." While the Commissions' current definition of interest is invalid because its breadth eviscerates the constitutionally mandated three-percent cap on fees, the Commissions are free to adopt another definition of interest that is consistent with the plain language of the constitution.

Oral Loan Applications

In their second issue on appeal, the Commissions and TBA argue that the trial court erred in invalidating a portion of Rule 153.12(2), interpreting section 50(a)(6)(M)(i) of the Texas Constitution. At the time summary judgment was rendered, section 50(a)(6)(M)(i) stated that a home equity loan may not be closed before "the 12th day after the later of the date that the owner of the homestead submits an application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by Subsection (g) of this section." Tex. Const. art. XVI, § 50(a)(6)(M)(i) [**19] (amended 2007). Under this provision, a home equity loan could not be closed until the conclusion of a 12-day waiting period, beginning on the date an application is submitted or the date the owner receives the required consumer disclosure, whichever is later. *Id.* The Commissions' regulation states that for purposes of triggering this 12-day waiting period, "[a] loan application may be given orally or electronically." Rule 153.12(2). The trial court invalidated that portion of the rule allowing oral applications to trigger the waiting period and preserved that portion of the rule allowing electronic applications.

[*413] ACORN argues that allowing an oral application to trigger the waiting period is inconsistent with the level of formality that the legislature intended to inject into the home equity lending system for the purpose of protecting consumers. TBA and the Commissions, on the other hand, assert that it is not uncommon for lenders to accept oral applications from prospective borrowers by taking information over the telephone, and further argue that the potential for abuse is minimal because the 12-day waiting period does not begin to run until the *later of* the date the application [**20] is submitted or the date the borrower receives the required disclosure statement.

In 2007, after briefs were filed and oral argument was heard in this appeal, certain home equity provisions of the Texas Constitution were amended, including section 50(a)(6)(M)(i). Section 50(a)(6)(M)(i) was amended to change the phrase, "submits an application to the lender," to "submits the loan application to the lender." *See* Tex. Const. art. XVI, § 50(a)(6)(M)(i). While the Commissions amended certain regulations pursuant to the 2007 constitutional amendments, Rule 153.12(2) remained unchanged. In passing the joint

resolution proposing the 2007 constitutional amendment, however, the legislature recorded a "Statement of Legislative Intent" in the House Journal, in which the author of the resolution states, "The homeowner may submit a written, electronic, *or oral* application." H.J. of Tex., 80th Leg., R.S. 2432 (2007) (emphasis added); *see also* Tex. H.R.J. Res. 72, 80th Leg., R.S., 2007 Tex. Gen. Laws 6138. [11]

> 11 The quoted legislator, Representative Solomons, was also an author of the 1997 home equity lending amendments.

In matters of constitutional construction, we may "consider such things as the legislative [**21] history and purpose of the constitutional provision." *Dewhurst v. Hendee*, 253 S.W.3d 320, 336 (Tex. App.--Austin 2008, pet. dism'd) (citing *Stringer*, 23 S.W.3d at 355; *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997)). The statement of legislative intent quoted above is contrary to ACORN's position that allowing oral applications is inconsistent with the legislature's intent to create a formal home equity lending process.

Furthermore, the language of the 2007 amendments reflects an expression of legislative intent to allow oral applications. [12] In support of its argument that only written loan applications may trigger the waiting period, ACORN pointed to the notice language found in section 50(g), specifically the following statement: "THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A WRITTEN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER." Tex. Const. art. XVI, § 50(g) (amended 2007). We agree with ACORN's argument that the 50(g) notice language, while not binding, is a helpful indicator of legislative intent. *See Stringer*, 23 S.W.3d at 357 ("[S]ection 50(g)'s notice provisions do not independently establish [**22] rights or obligations for the extension of credit."). The language of section 50(g) upon which ACORN relies, however, was amended in 2007 to omit any reference to a written application. The relevant language now [*414] states, "THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A LOAN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER." Tex. Const. art. XVI, § 50(g). We read the legislature's amendment of the phrase "written application" to "loan application" in this provision to be a significant change, particularly in light of the fact that this suit was pending on appeal at the time of the 2007 amendment. Furthermore, the phrase "loan application," which the legislature apparently considers to be something other than a "written application," was also inserted into the provision describing the trigger for the 12-day waiting period. *See id.* § 50(a)(6)(M)(i).

> 12 While it was the 1997 legislature, rather than the 2007 legislature, that originally enacted the home equity provisions, it is the current version of the constitution that controls for our purposes, as ACORN challenges the validity of the regulations based on inconsistency with the [**23] relevant constitutional provisions, and any challenge based on inconsistency with provisions that no longer exist would be moot.

In light of the foregoing, we hold that the Commissions' interpretation of "application" to include oral applications is consistent with the plain language of the constitution as it is currently written. We sustain this issue and reverse the trial court's order to the extent it invalidates the "oral application" portion of Rule 153.12(2).

Convenience Checks

In a third issue on appeal, TBA and the Commissions argue that the trial court erred by invalidating Rule 153.84(1), which interpreted article 16, section 50(t)(3) of the constitution. At the time summary judgment was rendered in this case, section 50(t)(3) stated that a homeowner, in accessing a home equity line of credit (HELOC), may "not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance." Tex. Const. art. XVI, § 50(t)(3) (amended 2007). At that time, Rule 153.84(1) stated, in relevant part:

> 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 [**24] for an advance, telephonic fund transfers, and electronic fund [*415] transfers. Examples of devices that are not prohibited similar devices include prearranged drafts, convenience checks, or written transfer

> instructions.

Former Rule 153.84(1).

In Former Rule 153.84(4), the Commissions defined "preprinted solicitation check" as a check that is provided to the borrower or owner for the purpose of originating or soliciting advances on a HELOC, contains at least one preprinted key payment term, and is not requested by the borrower or owner.

ACORN challenged Former Rule 153.84 on the basis that "convenience checks" are similar devices to credit cards, debit cards, and preprinted solicitation checks and therefore should be prohibited as a "similar device" under section 50(t)(3) of the constitution. ACORN further argued that the rule did not provide a clearly defined distinction regarding permissible versus impermissible devices, emphasizing the difficulty in distinguishing between a "convenience check" and a "preprinted solicitation check."

In 2007, the relevant constitutional provision was amended to state that a homeowner may "not use a credit card, debit card, or similar device, or preprinted [**25] check unsolicited by the borrower, to obtain an advance." Tex. Const. art. XVI, § 50(t)(3).

In accordance with the 2007 constitutional amendment, the Commissions also amended Rule 153.84(1). As amended, the rule states, in relevant part:

> 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.

Current Rule 153.84(1) (emphasis added). The Commissions also deleted subsection (4) of Rule 153.84, defining "preprinted solicitation check," as that phrase no longer appears in the relevant constitutional provision. *See* Current Rule 153.84.

Pursuant to the 2007 amendment, the constitution now prohibits "preprinted check[s] unsolicited by the borrower," rather than "preprinted solicitation checks." Tex. Const. art. XVI, § 50(t)(3). Current Rule 153.84(1) is consistent with this language, as it includes "preprinted checks requested by the borrower" in the list of acceptable [**26] devices. The rule no longer expressly permits the use of "convenience checks," the primary focus of ACORN's challenge to the validity of the rule. Furthermore, the constitutional prohibition on the use of "similar device[s]" now applies only to devices similar to credit cards and debit cards, as opposed to the pre-amendment language prohibiting devices similar to preprinted solicitation checks, which opened the door to the possible exclusion of other types of checks, including, as ACORN argued, convenience checks. Given the relevant constitutional amendments and the subsequent changes to Rule 153.84, we hold that ACORN's challenge to Rule 153.84 has been rendered moot. We reverse the trial court's order to the extent it invalidated Rule 153.84.

Documents Provided at Closing

In their fourth issue on appeal, the Commissions and TBA argue that the trial court erred in invalidating Rule 153.22, which described the documents that must be provided to the borrower at closing. When summary judgment was rendered, article 16, section 50(a)(6)(Q)(v) of the constitution provided that at the time an extension of credit is made, the lender must "provide the owner of the homestead a copy of all documents [**27] signed by the owner related to the extension of credit." Tex. Const. art. XVI, § 50(a)(6)(Q)(v) (amended 2007). To interpret this provision, the Commissions adopted Former Rule 153.22, which stated:

> At closing, the lender must provide the owner with a copy of all documents that are signed at closing in connection with the equity loan. The lender is not required to give the owner copies of documents that were signed by the owner prior to closing, such as those signed during the application process. Because of their nature some documents, for example, a notification of the election of an owner or an owner's spouse not to rescind under the right of recission must be signed after the date of closing. The lender must provide the owner copies of documents signed after the date of closing within three business

days.

Former Rule 153.22.

In challenging this regulation, ACORN argued that the Commissions improperly limited the documents to be provided to those actually signed at closing. According to ACORN, the plain language of the constitution requires that the homeowner be provided with documents signed before closing that are related to the extension of credit, such as the loan application, [**28] employment verification, and certain disclosure notices.

In 2007, the relevant constitutional provision was amended to state, "[A]t the time the extension of credit is made, the owner of the homestead shall receive a copy of the final loan application and all executed documents signed by the owner at closing related to the extension of credit." Tex. Const. art. XVI, § 50(a)(6)(Q)(v). The [*416] Commissions then amended Rule 153.22 to state:

> 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.

Current Rule 153.22.

Current Rule 153.22 is clearly consistent with the plain language of the constitution as it is currently written. The 2007 constitutional amendment renders moot ACORN's argument that documents signed prior to closing must be provided to the homeowner, as the relevant provision now requires the lender to provide only copies of the loan application and [**29] any documents "signed by the owner at closing." Tex. Const. art. XVI, § 50(a)(6)(Q)(v). As a result, we sustain this issue on appeal and reverse that portion of the trial court's judgment invalidating Rule 153.22.

Power of Attorney

In its first issue on cross-appeal, ACORN argues that the trial court erred in refusing to invalidate Rule 153.15, interpreting section 50(a)(6)(N) of the home equity provisions of the constitution. [13] Section 50(a)(6)(N) states that a home equity loan must be "closed only at the office of the lender, an attorney at law, or a title company." Rule 153.15(2) states that a "lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner," while subsection (3) of Rule 153.15 states that a "lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and not the homestead." Neither section 50(a)(6)(N) nor Rule 153.15 have been amended since ACORN filed suit.

> 13 ACORN raises another issue on cross-appeal in which it argues that the Commissions exceeded their authority in enacting Rules 153.15(2) and 153.51(3). [**30] Because any discussion of this issue is subsumed in our analysis of ACORN's remaining two issues on cross-appeal--that the trial court erred in refusing to invalidate Rule 153.15 and 153.51(3)--we will not address it as a separate point of error. We note also that while this argument was raised in the trial court, it was not raised or ruled on as a separate issue distinct from ACORN's challenges to the individual regulations.

According to ACORN, Rule 153.15(2) is not an interpretation of the constitution, but an impermissible new rule that violates the drafters' intent to prohibit coercion in relation to the closing of a home equity loan. Furthermore, ACORN contends that Rule 153.15(3) contradicts the constitution because it allows consent to be given anywhere and mailed to an authorized location for closing. The Commissions and TBA counter that Rule 153.15(2) is not a new rule, but merely a permissible interpretation clarifying that section 50(a)(6)(N) does not change the existing principle of Texas law that allows the use of a properly executed power of attorney in business transactions. The Commissions and TBA further point out that the legislature has demonstrated its inclination [**31] to use express language prohibiting use of a power of attorney when necessary in the home equity provisions of the constitution, citing section 50(a)(6)(Q)(iv), which states that home equity lending is permitted only on the condition that "the owner of the homestead not sign a confession of judgment or power of attorney to the lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding." Tex. Const. art. XVI, § 50(a)(6)(Q)(iv).

[*417] We agree with the Commissions and TBA. The use of powers of attorney to designate an attorney-in-fact to act on the designor's behalf is a recognized principle of Texas law. *See, e.g., Citigroup Global Mkts., Inc. v. Brown*, 261 S.W.3d 394, 402 (Tex. App.--Houston [14th Dist.] 2008, orig. proceeding); *FDIC v. Great Am. Ins. Co*., 469 S.W.2d 254, 258 (Tex. Civ. App.--Austin 1971, writ ref'd n.r.e.). As a result, it is neither inconsistent with the constitution nor impermissible rulemaking for the Commissions to clarify that this principle continues to apply in the context of home equity loan closings, particularly where the drafters expressly prohibited the use of powers of attorney in other home equity lending contexts, but [**32] not with regard to closing the loan.

Furthermore, Rule 153.15(3) is not inconsistent with the literal text of the relevant constitutional provision. The Commissions' interpretation simply allows borrowers who are otherwise unable to appear in person at the closing to execute closing documents by mail, while still preserving the constitution's requirement that closing take place at the offices of the lender, an attorney, or a title company. This interpretation is not unreasonable or contrary to the plain language of the constitution.

We overrule this issue on cross-appeal and affirm that portion of the trial court's judgment upholding Rule 153.15.

Disclosure Mailing

In its second issue on cross-appeal, ACORN argues that the trial court erred in refusing to invalidate Rule 153.51, subparts (1) and (3), interpreting section 50(g) of the home equity provisions. Section 50(g) states that a home equity extension of credit may not be "closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument." Tex. Const. art. XVI, § 50(g). The provision then sets forth the required disclosure language. *See id*. In Rule 153.51, the Commissions interpreted [**33] the disclosure requirement, stating, in relevant part:

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

Rule 153.51(1), (3).

ACORN contends that the Commissions' interpretation contradicts the constitutional requirement to "provide[]" notice by presuming that the borrower has received notice three days after mailing. ACORN further argues that subpart (3) creates a new, unauthorized rule by allowing lenders to rely on "an established system of verifiable procedures" rather than proving that the notice was actually provided to an individual borrower.

We agree with the trial court's determination that Rule 153.51 is consistent with the applicable constitutional provision. The constitution requires the lender to "provide[]" notice, but does not define "provide" or clarify how a lender may establish that notice was provided when the required [**34] disclosure is mailed to the borrower. The Commissions interpreted the constitution by determining that in the event of mailing, the 12-day waiting period begins to run three days after the disclosure was mailed, absent any dispute by the borrower on the issue of whether notice was provided. The borrower is free to rebut this presumption of receipt. We [*418] note also that the Commissions' interpretation incorporates familiar concepts from Texas Rule of Civil Procedure 21a, which states:

> Whenever a party has the right or is required to do some act within a proscribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail or by telephonic document transfer, three days shall be added to the prescribed period. . . . Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office . . . .

Tex. R. Civ. P. 21a.

The constitution requires that a 12-day waiting period begin to run from the date of a certain event. The Commissions' regulations merely interpret the appropriate way to determine whether [**35] that event has occurred and to establish compliance with the notice requirement. It is for precisely that type of guidance that the Commissions were authorized to issue interpretations in the first place. [14] As a result, we cannot conclude that Rule 153.51(1) is inconsistent with the constitution. Furthermore, subpart (3) of Rule 153.51 does not represent a new rule, as ACORN contends, but merely a necessary interpretation of the means by which a lender may establish compliance with the constitutional requirement of notice. The borrower is free to offer evidence that he did not, in fact, receive proper notice. We affirm the portion of the trial court's judgment denying ACORN's challenge to Rule 153.51(1) and (3).

14 The bill analysis for the resolution delegating interpretive authority to the Commissions stated:

> Home equity lenders in Texas often are uncertain about whether a particular action would violate the Constitution and require them to forfeit the principal on a loan. However, since home equity lending in Texas is authorized by the Constitution rather than by statute, no state agency is authorized to give guidance on the Constitution's meaning. That uncertainty translates into [**36] higher interest rates for all home equity loans as lenders try to cover the market risk they face. SJR 42 would solve the problem by giving the Finance and Credit Union Commissions the responsibility of clarifying home equity law. This would enable lenders to make loans with confidence that their actions were within the law, thus lowering their risk and, consequently, lowering the interest rates charged to customers.
>
> House Comm. on Fin. Insts., Bill Analysis, Tex. S.J. Res. 42, 78th Leg., R.S. (2003).

CONCLUSION

We reverse that portion of the trial court's judgment invalidating Rule 153.12(2), 153.84(1), and 153.22, and render judgment denying ACORN's challenges to these rules. We affirm the remainder of the trial court's judgment.

Diane M. Henson, Justice

Before Justices Patterson, Puryear and Henson [15]

15 Because Chief Justice Law was originally assigned to author this opinion, authoring duties were reassigned as of August 4, 2009. Justice Patterson was subsequently designated to replace Chief Justice Law on the panel. *See* Tex. R. App. P. 41.1.

Concurring and Dissenting Opinion by Justice Puryear

Affirmed in part; Reversed and Rendered in part

Filed: January 8, 2010

CONCUR BY: David Puryear

DISSENT BY: David Puryear

DISSENT

CONCURRING [**37] **AND DISSENTING OPINION**

For the reasons that follow, I respectfully dissent from the majority's resolution of the first issue on appeal. I join the result reached by the majority in the other issues because I agree that the rules promulgated by the Finance Commission of Texas and the Credit Union Commission of Texas (collectively, the "Commissions") should be upheld. However, I do not agree with the analysis employed by the majority in these issues because in resolving all of the issues on appeal, the majority reviews the rules promulgated by the Commissions in the same manner that this Court typically treats rules promulgated by administrative [*419] agencies. The majority's election to review the rules using traditional

canons of construction ignores the unique grant of authority bestowed upon the Commissions by the constitution and by the legislature. It also fails to address what the judiciary's role is, if any, regarding the review of the Commissions' rules in light of the sweeping authorization given to those agencies.

The rules at issue in this appeal originate from a series of constitutional amendments. As mentioned in the majority opinion, in 1997 the citizens of Texas passed an amendment [**38] to the Homestead Provision of the constitution that allows bankers in Texas to issue home-equity loans provided that certain criteria are met. *See* Tex. Const. art. XVI, § 50. The condition at issue in this case limits the fees that a homeowner may be charged for obtaining the loan. Specifically, the provision states that a bank may:

> not require the owner or the owner's spouse to pay, *in addition to any interest*, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit.

Tex. Const. art. XVI, § 50(a)(6)(E) (emphasis added). The voters also passed a second amendment allowing the legislature to empower one or more state agencies to interpret the home-equity-loan amendment to the Homestead Provision. *Id.* § 50(u). [1] In light of this constitutional authorization, the legislature enacted laws empowering the Commissions to issue "interpretations" of the home-equity-loan amendment. Tex. Fin. Code Ann. §§ 11.308 (pertaining to finance commission), 15.413 (West Supp. 2009) (empowering credit union commission); *see also Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996) [**39] (stating that courts "must liberally construe any constitutional provision that directs the Legislature to act for a particular purpose").

1 Subsection 50(u) provides as follows:

> The legislature may by statute delegate one or more state agencies the power to interpret Subsections (a)(5)B(a)(7), (e)B(p), and (t), of this section. An act or omission does not violate a provision included in those subsections if the act or omission conforms to an interpretation of the provision that is:
>
> (1) in effect at the time of the act or omission; and
>
> (2) made by a state agency to which the power of interpretation is delegated as provided by this subsection or by an appellate court of this state or the United States.

Tex. Const. art. XVI, § 50(u).

After the legislature passed the provisions allowing the Commissions to interpret the home-equity-loan amendment, the Commissions adopted rules governing home-equity lending. *See* 7 Tex. Admin. Code §§ 153.1-.96 (2009). Among other things, the rules clarify what the term "interest" in the amendment means. Those rules form the subject of this appeal.

The fact that the rules were promulgated in response to a delegation of authority to administrative agencies by the [**40] constitution is significant and unprecedented. Typically, agencies are empowered by the legislature, not by the constitution. Moreover, the delegation at issue specified that the Commissions have the authority to "interpret" the home-equity-loan amendment. *See* Tex. Const. art. XVI, § 50(u); *see also id.* art. II, § 1 (explaining that one branch of government may exercise powers typically reserved for one of remaining branches when expressly authorized by constitution). In light of this unique delegation, it is not entirely clear that this Court has any authority to review or invalidate the rules at issue in this case. *Cf.* [*420] *State v. Thomas*, 766 S.W.2d 217, 219 (Tex. 1989) (explaining that legislature cannot "by statute abrogate the Attorney General's constitutional grant of power" and that constitutional

balance of powers may only be altered "by constitutional amendment"). Assuming that such authority exists, our ability to review the Commissions' rules regarding the home-equity-loan amendment would have to be more limited than the review that we typically use regarding agency rules and that was used by the majority in this case.

In its opinion, the majority concludes that the rules identified [**41] in all but the first issue should be upheld. Because I believe that a more deferential standard should have been applied, I would also conclude that the rules should be upheld. Accordingly, I join the result reached by the majority in its resolution of these issues.

Under that more deferential standard, I would also conclude that the rules addressed in the first issue survive appellate scrutiny. However, even assuming that the typical and less deferential standard applies, I would still conclude that the rules discussed in that issue should be upheld. The traditional guidelines instruct us that an agency's construction of a governing law that it is charged with enforcing is entitled "to serious consideration by reviewing courts, so long as the construction is reasonable and does not contradict" the law's plain language. *Employees Ret. Sys. v. Jones*, 58 S.W.3d 148, 151 (Tex. App.--Austin 2001, no pet.). In other words, when determining whether a rule is valid, courts must determine whether the rule is in harmony with or contrary to the relevant governing scheme. *Texas Orthopaedic Ass'n v. Texas State Bd. of Podiatric Med. Exam'rs*, 254 S.W.3d 714, 719 (Tex. App.--Austin 2008, pet. abated) [**42] (op. on reh'g). If the rule has "no supporting statutory authority, the rule is void." *Id.*

Before delving into the merits of this issue, a brief discussion of the context in which the rules were promulgated is necessary. The home-equity-loan amendment is not the only constitutional provision implicated by this case. Another provision empowers the legislature to define "interest." Tex. Const. art. XVI, § 11 (stating that "Legislature shall have the authority to define interest and fix maximum rates of interest"). In light of this broad authority, the legislature defined interest in the financial code. Tex. Fin. Code Ann. § 301.002(a)(4) (West 2006). That definition provides as follows:

> "Interest" means compensation for the use, forbearance, or detention of money. The term does not include time price differential, regardless of how it is denominated. The term does not include compensation or other amounts that are determined or stated by this code or other applicable law not to constitute interest or that are permitted to be contracted for, charged, or received in addition to interest in connection with an extension of credit.

Id. § 301.002(a)(4) (West 2006). When they promulgated their [**43] rules interpreting the home-equity-loan amendment, the Commissions adopted the definition of "interest" found within the financial code, 7 Tex. Admin. Code § 153.1(11), and explained that interest charges "are not fees subject to the three percent limitation" found in the home-equity-loan amendment, *id.* § 153.5(3).

The majority supports its determination that the definition chosen by the Commissions is invalid by asserting that the definition adopted by the Commissions is pulled from the financial code provisions governing usury. *See* Tex. Fin. Code Ann. §§ 302.001-.002 (West 2006) (constituting subchapter entitled "Usurious Interest"). The majority reasons that the usury provisions [*421] require a broad definition for interest because they are consumer oriented whereas the fee cap in the home-equity-loan amendment must be given a more limited definition in order to comply with the legislative intent of protecting homeowners.

However, the legislative definition for "interest" is not found within the usury provisions and is instead listed in the "GENERAL PROVISIONS" of the financial code containing the definitions for terms that are to be used in the subtitle governing the use of interest. *See* [**44] *id.* §§ 301.001-.002 (West 2006) (containing general provisions); *see also id.* §§ 301.001-339.005 (West 2006 & Supp. 2009) (encompassing "INTEREST" subtitle of title 4 of finance code; title 4 is entitled "REGULATION OF INTEREST, LOANS, AND FINANCED TRANSACTIONS"). Although that definition is used in the usury provisions of the "Interest Rates" chapter, *see id.* § 302.001-.002, (West 2006), it is also used in the provisions of the subtitle not specifically addressing usury, *see generally id.* §§ 302.102-339.005 (addressing, among other things, rate ceilings, judgment interest, and commercial loans). This definition is also directly incorporated into another subtitle of the financial code governing loans and financial transactions and containing

provisions that do not pertain to usury. *See id.* § 341.001(8) (West 2006); *see also id.* §§ 341.001-350.004 (West 2006 & Supp. 2009) (comprising subtitle B of title 4).

These non-usurious provisions would not seem to have the same consumer-oriented concerns that the majority relies on in asserting that the Commissions' definition is improper. Because the legislature chose to use the same definition for interest in the usury and in the non-usury portions [**45] of the financial code, we must presume that the legislature weighed any potential conflicts between these types of statutes and crafted a definition for interest that reconciled those conflicts.

In addition, when determining the validity of a law, we must presume that the legislature enacted the statute "with complete knowledge of existing law and with reference to it." *In re Garcia*, 944 S.W.2d 725, 727 (Tex. App.--Amarillo 1997, no writ). Although that canon of construction is typically employed when construing statutes, it would also seem to apply to constitutional provisions proposed by the legislature. In this case, the legislature proposed a constitutional amendment allowing an agency to interpret the home-equity-loan amendment after the legislature had already codified a definition for interest. Moreover, after the Commissions' rule became effective in 2004, *see* 7 Tex. Admin. Code § 153.1, the legislature revised its definition of "interest" by adding the last sentence found in the current definition, [2] *see* Act of May 29, 2005, 79th Leg., R.S., ch. 1018, § 2.01, 2005 Tex. Gen. Laws 3438, 3439-40. In light of the prior promulgation of the rule, the fact that the legislature chose [**46] not to exclude its definition for interest from the home-equity-loan context is some indication that the legislature intended for its definition to apply. *See Bullock v. Marathon Oil Co*., 798 S.W.2d 353, 357 (Tex. App.CAustin 1990, no writ) (explaining that "if an agency interpretation is in effect at the time the legislature amends the law without making any [*422] substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation").

> 2 The last sentence reads as follows: "The term does not include compensation or other amounts that are determined or stated by this code or other applicable law not to constitute interest or that are permitted to be contracted for, charged, or received in addition to interest in connection with an extension of credit." Tex. Fin. Code Ann. § 301.002(a)(4) (West 2006).

Furthermore, because the Commissions chose to adopt the definition for interest that was codified by the legislature, the Commissions' rules are consistent with the statutory definition of "interest" and, accordingly, clearly have statutory support. *See* 7 Tex. Admin. Code § 153.1(11). It is hard to imagine a more reasonable manner in which the Commissions could [**47] have attempted to give effect to the legislature's intent than using the very definition adopted by the legislature. This seems particularly true where, as here, the legislature's definition was also made in response to a constitutional directive.

In light of the preceding, I would conclude that the Commissions' rule is reasonable, does not contradict the amendment's plain language, and is in harmony with the relevant governing scheme. Accordingly, I would reverse the portion of the trial court's ruling invalidating the Commissions' rules adopting and using the definition of interest found in the financial code. [3] Although I personally might not endorse a definition for interest that could lead to homeowners being charged higher fees in connection with home-equity loans, this Court does not have the authority to countermand the actions of the legislature or the will of the people expressed by the passage of a constitutional amendment empowering the Commissions to act in the manner that they did.

> 3 In its judgment, the district court invalidated the rule containing the definition of interest and various rules using that definition. *See* 7 Tex. Admin. Code §§ 153.1(11), 153.5(3), (4), (6), [**48] (8), (9), (12) (2009). The same reasons compelling my determination that the district court erred by invalidating the rule defining interest would also compel me to conclude that the district court erred by invalidating the rules using that definition.

For the reasons previously given, I dissent from the majority's resolution of the first issue but concur with the result reached by the majority in all of the remaining issues on appeal.

David Puryear, Justice

Before Justices Patterson, Puryear, and Henson

Filed: January 8, 2010

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TITLE 7 BANKING AND SECURITIES
PART 8 JOINT FINANCIAL REGULATORY AGENCIES
CHAPTER 153 HOME EQUITY LENDING
RULE §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 section, 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--interest as defined in the Texas Finance Code §301.002(4) and as interpreted by the courts.

(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) Three percent limitation--the limitation on fees in Section 50(a)(6)(E).

Source Note: The provisions of this §153.1 adopted to be effective January 8, 2004, 29 TexReg 84

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TITLE 7	BANKING AND SECURITIES
PART 8	JOINT FINANCIAL REGULATORY AGENCIES
CHAPTER 153	HOME EQUITY LENDING
RULE §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) A lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner.

(3) A lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and not the homestead.

Source Note: The provisions of this §153.15 adopted to be effective January 8, 2004, 29 TexReg 84

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TITLE 7	BANKING AND SECURITIES
PART 8	JOINT FINANCIAL REGULATORY AGENCIES
CHAPTER 153	HOME EQUITY LENDING
RULE §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 closed-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.

Source Note: The provisions of this §153.51 adopted to be effective January 8, 2004, 29 TexReg 84; amended to be effective November 13, 2008, 33 TexReg 9074

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TITLE 7	BANKING AND SECURITIES
PART 8	JOINT FINANCIAL REGULATORY AGENCIES
CHAPTER 153	HOME EQUITY LENDING
RULE §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 Note: The provisions of this §153.92 adopted to be effective November 11, 2004, 29 TexReg 10257

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Appendix

Tab D

NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:

(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER'S SPOUSE;

(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;

(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;

(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;

(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 3 PERCENT OF THE LOAN AMOUNT;

(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME UNLESS IT IS A HOME EQUITY LINE OF CREDIT;

(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;

(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;

(I) THE LOAN MAY NOT BE SECURED BY HOMESTEAD PROPERTY THAT IS DESIGNATED FOR AGRICULTURAL USE AS OF THE DATE OF CLOSING, UNLESS THE AGRICULTURAL HOMESTEAD PROPERTY IS USED PRIMARILY FOR THE PRODUCTION OF MILK;

(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;

(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;

(L) THE LOAN MUST BE SCHEDULED TO BE REPAID IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;

(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A LOAN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER; AND MAY NOT WITHOUT YOUR CONSENT CLOSE BEFORE ONE BUSINESS DAY AFTER THE DATE ON WHICH YOU RECEIVE A COPY OF YOUR 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; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING DATE OF THE OTHER LOAN, UNLESS ON OATH YOU REQUEST AN EARLIER CLOSING DUE TO A DECLARED STATE OF EMERGENCY;

(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;

(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;

(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:

(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT EXCEPT A DEBT THAT IS SECURED BY YOUR HOME OR OWED TO ANOTHER LENDER;

(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;

(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS FOR SUBSTANTIVE TERMS OF AGREEMENT LEFT TO BE FILLED IN;

(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN A LEGAL PROCEEDING ON YOUR BEHALF;

(5) PROVIDE THAT YOU RECEIVE A COPY OF YOUR FINAL LOAN APPLICATION AND ALL EXECUTED DOCUMENTS YOU SIGN AT CLOSING;

(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;

(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER'S OBLIGATIONS UNLESS THE LENDER CURES THE FAILURE TO COMPLY AS PROVIDED BY SECTION 50(a)(6)(Q)(x), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND

(R) IF THE LOAN IS A HOME EQUITY LINE OF CREDIT:

(1) YOU MAY REQUEST ADVANCES, REPAY MONEY, AND REBORROW MONEY UNDER THE LINE OF CREDIT;

(2) EACH ADVANCE UNDER THE LINE OF CREDIT MUST BE IN AN AMOUNT OF AT LEAST $4,000;

(3) YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, OR SIMILAR DEVICE, OR PREPRINTED CHECK THAT YOU DID NOT SOLICIT, TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT;

(4) ANY FEES THE LENDER CHARGES MAY BE CHARGED AND COLLECTED ONLY AT THE TIME THE LINE OF CREDIT IS ESTABLISHED AND THE LENDER MAY NOT CHARGE A FEE IN CONNECTION WITH ANY ADVANCE;

(5) THE MAXIMUM PRINCIPAL AMOUNT THAT MAY BE EXTENDED, WHEN ADDED TO ALL OTHER DEBTS SECURED BY YOUR HOME, MAY NOT EXCEED 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LINE OF CREDIT IS ESTABLISHED;

(6) IF THE PRINCIPAL BALANCE UNDER THE LINE OF CREDIT AT ANY TIME EXCEEDS 50 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME, AS DETERMINED ON THE DATE THE LINE OF CREDIT IS ESTABLISHED, YOU MAY NOT CONTINUE TO REQUEST ADVANCES UNDER THE LINE OF CREDIT UNTIL THE BALANCE IS LESS THAN 50 PERCENT OF THE FAIR MARKET VALUE; AND

(7) THE LENDER MAY NOT UNILATERALLY AMEND THE TERMS OF THE LINE OF CREDIT.

THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE."

Appendix

Tab E

Sec. 46. (Repealed Aug. 5, 1969.)

Sec. 47. (Repealed Nov. 2, 1999.)

(TEMPORARY TRANSITION PROVISIONS for Sec. 47: See Appendix, Note 1.)

Sec. 48. EXISTING LAWS TO CONTINUE IN FORCE. All laws and parts of laws now in force in the State of Texas, which are not repugnant to the Constitution of the United States, or to this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation or shall be amended or repealed by the Legislature.

Sec. 49. PROTECTION OF PERSONAL PROPERTY FROM FORCED SALE. The Legislature shall have power, and it shall be its duty, to protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female.

Sec. 50. HOMESTEAD; PROTECTION FROM FORCED SALE; MORTGAGES, TRUST DEEDS, AND LIENS. (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:

(1) the purchase money thereof, or a part of such purchase money;

(2) the taxes due thereon;

(3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding;

(4) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;

(5) work and material used in constructing new improvements thereon, if contracted for in writing, or work and material used to repair or renovate existing improvements thereon if:

(A) the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead;

(B) the contract for the work and material is not executed by the owner or the owner's spouse before the fifth day after the owner makes written application for any extension of credit for the work and material, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing;

(C) the contract for the work and material expressly provides that the owner may rescind the contract without penalty or charge within three days after the execution of the contract by all parties, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing; and

(D) the contract for the work and material is executed by the owner and the owner's spouse only at the office of a third-party lender making an extension of credit for the work and material, an attorney at law, or a title company;

(6) an extension of credit that:

(A) is secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner's spouse;

(B) is 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;

(C) is 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;

(D) is secured by a lien that may be foreclosed upon only by a court order;

(E) does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit;

(F) is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time unless the open-end account is a home equity line of credit;

(G) is payable in advance without penalty or other charge;

(H) is not secured by any additional real or personal property other than the homestead;

(I) is not secured by homestead property that on the date of closing is designated for agricultural use as provided by statutes governing property tax, unless such homestead property is used primarily for the production of milk;

(J) 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;

(K) is 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 Subsections (a)(1)-(a)(5) or Subsection (a)(8) of this section;

(L) is scheduled to be repaid:

(i) 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; or

(ii) if the extension of credit is a home equity

line of credit, in periodic payments described under Subsection (t)(8) of this section;

(M) is closed not before:

(i) the 12th day after the later of the date that the owner of the homestead submits a loan application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by Subsection (g) of this section;

(ii) 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 documentation to the owner or the lender may modify previously provided documentation on the date of closing; and

(iii) the first anniversary of the closing date of any other extension of credit described by Subsection (a)(6) of this section secured by the same homestead property, except a refinance described by Paragraph (Q)(x)(f) of this subdivision, unless the owner on oath requests an earlier closing due to a state of emergency that:

(a) has been declared by the president of the United States or the governor as provided by law; and

(b) applies to the area where the homestead is located;

(N) is closed only at the office of the lender, an attorney at law, or a title company;

(O) permits a lender to contract for and receive any fixed or variable rate of interest authorized under statute;

(P) is 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:

(i) a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state

or the United States;

(ii) a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans;

(iii) a person licensed to make regulated loans, as provided by statute of this state;

(iv) a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase;

(v) a person who is related to the homestead property owner within the second degree of affinity or consanguinity; or

(vi) a person regulated by this state as a mortgage broker; and

(Q) is made on the condition that:

(i) 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;

(ii) the owner of the homestead not assign wages as security for the extension of credit;

(iii) the owner of the homestead not sign any instrument in which blanks relating to substantive terms of agreement are left to be filled in;

(iv) the owner of the homestead not sign a confession of judgment or power of attorney to the lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding;

(v) at the time the extension of credit is made, the owner of the homestead shall receive a copy of the final loan application and all executed documents signed by the owner at closing related to the extension of credit;

(vi) the security instruments securing the extension of credit contain a disclosure that the extension of credit is the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution;

(vii) within a reasonable time after termination and full payment of the extension of credit, the lender cancel and return the promissory note to the owner of the homestead and give

the owner, in recordable form, a release of the lien securing the extension of credit or a copy of an endorsement and assignment of the lien to a lender that is refinancing the extension of credit;

(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;

(ix) the owner of the homestead and the lender sign a written acknowledgment as to the fair market value of the homestead property on the date the extension of credit is made;

(x) except as provided by Subparagraph (xi) of this paragraph, the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply by:

(a) paying to the owner an amount equal to any overcharge paid by the owner under or related to the extension of credit if the owner has paid an amount that exceeds an amount stated in the applicable Paragraph (E), (G), or (O) of this subdivision;

(b) sending the owner a written acknowledgement that the lien is valid only in the amount that the extension of credit does not exceed the percentage described by Paragraph (B) of this subdivision, if applicable, or is not secured by property described under Paragraph (H) or (I) of this subdivision, if applicable;

(c) sending the owner a written notice modifying any other amount, percentage, term, or other provision prohibited by this section to a permitted amount, percentage, term, or other provision and adjusting the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by this section and is not subject to any other term or provision prohibited by this section;

(d) delivering the required documents to the borrower if the lender fails to comply with Subparagraph (v) of this paragraph or obtaining the appropriate signatures if the

lender fails to comply with Subparagraph (ix) of this paragraph;

(e) sending the owner a written acknowledgement, if the failure to comply is prohibited by Paragraph (K) of this subdivision, that the accrual of interest and all of the owner's obligations under the extension of credit are abated while any prior lien prohibited under Paragraph (K) remains secured by the homestead; or

(f) if the failure to comply cannot be cured under Subparagraphs (x)(a)-(e) of this paragraph, curing the failure to comply by a refund or credit to the owner of $1,000 and offering the owner the right to refinance the extension of credit with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original extension of credit with any modifications necessary to comply with this section or on terms on which the owner and the lender or holder otherwise agree that comply with this section; and

(xi) the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the extension of credit is made by a person other than a person described under Paragraph (P) of this subdivision or if the lien was not created under a written agreement with the consent of each owner and each owner's spouse, unless each owner and each owner's spouse who did not initially consent subsequently consents;

(7) a reverse mortgage; or

(8) the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property, including the refinance of the purchase price of the manufactured home, the cost of installing the manufactured home on the real property, and the refinance of the purchase price of the real property.

(b) An owner or claimant of the property claimed as homestead may not sell or abandon the homestead without the consent of each owner and the spouse of each owner, given in such manner as may be prescribed by law.

(c) No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section, whether such mortgage, trust deed, or other lien, shall

have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

(d) A purchaser or lender for value without actual knowledge may conclusively rely on an affidavit that designates other property as the homestead of the affiant and that states that the property to be conveyed or encumbered is not the homestead of the affiant.

(e) A refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)-(a)(5) 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) of this section; 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 this section.

(f) A refinance of debt secured by the homestead, any portion of which is an extension of credit described by Subsection (a)(6) of this section, may not be secured by a valid lien against the homestead unless the refinance of the debt is an extension of credit described by Subsection (a)(6) or (a)(7) of this section.

(g) An extension of credit described by Subsection (a)(6) of this section may be secured by a valid lien against homestead property if the extension of credit is not closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument:

"NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

"SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:

"(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER'S SPOUSE;

"(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL

BALANCES OF ALL OTHER LIENS AGAINST YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;

"(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;

"(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;

"(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 3 PERCENT OF THE LOAN AMOUNT;

"(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME UNLESS IT IS A HOME EQUITY LINE OF CREDIT;

"(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;

"(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;

"(I) THE LOAN MAY NOT BE SECURED BY HOMESTEAD PROPERTY THAT IS DESIGNATED FOR AGRICULTURAL USE AS OF THE DATE OF CLOSING, UNLESS THE AGRICULTURAL HOMESTEAD PROPERTY IS USED PRIMARILY FOR THE PRODUCTION OF MILK;

"(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;

"(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;

"(L) THE LOAN MUST BE SCHEDULED TO BE REPAID IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;

"(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A LOAN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER; AND MAY NOT WITHOUT YOUR CONSENT CLOSE BEFORE ONE BUSINESS DAY AFTER THE DATE ON WHICH YOU RECEIVE A COPY OF YOUR 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; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING DATE OF THE OTHER LOAN, UNLESS

ON OATH YOU REQUEST AN EARLIER CLOSING DUE TO A DECLARED STATE OF EMERGENCY;

"(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;

"(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;

"(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

"(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:

"(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT EXCEPT A DEBT THAT IS SECURED BY YOUR HOME OR OWED TO ANOTHER LENDER;

"(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;

"(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS FOR SUBSTANTIVE TERMS OF AGREEMENT LEFT TO BE FILLED IN;

"(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN A LEGAL PROCEEDING ON YOUR BEHALF;

"(5) PROVIDE THAT YOU RECEIVE A COPY OF YOUR FINAL LOAN APPLICATION AND ALL EXECUTED DOCUMENTS YOU SIGN AT CLOSING;

"(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

"(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;

"(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

"(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

"(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER'S OBLIGATIONS UNLESS THE LENDER CURES THE FAILURE TO COMPLY AS PROVIDED BY SECTION 50(a)(6)(Q)(x), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND

"(R) IF THE LOAN IS A HOME EQUITY LINE OF CREDIT:

"(1) YOU MAY REQUEST ADVANCES, REPAY MONEY, AND REBORROW MONEY UNDER THE LINE OF CREDIT;

"(2) EACH ADVANCE UNDER THE LINE OF CREDIT MUST BE IN AN AMOUNT OF AT LEAST $4,000;

"(3) YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, OR SIMILAR DEVICE, OR PREPRINTED CHECK THAT YOU DID NOT SOLICIT, TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT;

"(4) ANY FEES THE LENDER CHARGES MAY BE CHARGED AND COLLECTED ONLY AT THE TIME THE LINE OF CREDIT IS ESTABLISHED AND THE LENDER MAY NOT CHARGE A FEE IN CONNECTION WITH ANY ADVANCE;

"(5) THE MAXIMUM PRINCIPAL AMOUNT THAT MAY BE EXTENDED, WHEN ADDED TO ALL OTHER DEBTS SECURED BY YOUR HOME, MAY NOT EXCEED 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LINE OF CREDIT IS ESTABLISHED;

"(6) IF THE PRINCIPAL BALANCE UNDER THE LINE OF CREDIT AT ANY TIME EXCEEDS 50 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME, AS DETERMINED ON THE DATE THE LINE OF CREDIT IS ESTABLISHED, YOU MAY NOT CONTINUE TO REQUEST ADVANCES UNDER THE LINE OF CREDIT UNTIL THE BALANCE IS LESS THAN 50 PERCENT OF THE FAIR MARKET VALUE; AND

"(7) THE LENDER MAY NOT UNILATERALLY AMEND THE TERMS OF THE LINE OF CREDIT.

"THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE."

If the discussions with the borrower are conducted primarily in a language other than English, the lender shall, before closing, provide an additional copy of the notice translated into the written language in which the discussions were conducted.

(h) A lender or assignee for value may conclusively rely on the written acknowledgment as to the fair market value of the homestead property made in accordance with Subsection (a)(6)(Q)(ix) of this section if:

(1) the value acknowledged to is the value estimate in an appraisal or evaluation prepared in accordance with a state or federal requirement applicable to an extension of credit under Subsection (a)(6); and

(2) the lender or assignee does not have actual knowledge at the time of the payment of value or advance of funds by the

lender or assignee that the fair market value stated in the written acknowledgment was incorrect.

(i) This subsection shall not affect or impair any right of the borrower to recover damages from the lender or assignee under applicable law for wrongful foreclosure. A purchaser for value without actual knowledge may conclusively presume that a lien securing an extension of credit described by Subsection (a)(6) of this section was a valid lien securing the extension of credit with homestead property if:

(1) the security instruments securing the extension of credit contain a disclosure that the extension of credit secured by the lien was the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution;

(2) the purchaser acquires the title to the property pursuant to or after the foreclosure of the voluntary lien; and

(3) the purchaser is not the lender or assignee under the extension of credit.

(j) Subsection (a)(6) and Subsections (e)-(i) of this section are not severable, and none of those provisions would have been enacted without the others. If any of those provisions are held to be preempted by the laws of the United States, all of those provisions are invalid. This subsection shall not apply to any lien or extension of credit made after January 1, 1998, and before the date any provision under Subsection (a)(6) or Subsections (e)-(i) is held to be preempted.

(k) "Reverse mortgage" means an extension of credit:

(1) that is secured by a voluntary lien on homestead property created by a written agreement with the consent of each owner and each owner's spouse;

(2) that is made to a person who is or whose spouse is 62 years or older;

(3) that is made without recourse for personal liability against each owner and the spouse of each owner;

(4) under which advances are provided to a borrower based on the equity in a borrower's homestead;

(5) that does not permit the lender to reduce the amount or number of advances because of an adjustment in the interest rate if periodic advances are to be made;

(6) that requires no payment of principal or interest until:

(A) all borrowers have died;

(B) the homestead property securing the loan is sold or otherwise transferred;

(C) all borrowers cease occupying the homestead property for a period of longer than 12 consecutive months without prior written approval from the lender; or

(D) the borrower:

(i) defaults on an obligation specified in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property;

(ii) commits actual fraud in connection with the loan; or

(iii) fails to maintain the priority of the lender's lien on the homestead property, after the lender gives notice to the borrower, by promptly discharging any lien that has priority or may obtain priority over the lender's lien within 10 days after the date the borrower receives the notice, unless the borrower:

(a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to the lender;

(b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings so as to prevent the enforcement of the lien or forfeiture of any part of the homestead property; or

(c) secures from the holder of the lien an agreement satisfactory to the lender subordinating the lien to all amounts secured by the lender's lien on the homestead property;

(7) that provides that if the lender fails to make loan advances as required in the loan documents and if the lender fails to cure the default as required in the loan documents after notice from the borrower, the lender forfeits all principal and interest of the reverse mortgage, provided, however, that this subdivision does not apply when a governmental agency or instrumentality takes an assignment of the loan in order to cure the default;

(8) that is not made unless the owner of the homestead

attests in writing that the owner received counseling regarding the advisability and availability of reverse mortgages and other financial alternatives;

(9) that requires the lender, at the time the loan is made, to disclose to the borrower by written notice the specific provisions contained in Subdivision (6) of this subsection under which the borrower is required to repay the loan;

(10) that does not permit the lender to commence foreclosure until the lender gives notice to the borrower, in the manner provided for a notice by mail related to the foreclosure of liens under Subsection (a)(6) of this section, that a ground for foreclosure exists and gives the borrower at least 30 days, or at least 20 days in the event of a default under Subdivision (6)(D)(iii) of this subsection, to:

(A) remedy the condition creating the ground for foreclosure;

(B) pay the debt secured by the homestead property from proceeds of the sale of the homestead property by the borrower or from any other sources; or

(C) convey the homestead property to the lender by a deed in lieu of foreclosure; and

(11) that is secured by a lien that may be foreclosed upon only by a court order, if the foreclosure is for a ground other than a ground stated by Subdivision (6)(A) or (B) of this subsection.

(l) Advances made under a reverse mortgage and interest on those advances have priority over a lien filed for record in the real property records in the county where the homestead property is located after the reverse mortgage is filed for record in the real property records of that county.

(m) A reverse mortgage may provide for an interest rate that is fixed or adjustable and may also provide for interest that is contingent on appreciation in the fair market value of the homestead property. Although payment of principal or interest shall not be required under a reverse mortgage until the entire loan becomes due and payable, interest may accrue and be compounded during the term of the loan as provided by the reverse mortgage loan agreement.

(n) A reverse mortgage that is secured by a valid lien against homestead property may be made or acquired without regard to the following provisions of any other law of this state:

(1) a limitation on the purpose and use of future advances or other mortgage proceeds;

(2) a limitation on future advances to a term of years or a limitation on the term of open-end account advances;

(3) a limitation on the term during which future advances take priority over intervening advances;

(4) a requirement that a maximum loan amount be stated in the reverse mortgage loan documents;

(5) a prohibition on balloon payments;

(6) a prohibition on compound interest and interest on interest;

(7) a prohibition on contracting for, charging, or receiving any rate of interest authorized by any law of this state authorizing a lender to contract for a rate of interest; and

(8) a requirement that a percentage of the reverse mortgage proceeds be advanced before the assignment of the reverse mortgage.

(o) For the purposes of determining eligibility under any statute relating to payments, allowances, benefits, or services provided on a means-tested basis by this state, including supplemental security income, low-income energy assistance, property tax relief, medical assistance, and general assistance:

(1) reverse mortgage loan advances made to a borrower are considered proceeds from a loan and not income; and

(2) undisbursed funds under a reverse mortgage loan are considered equity in a borrower's home and not proceeds from a loan.

(p) The advances made on a reverse mortgage loan under which more than one advance is made must be made according to the terms established by the loan documents by one or more of the following methods:

(1) an initial advance at any time and future advances at regular intervals;

(2) an initial advance at any time and future advances at regular intervals in which the amounts advanced may be reduced, for

one or more advances, at the request of the borrower;

(3) an initial advance at any time and future advances at times and in amounts requested by the borrower until the credit limit established by the loan documents is reached;

(4) an initial advance at any time, future advances at times and in amounts requested by the borrower until the credit limit established by the loan documents is reached, and subsequent advances at times and in amounts requested by the borrower according to the terms established by the loan documents to the extent that the outstanding balance is repaid; or

(5) at any time by the lender, on behalf of the borrower, if the borrower fails to timely pay any of the following that the borrower is obligated to pay under the loan documents to the extent necessary to protect the lender's interest in or the value of the homestead property:

(A) taxes;

(B) insurance;

(C) costs of repairs or maintenance performed by a person or company that is not an employee of the lender or a person or company that directly or indirectly controls, is controlled by, or is under common control with the lender;

(D) assessments levied against the homestead property; and

(E) any lien that has, or may obtain, priority over the lender's lien as it is established in the loan documents.

(q) To the extent that any statutes of this state, including without limitation, Section 41.001 of the Texas Property Code, purport to limit encumbrances that may properly be fixed on homestead property in a manner that does not permit encumbrances for extensions of credit described in Subsection (a)(6) or (a)(7) of this section, the same shall be superseded to the extent that such encumbrances shall be permitted to be fixed upon homestead property in the manner provided for by this amendment.

(r) The supreme court shall promulgate rules of civil procedure for expedited foreclosure proceedings related to the foreclosure of liens under Subsection (a)(6) of this section and to foreclosure of a reverse mortgage lien that requires a court order.

(s) The Finance Commission of Texas shall appoint a director

to conduct research on the availability, quality, and prices of financial services and research the practices of business entities in the state that provide financial services under this section. The director shall collect information and produce reports on lending activity of those making loans under this section. The director shall report his or her findings to the legislature not later than December 1 of each year.

(t) A home equity line of credit 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:

(1) the owner requests advances, repays money, and reborrows money;

(2) any single debit or advance is not less than $4,000;

(3) the owner does not use a credit card, debit card, or similar device, or preprinted check unsolicited by the borrower, to obtain an advance;

(4) any fees described by Subsection (a)(6)(E) of this section 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;

(5) the maximum principal amount that may be extended under the account, when added to the aggregate total of the outstanding principal balances of all indebtedness secured by the homestead on the date the extension of credit is established, does not exceed an amount described under Subsection (a)(6)(B) of this section;

(6) no additional debits or advances are made if the total principal amount outstanding exceeds an amount equal to 50 percent of the fair market value of the homestead as determined on the date the account is established;

(7) the lender or holder may not unilaterally amend the extension of credit; and

(8) 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:

(A) during the period during which the owner may request advances, each installment equals or exceeds the amount of

accrued interest; and

(B) after the period during which the owner may request advances, installments are substantially equal.

(u) The legislature may by statute delegate one or more state agencies the power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t), of this section. An act or omission does not violate a provision included in those subsections if the act or omission conforms to an interpretation of the provision that is:

(1) in effect at the time of the act or omission; and

(2) made by a state agency to which the power of interpretation is delegated as provided by this subsection or by an appellate court of this state or the United States.

(v) A reverse mortgage must provide that:

(1) the owner does not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance;

(2) after the time the extension of credit is established, no transaction fee is charged or collected solely in connection with any debit or advance; and

(3) the lender or holder may not unilaterally amend the extension of credit.

(Amended Nov. 6, 1973, and Nov. 7, 1995; Subsecs. (a)-(d) amended and (e)-(s) added Nov. 4, 1997; Subsecs. (k), (p), and (r) amended Nov. 2, 1999; Subsec. (a) amended Nov. 6, 2001; Subsecs. (a), (f), and (g) amended and (t) and (u) added Sept. 13, 2003; Subsec. (p) amended and (v) added Nov. 8, 2005; Subsecs. (a), (g), and (t) amended Nov. 6, 2007.)

Sec. 51. AMOUNT OF HOMESTEAD; USES. The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided, that the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a