



Independent Bankers Association of Texas

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Compliance FAQs

Home Equity: Issues After January 1, 2018

Topic: Fee Caps

- Q:** Can we disclose actual costs on LE that exceed the 3% cap (now) but are within the later 2% cap and then give a lender credit at closing, or do we have to show lender credit at LE?
- A:** The LE must be a “good faith estimate” of the costs that will be charged at closing. Since you know that the loan will not close until next year, when the legal requirements relating to home equity caps are changed, disclose based on the good faith estimate of costs to be actually charged at closing. Remember, too, that the test for lien validity will be compliance with the constitutional requirements at closing. Since you will be closing next year, you will give the revised Notice Regarding Extension of Credit to the applicant after January 1, 2018, and that notice provides for the 2% fee cap.
- Q:** On an unregulated second lien, are the appraisal, survey, and title policy fees still excluded from the 2% cap after 1/1/18?

A: Yes!

Topic: Power of Attorneys

- Q:** If a qualified POA is provided, does a lender have to honor it, or is that up to the lender as to whether or not they will accept a POA?
- A:** If it is a durable POA, you must honor it unless one of the exceptions applies. Please see the FAQs on POAs for that information!

Topic: Lender Can't Require Bank Payoffs

- Q:** We can't make a loan because D/I is too high. We would only be able to make the loan if the borrower paid lender debts off to qualify. We could still give him proceeds and let him write a check but we still required it.
- A:** A home equity lien would not be valid if it is made on the condition that another debt to the creditor must be paid unless that other debt is also secured by the homestead. Sorry. You can't “require” the debt to be repaid. If this has already occurred, then disclaim that requirement in a cure letter.

Topic: Homestead

- Q:** I live in town (urban) on ½ acre and my neighbor's house (contiguous) goes up for sale. I want to buy it to rent out. Reg. Z business purpose, but is it my homestead for HE purposes, or can I disclaim it?
- A:** First, if the loan is a purchase money one, the lien will be valid no matter what! Second, there is case law that indicates that rental property is an “investment” rather than “profession.” So, at least some cases have held that it would not be homestead. Finally, if the lots are contiguous, you can't disclaim the second lot since together the lots are not over 10 acres (the size allotted to urban homesteads).



Topic: Escrow

- Q:** Is negative escrow a debt against the property? (Not just under-estimated, but for lack of payments ongoing, etc.)
- A:** The escrow is technically secured by the deed of trust lien. The Texas Supreme Court has concluded that the taxes and insurance can be rolled into a modification under the original lien. Also, Finance Commission Interpretation at 7 TAC 153.5 (15) indicates that property insurance premiums are not subject to the 3% limitation. This is a permitted contractual charge.

Topic: Deed of Trust Title

- Q:** Does “50 (a)6” have to be at the top (Heading) on 2nd lien DOT?
- A:** The Constitution doesn’t specify the location for the designation. It could be in the title/description of the instrument at the center of the first page, for example. Some drafters put it at the very top right-hand corner. No absolute specification, though, in the law.

Topic: Emergency Closing

- Q:** County declared state of emergency, but customer not affected – can they still swear for earlier closing?
- A:** First, this emergency rule only applies to the one year waiting period. Next, the Constitution requires that the disaster declaration be declared by the governor or president and that the declaration apply to the area where the homestead is located.

Topic: ATR

- Q:** When figuring ATR, do we still take into consideration items customer wants to pay off with funds?
- A:** Under the Reg Z rules for ATR calculation, you do not include debts paid off at or before consummation.

Topic: Urban Definition

- Q:** Is an ‘urban homestead’ defined as up to 10 acres, or a 10-acre minimum?
- A:** It is “up to” 10 acres. Most urban homesteads are much smaller!

Topic: Owelty

- Q:** Husband is the only one in the title, but first lien is in both husband and wife’s names. Husband wants second lien HEL to make improvements and pay the wife. His intent is to sell the property and pay loan off. Should the wife be removed from the first lien? Should this be closed in a title company or is it okay to close in the bank? (no title insurance)
- A:** More facts needed! It sounds like there is a divorce and the husband is making a settlement payment to the wife. If this is true, there should be divorce proceedings with this property settlement a part of the title records. Remember that if they are still married, both must sign the lien documents in order to have a valid lien even if the property is the separate property of the husband. You need clarity on the state of the title! You might reconsider title insurance on this one. In any event, you can close at the bank or at a title company.
- You could make a straightforward home improvement loan to the husband. If he is buying out the wife’s interest as a result of a divorce, you could make a loan for the owelty payment. Then you could refinance those into a single note.



Topic: Balance Modification

Q: We added taxes onto a Home Equity Loan without doing a modification. The loan has now matured and has a balance remaining. Can we do a modification on this remaining balance?

A: You should be able to do this. The taxes do not constitute an advance of additional funds but rather an obligation that was incurred—but not paid—during the term of the note and secured by the deed of trust lien. I strongly recommend that you visit with local counsel about the best way to handle this, though! It would appear to fit the scenario permitted by the Texas Supreme Court in *Carrington Homes v. Sims*.

Topic: Seasoned Refi of HE Loan

Q: Any future restrictions on refi of loans that are closed under the seasoned refi product?

A: There are several requirements.

1. The existing home equity loan must be at least one year old.
2. No additional funds other than refi of another debt validly secured by homestead (i.e. purchase money, home improvement, owelty, taxes) plus actual costs and reserves required to refi the debt
3. Refi must be of a principal amount that when added to all other debt secured by homestead does not exceed 80% of the fair market value on the date the refi is made
4. Lender must provide the owner with the required notice (about loss of home equity protections) that is spelled out in the Constitution not later than the third business day after the owner submits the loan application.

There is no definition for “application,” so I would use the TRID one since that triggers other notices. The required notice should be hand-delivered, sent by email (if E-SIGN compliance is in place), or mailed. But if the latter, you have to allow time for receipt. So the better practice will be to use Fed Ex or other method where you can assure timely delivery and proof of receipt!

Topic: Admin Fee

Q: TX-OCCC-Eff-9/5/13-Increased Admin Fee. Senate Bill 1251 say \$100 Admin Fee, please confirm what the acceptable allowable Admin Fee is for Real Estate lending?

A: \$25.00. The secondary mortgage portion of chapter 342 that authorizes the \$25 admin fee was not changed!

Topic: HE dates: Effective date 1/1/18

Q: How does that apply to application and consummation dates?

A: It is a bit tricky. I think that you could theoretically take an application before 1/1/18 so that you could start the underwriting process. However, you will have to provide the new Notice Concerning Extensions of Credit after 1/1/18. That starts the twelve-day waiting period for closing. Don't forget both New Year's Day and MLK holiday! Logically that means that the first day to close would be January 16.

Topic: Construction

Q: There are overrun expenses on building a primary residence. Can we process a home equity loan for the additional funds, or can we modify the existing loan and add the funds?

A: The problem is lien validity. To have a valid construction lien that is ahead of all others, the lien for the correct amount must be in place before the work is done! Modification will not work if the work is already performed. You could do a home equity loan for this overrun since the HE lien validity is not dependent on the timing of the construction.



Topic: Evaluations/Appraisals

Q: Can we process an Evaluation vs. Certified appraisal on a primary “homestead” property?

A: Under the federal appraisal rules, if the transaction is for less than \$250,000, you can use an evaluation rather than an appraisal. For a home equity loan, the Constitution requires the owner and lender to sign a “written acknowledgement as to the fair market value” of the property on the date the extension of credit is made. That does not appear to require a full-blown appraisal.

Topic: Loan-to-Value (LTV)

Q: I have a purchase loan on 1,000 acres. I want to take out an equity loan on 200 of those acres. Please explain how to calculate the LTV on this situation for interagency guidelines.

A: First, I would suggest that you need a survey to describe those 200 acres. Next, you need an appraisal for that tract. You can’t just assume that the value is 20% of the total acreage value. If the house is on the 200 acres, that will affect the value, for example.

Next, the interagency guidance with supervisory LTV limits generally applies a 90% LTV for owner-occupied 1-to-4 family loans and home equity. The applicable ratio will depend on the character of the real property—raw land, improved, etc.

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