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CREDIT ACCESS BUSINESS ADVISORY BULLETIN

Filing Criminal Charges Against Consumers

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Under Section 393.201(c)(3) of the Texas Finance Code, a contract between a consumer and a credit access business (CAB) must state that “a person may not threaten or pursue criminal charges against a consumer related to a check or other debit authorization provided by the consumer as security for a transaction in the absence of forgery, fraud, theft, or other criminal conduct.”

This means that a CAB may not pursue criminal charges against a consumer unless it has specific evidence of criminal conduct, sufficient to support one of the specified exceptions. For example, if a consumer postdates a check to pay for a payday loan, and that check later bounces, this is not sufficient evidence to show that the consumer committed criminal conduct. A CAB should not pursue criminal charges in this situation unless it has additional evidence showing that the consumer intended to commit a criminal act.

Along the same lines, a CAB should not use a district attorney’s hot-check division simply as a means for collecting on delinquent loans. Generally, the hot-check provisions of the Texas Penal Code apply to dishonored checks bearing the date they are issued, where the writer of the check represents that funds are available even though they are not. Postdated checks are generally not subject to these provisions. When a CAB accepts a postdated check or ACH transfer authorization, the CAB should understand that there might not be available funds at the time of the transaction.

Before threatening or pursuing a criminal charge, a CAB should have specific evidence that the state could use to prove—beyond a reasonable doubt—that a consumer knowingly or intentionally violated a criminal law when entering the transaction. Otherwise, the CAB risks violating Chapter 393 of the Finance Code, as well as the Texas Debt Collection Act (Chapter 392 of the Finance Code).