*Title 7. Banking and Securities*
*Part 5. Office of Consumer Credit Commissioner*
*Chapter 89. Property Tax Lenders*
*§§89.102, 89.207, 89.504, & 89.601*

The Finance Commission of Texas (commission) adopts amendments to §§89.102, 89.207, 89.504, and 89.601 concerning Property Tax Lenders.

The commission adopts the amendments to §89.102 and §89.504 without changes to the re-proposed text as published in the December 26, 2014, issue of the *Texas Register* (39 TexReg 10122). The commission adopts the amendments to §89.207 and §89.601 with changes to the re-proposed text as published in the December 26, 2014, issue of the *Texas Register* (39 TexReg 10122). The commission withdraws the proposed amendments to §89.802 which appeared in the December 26, 2014, issue of the *Texas Register* (39 TexReg 10122). The withdrawal of the amendments to §89.802 is published elsewhere in this issue of the *Texas Register*.

The commission received eighteen written comments on the re-proposal from the following organizations and entities: Atlas, Hall & Rodriguez, LLP; Harrison Duncan, PLLC; Homefront Tax Loans; Home Tax Solutions; Hunter-Kelsey of Texas, LLC; the Law Firm of Daniel J. Young PLLC; the Law Office of Nathan C. Cace, PC; Ovation Financial Services; Propel Financial Services, LLC; Protect My Texas Property; Resolution Finance LLC; Sombrero Capital, LLC; Tax Advances LLC; Tax Ease; the Texas Mortgage Bankers Association; the Texas Property Tax Lienholders Association; Texas Property Tax Loans; and USPTL LLC.

The following is a summary of the issues raised by the commenters, as well as the number of comments received on each particular issue: (1) disclosure of affiliated businesses (one comment), (2) the general maximum fee limit on closing costs (six comments), (3) clarification on costs for additional parcels and costs necessary to address title defects (two comments), and (4) the use of legitimate discount points (eighteen comments).

All eighteen commenters discussed the re-proposed provisions on legitimate discount points. The comments fell into four main groups. Three comments supported the rule amendments as re-proposed. Two comments were generally supportive, but suggested additional disclosures for discount points. Eight commenters argued that discount points should be prohibited, contrary to the re-proposed rule, which acknowledged circumstances where discount points would be authorized. Five commenters argued that the rule went too far in regulating discount points.

A more detailed analysis of the comments related to discount points is included after the purpose discussion regarding §89.601(d). Additionally, comments on the remaining issues will be addressed by discussion following the purpose of the provisions receiving comments.

In general, the purpose of the adopted amendments is to provide updated guidelines on the costs allowed for property tax loans. The major areas of amendment

involve the replacement of tiers with a general fee cap for reasonable closing costs, the disclosure of affiliated businesses used by property tax lenders, and a prohibition on charging discount points in connection with property tax loans.

The rule provisions regarding reasonable closing costs were initially adopted in 2008, with maximum amounts categorized into five tiers based on the size of the loan. Since that time, the property tax loan industry has seen growth and increased competition, resulting in changing costs over the last five years. The agency believed it to be an appropriate time to revisit the structure and amounts of costs outlined in §89.601, Fees for Closing Costs, as well as explore guidelines for post-closing costs.

The agency decided that it would be in the best interest of consumers as well as the industry to gather information from interested stakeholders in order to prepare an informed and well-balanced rule action for the commission on the costs allowed for property tax loans. Accordingly, the agency distributed an Advance Notice of Proposed Rulemaking (ANPR) and held a stakeholders meeting where several stakeholders provided verbal statements regarding the issues presented in the ANPR. Subsequently, a number of stakeholders provided written comments, elaborating on their statements from the stakeholders meeting.

Upon review of all the thorough and insightful commentary provided, the agency also distributed a rule draft to the stakeholders for specific early or pre-comment prior to the presentation of the rules to commission. The agency believes that this early participation of stakeholders in the rulemaking process has greatly benefited the resulting amendments.

The agency carefully evaluated the stakeholders' comments and incorporated numerous recommendations offered by the stakeholders into the rules as proposed. As a result of the feedback provided from stakeholders prior to the proposal, provisions concerning definitions, recordkeeping, and disclosures were in need of related amendments to fully incorporate the updated cost provisions. Thus, in addition to §89.601, the amendments also include changes to §89.102, Definitions; §89.207, Files and Records Required; and §89.504, Requirements for Disclosure Statement to Property Owner. Also, certain technical corrections have been made in order to better align these rules with prior changes made to other sections within the chapter. The following paragraphs outline the purposes of each rule amendment.

*I. Affiliated businesses and recordkeeping*

The amendments to §89.102, concerning Definitions, contain a few technical corrections, as well as the addition of the definition of "Affiliated business."

The first technical correction deletes the title of Texas Finance Code, Chapter 351 ("Property Tax Lenders"), along with the deletion of the short title and citation in two instances in the rule. When Chapter 89 was first adopted, this language was needed in order to distinguish the chapter regarding property tax lenders from another chapter with an identical number. The legislature has since corrected the duplicate numbering and hence made this language unnecessary.

The second technical change replaces the verb "shall" with "will" in the

introductory paragraph. Similar changes have been made to numerous rules in Chapter 89 in the past, as well as other chapters under the agency's authority. The agency believes that the latter language is reflective of a more modern and plain language approach in regulations.

The definition of "Affiliated business" has been added as new (renumbered) §89.102(1). The purpose of this definition is to implement recordkeeping requirements in §89.207 and disclosure requirements in §89.504, which will be discussed further under the purpose paragraphs for those sections.

New paragraph (1) provides that an "Affiliated business" is a person that shares common management with a property tax lender, shares more than 10% common ownership with a property tax lender, or is controlled by a property tax lender through a controlling interest greater than 10%. The common ownership or controlling interest may occur either directly or indirectly. The 10% threshold has been selected to maintain consistency with the ownership disclosure requirements found in the following property tax lender licensing regulations: §89.302, concerning Filing of New Application; §89.303, concerning Transfer of License; and §89.304, concerning Change in Form or Proportionate Ownership. The disclosure of a 10% ownership or controlling interest is also well established in similar regulations for industries under the agency's authority. With the addition of new paragraph (1), the remaining definitions existing in §89.102 have been renumbered accordingly.

In §89.207, concerning Files and Records Required, the amendments provide clarification regarding records that must be retained relating to payments made to attorneys, and records regarding affiliated businesses. New provisions are contained in §89.207(3)(A)(ix) concerning receipts or invoices along with proof of payment for recording costs or attorney's fees necessary to address a defect in title. The re-proposed version of §89.207(3)(A)(x), which required lenders to retain records related to discount points, has been removed for this adoption because of the prohibition on discount points under §89.601(d).

The purpose of §89.207(3)(A)(ix) is to implement another new provision that has been added in §89.601(c)(5) regarding additional costs for preparing documents necessary to address a defect in title to real property. Section §89.601(c)(5) allows a property tax lender to charge a reasonable fee for costs directly incurred in preparing, executing, and recording documents necessary to address a title defect, in addition to the general maximum fee limit described in §89.601(c)(3) (discussed later in this adoption). The purpose of §89.601(c)(5) is to ensure that property tax lenders can be compensated for costs incurred to address title defects. As a result, the recordkeeping provision in §89.207(3)(A)(ix) has been added to clarify what records must be maintained to establish compliance.

The purpose of the amendments in §89.207(3)(I)(iii) and (7) is to enable the agency to verify that a property tax lender has complied with Texas Finance Code, §351.0021(d), which provides that certain post-closing costs "must be for services performed by a person that is not an employee of the property tax lender." Certain property tax lenders impose post-closing costs that are paid to companies affiliated with the property tax lender

through common management, ownership, or control. By requiring property tax lenders to maintain records of their business relationships with affiliated businesses, as well as records of all amounts paid to affiliated businesses, the amended provisions ensure that property tax lenders can substantiate their relationship with affiliated businesses and the fact that costs are not paid to employees of the property tax lender.

Additionally, please refer to the discussion following §89.601(c)(5) regarding documentation related to attorney's fees to address title defects.

In §89.207(3)(L)(i), concerning notices sent by attorneys involving judicial foreclosures under Texas Tax Code, §32.06, the changes provide language that better tracks the statute. For this adoption, the phrase "a non-salaried attorney of the licensee" has been replaced by the phrase "an attorney who is not an employee of the licensee."

Throughout §89.207, minor technical changes have been made to accommodate the new and revised provisions, including the renumbering of the last two paragraphs. In addition, the agency's acronym "OCCC," as defined in §89.102(8) (as renumbered), replaces the use of "Office of Consumer Credit Commissioner" and "commissioner" in §89.207(9) (as renumbered). The first instance is simply for abbreviation purposes. In the second instance, the agency believes that the use of "OCCC" will provide better clarity as the context calls for action by the agency, as opposed to the commissioner specifically.

In §89.504, concerning Requirements for Disclosure Statement to Property Owner, the adoption adds subsection (f) relating to the disclosure of affiliated businesses. New subsection (f) requires property tax lenders that impose post-closing costs paid to affiliated businesses to include additional information in the disclosure form that the property tax lender must provide to the borrower before closing. In particular, the subsection requires the disclosure to include the name of the affiliated business, a statement that it is affiliated with the property tax lender, and a statement that costs paid to the affiliated business cannot be for services performed by employees of the property tax lender. The purpose of this amendment is to provide the borrower with additional information regarding the property tax lender's use of affiliated businesses, and to ensure that a property tax lender has complied with Texas Finance Code, §351.0021(d), which provides that certain post-closing costs "must be for services performed by a person that is not an employee of the property tax lender."

In addition, regarding the affiliated business disclosure statement required by §89.504(f), the agency believes that these revisions are appropriately contained in the rule text as opposed to the corresponding forms in each rule. Only certain property tax lenders use affiliated businesses. Thus, to avoid potential confusion, the changes focus this voluntary practice in the rule text, without placing optional language in the forms used by the entire industry.

One commenter stated: "The idea that the disclosure of affiliated business arrangements is sufficient to avoid abuses is illogical. The disclosures would mean practically nothing to property owners. Without a scheme for enforcing prohibitions for affiliate businesses charging unreasonable fees and costs to circumvent

fee and cost regulations, it is difficult to understand what purpose these proposed regulations will serve."

The commission disagrees with this comment. As discussed earlier, certain property tax lenders impose post-closing costs that are paid to companies affiliated with the property tax lender through common management, ownership, or control. By requiring property tax lenders to disclose the identities of affiliated businesses, the amended provision ensures transparency and enables the borrower to make an informed decision before closing. Thus, the commission maintains new §89.504(f) for this adoption.

*II. Closing cost limitation*

The majority of the amendments are contained in §89.601, concerning Fees for Closing Costs.

*A. Repeal of closing cost tiers*

During the early stages of rule development, most stakeholders agreed that the rule's former five-tier system based on the total tax lien payment amount did not correlate to the costs incurred by a property tax lender to obtain a transfer of a residential property tax lien. Thus, all the language relating to the five tiers has been deleted from §89.601. Specifically, the deletions are as follows: the introductory sentence in subsection (c), the last sentence of subsection (c)(2), and subparagraphs (A) - (E) of subsection (c)(2).

One commenter argued that the tiered system should be maintained, stating that "a complete flattening of the closing cap tiers is ill advised. While it may be true that some expenses of origination are constant regardless of the size of the transaction, this is not true of all expenses. For example, it would be imprudent to apply the same level of scrutiny when considering a loan of $5,000 versus a loan of $50,000. A prudent originator would certainly pay for a more definitive title report. They would examine more closely the property value. Additionally, they would use more scrutiny in examining the borrowers' ability to pay." The agency is unaware of increased costs for a "more definitive title report" on a larger loan, because the cost of an abstract of title generally does not vary with the loan amount. The commission believes that the commenter's concerns are addressed by the provisions in §89.601(c)(4) and (5), which authorize additional amounts for multiple parcels of residential property and documents necessary to address title defects, as discussed later in this adoption. These provisions should enable property tax lenders to recover their costs in more complex transactions.

*B. General maximum fee limit*

In place of the five tiers, this adoption adds paragraphs (3) - (5) to subsection (c), which provide a $900 general maximum fee limit, as well as two areas of exception to that general maximum fee limit for loans involving multiple parcels and costs for preparing documents to address title defects. The commission believes that the $900 limitation will help ensure that lenders' closing-related costs are accurately reflected in the amounts that they charge, ensuring that prices are transparent and result in informed credit decisions.

Data collected in annual reports from property tax lenders indicates a downward trend in closing costs for residential property tax loans between 2008 and 2013. In

particular, a 2012 study by the commission indicated a decrease in average residential closing costs from $1,259 in 2008 to $866 in 2011. Finance Commission of Texas, *Legislative Report: Property Tax Lending Study* at 21 fig. 3 (2012). The average closing costs for residential property tax loans in 2013 was $707. Furthermore, many property tax lender stakeholders provided oral and written information stating that they charge well below the former maximums in the rule and even the new re-proposed maximum limit.

One commenter "urge[d] the Commission to consider a $500 general maximum closing cost cap." The commenter stated: "Although $900 is much better than the caps provided by the current system, it far exceeds an amount necessary to recover costs directly associated with closing most transactions. [The commenter's] average third party costs on a single property transfer are below $300, and we believe that most or all tax lien transferees can comply with a $500 cap with relative ease. The closing cost cap is intended to reflect costs associated with each transaction, and should not serve as a method of recovering overhead or creating a profit center for tax lien transferees."

The commission agrees that the closing cost limitation should reflect costs directly related to closing. As stated in §89.601(b)(1), "the term 'closing costs' includes costs incurred by a property tax lender from the time of application through the time of closing." Closing costs should not include overhead or serve as a profit center. However, based on available information, the commission believes that a $500 maximum would be too low. The agency received several informal comments prior to the proposal indicating that an $800 cap would be too low. In addition, property tax lenders charged an average of $707 in closing costs during 2013. It is important to note that $707 is an average amount, whereas the $900 cap in §89.601(c)(3) is a maximum amount. An average by definition reflects numbers both below *and above* that number. Consequently, new §89.601(c)(3), which sets the general maximum fee limit for closing costs at $900, is maintained for this adoption.

Five commenters argued that the $900 limit is too low and would not cover the costs of certain property tax lenders. Two of these commenters provided itemizations of their costs per loan. One commenter stated that the lenders in its network make $100.73 net profit per loan, charging an average of $1,099.49 in closing fees. This commenter stated that the lenders' average costs of goods sold are $393.55 (which includes an attorney fee, closing fee, courier and delivery, flood, inspection, recording, and title), and that their average expenses are $1,470.50 (which includes salaries and benefits, commissions, marketing, facilities, postage, office supplies, and other general and administrative expenses). The other commenter stated that its costs per loan are $1,408, consisting of $325 for advertising; $253 for title, legal, and mobile notaries; $680 for payroll and benefits; and $150 for office expenses.

It appears that these two commenters are including advertising and overhead expenses in their closing costs, even though advertising and overhead expenses are outside the intended scope of the closing cost limitation. As stated in §89.601(b)(1), "the term 'closing costs' includes costs incurred by a property tax lender from the time of application through the time of closing." Advertising costs are incurred long

before a prospective borrower applies for a loan, so they do not directly relate to closing. Similarly, overhead expenses (including general and administrative expenses) are incurred continuously and have no direct relationship to closing. These expenses should not be included in closing costs. Rather, interest charges are the proper avenue to compensate the lender for general overhead expenses. *See Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486, 494 (Tex. 1979) ("Interest is charged to compensate the lender for the risk of making the loan and for the lender's overhead costs."). When advertising and overhead expenses are removed from these commenters' closing costs, it appears that the costs fall within the $900 maximum. In addition, the new provisions in §89.601(c)(4) and (5) authorize additional amounts for multiple parcels of residential property and documents necessary to address title defects, enabling these commenters to recover their costs in more complex transactions.

Two commenters argued that a reduction in maximum closing costs is unnecessary because competition is already causing a decline in average closing costs. One commenter stated that "market forces are already operating to lower closing costs on residential property tax loans. We believe market forces will do a better job regulating closing costs than regulatory amendments." Similarly, another commenter stated that "the marketplace has achieved your objective without adding new regulations regarding closing fees."

The commission disagrees with the contention that the decrease in average closing costs makes the rule amendments unnecessary. On the contrary, as discussed earlier, the comments indicated that some property tax lenders are currently including non-closing-related amounts (such as advertising and overhead) in the closing costs that they charge to borrowers. Reducing the closing cost limitation to $900 will help ensure that lenders' closing-related costs are accurately reflected in the amounts that they charge. This will make lenders' prices more transparent and help ensure that borrowers can make informed credit decisions, leading to a more competitive marketplace.

The commission believes that the $900 cap provides an appropriate balance between consumer protection and industry cost recovery, and represents a reasonable amount of closing costs. Therefore, the commission declines to revise §89.601(c)(3) and maintains the $900 general maximum fee limit for this adoption. Property tax lenders are welcome to charge below the general maximum fee cap to continue to foster a competitive marketplace.

*C. Additional fees for multiple parcels of real property and documents to address title defects*

For property tax loans including the payment of taxes for more than one parcel of real property, new §89.601(c)(4) states that a property tax lender may charge up to $100 for each additional parcel, in addition to the general maximum fee limit in paragraph (3).

One commenter requested clarification that the additional $100 per parcel applies to residential property, stating: "We request clarification that the additional $100.00 for each additional parcel be clarified to only apply to the aforementioned Category A and Category E Property Classification, as published by the Texas Comptroller." The commission agrees with this suggestion and

has added text specifying that the $100 amount is authorized for each additional piece of residential property described by §89.601(a), which states: "The fee limitations contained in this section are applicable to property tax loans secured by property designated as 'Category A (Real Property: Single-Family Residential),' and homesteads designated as 'Category E (Real Property: Farm and Ranch Improvements)' by the Property Classification Guide published by the Texas Comptroller of Public Accounts."

A new provision is also contained in §89.601(c)(5) regarding additional costs for preparing documents necessary to address a defect in title to real property. The provision allows a property tax lender to charge a reasonable fee for costs directly incurred in preparing, executing, and recording documents necessary to address a title defect, in addition to the general maximum fee limit described in paragraph (3). The fee for these documents is limited to recording costs and reasonable attorney's fees paid to a person who is not an employee of the property tax lender. The purpose of this provision is to ensure that property tax lenders can be compensated for costs incurred to address title defects. Several precommenters identified situations where title defects require different types of documents to be prepared, executed, and recorded, such as deeds and affidavits of heirship. The fee is limited to recording costs and attorney's fees in order to ensure that property tax lenders do not violate Texas Government Code, §83.001(a), which generally prohibits a person other than an attorney from "charg[ing] or receiv[ing], either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien."

One commenter suggested that §89.601(c)(5) be amended to include costs charged by private entities designated for electronic recording. Regarding the proposed language, the commenter stated: "We believe this language prohibits recovery of legitimate third party recording fees incurred when e-recording documents with a county clerk's office. Since this language could potentially exclude certain charges legitimately associated with the recording process, we object to this section and request amendment to include e-recording fees paid to a licensed e-recording provider." The commission agrees with this suggestion and has added text to §89.601(c)(5) specifying that the additional amount charged by the property tax lender may include recording costs paid to "a private entity designated by a governmental entity for electronic recording."

One commenter objected to a provision in the re-proposed version of §89.601(c)(5) stating that in order for the property tax lender to include additional amounts for attorney's fees, the attorney must provide a signed statement to the borrower. The commenter stated: "The Agency may require a licensee to produce invoices or other documentation to ensure that allowable charges for attorney review are in fact legitimate or paid. There is no authorization, however, to dictate what an attorney representing a licensee must provide to a non-client. Further, many property owners may be confused and think they have an attorney representing their interests in the transaction." To address this comment, the commission has amended §89.601(c)(5) to remove the word "signed" and specify that the property tax lender, rather than the

attorney, must provide the statement to the property owner describing the nature of the title defect and the work performed by the attorney. A conforming change has been made to §89.207(3)(A)(ix).

Additionally, as a result of new §89.601(c)(3) - (5), the remaining paragraph has been renumbered and includes corresponding technical corrections.

*III. Discount points*

*A. Prohibition on charging discount points*

New §89.601(d) prohibits property tax lenders from charging discount points in connection with a property tax loan. The subsection also provides that a property tax lender may not use the term "discount point" in connection with a property tax loan. The subsection explains that this prohibition applies notwithstanding subsection (a), which limits the rule's general fee limitations to residential and agricultural property tax loans.

In the December 26 re-proposal, §89.601(d) allowed legitimate discount points but prohibited including them in the principal balance of a property tax loan. All eighteen comments discussed the proposed provisions on legitimate discount points. After carefully reviewing the comments, the commission has determined that discount points are an unreasonable charge in connection with a property tax loan. The commission has therefore amended the rule to prohibit discount points. This prohibition is adopted under Texas Tax Code, §32.06(a-4)(2), which allows the commission to "adopt rules relating to the reasonableness of closing costs, fees, and other charges permitted under this section," and Texas Finance Code, §351.007, which provides: "The finance commission may adopt rules to ensure compliance with this chapter and Sections 32.06 and 32.065, Tax Code."

The commission has four main reasons for determining that discount points are an unreasonable charge in connection with a property tax loan.

First, the comments revealed that the property tax loan industry, unlike the general mortgage lending industry, has no standard method for calculating the benefit that a borrower receives in exchange for discount points. In determining whether charges are commercially reasonable, Texas courts have looked at whether a charge is customary and made in conformity with reasonable commercial practices. *See Regal Fin. Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601-02 (Tex. 2010); *Avia Jet Mgmt Corp. v. Aeroplace Serv., Inc.*, 626 S.W.2d 325, 326-37 (Tex. App.--Tyler 1981, no writ). The comments suggest that standardized, customary practices for calculating discount points do not exist in the property tax loan industry. One commenter stated that "tax transferees do not have the ability to have a 'standard rate' off which discount point can give meaningful interest reductions. Mortgage rates are determined by national and international financial forces through large institutions." Two commenters were property tax lenders that currently charge discount points, and they provided example calculations that purportedly showed the benefits of discount points. However, it did not appear that either of these commenters used an industry-standard method for calculating discount points. One of these commenters apparently calculated the reduced interest rate based on average rates in the property tax loan industry, rather than

a higher interest rate offered by the commenter. The other commenter provided an example where the borrower pays 2.5% of the loan amount for each percentage point discount in the interest rate, but it was unclear how the commenter arrived at this calculation. Because there is no standard methodology, each lender can arbitrarily select its own method for calculating discount points, with no uniform correspondence between the amount charged for discount points and the reduction in the interest rate. This distinguishes the property tax loan industry from the mortgage industry, which relies on standard rate sheets in order to calculate discount points, as discussed in one of the comments. The commission believes that this practice is unreasonable.

Second, the comments revealed that property tax lenders are unable to charge discount points in a manner that complies with the limitation on funds advanced in Texas Tax Code, §32.06(e). The limitation on funds advanced prohibits lenders from including discount points in the principal balance of a property tax loan. The definition of "funds advanced" in Texas Tax Code, §32.06(e) provides: "Funds advanced are limited to the taxes, penalties, interest, and collection costs paid as shown on the tax receipt, expenses paid to record the lien, plus reasonable closing costs." In addition, if property tax lenders charge interest on the discount points, this could lead to a usury violation for charging interest on interest. *See William C. Dear & Assocs., Inc. v. Plastronics, Inc.*, 913 S.W.2d 251, 254 (Tex. App.--Amarillo 1996, writ denied) (interpreting a usury statute to prohibit compounding of interest where it was not expressly authorized). As re-proposed, §89.601(d)(4) and (5) prohibited property tax lenders from including discount points in the principal balance of a property tax loan, and required any discount points to be paid by the borrower before closing. The comments indicated that property tax lenders cannot charge discount points in a manner that complies with this limitation, because borrowers are unable to pay for the discount points up front. Ten commenters supported the re-proposed rule's prohibition on including discount points in the principal balance of a property tax loan. For example, one commenter stated: "ensuring that prepaid interest is kept separate from interest bearing principal to avoid charging property owners interest on the prepaid interest." However, five commenters objected to the prohibition on including discount points in the principal balance. One commenter stated: "Overwhelmingly, the property owner who is seeking a tax lien loan is cash strapped. . . . Requiring discount points to be paid in cash takes yet one more option away from borrowers who have precious few options in the first place." Furthermore, one commenter who supported prohibiting discount points stated that the rule would substantially reduce the number of transactions with discount points, stating: "We have always offered the ability for customers to pay some or all of the closing costs up front, and they never elect to use this option. This experience leads me to confidently predict that less than 1 out of 1,000 tax lien transfer transactions will have a borrower elect to pay upfront for the discount points." Because borrowers in property tax loans are unable to pay discount points up front, property tax lenders are unable to charge discount points in a manner that complies with the limitation on funds advanced. This is another reason why discount points are not a reasonable charge in connection with property tax loans.

Third, the comments indicated that certain property tax lenders have used discount points as disguised closing costs, rather than an option to obtain a lower interest rate. For example, one commenter expressed concern "that a handful of licensees are attempting to disguise a portion of their closing costs as discount points. . . . [C]ertain licensees originate transfers but immediately sell them to an unrelated funding company, keeping the closing costs and 'discount points' as their sole compensation for each transaction. What this practice has created is a system whereby these originators have incentive to charge high discount points, although the rate charged by the licensee actually funding the loan does not decrease proportionally." Along the same lines, some comments suggested that certain property tax lenders currently rely on discount points as a primary source of funding. For example, one commenter stated: "Without our own funding capabilities, we rely on the origination fees and discount points to be able to meet our financial obligations in running our business." In other words, certain property tax lenders are relying on discount points in order to compensate them for the costs incurred in closing a loan. Discount points should be a method for providing borrowers with an option to obtain a lower interest rate. They should not be a method of maximizing profits or charging disguised closing costs. In order to be legitimate, discount points must be an option available to the borrower, rather than a fee necessary to originate the loan. *See, e.g.*, *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 596 (Tex. 2013). The comments did not indicate that any property tax lenders have offered a borrower a clear statement of the option to obtain a higher interest rate, versus a lower rate with discount points. So it is unclear whether any of the small number of property tax lenders that charge discount points are doing so in a legitimate manner. Therefore, this is another reason that discount points are not a reasonable charge in connection with a property tax loan.

Fourth, the comments indicated that discount points provide little benefit to borrowers. Property tax lenders could provide equivalent benefits to borrowers through more transparent, less confusing practices. Some commenters argued that discount points should be prohibited for property tax loans because they are confusing, and borrowers are unfamiliar with discount points in this context. One commenter stated: "Approximately half of our customers do not have a mortgage and therefore have probably not been exposed to the concept of discount points." In addition, due to the relatively short terms of property tax loans, discount points provide little benefit to the consumer. For example, one commenter stated: "The only way for borrowers to benefit from discount points is to make regular payments on the mortgage long enough that the front loaded points are spread enough to lower the effective interest rate below the standard rate they could have chosen without points. That break-even point is typically 6 to 8 years into a 30 year mortgage." However, for a property tax loan, where the typical term is five years, the benefit of a lower interest rate is greatly reduced. In the case of financed discount points, the property tax lender exaggerates the apparent savings that the borrower is receiving in exchange for paying for the discount points. It may appear to the borrower that there will be a substantial savings through an interest rate reduction, but this savings is partially offset by the extra principal that the borrower will have to repay over the life of the loan. Two

commenters argued that discount points can benefit borrowers, and provided example transaction comparisons showing that financed discount points can result in savings for borrowers, assuming that closing costs remain constant, the note rate is decreased by approximately 3%, and each discount point is approximately $350 for a $12,000 loan. The commenters argued that borrowers would be deprived of these benefits if the lenders were unable to finance discount points. The commission disagrees with these comments. Both commenters could provide substantially the same savings to borrowers by offering lower interest rates without discount points. This approach would enable borrowers to more easily compare the cost of credit among different property tax lenders, helping ensure that the marketplace remains competitive. This approach would also help reduce borrowers' confusion resulting from financed discount points, where the savings is partially offset by the extra principal that the borrower will have to repay over the life of the loan. One commenter stated: "The economic benefit of discount points is even greater for another customer class. That customer who is certain that they will pay off their loan significantly early can benefit greatly by negotiating a longer term, buying down the rate for a lower monthly payment and then paying off the loan early. They benefit in two ways. They free more operating capital for their family or business in the near term and when they receive the lump sum to pay off the loan they pay less total interest expenses." The commission disagrees with this comment. Whether the discount points benefit the borrower in this situation would depend on the date of prepayment and how much of the discount points are refundable. Again, it appears that property tax lenders could provide an equivalent benefit by charging a lower interest rate, which would be less confusing to borrowers. These disclosure problems and lack of a clear benefit for borrowers are another reason that discount points are unreasonable in connection with property tax loans.

The comments described additional reasons why discount points should be prohibited for property tax loans. Eight commenters argued that discount points should be prohibited for property tax loans. The commenters' primary argument for prohibiting discount points focuses on differences between property tax loans and standard mortgages. Because of the differences between property tax loans and standard mortgages, they argue that discount points should be prohibited for property tax loans. For example, two commenters stated: "I believe discount points should be prohibited from Transfer of Tax liens because they are confusing and are a mortgage like product." One commenter included a table with a list of differences: for standard mortgages, the lien is created voluntarily, priority is based on time of recording, nonjudicial foreclosure is allowed, there is a larger average loan amount and number of loans made, credit ratings of borrowers are higher, there is more sophistication in the market, there is more statistical information available, and there are standard rates.

Along the same lines, several commenters pointed out that Texas Tax Code, §32.06 does not expressly authorize discount points. One commenter stated: "Texas mortgage law deals with the reality of discount points that are offered nationwide for mortgages, but our law does not address whether all Texas businesses have a right to offer discount points for any type of loan--mortgages or otherwise. The statutory scheme governing transferred

property tax liens does not authorize the charging of discount points, and there is no reason why the OCCC should create the additional charge that is inappropriate and for which compliance is unclear and unenforceable." Another stated: "Because Section 32.06 does not contemplate the imposition of discount points, [the commenter] would urge that the proposed rules be amended to prohibit the imposition of discount points."

Some commenters expressed concern that certain property tax lenders would not comply with requirements for discount points, or that certain lenders would use discount points as a disguised method of collecting closing costs. One commenter stated: "Successfully servicing a property tax loan that incorporates discount points is very difficult. Interest may not be charged on the prepaid interest component, refunds of the unamortized portions of the prepaid interest have to be calculated and refunded, and APR calculations have to correctly incorporate the prepaid interest. It is our observation that the property tax lenders that currently offer discount points do not consistently follow these requirements due to their complexity. I am concerned they may evolve and continue their business model of pushing discount points, and subsequently not properly service the loan. The result will be additional consumer complaints . . . ."

Several commenters suggested additional disclosures and calculation requirements for discount points, if discount points were allowed. For the reasons discussed in this preamble, the commission has determined that discount points are an unreasonable charge in connection with property tax loans. Because the rule prohibits discount points, additional disclosures and calculation requirements are unnecessary.

The re-proposed amendment to §89.802(9)(C), which required unearned discount points to be itemized on payoff statements, has been withdrawn for this adoption because of the prohibition on discount points under §89.601(d).

One commenter stated: "[W]e further object to the requirement in the proposed 7 TAC 89.601(d)(4) requiring that any discount point be paid by cash, check, or electronic fund transfer before or at closing of a property tax loan. . . . We believe this rule serves no purpose and, pursuant to Tex. Gov't Code § 2001.031, we hereby request a concise statement to the principal reasons for and against its adoption." It appears that this commenter made a typographical error and intended to request a statement under Texas Government Code, §2001.030, which provides: "On adoption of a rule, a state agency, if requested to do so by an interested person either before adoption or not later than the 30th day after the date of adoption, shall issue a concise statement of the principal reasons for and against its adoption. The agency shall include in the statement its reasons for overruling the considerations urged against adoption."

The following is a concise statement of reasons for adopting the prohibition on discount points in §89.601(d). Discount points are an unreasonable charge in connection with property tax loans for four reasons. First, the property tax loan industry, unlike the general mortgage lending industry, has no standard method for calculating the benefit that a borrower receives in exchange for discount points. Second, the comments revealed that property tax lenders are unable to charge

discount points in a manner that complies with the limitation on funds advanced in Texas Tax Code, §32.06(e), because borrowers are unable to pay discount points up front. Third, certain property tax lenders have used discount points as disguised closing costs, rather than an option to obtain a lower interest rate. Fourth, the comments indicated that discount points are particularly confusing to property tax loan borrowers, and that they provide little benefit to borrowers.

The following is a concise statement of objections that commenters proposed against adopting a prohibition on discount points, along with the commission's reasons for disagreeing with the objections. First, some commenters argued that the commission does not have authority to regulate discount points. The commission disagrees with this objection, because the commission has the authority to adopt the rule under both Texas Finance Code, §351.007 and Texas Tax Code, §32.06(a-4)(2). Second, some commenters argued that prohibiting discount points would deprive borrowers of benefits associated with discount points. The commission believes that similar benefits can be achieved with different pricing structures, and that the different pricing structures would result in less confusion on the part of borrowers. Third, some commenters argued that the rule would disproportionately affect small businesses. The commission believes that the impact on small businesses should be minimal, and that small businesses should be able to adjust their pricing practices to comply with the rule, as discussed in more detail in the "Impact on small businesses" section.

*B. Commission's authority to regulate discount points*

Two commenters argued that the commission does not have authority to regulate or prohibit discount points. The commission disagrees with these comments. Rules governing discount points are within the commission's rulemaking authority under two different sections. First, the rules are authorized under Texas Finance Code, §351.007, which provides: "The finance commission may adopt rules to ensure compliance with this chapter and Sections 32.06 and 32.065, Tax Code." Second, the rules are authorized under Texas Tax Code, §32.06(a-4)(2), which authorizes the commission to "adopt rules relating to the reasonableness of closing costs, fees, and other charges permitted under this section."

The commenters made three arguments to support the conclusion that the commission does not have authority to adopt rules regulating discount points.

First, one of the commenters argued that Texas Finance Code, §351.007 does not authorize the commission to adopt rules relating to interest. The commenter stated: "§351.007 gives the Finance Commission a broad mandate to 'adopt rules to ensure compliance with this chapter'. However, this language only provides the Finance Commission authority to adopt rules to implement the statutes in embodied in Chapter 351 of the Tex. Finance Code. There is nothing in Chapter 351 of the Finance Code that addresses interest rates and § 351.007 does not give the Finance Commission the authority to regulate interest."

The commission disagrees with this comment. The commenter failed to quote

the last seven words of §351.007, which authorize the commission to adopt rules to ensure compliance with Texas Tax Code, §32.06. In particular, the commission may adopt rules to ensure compliance with §32.06(e), which includes the limitation on funds advanced and the reasonable-closing-costs requirement. The provisions in §89.601(d) help ensure that property tax lenders do not use discount points to violate the limitation on funds advanced. They also help ensure that property tax lenders do not use discount points as a disguised closing cost in violation of the reasonable-closing-costs requirement.

Second, both commenters argued that the rulemaking authority in Texas Tax Code, §32.06(a-4)(2) is limited to closing costs and other non-interest charges. One commenter stated: "'Interest' isn't a fee or closing cost, even if it is added at the beginning of a transaction rather than spread over time. As such, the proposed rules on discount points can't get their authority under [§32.06(a-4)(2)], relating to the reasonableness of a closing cost, fee or charge." The other commenter stated: "Since the legislative rule making authority granted to the Finance Commission only authorizes the Finance Commission to adopt rules relating to the reasonableness of closing costs, fees, and other charges, the Finance Commission does not have the authority to regulate interest rates."

The commission also disagrees with these comments. Interest is a charge authorized under §32.06(e), so it falls within the "other charges permitted under this section" described in §32.06(a-4)(2). The commenters' argument appears to be based on the premise that interest is not a charge, but this premise is incorrect. Texas courts have routinely referred to interest as a charge. *See, e.g.*, *Danziger v. San Jacinto Sav. Ass'n*, 732 S.W.2d 300, 304 (Tex. 1987) ("A usurious *charge* may be contained in an invoice, a letter, a ledger sheet or other book or document. . . . A pay-off quote which reflects a *charge* of interest in excess of that allowed by law constitutes '*charging*' of usurious interest.") (emphasis added). Because interest is a charge authorized under §32.06(e), the commission is authorized to adopt rules relating to interest under §32.06(a-4)(2). The commission may also adopt a rule prohibiting discount points because they are an unreasonable charge in connection with a property tax loan.

Third, both commenters argued that a rule governing discount points would be inconsistent with the 18% interest limitation in §32.06(e). One commenter stated: "The Legislature capped the interest rate on tax loans covered by Tex. Tax Code §32.06 at 18%. Accordingly, so long as a lender follows the appropriate rules for calculating interest already provided by the Legislature regarding interest calculations, the OCCC and Finance Commission are only authorized to enforce the existing statutes regarding property tax loan interest rates and does not have the independent authority to implement rules regulating interest rates." Similarly, the other commenter stated: "A prohibition is inconsistent because §32.06(e) is unambiguous: the interest rate cap is 18% per year. If the aggregate interest rate calculation falls below 18%, compliance is achieved."

The commission disagrees with the suggestion that the rule is inconsistent with the 18% interest limitation. The provisions in §89.601(d) do not substitute a different maximum interest rate for the 18% maximum in §32.06(e). Rather, the

provisions help ensure that lenders do not impose an unreasonable charge, and that they do not violate the limitation on funds advanced. They also help ensure that property tax lenders do not mischaracterize discount points as closing costs.

*IV. Impact on small businesses*

The adopted rules may have an economic impact on some small and micro-businesses. Many small property tax lenders will be unaffected by the adopted rules, because they already charge closing costs below the adopted $900 limitation, do not use affiliated business arrangements, and do not charge discount points. However, the comments indicated that a segment of small property tax lenders relies exclusively on closing costs and discount points to compensate the lenders for all origination costs. These lenders will have to adjust their pricing practices in order to comply with the rule and with Texas Tax Code, §32.06(e). The primary impact will be on lenders whose closing costs currently include costs that are unrelated to closing (such as advertising and overhead), as well as lenders that charge discount points. Ultimately, however, the commission estimates that the impact on these lenders will be minimal, because they should be able to recoup these costs through other methods, such as charging a higher interest rate and ensuring that they are able to retain a portion of that interest rate. Because many small lenders currently operate without charging closing costs over $900 and without charging discount points, the commission believes that the segment of small property tax lenders referenced earlier will be able to adjust their practices to comply with the rule.

In the original proposal of these rules in October 2014, as well as the re-proposal as published in the December 26, 2014, issue of the *Texas Register* (39 TexReg 10122, 10128), the preamble explained that the agency was not aware of any adverse economic impact on small businesses, but the agency invited comments on the effects that the rules would have on small businesses. After the re-proposal, five commenters argued that as re-proposed, the rules would disproportionately affect small businesses. One commenter stated: "As a small originator in an extremely competitive market, it is necessary for [the commenter], and many other small originators, to utilize investment capital from larger firms to offer flexible property tax loans to homeowners so they will not lose their homes. Without our own funding capabilities, we rely on the origination fees and discount points to be able to meet our financial obligations in running our businesses." Another commenter stated: "As a small business that depends on origination profits we are unable to originate loans at a loss unlike large players in the marketplace . . . which in some cases are publicly held companies that are happy to originate loans at a loss and then make up for it in profits from the interest rate spread they enjoy from those assets." Another commenter stated: "Evidence shows that competition has lowered the average closing costs to a level that is below the true cost of origination. It is one thing for a business to *choose* to take a loss on origination (at least for a time) for a competitive advantage. It is quite another to *force* all originators to operate at a loss in originations. To do so will drive most originators out of business who do not meet a certain business profile, i.e. large, established originators with access to institutional or extremely cheap financing who originate and own their own loans.

Such an originator is able to capitalize their losses in their origination arm and make it up in the interest rate spread over the life of the loan. A small originator without access to cheap investment capital or who sells their loans must make a profit at origination or they will be forced to close their doors."

These commenters have stated that they rely on closing costs and discount points to compensate them for the costs of origination. But closing costs and discount points are not intended to cover *all* costs of origination. Closing costs are intended to cover costs that arise between the loan application and closing, and discount points, in transactions where they are permitted, should be an optional offset that enables a borrower to obtain a lower interest rate than the standard par rate offered by the lender. Therefore, in order to comply with the rule as adopted, these lenders may have to adjust their pricing practices. These lenders may have to recoup their origination costs by charging a higher interest rate and ensuring that they are able to retain a portion of that higher interest rate. It appears that there is room for them to do so; two of the commenters stated that they charge fixed interest rates between 9.90% and 10%, well below the 18% maximum. After making this adjustment, these small lenders will still be able to recover their costs and effectively receive the same stream of payments, but the amounts they charge for closing costs will more accurately reflect costs actually related to closing. The commission disagrees with the contention that the rule will force lenders to operate at a loss.

Some commenters emphasized that the combination of a $900 closing cost cap and a prohibition on discount points would put certain small property tax lenders out of business. For example, one commenter stated: "Lowering origination fees to $900 and in effect eliminating discount points would put us out of business." Another commenter stated that "to further reduce origination fees beyond the current well thought out guidelines and to, in effect, eliminate discount points, will create an injustice to the property owners by putting them more at risk in the long run with fewer options to assist them with their property taxes which will increase their cost and risk of losing their property." Again, the commission disagrees with the contention that the rule will force lenders to operate at a loss, because of the alternative pricing structures available to lenders.

The commission believes that small-business-related exceptions to the rule would be legally infeasible. Creating a higher alternative closing cost cap for small businesses would be infeasible because it would mean that the cap would include costs that are not related to closing (such as advertising and overhead). In addition, exempting small businesses from the prohibition on discount points would fail to ensure that these small businesses impose reasonable charges and comply with the limitation on funds advanced in Tax Code, §32.06(e). The commission also considered the rule as re-proposed in December, which allowed legitimate discount points but prohibited including them in the principal balance of a property tax loan. However, after reviewing the comments, the commission has determined that this would be infeasible because property tax lenders are unable to charge discount points in a manner that complies with the prohibition on financing discount points, and because this would fail to ensure that property tax lenders impose reasonable charges in connection with property tax loans.

The agency does not know exactly how many small and micro-businesses will be affected by the adopted rules, because it does not know how many small and micro-businesses engage in the practice described earlier (i.e., relying on closing costs and discount points to compensate the lender for all origination costs, and assigning the loan to another party). The agency estimates that five property tax loan companies engage in this practice. This estimate is based on the number of property tax lenders that filed an annual report in 2014 stating that they made loans but did not have any loan receivables. If these lenders are charging closing costs that exceed the limitations specified in adopted §89.601(c), or if they are charging discount points, then they will have to amend their pricing practices in order to comply with the rule.

The precise amount of the rule's economic impact on small businesses is difficult to estimate, and depends partly on information that the agency does not have. For example, the agency does not know how many secondary-market participants will be willing to purchase loans from small originators on terms that comply with the adopted rule. Nonetheless, the commission believes that the impact on small businesses will be minimal. As outlined in the previous discussion, the property tax lenders that currently rely exclusively on closing costs and discount points should be able to recover their costs and effectively receive the same stream of payments by charging higher interest rates. So it is unclear why secondary-market participants would refuse to purchase the loans on terms that allow the lenders to recover substantially the same costs that they recover today.

While the adopted rules may have an impact on certain small property tax lenders, the commission believes that this impact will be minimal. For the reasons discussed earlier, small property tax lenders should be able to amend their pricing practices in a manner that enables them to comply with the rule and recoup their actual costs.

*V. Conclusion*

The amended provisions in this adoption, including the amended recordkeeping requirements, the disclosure of affiliated businesses, the amended limitation on closing costs, and the prohibition on discount points, will only apply to loans made on or after the effective date of these rules, which is anticipated to be March 15, 2015.

All of the amendments are adopted under Texas Finance Code, §351.007, which authorizes the commission to adopt rules to ensure compliance with Texas Finance Code, Chapter 351 and Texas Tax Code, §32.06. Additionally, the amendments are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code.

The amendments related to affiliated businesses contained in §§89.102, 89.207, and 89.504 are adopted under Texas Finance Code, §351.0021(e), which authorizes the commission to adopt rules implementing and interpreting authorized charges that a property tax lender may impose after closing.

The Texas Tax Code also contains specific authority for the amendments to certain rules. In particular, the amendments to §89.504 are adopted under §32.06(a-4)(1) of the Tax Code, which authorizes the commission to prescribe the form and

content of an appropriate disclosure statement to be provided to a property owner before the execution of a tax lien transfer. The amendments to §89.601 are adopted under §32.06(a-4)(2) of the Tax Code, which authorizes the commission to adopt rules relating to the reasonableness of closing costs, fees, and other charges permitted under §32.06.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 351, and Texas Tax Code, §32.06 and §32.065.

*§89.102. Definitions.*

Words and terms used in this chapter that are defined in Texas Finance Code, Chapter 351[~~, Property Tax Lenders, known as the "Property Tax Lender License Act" (Acts 2007, 80th Leg., ch. 1220),~~] have the same meanings as defined in Chapter 351. The following words and terms, when used in this chapter, will [~~shall~~] have the following meanings, unless the context clearly indicates otherwise.

(1) Affiliated business--A person that:

(A) shares common management with a property tax lender;

(B) shares, directly or indirectly, more than 10% common ownership with a property tax lender; or

(C) is controlled, directly or indirectly, by a property tax lender through a controlling interest greater than 10%.

(2) [~~(1)~~] Borrower--The borrower in a property tax loan is the property owner.

(3) [~~(2)~~] Commissioner--The Consumer Credit Commissioner of the State of Texas.

(4) [~~(3)~~] Date of consummation--The date of closing or execution of a loan contract.

(5) [~~(4)~~] Licensee--Any person who has been issued a property tax lender license pursuant to Texas Finance Code, Chapter 351[~~, Property Tax Lenders, known as the "Property Tax Lender License Act" (Acts 2007, 80th Leg., ch. 1220)~~].

(6) [~~(5)~~] Making a loan--The act of making a loan is either the determination of the credit decision to provide the loan, the act of funding the loan, or the act of advancing money on behalf of a borrower to a third party. A person whose name appears on the loan documents as the payee of the note is considered to have "made" the loan.

(7) [~~(6)~~] Negotiating a loan--The process of submitting and considering offers between a borrower and a lender with the objective of reaching agreement on the terms of a loan. The act of passing information between the parties can, by itself, be considered "negotiation" if it was part of the process of reaching agreement on the terms of a loan. "Negotiation" involves acts which take place before an agreement to lend or funding of a loan actually occurs.

(8) [~~(7)~~] OCCC--The Office of Consumer Credit Commissioner of the State of Texas.

(9) [~~(8)~~] Transacting a loan--Any of the significant events associated with the lending process through funding, including the preparation, negotiation and execution of loan documents, and an advancement of

money on behalf of a borrower by the lender to a third party. This also includes the act of arranging a loan.

*§89.207. Files and Records Required.*

Each licensee must maintain records with respect to each property tax loan made under Texas Finance Code, Chapter 351 and Texas Tax Code, §32.06 and §32.065, and make those records available for examination under Texas Finance Code, §351.008. The records required by this section may be maintained by using either a paper or manual recordkeeping system, electronic recordkeeping system, optically imaged recordkeeping system, or a combination of the preceding types of systems, unless otherwise specified by statute or regulation. If federal law requirements for record retention are different from the provisions contained in this section, the federal law requirements prevail only to the extent of the conflict with the provisions of this section.

(1) - (2) (No change.)

(3) Property tax loan transaction file. A licensee must maintain a paper or imaged copy of a property tax loan transaction file for each individual property tax loan or be able to produce the same information within a reasonable amount of time. The property tax loan transaction file must contain documents that show the licensee's compliance with applicable law, including Texas Finance Code, Chapter 351; Texas Tax Code, §32.06 and §32.065, and any applicable state and federal statutes and regulations. If a substantially equivalent electronic record for any of the following documents exists, a paper copy of the record does not have to be included in the property tax loan transaction file if the electronic record can be accessed upon request. The property tax loan transaction file must include copies of the following records or documents, unless otherwise specified:

(A) For all property tax loan transactions:

(i) - (viii) (No change.)

(ix) receipts, invoices, or statements describing the nature of the title defect and the work performed by an attorney, along with proof of payment for recording costs or attorney's fees necessary to address a defect in title, as described by §89.601(c)(5) of this title (relating to Fees for Closing Costs), unless the records required by this clause are maintained under paragraph (1)(B) of this section, and upon request, the licensee produces these records within a reasonable amount of time, and itemizes or otherwise indexes individual entries to a particular property tax loan transaction file;

(B) - (H) (No change.)

(I) If fees are assessed, charged, or collected after closing, copies of the receipts, invoices, checks or other records substantiating the fees as authorized by Texas Finance Code, §351.0021 and Texas Tax Code, §32.06(e-1) including the following:

(i) if the licensee acquires collateral protection insurance, a copy of the insurance policy or certificate of insurance and the notice required by Texas Finance Code, §307.052; [~~and~~]

(ii) receipts or invoices along with proof of payment for attorney's fees assessed, charged, and collected under

Texas Finance Code, §351.0021(a)(4) and (a)(5), including specific descriptions of services performed by the attorney, unless the records required by this clause are maintained under paragraph (1)(B) of this section, and upon request, the licensee produces these records within a reasonable amount of time, and itemizes or otherwise indexes individual entries to a particular property tax loan transaction file; and [~~;~~]

(iii) records identifying all amounts paid to an affiliated business described by paragraph (7) of this section, including a designation that an amount was paid to an affiliated business and a statement of which affiliated business was paid, unless the records required by this clause are maintained under paragraph (1)(B) of this section, and upon request, the licensee produces these records within a reasonable amount of time, and itemizes or otherwise indexes individual entries to a particular property tax loan transaction file;

(J) - (K) (No change.)

(L) For property tax loan transactions involving a foreclosure or attempted foreclosure, the following records required by Texas Tax Code, Chapters 32 and 33:

(i) For transactions involving judicial foreclosures under Texas Tax Code, §32.06(c):

(I) (No change.)

(II) if sent by an [~~a non-salaried~~] attorney who is not an employee of the licensee, any notice to cure the default sent to the property owner and each holder of a recorded first lien on the property as specified by Texas Property Code, §51.002(d) including verification of delivery of the notice;

(III) if sent by an [~~a non-salaried~~] attorney who is not an employee of the licensee, any notice of intent to accelerate sent to the property owner and each holder of a recorded first lien on the property, including verification of delivery of the notice;

(IV) if sent by an [~~a non-salaried~~] attorney who is not an employee of the licensee, any notice of acceleration sent to the property owner and each holder of a recorded first lien on the property;

(V) - (VIII) (No change.)

(ii) (No change.)

(M) (No change.)

(4) - (6) (No change.)

(7) Records of affiliated businesses. A property tax lender must maintain records describing its relationship with any affiliated business with which the property tax lender regularly contracts for services under Texas Finance Code, §351.0021(a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(10) that are not performed by an employee of the property tax lender. The records must include any agreements between the property tax lender and the affiliated business, as well as any filings with the Texas Secretary of State that show the relationship between the property tax lender and the affiliated business.

(8) [~~(7)~~] Disaster recovery plan. A property tax lender must maintain a sufficient disaster recovery plan to ensure

that property tax loan transaction information is not destroyed, lost, or damaged.

(9) [~~(8)~~] Retention and availability of records. All books and records required by this section must be available for inspection at any time by OCCC [~~Office of Consumer Credit Commissioner~~] staff, and must be retained for a period of four years from the date of the contract, two years from the date of the final entry made thereon by the licensee, whichever is later, or a different period of time if required by federal law. The records required by this section must be available or accessible at an office in the state designated by the licensee except when the property tax loan transactions are transferred under an agreement which gives the OCCC [~~commissioner~~] access to the documents. Documents may be maintained out of state if the licensee has in writing acknowledged responsibility for either making the records available within the state for examination or by acknowledging responsibility for additional examination costs associated with examinations conducted out of state.

*§89.504. Requirements for Disclosure Statement to Property Owner.*

(a) - (e) (No change.)

(f) Disclosure of affiliated businesses. If a property tax lender regularly contracts with one or more affiliated businesses for services under Texas Finance Code, §351.0021(a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(10) that are not performed by an employee of the property tax lender, then the disclosure statement must include a statement substantially similar to the following: "The property tax lender can impose certain additional charges after closing. Some of these charges may be paid to (INSERT NAME OF AFFILIATED BUSINESS OR BUSINESSES), which is affiliated with the property tax lender. The costs paid to the affiliated business cannot be for services performed by employees of the property tax lender."

*§89.601. Fees for Closing Costs.*

(a) - (b) (No change.)

(c) Total maximum fees for closing costs. [~~For purposes of this section, the "total amount of money paid by a property tax lender to the taxing unit(s) to obtain transfer of the tax lien" will be referred to as the "total tax lien payment amount."~~]

(1) Maximum fees include funds received by third parties or retained by property tax lender. The maximum fees provided for by this section encompass fees related to closing costs, whether the charge is paid by a property owner directly to a third party, paid to a third party through a property tax lender, or paid by a property owner directly to and retained by a property tax lender. A property tax lender may absorb any closing costs and may pay third parties out of the total compensation paid to it by a property owner.

(2) Maximum fee limits for closing costs. A property owner may not be charged, directly or indirectly, by a property tax lender an amount related to closing costs in excess of the amounts authorized by this section. A property tax lender may not directly or indirectly charge, contract for, or receive any amount related to closing costs from a property owner in excess of the amounts authorized by this section. [~~The following subparagraphs contained in this paragraph outline the total maximum fees~~

~~for closing costs that may be charged, contracted for, or received by a property tax lender in connection with a property tax loan, based on the total tax lien payment amount.~~]

[~~(A) For a total tax lien payment amount that is less than $2,500, the maximum fee for closing costs is $1,000.~~]

[~~(B) For a total tax lien payment amount that is equal to or greater than $2,500 but less than $5,000, the maximum fee for closing costs is $1,250.~~]

[~~(C) For a total tax lien payment amount that is equal to or greater than $5,000 but less than $7,500, the maximum fee for closing costs is $1,500.~~]

[~~(D) For a total tax lien payment amount that is equal to or greater than $7,500 but less than $10,000, the maximum fee for closing costs is $1,750.~~]

[~~(E) For a total tax lien payment amount that is equal to or greater than $10,000, the maximum fee for closing costs is $2,000, or 10% of the total tax lien payment amount, whichever is greater.~~]

(3) General maximum fee limit. The general maximum fee for closing costs is $900.

(4) Cost for additional parcels of real property. If a property tax loan includes the payment of taxes for more than one parcel of real property, then the property tax lender may charge up to $100 for each additional parcel of residential property described by subsection (a), in addition to the general maximum fee limit described in paragraph (3) of this subsection.

(5) Cost for preparing documents to address title defect. If one or more documents must be prepared in order to address a defect in title on the real property subject to the property tax loan, then the property tax lender may charge a reasonable fee for costs directly incurred in preparing, executing, and recording any necessary documents, in addition to the general maximum fee limit described in paragraph (3) of this subsection. The fee for preparing documents is limited to recording costs paid to a governmental entity (or a private entity designated by a governmental entity for electronic recording) and reasonable attorney's fees paid to a person who is not an employee of the property tax lender. In order for the fee for these documents to be authorized, any documents must comply with all applicable laws, including recording requirements. In particular, any affidavit of heirship must comply with the substantive and procedural requirements of Texas Estates Code, Chapter 203, and must be recorded in the deed records of a county as provided in Texas Estates Code, §203.001(a)(2). For attorney's fees, the property tax lender must provide a statement to the property owner describing the nature of the title defect and the work performed by the attorney. The fee for preparing documents is not authorized under this paragraph if the fee includes any of the following:

(A) recording costs that are not paid to a governmental entity or a private entity designated by a governmental entity for electronic recording;

(B) attorney's fees that are not reasonable;

(C) costs that are not necessary in order to address a defect in title on the real property; or

(D) costs that are not substantiated by receipts or invoices that are maintained under §89.207(3)(A)(ix) of this title (relating to Files and Records Required).

(6) [~~3~~] Reasonable closing costs. The maximum fees contained in paragraphs (3), (4), and (5) [~~paragraph (2)~~] of this subsection constitute "reasonable closing costs" under Texas Tax Code, §32.06.

(d) Discount points. A property tax lender may not charge any discount points in connection with a property tax loan. A property tax lender may not use the term "discount point" to describe any fee or charge in connection with a property tax loan. This prohibition applies to all property tax loans, notwithstanding subsection (a).

**Certification**

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas on February 20, 2015.

Matthew J. Nance
Assistant General Counsel
Office of Consumer Credit Commissioner