Texas Catholic Conference of Bishops
THE PUBLIC POLICY VOICE OF THE CHURCH

December 12, 2019

Michael Rigby, General Counsel
Office of Consumer Credit Commissioner
2601 North Lamar Blvd.
Austin, TX 78705
Submitted via email to: rule.comments@occc.texas.gov.

RE: Regarding Credit Services Organizations and
Attorney General Opinion KP-0277

Dear OCCC,

The Texas Catholic Conference of Bishops (TCCB) wishes to respond to the questions from the stakeholder meeting of the Office of the Consumer Credit Commissioner (OCCC) regarding the recent Texas Attorney General Opinion (KP-0277). As bishops representing almost 9 million Catholics in Texas, we are united in our advocacy for the working poor Texans who turn to short-term loans for unexpected and overwhelming expenses.

Through our ministries, we witness the high costs of payday and auto-title lending every day. Over the last decade, our churches have been active in supporting payday lending reform. These lenders trap Texans in a cycle of debt which leaves borrowers in greater financial straits than before the loan. Borrowers make good faith attempts to repay these loans, often many times over, without progress. That is unjust. Yet, new financial products offered by payday lenders raise serious concerns regarding whether they perpetuate usurious practices.

The relevant Attorney General Opinion responded to a request by Rep. Jim Murphy (RQ-0300-KP). That request asked whether or not the Texas Finance Code authorizes a Credit Services Organization (CSO), as defined in Section 393.001 (3), from assisting a consumer with obtaining an extension of credit in a form other than a deferred presentment transaction or motor vehicle title loan. Furthermore, it also asked whether Chapter 393 allows a CSO to issue so-called "signature loans," whereby no security is obtained from the consumer in exchange for the extension of credit or cash advance.

The Attorney General answered the first question in the affirmative, as in the case of certain CSOs participating in non-Credit Access Business (CAB) transactions. Specifically, the AG opinion states, "Payday loans and motor vehicle title loans are two methods for deferring payment of debt that would qualify as extensions of consumer credit. But the plain language of chapter 393 does not restrict credit services organizations, other than when operating as credit access businesses, from obtaining for a consumer or assisting a consumer in obtaining *an extension of consumer credit in another form* [emphasis added]." Notably, however, the Attorney General Opinion did not provide an answer to the second question regarding "signature loans."

The opinion creates uncertainty in the payday loan marketplace and opens the door to potential circumvention of the legislative reforms undertaken in recent sessions. As we stated in our previously submitted comment letter to the Attorney General, a plain reading and reasonable interpretation of Chapter 393, Finance Code limits credit services organizations from obtaining extensions of consumer credit only to deferred presentment transactions or motor vehicle title loans. We also reiterate our position that a review of the legislative history, intent, and statutory language prohibiting "device, subterfuge, or pretense" in Section 393.602(c) to evade the application of this statute applies to "signature loans."

We respectfully submit this letter to respond to the specific questions outlined in the OCCC Stakeholder comment request to express our concerns regarding financial products that may negatively impact our poorest and most vulnerable brothers and sisters. As Pope Francis has stated, "[Jesus] meets the poor and beggars, lepers and paralytics and 'puts them back on their feet', restoring their dignity and future. Facing usury and corruption, you too can transmit hope and strength to the victims so that they can recover confidence and recover from their needs."

In His peace,

Yours in Christ,

Jennifer Carr Allmon
Executive Director
Texas Catholic Conference of Bishops

cc:

Enclosures - Comments Regarding Credit Services Organizations and
Attorney General Opinion KP-0277

Comments Regarding Credit Services Organizations and Attorney General Opinion KP-0277

1. **Does the opinion's analysis affect the regulatory landscape for CAB transactions (i.e., deferred presentment transactions and motor vehicle title loans)?**

Yes, by distinguishing between CSOs in general and CSOs operating as CABs. The AG Opinion states this in their analysis on pages 2-3:

> "Thus, through the 2011 amendments, the Legislature identified a specific type of credit services organization - a credit access business - that obtains for a consumer or assists a consumer in obtaining a payday loan or a motor vehicle title loan. And the Legislature augmented the regulations applicable to a credit services organization *when operating as a credit access business* [emphasis added]."

Instead of one unified regulatory framework governing payday lending, this creates a bifurcated market with varying products that are regulated to different degrees depending upon the issuer of the loan. The effect of this is to create a chaotic marketplace and uncertainty with respect to the various consumer protections that govern loan products.

2. **Must persons engaged in non-CAB transactions comply with all requirements of Chapter 393 other than those that apply specifically to CABs (i.e., Section 393.201(c), Subchapter C-1, Subchapter G)?**

According the AG opinion, yes: "But those [2011] amendments did not otherwise amend the definition of credit services organization or evidence an intent to revoke the authority of a credit services organization *when not operating as a credit access business* [emphasis added]." Therefore, CSOs engaged in non-CAB transactions comply with the rest of Chapter 393 requirements other than those that apply specifically to CABs.

However, in our view, the 2011 and subsequent reforms were meant to comprehensively regulate payday lending and not only certain types of payday lenders. As evidenced in testimony and on the floor debate (referenced in our comments to the AG), recent legislative changes to payday lending in Texas show legislative intent to address some of the most egregious practices of payday and auto title lending.

The relevant portion of Chapter 393 is subchapter G of Chapter 393. It created the licensing and regulation of credit access businesses and was added by HB 2594 in the 82nd Texas Legislative session. The bill addressed fees, examination of CABs, annual assessments, disclosure requirements, administrative penalties for violations, among other reforms.

CSHB 2594 was a part of a package of three bills (HB 2592 and HB 2593) designed to address a variety of concerns with payday and auto title lending and gaps within the existing Texas CSO Act of 1987. The legislative history shows that this trio of bills were carefully negotiated after more than 40 hours of mediation between consumer advocacy groups and the payday and auto title lending industry and brought the groups under state regulation. An interpretation of Chapter 393 to allow CSO services to extend consumer credit in a form other than a deferred presentment

loan or motor vehicle title loan contradict the legislative intent of the Act to increase consumer protections.

Subsequently promulgated rules also show the interchangeability of CSOs and CABs in TAC § 83.6002: "(1) Credit access business--has the meaning assigned by Texas Finance Code, §393.221(1). Credit access businesses ("CABs") are organized as credit services organizations ("CSOs") under Chapter 393. After providing the full terminology followed by the acronym, a credit access business may refer to itself using the following acronyms: "CAB" or "CSO.""

3. **Are persons engaged in non-CAB transactions subject to the enforcement authority of the attorney general under Section 393.502?**

Yes, the plain language of Sec. 393.502 states: "A district court on the application of the attorney general or a consumer may enjoin a violation of this chapter." Because the statutory language is without limitation it applies to *any* violation of Chapter 393.

4. **Are persons engaged in non-CAB transactions subject to local ordinances and the enforcement authority of local governments?**

This is a fact-specific question and cannot be generalized. Texas local governments - particularly home rule cities - have broad authority: A home rule city may do anything authorized by its charter that is not specifically prohibited or preempted by the Texas Constitution or state or federal law. Municipal ordinances addressing CAB transactions have prevailed in multiple legal challenges.

In Texas, efforts at the state level to overturn local ordinances aimed at payday lending institutions have also failed. Bills filed by legislators last session to nullify local payday lending ordinances have failed (e.g., HB 4146 by State Rep Capriglione and SB 1530 by State Senator Craig Estes in 86-R and 85-R). Barring judicial decision or legislative preemption, local governments may continue to enforce ordinances.

5. **Are persons engaged in non-CAB transactions subject to federal law and the enforcement authority of federal agencies (e.g., the Consumer Financial Protection Bureau, the Federal Trade Commission)?**

Insofar as federal laws govern non-CAB transactions, persons engaged in such transactions must follow federal laws under the Supremacy Clause of the U.S. Constitution. Indeed, in certain places the Texas Finance Code explicitly requires compliance with certain federal laws.

For example, the Texas Finance Code Section 393.201 references federal law by stating that a contract for services must "contain a statement that a credit access business must comply with Chapter 392 and the federal Fair Debt Collection Practices Act (15 U.S.C. Section 1692 et seq.) with respect to an extension of consumer credit described by Section 393.602(a)."

Additional rules promulgated under the administrative code concerning lenders and credit access businesses also contemplate this state-federal interrelation such as:

• TAC § 83.2002: "Each officer, director, employee, and agent of a licensee engaged in or responsible for licensed activity must have a working knowledge of Texas Finance Code, Chapter 393, its implementing regulations, and other pertinent state and federal statutes and regulations that apply to the licensee's business."

• TAC § 83.6005: "In the event of an inconsistency or conflict between the disclosure or notice requirements in these provisions and any current or future federal law, regulation, or interpretation, the requirements of the federal law, regulation, or interpretation will control to the extent of the inconsistency."

These and other similar provisions recognize the viability of federal statutes and enforcement authority of their regulatory bodies in Texas through concurrent jurisdiction with the OCCC.

Evading the CAB licensing should not change applicability of federal statutes referenced in these provisions. However, it opens up substantial concern regarding enforcement.

6. Sections 14.101 and 14.201 of the Texas Finance Code give the OCCC authority to investigate and enforce violations of Chapter 393 with respect to a credit access business. What is the proper role of the OCCC in light of the opinion?

The proper role of the OCCC in light of this opinion is to focus on the heightened importance of examining any purported non-CAB products with a keen eye on subterfuge, which could also include a violation of 393.303, as if 393.303 is violated, the transaction could be construed as subterfuge under 342.051(b) or a usury violation of Chapter 342. The AG opinion specifically pulls out these standards and so they should be meticulously applied and are within the OCCC's existing enforcement powers.

7. Section 393.602 of the Texas Finance Code says a person may not use a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G. Under the opinion, what would constitute a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G?

The AG opinion did not take a position on what could be considered a device, subterfuge, or pretense to evade Chapter 393, stating "Whether any specific extension of credit is substantially the same as that available to the public, or uses a device, subterfuge, or pretense to evade regulation as a credit access business, are fact questions that this office cannot decide through an attorney general opinion."

However, we believe that the legislature explicitly added a provision prohibiting "device, subterfuge, or pretense" in Section 393.602(c) to address possible attempts by the payday lending industry to circumvent the CAB requirements of the CSO Act. This provision shows an explicit intent of the legislature to ensure that CSOs that that sought to circumvent regulations on deferred presentment transactions or motor vehicle title loans, including by offering unregulated financial products, were prohibited from doing so.

To flesh out this definition, rules were promulgated in TAC §83.2003 stating, "A "device, subterfuge, or pretense to evade the application" of this chapter, as used in Texas Finance Code, §393.602(c) refers to *any transaction that in form may appear on its face to be something other*

than a deferred presentment transaction or a motor vehicle title loan, but in substance meets the definition of a deferred presentment transaction or a motor vehicle title loan as defined in Texas Finance Code, §393.602 [emphasis added]."

Furthermore, the OCCC specifically addressed "device, subterfuge, or pretense" language in one enforcement action. In Case L18-00088, Advance America sought not to include data on a certain non-credit access business single payment 'cash advance' product on its quarterly reports. They argued that the Data Reporting Policy in the Texas Finance Code did not require inclusion of non-CAB products in disclosures, asserting that unreported transactions were not deferred presentment transactions because the amount of the check did not equal the amount of the advance plus the fee. The agency disagreed and said that Advance America was using a device, subterfuge, or pretense to evade the statute's requirements and quarterly report requirements because the Finance Code's definition of a deferred presentment transaction states that the deferment check equals the amount of the advance plus a fee and that the definition encompasses transactions where the check includes the entire CSO fee.

Taken together, these statutes, rules, and enforcement actions establish a clear obligation for the regulator to engage in a fact-based assessment of any purported non-CAB product to ensure that it does not, at any point in the period of CSO services, substantively function as a deferred presentment transaction or motor vehicle title loan.

8. **Section 393.303 of the Texas Finance Code says a credit services organization may not charge or receive from a consumer valuable consideration solely for referring the consumer to a retail seller who will or may extend to the consumer credit that is substantially the same as that available to the public. Under the AG opinion, what would constitute a violation of Section 393.303?**

The AG opinion did not give a clear answer as to what would constitute a violation of 393.303. They stated, "Whether any specific extension of credit is substantially the same as that available to the public, or uses a device, subterfuge, or pretense to evade regulation as a credit access business, are fact questions that this office cannot decide through an attorney general opinion."

Furthermore, during the initial stakeholder meeting, the OCCC representatives when asked said they were not aware of any specific rulings, enforcement actions, or opinion letters regarding analysis of the statutory language at issue on "consumer credit that is substantially the same as that available to the public."

However, our position is that by specifically recognizing the two types of loans that CSOs could offer in Section 393.602, the legislature circumscribed the permissible bounds of financial products that could be offered to consumers. Nowhere is it contemplated in the Chapter 393 that credit service organizations could offer consumers extensions in forms other than a deferred presentment transaction or a motor vehicle title loan. For any other extensions of consumer credit, the CSO Act establishes a very clear standard under 393.303:

> *CHARGE OR RECEIPT OF CONSIDERATION FOR REFERRAL. A credit services organization or a representative of the organization may not charge or receive from a consumer valuable consideration solely for referring the consumer to a retail seller*

who will or may extend to the consumer credit that is substantially the same as that available to the public.

This section is further supported by 393.304 and 393.305. Taken together, these sections create a clear prohibition on charging a consumer to refer a consumer to a product that is substantially the same as that available to the public.

According to the Oxford English Dictionary, "substantial" means "For the most part; essentially." "Available" is defined to be "able to be used or obtained; at someone's disposal." Taken together, ordinary rules of statutory interpretation that stress words and phrases shall be read in context and construed according to the rules of grammar and common usage, mean that these refer to loan products in other forms that are able to be obtained by the public.

Therefore, a CSO must verify, for every consumer, that the extension of credit they are arranging is not otherwise available in the market. This standard also applies to deferred presentment transactions and motor vehicle title loans.

9. Does the opinion's analysis raise other significant policy issues?

Yes, the AG opinion leaves the door open to unregulated products by not affirmatively stating that they are prohibited under the Texas Finance Code.

To include signature loans in the range of financial products that CSOs may issue would allow payday lenders to circumvent the multitude of requirements regulating deferred presentment transactions and motor vehicle title loans that the legislature intended to regulate in recent sessions. In this case, a signature loan does not require the securitization of collateral from a debtor in the first instance as a prerequisite to extending consumer credit. A prospective borrower often provides their personal information, including income and credit history, along with a signature and promise to back the loan.

In the absence of legislative action, statutory language prohibiting "device, subterfuge, or pretense" to evade the application of this statute should apply to "signature loans" too.

10. Should the OCCC and the Finance Commission engage in rulemaking related to any of these issues? If so, what is the statutory basis for the rulemaking?

Yes, under Sections 393.222, 393.223, 393.224, 393.622, and 393.624 that provide for certain powers to the Finance Commission to adopt rules necessary to enforce and administer this subchapter. In particular, we encourage consideration of a rule that requires examination of all loan transactions being arranged by a CAB that are purported to be non-CAB to ensure the products do not meet the standard for subterfuge either under 342.051 (b) or 393.602(c).

Texas
APPLESEED

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December 12, 2019

Dear Mr. Rigby,

Thank you for the opportunity to provide comments concerning AG Opinion No. KP-0277.

Texas Appleseed is a public interest justice center working to change unjust laws and policies that prevent Texans from realizing their full potential. Working with pro bono partners and collaborators, Texas Appleseed develops and advocates for innovative and practical solutions to complex issues. As part of its work, Texas Appleseed also conducts data-driven research to better understand inequities and identify solutions for concrete, lasting change. Texas Appleseed is part of a non-profit network of 17 justice centers in the United States and Mexico.

Texas Appleseed has long studied the payday and auto title lending market in Texas and has worked with borrowers and local communities to address the problems created by these high-cost loans and the cycle of on-going debt that too often results from these loans.

We have substantial concerns regarding harmful impacts resulting from the opinion for the market and for consumers. It has potential to make irrelevant the carefully negotiated reforms that were adopted by the Texas Legislature in 2011. The 2011 reforms established licensing of uncapped lending activity in Texas operating under the CSO Act, mandated disclosures, and created data reporting to better understand the pricing and features of the products in the market.

The opinion opens the possibility of new CSO loan products with uncapped fees operating outside of any state licensing or examination, putting Texas families at risk of added financial harm. It could also create substantial confusion and possible deception in the marketplace with consumers unaware that the products they may be engaging with are not subject to state licensing, examination, and oversight.

The opinion also elevates important tools for the Office of Consumer Credit Commissioner to use in enforcement of the CAB licensing statute. It highlights two important tools: assessing compliance with Ch. 393.602(c) of the Texas Finance Code, which prohibits the use of, "a device subterfuge, or pretense" to evade CAB licensing; and Ch. 393.303, which prohibits charging a fee for a referral to "consumer credit that is substantially available to the public." A violation of 393.303 could also be deemed subterfuge under Ch. 342.501(b) and a violation of Texas rate and fee caps for consumer credit. It is essential that factual inquiries be made into each transaction purporting to be outside of CAB licensing to ensure compliance with state law.

Answers to a selection of the questions posed by the OCCC:

1. Does the opinion's analysis affect the regulatory landscape for CAB transactions?

   Yes. It injects substantial uncertainty into the market from a consumer and regulatory perspective. It creates enforcement barriers and has potential to create new hidden corners of the market operating in shadows outside of regulatory oversight. It is particularly concerning given the types of products that are being offered in the "non-CAB" space. For example, an 846% APR "signature loan" and a 650% APR "personal loan."

5. Are persons engaged in non-CAB transactions subject to federal law and the enforcement authority of federal agencies?

   The first part of the question, regarding the applicability of federal law, is difficult to answer in the abstract, and will need to be assessed based on specific transactions. To the extent particular federal laws are applicable, under the AG opinion, there likely will be a dangerous oversight and enforcement gap created. With no regulatory examinations of non-CAB transactions, it opens Texans up to a substantial likelihood of abusive practices. No examinations mean little to no enforcement.

   In addition, an expansion of non-CAB transactions could leave our military families vulnerable to unscrupulous loan businesses, as there will no longer be any examinations for compliance with the Military Lending Act. The CFPB does not examine for compliance, leaving the state regulator as the only regulator doing so for licensed CAB transactions. Non-CAB loans would not face the same scrutiny.

6. Sections 14.101 and 14.201 of the Texas Finance Code give the OCCC authority to investigate and enforce violations of Chapter 393 with respect to a credit access business. What is the proper role of the OCCC in light of the opinion?

The proper role of the OCCC, in light of the opinion, is to be vigilant to ensure that transactions are in compliance with sections 393.602 and 393.303. The AG opinion elevates these two provisions stating, "A determination about whether a specific service complies with the requirements of chapter 393 will involve a factual inquiry into the specific offering". A transaction in violation of Ch. 393.303 may also be subterfuge or evasion under Ch. 342.051(b) and in violation of the rate fee caps under Ch. 342 of the Texas Finance Code or other applicable state law.

7. Section 393.602 of the Texas Finance Code says a person may not use a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G. Under the opinion, what would constitute a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G?

   The applicable legal standard in the Texas Administrative Code asserts that a, "'device, subterfuge, or pretense to evade the application' of this chapter, as used in the Texas Finance Code, §393.602(c) refers to any transaction that in form may appear on its face to be something other than a deferred presentment transaction or a motor vehicle title loan, but in substance meets the definition of a deferred presentment transaction or a motor vehicle title loan…" This is a fact-based assessment that requires a detailed examination of each transaction, from inception to repayment or default.

8. Section 393.303 of the Texas Finance Code says a credit services organization may not charge or receive from a consumer valuable consideration solely for referring the consumer to a retail seller who will or may extend to the consumer credit that is substantially the same as that available to the public. Under the AG opinion, what would constitute a violation of Section 393.303?

   The AG opinion does not offer specific guidance, but rather deems it a question of fact. Unsecured single payment and installment loans are substantially the same as products available to the public, including loans available through banks, credit unions, and lenders licensed under Ch. 342 of the Texas Finance Code. Therefore, these transactions appear, on their face, to violate this section.

9. Does the opinion's analysis raise other significant policy issues?

   Yes. It raises substantial issues regarding the legislative intent of the CAB statute as adopted and how this new interpretation diminishes the effect of the law. It also raises significant policy issues for consumer protection as it opens up a scenario where a multibillion-dollar high-cost loan industry could again operate outside of any regulatory oversight.

10. Should the OCCC and the Finance Commission engage in rulemaking related to any of these issues? If so, what is the statutory basis for rulemaking?

> This question depends on whether the OCCC needs additional rulemaking in order to appropriately enforce the law. Ch. 393.622 (1) establishes broad rulemaking authority for the Finance Commission to enforce and administer subchapter G. The AG opinion highlights the need for a fact-based analysis of questions regarding subterfuge and compliance with 393.303. If additional rulemaking is needed in order for the OCCC to engage in these fact-based analyses, then it would be statutorily supported.

Sincerely,

Ann Baddour
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December 12, 2019

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Via Electronic Submission: rule.comments@occc.texas.gov

Re: Credit Service Organizations and Attorney General Opinion KP-0277

Dear Mr. Rigby:

The Texas Consumer Finance Association ("TCFA") appreciates the opportunity to provide the following comments regarding the Office of Consumer Credit Commissioner's ("OCCC") solicitation of comments regarding Attorney General Opinion KP-0277 ("Opinion"). The Opinion addresses the authority of a credit services organization ("CSO") to assist a consumer with obtaining an extension of consumer credit in a form other than a deferred presentment transaction or motor vehicle title loan.

The OCCC has invited comments to a number of questions about the Opinion. TCFA does not address whether the Opinion is correct in its analysis, nor does TCFA attempt to address each specific question posed by the OCCC. Rather, TCFA offers its over-arching concerns resulting from the Opinion. The Opinion did not reach the question of whether a CSO could arrange for a "signature loan," arguably leaving that factual determination up to the OCCC in particular cases. The term "signature loan" is a term of art that has long been used to describe regulated, installment loans offered under and subject to Chapter 342, Texas Finance Code. Accordingly, TCFA is concerned about confusion to consumers and local governments and a fair and equitable market for regulated lenders. Because the OCCC has authority to enforce compliance with Chapter 342, TCFA's concerns are relevant to the questions raised.

I. Licensed regulated lenders make direct, signature loans.

TCFA represents the interests of regulated lenders in Texas making traditional installment loans under Subchapter F, Chapter 342, Texas Finance Code. In 2018, Texas traditional installment lenders issued approximately 3.6 million loans totaling over $2.5 billion.[1] These loans are commonly referred to as "signature loans," although the loans can also be secured.

Subchapter F regulates the loan size, loan term, rate of interest, and all fees and amounts that may be received by the lender. *See id.* §§ 342.251-.260. The loans are typically for a term of 180 days or longer. The licensed regulated lender makes the loans directly to the consumer; they are not arranged by a third party. Texas lenders making traditional installment loans do not require

[1] Regulated Lender Consolidated Volume Report—Calendar Year 2018, Office of Consumer Credit Commissioner (July 18, 2019), available at https://occc.texas.gov/sites/default/files/uploads/reports/reg-lender-consolidated-2018.pdf.

access to a customer's bank account or a postdated check as a condition for loan approval. Before issuing a loan, the lenders perform underwriting to determine whether the loan is appropriate given the applicant's financial circumstances.

Texas law distinguishes regulated loans from other types of credit extensions, such as short-term payday and auto-title loans, which are governed by Chapter 393 of the Texas Finance Code. To make a traditional installment or signature loan, one must be licensed as a regulated lender under Chapter 342, and make that direct loan in compliance with Chapter 342. Such lenders are licensed and examined by the OCCC, and must file annual reports of activity with the OCCC. *See* TEX. FIN. CODE § 342.559.

II. Texas usury laws

The Texas Constitution establishes that, unless the Legislature determines otherwise, the maximum rate of interest in Texas is ten per centum (10%) per annum. TEX. CONST., art. 16, § 11. All contracts for a greater rate of interest are usurious. *Id*. The Legislature has reiterated "the maximum rate or amount of interest is 10 percent a year except as otherwise provided by law. A greater rate of interest than 10 percent a year is usurious unless otherwise provided by law." TEX. FIN. CODE § 302.001(b); *see also id*. § 342.004(a). Any person seeking to charge an interest rate[2] greater than 10 percent must do so according to other law, including CSOs.

In the Texas Finance Code the Legislature has set out the manner in which a person may charge an interest rate greater than 10 percent per annum. The Texas Finance Code qualifies that a person "may not perform an act, including advertising, or offer a service that would cause another to believe that the person is offering to make, arrange, or negotiate a loan that is subject to this subtitle, Subtitle C, or Chapter 394 unless the person is authorized to perform the act or offer the service as: (1) a credit service organization under Chapter 393; (2) a pawnbroker under Chapter 371; or (3) an authorized lender." TEX. FIN. CODE § 341.404.

Section 341.404 establishes that, for a person to advertise, offer, arrange, or negotiate a loan as a CSO, it may only do so as a "credit service organization under Chapter 393." As explained further below, a CSO cannot advertise, offer, arrange, or negotiate a loan under Chapter 342—only authorized lenders can do that. CSOs are restricted to Chapter 393.

III. A person must be licensed as a regulated lender to make a traditional signature loan.

Chapter 342 of the Texas Finance Code authorizes interest rates greater than 10 percent, so long as the loan is made in accordance with the chapter. A loan is subject to Chapter 342 if it:

(1) provides for interest in excess of 10 percent a year;
(2) is extended primarily for personal, family, or household use;
(3) is made by a person engaged in the business of making, *arranging*, or negotiating those types of loans; and
(4) either:

[2] "To determine the interest rate of a loan . . . all interest at any time contracted for shall be aggregated and amortized using the actuarial method during the stated term of the loan." *Id*. § 302.001(c).

(A) is not secured by a lien on real property; or
(B) is described by Section 342.001(4), 342.301, or 342.456 and is predominantly payable in monthly installments.

Id. § 342.005 (emphasis added). As the emphasized language makes clear, even arranging for a loan of this type, such as might be done by a CSO, subjects the loan to Chapter 342. A person must hold a license issued under Chapter 342 to make, transact, or negotiate a loan under Chapter 342, or "to contract for, charge, or receive, directly or indirectly, in connection with a loan subject to this chapter, a charge, including interest, compensation, consideration, or other expense, authorized under this chapter that in the aggregate exceeds the charges authorized under other law." *Id.* § 342.051. A CSO that arranges for or negotiates for a consumer an extension of credit, such as a signature loan, would be subject to the licensing requirements of Chapter 342.

Importantly, a "lender may not directly or indirectly charge, contract for, or receive an amount that is not authorized under [Chapter 342] in connection with a loan to which [Chapter 342] applies, including any fee, compensation, bonus, commission, brokerage, discount, expense, and any other charge of any nature, whether or not listed by this subsection." TEX. FIN. CODE § 342.502; *see also id.* § 342.254(a) ("On a loan made under [Subchapter F, Chapter 342] a lender may not contract for, charge, or receive an amount unless this subchapter authorizes the amount to be charged."). Chapter 342 does not authorize a CSO—that is only registered under Chapter 393—to charge or receive consideration for obtaining or arranging for an extension of credit under Chapter 342. Only licensed regulated lenders can do so. *Id.* § 342.051.

Loans that involve a deferred presentment transaction or security in a motor vehicle are also covered by and subject to Chapter 342. *See id.* §§ 342.007, .008 & Subchapter M; 7 TEX. ADMIN. CODE § 83.604. That is, a regulated lender can enter into a deferred presentment transaction or motor vehicle title loan, but the loan must comply with all requirements of Chapter 342, including loan size, loan term, interest rate, and all fees and amounts that may be charged or received. *See, e.g.*, TEX. FIN. CODE §§ 342.251 - .260.

If an entity, such as a CSO, obtains, arranges for, or negotiates (or "assists a consumer in obtaining") an extension of credit that is subject to Chapter 342, it must be licensed under and comply with Chapter 342. Otherwise, a CSO is limited to what is authorized by Chapter 393.[3] While the Attorney General did not reach this issue in the Opinion, for the OCCC to conclude otherwise would undermine the distinction identified by the Legislature in Section 341.404 and Chapters 342 and 393, and render meaningless the requirements in Sections 342.005 (applicability of chapter), 342.051 (licensing), 342.051 (limitation on fees and charges), and 342.254 (no charges unless authorized by Subchapter F, Chapter 342).

[3] Chapter 393 does not apply to licensed regulated lenders who make Chapter 342 loans, even if such loans involve a deferred presentment transaction or are secured by a motor vehicle. TEX. FIN. CODE § 393.002(a)(1) (Chapter 393 does not apply to a person "authorized to make a loan or grant an extension of consumer credit under the laws of this state or the United States" and "subject to regulation and supervision by this state or the United States").

IV. Potential for confusion in the marketplace.

TCFA provides the preceding statutory background because it is concerned that, if CSOs assist consumers in obtaining an extension of credit that is marketed as a "signature loan" or "installment loan," consumers and local governments will confuse such products with true signature loans or regulated installment loans offered by regulated lenders. Consumers may believe they are entering into a Chapter 342 loan, which carries with it the protection of regulated terms and rates, when in actuality they are not. Local governments desiring to regulate CSO and CAB activities may believe they need to seek to regulate signatures loans under Chapter 342, when in fact CSOs cannot offer such direct loan products. CSOs, in turn, would unfairly benefit from Chapter 342 without complying with the statutory protections associated with such loans.

Such activity by a CSO would be in contravention of the prohibition that a person "may not perform an act, including advertising, or offer a service that would cause another to believe that the person is offering to make, arrange, or negotiate a loan that is subject to this subtitle, Subtitle C, or Chapter 394 unless the person is authorized to perform the act or offer the service as . . . an authorized lender." TEX. FIN. CODE § 341.404.

The potential for confusion requires clarification by the OCCC with respect to the types of extensions of credit that CSOs may assist consumers in obtaining, and requires additional disclosures by CSOs to make clear they are not able to arrange regulated loans subject to Chapter 342. For instance, CSO advertisements, solicitations, and transaction documents should disclose the CSO is not offering a product regulated under Chapter 342. And CSOs should be precluded from using commonly accepted terms of art, such as "signature loan."

CONCLUSION

It is important to maintain the distinction between regulated loans and products offered through a CSO transaction. The Texas Finance Code's distinction between CSOs and regulated lenders exists for good reason—it protects consumers and fosters fair competition in the regulated lending market. Clarifying the types of credit extensions that a CSO may arrange, and requiring disclosures to avoid confusion, properly maintain this legislative distinction. The OCCC has authority in this regard, at a minimum, through its enforcement authority over Chapter 342 transactions. *See* TEX. FIN. CODE §§ 14.101, 14.201(2); *see also id.* § 341.404. Failure to address these concerns could lead to circumvention of Chapter 342, foster unlicensed lending activity, mislead and confuse consumers, and undermine fair competition for licensed regulated lenders.

Sincerely,

/s/Carl R. Galant
Carl R. Galant
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[redacted]
Attorneys for TCFA

Comments of the City of Austin, Texas, Office of Telecommunications & Regulatory Affairs

Credit Services Organizations and Attorney General Opinion KP-0277
Texas Office of Consumer Credit Commissioner

Submitted via email: rule.comments@occc.texas.gov

The Office of Telecommunications & Regulatory Affairs of the City of Austin submits these comments in response to the Texas Office of Consumer Credit Commissioner's request for comments and suggestions about the opinion issued by the Attorney General (AG) under number KP-0277 on November 1, 2019. This opinion concluded that Chapter 393 of the Texas Finance Code does not restrict a Credit Services Organization (CSO) from assisting a consumer to obtain an extension of consumer credit outside of the following two forms: a deferred presentment transaction (also known as a payday loan) or a motor vehicle title loan. The City of Austin is concerned that the AG opinion will be used by credit access businesses (CAB) as authority under which they can offer illegal loan products.

The City of Austin regulates CABs through its Credit Access Business Ordinance, which the Office of Telecommunications & Regulatory Affairs is tasked with enforcing. The City's ordinance is predicated on the understanding that the Texas Finance Code stipulates that CABs may assist consumers in obtaining only deferred presentment transactions, otherwise known as payday loans, or motor vehicle titles loans. In response to several City of Austin audits, CABs operating in Austin have already indicated that the loans they assist consumers in obtaining are neither payday loans nor motor vehicle title loans. These CABs allege that their loans are made within the confines of Chapter 393 of the Texas Finance Code, but are exempt from CAB regulations. That is, some CABs now maintain that they can assess CAB fees, as authorized by Texas Finance Code 393.602(b), but are not subject to CAB regulations. The City of Austin regulations seek to protect consumers from predatory lending practices by placing limits on certain aspects of CAB transactions. Products offered by CSOs, other than payday and auto title loans, will circumvent provisions designed to protect consumers such as limits on a loan's principal related to a consumer's ability to pay.

Therefore, the City of Austin requests the following of the Office of Consumer Credit Commissioner:

1. Publish an advisory bulletin to clarify the types of loans a CSO or CAB may assist a consumer in obtaining;

2. Publish an advisory bulletin to clarify the restrictions and requirements of CSO products and CAB products;

3. Pursuant to Texas Finance Code 342.007 and 393.622, adopt a rule requiring CSOs to report if a service is being provided as a CSO or a CAB;

4. Pursuant to Texas Finance Code 342.007 and 393.622, adopt rules delineating what a CSO must do to extend to a consumer credit that is not "substantially the same as that available to the public" as required by Texas Finance Code Section 393.303.

The City of Austin appreciates the opportunity to provide comments and feedback to the Office of Consumer Credit Commissioner in an effort to harmonize State and municipal regulations to the benefit of all stakeholders.

Michael Rigby - comments from TOFSC on non-CAB transactions from stakeholder meeting

From: Michael Brown [redacted]
To: Michael Rigby <michael.rigby@occc.texas.gov>
Date: 12/11/2019 2:56 PM
Subject: comments from TOFSC on non-CAB transactions from stakeholder meeting

Hello Mr. Rigby! See below for our comments and questions related to the stakeholder meeting. Sending this on behalf of our group (TOFSC) we are mostly smaller CABs in the 1-5 location range...the moms and pops if you will. I am still trying to learn as much as I can about all of this and it is possible I am wrong on my comments. I will be looking to connect with Attorneys, talk more with Rob Norcross, and see what companies end up rolling with the "non-CAB" program. As I learn from talking to others and observe the new programs in action I will of course be better equipped. Other than those information sources I would like to know more about what OCCC knows...that would help fill in the gaps as well.

1. Does the opinion's analysis affect the regulatory landscape for CAB transactions (i.e., deferred presentment transactions and motor vehicle title loans)?

Comment: I spoke up and stated that I thought "yes"the regulatory landscape would be affected. At that point I was assuming so because I thought OCCC would brought in to oversee non-CABs, maybe provide documents, bulletins, advisories? Or additional disclosures for consumers? If that was done then yes. Later in the meeting I began to wonder if OCCC would do anything before they were expressly given the authority (by new laws or admin rules). Maybe it is not even their jurisdiction? That idea was brought up when discussing what would happen if a consumer called in a complaint and Commissioner Pettijohn was not sure they can handle the complaint. One thing I said I did not know is who asked the AG for the opinion. If I knew that then I may have an idea of whether this is going to be a significant

development in the market. If a big player with hundreds of locations leads the way and goes all out on this and it catches on with many others, then likely yes. If this new non-CAB ends up not catching on as a big development in the market state-wide, then perhaps not so much.

2. Must persons engaged in non-CAB transactions comply with all requirements of Chapter 393 other than those that apply specifically to CABs (i.e., Section 393.201(c), Subchapter C-1, Subchapter G)?

Comment: Yes, simple here. All non-CAB CSO's need to abide by the law.

3. Are persons engaged in non-CAB transactions subject to the enforcement authority of the attorney general under Section 393.502?

Comment: Yes. If the OCCC is not charged with this then it goes back to the Attorney General to handle just like before CAB was in place.

4. Are persons engaged in non-CAB transactions subject to local ordinances and the enforcement authority of local governments?

Comment: No.

5. Are persons engaged in non-CAB transactions subject to federal law and the enforcement authority of federal agencies (e.g., the Consumer Financial Protection Bureau, the Federal Trade Commission)?

Comment: I spoke on this stated that the CFPB rule as written might not apply to non-CABs but have not gotten opinion on that from CFPB experts. It is assumed that the CFPB would have authority over non-CABs in terms of their ability to examine or enforce against a bad actor in the category. But it does stand to reason that any portion of the rules as written may

not apply without being re-written to include transactions without a post dated instrument for payment.

6. Sections 14.101 and 14.201 of the Texas Finance Code give the OCCC authority to investigate and enforce violations of Chapter 393 with respect to a credit access business. What is the proper role of the OCCC in light of the opinion?

Comment: At first blush one might think OCCC has the authority, or at least is in the best position to investigate and enforce. As said earlier, OCCC may not have the authority to though. They could possibly send out a bulletin. Also, would be good to advise us on how can get into trouble doing non-CAB transactions. (device, subterfuge, pretense see #7 below).

7. Section 393.602 of the Texas Finance Code says a person may not use a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G. Under the opinion, what would constitute a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G?

Comment: No one spoke up on this and it remains to be seen. Will be talking to others and see how this plays out.

8. Section 393.303 of the Texas Finance Code says a credit services organization may not charge or receive from a consumer valuable consideration solely for referring the consumer to a retail seller who will or may extend to the consumer credit that is substantially the same as that available to the public. Under the AG opinion, what would constitute a violation of Section 393.303?

Comment: I believe this says a non-CAB cannot charge a consumer money to make a referral to a lender down the road who will lend them money in the form of a readily available loan product on the market. This has always been a mystery TOFSC members do not report seeing it in the market. OCCC stated they do not look at this much during examinations I suppose that is because it is not a large factor out there.

9. Does the opinion's analysis raise other significant policy issues?

Comment: No one spoke on this. We would say it yes…if this were to become a highly used model then there will be a lot of noise coming from the consumer advocates, maybe new bills, perhaps some new administrative rules. I suppose that process will include a lot of pressure from consumer advocates who are not happy about this "chaos" causing development. So, they will be out in force trying to rein in the chaos, right?

10. Should the OCCC and the Finance Commission engage in rulemaking related to any of these issues? If so, what is the statutory basis for the rulemaking?

Comment: TOFSC would say no. The door would be opened for consumer advocates to come in and pressure OCCC, legislators, or others, to overreach and hurt us in some way with more burdensome rules. It would be a fight and what un-knowns would be out there during that process?

Best,
Michael B.

Michael Brown
Principal, CAB Consulting
www.CreditAccessBusiness.com
President, Texas Organization of Financial Service Centers ("TOFSC")
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JIM MURPHY
Member
HOUSE OF REPRESENTATIVES
District 133 • Harris County

COMMITTEES
Pensions, Investments and Financial Services, *Chairman*
Ways & Means

12/12/19

Commissioner Leslie Pettijohn
Office of Consumer Credit Commissioner
2601 North Lamar Blvd.
Austin, TX 78705

Commissioner Pettijohn,

Thank you for holding a stakeholder meeting on Monday, December 9th and soliciting comments in light of Attorney General Paxton's opinion KP-0277. Please find my comments below.

My Attorney General opinion request asked for, in part, an interpretation of Chapter 393, Finance Code, and whether credit services organizations ("CSO's") are restricted to exclusively offering extensions of consumer credit in the form of deferred presentment transactions or motor vehicle title loans.

As noted in Attorney General Paxton's opinion, the statutory language of Chapter 393 related to extensions of credit by CSO's in 'non-CAB' transactions is unambiguous. While the Legislature did pass amendments to the Finance Code in 2011 to place restrictions on a specific type of credit services organizations (i.e. credit access businesses), the definition for CSO's in Sec. 391.001, Finance Code, was not changed. The plain language of the statute provides that CSO's may continue to obtain for or assist consumers in obtaining extensions of credit subject to Subchapters B-F, Chapter 393, Finance Code.

Because the statute is unambiguous and must be read according to the plain language there is neither a need nor statutory authority for the OCCC or the Finance Commission to engage in rulemaking related to any of the issues presented to stakeholders at the December 9th

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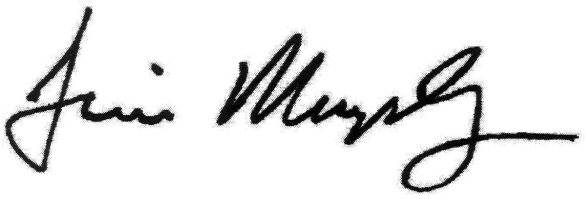
meeting. Paraphrasing your 2012 advisory bulletin, it is the legislature who has the power and purview to promulgate laws affecting CSO's.

Attorney General Paxton issued his opinion on November 1 of this year and the impact that it will have on private sector practices cannot yet be fully understood. As Chairman of the House Committee on Pensions, Investments, and Financial Services, I look forward to working with you and your agency as we determine what type of legislative action - if any - is necessary.

Sincerely,



cc: Michael Rigby, General Counsel

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December 12, 2019

By email (rule.comments@occc.texas.gov)

Michael Rigby, General Counsel
Office of Consumer Credit Commissioner
2601 North Lamar Boulevard
Austin, Texas 78705-4207

Re: Credit Services Organizations and Attorney General Opinion KP-0277

Dear Mr. Rigby:

On behalf of our client ACE Credit Access LLC ("ACE"), this letter addresses the questions raised by the Office of Consumer Credit Commissioner in its Notice of Stakeholder Meeting on the above subject (the "Notice"). The OCCC questions and our responses are as follows:

1. Does the opinion's analysis affect the regulatory landscape for CAB transactions (i.e., deferred presentment transactions and motor vehicle title loans)?

   Attorney General Opinion KP-0277 (the "Opinion") addresses whether a credit services organization ("CSO") may assist a consumer in obtaining an extension of credit in a form *other than* a deferred presentment transaction or motor vehicle title loan. It does not purport to address deferred presentment transactions and title loans and accordingly has no impact whatsoever on the regulatory landscape for such loans.

2. Must persons engaged in non-CAB transactions comply with all requirements of Chapter 393 other than those that apply specifically to CABs (i.e., Section 393.201(c), Subchapter C-1, Subchapter G)?

   Consistent with the views expressed by the Attorney General in the Opinion, we believe that Chapter 393 clearly distinguishes between requirements applicable to all CSOs and requirements applicable solely to CSOs performing services as CABs. Accordingly, CSOs engaged in non-CAB transactions must comply with the requirements of Chapter 393 other than the requirements that apply solely to CABs.

3. Are persons engaged in non-CAB transactions subject to the enforcement authority of the attorney general under Section 393.502?

   Section 393.502 gives the Attorney General the power to apply to a district court to enjoin *any violation of Chapter 393*, whether the violator is a CAB or non-CAB CSO.

4. Are persons engaged in non-CAB transactions subject to local ordinances and the enforcement authority of local governments?

   No. The local ordinances of which we are aware govern CAB transactions only.

5. Are persons engaged in non-CAB transactions subject to federal law and the enforcement authority of federal agencies (e.g., the Consumer Financial Protection Bureau, the Federal Trade Commission)?

   CSO services are consumer financial services governed by a host of federal laws (including "UDAAP" laws prohibiting unfair, deceptive and abusive acts and practices) and are fully subject to the enforcement authority of the CFPB and Federal Trade Commission.

6. Sections 14.101 and 14.201 of the Texas Finance Code give the OCCC authority to investigate and enforce violations of Chapter 393 with respect to a credit access business. What is the proper role of the OCCC in light of the opinion?

   Sections 14.101 and 14.201 give the OCCC investigative and enforcement power to enforce "Chapter 393 with respect to a credit access business." They give the OCCC no enforcement power over non-CABs.

   During the December 9, 2019 Stakeholder Meeting, our notes reflect that the OCCC referred to Section 393.201(c) of the Finance Code and stated its position that CSOs must give notice to consumers of the OCCC's name, address and phone number. However, Section 393.201 relates to "A contract with a *credit access business*," not a contract with a CSO. Therefore, to answer the Commissioner's question posed at the meeting, if the OCCC receives a complaint from a consumer about a non-CAB loan, the consumer should be redirected to the Office of the Attorney General. Prior to the adoption of the special provisions addressing CABs, the Attorney General handled complaints about CSO companies. Because the CAB provisions of Chapter 393 change nothing for non-CAB CSOs, the Attorney General should continue to handle complaints about such companies.

7. Section 393.602 of the Texas Finance Code says a person may not use a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G. Under the opinion, what would constitute a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G?

   We do not know of any CSOs that are using any devices, subterfuges or pretenses to evade the application of the CAB provisions of Chapter 393.

8. Section 393.303 of the Texas Finance Code says a credit services organization may not charge or receive from a consumer valuable consideration solely for referring the consumer to a retail seller who will or may extend to the consumer credit that is substantially the same as that available to the public. Under the AG opinion, what would constitute a violation of Section 393.303?

   We do not believe that the Opinion has any bearing on Section 393.303.

9. Does the opinion's analysis raise other significant policy issues?

   We believe that the Opinion represents a straightforward (and correct) reading of Chapter 393.

10. Should the OCCC and the Finance Commission engage in rulemaking related to any of these issues? If so, what is the statutory basis for the rulemaking?

    We see no need for rulemaking and no statutory authorization for rulemaking related to the Opinion. While a few participants in the Stakeholder Meeting talked, without elaboration, about "chaos" resulting from the Opinion, no participant articulated the nature of the purported "chaos" and we do not believe any "chaos" exists today or is likely in the future. Not only would rule-making exceed the OCCC's statutory authority, so, too, would the issuance of interpretations of the law, as suggested by some at the Stakeholder Meeting, with respect to non-CAB CSOs.

Thank you for your consideration of our views.

Sincerely,

Jeremy T. Rosenblum