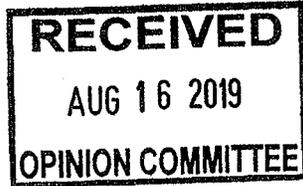


BAKER BOTTS LLP

98 SAN JACINTO BLVD.
SUITE 1500
AUSTIN, TEXAS
78701-4078

TEL +1 512.322.2500
FAX +1 512.322.2501
BakerBotts.com

AUSTIN	LONDON
BEIJING	MOSCOW
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August 16, 2019

VIA EMAIL

Office of the Attorney General
Attention: Opinion Committed
opinion.committee@oag.texas.gov

FILE # RQ-0300-KP
D. # 48596

Scott Keller
TEL: 5123222500
FAX: 5123222501
scott.keller@bakerbotts.com

Re: Attorney General Opinion Request RQ-0300-KP

Dear Office of the Attorney General:

I write regarding opinion request RQ-0300-KP, which Representative Jim Murphy, the Chairman of the House Committee on Pensions, Investments, and Financial Services, submitted on July 30, 2019. Chairman Murphy's request asks two questions related to "credit services organizations" (CSOs):

1. Does Chapter 393 authorize a [CSO], as defined in Section 393.001(3) of the Texas Finance Code, 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 (each as defined in Section 341.001 of the Texas Finance Code)?
2. If so, does Chapter 393 allow a [CSO] to assist a consumer with obtaining an extension of consumer credit in the form of a "signature loan," whereby no security is obtained from the consumer in exchange for the extension of consumer credit or cash advance (including, without limitation, a motor vehicle title) and no personal check or authorization to debit a deposit account is obtained from the consumer in exchange for the extension of consumer credit or cash advance?

As explained in more detail below, both questions should be answered "Yes."

First, Section 393.001(3)'s plain text allows any CSO to help a consumer "obtain[] an extension of consumer credit." Tex. Fin. Code § 393.001(3). The same section defines an "extension of consumer credit" as the "right . . . to incur [a] debt and defer its payment." *Id.* § 393.001(4). The statute does not define "debt," but that term's ordinary meaning undoubtedly encompasses extensions of consumer credit beyond deferred presentment transactions and motor vehicle title loans. Thus, deferred presentment transactions and motor vehicle title loans are not the only extensions of consumer credit that a CSO can arrange. Importantly, this answer is the same regardless of whether the CSO is also licensed to operate as a "credit access business" (CAB).

Second, a consumer who works with a CSO to obtain a signature loan does "incur [a] debt and defer its payment." *Id.* Accordingly, Chapter 393 allows CSOs to help consumers obtain signature loans—again, regardless of whether the CSO is also licensed to operate as a CAB.

Statutory Background

Credit services organizations (CSOs). The Texas Legislature created the statutory framework for CSOs in 1987. *See* Act of June 19, 1987, 70th Leg., R.S., ch. 764, § 1 (1987). The Legislature made non-substantive edits to the definition of “CSO” in 1997. *See* Act of June 19, 1997, 75th Leg., R.S., ch. 1008, § 1. The definition has since remained unchanged:

“Credit services organization” means a person who provides, or represents that the person can or will provide, for the payment of valuable consideration any of the following services with respect to the extension of consumer credit by others:

- (A) improving a consumer’s credit history or rating;
- (B) obtaining an extension of consumer credit for a consumer; or
- (C) providing advice or assistance to a consumer with regard to Paragraph (A) or (B).

Tex. Fin. Code § 393.001(3).

A CSO accepts a fee to aid in “improving a consumer’s credit history or rating” or “obtaining an extension of consumer credit for a consumer.” *Id.* A CSO does not directly lend to the consumer. Instead, the CSO helps the consumer obtain an “extension of consumer credit” from a third-party lender. *Id.* The same statutory section also defines “extension of consumer credit”:

“Extension of consumer credit” means the right to defer payment of debt offered or granted primarily for personal, family, or household purposes or to incur the debt and defer its payment.

Id. § 393.001(4). Read together, these definitions allow CSOs to help consumers “obtain[]” the “right . . . to incur [a] debt and defer its payment.” *Id.* § 393.001(3), (4). Chapter 393 does not define the term “debt.”

Credit access businesses (CABs). The Legislature amended Chapter 393 in 2011 by adding Subchapter C-1: “Notice and Disclosure Requirements for Certain [CSOs].” *See* Act of June 17, 2011, 82nd Leg., R.S. ch. 1301, § 1. This subchapter created a new subtype of CSO called a “credit access business” (CAB). *See* Tex. Fin. Code § 393.221(1). Because a CAB is a subtype of CSO, every CAB is a CSO. But for the same reason, not all CSOs also operate as CABs. The Legislature defined a CAB as follows:

“Credit access business” means a credit services organization that obtains for a consumer or assists a consumer in obtaining an extension of consumer credit in the form of a deferred presentment transaction or a motor vehicle title loan.

Id.; *see id.* § 393.601(2) (providing the same definition).

A CSO therefore “operates as a [CAB],” *id.* § 393.603, *only* when it helps arrange either of two specific types of loans: “a deferred presentment transaction or a motor vehicle title loan,” *id.* §§ 393.221(1), 393.601(2). The term “‘Deferred presentment transaction’ has the meaning assigned by Section 341.001,” *id.* § 393.601(3), which states:

“Deferred presentment transaction” means a transaction in which:

- (A) a cash advance in whole or part is made in exchange for a personal check or authorization to debit a deposit account;
- (B) the amount of the check or authorized debit equals the amount of the advance plus a fee; and
- (C) the person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date.

Id. § 341.001(6). Additionally:

“Motor vehicle title loan” or “auto title loan” means a loan in which an unencumbered motor vehicle is given as security for the loan.

Id. § 393.221(3); *see id.* § 393.601(5) (providing the same definition).

Chapter 393 regulates CABs more stringently than CSOs that are not licensed as CABs. For example, a CSO that also operates as a CAB “must obtain a license . . . for each location at which the organization operates as a [CAB].” *Id.* § 393.603. By contrast, non-CAB CSOs do not need a license and instead just need to “register with the secretary of state.” *Id.* § 393.101(a). CABs must also “file a quarterly report” with the Consumer Credit Commissioner, whereas non-CAB CSOs need not. *Id.* § 393.627; *see also* 7 Tex. Admin. Code § 83.5001 (discussing reporting requirements for CABs). These reporting and oversight requirements do not apply to the other extensions of consumer credit that CSOs arrange.

Analysis

Chapter 393’s plain text dictates that the answer to both questions in the opinion request is “Yes.” The “primary goal in statutory construction is to give effect to the Legislature’s intent.” *Gunn v. McCoy*, 554 S.W.3d 645, 672 (Tex. 2018). Courts “rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results.” *Id.* When a statute lacks a definition, courts “must determine the term’s common, ordinary meaning.” *State ex rel. Best v. Harper*, 562 S.W.3d 1, 11 (Tex. 2018) (citations omitted). “To determine a statutory term’s common, ordinary meaning, [courts] typically look first to its dictionary definitions.” *Id.*

I. Chapter 393 allows all CSOs to help consumers obtain any “extension of consumer credit” in a form other than a deferred presentment transaction or motor vehicle title loan.

Chapter 393’s plain text allows a CSO to help a consumer “obtain[] an extension of consumer credit.” Tex. Fin. Code § 393.001(3). An “extension of consumer credit” includes “the right . . . to incur [a] *debt* and defer its payment.” *Id.* § 393.001 (4) (emphasis added). Chapter 393 does not define “debt,” but the term’s dictionary definitions show that “debt” is commonly understood to cover all types of loans—not just deferred presentment transactions or motor vehicle title loans. For example, Black’s Law Dictionary defines “debt” as: “Liability on a claim; a specific sum of money due by agreement or otherwise.” Black’s Law Dictionary (11th ed. 2019). Other dictionaries also define “debt” to cover all types of loans. *See, e.g.*, Webster’s Third New International Dictionary 583 (1968) (defining “debt” as “something (as money, goods, or services) owed by one person to another”); The American Heritage Dictionary of the English Language 468 (5th ed., 2011) (defining “debt” as “[s]omething owed,” a “[f]inancial instrument[], such as [a] loan[], that represents a claim to payment and a right to creditorship”).

From 1987 through 2011—before the Legislature created the “CAB” designation—CSOs commonly arranged extensions of consumer credit in the form of loans. *See, e.g., Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 436 (5th Cir. 2004) (discussing a CSO that arranged motor vehicle title loans); *In re Ace Credit Services, LLC*, 04-10-00049-CV, 2010 WL 1491780, at *1 (Tex. App.—San Antonio 2010, no pet.) (mem. op.) (discussing a CSO that arranged a loan). And importantly, the preexisting statute allowed a CSO to help a consumer obtain any “extension of consumer credit.” *See* Tex. Fin. Code § 393.001(3).

The 2011 amendments created and imposed certain additional restrictions on CABs. *See id.* § 393.221(1). Under these amendments, a CSO operates as a CAB whenever it helps a consumer obtain an extension of credit in the form of a “deferred presentment transaction or a motor vehicle title loan.” *Id.* Apart from addressing these specific transactions, the additional restrictions on CABs did not alter whatsoever the preexisting statutory framework for CSOs. Nowhere did the Legislature prohibit CSOs—which had already been arranging loans for more than two decades—from continuing to arrange loans other than deferred presentment transactions and motor vehicle title loans. Rather, the 2011 amendments required any CSO that wished to also continue arranging these two types of transactions to become licensed as a CAB. *See id.* § 393.603.

In short, the 2011 amendments did not create any new restrictions on the other types of loans that CSOs could arrange. Indeed, if the Legislature had wanted to prohibit CSOs from assisting consumers with other types of loans, it could have easily drafted a simple statutory provision to that effect. *See, e.g., In re Reece*, 341 S.W.3d 360, 374 (Tex. 2011) (holding that when “[t]he Legislature could have included language designating . . . [an] exclusive remedy . . . , but declined to do so,” then courts “will not read such a limitation into the statutory scheme”). Since the Legislature did not prohibit CSOs from arranging other types of loans, a court would presume that the Legislature did not intend to do so. *See id.; see also Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (per curiam) (“A court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written.”).

August 16, 2019

Nor does anything in the 2011 amendments indicate that a CSO *loses* authority to arrange other types of loans by obtaining a license to operate as a CAB. Instead, a CSO's authority to assist consumers with loans other than deferred presentment transactions and motor vehicle title loans turns on the preexisting CSO statutes. Texas law has allowed CSOs to help consumers obtain loans since 1987. *See supra* p.2. As amended in 1997, Chapter 393 allows a CSO to help a consumer "incur [a] *debt* and defer its payment." Tex. Fin. Code § 393.001(3), (4) (emphasis added). "Debt" includes loans besides just deferred presentment transactions and motor vehicle title loans, as the dictionary definitions cited above confirm. *See supra* p.4.

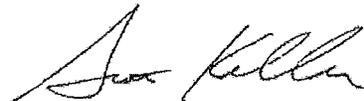
Chapter 393 is clear: A non-CAB CSO's menu of services may include helping consumers obtain any type of extension of consumer credit except a deferred presentment transaction or a motor vehicle title loan. *See* Tex. Fin. Code § 393.221(1). If a CSO wishes to expand its menu of services to include assisting with obtaining a deferred presentment transaction or a motor vehicle title loan, then the CSO must obtain a CAB license. *Id.* But obtaining the CAB license does not require a CSO to reduce any of its services.

II. Chapter 393 allows any CSO to help a consumer obtain a signature loan.

As Chairman Murphy's request explains, a "signature loan" is a loan in which the consumer does not provide security or pre-authorization to debit an account, but in which the CSO still arranges for the consumer to receive an extension of consumer credit or a cash advance from the lender. In other words, a signature loan is neither a deferred presentment transaction nor a motor vehicle title loan, so a signature loan would not trigger the CAB requirements. *See id.*

Because a signature loan is an extension of consumer credit that creates a "debt," any CSO can assist a consumer with obtaining a signature loan. *See supra* p.4 (discussing the definition of "debt"). And because signature loans are neither deferred presentment transactions nor motor vehicle title loans, signature loans do not implicate the 2011 amendments regarding CABs in any way. The absence of securitization or debit pre-authorization does not transform a signature loan into anything other than a *loan* that creates a *debt*. Thus, when any CSO helps a consumer obtain a signature loan, that CSO helps the consumer "incur [a] debt" under Chapter 393's plain text. Tex. Fin. Code § 393.001(3). So any CSO can help a consumer obtain a signature loan.

Respectfully submitted,



Scott A. Keller

cc: Representative Jim Murphy, jim.murphy@house.texas.gov

Martinez, Steven

From:
Sent: Friday, August 16, 2019 11:04 AM
To: Opinion_Committee
Cc: jim.murphy@house.texas.gov
Subject: Brief on Opinion Request RQ-0300-KP
Attachments: Keller - RQ-0300-KP.pdf

Please find attached a brief addressing the questions presented in Opinion Request RQ-0300-KP.

Scott A. Keller

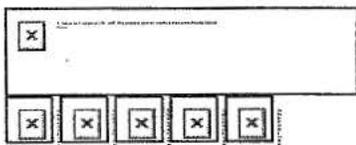
Partner

Baker Botts L.L.P.

T +1.202.639.7837
F +1.202.585.1023
M +1.202.655.8162

1299 Pennsylvania Ave. NW
Washington, DC 20004

98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701



*Admitted only in Texas. Not admitted in the District of Columbia. Practicing under the supervision of principals of the firm who are members of the District of Columbia bar.

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Martinez, Steven

OPINION COMMITTEE

From: Hobby Services
Sent: Tuesday, August 27, 2019 2:02 PM
To: Opinion_Committee
Subject: Authority of a Credit Service Organization Brief

FILE # RQ-0300-KP
I.D. # 48600

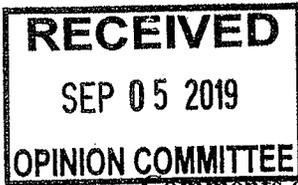
Based on our understanding of the Texas Finance Code, Chapter 393 does not authorize a CSO to assist a consumer with obtaining an extension of Consumer Credit in any other form than a Deferred Presentment Transaction or a Motor Vehicle Title Loan.

Rule 83.604(A) Definitions(2)

Payday Loan or Deferred Presentment Transaction

(A) A transaction in which

(i) A cash advance in whole or part is made in exchange for a personal check or authorization to debit a deposit account



Comments of the City of Austin, Texas

FILE # RQ-0300-KP
I.D. # 48604

Authority of a credit services organization 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

Request No. RQ-0300-KP

Submitted via email: opinion.committee@oag.texas.gov

The City of Austin, Texas files these comments in response to Request No. RQ-0300-KP, seeking clarification on the authority of a credit services organization (CSO) to assist a consumer obtain an extension of consumer credit in a form other than a deferred presentment transaction or motor vehicle title loan.

Section 393.221 of the Texas Finance Code states that the only forms of extensions of consumer credit a credit access business (CAB) may obtain for or assist a consumer in obtaining are a deferred presentment transaction or a motor vehicle title loan. Since extensions of consumer credit in any other form are not expressly discussed, the legislative intent is to limit the allowed transactions to only those discussed in Chapter 393. The City of Austin believes that the protection provided by this interpretation of the Texas Finance Code continues to be needed as desperate consumers are forced to accept loans with extremely high interest and fees. If credit services organizations are permitted to provide unregulated loans, there will be an increased incidence of predatory lending practices on vulnerable citizens.

Furthermore, Section 393.303 prohibits credit services organizations from charging fees for obtaining or assisting a consumer in obtaining an extension of consumer credit that is substantially similar to that which is otherwise available to the public. This restriction supports the narrow reading of the CSO statutes since the legislature clearly intended to limit the types of services and products a CSO or CAB may offer. Offering an extension of consumer credit in a form other than a deferred presentment transaction or motor vehicle title loan represents a clear attempt to evade the regulatory requirements of Chapter 393 and thereby circumvent the law.

It is for these reasons that the City of Austin strongly recommends the Attorney General does not expand the interpretation of Chapter 393 of the Texas Finance Code to include consumer credit in a form other than a deferred presentment transaction or motor vehicle title loan.

Martinez, Steven

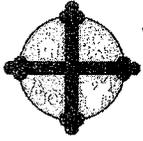
From: Kaeini, Christina <Christina.Kaeini@austintexas.gov>
Sent: Thursday, September 05, 2019 10:43 AM
To: Opinion_Committee
Cc: Franco, Brie; Musgrove, Ida
Subject: RQ-0300-KP: City of Austin Comments
Attachments: City of Austin Comments on Request No. RQ-0300-KP.pdf

Good morning,

Attached please find comments from the City of Austin in response to RQ-0300-KP: authority of a credit services organization 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.

Please let us know if you have any questions or require additional information.

Christina Kaeini
Senior Intergovernmental Relations Coordinator
Intergovernmental Relations Office
City of Austin
(512) 974-2246 (direct)
(817) 723-8758 (mobile)



Texas Catholic Conference of Bishops

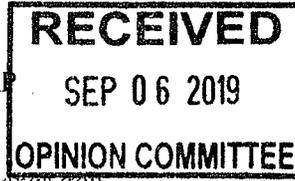
THE PUBLIC POLICY VOICE OF THE CHURCH



Christian Life COMMISSION

September 5, 2019

Office of the Attorney General
Attention Opinion Committee, Re: RQ-0330-KP
P.O. Box 12548
Austin 78711-2548
Submitted by Email: opinion.committee@oag.texas.gov



FILE # RQ-0300-KP
I.D. # 48605

Dear Opinion Committee,

The Texas Catholic Conference of Bishops (TCCB) and the Christian Life Commission of the Baptist General Convention of Texas (CLC) are united in our advocacy for the working poor Texans who turn to short term loans for unexpected and overwhelming expenses.

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.

Rep. Murphy's request would allow for credit services organizations to obtain extensions of consumer credit in the form of "signature loans," whereby no security is obtained from the consumer in exchange for the extension of credit or cash advance and no personal check or authorization to debit a deposit account is obtained from the consumer in exchange for the extension of consumer credit or cash advance.

First, a plain reading and reasonable interpretation of the text necessitates that only credit services organization would be allowed to offer the two types of loans explicitly mentioned in statute. Second, even if the Attorney General were of the opinion that credit service organizations could offer extensions of credit in forms other than deferred presentment loans or motor vehicle title loans, 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."

While we recognize consumers need access to credit, "signature loans" only perpetuate the cycle of debt and are harmful to our communities. We encourage the State Legislature to adopt a more comprehensive strategy to support a lending market that encourages borrower and lender success.

Respectfully Submitted,

Jennifer Allmon (handwritten signature)

Jennifer Allmon
Executive Director
Texas Catholic Conference of Bishops

Gus Reyes (handwritten signature)

Gus Reyes
Executive Director
Texas Christian Life Commission

**Comments of TCCB and CLC on
Request for Texas Attorney General Opinion RQ-0330-KP**

Question 1. Does Chapter 393 authorize a credit services organization, as defined in Section 393.001 (3) of the Texas Finance Code, 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 (each as defined in Section 341.001 of the Texas Finance Code)?

Answer: 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. The TCCB and the CLC submits the following response:

1. The plain language of the Chapter 393 only authorizes CSOs to provide consumers with obtaining an extension of credit in the form of (1) a deferred presentment loan or (2) a motor vehicle title loan.
2. Further loosening Texas law to allow CSO services to obtain an extension of consumer credit in a form other than a deferred presentment transaction or motor vehicle title loan enables expensive loan products with high rates of defaults, thus further damaging a borrower's credit report.

A fundamental principle of statutory construction in Texas is the primacy of language of the statute in determining its intent. In the Code Construction Act, the Texas Legislature has explicitly provided rules for how statutes are to be construed: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage."¹ Additionally, "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."² Courts, too, recognize that the plain meaning of the text of a statute is to control.³

Correspondingly, the relevant portion of Section 393.001 (3) defines "credit services organization" as a "person who "who provides, or represents that the person can or will provide, for the payment of valuable consideration any of the following services with respect to the extension of consumer credit by others", including through "obtaining an extension of consumer credit for a consumer."⁴ Additionally, in Section 393.221(1) it defined "credit access business" to mean a "credit services organization that obtains for consumer or assists a consumer in obtaining an extension of consumer credit in the form of a deferred presentment transaction *or* [emphasis added] a motor vehicle title loan." Read together, we see the interchangeability of credit access business and credit services organization and the language at issue clearly stating that CSOs (including CABs) were contemplated as offering two types of permissible services to extend consumer credit.

¹ Tex. Gov't. Code § 311.011 (a).

² Tex. Gov't. Code § 311.011 (b).

³ See, e.g., *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) ("W]hen possible, we discern [legislative intent] from the plain meaning of the words chosen"); *Boykin v. State*, 818 S.W.2d 782 Tex. Crim. App. 1991) ("[W]e necessarily focus our attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment [...] because the text of the statute is the law in the sense that it is the only thing actually adopted by the legislators, probably through compromise, and submitted to the Governor for her signature").

⁴ Tex. Fin. Code § 393.001 (3)(C).

“Deferred presentment transaction” is a legal term for what is commonly called a payday loan. In plain terms, the lender makes a cash advance in exchange for a personal check or authorization to debit an account, with an additional fee. The maximum amount of interest that can be charged by these lenders is 10% under Article 15, Section 11 of the Texas Constitution. While the 5th Circuit ruled that there is no limit on the amount of *fees* that may be charged by a CSO in *Lovick v. Ritemoney Ltd.*,⁵ that was still in the context of a deferred presentment loan and not a new product.

Chapter 393 specifically links its definition to the definition of “Deferred presentment transaction” found in Section 341.001 (6) off the Finance Code which states:

- (6) "Deferred presentment transaction" means a transaction in which:
- (A) a cash advance in whole or part is made in exchange for a personal check or authorization to debit a deposit account;
 - (B) the amount of the check or authorized debit equals the amount of the advance plus a fee; and
 - (C) the person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date.

This deferred presentment transaction language coupled with the subterfuge language in Section 393.602(c), which we analyze in the next question, further supports a narrow reading of the law because the legislature has also supplied a definition to “Extension of consumer credit”, stating that it is the right to defer payment of debt offered or granted primarily for personal, family, or household purposes or to incur the debt and defer its payment.⁶ Second, in Subchapter G (“Licensing and Regulation of Certain Credit Services Organizations”), it elaborates upon the previous provision by specifically including within the definition of “credit access business” CSOs. Finally, the applicative portion of that Chapter (Section 393.602) reads:

This subchapter applies only to a credit services organization that obtains for a consumer or assists a consumer in obtaining an extension of consumer credit in the form of:

- (1) a deferred presentment transaction; or
- (2) a motor vehicle title loan.

By specifically recognizing the two types of loans that CSOs could offer, 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:

⁵ See *Lovick v. Ritemoney Ltd.*, 378 F.3d 433 (5th Cir 2004) (upholding a CSO transaction with a third-party broker that did not attribute those fees to the lender for the purposes of interest consideration under Texas usury laws).

⁶ Tex. Fin. Code § 393.001 (4).

Sec. 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 solely to refer a consumer to a product that is substantially the same as that available to the public.⁷ 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.

The Texas Attorney's General Office has upheld the principle of respecting the primacy of the statute in its own opinions. As best articulated in *Luberman's Underwriters v. State Bd. of Insurance*, "When the legislature plainly has expressed its intent in language of statute, intent must be effectuated without attempting to construe or interpret law."⁸ In many of its opinions, including its 1994 Opinion to uphold the legislative exemption of independent mortgage brokers from the CSO Act, the Texas Attorney General held, that when the language is clear it "need not rely on extrinsic materials to determine what the legislature intended..."⁹ The principal was further affirmed and articulated in a 2016 Texas Court of Appeals Ruling:

Our holding is reinforced by a fundamental principle of statutory construction. It is well established that a court should seek out the intent of a statute in construing it. However, such intent must be found in the language of the statute and not elsewhere. It is of course appropriate for a court to reach beyond statutory language in an ambiguous statute by reviewing the legislative history to ascertain intent. However, a court may not look to extraneous reasons merely to justify its own interpretation of legislative intent not expressed in the statute. When legislative intent is as unambiguous and clearly expressed in a statute as it is in the Act we now consider, we will not attempt to interpret or construe the law beyond the language of the statute.¹⁰ (internal citations omitted)

Therefore, according to the plain language of the statute, CSOs services can provide an extension of consumer credit either in the form of a deferred presentment loan or a motor vehicle title loan. Therefore, we respectfully submit that Chapter 393 does not authorize a credit services organization 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.

⁷ See Texas Gov't. Code § 311.016 (5) : May not has same meaning as "shall not".

⁸ *Lumbermen's Underwriters v. State Bd. of Ins.*, 502 S.W.2d 217, 219 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) (citing 53 Tex. Jur. 2d Statutes § 125, at 182 n.17).

⁹ See Tex. Atty. Gen. Op. LO-94-029 (Tex. A.G.), Letter Opinion No. 94-029, March 24, 1994. See also, Tex. Atty. Gen. Op. DM-457 (Tex. A.G.), Opinion No. DM-457, November 26, 1997; Tex. Atty. Gen. Op. LO-96-055 (Tex. A.G.), Letter Opinion No. 96-055, May 23, 1996; Tex. Atty. Gen. Op. LO-94-048 (Tex.A.G.), 1994, Letter Opinion No. 94-048, May 19, 1994.

¹⁰ *William S. Banowsky, Jr. v. Brian Schultz*, No. 05-14-01624-CV, Feb. 10, 2016, 2016 WL 531573

Question 2. If so, does Chapter 393 allow a credit services organization to assist a consumer with obtaining an extension of consumer credit in the form of a "signature loan," whereby no security is obtained from the consumer in exchange for the extension of consumer credit or cash advance (including, without limitation, a motor vehicle title) and no personal check or authorization to debit a deposit account is obtained from the consumer in exchange for the extension of consumer credit or cash advance?

Answer: No. 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."

1. Legislative intent and history show that the legislature sought to address predatory lending practice and provide recourse to consumers exploited by certain payday lenders.

If a plain reading of the text does not cure ambiguities in interpreting the law, we can next turn to the legislative history to effectuate the intent of the legislature and to resolve any ambiguity or inconsistency. This is because we resort to rules of construction or extrinsic aids when words are ambiguous.¹¹ Texas provides certain statutory construction presumptions in Section 311.021 of the Government Code ("Code Construction Act") to interpret a statute, namely, that:

1. compliance with the constitutions of this state and the United States is intended;
2. the entire statute is intended to be effective;
3. a just and reasonable result is intended;
4. a result feasible of execution is intended; and
5. public interest is favored over any private interest.

Texas Courts have also taken this view that a correct interpretation of the statutory text can also rely on the context in which the statute is written and what it seeks to remedy on a policy level.¹² In this case, the legislative intent further upholds the limitation that all CSO consumer credit extension services should be limited to deferred presentment transactions and motor vehicle title loans. Any interpretation to the contrary not only contradicts the plain language, but the history and intent of the statute itself.

First, the legislative history and intent of the legislature show that the purpose of Chapter 393 was to limit credit access businesses to offering two types of loans: deferred presentment loans and

¹¹ See, e.g., *Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421, 435 (Tex. 2011) ("We look first to the text. When the text is not clear, we explore extrinsic aids, including legislative history"); *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007) ("If a statute is clear and unambiguous, we apply its words according to their common meaning without resort to rules of construction or extrinsic aids").

¹² See, e.g., *Travelers Insurance Co. v. Marshall*, 124 Tex. 45, 76 S.W.2d 1007, 1012 (1934) ("Generally it may be said that in determining the meaning, intent, and purpose of a law or constitutional provision, the history of the times out of which it grew, and to which it may be rationally supposed to bear some direct relationship, the evils intended to be remedied, and the good to be accomplished, are proper subjects of inquiry"); *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) ("the words [the Legislature] chooses should be the surest guide to legislative intent"); *Texas National Guard Armory Board v. McCraw*, 132 Tex. 613, 126 S.W.2d 627 (Tex. 1939) (citing *Middleton v. Texas Power Light Co.*, 249 U.S. 152, 157, 39 S. Ct. 227 (1919) ("There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds").

motor vehicle title loans. 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.

CASHB 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 1987.¹³ 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.¹⁴ As Representative Vicki Truitt said during the floor debate, the CSO Act was meant to reign in bad actors and predatory practices in the “wild west” of payday lending by bringing payday loan regulation under one umbrella:

There are predatory practices. There’s failure to disclose pertinent information to customers and our authority in Texas. We have no ability whatsoever to deal with the bad actors. And I don’t want to limit or prohibit the good actors from being available and providing this valuable service, but we have no way of dealing with bad actors at this time.¹⁵

In a particularly telling exchange between Representatives Anchia, Elkins, and Truitt, Truitt requested the tabling of an amendment that would circumvent regulations on CSOs regarding the financial products they could offer. To that, Truitt responded:

Thank you. I am going to respectfully request to table this amendment because I think what is possibly an end around, if they offer one type of check cashing services, they would avoid the oversight regarding the other types business activities and that defeats the purpose of what we are trying to do, so I respectfully ask you to table this amendment.¹⁶

Correspondingly, the legislative debate in the Senate specifically addressed concerns about treatment of deferred presentment transactions under proposed provisions of the CSO Act. In support of that amendment, Senator John Carona stated:

This amendment addresses concerns that the somewhat narrow definition of deferred presentment transaction in section 341.001 of the finance code would affect current lending practices under Ch. 393. This change does not expand current law or remove any limitations on loan products that currently exist under Ch. 393. We made this change because the industry had requested it in order to be comfortable that there was no reduction in their current authority. We, at the same time, wanted to make sure that going forward, we would have licensing authority over what they were doing, and that is what this gives us.¹⁷

¹³ See generally V.T.C.A., BUS. & C. § 18.01, et. seq.

¹⁴ See generally House Research Organization Bill Analysis of HB 2594 (82nd Tex. Leg.) (May 11, 2011).

¹⁵ Transcript of HB 2594 Floor Debate from May 5, 2011 starting at 1:54 (transcript on file with authors).

¹⁶ Transcript of HB 2594 Floor Debate from May 12, 2011 around 9:46, available at http://tlchouse.granicus.com/MediaPlayer.php?view_id=19&clip_id=4915 (transcript on file with authors).

¹⁷ Transcript of SB 2592 and 2594 Floor Debate from May 23, 2011 around 3:26, available at

That amendment was ultimately adopted. Importantly, Section 393.221 provides a definition of “deferred presentment loan”: “Deferred presentment transaction” has the meaning assigned by Section 341.001. For purposes of this chapter, this definition does not preclude repayment in more than one installment.” The term is also referred to as a payday loan.”¹⁸ This expansive definition—broader than that provided in 341.001 indicates that the law clearly captures any loan where security is taken in the amount of the loan principal plus a fee. The legislative intent with this provision—explicitly stated in the Senate floor debate—is to capture all products currently offered in the market and give the OCCC clear authority over them.

In sum, recent legislative changes to payday lending in Texas show a clear intent by the legislature to preempt some of the most egregious practices of payday lenders and payday lending, including through comprehensive regulations of the industry for the first time. 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. Just as the court refused to do in *Banowsky v Schultz*, the Texas Attorney General must “not usurp a legislative function by interpreting legislation” in order to achieve a differing result and hold that “any defects or deficiencies defects or deficiencies in [an Act] must be corrected by the legislature and not by this or any other court.”¹⁹

2. The prohibition on “device, subterfuge, or pretense” in Section 393.602(c) applies to signature loans because it seeks to circumvent the broad regulations that other financial products such as deferred presentment transactions or motor vehicle title loans are subject to.

In addition to the legislative intent and history that shows the legislature intended to regulate motor vehicle title loans and deferred presentment transactions, 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 requirements of the CSO Act. The relevant provision in full reads:

(c) A person may not use a device, subterfuge, or pretense to evade the application of this subchapter. A lawful transaction governed under another statute, including Title 1, Business & Commerce Code, does not violate this subsection and may not be considered a device, subterfuge, or pretense to evade the application of this subchapter.

The inclusion of the “device, subterfuge, or pretense to evade” 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

http://tlcsenate.granicus.com/MediaPlayer.php?view_id=12&clip_id=1719 (transcript on file with authors).

¹⁸ Tex. Fin. Code § 34.001(6) states: “Deferred presentment transaction” means a transaction in which: (A) a cash advance in whole or part is made in exchange for a personal check or authorization to debit a deposit account; (B) the amount of the check or authorized debit equals the amount of the advance plus a fee; and (C) the person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date.

¹⁹ No. 05–14–01624–CV, Feb. 10, 2016, 2016 WL 531573.

products, were preempted from doing so. The Texas Office of Consumer Credit Commissioner (OCCC) specifically addressed this provision in one enforcement action.

In that 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.²⁰ 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, stating that 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. OCCC stated:

Texas law prohibits a person from using a "device, subterfuge, or pretense" to evade the application of the definition of deferred presentment transaction or the quarterly reporting requirement. By altering the amount of the deferment check it requests from its customers, and altering the definition of "deferred presentment transaction," Advance America is using a device, subterfuge, or pretense to evade the statute's definition. By failing to report transactions based on an altered deferment check amount and alternative definition of deferred presentment transaction, Advance America is using a device, subterfuge, or pretense to evade the quarterly report requirements.²¹

Similarly, by seeking to include signature loans in the range of financial products that CSOs may issue, payday lenders are seeking 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. The interest rates on signature loans are often significantly higher than traditional loans. The APR of these types of loans average about 86% with an average fee of \$12.52 per \$100 dollars borrowed per 1 month.²² 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.

On behalf of congregations, faith leaders, and the people we serve across the state of Texas, thank you for your consideration. We urge you to uphold original intent and plain language of the statute by finding that Chapter 393 does not authorize a credit services organization 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, nor does it allow a credit services organization to assist a consumer with obtaining an extension of consumer credit in the form of a "signature loans."

²⁰ See generally ACSO OF TEXAS LP d/b/a ANYTIME WALLET (Case. L18-00088) (Feb. 23, 2018).

²¹ *Id.* at pg. 3.

²² ACE Cash Express Payday Loan Cost Disclosure Form (Rev. 04/2019) (on file with author).

Martinez, Steven

From: Jennifer Allmon
Sent: Thursday, September 05, 2019 9:15 PM
To: Opinion_Committee
Cc: Gus Reyes; Pier, Steve
Subject: TCCB-CLC Opinion Request Response, RQ-0330-KP
Attachments: TCCB-CLC AG Opinion Request FINAL.pdf

Dear Opinion Committee,

Please see the attached letter and comments on the opinion request submitted by Rep. Jim Murphy regarding Credit Access Businesses (RQ-0330-KP). Thank you for your consideration of our comments on how these loans impact those we serve in ministry.

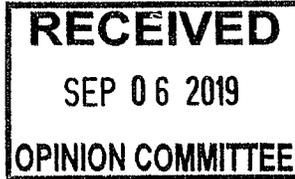
In His Peace,

Jennifer Allmon
Executive Director
Texas Catholic Conference of Bishops
512-339-9882

Visit our Website at: www.txcatholic.org
Mailing Address: P.O. Box 13285, Austin, Texas 78711
Physical Address: 1600 Congress Ave., Austin, Texas 78701

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1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
TEL 215.665.8500
FAX 215.864.8999
www.ballardspahr.com

Jeremy T. Rosenblum
Tel: 215.864.8505
Fax: 215.864.8999
rosenblum@ballardspahr.com

September 6, 2019

FILE # RQ-0300-KP
I.D. # 48606

Via E-mail (opinion.committee@oag.texas.gov)

Honorable Ken Paxton
Attorney General of Texas
300 W. 15th Street
Austin, TX 78701

Attention: Opinion Committee

Re: Request for Attorney General Opinion (RQ-0300-KP)

Dear Attorney General Paxton:

On behalf of a client of ours (the "Company") that is registered as a credit services organization ("CSO") and licensed as a credit access business ("CAB"), we write to address the above Request for Attorney General Opinion (the "Request"), submitted by the Pensions, Investments and Financial Services Committee of the Texas Assembly. The Request asks whether a credit services organization may assist a consumer with obtaining an extension of consumer credit in a form other than a deferred presentment transaction or motor vehicle title loan. We submit that the power of a Texas CSO to make such loans is clear under Texas law.

The Company and its Signature Loans

As a registered CSO and licensed CAB, the Company has facilitated deferred presentment transactions for over a decade, and title loans as well. In the past few years, it has introduced "signature loans" ("Loans") as a new product offering in its storefronts.

The Loans are unsecured fully-amortizing installment loans at interest rates of 10% per annum. The principal amount of the Loans ranges from \$100 to \$1,500. They are payable, with CSO fees charged by the Company and interest charged by the third-party lender making the Loans (the "Lender"), in substantially equal installments over a period of 128 to 175 days. Payment dates are typically set to coincide with the borrower's paydays or the dates when the borrower receives non-employment forms of income (e.g., Social Security).

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The Loan documents include, without limitation: (1) a Credit Services Disclosure Statement designed to meet the requirements of Section 393.105 of the Texas Finance Code;¹ (2) a Credit Services Agreement designed to comply with Sections 393.201(a) and (b) (the “CSO Agreement”); and (3) a Loan Agreement and Promissory Note between the Lender and the borrower (the “Loan Agreement”).

As voluntary best practices: (1) the Credit Services Agreement contains many or all of the disclosures required for CABs by Section 393.201(c); (2) the Company posts a fee schedule providing most if not all of the information referenced in Section 393.222; and (3) the Company provides the OCCC with Loan reporting in the same detail required of CAB loans under Chapter 393.

Borrowers are not required, either at Loan origination or subsequently, to make loan or CSO payments by post-dated checks or electronic funds transfers (“EFTs”), whether in the form of ACHs, card payments or otherwise. Indeed, the CSO Agreement and Loan Agreement used for the Loans make no reference to any payment by EFTs or post-dated checks. Rather, after a 72-hour cooling-off period, borrowers may elect to make payments by regularly recurring or “pre-authorized” EFTs (“PEFTs”) if and only if they voluntarily choose to do so. The Company does not pressure borrowers to pay by this mechanism and does not provide any financial inducement (e.g., a lower interest rate) for them to do so. Thus, borrowers are free to pay by PEFTs or some other method—for example, they may visit the Company’s storefronts to make payments. Through June 30, 2019, less than one-half of one percent of borrowers on its signature loans have elected to pay through PEFTs.

The Company believes that, in the right circumstances, signature loans can constitute a better option than deferred presentment transactions for consumers. In particular, the Company and the Lenders have never charged a penny in non-sufficient funds (“NSF”) fees on the Loans. By contrast, from 2016-2018, they charged about \$2.2 million in NSF fees on Texas deferred presentment transactions, and the borrowers’ banks likely charged more than \$2.5 million of additional NSF fees, assuming charges of approximately \$35 per overdraft item.

The OCCC Position

We are aware that the Texas Office of the Consumer Credit Commissioner (the “OCCC”) has taken the position that Chapter 393 does not authorize a CAB or a CSO to obtain an extension of consumer credit in any form other than a deferred presentment transaction or a motor vehicle title loan. We understand that the sole authorities cited for this conclusion were: (1) the identical definitions of “credit access business” in Sections 393.221 and 393.601(2); and (2) Section 393.602(a).

¹ Unless otherwise noted, all statutory references are to the Texas Finance Code.

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In addition to the OCCC's assertion that Chapter 393 does not allow for the facilitation of signature loans, it is our understanding the OCCC has advised that such activity constitutes an evasion of the CAB provisions of Chapter 393. We do not know of any authority the OCCC has cited for this position.

We submit that the OCCC positions on these issues are incorrect and contrary to governing law.

Legal Analysis

Chapter 393 is captioned "CREDIT SERVICES ORGANIZATIONS." It includes subchapters of general applicability to CSOs (including CABs): (1) Subchapter A (GENERAL PROVISIONS); (2) Subchapter B (REGISTRATION AND DISCLOSURE STATEMENTS); (3) Subchapter C (CONTRACT FOR SERVICES); (4) Subchapter D (PROHIBITIONS AND RESTRICTIONS); (5) Subchapter E (SURETY BOND; SURETY ACCOUNT); and (6) Subchapter F (CRIMINAL PENALTIES AND CIVIL REMEDIES)

In addition to its subchapters of general applicability, Chapter 393 contains two subchapters limited to "credit access businesses": (1) Subchapter C-1 (NOTICE AND DISCLOSURE REQUIREMENTS FOR *CERTAIN* CREDIT SERVICES ORGANIZATIONS) (emphasis added); and (2) Subchapter G (LICENSING AND REGULATION OF *CERTAIN* CREDIT SERVICES ORGANIZATIONS) (emphasis added).

The two substantive provisions of Subchapter C-1 apply solely to "credit services businesses" and not more generally to "credit services organizations." See Section 393.222 (requiring a "credit access business" to post a fee schedule and specified notices); Section 393.223 (requiring a "credit services business" to provide specified consumer transaction information prior to performing its services).

The scope provision of Subchapter G provides: "*This subchapter* applies only to a credit services organization that obtains for a consumer or assists a consumer in obtaining an extension of consumer credit in the form of: (1) a deferred presentment transaction; or (2) a motor vehicle title loan." See Section 393.602(a) (emphasis added). Notably, Section 393.602(a) limits the application of *Subchapter G* to CSOs providing specified services in connection with deferred presentment transactions and title loans; it does *not* limit the application of *the entirety of Chapter 393* in this manner.

Section 393.001(3), in Subchapter A, defines "credit services organization" to mean—

a person who provides, or represents that the person can or will provide, for the payment of valuable consideration any of the following services with respect to the extension of consumer credit by others:

- (A) improving a consumer's credit history or rating;
- (B) obtaining an extension of consumer credit for a consumer; or

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(B).
(C) providing advice or assistance to a consumer with regard to Paragraph (A) or

Nothing in this broad definition of CSO, applicable throughout Chapter 393, confines the activities of CSOs to particular forms of consumer credit.

By contrast, the term “credit access business,” as defined in Subchapters C-1 and G, is limited to specified types of consumer credit. Using identical language, Sections 393.221 and 393.601(2) provide: “‘Credit access business’ means a credit services organization that obtains for a consumer or assists a consumer in obtaining an extension of consumer credit in the form of a deferred presentment transaction or a motor vehicle title loan.”

Historically, CSO-facilitated loans have not been limited to deferred presentment transactions and motor vehicle title loans. Indeed, a January 12, 2006 letter from First Assistant Attorney General Barry R McBee to OCCC Commissioner Leslie Pettijohn (the “Prior AG Letter”), attached as Exhibit A, notes that “the Legislature designed the statutes to provide for CSOs to assist in obtaining mortgage financing for consumers,” but “the plain language of the law does not limit its use to only mortgage finance transactions.” By the same token, except for the provisions in Subchapters C-1 and G directed at CABs, there is no language anywhere in Chapter 393 that limits CSO activity to CAB transactions.

It would have been easy for the Texas Legislature to include language in Chapter 393 prohibiting CSOs from facilitating signature loans. For example, it could have said: “No credit services organization shall obtain for a consumer or assist a consumer in obtaining consumer credit that is not in the form of a deferred presentment transaction or a motor vehicle title loan.” In the absence of such language and as recognized in the Prior AG Letter when it gave effect to the plain language of Chapter 393, no such prohibition may properly be inferred. *See Cadena Comercial USA Corp. v. Tex. Alcoholic Bev. Comm’n*, 518 S.W.3d 318, 337 (Tex. 2017) (rejecting dissent’s statutory analysis because it “would manufacture a definition not found in the statute by adding words the Legislature did not enact”); *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (“A court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written.”); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 631 (Tex. 2008) (“If the Legislature desires to amend the statute to add words so that the statute will then say what is contended for by the [appellee], we are confident it will do so. However, changing the meaning of the statute by adding words to it, we believe, is a legislative function, not a judicial function.”).

The CAB provisions in Chapter 393 were part of a package of laws adopted in 2011 and effective on January 1, 2012. *See* Acts 2011, 82nd Leg., R.S., Ch. 1301 and 1302 (the “2011 Acts”). In the absence of language in the 2011 Acts establishing a prohibition on CSOs brokering non-CAB signature loans for consumers, we doubt that anything in the legislative history of the 2011 Acts could have such effect. Nevertheless, we have reviewed the legislative history of the 2011 Acts in depth and have found no suggestion whatsoever that the Legislature sought to accomplish such a result. Rather, the entire focus of the 2011 Acts, from inception, was on deferred presentment transactions and title loans.

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Of course, legitimate CSO activity long predated the adoption of the 2011 Acts. In *Lovick v. Ritemoney*, 378 F.3d 433 (5th Cir. 2004), the U.S. Court of Appeals for the Fifth Circuit affirmed a district court judgment dismissing for failure to state a claim RICO claims premised on the alleged collection of unlawful and usurious debts. The plaintiff, on behalf of a putative class of borrowers, argued that fees charged by a CSO, which amounted to \$1,500 on a \$2,000 loan and produced an annual percentage rate of approximately 131% under the federal Truth in Lending Act, rendered her loan usurious. The Fifth Circuit disagreed, holding that Chapter 393 authorized CSO fees, without restriction, on loans originated under Section 301.001 of the Finance Code. Nothing in the opinion suggests that its holding is limited to deferred presentment transactions or title loans. Thus, under Chapter 393 and *Lovick*, and in the absence of any language in the 2011 Acts to the contrary, CSOs could obtain for their customers deferred presentment transactions, title loans *and* signature loans under Section 301.001.

We note that, by subjecting deferred presentment and title loan activity to special requirements that are not imposed on signature loans, Chapter 393 produces a perfectly reasonable result. Further, contrary to the OCCC's position, the facilitation of signature loans does not constitute an evasion of the CAB provisions of Chapter 393 and OCCC regulations thereunder applicable to deferred presentment transactions.

In October 2017, the U.S. Consumer Financial Protection Bureau (the "CFPB") adopted a Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. Part 1041 (the "CFPB Rule"). Like Chapter 393, the CFPB Rule imposes on high-cost deferred presentment installment transactions requirements that do not apply to signature installment loans.

Under the CFPB Rule, specified payment restrictions, *id.* at §§ 1041.7-1041.9, apply to three categories of covered loans:

- Covered short-term loans—all consumer loans of 45 days or less (*id.* at §§ 1041.2(b)(10) and 1041.3(b)(1));
- Covered longer-term balloon payment loans—longer-term consumer loans with at least one payment that is more than twice as large as any other payment (*id.* at §§ 1041.2(b)(7) and 1041.3(b)(2)(i)); and
- Covered longer-term loans—effectively, deferred presentment transactions and title loans with terms exceeding 45 days (*id.* at §§ 1041.2(b)(8) and 1041.3(b)(3)).

Thus, the CFPB Rule and its payment restrictions do not apply to the Loans, since their term exceeds 45 days, they are payable in regular installments and the Lender does not take motor vehicle security or a "leveraged payment mechanism" giving it the right to initiate a payment from the consumer's account. *Id.* at §§ 1041.3(b)(3) (describing covered longer-term loans) and 1041.3(c) (defining "leveraged payment mechanism").

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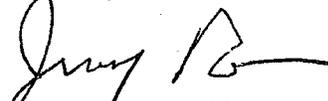
Initially, the CFPB proposed to impose stringent ability-to-pay or “ATR” requirements on *all* covered loans, including covered longer-term loans. *See* 81 FR 47863 (July 22, 2016). These ATR requirements would have applied to high-cost installment title loans and deferred presentment transactions but not to high-cost installment loans, such as the Loans, that lack vehicle security and/or a payment authorization that is obtained within 72 hours after loan funding or with an improper inducement. *See* proposed § 1041.3(b)(2)(ii). Consistent with the Company’s views and experience, the CFPB explained the rationale for regulating certain installment deferred presentment transactions but not signature loans: “The Bureau believes that loans in which the lender obtains a leveraged payment mechanism [e.g., an ACH authorization] may pose an increased risk of harm to consumers, especially where payment schedules are structured so that payments are timed to coincide with expected income flows into the consumer’s account.” 81 FR at 47913. It went on to explain that ordinarily a 72-hour delay between funding and the time a leveraged payment mechanism is obtained will “help ensure that the lender will engage in appropriate consideration of the consumer’s ability to repay the loan.” *Id.* at 47914.

The CFPB explicitly addressed the possibility of evasion in this context but limited its concerns to scenarios where lenders use financial or other incentives to induce borrowers to execute leveraged payment mechanisms after the 72-hour cooling-off period. The trivial percentage of Loan customers who make payments by PEFTs makes it clear that there is no evasion of this type. Further, the Company’s voluntary compliance with most of the provisions of Chapter 393 applicable to CAB loans should likewise put to rest any contention that the Company makes signature Loans in order to evade Chapter 393.

In short, there is no language in Chapter 393, the legislative history of the 2011 Acts or *Lovick* restricting CSO activity to deferred presentment transactions and title loans. Allowing CSOs to assist consumers to obtain deferred presentment transactions, title loans and signature loans but imposing special additional requirements solely on deferred presentment transactions and title loans makes perfect sense. Treating signature loans, which are safer for consumers, on a *disfavored* basis would produce a perverse result. Accordingly, we submit that a CSO is authorized under Chapter 393 to facilitate signature and other loans that are not deferred presentment transactions or motor vehicle title loans, without the necessity of obtaining a license as a CAB under Section 393.603 or complying with any of the other provisions of Subchapters C-1 and G applicable to CABs and the deferred presentment transactions and motor vehicle title loans the CABs facilitate.

We very much appreciate your consideration of our views.

Sincerely,



Jeremy T. Rosenblum



ATTACHMENT C

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2006

Ms. Leslie Pettjohn, Commissioner
Office of the Consumer Credit Commissioner
2601 N. Lamar Blvd.
Austin, Texas 78703-4207

Dear Commissioner Pettjohn:

Pursuant to a request in August 2005, this office began looking into the recent change in lending practices within the payday loan industry to begin use of the credit services organization, or CSO, model. Shortly thereafter, we received a letter from Senator Eliot Shapleigh asking the Office of the Attorney General (OAG) to review the same practices, and we were also copied on a letter from consumer advocates asking you to request enforcement action by the OAG against payday lenders based on the contention that such practices violate state consumer lending laws. Based on these three requests, this office embarked upon a review of the CSO model. As a preliminary matter it must be noted that this letter is not a formal Attorney General opinion which is subject to exhaustive review and public comment, but is merely the analysis of a team of attorneys at our office based on information provided to this office, visits with members of industry, consumer advocates and state agency personnel, and a review of relevant law. Our analysis is as follows:

In July 2005, as a result of a change in federal guidelines controlling the number of payday loans national banks may make, the payday loan industry developed a new model for making payday loans based on existing Texas laws authorizing credit services organizations. TEX. FIN. CODE ANN. §§393.001-.505. Under these statutes, those who formerly operated under the national bank model now structure themselves as a CSO in order to obtain loans for consumers through third party lenders. The interest amount charged by the third party lender is 10%, conforming with Article 16, Section 11 of the Texas Constitution. A fee is charged by the CSO to arrange for the loan. (Notably, the total fees charged by the CSO plus the 10% interest often may make loans under this model more expensive than traditional payday loans.)

The first question raised by this new model is whether there is any limit on the amount of fees in these transactions under Chapter 393 of the Finance Code. We believe there is not. Although the legislature designed the statutes to provide for CSOs to assist in obtaining mortgage financing for consumers, the plain language of the law does not limit its use to only mortgage finance transactions. Also, there is no limit in the CSO statutes on the amount of fees that may be charged by a CSO. Additionally, an alternative use of the CSO model was examined and upheld by the U.S. Fifth Circuit Court of Appeals in *Lovick v. Ritzmoney Ltd.*, 378 F.3d 433 (5th Cir. 2004). Based on these facts, on its face the CSO model does not appear to be prohibited under Texas law.

Exhibit A

Ms. Lealle Pettijohn

Page 2

January 12, 2006

The next question raised by the model is whether the lender and the CSO are truly independent. By definition, a CSO is one who arranges for the extension of credit to a consumer "by others." TEX. FIN. CODE ANN. §393.001(3). The only reason we believe a lender would agree to make these loans is because the CSO is guaranteeing, through a letter of credit or otherwise, that the loan will be repaid. While this aspect of the model raises many questions, theoretically, if the CSO and the lender are truly independent actors, there would be nothing patently illegal about the model. Determining the true relationship between a CSO and a lender would be a fact-intensive endeavor.

Any discussion of whether the use of this model is the best public policy choice for the State of Texas is one that must be addressed by the legislature and has not been explored by this office. As the attorney representing your office, we will act on referrals from you for enforcement actions under the statutes. We remain committed to work with your office, the legislature and the payday lending industry to find a balanced approach that is legally sound and good for Texas. If you have any questions, please feel free to contact our office again.

Sincerely,



Barry R. McBee
First Assistant Attorney General

Martinez, Steven

From: Rosenblum, Jeremy T.
Sent: Friday, September 06, 2019 7:04 AM
To: Opinion_Committee
Subject: Request for Attorney General Opinion (RQ-0300-KP)
Attachments: Final Signed Letter to TX AG re Signature Loans.PDF

Importance: High

Ladies and Gentlemen –

I am attaching our brief in connection with the above matter. Thank you for your consideration.

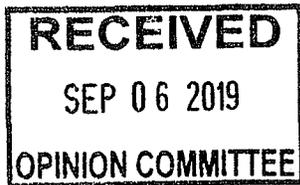
Jeremy T. Rosenblum



1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215.864.8505 DIRECT
215.864.8999 FAX

610.574.4836 MOBILE |
VCARD

www.ballardspahr.com



FILE # RQ-0300-KP
I.D. # 48607

September 6, 2019

Virginia K. Hoelscher
Chair, Opinion Committee
Office of the Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548



Via Electronic Submission: opinion.committee@oag.texas.gov

Re: RQ-0300-KP – Authority of a credit services organization 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

Dear Opinion Committee:

The Texas Consumer Finance Association (“TCFA”) appreciates the opportunity to provide the following comments regarding The Honorable Jim Murphy’s request for an attorney general opinion regarding 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, designated Request No. 0300-KP (the “Request”). In particular, the request asks:

1. Does Chapter 393 authorize a credit services organization, as defined in Section 393.001(3) of the Texas Finance Code, 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 (each defined in Section 341.001 of the Texas Finance Code)?
2. If so, does Chapter 393 allow a credit services organization to assist a consumer with obtaining an extension of consumer credit in the form of a “signature loan,” whereby no security is obtained from the consumer in exchange for the extension of consumer credit or cash advance (including, without limitation, a motor vehicle title) and no personal check or authorization to debit a deposit account is obtained from the consumer in exchange for the extension of consumer credit or cash advance?

TCFA respectfully asserts that, based on unambiguous statutory language, the Attorney General must answer each question in the negative, to the extent CSOs engage in activity that is subject to licensure and compliance obligations under other chapters of the Texas Finance Code.

I. TCFA consists of licensed regulated lenders who 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 often referred to as “signature” loans, although the loans can also be secured.

Regulated lenders have a strong history of regulatory cooperation and compliance. Traditional installment loans have been regulated in Texas since 1963. The lenders are licensed and examined by the Texas Office of Consumer Credit Commissioner (“OCCC”), and they must file annual reports of activity with the OCCC. *See* TEX. FIN. CODE § 342.559. Before issuing a loan, the lenders perform underwriting to determine whether the loan is appropriate given the applicant’s financial circumstances.

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 access to a customer’s bank account or a postdated check as a condition for loan approval.

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. Entities licensed under Chapter 393 can only extend credit through deferred presentment transactions or motor vehicle title loans as defined in Chapter 393. Conversely, 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. The Attorney General’s response to the Request must recognize this important statutory distinction.

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 rate² 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

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>.

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).

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. Chapter 342 covers traditional signature loans, as well as deferred presentment transactions and motor vehicle title loans, offered by authorized lenders.

Chapter 342 of the Texas Finance Code authorizes interest rates greater than 10 percent, so long as the loans are 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:
 - (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.

IV. Chapter 393 provides limited authority, and cannot be interpreted to undermine Chapter 342.

Chapter 393 specifically deals with CSOs. It 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”).

Unless a CSO is otherwise licensed as a regulated lender under Chapter 342, or another Texas consumer finance licensing statute, it can act only pursuant to Chapter 393. The chapter defines a CSO as one who provides the service of obtaining, or advising or assisting in obtaining, an extension of consumer credit for a consumer for consideration. *Id.* § 393.001(3). As explained above, if that extension of consumer credit is subject to Chapter 342, the CSO must be licensed as a regulated lender under Chapter 342. To opine 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).

In 2011 the Legislature clarified in House Bills 2592 and 2594 how a CSO, acting as a credit access business, may assess a fee for the service of assisting a consumer in obtaining an extension of consumer credit. *See* TEX. FIN. CODE §§ 393.601, .602. The CSO must qualify as a credit access business, which is defined as one who obtains or assists in obtaining “an extension of consumer credit in the form of a deferred presentment transaction or a motor vehicle title loan.” *Id.* §§ 393.601(2), .221(1); *see also id.* § 392.602(a). Thus, when it comes to charging a fee to assist a consumer in obtaining an extension of consumer credit, a CSO is limited to a deferred presentment transaction or a motor vehicle title loan. And when a CSO performs such a service, it must meet the disclosure and licensing requirements set out in Chapter 393. If the extension of credit arranged is subject to Chapter 342, the CSO cannot provide such a service without being licensed under Chapter 342.

The Texas Finance Code’s distinction between CSOs and regulated lenders exists for good reason—to protect consumers and foster fair competition in the regulated lending industry. Allowing CSOs, without being licensed under Chapter 342, to advertise and obtain traditional installment loans or signature loans for consumers will create confusion in the market place. Consumers will believe they are entering into a transaction that carries with it the protections of Chapter 342, when in actuality they are not. CSOs, in turn, would unfairly benefit from Chapter 342 without complying with the statutory protections associated with such loans.

CONCLUSION

The Texas Finance Code mandates compliance with Chapter 342 when a person advertises, offers, arranges, or negotiates a loan subject to Chapter 342, such as a traditional installment loan or signature loan. A CSO may assist in obtaining an extension of consumer credit, and receive a fee for such, only in accordance with Chapter 393, which limits the extension of credit to the form of a deferred presentment transaction or motor vehicle title loan. A contrary interpretation will allow circumvention of Chapter 342, foster unlicensed lending activity, mislead and confuse consumers, and undermine fair competition for licensed regulated lenders that follow the law.

Sincerely,

/s/ Trey Stockton

Trey Stockton
President, TCFA

/s/Carl R. Galant

Carl R. Galant
MCGINNIS LOCHRIDGE LLP
600 Congress Ave., Suite 2100
Austin, Texas 78701
512.495.6083

Attorneys for TCFA

Martinez, Steven

From: Galant, Carl
Sent: Friday, September 06, 2019 11:49 AM
To: Opinion_Committee
Subject: RQ-0300-KP: TCFA Comments
Attachments: 2019_09-06_TCFA_Comments_AG RQ-0300-KP(1185851).pdf

Ms. Hoelscher,

I attach comments from the Texas Consumer Finance Association regarding opinion request RQ-0300-KP.

Thanks,

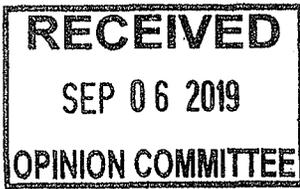
Carl

Carl R. Galant
Partner
McGINNIS LOCHRIDGE
600 Congress Avenue, Suite 2100
Austin, TX 78701
o 512-495-6083 f 512-505-6383



McGINNIS LOCHRIDGE

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Texas Fair Lending Alliance

FILE # RQ-0300-KP
I.D. # 48608

Ann Baddour
Director, Fair Financial Services Project
Texas Appleseed
(512-473-2800 x104
abaddour@texasappleseed.net
www.texasappleseed.org

September 6, 2019

Email: opinion.committee@oag.texas.gov

Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: RO-0300-KP

Dear General Paxton,

Texas Appleseed is submitting this brief on behalf of itself and the Texas Fair Lending Alliance (TFLA), in response to opinion request RQ-0300-KP. Texas Appleseed is a public interest justice center working to change unjust laws and policies that prevent Texans from realizing their full potential. TFLA is a coalition of over 60 organizations and individuals working to promote fair consumer loan practices and products. Its member organizations often assist borrowers trapped in loans arranged by credit services organizations (CSOs) under the current credit access business (CAB) model of lending.

We are deeply concerned by this opinion request, because the effect could be financially devastating for Texas families and communities, allowing expanded uncapped lending with no regulatory oversight—including no oversight for compliance with state law, no oversight for compliance with the Military Lending Act and fair debt collection practices, and no market data to assess whether the current policy of allowing continued uncapped lending through the CSO Act is the right policy for Texas.

Current lending using the CAB model is exceedingly expensive and too often drives Texans to the doors of our nonprofits asking for rent or food assistance because they are trapped in one of these high-cost loans. Based on 2018 data reported to the Texas Office of Consumer Credit Commissioner, payday loans in Texas average 420% APR for single payment loans and 523% APR for installment loans. Auto title loans average 204% APR for single payment loans and 417% APR for installment loans.

Data on these businesses show a market dominated by fees and refinances. From 2012 to 2018, refinances and fees made up 68% or more of the total dollar volume of the market,

which includes both short- and longer-term loans. Fees have increased at a rapid rate over the past six years. Total fees collected rose by 50% from \$1.24 billion in 2012 to \$1.86 billion in 2018, while the dollar value of new loans fell by 12%. Much of the increase in fees is being driven by the increase in installment lending.¹

The harmful impacts of these high-cost products are particularly detrimental to Texas' 1.5 million veterans. A 2018 survey of Texas veterans found that 76% of those surveyed who had used a loan arranged by a credit access business struggled to repay the loan when it came due and 77% struggled to pay other bills because of the outstanding uncapped loans.²

The expanded loan product offerings being contemplated by this opinion request would lead to more high-cost and harmful lending. Two such products, which purport to be loans offered through the CSO registration and not the CAB licensing, include the "Texas Flex Loan" by ACE Cash Express and the "Personal Loan," by TitleMax. Both of these loan products REQUIRE bank account information—the basis of obtaining a security interest through the ability to debit amounts owed from the account—as part of the loan application process. The details of these loans give pause. See Exhibits A and B for the loan information that was provided at store locations.

The ACE Cash Express "Texas Flex Loan" is offered at 846% APR with a term of 168 days. The repayment on a \$400 loan is \$1,609.82—a shocking figure. Even more concerning is what is not written on the disclosure pages. The staff at the store encouraged repaying the loan in full after two weeks (a total of \$101 in fees and \$400 in principal), and then refinancing the full transaction—essentially the equivalent of a payday loan. This method of "repayment" is no different from a two-week payday loan and includes high fees with no amortization.

The TitleMax "Personal Loan" was advertised as between 522% APR (with recurring electronic payments) or 650% APR (without recurring electronic payments): a cost of \$1,515 to \$1,765 to repay a \$500 loan over 140 days. Both products are exceedingly expensive, with charges equal to or higher than the market averages for CAB loans. The purported option for authorization to electronically debit the borrower's bank account is again undermined by the actual marketing of the product. All applicants must provide an active bank account and a check; and, from the outset, staff at the store location strongly pushed the option for recurring electronic payments.

The CAB licensing was adopted in 2011, due to an outpouring of concern from faith, nonprofit, and community leaders across Texas about the harmful impacts of uncapped CSO lending. Current state law does not address all the problems in the market, but it does establish a baseline

¹ Ann Baddour and Jamie Sauer, *Payday Lending in Texas: Market Overview and Trends, 2012-2015*, Texas Appleseed, at 3 (June 2016), available at: https://texasappleseed.org/sites/default/files/Payday-Auto-Title-Lending-Tx_MktOv-Trends2012-2015Rev.pdf.

² *Thank You for Your Service*, Texas Appleseed, United Way of Central Texas, and United Way of Greater Houston (March 2019), available at: https://texasappleseed.org/sites/default/files/ThankYouForYourService_March%202019.pdf.

to ensure compliance with applicable lending and consumer protection laws. The following brief presents legal arguments as to why allowing CSO lending outside of the CAB statute violates the letter and intent of the current statute. Any other reading would go counter to both the letter and intent of the statute.

Question 1. Does Chapter 393 authorize a credit services organization, as defined in Section 393.001(3) of the Texas Finance Code, 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 (each as defined in Section 341.001 of the Texas Finance Code)?

Question 2: If so, does Chapter 393 allow a credit services organization to assist a consumer with obtaining an extension of consumer credit in the form of a "signature loan," whereby no security is obtained from the consumer in exchange for the extension of consumer credit or cash advance (including, without limitation, a motor vehicle title) and no personal check or authorization to debit a deposit account is obtained from the consumer in exchange for the extension of consumer credit or cash advance?

Short Answers:

Answer 1: Chapter 393 grants no such authorization to credit services organizations (CSOs), nor does it imply such authorization. There is no textual support within Chapter 393 for authorizing a 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.

Without clear textual support, statutory construction requires determination as to whether the Texas Legislature intended to grant such authorization. The legislative history, however, is clear: in response to the 5th Circuit's decision in *Lovick*, Chapter 393 was amended to regulate all extensions of consumer credit offered by CSOs at the time: deferred presentment transactions and motor vehicle title loans. *Lovick v. Ritemoney Ltd.*, 378 F.3d 433 (5th Cir. 2004).

Answer 2: Chapter 393 does not grant authorization for a 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. However, assuming *arguendo* that such authorization is granted in Chapter 393, Chapter 393 does not allow a CSO to assist a consumer with obtaining an extension of consumer credit in the form of a "signature loan."

A signature loan is not defined in the Texas Finance Code. Absent such a definition, the AG should not create a definition, and certainly not one that conflicts with generally understood financial terms. Based on plain language, a signature loan is one in which only a signature and a promise to pay is required to obtain a loan. No authority supports the definition proposed in Question 2. Furthermore, allowing a CSO to offer the proposed signature loans with would run counter to the text of the statute, to legislative intent, and would violate the subterfuge provisions of Chapter 393.

Introduction

Texas Applesseed submits this brief, on behalf of the undersigned members, to address the proper interpretation of Chapter 393 of the Texas Finance Code (hereinafter “Chapter 393”). Chapter 393 was initially conceived to protect consumers against scams perpetrated by credit repair organizations. Importantly, Chapter 393 does not authorize any specific type of loan or loan assistance to a consumer. Rather, it is a framework for protecting consumers. As amended after the 5th Circuit’s decision in *Lovick*, Chapter 393 applies only to the brokering of two types of loans: deferred presentment transactions and motor vehicle title loans. No other types of loans are contemplated. As such, no authorization for other types of loans, including “signature loans,” can be inferred.

Even assuming that Chapter 393 allowed for brokering of other types of loans, the proposed signature loans cannot circumvent the licensing requirements of Subchapter G. Furthermore, any loan that implicates the use of security collateral, a personal check, or an authorization to debit a deposit account that includes the loan principal and at least a portion of a fee, would be a deferred presentment transaction subject to the licensing requirements of credit access businesses (“CABs”). Moreover, under a proper understanding of Chapter 393, only fees associated with CABs are exempt from Texas usury laws, since such fees are only explicitly authorized for CABs. Fees associated with other CSOs are afforded no such protection under Chapter 393, and to hold otherwise would render 393.602 meaningless. Finally, any attempt to evade the licensing requirements for CABs while brokering loans to the public that effectively require collateral along with fees would qualify as subterfuge explicitly identified and prohibited by 393.602(c). Such actions contravene the letter and intent of Chapter 393.

Background

The questions presented require an understanding of the history and statutory framework of the Texas Finance Code. The Texas Finance Code regulates all manner of loan products. Consumer loans are regulated under Chapter 342. Such loans generally involve an effective interest rate greater than 10% when fees and other charges are included. Loans with an effective rate of less than 10% are regulated under Chapter 302. Both of these chapters are part of Title IV of the Texas Finance Code, entitled “REGULATION OF INTEREST, LOANS, AND FINANCED TRANSACTIONS.”

Title V of the Texas Finance Code, entitled “PROTECTION OF CONSUMERS OF FINANCIAL SERVICES,” addresses specific consumer protections not covered in other parts of the code, such as consumer protections for motor vehicle title loans and payday loans offered outside of the framework in Chapter 342. The Texas Legislature passed Chapter 393, the Texas Credit Services Organization Act (the “CSOA”), in 1987, which was then codified into Title V of the Texas Finance Code. *See* TEX. FIN. CODE §§ 393.001–505. According to the bill analysis, the CSOA was originally intended to address the abuses of credit repair clinics that had arisen since the passage of the Federal Fair Credit Reporting Act. *See* Bill Analysis, House Bill 742, 70th R.S. Although not prescribing fees, the CSOA nonetheless comprised standards to address problematic market practices related to specific services, including assisting consumers in obtaining extensions of consumer credit provided by “others.” *Id.*, § 393.001(3)(b). In the 1990’s, a handful of CSOs began using this provision to engage in high-cost lending in Texas without complying with the

prescribed rate and fee caps for consumer loans. These businesses charged fees to arrange, collect, and guarantee a loan for a consumer with a third-party lender operating under Chapter 302 of the Texas Finance Code.

The CSO fee structure was challenged in court. In *Lovick*, the 5th Circuit Court of Appeals held that the fees charged by a CSO to obtain consumer credit for customers are not considered part of the interest when determining compliance with usury laws. The *Lovick* decision appeared to conflict with earlier decisions regarding similar fees. *See Federal Mortgage Co. v. State Nat. Bank of Corsicana*, 254 S.W. 1002, 1005 (Tex.Civ.App.-Beaumont 1923, writ dismissed); *See Dodson v. Peck*, 75 S.W.2d 461, 464 (Tex.Civ.App.-Amarillo 1934, writ denied). This decision led to the proliferation of payday and auto title lenders operating outside of the consumer credit licensing structure of Chapter 342 of the Texas Finance Code.³

In response to *Lovick*, the Texas Legislature passed two bills in 2011. Both were negotiated and supported by the payday lending/auto title loan industry, as well as advocates of reform. The result was Subchapter G of Chapter 393, which created a special designation for payday and motor vehicle title loan businesses: “credit access businesses” (CABs). *See* Acts 2011, 82nd Leg., Ch. 1302 (H.B. 2594), § 2, eff. Jan. 1, 2012; Acts 2011, 82nd Leg., R.S., Ch. 1301 (H.B. 2592), §, eff. Jan. 1, 2012. Subchapter G established licensing requirements for businesses that obtain or assist in obtaining on payday or motor vehicle title loans for consumers, but allowed the parties to agree to fees. TEX. FIN. CODE §§ 393.601-628. CABs were defined as CSOs, and as such, each CAB was also required to register as a CSO and comply with all provisions in the CSOA.

Although the payday and auto title loan businesses helped create the CAB licensing structure and other legal requirements, they are now attempting to avoid the licensing requirements imposed by Subchapter G, as evidenced by loan products that they purport to be outside of the CAB licensing requirement.⁴

Answer 1:

Chapter 393 deals specifically with CSOs. A CSO is defined as “a person who provides, or represents that the person can or will provide, for the payment of valuable consideration any of the following services with respect to the extension of consumer credit by others: (A) improving a consumer’s credit history or rating; (B) obtaining an extension of consumer credit for a consumer; or (C) providing advice or assistance to a consumer with regard to Paragraph (A) or (B).” 393.001(3)(C). Extension of consumer credit is defined as “the right to defer payment of debt offered or granted primarily for personal, family, or household purposes or to incur the debt and defer its payment.” TEX. FIN. CODE § 393.001(4).

³ *See* Ann Baddour, *Why Texas’ Small Dollar Lending Market Matters*, Federal Reserve Bank of Dallas, e-Perspective, vol. 12, Issue 2 (2012) (According to CSO registration data from the Texas Secretary of State, there were 250 registered CSOs in Texas in 2004. That number grew to 3,430 by 2011, with the increase largely comprising of payday and auto title loan businesses).

⁴ *See* Exhibits A and B. *See also* OCCC Case No. L18-00088, *In the Matter of: Master File No: 16381, ACSO of Texas, LP d/b/a Advance America 135 N. Church St., Spartanburg, South Carolina 29306 Before the Office of Consumer Credit Commissioner, State of Texas* (Dec. 20, 2017) (documenting that credit access business offer a loan product that it purports to be outside of the licensing requirement under the CSO Act).

Chapter 393 is a regulatory framework, meant to establish standards that credit service organizations must abide by when assisting clients in certain types of transactions. Indeed, after the definitions of 393.001, Chapter 393 lists the entities for which the chapter “does not apply” (emphasis added). 393.002. The subsequent subchapters are dedicated to requirements such as registration, disclosure, contract requirements, surety bonds, and penalties. 393, Subchapters B-E.

No part of Chapter 393 authorizes assisting a consumer with obtaining an extension of credit in a form other than a deferred presentment transaction or motor vehicle title loan. Nor should such authorization be inferred in light of the rules of statutory construction, the language of the chapter, and the legislative history. 311.021 of the Texas Government Code.

A. Chapter 393’s silence regarding authorizing CSOs to assist a consumer with obtaining an extension of consumer credit means the answer to Question 1 must be “no.”

Chapter 393 does not explicitly authorize a CSO to assist a consumer with obtaining an extension of consumer credit in a form other than deferred presentment transactions or motor vehicle title loans. This omission is noteworthy, and leads to the conclusion that the answer to Question 1 is “no.”

Rules of statutory construction are used to construe the provisions of a statute. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162 (1988). Statutes are construed by first looking to the statutory language for the Legislature’s intent. Only if legislative intent cannot be discerned in the language of the statute itself are canons of construction or other aids referred to. *City of Rockwall*, 246 S.W.3d at 626. (Tex. 2008). In Texas, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” TX Code Const. Act. The first step is to look at the wording used by the Legislature. *Beech Aircraft Corp.*, 488 U.S. at 162.

Because Legislatures are presumed to understand statutory drafting, if a statute is silent with regard to an issue, the implication is that the Legislature reasonably and purposefully excluded the issue when drafting the statute. *See Cameron v. Terrell Garrett*, 618 S.W.2d 535, 540 (Tex. 1981). “Nothing is to be added to what the text states or reasonably implies; that is, a matter not covered is to be treated as not covered.” *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* (West 2012), at 101. One reason why a legislature may stay silent is because it did not intend for a particular issue to be covered by the statute. *See Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1999).

There is no textual support within Chapter 393 that “authorizes” a CSO to assist a consumer with obtaining an extension of credit in a form other than that a deferred presentment transaction or a motor vehicle title loan. Nowhere does 393 grant CSOs authorization to engage in certain activities, let alone grant the specific authorization identified in Question 1. Indeed, no form of the word “authorize” appears in the chapter. The Legislature’s silence on authorizing CSOs to offer other forms of extensions of credit must be presumed to be intentional and purposeful. Other actions are allowed under Chapter 393, showing that the Texas Legislature understood that it could wield such power. In spite of this, nowhere does Chapter 393 authorize a CSO to perform the activity that Question 1 posits. *See generally* Chapter 393. Thus, there is no specific authorization for a CSO to charge a fee for brokering an extension of consumer credit in a form other than a

deferred presentment transaction or motor vehicle title loan. In contrast, TEX. FIN. CODE § 393.602(b) provides that a CAB “may assess fees for its services as agreed to between the parties.”

The statute includes unique consumer credit protections that are applicable to CABs. Among the protections are:

- §393.201 (c) – requiring specific contracts disclosures,
- §393.222-224 – posting of fees, consumer transaction information and penalty for non-compliance,
- §393.627 – data reporting requirement.
- §393.625 – requiring compliance with the federal Military Lending Act,
- §393.626 – requiring compliance with Texas fair debt collection laws,
- Subchapter G of Chapter 393, in general, constitutes consumer credit protection.

However, other CSOs are not specifically bound by these protections. To read Chapter 393 such that CSOs other than CABs are authorized to broker extensions of credit in a form other than deferred presentment transactions or motor vehicle title loans, without having to comply with these protections, would be difficult to justify, given that the purpose of Chapter 393 is to protect consumers. The silence of the Texas Legislature with regard to CSOs in the context of obtaining for a consumer or assisting a consumer in obtaining an extension of consumer credit in a form other than a deferred presentment transaction or motor vehicle title loan must be presumed to be intentional. Therefore, due to a lack of textual support, the answer to Question 1 must be “no.”

B. Legislative intent compels an answer of “no” to Question 1.

A fundamental rule of statutory construction is to ascertain and give effect to the Legislature’s intent. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003); *State v. Terrell*, 588 S.W.2d 784, 786 (Tex. 1979); *Imperial Irrigation Co. v. Jayne*, 138 S.W. 575, 581 (Tex. 1911). Although Chapter 393’s silence with regard to authorization alone answers Question 1, to decide an issue on which a statute is silent, one should first try to discern the legislature’s intent. *Quick v. City of Austin*, 7 S.W.3d 109.

During the 2011 legislative session, a package of three bills (HB 2594 along with HB 2592 and HB 2593) was designed to address a variety of concerns with payday and auto title lending. The Legislative history shows that these bills were carefully negotiated⁵ between consumer advocacy groups and the payday and auto title lending industry and brought meaningful state regulation to Chapter 393. The amendments were a direct response to the decision of the 5th Circuit in *Lovick*. The legislative history surrounding Subchapter G establishes that Chapter 393 was designed to address abuses of consumers by the credit repair industry; the 2011 amendments created standards and requirements for companies brokering payday and auto title loans. This was confirmed by comments made by Representative Vicki Truitt, the bill author, in the floor debate regarding the subchapter.⁶ Comments made by Senator Carona, the Senate sponsor of HB 2592 and HB 2594

⁶ See, e.g., Texas House of Representatives Floor Debate on HB 2592, 82nd Legislature – Regular Session (statement by Rep. Vicki Truitt: “I have three bills... These bills are the product of more than 100 hours of intense negotiations between representatives of the industry and consumer advocates, with help from the UT Law School Center for

further support the intent to cover all forms of CSO brokered loans in the Texas market at the time through the definitions of deferred presentment transaction and motor vehicle title loans, and bring all CSO brokered loans under Subchapter G. In fact, he amended the definition of deferred presentment transaction on the Senate floor, to ensure that it covered payments in installments.⁷

Furthermore, the 2011 amendments to Chapter 393, which applied uniquely to CABs, were clearly intended to protect consumers with regard to consumer credit transactions, as demonstrated by the several sections identified earlier: 393.201(c)—Specific credit-related contract disclosures; 393.222-224—posting of fees and a warning related to extensions of credit, consumer transaction information and penalty for non-compliance; 393.627—data reporting requirement; 393.625 —requiring compliance with the federal Military Lending Act; 393.626—requiring compliance with Texas fair debt collection laws; and Subchapter G generally. This intent does not comport with authorizing CSOs to obtain or assist a consumer with obtaining extensions of credit other than deferred presentment transactions and motor vehicle title loans.

Additionally, the title of a statute may resolve any doubt about the meaning of a statute. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). Title V's title "PROTECTION OF CONSUMERS OF FINANCIAL SERVICES," is further compelling evidence as to the Texas Legislature's intent. The chapter was therefore designed to protect consumers by regulating the activities of CSOs. To read this chapter as a statute that grants authorization to CSOs, particularly authorization to engage in lending practices that harm consumers, would be to frustrate the intent of the Texas Legislature.⁸

The legislative history of Subchapter G clearly demonstrates the Legislature's intent not to authorize extensions of consumer credit beyond deferred payment transactions and motor vehicle

Public Policy Dispute Resolution, mediation settled many of the questions and disputes between the two groups. The three bills will rename CSOs as credit access businesses. That's because the law that created CSOs was never intended to be used for entities making payday loans or auto title, but today that is its primary use. Therefore, it has become necessary to distinguish between true CSOs that provide debt counseling and credit assistance and credit access businesses that broker payday and auto title loans." Rep. Truitt goes on to state, in the same debate, "There are predatory practices. There's failure to disclose pertinent information to customers and our authority in Texas. We have no ability whatsoever to deal with the bad actors. And I don't want to limit or prohibit the good actors' from being available and providing this valuable service, but we have no way of dealing with bad actors at this time") *available at* http://tlchouse.granicus.com/MediaPlayer.php?view_id=19&clip_id=500, (5/11/2011).

⁷ See Committee Amendment 2, HB 2594, 82nd Legislature – Regular Session (statement by Sen. Carona: "This amendment addresses concerns that the somewhat narrow definition of deferred presentment transaction in section 341.001 of the finance code would affect current lending practices under Ch. 393. This change does not expand current law or remove any limitations on loan products that currently exist under Ch. 393. We made this change because the industry had requested it in order to be comfortable that there was no reduction in their current authority. We, at the same time, wanted to make sure that going forward, we would have licensing authority over what they were doing, and that is what this gives us."), *available at* http://tlesenate.granicus.com/MediaPlayer.php?view_id=12&clip_id=1719 (5/23/2011).

⁸ The ACE Cash Express "Texas Flex Loan" is offered at 846% APR with a term of 168 days. The TitleMax "Personal Loan" was advertised as between 522% APR (with recurring electronic debits) or 650% APR (without recurring electronic debits).

title loans under Chapter 393. Therefore, due to clear legislative intent, the answer to Question 1 must be “no.”

C. §393.602(c) of the Texas Finance Code resolves this issue.

In Subchapter G, the Legislature gave explicit permission for CABs to charge agreed upon fees: “[a] credit access business may assess fees for its services as agreed to between the parties.” 393.602(b). This statement conclusively demonstrates legislative intent not to authorize extensions of credit other than deferred presentment transactions and motor vehicle title loans under Chapter 393.

Statutory texts should be construed as a whole. *Lottery Com'n. v. State Bank of Dequeen*, 325 S.W.3d 628, 639 (Tex. 2010). It is an established rule of law that “every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.” *Peterson v. Bell Helicopter Textron, Inc.* 807 F.3d 650 (5th Cir. 2015). Statutes must be read to give meaning to all parts of the statute. *Regions Hospital v. Shalala*, 522 U.S. 448 (1998). Every word should be considered and granted purpose. *Id.* “[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be **superfluous, void, or insignificant**” (emphasis added). *Id.* Every part of a statute must be construed to harmonize with other parts of the statute, and to give meaning to every part. *Market Co. v. Hoffman*, 101 U.S. 112 (1879).

The Legislature’s decision to allow CABs to assess fees as agreed between the parties precludes a reading of the statute that would allow CSOs to obtain or assist a consumer in obtaining an extension of credit in a form other than a deferred presentment transaction or a motor vehicle title loan. If other CSOs were able to obtain or assist a consumer in obtaining other loan products, and charge fees accordingly, it would render 393.602(b) superfluous, in violation of guiding principles from the United States Supreme Court, the Texas Supreme Court, and virtually every other authority on statutory interpretation. That portion of the statute may as well have not been written.

Additionally, the inclusion of 393.602(b) limits the application of *Lovick* to only brokering certain types of loans. *Lovick* states that CSOs may charge fees and those fees would not count towards the interest rate for usury purposes. By including 393,602(b), the Legislature effectively denoted the types of loans to which *Lovick* applies. *Lovick*, at 444. Thus, based on the 2011 amendments to Chapter 393, only organizations that broker deferred presentment transactions and motor vehicle title loans are allowed to assess fees that would not be counted for purposes of usury.

The specific grant of 393.602(b) would be rendered superfluous if the answer to Question 1 were “yes.” Therefore, applying the universally accepted rules of statutory construction, the answer to Question 1 must be “no.”

Answer 2:

The Texas Finance Code defines financial terms and financial products. The relevant portion of Section 393.001(3) defines “credit services organization” as a “person who “who provides, or represents that the person can or will provide, for the payment of valuable consideration any of the

following services with respect to the extension of consumer credit by others,” including through “obtaining an extension of consumer credit for a consumer.”

Additionally, Section 393.221(1) defines “credit access business” as a “credit services organization that obtains for a consumer or assists a consumer in obtaining an extension of consumer credit in the form of a deferred presentment transaction or a motor vehicle title loan.” “Deferred presentment transaction” is a legal term for what is commonly referred to as a payday loan. In plain terms, the lender makes a cash advance in exchange for a personal check or authorization to debit an account, with an additional fee. The maximum amount of interest that can be charged by lenders providing deferred presentment transactions or motor vehicle title loans arranged by a CAB is 10% annual interest, per Chapter 302 of the Texas Finance Code. In addition, Chapter 393 expands upon the definition of “deferred presentment transaction” found in Section 341.001(6) of the Texas Finance Code which, in part, states that “the person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date” by adding, “[f]or the purposes of this chapter, this definition does not preclude repayment in more than one installment.” TEX. FIN. CODE §393.221(2).

A signature loan is not defined in the Texas Finance Code. The addition of products such as signature loans under Chapter 393 runs contrary to other provisions of Chapter 393, in particular 393.303. Furthermore, the subterfuge language in Section 393.602(c) shows that the legislature intended to prevent companies from trying to avoid the requirements of Subchapter G. Even if a signature loan were not a deferred presentment transaction when signed, it would become one if a check or debit authorization were subsequently obtained from the borrower.

A. No applicable definition of signature loans exists.

Signature loans are not defined in the Texas Finance Code. Question 2 asks the AG to endorse a definition of signature loans (the “proposed signature loans”) that does not conform with a plain language meaning of such loans. Such an endorsement by the AG here would effectively amend Chapter 393, which only can be done under the purview of the Legislature.

In the proposed signature loan, “no security is obtained from the consumer in exchange for the extension of consumer credit or cash advance (including, without limitation, a motor vehicle title loan) and no personal check or authorization to debit a deposit account is obtained from the consumer in exchange for the extension of consumer credit or cash advance.” Thus, the proposed signature loan includes negative expressions that include temporal aspects (e.g., “no security is obtained from the consumer in exchange for,” “no personal check or authorization to debit a deposit account is obtained from the consumer in exchange for”) that can lead to confusion. For example, it’s not clear when an exchange would need to occur to satisfy “in exchange for,” leaving open the possibility that that the loan may be obtained in exchange for information that could be used as collateral at a later time.

Due to the lack of required legislative input and the opportunity for confusion surrounding the proposed signature loan, the answer to Question 2 must be “no.”

B. The proposed signature loans are prohibited by §393.303 of the Texas Finance Code.

When considering the entirety of Chapter 393, the proposed signature loans are specifically the form of products that are not authorized. Chapter 393 prohibits mere referrals as the type of assistance permitted under Chapter 393. Additionally, Chapter 393 prohibits the charging of fees to arrange loan products that are substantially similar to those available in the market, which would include those substantially similar to those offered by lending institutions. *See* 393.303.

Statutory texts should be construed as a whole. *Lottery Com'n. v. State Bank of Dequeen*, 325 S.W.3d 628, 639 (Tex. 2010). It is an established rule of law that "every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Peterson v. Bell Helicopter Textron, Inc.* 807 F.3d 650 (5th Cir. 2015). Statutes must be read to give meaning to all parts of the statute. *Regions Hospital v. Shalala*, 522 U.S. 448 (1998). Every word should be considered and granted purpose. *Id.* "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Id.* Every part of a statute must be construed to harmonize with other parts of the statute, and to give meaning to every part. *Market Co. v. Hoffman*, 101 U.S. 112 (1879).

393.303 states "[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.**" (emphasis added). This section is further supported by 393.304 and 393.305. Taken together, these sections create a clear prohibition on charging a consumer solely to refer a consumer to a product that is substantially the same as that available to the public.⁹

The proposed signature loans are substantially the same as other loans available to the public, they are explicitly excluded from Chapter 393, and the answer to Question 2 must be "no."

C. An opinion should not endorse the subterfuge and pretense currently being used to evade Subchapter G of Chapter 393 of the Texas Finance Code.

The Texas Legislature drafted Subchapter G with full knowledge that brokers would want to avoid the licensing requirements imposed. The Texas Legislature therefore included a clause to prohibit attempts to circumvent the protections offered by Subchapter G. According to 393.602(c), "A person may not use a device, subterfuge, or pretense to evade the application of this subchapter."

The proposed signature loans can be used to circumvent the protections offered by Subchapter G. In one example, a broker may collect information regarding a borrower's bank account with the intention of debiting the account at a future date, but may claim that the broker's services are not offered "in exchange for" a debit authorization, since the broker did not obtain debit authorization at the time the services were provided. In some instances, the broker may claim that the information gathered was for the purpose of collecting the broker's fee, but then use the same information at a later date to collect loan repayments.

⁹ *See* Texas Gov't. Code Sec. 311.016 (5): "May not" imposes a prohibition and is synonymous with "shall not".

Currently, ACE Cash Express offers a “Texas Flex Loan” at 846% APR with a term of 168 days. The full repayment on a \$400 loan is \$1,609.82. TitleMax offers a “Personal Loan” with an APR advertised as between 522% (if secured with access to a bank account) or 650% (without security)—a cost of \$1,515 to \$1,765 to repay a \$500 loan over 140 days. Both ACE Cash Express and TitleMax are licensed CABs. Each of these products is essentially the equivalent of a payday loan or deferred presentment transaction, as, based on the description and required documentation to obtain a loan, the CSO obtains all the information necessary to debit the borrower’s account in an amount that equals the loan principal plus a fee. It is important to note that the statute does not provide a time limit for associating such security with a loan, indicating that as soon as it is obtained, even after origination of the loan, that loan would fall under the statutory definition. See TEX. FIN. CODE § 341.001; § 393.221(2).

Allowing products such as these ACE Cash Express and TitleMax loans outside of the CAB licensing amounts to the type of subterfuge or pretense prohibited under Subchapter G. Any information given in exchange for assistance given in connection with obtaining an extension of credit should be construed broadly for purposes of subchapter G. Thus, if an extension of credit requires a borrower to provide information that could be used to debit a borrower’s account or for the broker to obtain a check from the borrower, then the transaction should be considered a deferred presentation transaction under Chapter 393.

Notably, the high likelihood for subterfuge makes Question 2, at least in part, a fact intensive inquiry. Even if the proposed signature loans were permitted under 393, the chances of these loans being used to deceive and exploit consumers is high, as can be seen from the ACE Cash Express and TitleMax loans mentioned above. Any such loan would require a tremendous amount of scrutiny to ensure that Sections 393.602(c) and 393.303 of the Texas Finance Code are not contravened.

For these additional reasons, the answer to Question 2 must be “no.”

Conclusion

Based on this analysis of the language of Chapter 393, laws of statutory construction, and legislative intent, the answer to Question 1 is “no.” For this and other additional reasons, the answer to Question 2 is also “no.” Any other reading of the law would render the legislative action in 2011 meaningless and unenforceable.

The Attorney General should issue an opinion that follows both the letter and the spirit of the law by answering “no” to Questions 1 and 2.

Sincerely,

Ann Baddour
Director, Fair Financial Services Project
Texas Appleseed

Adrianna Cuellar Rojas
President & CEO
United Ways of Texas

Rev. Wesley Helm
Faith in Texas
Faith in Formation Manager,

Stephanie Mace
Vice President, Strong Communities
United Way of Metropolitan Dallas
Also on behalf of Anti-Poverty Coalition of
Greater Dallas

Jay Meador
Brazos Valley Financial Fitness Director
Financial Fitness Center

Stephanie O'Banion
President/CEO
United Way of Central Texas

Tasha Tedrow Roberts
Executive Director
Helping Hands Ministry of Belton

Katherine von Haefen
Manager, Mission and Strategy
United Way of Greater Houston

Woody Widrow
RAISE Texas
Executive Director

EXHIBIT A: ACE Cash Express "Texas Flex Loan"

Materials obtained from store visit in Austin, Texas in August 26 of 2019

Photo of Information Regarding "Texas Flex Loan" Posted at Store Location:

Texas Flex Loan
Third-Party Signature Loan Fees and Examples

- Loan term varies from 120 days to 175 days based on payday
- Amounts may vary from \$100 to \$1,500 in \$10 increments
- The CSO fee is \$25 per payment for each \$100 originally borrowed (Total of \$300 per \$100 borrowed over the entire loan)
- Annual Percentage Rate (APR) varies based on loan term and amount borrowed

The chart below shows the most common loan amounts *with* and *without* weekly payments

Loan Amount	Payment 1-11	Payment 12	Lender Interest (9.95% per annum)	CSO Fee	Total Finance Charge	Total Amount Due To CSO / To Lender (Equals)		Annual Percentage Rate (APR) (assumes 180-day term)
\$200	\$67.44	\$63.18	\$4.91	\$50.00	\$54.91	\$60.00	\$204.91	346.16%
\$300	\$101.74	\$93.32	\$7.36	\$75.00	\$83.32	\$90.00	\$307.32	346.16%
\$400	\$134.85	\$124.35	\$9.82	\$100.00	\$114.62	\$120.00	\$414.62	346.16%

**CSO fee discounts may be available for existing customers with good repayment history. Restrictions may apply.*

ACE Credit Access LLC is only a credit services organization and is not the lender. All loans are made by an unaffiliated third-party lender.

The information above is based upon the customer paying on time. For example, charges that a customer might have to pay include a late charge of the greater of 5% of the payment amount or \$7.50 if the customer is in default for 10 or more days, and a dishonored item charge of \$30.00 if an electronic payment is not paid by your bank.

Before entering into a transaction, you should read the disclosure statements and contact info are provided to you for more information.

An advance of money obtained through a short-term signature loan is not intended to meet long-term financial needs. A short-term signature loan should only be used to meet immediate short-term cash needs.

This business is licensed and examined under Texas law by the Office of Consumer Credit Commissioner (OCCC), a state agency. If a complaint or question cannot be resolved by contacting the business, consumers can contact the OCCC to file a complaint or ask a general credit-related question. OCCC address: 2601 N. Lamar Blvd., Austin, Texas 78705. Phone: (800) 528-4579; Fax: (612) 858-7870. Website: occc.texas.gov. Email: consumer.complaints@occc.texas.gov.

Texas Flex Loan 01/2019

Consumer Complaints Concerning Money Transmission Activities
Should Be Directed To:

Transaction: Check-Free Pay

Advertisement Flyer Distributed at Store Location:

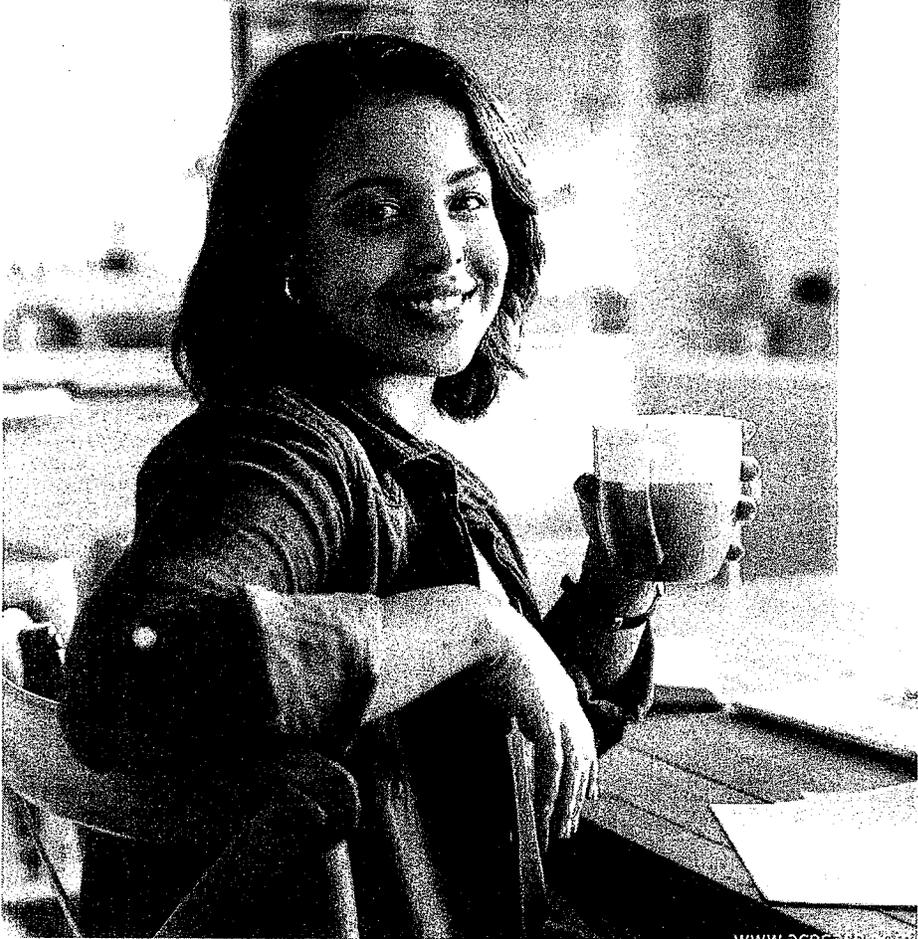
Front of Flyer:



**WE HAVE THE
LOAN FOR YOU**



Discounts with good repayment history¹
See back for details



Back of Flyer:



Example for Biweekly Paid Customer Borrowing \$500.00

First Loan¹

CSO Fee/\$100 Per Installment	\$25.00
Annual Percentage Rate (APR)	846.19%
Biweekly Payments 1-12	\$168.58 <small>last payment may vary slightly</small>
Payoff on first due date	\$626.61 (660.18% APR)

Second Loan¹

CSO Fee/\$100 Per Installment	\$16.00
Annual Percentage Rate	585.31%
Biweekly Payments 1-12	\$123.58 <small>last payment may vary slightly</small>
Payoff on first due date	\$581.91 (427.10% APR)

Third Loan¹

same rate applies to subsequent loans

CSO Fee/\$100 Per Installment	\$14.00
Annual Percentage Rate	524.20%
Biweekly Payments 1-12	\$113.58 <small>last payment may vary slightly</small>
Payoff on first due date	\$571.91 (374.96% APR)



ACE CASH EXPRESS
Earning Your Trust Since 1968

CSO fee discounts may be available for existing customers with good repayment history. Customer information, including, without limitation, income and pay frequency, must remain the same on each loan originated for discounts to apply.

All loans subject to approval pursuant to standard underwriting criteria. Loans should be used for short-term financial needs only, and not as a long-term solution. Customers with credit difficulties should seek credit counseling. Loans in Texas arranged by ACE Credit Access LLC and made by, and subject to the approval of, an unaffiliated third-party lender.

ACE Cash Express "Texas Flex Loan" Disclosure printed and shared by staff at store location:

Rev. 04/2019

ACE Cash Express

Payday Loan

\$400, 12 Payments

Cost Disclosure

Cost of this loan:

Borrowed amount (cash advance)	\$ 400.00
Interest paid to lender (interest rate: 10.0%)	\$ 9.82
Fees paid to	
ACE Cash Express	\$ 1,200.00
Payment amounts (payments due every 2 Weeks)	Payments #1-# 11 \$ 134.86 (Final) Payment # 12 \$ 126.36
Total of payments (if I pay on time)	\$ 1,609.82

APR (cost of credit as a yearly rate)	846.16 %
Term of loan	168 Days

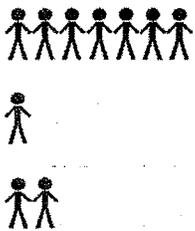
If I pay off the loan in:	I will have to pay interest and fees of approximately:	I will have to pay a total of approximately:
2 Weeks	\$101.53	\$501.53
1 Month	\$202.93	\$602.93
2 Months	\$405.34	\$805.34
3 Months	\$607.24	\$1,007.24
4 Months	\$808.62	\$1,208.62

Cost of other types of loans:

Least Expensive	Credit Cards	Secured Loans	Signature Loans	Pawn Loans	Auto Title Loans	Payday Loans	Most Expensive
	16%	30%	89%	180%	229%	410%	Average APR
	\$1.32	\$3.51	\$12.52	\$15.00	\$18.85	\$33.72	Average fees & interest per \$100 borrowed over 1 month

Repayment:

Of 10 people who get a new multi-payment payday loan:



- 7 will pay the loan on time as scheduled (typically 5 months)
- 1 will renew 1 to 4 times before paying off the loan
- 2 will renew 5 or more times or will never pay off the loan.

This data is from 2014 reports to the OCCC.

Before getting this loan, ask yourself:

- Do I need to borrow this money?
- Can I pay back the loan *in full* when it is due?
- Can I pay my bills and repay this loan?
- Can I afford late charges if I miss a payment?
- Do I have other credit options?

OCCC notice:

- This company is regulated by the Texas Office of Consumer Credit Commissioner (OCCC).
- OCCC Consumer Helpline: (800) 538-1579, consumer.complaints@occc.texas.gov.
- Visit occc.texas.gov for more information.
- This disclosure is provided under Texas Finance Code Section 393.223.

Credit services provided by ACE Credit Access LLC. Loans made by RPCAP X, LLC, RPCAP IV, LLC, and Bastion Funding TX I, LLC.

EXHIBIT B: TitleMax "Personal Loan"

Materials obtained from store visit in Austin, Texas in August 26 of 2019

Photo of Information Regarding "Personal Loan" Posted at Store Location:

on the Consumer's chosen repayment method at the time of origination. Consumers who opt to repay via recurring electronic payments at origination will be eligible for a lower daily CSO Fee percentage. CSO's standard CSO fees are shown in the following table. Lower promotional rates may be offered from time to time.

CSO Fee as a Daily % of the Amount Financed	
Without Recurring Electronic Payment Authorization	1.780% per day
With Recurring Electronic Payment Authorization	1.424% per day

Lender Interest and Fee Schedule - Personal (Unsecured) Loans

- **Maximum Loan Terms:** Lender makes loans secured by a CSO letter of credit, with terms not to exceed 180 days and an Amount Financed from \$100.00 to \$2,500.00.
- **Lender Interest:** Lender interest accrues on the outstanding principal balance of the Loan at 9.95% per annum, daily simple interest. Interest will continue to accrue on past due principal amounts until paid in full.
- **Late Charge:** \$7.50 or 5% of the amount of the unpaid scheduled payment, whichever amount is greater, on any payment not paid in full within 10 days of the scheduled payment date.
- **Returned Payment Fee:** \$30 for any check, money order, payment (whether tangible or electronic), transfer or other instrument or item that is rejected or returned for any reason.
- **Prepayment:** There is no prepayment penalty.
- **Costs of Collection:** To the extent permitted by law, Consumer will pay the costs of any attorney's fees incurred in connection with the referral of the Loan Agreement to an attorney to collect the Loan after default.

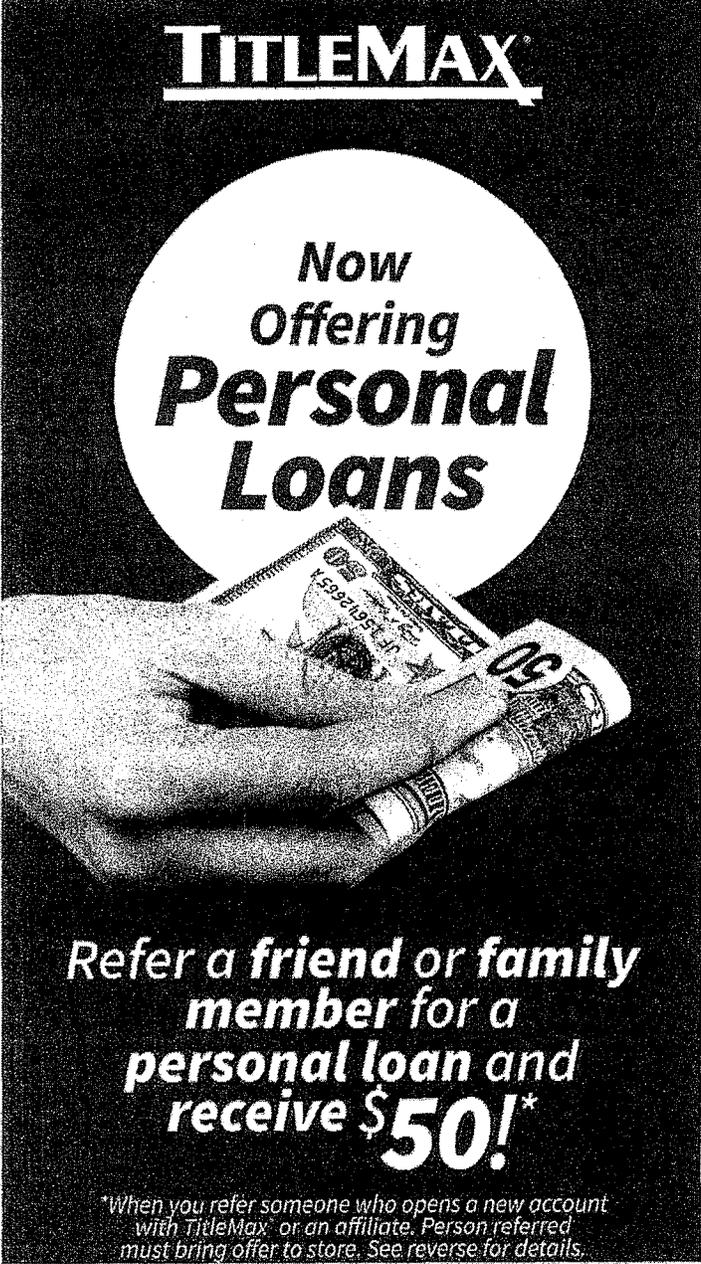
Loan/CSO Fee Examples - Personal (Unsecured) Loans

Bi-Weekly Payment Examples: The following examples have a 10 payment, 140-day term with payments due every 14 days.

Example 1	Example 2
Amount Financed	Amount Financed
\$ 400.00	\$ 500.00
Daily CSO Fee % (without recurring electronic payments)	Daily CSO Fee % (with recurring electronic payments)
1.780%	1.424%
Finance Charge	Finance Charge
\$ 124.60	\$ 96.80
CSO Fee (payable in 10 installments)	CSO Fee (payable in 10 installments)
\$ 124.60	\$ 96.80
Lender Interest	Lender Interest
\$ 7.50	\$ 4.98
Total of Payments	Total of Payments
\$ 350.00	\$ 1,515.88
APR	APR
6.99%	22.14%
Payments #1-9	Payments #1-9
\$ 124.60	\$ 99.68
\$ CSO Fee (installment of)	\$ CSO Fee (installment of)
Payment #10	Payment #10
\$ 124.60	\$ 99.68
CSO Fee (installment 10)	CSO Fee (installment 10)
\$ 519.08	\$ 519.88
Payment to Lender	Payment to Lender
\$ 643.68	\$ 618.76
Example 3	Example 4
Amount Financed	Amount Financed
\$ 500.00	\$ 1,000.00
Daily CSO Fee % (without recurring electronic payments)	Daily CSO Fee % (with recurring electronic payments)
1.780%	1.424%
Finance Charge	Finance Charge
\$ 175.00	\$ 2,000.40
CSO Fee (payable in 10 installments)	CSO Fee (payable in 10 installments)
\$ 175.00	\$ 97.25
Lender Interest	Lender Interest
\$ 237.72	\$ 1,517.88
Total of Payments	Total of Payments
\$ 600.00	\$ 3,221.93
APR	APR
6.99%	22.14%
Payments #1-9	Payments #1-9
\$ 373.89	\$ 981.04
\$ CSO Fee (installment of)	\$ CSO Fee (installment of)
Payment #10	Payment #10
\$ 373.89	\$ 299.04
CSO Fee (installment 10)	CSO Fee (installment 10)
\$ 1,937.03	\$ 1,138.72
Payment to Lender	Payment to Lender
\$ 1,937.03	\$ 1,858.20

Advertisement Flyer Distributed at Store Location:

Front of Flyer:



TITLEMAX

Now
Offering
**Personal
Loans**

Refer a **friend or family
member** for a
personal loan and
receive \$50!*

*When you refer someone who opens a new account with TitleMax or an affiliate. Person referred must bring offer to store. See reverse for details.

Back of Flyer:



TitleMax[®] Just Got Personal
Same Trusted Company.
Great New Product.

Get \$100 - \$2,500*
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*\$50 paid to a referring party when a referred party presents this card and opens a new account with TitleMax or an affiliate of TitleMax. Both parties must be at least 18 years of age (19 in Alabama). Account approval requires satisfaction of all eligibility requirements, including a credit inquiry. **Minimum/maximum loan amounts vary by state; not all loan amounts available in all states. Maximum loan amount for first time borrowers is \$1,000.00. Returning customers with a good payment history may qualify for higher loan amounts, currently up to \$2,500.00 in most states.** Certain other terms and conditions apply. Unsecured loan products not available in all stores or states. Void where prohibited. See the nearest TitleMax for details. **Texas customers:** In TX, for unsecured loans, TitleMax of Texas, Inc. d/b/a TitleMax acts as a Credit Services Organization to assist customers in obtaining a loan through an unaffiliated third-party lender.

Martinez, Steven

From: Ann Baddour
Sent: Friday, September 06, 2019 12:11 PM
To: Opinion_Committee
Subject: Brief from Texas Fair Lending Alliance in Response to RQ-0300-KP
Attachments: Texas Fair Lending Alliance Response Brief to RQ-0300-KP.pdf

Dear Opinion Committee,

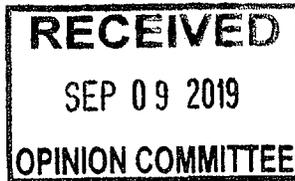
Attached is the brief from the Texas Fair Lending Alliance in response to RQ-0300-KP.

Please feel free to contact me if you have any questions.

Sincerely,

Ann Baddour

Ann Baddour
Director, Fair Financial Services Project
Texas Appleseed
512-473-2800 x104
www.texasappleseed.org



September 6, 2019

Via e-mail to opinion.committee@oag.texas.gov

Virginia K. Hoelscher
Chair, Opinion Committee
Office of the Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

FILE # RQ-0300-KP
I.D. # 48609

Re: OCCC Brief in Response to Request for Opinion RQ-0300-KP

Dear Ms. Hoelscher:

Your office received opinion request RQ-0300-KP, which asks two questions. The first is whether Chapter 393 of the Texas Finance Code authorizes a credit services organization 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 second is whether Chapter 393 allows a credit services organization to assist a consumer to obtain an extension of credit in the form of a "signature loan." The Office of Consumer Credit Commissioner (OCCC) submits this brief to aid your office in responding to the request.

For the reasons discussed below, the OCCC believes Chapter 393 exclusively authorizes a credit services organization to assist a consumer to obtain an extension of consumer credit in two forms: (1) a deferred presentment transaction, or (2) a motor vehicle title loan. Chapter 393 does not authorize a credit services organization to assist a consumer to obtain an extension of credit in any other form. Therefore, the answer to the first question is no.

Because Chapter 393 only authorizes an extension of credit in these two forms, an extension of credit in the form of a "signature loan" as described in the request is not allowed. Therefore, the answer to the second question is no.

I. Background on Chapter 393 of the Texas Finance Code

Chapter 393 authorizes a person to act as a "credit services organization" (CSO) and a "credit access business" (CAB).¹ A CSO is a person who (1) improves a consumer's credit history or rating, (2) obtains an extension of consumer credit for a consumer, or (3) provides advice or assistance with regard to both of these services.² A CAB is a CSO that obtains an extension of consumer credit in the form of a "deferred presentment transaction" or a "motor vehicle title loan."³

¹ Tex. Fin. Code §§ 393.001(3), .221(3), .601(5).

² Tex. Fin. Code § 393.001(3).

³ Tex. Fin. Code §§ 393.221(3), .601(5).

03/15/2011

A “deferred presentment transaction” (also known as a “payday loan”) is defined as a transaction in which a cash advance in whole or part is made in exchange for a personal check or authorization to debit a deposit account, the amount of the check or authorized debit equals the amount of the advance plus a fee, and the person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date.⁴ A “motor vehicle title loan” is defined as a loan in which an unencumbered motor vehicle is given as security for the loan that is not a retail installment transaction under Chapter 348 or another loan made to finance the purchase of a motor vehicle.⁵

Chapter 393 unambiguously:

- authorizes an extension of credit in only two forms – a deferred presentment transaction and a motor vehicle title loan;⁶
- requires a CSO to be licensed as a CAB to obtain an extension of credit in these two forms;⁷
- does not authorize an extension of credit in the form of an unsecured “signature loan”;⁸ and
- prohibits a person from using a device, subterfuge, or pretense to evade regulation as a CAB.⁹

Where the meaning of the statutory language is unambiguous, and the purpose of the legislative enactment is obvious from the language itself, the plain language of the statute should be given effect.¹⁰

Moreover, Chapter 393 must be read in its entirety, and not as isolated sections.¹¹ Accordingly, the definition of a CSO in Section 393.001(3)(B) should be read in the context of the entire Chapter, which authorizes a CSO to obtain an extension of credit in only two forms, and only after becoming licensed as a CAB.¹²

In order to act as a CSO, a person must:

- register with the Texas Secretary of State;¹³
- maintain a surety bond for each location;¹⁴
- provide pre-contract disclosures;¹⁵
- comply with contract requirements;¹⁶ and
- refrain from fraudulent or deceptive conduct.¹⁷

⁴ Tex. Fin. Code §§ 341.001(6), .601(3).

⁵ Tex. Fin. Code §§ 393.221(3), .601(5).

⁶ Tex. Fin. Code § 393.602(a).

⁷ Tex. Fin. Code § 393.603.

⁸ Tex. Fin. Code Chapter 393.

⁹ Tex. Fin. Code § 393.602(c).

¹⁰ *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 865-866 (Tex. 1999).

¹¹ *Id.* at 866.

¹² Tex. Fin. Code §§ 393.001(3)(B), .221(1), .601(2), .603.

¹³ Tex. Fin. Code § 393.101.

¹⁴ Tex. Fin. Code § 393.302.

¹⁵ Tex. Fin. Code § 393.105.

¹⁶ Tex. Fin. Code §§ 393.201-.204.

¹⁷ Tex. Fin. Code §§ 393.301-.307.

If a CSO acts as a CAB, then it must also comply with the following:

- Obtain a license from the OCCC to operate at each of its locations;¹⁸
- Annually renew each license;¹⁹
- Display its license at each place of business;²⁰
- Post a notice of its fees, OCCC contact information, and warnings concerning payday and auto title loans;²¹
- Provide disclosures comparing payday and auto title loans to other consumer debt, fees incurred by renewing or refinancing, and typical repayment patterns;²²
- Maintain minimum net assets;²³
- Contribute to the Texas Financial Education Endowment;²⁴
- Refrain from prohibited advertising;²⁵
- Comply with restrictions on military borrowers;²⁶
- Comply with law applicable to debt collection practices;²⁷
- Maintain records of each transaction;²⁸
- Submit to periodic examinations;²⁹ and
- File quarterly and annual reports of its consumer credit transactions.³⁰

II. Construction of Chapter 393

In construing a statute, whether or not it is ambiguous on its face, a court may consider the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and

¹⁸ Tex. Fin. Code § 393.603 (requiring a CSO to obtain a license for each location where it operates as a CAB); Tex. Fin. Code § 393.609(c) (prohibiting a CAB from conducting business at a location other than the address stated on the license); see also Tex. Fin. Code § 393.604-393.608 (describing the license application requirements).

¹⁹ Tex. Fin. Code § 393.612 (requiring annual fee); Tex. Fin. Code § 393.613 (providing for license expiration upon failure to pay annual fee).

²⁰ Tex. Fin. Code § 393.610; 7 Tex. Admin. Code § 83.4001.

²¹ Tex. Fin. Code § 393.222; 7 Tex. Admin. Code § 83.6003 (describing requirements for posting in-person and internet sales); 7 Tex. Admin. Code § 83.6004 (describing the content of the required fee schedule).

²² Tex. Fin. Code § 393.223; 7 Tex. Admin. Code § 83.6006 (describing font, type size, and paper size for required disclosures); 7 Tex. Admin. Code § 83.6007 (describing required consumer disclosures); 7 Tex. Admin. Code § 83.6008 (describing permissible changes to required disclosures).

²³ Tex. Fin. Code § 393.611.

²⁴ Tex. Fin. Code § 393.628.

²⁵ Tex. Fin. Code §§ 393.623, .624.

²⁶ Tex. Fin. Code § 393.625.

²⁷ Tex. Fin. Code § 393.626.

²⁸ 7 Tex. Admin. Code § 83.5004.

²⁹ Tex. Fin. Code § 393.622; 7 Tex. Admin. Code §§ 83.5002, .5003.

³⁰ Tex. Fin. Code § 393.627; 7 Tex. Admin. Code § 83.5001.

(7) title (caption), preamble, and emergency provision.³¹

Information relevant to these considerations is set forth below.

A. Origins of Chapter 393 (1987)

The provisions of Chapter 393 relating to CSOs were first enacted in 1987 as the Credit Services Organization Act (CSOA).³² The Legislature passed the CSOA in response to certain deceptive practices by persons promising to improve a consumer's credit history or rating.³³ The CSOA required a credit services organization to register with the Texas Secretary of State.³⁴

B. Lovick v. Ritemoney (2004)

In the 2004 case, *Lovick v. Ritemoney*, the Fifth Circuit interpreted Chapter 393 as it existed before the Legislature imposed the 2011 CAB licensing requirements.³⁵ The court found that a \$1,500.00 CSO fee for a \$2,000.00 auto title loan did not violate Texas usury laws because the CSO did not share its fees with the lender and Chapter 393 authorized the CSO fees.³⁶ After this decision, many payday lenders and title lenders began to use the CSO business model.

C. Attorney General Letter (2006)

In 2006, the Texas Attorney General sent a letter to the OCCC's Commissioner summarizing its review of the CSO model to facilitate payday loans.³⁷ The letter was not a formal Attorney General opinion, but was drafted in response to requests to evaluate the use of the CSO model by the payday loan industry.³⁸ The letter concludes there is "nothing patently illegal" about using the CSO model to make payday loans, but any "discussion of whether the use of this model is the best public policy choice for the State of Texas is one that must be addressed by the legislature."³⁹

D. Amendments to Chapter 393 (2011)

In 2011, the Texas legislature amended Chapter 393 to authorize two forms of extension of credit – deferred presentment transaction and motor vehicle title loan – by a CSO that obtains a license from the

³¹ Tex. Gov't Code § 311.023.

³² Act of May 29, 1987, 70th Leg., R.S., ch. 764, 1987 Tex. Gen. Laws 2716; Tex. Gov't Code § 311.023(3) (authorizing a court to consider the legislative history of a statute); Tex. Gov't Code § 311.023(4) (authorizing a court to consider common law or former statutory provisions, including laws on the same or similar subjects).

³³ House Comm. on Bus. & Commerce, Bill Analysis, Tex. H.B. 742, 70th Leg., R.S. (1987).

³⁴ Tex. Fin. Code §§ 393.001(3), .101(a).

³⁵ *Lovick v. Ritemoney*, 378 F.3d 433, 444 (5th Cir. 2004); see Tex. Gov't Code § 311.023(4) (authorizing a court to consider common law or former statutory provisions, including laws on the same or similar subjects).

³⁶ *Lovick v. Ritemoney*, 378 F.3d 433 (5th Cir. 2004).

³⁷ January 12, 2006 Letter from Barry R. McBee, First Assistant Attorney General, to OCCC Commissioner Leslie Pettijohn.

³⁸ *Id.*

³⁹ *Id.*

OCCC to act as a credit access business.⁴⁰ The Legislature amended Chapter 393 to address a range of concerns associated with payday and auto title lending.⁴¹ Supporters of the bills pointed out that:

The [amendments are] the negotiated product of more than 40 hours of mediation between consumer advocacy groups and the payday and auto title lending industry. These bills would bring the industry, which has grown rapidly under the very minimal restrictions of the CSO chapter, under meaningful state regulation for the first time. The bills would prevent predatory practices and provide recourse for consumers exploited by rogue actors in the industry. At the same time, the bills would protect consumers' access to these short-term loans.⁴²

The purpose of the amendments was to distinguish between CSOs that provide credit repair services and CSOs that provide extensions of credit through payday and auto title loans. Specifically, Representative Vicki Truitt, the bills' sponsor, stated during the House floor debate:

Perhaps, members, you've seen the proliferation of storefronts offering payday and auto title loans. Presently these businesses operate outside of any state regulation or oversight under Chapter 393 of the Texas Finance Code, calling themselves credit service organizations or CSOs. They're not really credit service organizations, though. What they are and what I propose to rename them is credit access businesses or CABs. . . .The three bills will rename the CSOs as credit access businesses. That's because the law that created CSOs was never intended to be used for entities making payday loans or auto titles, but today that is its primary use. Therefore, it's become necessary to distinguish between true CSOs that provide debt counseling and credit assistance, and the credit access businesses that broker payday and/or auto title loans.⁴³

The 2011 changes to Chapter 393 became effective on January 1, 2012.⁴⁴ Under this regulatory framework, the payday and auto title industry grew to the point where it facilitated \$3.33 billion in consumer loans in fiscal year 2018.⁴⁵

⁴⁰ Tex. H.B. 2592, 82nd Leg., R.S. (2011); Tex. H.B. 2594, 82nd Leg., R.S. (2011).

⁴¹ See, e.g., *Small Dollar Loan Products Scorecard – Updated*, National Consumer Law Center (May 2010) page 19, footnote 75 (stating “Some lenders get around the rate cap on payday loans as well as the prohibition on title lending by setting themselves up as credit services organizations and facilitating both these loans with no rate cap. Tex. Fin. Code Ann. § 393.201 (Vernon)”).

⁴² House Research Organization, Bill Analysis, Tex. HB 2592 (May 11, 2011); House Research Organization, Bill Analysis, Tex. HB 2594 (May 11, 2011); see also Debate on Tex. H.B. 2592 on the Floor of the House of Representatives, 82nd Leg., R.S. at 1:48 (May 11, 2011).

⁴³ Debate on Tex. H.B. 2592 on the Floor of the House of Representatives, 82nd Leg., R.S. at 1:46 to 1:49 (May 11, 2011).

⁴⁴ Tex. H.B. 2592, 82nd Leg., R.S. (2011); Tex. H.B. 2594, 82nd Leg., R.S. (2011).

⁴⁵ Based on quarterly reports submitted to the OCCC by licensed CABs as required by Section 393.627 of the Texas Finance Code.

E. OCCC Advisory Bulletin (2012)

Shortly after the OCCC first acquired authority to enforce Chapter 393, it discovered that some CSOs were engaging in practices designed to avoid compliance with the 2011 amendments.⁴⁶ Specifically, the CSOs were assisting consumers to obtain a loan where no security is obtained from the consumer in the form of a post-dated check or a motor vehicle title.⁴⁷ The CSOs claimed that these loans were not deferred presentment transactions (payday loans) or motor vehicle title loans, and therefore were not subject to the new CAB requirements.

In response, the OCCC issued an advisory bulletin on December 11, 2012.⁴⁸ The bulletin stated that the 2011 amendments to Chapter 393 were intended to “cover transactions where the CSO obtains an extension of credit for a consumer, even where the CSO does not require the consumer to provide a post-dated check, debit authorization, or motor vehicle title.”⁴⁹ The bulletin warned that obtaining an unsecured loan for a consumer could be seen as subterfuge intended to circumvent the regulatory requirements of Chapter 393 under the 2011 amendments.⁵⁰

The OCCC’s bulletin reflects the agency’s position since it first acquired jurisdiction over these issues, and has been formally adopted and incorporated into its public enforcement orders and confidential examination activities.⁵¹ For example, in 2017 the OCCC issued an injunctive order against Advance America – the fourth largest credit access businesses in Texas.⁵² Advance America assisted consumers to obtain an extension of credit through a “non-CAB single payment ‘cash advance’ product” that it claimed was not a deferred presentment transaction.⁵³ Advance America claimed that it did not act as a CAB when it assisted consumers to obtain this loan, and was not required to include these transactions in its quarterly reports.⁵⁴ The OCCC disagreed, and concluded that Advance America’s arguments constituted a device, subterfuge, or pretense to evade the application of Chapter 393.⁵⁵

Question number two to Attorney General Request RQ-0300-KP asks the same question that was directly addressed by the OCCC in its 2012 bulletin. The OCCC has consistently construed Chapter 393 to

⁴⁶ Credit Services Organization Bulletin issued by the Office of Consumer Credit Commissioner on December 11, 2012, available on the OCCC’s website here: <https://occc.texas.gov/sites/default/files/uploads/disclosures/b12-5-cab-accepting-check-title.pdf>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Tex. Fin. Code § 393.602(c) (prohibiting the use of a device, subterfuge, or pretense to evade the CAB licensing requirements under Chapter 393, Subchapter G). The bulletin also warned that this practice could subject a CSO to civil liability under the Texas Deceptive Trade Practices Act Tex. Fin. Code § 393.504 (stating that a violation of Chapter 393 is also a violation of the Texas Deceptive Trade Practices Act); Tex. Fin. Code § 393.305 (prohibiting a CSO from directly or indirectly engaging in a fraudulent or deceptive act, practice, or course of business relating to the offer or sale of its services).

⁵¹ Tex. Fin. Code § 14.2015 (making confidential the OCCC’s examination and investigation activity, including communications with license holders about compliance issues).

⁵² *Injunctive Order to File Timely and Accurate Quarterly and Annual Reports* issued on December 20, 2017 against ACSO of Texas, LP d/b/a Advance America under OCCC Case No. L18-00088. According to the OCCC’s records, Advance America has 167 active CAB licenses – making it the fourth largest CAB in Texas by license count.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.*; Tex. Fin. Code § 393.602(c) (prohibiting a person from using a device, subterfuge, or pretense to evade the application of Chapter 393, Subchapter G).

prohibit extensions of credit without outside of the CAB requirements for seven years without legal challenge, and through four Legislative sessions, including Sunset review.⁵⁶

F. Industry Interpretations of Chapter 393 (2019)

Most licensed CABs support the fair, balanced, and deliberate legislative decisions reflected in the 2011 amendments to Chapter 393. For example, TitleMax of Texas, Inc., (TitleMax) is the second largest CAB in Texas.⁵⁷ In May 2019, TitleMax filed suit against the City of Austin with respect to its CAB ordinance.⁵⁸ The ordinance, adopted in 2011, limits activities by a CAB to obtain an extension of credit for a consumer within the city limits.⁵⁹ In its lawsuit, TitleMax asserts that:

- credit access services are extensively regulated under Texas law;⁶⁰
- the Texas Finance Commission serves as the primary point of accountability to ensure the State's financial industry functions as a coordinated, uniform, statewide system and protects consumer interests;⁶¹
- the Legislature charged the OCCC with the specific authority for enforcement of CAB-specific provisions of the Finance Code;⁶²
- the Legislature empowered the OCCC with a comprehensive enforcement regime for ensuring statewide compliance with Chapter 393;⁶³
- Chapter 393 and related rules regulate CAB credit-access activities in Texas and evidence the Legislature's intent to occupy the entire field of regulation as to this business;⁶⁴
- the Legislature's "comprehensive regulation of all aspects of the finance industry—and in particular its entrustment of extensive oversight of CABs to the Finance Commission and OCCC to ensure uniformity and consistency—evidences its clear and unmistakable intent to preempt local laws that interfere with the OCCC's authority or threaten standardized application of the statewide laws";⁶⁵

⁵⁶ Tex. Gov't Code § 311.023(6) (authorizing a court to consider the administrative construction of a statute); *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008) (upholding an agency's interpretation of a statute it was charged with enforcing where the construction is reasonable and does not contradict the statute's plain language); see also *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011).

⁵⁷ According to the OCCC's records, TitleMax has 238 active CAB licenses – making it the second largest CAB in Texas by license count.

⁵⁸ *Plaintiff's Original Petition for Declaratory Relief and Application for Permanent Injunction*, filed on May 10, 2019 in Cause No. D-1-GN-19-002613; *TitleMax of Texas, Inc. v. City of Austin*, In the 353rd Judicial District Court of Travis County, Texas.

⁵⁹ *Plaintiff's First Amended Original Petition for Declaratory Relief and Application for Temporary and Permanent Injunction*, pages 4-5, filed on July 12, 2019 in Cause No. D-1-GN-19-002613; *TitleMax of Texas, Inc. v. City of Austin*, In the 353rd Judicial District Court of Travis County, Texas.

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 2-3.

⁶² *Id.* at 3.

⁶³ *Id.* at 3.

⁶⁴ *Id.* at 3.

⁶⁵ *Id.* at 8.

- the City's ordinance attempts "to upset the balance of rights and duties established by the Legislature in 2011 with respect to CABs";⁶⁶
- the "Legislature chose a fair balance based upon licensing, agency examination, extensive disclosures, and flexibility in rate and terms";⁶⁷
- the "Legislature crafted a careful balancing of rights and responsibilities with its substantial, 2011 amendments to the Finance Code" and it "is not the province of the City to override these deliberate legislative decisions."⁶⁸

Accordingly, major market participants support the 2011 amendments that require a CSO to be licensed as a CAB, and limit a CAB to two authorized extensions of credit.⁶⁹

III. Policy Considerations and Consequences of This Request

To answer "yes" to the questions posed by this request would unravel the financial regulatory structure enacted in 2011.⁷⁰ A "yes" answer would allow a CSO to facilitate loans without any of the licensing, examination, reporting, and consumer protection requirements adopted by the Legislature in 2011.⁷¹ A "yes" answer would render CAB licensing optional, and required only if the CSO helped consumers obtain a deferred presentment transaction or a motor vehicle title loan.

Additionally, the \$3.33 billion consumer credit market is likely to enter a period of significant instability among CABs licensed under Chapter 393, and potentially small dollar lenders licensed under Chapter 342, as market participants sort through a new regulatory landscape.⁷² This instability is likely to create significant confusion among consumers trying to differentiate among the current and new financial products offered by these market participants.

However, to answer "no" would preserve the current financial regulatory structure, and recognize the Legislature's ability to make and implement orderly changes to the regulatory landscape. A "no" answer would maintain the current consumer protection, licensing, reporting, and examination requirements. A "no" answer would give meaning and effect to the prohibition against using a device, subterfuge, or

⁶⁶ *Plaintiff's Brief in Support of Application for Temporary Injunction*, page 3, filed on July 12, 2019 in Cause No. D-1-GN-19-002613; *TitleMax of Texas, Inc. v. City of Austin*, In the 353rd Judicial District Court of Travis County, Texas.

⁶⁷ *Id.* at 2.

⁶⁸ *Id.* at 14-15.

⁶⁹ *Miller v. Kennedy & Minshew*, 142 S.W.3d 325, 347 n.64 (Tex. App.—Fort Worth 2003, no pet.) *citing Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292, 295 (1956) (finding that under the doctrine of judicial estoppel a person is estopped from making a contrary assertion after having alleged or admitted in his pleadings under oath in another proceeding, even where the party invoking the doctrine was not a party to the other proceeding).

⁷⁰ Tex. Gov't Code § 311.023(5) (authorizing a court to consider the consequences of a particular construction of a statute).

⁷¹ That is, a "yes" answer would create two categories of transactions under Chapter 393: (1) licensed CABs facilitating deferred presentment transactions or motor vehicle title loans, and (2) registered CSOs facilitating any other form of transaction.

⁷² Also note that a "yes" answer is likely to significantly alter the marketplace information (e.g. annual loan volume of \$3.33 billion) available to the Legislature, the Governor, the Finance Commission, and the OCCC about payday loans or other extensions of credit by a CSO if the CSO is not licensed as a CAB. See Tex. Fin. Code § 393.627 (requiring a licensed credit access business to file quarterly reports regarding its financial transactions and activities).

pretense to evade licensing requirements by using a signature loan.⁷³ Competition among CABs, and between CABs and lenders licensed under 342, would continue on a well-established basis and with the regulatory certainty established in 2011.

Conclusion

Chapter 393 does not authorize a CSO to obtain an extension of consumer credit for a consumer in any form other than a deferred presentment transaction or a motor vehicle title loan.⁷⁴ Chapter 393 does not authorize a CSO to obtain an extension of consumer credit for a consumer in the form of an unsecured "signature loan."⁷⁵ Accordingly, the answer to both questions posed in this request is "no."

Only the legislature can make the policy decision to authorize a CSO to assist a consumer to obtain an extension of credit in a form other than a deferred presentment transaction or a motor vehicle title loan. As the Texas Supreme Court has stated, the task in statutory construction "is to effectuate the Legislature's expressed intent" and "not to impose our personal policy choices or 'to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results.'"⁷⁶ It would have been easy for the Texas legislature to add a "signature loan" or other financial products as authorized extensions of credit, but it did not elect to do so.⁷⁷ In the absence of such language, no such authorization may properly be inferred.⁷⁸

For the reasons set forth above, the OCCC believes that the attorney general should interpret Chapter 393 to require a CSO to be licensed as a CAB in order to assist a consumer to obtain an extension of credit, and to limit the form of any extension to a deferred presentment transaction or motor vehicle title loan.

The OCCC appreciates the opportunity to provide input on request RQ-0300-KP. If you have additional questions, please feel free to contact me by phone at (512) 936-7623, or by e-mail at michael.rigby@occc.texas.gov.

⁷³ See Fin. Code § 393.602(c); Tex. Gov't Code § 311.021(2) (stating that in interpreting a statute, it is presumed that the entire statute is intended to be effective).

⁷⁴ Tex. Fin. Code §§ 393.221, 393.601(2) (defining "credit access business"); Tex. Fin. Code § 393.602(a) (applying Subchapter G to a credit services organization that obtains, or assists a consumer to obtain, an extension of consumer credit in the form of a deferred presentment transaction or a motor vehicle title loan).

⁷⁵ *Id.*

⁷⁶ *Ritchie v. Rupe*, 443 S.W.3d 856, 866 (Tex. 2014) (quoting *Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011)).

⁷⁷ See Tex. Fin. Code Ch. 393.

⁷⁸ See *Cadena Commercial USA Corp. v. Tex. Alcoholic Bev. Comm'n*, 518 S.W.3d 318, 337 (Tex. 2017) (rejecting dissent's statutory analysis because it "would manufacture a definition not found in the statute by adding words the Legislature did not enact"); *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (stating that a "court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written."); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 631 (Tex. 2008) (stating that "changing the meaning of the statute by adding words to it, we believe, is a legislative function, not a judicial function").

Sincerely,

A handwritten signature in black ink, appearing to read 'MR', with a long horizontal stroke extending to the right.

Michael Rigby
General Counsel
Office of Consumer Credit Commissioner

Attachments:

- December 12, 2012 *Credit Services Organization Bulletin* issued by the OCCC
- December 20, 2017 *Injunctive Order to File Timely and Accurate Quarterly and Annual Reports* issued by the OCCC under Case No. L18-00088 against ACSO of Texas, LP d/b/a Advance America
- January 12, 2006 Attorney General Letter to OCCC Commissioner Leslie Pettijohn

December 12, 2012
Credit Services Organization Bulletin
Issued by the OCCC



2601 N. Lamar Blvd
Austin TX 78705

512-936-7600
Fax: 512-936-7610
Consumer Helpline: 800-538-1579
Email: info@occc.state.tx.us

Credit Services Organization Bulletin

December 11, 2012

The Office of Consumer Credit Commissioner (OCCC) is concerned about a business practice that some credit services organizations (CSOs) are using. The business practice appears to be designed to avoid compliance with Chapter 393 of the Texas Finance Code. Continued use of the practice could result in the Texas Legislature taking adverse action in the upcoming legislative session and could also lead to civil liability on the part of the CSO.

The business practice at issue is as follows. As contemplated by Chapter 393, the CSO assists the consumer in obtaining credit and charges a fee for this service. But the CSO does not take a post-dated check from the consumer or, in the case of a loan secured by the consumer's motor vehicle, the motor vehicle's title. By not requiring the consumer to provide a post-dated check or the motor vehicle's title, the CSO contends that the activity falls outside the definition of "credit access business" (CAB) and therefore escapes the regulatory requirements imposed on CABs in Chapter 393 of the Texas Finance Code. The Texas Finance Code does not specifically prohibit this practice; nevertheless, this transaction could be seen as an attempt to evade the regulatory requirements of Chapter 393 and an attempt to circumvent the law.

The OCCC believes that this business practice conflicts with the legislative intent manifested in house bills 2592 and 2594 passed in 2011. The purpose of these bills was to provide a licensing and regulatory framework to govern credit service organizations who obtain credit for Texas consumers. The OCCC believes that the legislature intended that the bills cover transactions where the CSO obtains an extension of credit for a consumer, even where the CSO does not require the consumer to provide a post-dated check, debit authorization, or motor vehicle title. If the legislature finds that this business practice conflicts with its intent, it could consider passing additional legislation that would put further regulatory restrictions on CSOs that obtain extensions of credit for consumers.

This practice could also subject a CSO to civil liability under the Texas Deceptive Trade Practices Act or under Chapter 393. If a consumer brought suit against a CSO who was engaged in the business practice described above, it is possible that a court could find for the consumer and enter a judgment against the CSO.

The OCCC is concerned about the potential legislative reaction to this practice and the possibility that the legislature will see this practice as a subterfuge intended to circumvent the regulatory requirements of Chapter 393. The OCCC is also concerned about the civil liability a CSO engaged in this practice could face. The agency strongly urges any CSO currently engaged in this practice to consider the legislative and legal consequences.

December 20, 2017
***Injunctive Order to File Timely and Accurate Quarterly
and Annual Reports***

**Issued by the OCCC under Case No. L18-00088
Against ACSO of Texas, LP d/b/a Advance America**

OCCC CASE NO. L18-00088

IN THE MATTER OF:	§	BEFORE THE
	§	
MASTER FILE NO.: 16381	§	OFFICE OF CONSUMER
ACSO OF TEXAS, LP	§	
d/b/a ADVANCE AMERICA	§	CREDIT COMMISSIONER
135 N. CHURCH ST.	§	
SPARTANBURG, SOUTH	§	STATE OF TEXAS
CAROLINA 29306		

INJUNCTIVE ORDER TO FILE TIMELY AND ACCURATE
QUARTERLY AND ANNUAL REPORTS

The Office of Consumer Credit Commissioner (“OCCC”) issues this Injunctive Order to File Timely and Accurate Quarterly and Annual Reports against ACSO of Texas, LP d/b/a Advance America (“Advance America”),¹

Statement of Facts and Law

Advance America is a credit services organization licensed to act as a credit access business under Chapter 393 of the Texas Finance Code. Advance America operates under master file number 16381 at 177 licensed locations.

A credit access business must file quarterly and annual reports with the Consumer Credit Commissioner (“Commissioner”).² For each of its licensed locations, a credit access business was required to submit a report for the second quarter of 2017 on or before July 31, 2017, and for the third quarter of 2017 on or before October 31, 2017.³ All information provided on the quarterly and annual reports must be accurate, complete, and calculated in accordance with the OCCC’s instructions.⁴

Advance America is required to file a quarterly report of information relating to its deferred presentment transactions (also called “payday loans”) and motor vehicle title loans.⁵ A “deferred presentment transaction” is defined as a transaction in which:

¹ Tex. Fin. Code § 14.208.

² Tex. Fin. Code § 393.627.

³ 7 Tex. Admin. Code § 83.5001.

⁴ 7 Tex. Admin. Code § 83.5001; see reporting instructions available on the OCCC’s website located here:

<http://occc.texas.gov/industry/cabs/reporting>.

⁵ Tex. Fin. Code §§ 393.602(a), 393.627.

- (A) a cash advance in whole or part is made in exchange for a personal check or authorization to debit a deposit account;
- (B) the amount of the check or authorized debit equals the amount of the advance plus a fee; and
- (C) the person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date.⁶

In October 2017, Advance America filed its report for the third quarter of 2017. However, Advance America notified the OCCC that this report did not include data relating to its "non-CAB single payment 'cash advance' product." Specifically, Advance America explained:

ACSO of Texas, LP assists customers to obtain a single payment cash advance lending product from a third party lender which is not a deferred presentment transaction under Tex. Fin. Code Ann. § 341.001, because the amount of the customer's check does not equal the amount of the advance plus the fee. ACSO of Texas, LP does not act as a Credit Access Business ("CAB") when it assists consumers to obtain the single payment cash advance product described above. Data regarding these transactions has not been included in the quarterly CAB reports, because the OCCC Credit Access Business Data Reporting Policy Statement and Tex. Fin. Code Ann. § 292.627 [sic] does not require us to provide information to the OCCC in the CAB quarterly report which relates to non-CAB products. Please let us know if, in the future, the OCCC would requires [sic] that information regarding the cash advance product referenced herein to be provided in the CAB quarterly report.⁷

The OCCC requested information from Advance America concerning all unreported transactions. In response, Advance America produced information for unreported transactions for the second and third quarters of 2017. The information produced identifies the amount of the cash advance, the interest charged by the lender, the fee charged by Advance America, and the amount of the consumer's deferred presentment check provided in exchange for the cash advance. Advance America explained that the amount of the consumer's deferred presentment check for the

⁶ Tex. Fin. Code §§ 341.001(6), 393.601(3).

⁷ Email from Advance America's Marie Edmonds to the OCCC's Karl Hubenthal dated October 30, 2017.

unreported transactions “equals the loan principal, plus lender interest for the full term of the advance, plus 80% of the CSO fee.”⁸

Advance America asserts that the unreported transactions are not deferred presentment transactions because “the amount of the check does not equal the amount of the advance plus the fee.”⁹ However, the Finance Code’s definition of a deferred presentment transaction states that the deferment check “equals the amount of the advance plus *a fee*.”¹⁰ By referring to “a fee,” this definition encompasses transactions where the check includes any fee amount.¹¹ The definition is not limited to transactions where the check includes *the entire* CSO fee. For this reason, Advance America’s unreported transactions are deferred presentment transactions. By failing to include information about these deferred presentment transactions in its quarterly reports, Advance America violated Texas law.¹²

Texas law prohibits a person from using a “device, subterfuge, or pretense” to evade the application of the definition of deferred presentment transaction or the quarterly report requirement.¹³ By altering the amount of the deferment check it requests from its customers, and altering the definition of “deferred presentment transaction,” Advance America is using a device, subterfuge, or pretense to evade the statute’s definition. By failing to report transactions based on an altered deferment check amount and alternative definition of deferred presentment transaction, Advance

⁸ Letter dated December 6, 2017 from Andria W. Patterson, Advance America’s Associate Corporate Counsel, to Joseph Adamek, the OCCC’s Administrative Review Examiner. “CSO” is an abbreviation of “credit services organization.” See Tex. Fin. Code § 393.001(3).

⁹ Email from Advance America’s Marie Edmonds to the OCCC’s Karl Hubenthal dated October 30, 2017.

¹⁰ Tex. Fin. Code § 341.001(6) (emphasis added).

¹¹ See Tex. Gov’t Code § 311.011(a) (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage”); Webster’s II New College Dictionary, pages 296 & 563 (1995) (defining “indefinite article” to mean “an article, as English *a* or *an*, that does not fix the identity of the noun modified,” and defining “definite article” to mean “an article, as *the*, that restricts or particularizes the noun or noun phrase following it”).

¹² Tex. Fin. Code § 393.627 (requiring a credit access business to file a quarterly report of information relating to deferred presentment transactions); 7 Tex. Admin. Code § 83.5001(a) (requiring that “all information provided on each quarterly or annual report must be accurate and calculated in accordance with the OCCC’s instructions”); 7 Tex. Admin. Code § 83.5001(e) (stating that the OCCC may take enforcement actions if a licensee fails “to file a complete and accurate quarterly or annual report by the applicable deadline”); 7 Tex. Admin. Code § 83.5001(e)(1) (stating that the OCCC may “issue an injunction ordering the licensee to file one or more complete, accurate, and timely quarterly or annual reports”); *Credit Access Business Data Reporting Policy Statement*, amended January 3, 2013, available at <http://occc.texas.gov/industry/cabs/reporting> (stating that the “purpose of this policy statement is to assure industry, consumers, and the public that data collected from credit access businesses as part of the reporting process will be accurate, purposeful, efficiently obtained, and made as confidential to the fullest extent of the law.”);

¹³ Tex. Fin. Code § 342.008 (prohibiting a party to a deferred presentment transaction from evading the application of the definition found in section 341.001(6) by use of any device, subterfuge, or pretense); Tex. Fin. Code § 393.602(c) (prohibiting a person from using a device, subterfuge, or pretense to evade the application of section 393.627 requiring quarterly reports).

America is using a device, subterfuge, or pretense to evade the quarterly report requirements.

The Commissioner may issue an injunction requiring a credit access business to file one or more complete, accurate, and timely quarterly or annual reports if the Commissioner has reasonable cause to believe that the credit access business is violating Chapter 393 of the Texas Finance Code.¹⁴

The Commissioner has reasonable cause to believe that Advance America is violating Chapter 393 of the Texas Finance Code, and therefore issues this Order, because Advance America failed to timely file a complete and accurate report for the second and third quarters of 2017.

Order

IT IS ORDERED that ACSO of Texas, LP d/b/a Advance America:

1. comply with, and cease and desist from violating, the reporting requirements set forth in Section 393.627 of the Texas Finance Code and Title 7, Section 83.5001 of the Texas Administrative Code;
2. file a complete and accurate report for the second quarter of 2017 within 30 days of service of this Order;
3. file a complete and accurate for the third quarter of 2017 within 30 days of service of this Order; and
4. timely file complete and accurate quarterly and annual reports in the future.

Quarterly and annual reports must be submitted through the OCCC's Application Licensing Examination and Compliance System (ALECS), which is accessible at alecs.occc.texas.gov. Instructions are available by clicking the "File Annual Report" button on the OCCC's home page, occc.texas.gov.

¹⁴ Tex. Fin. Code § 14.208; 7 Tex. Admin. Code § 83.5001(e)(1).

Violation of Order

You may be assessed an administrative penalty of up to \$1,000 for each day of violation of this Order.¹⁵ Multiple violations may also result in the suspension or revocation of your license.¹⁶

Right to Request Hearing

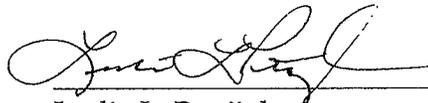
You have the right to request a hearing regarding this Order.¹⁷ Your request must be made in writing and sent to the OCCC not later than 30 days after you receive this Order. You must send your request to:

Michael Rigby
General Counsel
Office of Consumer Credit Commissioner
2601 N. Lamar Blvd.
Austin, Texas 78705

If you request a hearing, a hearing on this matter will be set and conducted in accordance with Chapter 2001 of the Texas Government Code.¹⁸ If you fail to request a hearing by this deadline, this Order is considered final and enforceable.¹⁹

All communications with the OCCC concerning this matter must be through Michael Rigby, General Counsel, who may be contacted by mail at 2601 N. Lamar Blvd., Austin, Texas 78705, by telephone at (512) 936-7623, or by email to michael.rigby@occc.texas.gov.

Signed this 20th day of December, 2017.



Leslie L. Pettijohn
Consumer Credit Commissioner
State of Texas

¹⁵ Tex. Fin. Code § 14.208(c); 7 Tex. Admin. Code § 83.5001(e)(2).

¹⁶ Tex. Fin. Code § 393.614; 7 Tex. Admin. Code § 83.5001(e)(3).

¹⁷ Tex. Fin. Code § 14.208(b).

¹⁸ Tex. Fin. Code § 14.208(b).

¹⁹ Tex. Fin. Code § 14.208(c).

CERTIFICATE OF SERVICE

I certify that on the 3rd day of January, 2018, a true and correct copy of this Injunctive Order to File Timely and Accurate Quarterly and Annual Reports has been sent to ACSO of Texas, LP d/b/a Advance America by regular mail and certified mail, return receipt requested, at:

ACSO of Texas, LP d/b/a Advance America
135 N. Church Str. 91 7199 9991 7031 6466 6012
Spartanburg, South Carolina 29306

ACSO of Texas, LP d/b/a Advance America
c/o Jeremy Wheelock, Compliance Officer
135 N. Church Str. 91 7199 9991 7031 6466 6029
Spartanburg, South Carolina 29306

ACSO of Texas, LP d/b/a Advance America
c/o Corporation Service Company, Statutory Agent
211 East 7th Street, Ste. 620 91 7199 9991 7031 6466 6036
Austin, Texas 78701



Michael Rigby
General Counsel
Office of Consumer Credit Commissioner
State Bar No. 50511925
2601 North Lamar Blvd.
Austin, Texas 78705
(512) 936-7623
(512) 936-7610 (fax)
michael.rigby@occc.texas.gov

January 12, 2006
Attorney General Letter
To OCCC Commissioner Leslie Pettijohn



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2006

Ms. Leslie Pettijohn, Commissioner
Office of the Consumer Credit Commissioner
2601 N. Lamar Blvd.
Austin, Texas 78705-4207

Dear Commissioner Pettijohn:

Pursuant to a request in August 2005, this office began looking into the recent change in lending practices within the payday loan industry to begin use of the credit services organization, or CSO, model. Shortly thereafter, we received a letter from Senator Eliot Shapleigh asking the Office of the Attorney General (OAG) to review the same practices, and we were also copied on a letter from consumer advocates asking you to request enforcement action by the OAG against payday lenders based on the contention that such practices violate state consumer lending laws. Based on these three requests, this office embarked upon a review of the CSO model. As a preliminary matter it must be noted that this letter is not a formal Attorney General opinion which is subject to exhaustive review and public comment, but is merely the analysis of a team of attorneys at our office based on information provided to this office, visits with members of industry, consumer advocates and state agency personnel, and a review of relevant law. Our analysis is as follows:

In July 2005, as a result of a change in federal guidelines controlling the number of payday loans national banks may make, the payday loan industry developed a new model for making payday loans based on existing Texas laws authorizing credit services organizations. TEX. FIN. CODE ANN. §§393.001-.505. Under these statutes, those who formerly operated under the national bank model now structure themselves as a CSO in order to obtain loans for consumers through third party lenders. The interest amount charged by the third party lender is 10%, conforming with Article 16, Section 11 of the Texas Constitution. A fee is charged by the CSO to arrange for the loan. (Notably, the total fees charged by the CSO plus the 10% interest often may make loans under this model more expensive than traditional payday loans.)

The first question raised by this new model is whether there is any limit on the amount of fees in these transactions under Chapter 393 of the Finance Code. We believe there is not. Although the legislature designed the statutes to provide for CSOs to assist in obtaining mortgage financing for consumers, the plain language of the law does not limit its use to only mortgage finance transactions. Also, there is no limit in the CSO statutes on the amount of fees that may be charged by a CSO. Additionally, an alternative use of the CSO model was examined and upheld by the U.S. Fifth Circuit Court of Appeals in Lovick v. Ritemoney Ltd., 378 F.3d 433 (5th Cir. 2004). Based on these facts, on its face the CSO model does not appear to be prohibited under Texas law.

Ms. Leslie Pettijohn

Page 2

January 12, 2006

The next question raised by the model is whether the lender and the CSO are truly independent. By definition, a CSO is one who arranges for the extension of credit to a consumer "by others." TEX. FIN. CODE ANN. §393.001(3). The only reason we believe a lender would agree to make these loans is because the CSO is guaranteeing, through a letter of credit or otherwise, that the loan will be repaid. While this aspect of the model raises many questions, theoretically, if the CSO and the lender are truly independent actors, there would be nothing patently illegal about the model. Determining the true relationship between a CSO and a lender would be a fact-intensive endeavor.

Any discussion of whether the use of this model is the best public policy choice for the State of Texas is one that must be addressed by the legislature and has not been explored by this office. As the attorney representing your office, we will act on referrals from you for enforcement actions under the statutes. We remain committed to work with your office, the legislature and the payday lending industry to find a balanced approach that is legally sound and good for Texas. If you have any questions, please feel free to contact our office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry R. McBee", with a long horizontal line extending to the right.

Barry R. McBee
First Assistant Attorney General

Martinez, Steven

From: Michael Rigby <Michael.Rigby@occc.texas.gov>
Sent: Friday, September 06, 2019 4:54 PM
To: Opinion_Committee
Subject: Re: OCCC Brief on Request No. RQ-0300-KP
Attachments: 2019-09-06_OCCC_Brief_Re_RQ-0300-KP_Final.pdf

Ms. Hoelscher,

Attached please find a revised final version of the OCCC's brief. The only change is the deletion of the word "DRAFT" after the date on page 1. I apologize for the inadvertent error.

Feel free to call me if you have questions or concerns. Thank you.

Michael Rigby
General Counsel

Office of Consumer Credit Commissioner
2601 N. Lamar Blvd.
Austin, TX 78705

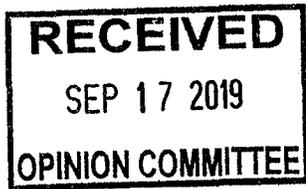
Tel 512.936.7623
Fax 512.936-7610
occc.texas.gov



>>> Michael Rigby 9/6/2019 4:44 PM >>>
Ms. Hoelscher,

Attached please find the OCCC's brief in connection with request number RQ-0300-KP.

Feel free to contact me if you have questions or concerns. Thank you.



KELLY HART

ANDREW WEBER
andrew.weber@kellyhart.com

TELEPHONE: (512) 495-6451
FAX: (512) 495-6401

September 16, 2019

The Honorable Ken Paxton
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # RQ-0300-KP
I.D. # 48615

Re: RQ-0300-KP Regarding Texas Finance Code Chapter 393

Dear General Paxton:

I write on behalf of the Consumer Service Alliance of Texas (“CSAT”). CSAT works cooperatively with consumers, financial industry leaders, and government officials to help ensure that Texans have access to credit services, which in turn supports access to emergency credit products and other financial services products in compliance with Texas law. To this end, I address the Opinion Request submitted by Chairman Jim Murphy on July 30, 2019. As discussed in Section I, the Office of Consumer Credit Commissioner’s interpretation of the statutory provisions at issue is not reasonable. Therefore, as further explained in Section II, the agency’s construction is not entitled to deference. Accordingly, for the reasons that follow, CSAT respectfully urges the Attorney General to conclude that the answer to both of Chairman Murphy’s questions is “yes.”

I. The Only Reasonable Construction of Texas Finance Code Chapter 393 Authorizes Credit Services Organizations to Arrange Extensions of Many Types of Consumer Credit Products, Not Just Loans that Fall Within the Definition of “Deferred Presentment Transactions” and “Motor Vehicle Title Loans.”

CSAT seconds and supports the August 16, 2019 letter brief submitted by Mr. Scott Keller discussing the proper plain-language construction of Chapter 393 as it applies to “credit services organizations” (hereinafter “CSOs”) and “credit access businesses” (hereinafter “CABs”). Since 1987, a CSO has been defined as any person who “obtain[s] an extension of consumer credit for a consumer.” Act of May 29, 1987, 70th Tex. Leg., R.S., ch. 764, 1987 Tex. Gen. Laws 2716 (ultimately codified at Tex. Fin. Code § 393.001(3)). In 2011, the Texas Legislature implemented a statute that creates CABs as a sub-set of CSOs that provide credit services in connection with “deferred presentment transactions” or “motor vehicle title loans.” See Act of June 17, 2011, 82nd Leg., R.S. ch. 1301, § 1. Notably absent from the 2011

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AUSTIN OFFICE | 303 COLORADO STREET, SUITE 2000 | AUSTIN, TX 78701 | TELEPHONE: (512) 495-6400 | FAX: (512) 495-6401
FORT WORTH OFFICE | 201 MAIN STREET, SUITE 2500 | FORT WORTH, TX 76102 | TELEPHONE: (817) 332-2500 | FAX: (817) 878-9280
NEW ORLEANS OFFICE | 400 POYDRAS STREET, SUITE 1812 | NEW ORLEANS, LA 70130 | TELEPHONE: (504) 522-1812 | FAX: (504) 522-1813
BATON ROUGE OFFICE | 301 MAIN STREET, SUITE 1600 | BATON ROUGE, LA 70801 | TELEPHONE: (225) 381-9643 | FAX: (225) 336-9763
MIDLAND OFFICE | 508 W. WALL STREET, SUITE 444 | MIDLAND, TX 79701 | TELEPHONE: (432) 683-4691 | FAX: (432) 683-6518

Kelly Hart & Hallman, a Limited Liability Partnership | www.kellyhart.com

legislation was any language that removed the 24 year-old definition of CSO, or otherwise prohibited CSOs who arranged extensions of credit *other* than “deferred presentment transactions” or “motor vehicle title loans” from continuing to do so.

It is telling that the 2011 Legislature added the CAB requirements at Subchapters C-1 and G to Chapter 393, but left intact the remainder of Chapter 393 that had governed CSOs since 1987. As Mr. Keller correctly recognizes, this demonstrates the Legislature’s intent to carve certain CABs from the CSO universe, then impose more stringent notice, disclosure, licensing, and fee regulations upon that discrete subset of CABs.¹ *See* Keller Br. at 2-3. For the reasons that follow, Mr. Keller’s construction is the only reasonable interpretation of Texas Finance Code Chapter 393.

(A) It is unreasonable to render sections of the CSO statute meaningless.

An interpretation of Chapter 393 that would prohibit CSOs from arranging loans other than “deferred presentment transactions” or “motor vehicle title loans” runs afoul of the fundamental statutory construction principle that Texas courts “do not interpret a statute in a manner that renders parts of it meaningless.” *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 442 (Tex. 2009) (citing *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8 (Tex. 2000)). Instead, courts “presume the Legislature chooses a statute’s language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.” *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 325–26 (Tex. 2017) (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)).

All parties agree that in 2011, the 82nd Texas Legislature implemented two new subchapters of Chapter 393—Subchapters C-1 and G—in an effort to add licensing and certain additional consumer protections for deferred presentment transactions and motor vehicle title loans.² In so doing, the Legislature authored a new definition for CABs, and specified that “in this subchapter,” a CAB “means a credit services organization that obtains for a consumer or assists a consumer in obtaining an extension of consumer credit in the form of a deferred

¹ Several briefs submitted in response to Chairman Murphy’s letter have suggested that a person who arranges consumer services loans under Chapter 393 can only be recognized as a CSO or a CAB. Nothing in the statute or rules prohibits an entity from operating as both a CAB and a CSO. Indeed, the OCCC’s September 6, 2019 brief correctly distinguishes between the requirements imposed upon CSOs and the requirements additionally imposed upon CSOs who also act as CABs. *See* September 6, 2019 Br. at 2-3.

² All parties also agree that only licensed, regulated lenders can make Chapter 342 loans. The Texas Consumer Finance Association’s September 6, 2019 letter brief invites the Attorney General to prohibit CSOs regulated by Chapter 393 from engaging in Chapter 342 transactions, but that distinction is undisputed. The subject of this inquiry is whether CSOs who have always been separately regulated under Chapter 393 maintain the ability to arrange extensions of consumer credit that do not fall within the definitions of “deferred presentment transactions” or “motor vehicle title loans.” Because that inquiry does not implicate Chapter 342 loans that the CSOs undoubtedly do not arrange, the Texas Consumer Finance Association’s distinctions are largely irrelevant.

presentment transaction or a motor vehicle title loan.” Tex. Fin. Code §§ 393.221(1), 393.601(2). What the Legislature did *not* do was alter the definition of CSO to otherwise prohibit CSOs from “obtaining an extension of consumer credit for a consumer.”³

Along with the definition of CSO, the Legislature also retained Texas Finance Code Section 393.002, which lists types of lenders that were not intended to be covered by Chapter 393. See Tex. Fin. Code § 393.002 (entitled “Persons Not Covered”). The Legislature’s decision *not* to repeal this section clearly illustrates an intent that CSOs continue to arrange other types of transactions in which these lenders were engaged. Otherwise, there would be no reason to specify that those lenders were not subject to Chapter 393.

Interpreting Chapter 393, as amended in 2011, to mean that all CSOs can only provide credit services in connection with deferred presentment transactions and motor vehicle title loans would give absolutely no effect to the CSO definition at Texas Finance Code Section 393.001(3)(B). Moreover, the Legislature did not and has not repealed Section 393.002. Texas law prohibits agencies or courts from rewriting Chapter 393 to delete these two provisions and insert into the statute a prohibition on non-CAB CSOs that simply does not exist.

(B) It is unreasonable to read the narrow CAB definition in a manner that swallows the remainder of the CSO regulations.

Prohibiting CSOs from providing credit services in connection with loans other than those arranged by CABs would also swallow the remainder of the regulations applicable to non-CAB CSOs. The Texas Supreme Court has consistently refused to interpret narrowly-defined statutory provisions in a manner that unnecessarily expands the reach of the statute:

- *Sabre Travel Int’l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 734 (Tex. 2019): The Court refused to adopt a more restrictive meaning for the word “appeal” when construing the permissive interlocutory appeal statute. The Court rejected the argument that a statute had to expressly confer jurisdiction on the Court in a manner more detailed than the term “appeal,” reasoning, “[i]f the Legislature intended the more restrictive meaning of

³ It is noteworthy that the definition of “credit services organization” at Texas Finance Code Section 393.001(3) applies throughout the entire “chapter,” whereas the definition of “credit access business” applies only to each of the CAB Subchapters the Legislature added in 2011. See Tex. Fin. Code §§ 393.221, .601 (both beginning with “in this subchapter”). This further exhibits the Legislature’s intent to apply a separate subset of regulations only to a narrowly-defined subset of CSOs—not to prohibit CSOs from providing credit services in connection with any other loan products. *City of Laredo v. Laredo Merchants Ass’n*, 550 S.W.3d 586, 597 (Tex. 2018) (“As a fundamental statutory-construction principle, we presume that the Legislature chooses a statute’s language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.”) (internal citations and quotations omitted).

“appeal” . . . the statute would refer to . . . acceptance “as an appeal,” or some other such language.”⁴ *Id.* at 733-34.

- *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 391 (Tex. 2014): The Court analyzed whether a “good cause” extension under a statute of limitations stood independently, or should be tethered to the remainder of the narrow requirements necessary for obtaining the extension. The Court concluded that the “good cause” language must be tempered by the language surrounding it, or else a broad construction “would swallow the narrow near-limitations exception and, quite likely, the contemporaneous filing rule.” *Id.*
- *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008): The Court refused to collapse the term “subject to appeal” into the term “pending on appeal” when that construction would unnecessarily broaden scope of the legislation as drafted. The Court rejected the argument that the Legislature had to expressly use the term “capable of being appealed.”

The Supreme Court’s reasoning in the foregoing cases applies with equal force to the question at hand. Answering “no” to Chairman Murphy’s questions would result in CSOs being limited to arranging only two types of loan products—even when the remainder of the statute that has always regulated the arrangement of additional types of loan products has never been repealed. In effect, the CAB definition—which expressly applies only to two of eight of the subchapters—would swallow the remainder of the Chapter 393 provisions generally applicable to CSOs. That would be an unreasonable construction under Texas law.

(C) It is unreasonable to insert a non-existent prohibition into Chapter 393 when the Legislature specifically enacted Chapter 393 Subchapters C-1 and G to apply only to two discrete types of consumer credit products.

By applying Texas Finance Code Subchapters C-1 and G to two discrete types of extensions of consumer credit, it is clear that the Legislature intended to contain the scope of the restrictions to that narrowly-defined subset of consumer credit products. When the Legislature enacts provisions using specifically-defined terms like “deferred presentment transaction” and “motor vehicle title loan,” Texas courts refrain from conflating other terms within those definitions in order to achieve broader enforcement than a statute’s plain language affords. *See*

⁴ The *Sabre* court’s reasoning flies in the face of the contention in Texas Appleeed’s September 6, 2019 letter brief that there is no textual authorization for CSOs to provide credit services in connection with consumer loan products other than deferred presentment transactions or motor vehicle title loans. *See* Texas Appleeed Br. at 6-7. The CSO definition and accompanying regulations are, in and of themselves, authorizations to “obtain[] an extension of consumer credit for a consumer.” Tex. Fin. Code § 393.001(3)(B). As the OCCC’s brief recognizes, Chapter 393 outlines the requirements a person must follow “[i]n order to act as a CSO.” OCCC Br. at 2. “Without any indication that the Legislature intended” to restrict CSOs to arranging only payday and motor vehicle title loans, the statute should not be interpreted so narrowly. *Sabre*, 567 S.W.3d at 734.

Cadena, 518 S.W.3d at 325–26 (citing *Entergy*, 282 S.W.3d at 443) (recognizing that Texas courts “take statutes as we find them and refrain from rewriting the Legislature’s text”).

This principle is most evident in *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). In *Combs*, the Texas Supreme Court held that the Comptroller had mischaracterized “receipts from licensing . . . seismic data” as “Texas business,” which erroneously increased the plaintiff’s franchise tax burden. *Id.* at 435. The inquiry turned on whether the licensing of seismic data was an “intangible asset” that could be taxed as Texas property. The Court refused to adopt the Comptroller’s statutory construction that would collapse “receipts from licensing” into the term “use of intangible assets.” *Id.*

As is particularly relevant to this case, the Court recognized that “intangible assets” was a specifically-defined term that did not include receipts from the licensing activity that the Comptroller had been taxing. *See id.* at 442 (“[O]ur Legislature has chosen to specifically name the intangibles which qualify for such treatment” and “could have allocated receipts from the use of intangible assets in this state to subsection (4) of the sourcing statute, generally, but it did not.”). The Court noted that, had it “been the Legislature’s intent,” to subsume all intangible assets within the term “license,” then “it would not have been necessary to name the intangible assets specifically as the Legislature has done in subsection (4).” *Id.* at 442. As a result, the Court concluded that the receipts at issue were not “intangible assets,” as that term was defined elsewhere in the statute, and declined to tax those receipts accordingly. *Id.*

Like the term “intangible assets” in *Combs*, both “deferred presentment transactions” and “motor vehicle title loans” are defined terms that refer to two very specific types of consumer credit products. *See* Tex. Fin. Code §§ 393.221(3) (defining motor vehicle title loan), .221(2) (defining deferred presentment transaction). Had it been the “[L]egislature’s intent to subsume every type of loan product that qualified as an “extension of consumer credit” into the CAB provisions, then it would not have been necessary to separately define these two subspecies of consumer credit extensions within Subchapters C-1 and G of the Texas Finance Code. Thus, just as the Supreme Court refused to subsume all “intangible assets” within the term “license,” the Attorney General should refuse to subsume all “extensions of consumer credit” into the terms “deferred presentment transaction” and “motor vehicle title loan.” *See Combs*, 340 S.W.3d at 442; *see also City of Laredo*, 550 S.W.3d at 597 (Texas Supreme Court concluded, “[i]f consumer products were to be excluded from the preemption provision, the Legislature would have said so, as it did by excluding consumer products elsewhere in the Act. As a fundamental statutory-construction principle, we presume that the Legislature chooses a statute’s language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.”).

(D) Because CSOs provide credit services in connection with unsecured consumer credit products that are not publicly available, Texas Finance Code Section 393.303 can be harmonized with the remainder of the statute.

Several of the letter briefs in favor of restricting CSOs to arranging only “deferred presentment transactions” and “motor vehicle title loans” argue that this is the only construction that can harmonize Texas Finance Code Section 393.303. *See, e.g.*, TCCCC and CLC Br. at 3-4, Texas Applesed Br. at 11. Entitled “Charge or Receipt of Consideration for Referral,” this provision provides:

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.*

Tex. Fin. Code § 393.303 (emphasis added). The contention that this section excludes extensions of consumer credit other than “deferred presentment transactions” and “motor vehicle title loans” from 393.303 is misplaced. The third-party lenders that have business arrangements with CSOs and CABs in connection with the consumer credit products at issue (whether secured or unsecured) are not willing to make those loans to consumers who have not agreed to do business with a CSO or CAB that is approved by the third-party lender. Accordingly, those loans offered by the third-party lenders are not offered to the public as a whole, regardless of the nature of the loan products themselves. Thus, because Section 393.303 only applies to extensions of consumer credit that are publicly available, this section has no effect on the Attorney General’s response to Chairman Murphy’s inquiry.

As is more fully described in the Ballard Spahr brief filed September 6, 2019, the types of loans described by Chairman Murphy’s second question are not “motor vehicle title loans” because they are not secured by motor vehicle collateral, and they are distinct from “deferred presentment transactions” because the borrowers are not required to supply post-dated checks or provide a debit authorization – specifically, these loans are not made in exchange for a personal check or authorization to debit a deposit account and an agreement to defer negotiating the check or payment authorization.⁵ The OCCC’s own December 11, 2012 Bulletin B12-5 concerning Credit Services Organizations describes this particular type of transaction as follows:

The CSO assists the consumer in obtaining credit and charges a fee for this service. But the CSO does not take a post-dated check from the consumer or, in the case of a loan secured by the consumer’s motor vehicle, the motor vehicle’s title. By not requiring the consumer to provide a post-dated check or the motor vehicle’s title, the CSO’s activity falls outside the definition of ‘credit access

⁵ *See* Tex. Fin. Code § 341.001(6). *See also* Ballard Spahr Br. at 1-2.

business' (CAB) and therefore is not subject to the regulatory requirements imposed on CABs in Chapter 393 of the Texas Finance Code.⁶

The concept of "security" implies the lender receives from the borrower some sort of tangible or intangible collateral that secures the borrower's repayment of the loan. In the case of "motor vehicle title loans" and "deferred presentment transactions" as contemplated by Chapter 393, the motor vehicle title or the post-dated checks or debit authorizations are inherent to the definitions of such products and are intrinsic to the nature of such products. The borrower is required to provide the motor vehicle collateral, post-dated checks or debit authorization, thereby ceding some control over his or her asset to the lender. In contrast, in order for a consumer to obtain a loan like that described in Chairman Murphy's second question, the consumer is not required to provide any collateral or payment mechanism, meaning that these loans are *unsecured*. Because consumers are not required to provide a post-dated check, debit authorization or motor vehicle collateral at the time these types of loans are arranged or as a condition of obtaining the loan, this form of consumer credit extension is easily distinguished from "motor vehicle title loans" and "deferred presentment transactions."

In sum, the Texas Legislature clearly recognized that the only CSOs who must comply with additional licensing, disclosure and fee collection requirements imposed upon CABs under Subchapters C-1 and G are those that arrange deferred presentment transactions and motor vehicle title loans. Any other construction unreasonably expands the narrow definition of the term, CAB, and reads the remainder of the Chapter 393 provisions generally applicable to CSOs, including the "credit services organization" definition and the "persons not covered" exclusions, out of Chapter 393 entirely.⁷

II. Because the OCCC's interpretation of Chapter 393 is unreasonable, it should be afforded no deference.

The OCCC is one of the parties who has encouraged the Attorney General to answer "no" to Chairman Murphy's two inquiries. *See* OCCC Br. at 1. However, for the reasons further detailed above and thoroughly detailed in Mr. Keller's letter, the only reasonable interpretation of Chapter 393 is the one that gives effect to the 1987 definition of "credit services organization" and recognizes that the Legislature explicitly applied more stringent regulations on only two discrete types of loans. *See Supra*, Section I. Because the OCCC's construction is not reasonable, no deference should be afforded to the OCCC's interpretation.⁸ *TracFone Wireless*,

⁶ Office of Consumer Credit Commissioner Bulletin B12-5, December 11, 2012, available online at <https://occc.texas.gov/sites/default/files/uploads/disclosures/b12-5-cab-accepting-check-title.pdf>.

⁷ *See* Tex. Fin. Code §§ 393.001(3)(B), 393.002.

⁸ The Attorney General has also refused to defer to an agency's interpretation of Chapter 339 of the Texas Finance Code when the OCCC had not adopted a formal opinion after a "formal proceeding" and the statute was not ambiguous. *See* Tex. Atty. Gen. Op. KP-0095 (June 16, 2016). ("Deference 'applies to formal opinions adopted

Inc. v. Comm'n on State Emergency Communications, 397 S.W.3d 173, 182 (Tex. 2013) (“Agency deference has no place when statutes are unambiguous—the law means what it says—meaning we will not credit a contrary agency interpretation that departs from the clear meaning of the statutory language.”).

In *Combs*, the Texas Supreme Court articulated the proper standard when determining whether to defer to an agency’s interpretation of a statute it is charged with regulating:

Deference to the agency's interpretation . . . is not conclusive or unlimited. [Courts] defer only to the extent that the agency's interpretation is reasonable, and no deference is due where an agency's interpretation fails to follow the clear, unambiguous language of its own regulations.

340 S.W.3d at 438 (citing *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254–55 (Tex. 1999)). Several glaring realities make clear that the OCCC’s interpretation fails to “follow the clear, unambiguous language of” Chapter 393.

First, it is telling that, even after the CAB legislation was passed in 2011, the OCCC recognized that “[t]he Texas Finance Code does not specifically prohibit” CSOs from offering the type of consumer credit extension at issue in Chairman Murphy’s second question. On December 12, 2012, the OCCC released a bulletin describing the very type of consumer credit extension at issue. See Office of Consumer Credit Commissioner Bulletin B12-5, December 11, 2012, available online at <https://occc.texas.gov/sites/default/files/uploads/disclosures/b12-5-cab-accepting-check-title.pdf>. The OCCC expressly affirmed that the Texas Finance Code did not specifically prohibit this practice. While the OCCC’s September 6, 2019 letter brief cites this bulletin as evidence suggesting that the CAB regulations effectively limit the types of consumer credit extensions CSOs can offer, the bulletin, itself, expressly states otherwise.

Similarly, the OCCC’s letter brief also cites the 2006 Attorney General Opinion Letter written by then-First Assistant Attorney General Barry McBee as similar evidence that the Legislature intended to restrict a CSO’s ability to arrange only “deferred presentment transactions” and “motor vehicle title loans.” See OCCC Br. at 4. However, like the 2012 OCCC bulletin, Mr. McBee’s letter also points out, “on its face, the CSO model does not appear to be prohibited under Texas law Any discussion of whether the use of this model is the best public policy choice for the State of Texas is one that must be addressed by the Legislature and has not been explored by this office.” See Ballard Spahr Br. at Attachment (1). Even before the 2011 CAB legislation was passed, the Attorney General recognized that restricting the otherwise-legal CSO model was inherently a legislative, not an agency, function.

after formal proceedings,’ and ‘the language at issue must be ambiguous.’ Because neither exists in this instance, we cannot defer to the OCCC Bulletin to provide definitive answers to the questions posed.”) (quoting *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006)).

As both the OCCC and Attorney General have previously recognized, nothing in the statutes has expressly precluded CSOs from arranging consumer credit extensions other than “deferred presentment transactions” and “motor vehicle title loans.” Restricting CSOs beyond that provided by the statute is a legislative function that should not be usurped by the Courts or the Attorney General. *See Entergy*, 282 S.W.3d at 445 (Hecht, C.J., concurring) (“Construing statutes is the judiciary’s prerogative; enacting them is the Legislature’s. To prevent trespass, this Court and others have repeatedly stressed that statutory construction must be faithful to the plain language of the text.”).

The most analogous case illustrating the Texas Supreme Court’s distaste for unreasonable agency constructions is *TracFone Wireless*, 397 S.W.3d at 177. Similar to this case, *TracFone* involved a clash between two subsections of a statute that had been enacted at different times in an effort to tax the evolving wireless telephone service industry. An earlier version of the statute (Section 771.011 of the Texas Health and Safety Code) taxed mobile providers a monthly \$.50 fee, whereas a later version of the same code (Section 771.012 of the Texas Health and Safety Code) taxed prepaid mobile providers a one-time 2% fee. *Id.* at 175-76. The prepaid mobile providers who paid both taxes argued that they were being unconstitutionally double-taxed, and the Texas Supreme Court agreed. *Id.* at 178-182.

Specifically as it relates to this case, the Texas Supreme Court rejected the agency’s contention that there was no illegal double-taxation because it applied Section 771.011 to prepaid providers *before* the Legislature passed Section 771.012, which was more particularly aimed at taxing prepaid providers. The Supreme Court rejected the agency’s construction as unreasonable, concluding, “Section 771.0712 would be utterly meaningless if it did not apply, meaning we must construe Section 771.0711 as inapplicable. And if Section 771.0711 does not apply to prepaid service today, then it never applied because *it has never been repealed as to such service.*” *Id.* (emphasis added).

TracPhone’s reasoning is relevant here. Like *TracPhone*’s monthly \$.50 tax at Section 771.011, the regulations generally pertaining to CSOs have never been repealed. And like the more modern statute that was passed to target modern prepaid providers at Section 772.012 of the Texas Health and Safety Code, the 2011 Legislature passed Subchapters C-1 and G in an effort to more specifically target CABs. But the passage of Section 771.012 did not automatically repeal the effect of 771.011, just as the passage of the CAB regulations did not automatically repeal the applicability of the CSO regulations. Such a construction is as unreasonable as the *TracPhone* agency’s contention that the Section 771.011 tax no longer applied simply because the Legislature passed 771.012.

In short, without an explicit repeal, statutes do not simply cease to have effect. Thus, as the Texas Supreme Court recognized in *TracPhone*, “the government seeks not judicial construction of a . . . law so much as judicial enlargement of it. *Id.* at 175–76. Because the OCCC’s construction unreasonably ignores the provisions of Chapter 393 specifically aimed at CSOs who offer services other than “deferred presentment transactions” and “motor vehicle title loans,” the OCCC should be afforded no deference.

III. Because Texas Finance Code Subchapters C-1 and G only apply to “deferred presentment transactions” and “motor vehicle title loans,” there is no “device, subterfuge or pretense” under Texas Finance Code Section 393.602.

Perhaps recognizing that the plain language of Chapter 393 does not support the construction supported by the OCCC, several of the letter briefs have accused the unsecured personal loan product offered by CSOs of being a “device, subterfuge, or pretense” to evade the CAB requirements under Texas Finance Code Section 393.602. *See, e.g.*, OCCC Br. at 9. This is not the case for several reasons.

First, for there to be a “subterfuge,” there must be an act inconsistent with the statute or regulation. There is no such inconsistent act here. On the contrary, as more thoroughly explained in the Ballard Spahr letter submitted on September 6, 2019, CSOs that arrange unsecured personal loan products comply in all respects with the requirements of Chapter 393 that apply to CSOs generally.

Moreover, after the Fifth Circuit in *Lovick v. Ritemoney, Ltd.* recognized the legitimacy of the CSO model, the 2011 Legislature adopted CAB regulations specifically related to only two loan products. 378 F.3d 433, 443 (5th Cir. 2004). However, the plain language of the CAB provisions of Chapter 393 does not apply to the credit services provided in connection with the *unsecured* personal loan product. Because there is a presumption that “[a]ny doubt as to the intention of the Legislature to punish the conduct of the party should be resolved in favor of the defendant,” the OCC’s conclusion that the Legislature entirely preempted *Lovick*’s blessing of the CSO model is unavailing. *Hight v. Jim Bass Ford, Inc.*, 552 S.W.2d 490, 491 (Tex. Civ. App. - Austin 1977, writ ref’d n.r.e.).

Second, Texas law is well established that compliance with the law is not evasion of the law. *See, e.g., Republic Bank Dallas, N.A. v. Shook*, 653 S.W. 2d 278, 281 (Tex. 1983) (“Texas cases hold that a lender’s requirement that the individual incorporate is not a violation of the usury laws but an intention to comply with them”); *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 256 (Tex. Civ. App. – Dallas 1975, writ ref’d n.r.e.) (“[Texas law] ...permits a corporate entity to make the contract [at 18% per annum] which would be illegal if made by an individual.... The law has not been evaded [by requiring the borrower to incorporate] but [instead] has been followed meticulously in order to accomplish a result which ... the law does not forbid.”) (internal quotation marks omitted). The OCCC, Attorney General and Fifth Circuit have all concluded that the CSO model—which has never been repealed—satisfied the requirements of Chapter 393. In order for the unsecured personal loan product to fall within the more stringent 2011 CAB regulations, the Legislature would have to speak. It has not done so.

Finally, the Attorney General should not allow the OCCC to achieve indirectly through the “subterfuge” statutory provision what could not be achieved directly via legislative action. Several of the letter briefs submitted to Attorney General have argued that the Legislative history makes clear that the Legislature intended to enact the CAB provisions to regulate “all”

extensions of consumer credit in response to Fifth Circuit's decision in *Lovick*. See Texas Applesseed Br. at 3; TCCC and CLC Br. at 5-6; OCCC Br. at 3-4 (citing *Lovick*, 378 F.3d at 444). However, as heated as the debate over what to regulate as a CAB may have been, the inescapable fact is that the language that would have more specifically regulated this type of product *failed to pass*. See generally Michael A. Garemko III, Texas's New Payday Lending Regulations: Effective Debiasing Entails More Than the Right Message, 17 Tex. J.C.L. & C.R. 211, 230 (2012) (detailing all proposals that passed and were proposed during 2011 Legislative Session).

Specifically, H.B. 410 by Craddick would have eliminated the Chapter 393.001(3)(B) definition as the OCCC's construction attempts to do by fiat, but failed to get out of committee. See *id.*; Tex. H.B. 410 (82nd Leg., R.S.) (2011). And H.B. 2539 by Truitt was the third of the three-bill package that was hotly debated during the 2011 session. See *id.*; Tex. H.B. 2539 (82nd Leg., R.S.) (2011). Known as the "Rollover and Rate Regulation Bill," it contained far more stringent regulations upon CABs, but failed to pass. See *id.* The OCCC and its allies simply cannot rewrite the statute to accommodate the OCCC's ambition to regulate what failed to pass.⁹

I sincerely hope that after consideration of the above analysis, you will conclude that the answers to both of Chairman Murphy's questions are, invariably, "yes." On behalf of CSAT, thank you for your consideration of this matter.

Sincerely,

/s/ Andrew Weber

Andrew Weber

⁹ One commentator has predicted that, even though H.B. 2539 failed to pass, the OCCC could possibly attempt the to impose the same regulation through the back door without Legislative authorization. See Garemko, 17 Tex. J.C.L. & C.R. at 234-35 ("The failure of H.B. 2593 is potentially significant because if the agency tried to regulate the practices covered in H.B. 2593 by using rulemaking authority granted in the other two bills, there would be a debate as to whether the agency has that authority. It would be an issue for the courts whether the legislature intended to provide a back door to that authority over opposition from either the industry or from a majority of the legislature itself.").

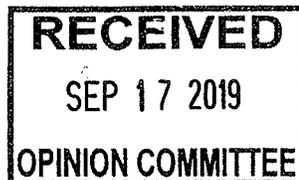
Martinez, Steven

From: Andrew Weber
Sent: Monday, September 16, 2019 7:06 PM
To: Opinion_Committee
Cc: Ofelia Williamson
Subject: RQ-0300
Attachments: 2998313_2.pdf

Please accept this brief in the above-referenced opinion request. If you have any questions or concerns, please let me know.

Andrew Weber
Kelly Hart & Hallman

512-495-6451



1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
TEL 215.665.8500
FAX 215.864.8999
www.ballardspahr.com

Jeremy T. Rosenblum
Tel: 215.864.8505
Fax: 215.864.8999
rosenblum@ballardspahr.com

September 17, 2019

Via E-mail (opinion.committee@oag.texas.gov)

Honorable Ken Paxton
Attorney General of Texas
300 W. 15th Street
Austin, TX 78701

FILE # RQ-0300-KP
I.D. # 48616

Attention: Opinion Committee

Re: Request for Attorney General Opinion (RQ-0300-KP)

Dear Attorney General Paxton:

This letter follows up on our September 6 submission and briefly addresses submissions by the OCCC and others who take the position that licensed CABs may not facilitate signature loans under Texas law (collectively referenced as the “Opposing Submissions” and individually referenced as the “Submission” of the applicable author). All capitalized terms not otherwise defined in this letter are defined in our September 6 submission.

The Opposing Submissions all concede, as they must, that, in Texas, statutes must be interpreted in accordance with their plain language. *See, e.g.*, OCCC Submission at 2 (“Where the meaning of the statutory language is unambiguous, and the purpose of the legislative enactment is obvious from the language itself, the plain language of the statute should be given effect.”). They cite the CAB provisions of Chapter 393, which affirmatively authorize CABs to facilitate deferred presentment transactions and title loans, but do not cite any language in Chapter 393—there is none—stating that CSOs may not facilitate signature and other types of loans.

Nor do any of the Opposing Submissions grapple with the fact that CSO loan facilitation long predated the CAB amendments to Chapter 393, as approved by *Lovick*. Thus, the OCCC Submission gets it exactly backwards when it suggests that “[o]nly the legislature can make the policy decision to authorize a CSO to assist a consumer to obtain an extension of credit in a form other than a deferred presentment transaction or a motor vehicle title loan.” *Id.* at 9. Because the necessary authorization is provided by the *pre-CAB* provisions of Chapter 393, “[o]nly the legislature can make the policy decision” at this time to reverse course and *prohibit* “a CSO to assist a consumer to obtain an extension of credit in a form other than a deferred presentment transaction or a motor vehicle title loan.”

Honorable Ken Paxton
Attention: Opinion Committee
September 17, 2019
Page 2

The OCCC Submission's claim that CSO-model signature loans constitute an evasion of CAB rules, and the exhibits it filed in support of this claim, are equally unavailing. For example, The OCCC's December 11, 2012 Credit Services Organization Bulletin states that signature loans "could be seen" as an attempt to evade and circumvent Chapter 393. Not only does the Bulletin merely reflect the view of *the OCCC*, not the view of any court or the Attorney General, it does not even say (and cannot say) outright that signature loans *are* an evasion or circumvention. Moreover, it affirmatively concedes that the "Texas Finance Code does not specifically prohibit this practice ..." and it describes the proper remedy for its (misguided) concern that signature loans might conflict with the legislative intent of the CAB provisions: "If *the legislature* finds that this business practice conflicts with its intent, *it* could consider passing *additional legislation* that would put further regulatory restrictions on CSOs that obtain extensions of credit for consumers." (emphasis added) Of course, the legislature has *not* adopted any "additional legislation" effectuating the OCCC's policy view.

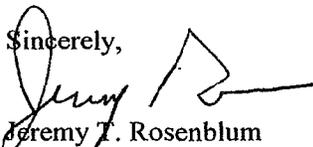
By the same token, the OCCC's December 20, 2017 Injunctive Order against Advance America says nothing about the proper treatment of signature loans. Patently, the loans addressed in the Injunctive Order, with post-dated checks in amounts equal to the loan's principal and interest, plus 80% of the CSO fee, were much closer to traditional deferred presentment transactions than they were to signature loans. Companies facilitating signature loans are evading nothing. As the CFPB has recognized, and as we pointed out in our original submission, signature loans and deferred presentment transactions are very different transactions. As a matter of business necessity, CSOs that provide credit support for signature loans must underwrite those loans without the comfort of a post-dated check or ACH authorization. Additionally, signature loans present a radically lower risk of NSF fees than deferred presentment transactions. And, in any event, the Company is willing to comply on a voluntary basis with most of the CAB protections in connection with the signature loans it originates.

Finally, as we observed in our original submission, the Prior AG Letter *supports* our position by making it clear that Chapter 393 was not even primarily (much less solely) directed at the facilitation of consumer credit in the form of deferred presentment transactions and title loans.

We will conclude with two final observations concerning the Opposing Submission of the Texas Consumer Finance Association (the "TCFA"). The sole argument of the TCFA seems to be that CSOs may not facilitate Chapter 342 loans without a Chapter 342 license. We do not disagree but the argument is entirely beside the point. *First*, it applies equally to signature loans and to deferred presentment transactions and title loans. *Second*, signature loans marketed today, including the Company's, all involve interest charges of 10% or less. Accordingly, under Section 342.005(1) of the Finance Code, these loans and the related CSO services are not subject to Chapter 342 at all.

Again, we very much appreciate your consideration of our views.

Sincerely,

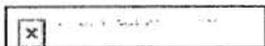

Jeremy T. Rosenblum

Martinez, Steven

From: Rosenblum, Jeremy T.
Sent: Tuesday, September 17, 2019 8:07 AM
To: Opinion_Committee
Subject: Supplemental Submission (RQ-0300-KP)
Attachments: DOC.pdf

Please see the attached Supplemental Submission.

Jeremy T. Rosenblum



1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215.864.8505 DIRECT
215.864.8999 FAX

610.574.4836 MOBILE |
VCARD

www.ballardspahr.com