POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

To: Clients and Friends of the Firm

From: Polunsky Beitel Green, LLP

Date: April 1, 2020

We wanted to alert you to the attached informal guidance that has been issued by the Texas Finance Commission agencies, including the Texas Department of Banking, the Texas Department of Savings and Mortgage Lending, the Texas Office of Consumer Credit Commissioner, and the Texas Credit Union Department (the "Finance Commission Agencies"). The Finance Commission Agencies make clear this is INFORMAL GUIDANCE and reliance on such guidance does NOT provide any safe harbor to avoid potential civil litigation against any lender.

Please note that Finance Commission Agencies remind everyone that the declaration of a state of emergency or disaster in all or a portion of the state does NOT alter the requirement that a Texas 50(a)(6) loan must close at a proper location, which is an office of the lender, an attorney or the title agent. The Finance Commission Agencies nevertheless suggest that parties take appropriate precautions to allow for social distancing and other protocols to minimize the risk of infection at any closing occurring at such proper location. The Finance Commission Agencies further indicated that a reasonable option in providing a safe location within the physical address of the office of the lender, attorney or title company might include allowing the closing to occur in the parking lot (which could allow the borrower to execute the documents inside the borrower's car).

The Finance Commission Agencies also noted that borrowers may still be able to obtain HELOC advances based on maximum amounts at the time the HELOC was originated, but the $4000 minimum draw still applies.

As those familiar with the Texas 50(a)(6) rules are aware, there is typically a one year seasoning requirement that prohibits a lender from refinancing a 50(a)(6) loan until the one year anniversary of the closing date (which is the date of the signing of loan documents) of the last 50(a)(6) loan. The Finance Commission Agencies noted that this seasoning can be waived at the request of the borrower IF the homestead is located within an area that has been declared a "disaster" by the Governor or the President of the United States. This disaster exception to the seasoning requirement is described in Section 50(a)(6)(M)(iii) of Article XVI of the Texas Constitution.

The Finance Commission Agencies also address Modification Agreements related to 50(a)(6) loans. They state:

An existing home equity loan may be modified at the request of the homeowner

without violating the Texas Constitution if the modification is consistent with the opinion of the Texas Supreme Court in *Sims v. Carrington Mortgage Services, L.L.C.* 440 S.W.3d 10 (2014). In the context of an existing home equity loan in default, the court held that a new agreement with the borrower that capitalizes past-due interest, fees (late charges), property taxes, and insurance premiums into the principal of the loan (all past-due amounts owed under the terms of the initial loan) and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit for purposes of Section 50(a)(6). Further, the court held that the capitalization of past-due interest, taxes, insurance premiums, and fees was not an "advance of additional funds" within the meaning of Section 50(a)(6) if those amounts were among the obligations assumed by the borrower under the terms of the original loan.

As noted in 7 Texas Admin. Code §153.14(2), a home equity loan and a subsequent modification are considered a single transaction for purposes of the home equity lending requirements of Section 50(a)(6), including the percentage cap on loan fees.

Although the *Sims* case did not explicitly involve traditional payment deferrals or an extension of the term of the original note, we believe these to be permissible under the Court's holding that "[t]he Constitution does not prohibit the restructuring of a home equity loan that already meets its requirements in order to avoid foreclosure while maintaining the terms of the original extension of credit." **The agencies recommend that lenders consult with qualified legal counsel before engaging in home equity loan modifications.**

For your convenience, we have attached a copy of the guidance from the Finance Commission Agencies and a copy of the Texas Supreme Court decision in *Sims*. If you need assistance in the preparation of Modification Agreements for home equity loans or other transactions or have questions regarding the contents of this alert, please let us know.

Allan Polunsky at Allan.Polunsky@mortgagelaw.com
Jay Beitel at Jay.Beitel@mortgagelaw.com
Marty Green at Marty.Green@mortgagelaw.com
Lauren Polunsky Dreszer at Lauren.Polunsky@mortgagelaw.com
Peter Idziak at Peter.Idziak@mortgagelaw.com
Andrew Duane at Andrew.Duane@mortgagelaw.com
Tye McWhorter at Tye.McWhorter@mortgagelaw.com
Doug Foster[1] at Doug.Foster@mortgagelaw.com

[1] Doug Foster is a non-lawyer and is not admitted to practice law in any state.