Texas Fair Lending Alliance

Faith Leaders 4 Fair Lending

July 31, 2020

Matthew Nance, Deputy General Counsel
Office of the Consumer Credit Commissioner
Texas Finance Commission
2601 N Lamar Blvd.
Austin, TX 78705
Sent via email to: rule.comments@occc.texas.gov.
RE: Draft Rules Review for Credit Access Businesses

Dear Matthew,

We appreciate the opportunity that the Office of Consumer Credit Commissioner (OCCC) has given to our coalition to respond to the draft amendments to §83.2003 (relating to Attempted Evasion of Applicability of Chapter), §83.4003 (relating to Denial, Suspension, or Revocation Based on Criminal History), §83.5001 (relating to Data Reporting Requirements), §83.5003 (relating to Examinations), §83.5004 (relating to Files and Records Required), and §83.6007 (relating to Consumer Disclosures); proposes new §83.5005 (relating to Separation Between Credit Access Business and Third-Party Lender); and proposes the repeal of §83.4007 (relating to License Reissuance) in 7 TAC, Chapter 83, Subchapter B, concerning Rules for Credit Access Businesses.

The Texas Fair Lending Alliance and Faith Leaders 4 Fair Lending is a coalition of community and faith leaders who support regulatory and legislative reforms to protect vulnerable Texans from high-cost loans and promote financial wellbeing. Last May, we submitted our informal pre-comments based on our wide-ranging experience working with borrowers, ministries, and other service providers to encourage the regulator to address predatory payday and auto title lending practices.

We are grateful that, as a result of your initial request for feedback, that the regulator published draft amendments to address some of our concerns, especially regarding the "device, subterfuge, or pretense" rules and the standards on separation between a CAB and a third-party lender. We believe these changes will help address potential circumvention of the Texas Finance Code and applicable Texas Administrative Code rules and promote consumer protections.

However, some of the proposed draft amendments do warrant further clarification to ensure that consumer protections are not lowered or inadvertently create other loopholes. Additionally, we express our disappointment with the agency that not all of our comments were taken under consideration for the rule review, including requests for increased data reporting requirements, explicitly adding a pattern of wrongfully using the criminal justice system to collect on a civil debt as a ground for revoking a CAB license under 7 TAC §83.4003(f), or elaborating rules on an examination process to ensure that a product is not "substantially the same as that available to the public."

Nevertheless, we respectfully submit these comments in accord with the timeline your agency outlined in the proposed rules published in 24 Tex. Reg. 4411 on July 3, 2020. Given the coronavirus pandemic devastating large swaths of our economy, poor and vulnerable Texans are being impacted the hardest. Your

agency's work is important now more than ever. The coalition assures you of our commitment, continued support, and engagement with this process.

I. Amending Section 83.2003 to specify practices that are considered "device, subterfuge, or pretense to evade Chapter 393, Subchapter G of the Texas Finance Code.

We support the agency's proposed amendments to address the "device, subterfuge, or pretense" rules. As stated in our previous comments, we believe this definition must be modified in light of the Attorney General Opinion (KP-0277). That opinion, addressing a request about the legal status of a "signature loan" offered under the CSO act, asserted that, "Whether any specific extension of credit is substantially the same as that available to the public, or uses a device, subterfuge, or pretense to evade regulation as a credit access business, are fact questions that this office cannot decide through an attorney general opinion." We believe that opinion opened loopholes for lenders to skirt requirements that governed deferred presentment transactions or motor vehicle title loans.

The agency's proposed draft amendments to address these concerns by enumerating more specific instances in rules of what constitutes "device, subterfuge, or pretense." Your proposed rules provide 6 specific instances that would expand on that definition:

(1) a transaction that is not identified as a deferred presentment transaction or payday loan, if the transaction is a deferred presentment transaction; (2) a transaction that is not identified as a motor vehicle title loan, if the transaction is a motor vehicle title loan; (3) a statement that a person is licensed by the Office of the Consumer Credit Commissioner if the person is not licensed; (4) a statement that a transaction is regulated by the Office of Consumer Credit Commissioner if the transaction is not regulated by the Office of Consumer Credit Commissioner; (5) a reference in a transaction to a statute or rule regulating deferred presentment transactions or motor vehicle title loans if the transaction is not a deferred presentment transaction or motor vehicle title loan; and (6) a disclosure or notice to a consumer about a deferred presentment transaction or motor vehicle title loan if the transaction is not a deferred presentment transaction or motor vehicle title loan."

In general, we support the enumeration of examples that would constitute "device, subterfuge, or pretense." As stated in the Attorney General opinion, analysis of this kind is intensive and very fact specific. Therefore, any elaboration of the rules, as done here, would provide further guidance for the regulator to ensure that applicable rules are being followed and, if necessary, to take enforcement measures when they are not.

We support the new inclusions of proposed paragraphs (1) and (2), based on stakeholder feedback, that would state that a device, subterfuge, or pretense includes a transaction that is not identified as a deferred presentment transaction or motor vehicle title loan, if the transaction is a deferred presentment transaction or motor vehicle title loan. Previously, the rule in Title 7, Chapter 83, Subchapter B, §83.2003 stated that a "device, subterfuge, or pretense" referred to "any transaction that in form may appear on its face to be something other than a deferred presentment transaction or motor vehicle title loan, but in substance meets the definition of a deferred presentment transaction or motor vehicle title loan as defined in Texas Finance Code, §393.602." We believe that this provision could ensure that transactions not currently anticipated that would, in substance, meet the definition still would fall under the purview of the OCCC and give flexibility to the regulator in the future.

II. Amending Section 83.4003 to update language on evaluating criminal history of applicants and licensees, to ensure consistency with HB 1342 (2019).

In general, we strongly support rules on delineation of grounds for denial, suspension, or revocation of licenses, including on the basis of criminal history of applicants who have engaged in fraudulent or criminal behavior. In our comments, we supported explicitly adding a pattern of wrongfully using the criminal justice system to collect on civil debt as a ground for revoking a CAB license under 7 TAC §83.4003(f), which we believe was authorized by state under a violation of the contract provisions in TFC §393.201(c)(3), which states:

> *...a person may not threaten or pursue criminal charges against a consumer related to a check or other debit authorization provided by the consumer as security for a transaction in the absence of forgery, fraud, theft, or other criminal conduct[.]*

The regulator's proposed rules do not directly address our requests on point, although they do require documentation of threats of criminal charges or referrals for prosecution (see §83.5004 comments below). Instead, they seek to conform the rules to HB 1342 (2019). That bill was introduced to promote the legislative intent of persons to obtain gainful employment after the person has (1) been convicted of an offense; and (2) discharged the sentence for that offense. Inter alia, that bill, now law, requires the licensing authority to take into account evidence of a person's compliance with any conditions of community supervision, parole, or mandatory supervision after determining whether a conviction directly relates to the duties and responsibilities of a licensed occupation.

We encourage the regulator, in implementing HB 1342, to ensure continued vigilance and robust processes for assessing denials, suspensions, or revocations of CAB licenses based on convictions related to character and fitness, and the duties and responsibilities of the licensed occupation.

III. Repealing Section 83.4007 on license reissuance, based on the assumption that the OCCC would issue a paper license

In general, we believe the rules in 7 TAC, Chapter 83, Subchapter B, are necessary to ensure the payday industry is held to standards that promote a fair marketplace, protect consumers, and ensure that their financial products are not usurious or run afoul of state laws and the Texas Constitution. As a part of this regulation, we believe that the licensing requirements in 7 TAC §§83.4001-83.4007 should be maintained or strengthened. However, we do not object the proposed draft rules to repeal §83.4007, insofar as the OCCC has expressed that they are no longer relevant, per the agency's practice to now reissue licenses through an online system (ALECS).

IV. Amending Sections 83.5001 to reflect OCCC practices on reporting violations.

In general, the coalition supports the enforcement actions that the OCCC may take if a licensee fails to file a complete and accurate quarterly report or annual report, including cumulative sanctions for violations. Reporting of data is crucial to allow the regulator and stakeholders to know the prevalence and impact of deferred presentment transactions and motor vehicle title loans in our state.

Insofar as the proposed amendments merely codify in rule the practice of the OCCC to issue an injunction for the first reporting violation, rather than an administrative penalty of $100 under §83.5001(e)(2)(A), we do not oppose it. This does not conflict with TFC §393.224: "The consumer credit commissioner, in accordance with rules adopted by the Finance Commission of Texas, *may* [emphasis added] assess an administrative penalty against a credit access business that knowingly and wilfully [sic] violates this subchapter or a rule adopted under this subchapter in the manner provided by Subchapter F, Chapter 14."

Additionally, we do not oppose the amendments to specify revocations of a license when a CAB fails to pay an administrative penalty resulting from a final order, recognizing that administrative penalties are more punitive in nature than an injunction because they impose a financial penalty on the CAB rather than only requiring a licensee to file one or more reports. This is permissible under TFC §393.614(a)(1): "After notice and opportunity for a hearing, the commissioner may suspend or revoke a license if the commissioner finds that: (1) the license holder failed to pay the license fee, an examination fee, an investigation fee, or another charge imposed by the commissioner under this subchapter." Even if an instance of this is very rare, it is important to provide within rules an explicit mechanism to effectuate the intent of TFC §393.614.

V. Amending Section 83.5003 to simplify the content of witness and records declarations obtained in examinations, to be consistent with the requirements for declarations under Chapter 132 of the Texas Civil Practices and Remedies Code

Recognizing that witness declarations during an examination process by the regulator may be the basis for an enforcement action or other litigation, we support the draft amendments to conform the rules to Chapter 132 of the Texas Civil Practices and Remedies Code (TCPRC), which governs unsworn declarations that may be used in lieu of a sworn declaration or affidavit.

TCPRC §132.001 allows for unsworn declarations to be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law. TCPRC §132.001(c) (1) and (2) requires that an unsworn declaration be "in writing" and "subscribed by the person making the declaration as true under penalty of perjury," respectively.

The proposed OCCC draft amendments to §83.5003(d)-(e) would specify the content of witness declarations and records declarations that OCCC examiners obtain from CABs during examinations by changing the current language from "statements" to "declarations" and also require an acknowledgement that the "witness is the custodian of records" at the licensee. This change seems reasonable to conform to the TCPRC. However, we ask the regulator to consider adding back in language from the previous paragraph (9) that was stricken that required an explicit "acknowledgement that the statement and the accompanying records may be introduced in an enforcement action in which the licensee is a party," as well as language in the draft amendments to a statement on the truthfulness of the declaration "under penalty of perjury" to more explicitly conform with the Code provision cited above.

VI. Amending Section 83.5004 to clarify recordkeeping requirements for threats or referrals for criminal prosecution.

In general, we support strengthening the recordkeeping requirements in §83.5004. Records retention is important for the regulator during a review or examination process of a CAB lender. Additionally, they ensure that transactions records undertaken by a CAB are properly maintained. The Texas Supreme Court Case *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 117-18 (Tex. 2018) determined that a CAB did not file a criminal complaint when it forward information to a district attorney about checks returned for insufficient funds. Under current rules, such transfer of information to district attorneys would not need to be maintained for recordkeeping purposes.

However, TFC §393.201(c)(3) states that a contract for services with a CAB must "contain a statement that a person may not threaten or pursue criminal charges against a consumer related to a check or other debit authorization provided by the consumer as security for a transaction in the absence of forgery, fraud, theft, or other criminal conduct." The current rules require the CAB to keep transactions files of any criminal charge or complaint, but they do not require criminal "referrals." The new rules would include that and

state that criminal charge records include "complete documentation of any criminal prosecution against a consumer," "any written statement threatening criminal prosecution, a written summary of any oral statement threatening criminal prosecution," and "any information submitted to law enforcement relating to alleged criminal conduct by a consumer."

We also support the addition of language in the draft rules in §83.5004 (3) that requires a licensee to "maintain documentation and records of transfers of money between itself and any third-party lender, as described by §83.5005 of this title (relating to Separation Between Credit Access Businesses and Third-Party Lender)."

Additionally, we propose adding record collection regarding the number of declined ACH or debit transactions for accounts where such transactions are authorized by the customer. This information is important to ensure compliance with the recently ratified payment provisions of the Consumer Financial Protection Bureau payday and auto title loan rule, which applies to CAB transaction.[1] This addition will enable the OCCC to ensure compliance with those provisions.

We support these recordkeeping changes because they would provide more complete data and ensure that the contract provisions prohibiting threats or criminal charges against a consumer under TFC §393.201(c)(3) are being followed in practice.

VII. Adding a new rule Section 83.5005 with standards on separation between a CAB and a third-party lender

We support the proposed draft amendments clarifying the separation between CABs and third-party lenders requiring separation between the two entities. Texas Appleseed has amply documented concerns that exist between multiple third-party lenders and multiple CABs. In many cases, third-party lenders with overlapping interests with CABs are the sole lenders to those CABs. We previously submitted comments in support of rules requiring no common ownership, no common directors, no common officers or employees, nor any common ownership, officers, directors or employees with a first-degree family relationship. This separation is the key legal standard upon which the applicability of Texas usury laws to the CSO fees hinges. The CSO Act limits CSO services to those, "with respect to the extension of credit by others" in TFC §393.001(3). In this provision, the phrase "by others" means that a CAB must operate independently from any third-party lender

The proposed rules require independent operation of a CAB licensee and a third-party lender that makes a transaction under TFC Chapter 393. The proposed draft amendments include requiring them to be separate legal entities, separateness in major operational decisions, functional separation, non-delegation requirements, separateness in underwriting criteria, in money lending, not acting as a general agent, not directly or indirectly sharing fees, and transparency in transfer of money to show the amount remitted in connection with a deferred presentment transaction or motor vehicle title loan.

Furthermore, the proposed rules would implement a CAB-lender separation requirement by providing factors that will be considered in an agency examination of whether a licensee operates independently from a third-party lender, including the extent of common ownership, shared officers, directors, or employees, familial relationships, sufficiency of documentation of transfers, and whether a licensee's performance is consistent with written agreements. Finally, it also includes prohibitions on false or misleading representations in the offer or sale of services.

[1] 12 CFR 1041.2, 1041.3, 1041.7–1041.9, 1041.12(a), (b) introductory text, (b)(4)–(5), 1041.13. See: https://files.consumerfinance.gov/f/documents/cfpb_ratification_payment-provisions_2020-07.pdf.

While the rules do not go so far as to altogether prohibit common ownership, officers, directors, or employees within a first-degree family relationship, we generally support these draft amendments that enhance the ability of the regulator to ensure the requirements of TFC §393.001 are being met and provide greater clarity with respect to what factors will be analyzed in making that assessment and to document a CAB's compliance with this requirement.

However, two provisions concern us greatly, and go counter to the letter of TFC §393.001(3). First, in response to stakeholder feedback in the informal pre-comment period, the agency now specifies in paragraph (3) that a CAB may not perform the functions of a third-party lender "except by written agreement" and specifies in paragraph (7) that a CAB may not act as a general agent of a third-party lender but may act as a "special limited agent." The previous draft that prohibited CABs and third-party lenders from engaging in a joint venture was removed from paragraph (7). If a written agreement could legitimate cooperation that otherwise would be not allowable under statute, that would defeat the purpose of the TFC §393.001(3) that requires independent operation. Additionally, while recognizing that special limited agents are confined in their authority to act in ways that general agent agents are not, that still defeats the purpose of the separation and independent operation requirement if a CAB and a third-party lender could simply invest or designate certain persons to perform particular, limited tasks – tasks that would otherwise violate the separation requirement but for the agency's allowance in this rule.

Furthermore, while we support the factors outlined in §83.5005(c) to determine sufficiency of independence, we continue to reiterate our suggestions from the informal pre-comments and request that §83.5005 (6) be added to include, "any estate planning or other documentation necessary to determine independent operation and that there is no direct or indirect fee sharing." This is important because we were concerned by some of the comments raised in the stakeholder session, contemplating scenarios that could, in fact, violate state law—such as a father operating as a third party lender and a son operating as a CAB. It was asserted that in such instances, estate planning would ensure that the son would have no ownership interest in the third-party lender, but these issues are questions of fact. Without access to the details of each arrangement, the OCCC would not have the information necessary to determine its legality. Another situation raised, of two individuals operating separately as CAB and third-party lender owners, but jointly in a totally separate business venture is another question of fact. A scenario could exist where this arrangement could violate state law. The OCCC needs to have access to information necessary to assess compliance if such relationships exist. Otherwise there could easily be a corporate shell game, where new enterprises are created as a way to hide sharing of funds, undermining the letter of the law. Therefore,

Additionally, we support the OCCC's paragraph (8) that specifies that a licensee may not directly or indirectly share fees for CAB services with the lender, as we believe the use of language such as "direct and indirect" with regard to fee sharing is justified and supported by law. In assessing fee sharing between the CSO and third-party lender, the *Lovick v. Ritemoney* decision notes that the plaintiff did not allege even an "incidental benefit" to the third-party lender, indicating that even an incidental benefit would be compelling evidence to support fee sharing between the parties. However, we are concerned about the second provision under §83.5005 (8) that requires a third-party lender who receives any portion of a fee for CAB services charged by a licensee to promptly remit that to the licensee. This language appears to offer a "get out of jail free card", allowing parties to share funds until caught and then remedy the situation with no penalty by returning ill-gotten funds. The statute already includes the high standard of violation, requiring it to be willful. This added language is not necessary and substantially weakens the provision.

Finally, TFC §393.622 allows finance commission to adopt rules to allow the Commissioner to review, as part of a periodic examination, any relevant contracts between a CAB and third-party lender organizations with which they contract or arrange extensions of consumer credit. We recommend that the regulator

include as part of its periodic review and examination processes such contracts and performance under them to ensure that they do not, in substance, violate the proposed rules requiring separation and statutory requirement on extension of credit "by others."

VIII. Updating Section 83.6007 model disclosures based on preliminary 2019 data

We support the agency's proposal to update the model disclosures using the latest data available reported by credit access businesses, including information on patterns of repayment based on the 2019 quarterly and annual reports provided by CABs to the OCCC.

In our previously submitted comment, however, we urged the regulator to increase data reporting requirements under 7 TAC §83.5001-5004. TFC §393.627 requires CABs to file quarterly reports with the OCCC identifying loan activity associated with single and installment deferred presentment (payday) loans, and single and installment auto title loans. Currently, data reflect location-specific activity and each location is treated as an individual reporting unit. Given the unclear aggregation and poor transparency of the data, there is no ability for public verification of the data's accuracy. The most significant gaps are in the accuracy of the refinance data, the absence of default data, and addressing inconsistencies between quarterly and annual reports.

Given the limitations on currently aggregated data, we continue to urge the regulator to work on improving the accuracy and consistency of data to ensure accurate consumer disclosures. Some of these practices include requiring the regulator to update these model disclosures as they receive amended or corrected data and requesting verification from the licensee of any data that is found to be questionable or unreasonable to ensure that the data in aggregate is as complete, accurate, and thorough as possible.

Respectfully Submitted,

Texas Faith Leaders for Fair Lending and Texas Fair Lending Alliance

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