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

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2601 North Lamar Blvd.
Austin, TX 78705
Submitted via email to: rule.comments@occc.texas.gov.

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

Dear OCCC,

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

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

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

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

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

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

In His peace,

Yours in Christ,

Jennifer Carr Allmon
Executive Director
Texas Catholic Conference of Bishops

cc:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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