



Financial Services & Products ADVISORY ■

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Texas Home Equity Loan Amendments Enacted

by [Stephen Ornstein](#)

In a little-noticed development, in May 2017, the Texas Legislature enacted [Senate Joint Resolution 60](#) (S.J.R. 60) proposing amendments to the Texas Constitution affecting home equity lending. The Resolution, known as Texas Proposition 2, was placed on the ballot on November 7, 2017, and approved overwhelmingly by voters. Notably, Proposition 2: (1) lowers the cap on home equity loan related fees from 3 percent to 2 percent but excludes certain additional fees from being included in this limit; (2) allows home equity loans secured by agricultural property; (3) permits the refinancing of a home equity loan with a purchase money loan; and (4) allows advances on a home equity line of credit (HELOC) as long as the principal amount remains at 80 percent of the fair market value (FMV) of a borrower's house. **The amendments take effect on January 1, 2018, and apply to all home equity loans originated on or after that date.**

Proposition 2 amended Article XVI, Section 50 of the Texas Constitution, which addresses the protection of homes from forced sales for payments of debts. In order to create a valid lien on a Texas homestead property (and hence, be able to foreclose on the mortgaged property), Texas home equity loans created pursuant to Section 50(a)(6), including HELOCs, must comply with a number of conditions. Significantly, failure to comply with these conditions could expose the holder of the loan to possible forfeiture of all principal and interest on the loan.

Fee Caps

Before the enactment of the amendments, lenders were prohibited from charging certain loan-related fees that exceeded 3 percent of the loan amount, excluding certain charges such as interest. While Proposition 2 lowered this cap on fees from 3 percent to 2 percent, it notably excludes from the cap costly loan-related fees such as appraisals, property surveys, title insurance premiums, and title examinations, which effectively allows lenders to exclude *more* charges from the fee cap.

Agricultural Homesteads

Before Proposition 2, a Section 50(a)(6) loan could not be secured by homestead property designated for agricultural use except for properties used primarily for the production of milk. The amendments permit owners of houses on land classified as agricultural to enter into voluntary liens to secure home equity loans.

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Refinancing a Home Equity Loan

Before the amendments, once a borrower obtained a Section 50(a)(6) loan, any subsequent refinancing of the loan (secured by the homestead property) would still be subject to the restrictions of Section 50(a)(6), even if the borrower did not receive any cash from the refinanced proceeds. Proposition 2 permits a borrower to combine a home equity loan with a loan taken to buy a house (e.g., a purchase money loan). It allows a borrower to refinance these two types of loans into one home equity or non-home equity loan with one rate and one term if *four conditions are satisfied*:

1. The refinanced loan is originated at least a year after the original home equity loan was consummated.
2. The refinanced loan does not provide additional funds to the borrower other than to cover the costs of the refinancing.
3. The refinanced loan does not exceed 80 percent of the FMV of the house.
4. At least 12 days before the refinancing, the lender provides the borrower with a special notice regarding certain rights associated with the new loan.

HELOC Advances

Proposition 2 eliminates the restriction on advances under a HELOC that prevented such advances if the principal amount of the debt was more than 50 percent of the FMV of the house. The amendment allows advances under the HELOC as long as the principal amount of the debt does not exceed 80 percent of the FMV of the house.

Authorized Lenders

Proposition 2 clarifies that entities regulated as “mortgage bankers” or “mortgage brokers,” as well as subsidiaries of banks, savings and loan associations, savings banks, and credit unions, are authorized to make home equity loans in Texas.

Alston & Bird Observations

Proposition 2 is a welcome development that should enhance home equity lending in Texas by eliminating certain restrictions and making notable clarifications to the complex Texas constitutional provisions. Unfortunately, the amendments do not clarify the statute of limitation period for asserting claims or defenses under Section 50(a)(6). In the past, lenders and their assignees have relied on an absolute four-year statute of limitations period (four years from when the loan was originated). In other words, after four years of seasoning, the borrower was unable to raise a violation of the Section 50(a)(6) constitutional provision. In May 2016, however, the Texas Supreme Court ruled in effect that holders of Section 50(a)(6) loans could not rely on the four-year statute of limitations if there was in fact a violation of the statute. We had hoped that the Texas legislature would ultimately clarify this issue in its amendments.

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