

Title 7. Banking and Securities
Part 5. Office of Consumer Credit Commissioner
Chapter 89. Property Tax Lenders

The Finance Commission of Texas (commission) adopts amendments to §89.701 (relating to Sworn Document Authorizing Transfer of Tax Lien), and adopts new §89.805 (relating to Payoff for Property Tax Loan Secured by Multiple Properties) in 7 TAC, Chapter 89, concerning Property Tax Lenders.

The commission adopts the amendments to §89.701 without changes to the proposed text as published in the July 3, 2020, issue of the *Texas Register* (45 TexReg 4450).

The commission adopts new §89.805 with changes to the proposed text as published in the July 3, 2020, issue of the *Texas Register* (45 TexReg 4450).

The commission received one written comment on the proposal from the Independent Bankers Association of Texas, Texas Bankers Association, Texas Mortgage Bankers Association, Cornerstone Credit Union League, and Credit Union Coalition of Texas. The comment generally supports proposed new §89.805, but includes suggested changes regarding the effective date of the rule. The commission's response to this comment is included following the discussion of §89.805.

In general, the purpose of the amendments and new rule in 7 TAC Chapter 89 is to remove language suggesting that the sworn document must be recorded, and to specify requirements for payoff of a tax lien for an individual property (in the case of a property tax loan secured by multiple properties).

The OCCC distributed an early precomment draft of proposed changes to interested stakeholders for review, and then held a stakeholder meeting and webinar regarding the rule changes. Stakeholders provided feedback during the webinar, and the OCCC received nine informal precomments on the rule text draft. Based on this feedback, the OCCC distributed a revised precomment draft and received three additional precomments. The OCCC appreciates the thoughtful input provided by stakeholders.

Amendments to §89.701 would remove language suggesting that the sworn document must be recorded. Under Texas Tax Code, §32.06(a-1), in order to authorize a tax lien transfer from a taxing unit to a property tax lender, a property owner must execute a sworn document containing an authorization for payment of taxes, contact information for the property tax lender, and a description of the property, among other information. Before 2013, Texas Tax Code, §32.065(b)(4) required the sworn document to be recorded in the county's real property records. In 2013, the Texas Legislature passed SB 247, which removed this requirement. Currently, §89.701(a)(2) requires the sworn document to state "that after the document is recorded, it is to be returned to the transferee." Amendments to §89.701(a)(2) and the accompanying figure at §89.701(c) would amend this statement to remove the reference to recording. However, an amendment at §89.701(d)(4) would allow property tax lenders to include this reference if the sworn document will be recorded.

Adopted new §89.805 provides a method for calculating the amount for a lienholder or mortgage servicer to pay off an individual property, in the case of a property tax loan that is secured by more than one property. In other words, if a property tax loan is secured by properties A, B, and C, and another lienholder holds a lien on property A, the new rule describes how to calculate the amount that the lienholder will pay to release the tax lien on property A. This rule is intended to implement Texas Tax Code, §§32.06(f), 32.06(f-1), and 32.065(b-1), which describe situations where a lienholder or mortgage servicer can obtain a release of a transferred tax lien.

Texas Tax Code, §32.06(f) states: "The holder of a loan secured by a transferred tax lien that is delinquent for 90 consecutive days must send a notice of the delinquency by certified mail on or before the 120th day of delinquency or, if the 120th day is not a business day, on the next business day after the 120th day of delinquency, to any holder of a recorded preexisting lien on the property. The holder or mortgage servicer of a recorded preexisting lien on property encumbered by a tax lien transferred as provided by Subsection (b) is entitled, within six months after the date on which the notice is sent, to obtain a release of the transferred tax lien by paying the transferee of the tax lien the amount owed under the contract between the property owner and the transferee."

Texas Tax Code, §32.06(f-1) states in part: "If an obligation secured by a preexisting first lien on the property is delinquent for at least 90 consecutive days and the obligation has been referred to a collection specialist, the mortgage servicer or the holder of the first lien may send a notice of the delinquency to the transferee of a tax lien. The mortgage servicer or the first

lienholder is entitled, within six months after the date on which that notice is sent, to obtain a release of the transferred tax lien by paying the transferee of the tax lien the amount owed under the contract between the property owner and the transferee."

Texas Tax Code, §32.065(b-1) states: "On an event of default and notice of acceleration, the mortgage servicer of a recorded lien encumbering real property may obtain a release of a transferred tax lien on the property by paying the transferee of the tax lien or the holder of the tax lien the amount owed by the property owner to that transferee or holder."

In new §89.805, subsection (a) describes the scope of the rule, with citations to the three Texas Tax Code provisions containing rights of other lienholders to pay off tax liens. Subsection (c) explains that if a property tax loan is secured by more than one property, a property tax lender must allow a holder or mortgage servicer to obtain a release for an individual property, by paying the amount owed for the individual property. Subsection (d) describes the method for calculating the amount owed for the individual property. The method is based on the individual property's attributable percentage in relation to the total amount paid to taxing units or governmental entities in connection with the property tax loan. Subsection (d)(4) describes how to calculate post-closing costs that may be included in the payoff amount. Subsection (d)(5) describes the requirement to maintain records, and subsection (d)(6) explains that a property tax lender may charge a lien release fee for each individual property for which a lien is released.

New §89.805 is being adopted in response to complaints that the OCC received from banks, alleging that property

tax lenders overcharged them in connection with payoffs under the Texas Tax Code. Many of these disputes have involved overcharges by the property tax lender and failure to maintain documentation that adequately supports the payoff amount. In some cases, the complaint involved an assertion by the property tax lender that the bank had no right to pay off the tax lien for an individual property. The OCCC has expended significant staff resources to review records spanning multiple years and multiple properties, identify and remove unauthorized charges, and calculate appropriate payoff amounts. The OCCC hopes that the new rule will provide a standard calculation method to avoid these disputes.

As discussed earlier, the commission received one written comment on the proposal from the Independent Bankers Association of Texas, Texas Bankers Association, Texas Mortgage Bankers Association, Cornerstone Credit Union League, and Credit Union Coalition of Texas. The comment generally supports new §89.805, stating that the rule's methodology is a "practical solution" to the "dilemma" of "property tax loan payoffs in which a consensual lender with a lien on a single property was required to pay off liens on multiple properties in order to protect itself and obtain a release." However, the comment includes suggested changes regarding the effective date of §89.805. The comment states: "We strongly believe that this rule should apply to all payoffs requested after the effective date, not to property tax loans entered into after that date. This would impair existing, statutory property rights. . . . The effective date language is in the preamble rather than the rule. Because of that--and because we believe that it flies in the face of existing statutory rights--we urge you to

clarify this point and add it the rule when published."

In response to this comment, the adoption includes new §89.805(b) describing the effective date of the rule. Subsection (b) explains that §89.805 applies only to property tax loans entered on or after December 1, 2020. The commission believes that with this change, the rule will appropriately specify that the rule's calculation methodology applies to future property tax loans, without affecting statutory rights for existing property tax loans.

In informal precomments, stakeholders were mixed in whether they supported or opposed new §89.805. Some stakeholders, including an association of banks and a property tax lender, supported the new rule. Some property tax lenders suggested changes to the new rule, and some opposed the new rule. The adopted text includes several changes responding to suggestions from stakeholders in informal precomments. The stakeholders who suggested changes or opposed the rule focused mainly on seven issues.

First, stakeholders emphasized that §89.805 should apply only to payoffs by lienholders or mortgage servicers under Texas Tax Code, §§32.06(f), 32.06(f-1), and 32.065(b-1). In response to these precomments, §89.805(a) specifies that the rule applies only to these three situations.

Second, stakeholders requested confirmation that §89.805 would apply only to property tax loans entered on or after the rule's effective date. One stakeholder requested confirmation of this in the rule text itself. As discussed earlier, in response to these precomments and the official comment, new §89.805(b) specifies that the rule applies

only to property tax loans entered on or after December 1, 2020, and that the rule does not affect any statutory rights for property tax loans entered before that date.

Third, the precomment drafts included a requirement to disclose the specific dollar amount paid for each property to the property owner before closing. Stakeholders responded that it would be difficult to calculate specific dollar amounts paid for each property, and to list these amounts on a pre-closing disclosure. One stakeholder suggested that this amount could be identified later if needed. In response to these precomments, the adoption does not include this disclosure requirement.

Fourth, stakeholders requested that the rule specify that the lien release fee applies to each property. In response to this comment, §89.805(d)(6) specifies that the lien release fee applies to each individual property for which a lien is released.

Fifth, stakeholders requested that the rule allow property tax lenders to charge additional types of fees in connection with a payoff, such as attorney fees in bankruptcy to amend pleadings, update court documents, and restart cases, as well as attorney fees to complete a foreclosure. The OCCC believes that this issue is addressed by language in §89.805(d)(4) that allows a portion of post-closing costs described by Texas Finance Code, §351.0021. Any post-closing costs that are not expressly authorized by statute may not be included in the payoff amount.

Sixth, a stakeholder requested that refinances (i.e., new property tax loans that satisfy and replace previous property tax loans) be exempted from new §89.805. The commission declines to put this exemption into the rule. Texas Tax Code, §32.06 and

§32.065 do not contain any exemption for refinances. In addition, some of the complaints from banks, as described earlier, resulted from property tax loans that were refinances. Exempting refinances would not achieve the rule's intended purposes.

Seventh, some property tax lenders objected to the rule's core concept that a lienholder can pay off the tax lien for an individual property by paying the amounts associated with the individual property. These property tax lenders argued that the proposed rules would cause property tax lenders to enter fewer loans secured by multiple properties, and would cause property tax lenders to charge higher closing costs. One of these property tax lenders proposed an alternative interpretation of the payoff rights in Texas Tax Code, §§32.06(f), 32.06(f-1), and 32.065(b-1). This property tax lender noted that the Tax Code provisions require the lienholder to pay the "amount owed" for the property tax loan, and interpreted the phrase "amount owed" to mean the full amount owed for all properties under the property tax loan. Under this alternative interpretation, if a property tax loan is secured by properties A, B, and C, and another lienholder holds a lien on property A, the lienholder would have to pay off the full amount owed for properties A, B, and C in order to obtain a release of the tax lien for property A. This property tax lender argued that a lienholder is not entitled to a "partial release."

The commission and the OCCC disagree with this alternative interpretation, because it would frustrate the statutory rights of lienholders and servicers to pay off transferred tax liens. The payoff described in the rule is not a "partial release," but is a full release of the tax lien for an individual property. Texas Tax Code, §§32.06(f),

32.06(f-1), and 32.065(b-1) each refer to the "property" for which the lienholder holds the lien, and refer to the "amount owed" that must be paid in order to exercise the right to pay off the tax lien. The commission and the OCCC understand the phrase "amount owed" to refer to the amount owed for the individual property, and the new rule provides a way to calculate that amount. This reading appropriately enables lienholders to exercise the rights described by the Tax Code, so that they can consolidate amounts owed for the property, reduce costs associated with servicing obligations on the property, and potentially avoid foreclosure.

The proposed alternative interpretation would inappropriately shift costs and risks associated with the property tax loan onto other lienholders. If "amount owed" refers to the amount owed for all properties, this suggests that lienholders must pay amounts for properties with no connection to their liens, and that the property tax lender can receive the same amount multiple times by requiring multiple lienholders to pay the same amounts. The property tax lenders that object to the rule's core concept seem to be stating that, when they make property tax loans secured by multiple properties, they depend on their ability to restrain other lienholders from paying off individual properties, and depend on the extra revenue that results from lienholders having to pay off multiple properties. To the extent that these practices depend on holding property A captive to a payoff for properties B and C, these practices are not consistent with a lienholder's payoff rights under the Tax Code, and it is entirely appropriate for the rule to specify that these practices are prohibited.

The rule changes are adopted under Texas Finance Code, §351.007, which

authorizes the commission to adopt rules to ensure compliance with Texas Tax Code, §32.06 and §32.065, and Texas Finance Code, Chapter 351. In addition, Texas Tax Code, §32.06(a-4) authorizes the commission to adopt rules relating to the reasonableness of closing costs, fees, and other charges permitted under that section, and to prescribe the form and content of the sworn document by rule. Texas Finance Code, §351.0021 authorizes the commission to adopt rules implementing and interpreting that section, which describes limitations on post-closing costs. Texas Finance Code, §11.304 authorizes the commission to adopt rules to ensure compliance with Texas Finance Code, Title 4.

The statutory provisions affected by the adoption are contained in Texas Tax Code, Chapter 32 and Texas Finance Code, Chapter 351.

Subchapter G. Transfer of Tax Lien

§89.701. Sworn Document Authorizing Transfer of Tax Lien

(a) Required information. A sworn document containing all of the required information provided by this subsection meets the requirements of Texas Tax Code, §32.06(a-1). A sworn document under this section must contain the following information:

(1) (No change.)

(2) a statement that [after] the document [~~is recorded, it~~] is to be returned to the transferee;

(3) - (17) (No change.)

(b) (No change.)

(c) Standard sworn document. The standard sworn document under Texas Tax Code, §32.06(a-1) is presented in the following figure.

Figure: 7 TAC §89.701(c) {See attached amendments.}

(d) Permissible changes.

(1) Multiple account transfers. In the case of multiple account transfers, the information required by subsection (a)(6), (7), and (8) of this section may be provided in table or list format as an attachment to the standard form.

(2) Joint owners. In a transfer involving joint owners, additional signature blocks containing the information required by subsection (a)(6), (7), (8), (9), and (15) of this section may be attached to the standard form.

(3) Title. The title of the sworn document may be relocated to the top of the form.

(4) Statement on recording. If the transferee will record the sworn document in the real property records, the transferee may replace "Return to:" with "After recording, return to:" at the top of the form.

Subchapter H. Payoff Statements

§89.805. Payoff for Property Tax Loan Secured by Multiple Properties

(a) Purpose and scope. Under Texas Tax Code, §§32.06(f), 32.06(f-1), and §32.065(b-1), in certain situations where a property tax loan or preexisting mortgage is delinquent or in default, a holder or mortgage servicer of a

preexisting lien on a property is entitled to obtain a release of a transferred tax lien, by paying the amount owed under the contract between the property owner and the property tax lender. This section describes how to calculate the amount owed for an individual property where a property tax loan is secured by more than one property. This section applies only to:

(1) a payoff by the mortgage servicer or holder of a recorded preexisting lien due to the delinquency of a property tax loan under Texas Tax Code, §32.06(f);

(2) a payoff by the mortgage servicer or holder of a preexisting first lien due to the delinquency of the obligation secured by a preexisting first lien under Texas Tax Code, §32.06(f-1); and

(3) a payoff by the mortgage servicer of a recorded lien due to default and notice of acceleration of a property tax loan under Texas Tax Code, §32.065(b-1).

(b) Effective date. This section applies only to a property tax loan entered on or after December 1, 2020. This section does not affect any statutory rights of a lienholder for a property tax loan entered before December 1, 2020.

(c) Requirement to allow payoff. If a property tax loan is secured by more than one property, a property tax lender must allow a holder or mortgage servicer to obtain a release for an individual property in accordance with Texas Tax Code, §§32.06(f), 32.06(f-1), and §32.065(b-1), by paying the amount owed for the individual property.

(d) Amount owed for individual property.

(1) Calculation of amount owed. A property tax lender must calculate the amount owed for an individual property by adding:

(A) the outstanding principal balance of the loan, multiplied by the attributable percentage for the individual property;

(B) the outstanding interest for the loan, multiplied by the attributable percentage for the individual property;

(C) authorized post-closing costs that are not part of the principal balance, multiplied by the attributable percentage for the individual property, if the costs relate to the property tax loan generally; and

(D) authorized post-closing costs that are not part of the principal balance, if the costs relate specifically to the individual property.

(2) Attributable percentage. To calculate the attributable percentage for an individual property, a property tax lender must divide the total amount paid for the individual property by the total amount paid for all properties in connection with the property tax loan.

(A) A property tax lender must calculate the total amount paid for the individual property by adding:

(i) the total amount paid to taxing units or governmental entities for unpaid taxes, penalties, interest, and collection costs for the individual property in connection with the property tax loan, as shown on the tax receipt; and

(ii) in the case of a property tax loan that is a refinance, any amount paid

for the individual property, as shown on the pre-closing disclosure statement.

(B) A property tax lender must calculate the total amount paid for all properties by adding:

(i) the total amount paid to taxing units or governmental entities for unpaid taxes, penalties, interest, and collection costs for all properties in connection with the property tax loan, as shown on the tax receipts; and

(ii) in the case of a property tax loan that is a refinance, the amounts paid for all properties as shown on the pre-closing disclosure statement.

(3) Lower payoff amount. A property tax lender may allow a property owner, holder, or servicer to obtain a release for an amount that is lower than the amount described by paragraphs (1) and (2) of this subsection.

(4) Post-closing costs. A property tax lender may include authorized post-closing costs related solely to the individual property in the amount owed for the individual property. Post-closing costs related to other individual properties may not be included. Post-closing costs related generally to the property tax loan may be included if multiplied by the attributable percentage. If the property tax lender has charged a post-closing cost that is not expressly authorized by Texas Finance Code, §351.0021, then the property tax lender may not include the cost in the amount owed, and must refund the cost to the property owner.

(5) Recordkeeping. A property tax lender must maintain documentation showing how it calculated the attributable

percentage and the amount owed for the individual property. This documentation must be maintained in the property tax loan transaction file for the period described by §89.207 of this title (relating to Files and Records Required).

(6) Lien release fee. In addition to the amount owed for the individual property, a property tax lender may charge a lien release fee described by §89.602 (relating to Fee for Filing Release) for each individual property for which a lien is released.

Certification

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas on October 16, 2020.

Matthew J. Nance
Deputy General Counsel
Office of Consumer Credit Commissioner

Figure: 7 TAC §89.701(c)

STATE OF TEXAS
COUNTY OF

§
§
§
§

Return to:
(Insert TRANSFEREE'S NAME)
(Insert TRANSFEREE'S
STREET ADDRESS)

SWORN DOCUMENT AUTHORIZING TRANSFER OF TAX LIEN

Before me, the undersigned notary, on this day personally appeared (Insert NAME(S) OF OWNER(S) OR AUTHORIZED REPRESENTATIVE(S)), known to me to be the person(s) whose name(s) is/are subscribed below, and being duly sworn, upon oath deposed and stated as follows:

"My name is (Insert NAME(S) OF OWNER(S) OR AUTHORIZED REPRESENTATIVE(S)). I am over 18 years of age and am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct. I or the entity I represent owns the real property described as follows:

Account No. or Property ID No.: _____
Legal Description: _____
Street Address, if applicable: _____
Amount Paid for Transfer (including taxes, penalties,
interest, and collection costs): \$ _____
Tax Years: _____
Transferee's Name: _____
OCCC Property Tax License Lender No.: _____
OR Exemption Information: _____
Transferee's Street Address: _____

"Pursuant to Texas Tax Code §32.06, I hereby authorize the above-named transferee or transferee's agent (the "Transferee"), to pay all taxes, penalties, interest, and collection costs imposed by any and all local taxing units or their agents on the real property, described above, for the tax years listed above. I further authorize and direct the tax assessor-collector(s) for said taxing units to issue a tax receipt with the collector's seal of office or notarized signature to the Transferee and to certify that the taxes and any penalties and interest on the subject property and collection costs have been paid by the transferee on behalf of the owner, and the tax lien on the owner's property has been transferred to the Transferee.

"I have been given notice that if this property is my homestead and I am disabled, I may be eligible for a tax deferral under Texas Tax Code §33.06."

Property Owner _____
OR Authorized Representative: Signature _____ Date Signed _____
Printed Name _____ Representative Capacity (if applicable) _____

(Insert NOTARY'S SEAL)

SUBSCRIBED AND SWORN TO BEFORE ME on this, the _____ day of _____, 20____.

Notary Public, State of Texas