



Office of the Attorney General
State of Texas

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March 24, 1994

Honorable Mark W. Stiles
Chair
Calendars Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 94-029

Re: Whether independent mortgage brokers are
subject to chapter 18 of the Business and
Commerce Code (ID# 23655)

Dear Representative Stiles:

You have asked us to consider whether section 18.02(b) of the Business and Commerce Code exempts independent mortgage brokers from the requirements of chapter 18. You appear to be especially interested in the exemption that subsection (b)(9) provides, although you do not limit your inquiry to that exemption.

The legislature originally enacted chapter 18 of the Business and Commerce Code in 1987, *see* Acts 1987, 70th Leg., ch. 764, § 1, at 2716, to remedy the following situation:

The Federal Fair Credit Reporting Act, passed in 1970, entitles consumers who are denied credit based on a credit report the right to review and correct the contents of their credit file at no charge. Reportedly, consumers have paid extensive fees to companies to investigate their credit records. There is a concern that the consumer is misled by some operators who promise to solve consumer credit woes and clean up a bad credit history.

House Comm. on Business and Commerce, Bill Analysis, C.S.H.B. 742, 70th Leg. (1987). Chapter 18 thus regulates credit services organizations by prohibiting certain conduct, *see* Bus. & Com. Code § 18.03, requiring credit services organizations to register with the secretary of state, *see id.* § 18.05, requiring credit services organizations to disclose certain information to buyers, *see id.* § 18.06, and providing buyers with remedies, *see id.* §§ 18.08, 18.09, 18.15. Section 18.02 defines "credit services organization" as

a person¹ who, with respect to the extension of credit by others² and in return for the payment of money or other valuable consideration,

¹Under the Code Construction Act, the word "person" includes a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." Gov't Code § 311.005(2).

provides, or represents that the person can or will provide, any of the following services:

- (1) improving a buyer's³ credit record, history, or rating;
- (2) obtaining an extension of credit for a buyer; or
- (3) providing advice or assistance to a buyer with regard to Subdivision (1) or (2) of this subsection. [Footnotes added.]

Section 18.02(b) exempts several entities from chapter 18. As originally enacted, subsection (b) exempted the following:

(1) a person authorized to make loans or extensions of credit under the laws of this state or the United States who is subject to regulation and supervision by this state or the United States, or a lender approved by the United States secretary of housing and urban development for participation in a mortgage insurance program under the National Housing Act (12 U.S.C. Section 1701 et seq.);

(2) a bank or savings and loan association whose deposits or accounts are eligible for insurance by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation, or a subsidiary of such a bank or savings and loan association;

(3) a credit union doing business in this state;

(4) a nonprofit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986;

(5) a person licensed as a real estate broker or salesman under The Real Estate License Act (Article 6573a, Vernon's Texas Civil Statutes) acting within the course and scope of that license;

(6) a person licensed to practice law in this state acting within the course and scope of the person's practice as an attorney;

(7) a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission acting within the course and scope of that regulation; and

²For purposes of chapter 18 of the Business and Credit Code, the term "extension of credit" refers to "the right to defer payment of debt or to incur debt and defer its payment offered or granted primarily for personal, family, or household purposes." Bus. & Com. Code § 18.01(3).

³Section 18.01(1) of the Business and Commerce Code defines "buyer" as an individual whom a credit services organization solicits to purchase its services or who purchases such services.

(8) a consumer reporting agency.⁴ [Footnote added.]

In 1989 the legislature added a ninth exemption, subsection (b)(9): "a person whose primary business is making loans secured by liens on real property." See Acts 1989, 71st Leg., ch. 767, § 1, at 3366, 3366. We found no legislative history indicating the legislature's purpose in enacting this ninth exemption.⁵ Given the clear language of the exemption, however, we need not rely on extrinsic materials to determine what the legislature intended the ninth exemption to mean. See *Lumbermen's Underwriters v. State Bd. of Ins.*, 502 S.W.2d 217, 219 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) (citing 53 TEX. JUR. 2d *Statutes* § 125, at 182 n.17) (stating that, when legislature plainly has expressed its intent in language of statute, intent must be effectuated without attempting to construe or interpret law).

We assume, as you appear to, that an independent mortgage broker is a credit services organization within the scope of section 18.02(a). None of the exemptions listed in section 18.02(b) of the Business and Commerce Code explicitly exempts independent mortgage brokers. Consequently, the determination of whether a particular mortgage broker is exempt from chapter 18 will depend on whether the mortgage broker falls within one of the exemptions to chapter 18 listed in section 18.02(b). Such a determination requires the resolution of fact questions and is therefore beyond the scope of the opinion process. For example, whether a particular independent mortgage broker's *primary* business is making loans secured by liens on real property, and the independent mortgage broker is therefore exempt from chapter 18 of the Business and Commerce Code, is a question requiring the resolution of facts.

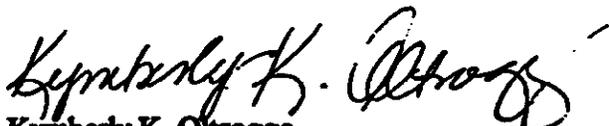
⁴In the context of chapter 18 of the Business and Commerce Code, the phrase "consumer reporting agency" has the meaning that section 603(f) of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681a(f), assigns to it. *Id.* § 18.01(2).

⁵You included with your request letter to this office a letter from Mr. D. Barry Connelly, one of the co-sponsors of House Bill 1450, which among other things, when enacted, amended section 18.02(b) of the Business and Commerce Code by adding the ninth exemption. Mr. Connelly explains that "[o]ne of the main purposes of the Amendment was to clearly exempt mortgage bankers and mortgage brokers from the Act, since it did not apply to their activities, and they were not credit service organizations." A legislator's after-the-fact statement about the intent of particular enacted legislation cannot be used to prove the intent of the enactment. See *State of Texas v. United States*, 951 F.2d 645, 650 (5th Cir. 1992) (citing *Bread Political Action Comm. v. Federal Election Comm.*, 455 U.S. 577 (1982), and *Regional Rail Reorg. Act Cases*, 419 U.S. 102 (1974)) (stating that single legislator's after-the-fact statement is not entitled to probative weight in determining legislative intent), *reversed on other grounds*, 113 S. Ct. 1631 (1993); see also *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir.) (stating that legislator's speech asserting intent of prior legislative enactment is not part of legislative history of original enactment), *cert. denied*, 449 U.S. 889 (1980).

S U M M A R Y

Assuming that an independent mortgage broker is a credit services organization within the scope of section 18.02(a) of the Business and Commerce Code, a particular mortgage broker is exempt from chapter 18 only if the mortgage broker falls within one of the exemptions to chapter 18 listed in section 18.02(b). Such a determination requires the resolution of fact questions. For example, whether a particular independent mortgage broker's *primary* business is making loans secured by liens on real property, and the independent mortgage broker is therefore exempt from chapter 18 of the Business and Commerce Code under section 18.02(b)(9), is a question requiring the resolution of facts.

Yours very truly,



Kimberly K. Oltrogge
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Opinion Committee