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**Regulating the Financers: Dodd- Frank and Oregon Licensing  
Requirements**

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Lauren E. Winters, Senior Policy Analyst  
(503) 947-7039  
lauren.e.winters@state.or.us

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**IMPORTANT INFORMATION ABOUT THIS  
PRESENTATION**

This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such.

This presentation is not intended to address all relevant legal developments or situations relating to mortgage reform or foreclosures.

**Topic**

- Introduction - DCBS, DFCS
- ORS 86A Licensing Requirements
- Seller Carry Financing
  - ❖ House Bill 2856
  - ❖ House Bill 3482
- Federal Mortgage Reform
  - ❖ SAFE Act and the SAFE Act Final Rule
  - ❖ The Dodd-Frank Act and CFPB Final Rules
  - ❖ Marketing Service Agreements

**Notes:**

## **DCBS, DFCS – Who We Are**

Protecting and serving Oregon’s consumers and workers while supporting a positive business climate in the state. The role of DFCS is to ensure that a wide-range of financial services and products are provided to Oregonians in a safe, sound, equitable, and fraud-free manner.

- State-Chartered Banks and Credit Unions
- Mortgage Lending
- Securities
- Debt Relief
- Short-term Loans
- Financial Consumer Protection Laws

## **SAFE Act Overview**

In 2008, the Federal government passed the **Secure and Fair Enforcement for Mortgage Licensing (SAFE) Act** to “enhance consumer protection and reduce fraud” and mandated that **states adopt minimum licensing requirements** for “residential real estate transactions.” The SAFE Act requires every loan originator to be **licensed under state law** unless the loan originator is a “registered” mortgage loan originator.

The definition of a “registered” mortgage loan originator includes the **“employee of a depository institution or a subsidiary of a depository institution that is owned or controlled by a depository institution** and is regulated by a federal banking agency.”

## **Subsidiary Licensing Requirements**

The **Dodd- Frank Wall Street Reform and Consumer Protection (Dodd- Frank) Act of 2010** overruled case law, including a Supreme Court decision, that gave the operating subsidiaries and affiliates of national banks the same preemption protection enjoyed by national banks.

It also subjects federally chartered savings banks and federally-regulated savings associations to the same preemption national bank preemption standards.

The Dodd-Frank Act repeal of these preemption protections for operating subsidiaries and affiliates of national banks means that a subsidiary or affiliate of a national bank or federal savings association must comply with state licensing laws **unless those laws provide an exemption from licensing requirements.**

HB 2239 amended the licensing exemption for national bank subsidiaries contained in the definitions of “mortgage banker” under Oregon Revised Statutes (ORS) 86A.100(3)(b)(B) and “mortgage broker” under ORS 86A.100(5)(b)(B). This means that, beginning **January 1, 2014**, the operating subsidiary or affiliate of a national bank or federal savings association must comply with the licensing provisions contained in ORS 86A.103 to engage in residential real estate transactions in Oregon.

#### **Licensing Requirements under ORS Chapter 86A**

**Remember:** ORS Chapter 86A governs the **residential mortgage lending activities of companies** (ORS 86A.095 to 86A.198) and the **mortgage lending activities of individuals** (ORS 86A.200 to 86A.239).

**ORS 86A.103(1)** prohibits a “**person**” from engaging in residential mortgage transactions as a “mortgage banker” or “mortgage broker” unless they are licensed under ORS 86A.095 to 86A.198.

**ORS 86A.100(8)** triggers the licensing requirements and defines “residential mortgage transaction” as “a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is **created or retained in property upon which four or fewer residential dwelling units are planned or situated . . . .**”

#### **Loan Originator Licensing Requirements**

Oregon law governing the **licensing of mortgage loan originators** must be consistent with and not contrary to the SAFE Act and **the SAFE Act Final Rule, 12 CFR Part 1008 (Regulation H)**. The SAFE Act and related rules **establish the minimum floor** for the state regulation of loan originators and **require States to meet or exceed SAFE Act licensing requirements.**

## **Differences between State and Federal Law**

The Oregon definition of “residential mortgage loan” is **broader than the federal definition** of “residential mortgage loan” contained in the federal SAFE Act or in state SAFE Acts that incorporated the federal definition. For example, the SAFE Act and the Texas version of the SAFE Act define “residential mortgage loan” as “a loan primarily for personal, family, or household use.”

**ORS 86A.100(8) and ORS 86A.200(8)** define “residential mortgage transaction” and “residential mortgage loan” as a loan that is secured by a mortgage, deed of trust or equivalent consensual security interest on **four or fewer residential dwelling units**, including but not limited to individual dwelling units, mobile homes, condominiums or cooperatives that **are planned for or situated on real property in this state.**”

### **Private Money Lenders**

A licensing exemption exists for **an individual engaged in private money lending** if the individual makes less than 10 loans secured by an interest in residential real estate during any consecutive 12-month period and does not advertise or otherwise hold itself out as being in the business of making mortgage loans. **OAR 441-0860-0130.**

**The individual would still need an Oregon licensed loan originator to take the application or negotiate the terms or conditions of a residential real estate loan.**

### **Real Estate Professionals**

**ORS 86A.100(5)(b)(D)** provides a licensing exemption for a **real estate professional who performs services solely incidental** to the practice of professional real estate activity as defined in ORS 696.010 unless the real estate licensee **performs the functions of a mortgage banker or a mortgage broker.**

**ORS 86A.100(5)(a)(C)** defines “mortgage broker” as a person who for compensation . . . **either directly or indirectly makes, negotiates or offers to make or negotiate a mortgage loan.**

**ORS 86A.200(4)(b)(B)** provides a licensing exemption for a real estate professional unless the

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### CONTACT INFORMATION



**Grant Norling, MAI**

Senior Valuation Services Director  
+1 503 542 5416  
Grant.Norling@colliers.com  
Retail & Hospitality



**Jeff Grose, MAI**

Executive Managing Director  
+1 503 542 5411  
Jeff.Grose@colliers.com  
Industrial & Office



**Jeremy Snow, MAI**

Senior Valuation Services Director  
+1 503 542 5409  
Jeremy.Snow@colliers.com  
Multi Family



**Brian Kelley, MAI**

Senior Valuation Services Director  
+1 503 542 5412  
Brian.Kelley@colliers.com  
Development Land & Subdivision

**Portland Office \*New Address**

851 SW 6th Avenue, Suite 1200  
Portland, OR 97204

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individual is **compensated** by a mortgage banker, mortgage broker, mortgage loan originator or lender or an agent of a mortgage banker, mortgage broker, mortgage loan originator or lender.

### **Attorney Licensing Exemption**

**ORS 86A.100(5)(b)(G) and 86A.203(2)(d)** provide an exemption for Oregon licensed attorneys under very narrowly defined circumstances (the activity is **ancillary to the attorney's representation** of a client, and the attorney does not receive compensation from a **mortgage banker, mortgage broker, mortgage loan originator or lender** (or their agents).

“Ancillary” is not statutorily defined; however, consistent with other jurisdictions, **the term is construed to mean that the transaction occurred while the attorney is representing the client on an independent matter.**

### **Seller Carry Financing**

Typical Seller Carry Terms: The seller agrees to finance the sale of the property in exchange for receiving monthly installments based on a 30-year amortization schedule with interest at the rate of five percent and a balloon payment due five years from the date of closing. The transaction may cover the **full amount** of the purchase price, and it may provide financing to cover the **“short fall” between a conventional first loan and the full purchase price.**

### **Seller Carry Licensing Requirements**

**ORS 86A.203(1) and 86A.200(4)(a)** require an individual to have a loan originator license if the person takes a “residential mortgage loan application” or negotiates the terms or conditions of a “residential mortgage loan” unless an exemption applies.

**ORS 86A.203(2)(b)** provides a licensing exemption for an individual who offers or negotiates terms of a residential mortgage loan with or on behalf of the individual's spouse, child, sibling, parent, grandparent, grandchild or a relative in a similar relationship with the individual that is created by law, marriage or adoption.

**ORS 86A.203(2)(c)** provides a licensing exemption for an individual who offers or negotiates terms of

a residential mortgage loan that is secured by the individual's primary residence.

**House Bill 2856** amended ORS 86A.203 and provides a licensing exemption for an individual who offers or negotiates terms of a residential mortgage loan that is secured by property that is not the individual's primary residence if the individual **makes less than 3 loans during any consecutive 12- month period and does not hold more than 8 residential mortgage loans at any one time.**

This means that, beginning **September 3, 2013**, an individual selling investment property or a vacation home does not need a mortgage loan originator license to take an application or negotiate the terms or conditions of a residential mortgage loan that is secured by the property.

**House Bill 3482** contains similar licensing exemptions for individual manufactured structure dealers subject to the following conditions: Three are fewer transactions for individual licensees in a calendar year, and five are fewer transactions for individuals holding a limited dealer license with no more than 12 loans at any one time. **Effective date June 18, 2013.**

**What is the effect of House Bill 2856 upon real estate brokers and agents?** The exemption does not apply to real estate brokers and agents.

This means that a real estate broker or agent may not "take an application" for seller-carry financing or "negotiate the terms and conditions" of the seller carry transaction. **The seller must retain the services of an Oregon licensed loan originator to take the application or negotiate the terms or conditions of the seller carry loan if the seller uses a third- party to facilitate the transaction.**

A real estate broker or agent can note that the seller is willing to provide seller-carry financing in the listing remarks; however, **the real estate broker or agent is prohibited from stating or discussing potential terms with third parties unless** the real estate broker or agent is an Oregon

licensed mortgage broker or loan originator. Likewise, a real estate broker or agent may include the financing terms in the purchase and sale documents.

### **The Dodd- Frank ACT And Seller Carry Loans**

The definition of “mortgage originator” under Section 1401 of the Dodd-Frank Act is broader than the SAFE Act definition.

Section 1401 of the Dodd-Frank Act defines “mortgage originator” as **any person who, for (or in the expectation of) direct or indirect compensation or gain:**

- takes a residential mortgage loan application;
- **assists a consumer in obtaining or applying to obtain a residential mortgage loan** (e.g., advising on loan terms, preparing loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage); or
- offers or negotiates terms of a residential mortgage loan.

Section 1403 of the Dodd-Frank Act, as implemented by **15 U.S.C. § 1639b(c) and Regulation Z, 12 C.F.R. § 1026.36**, prohibits a mortgage originator from **directly or indirectly receiving compensation based on the transaction’s terms or conditions or proxies** for such terms and conditions.

In short, a mortgage originator may not “steer” a consumer into a credit transaction on the basis that the originator will receive more compensation from the creditor (i.e., a seller of the residential real estate) than would be received in a different transaction unless the transaction is **in the best interest of the consumer**.

Regulation Z defines “compensation” as, among other things, salaries, **commissions**, bonuses, awards, and any **financial or similar incentives** based on the terms or conditions of the loan.

### **Seller Carry Rules under the Dodd- Frank Act**

On **January 22, 2013**, the Consumer Financial Protection Bureau (CFPB) issued the final mortgage originator compensation rule, amending Regulation Z, which implements the Truth in



Lending Act. **The effective date of the rule is January 10, 2014.** The final rule continues the prohibition on receiving compensation based on the **profitability of a transaction, the interest rate, or any other term of a transaction.**

The final rule **prohibits a person from steering a consumer into a non-prime loan that provides more compensation to the person than a prime loan that the consumer could obtain from a different creditor** unless the consummated non-prime loan is in the **consumer's best interest.**

### **Section 1403 Unanswered Questions**

Do the steering prohibitions and requirements apply if the real estate licensee's commission does not increase based on a term or condition of the seller carry financing?

Does the steering prohibition apply if, **but for** steering a buyer who could qualify for a "prime" loan into a seller carry "sub-prime" loan, the real estate licensee would not have received a real estate commission?

Does the real estate licensee have to determine that the seller carry transaction is **in the best interest of the buyer?**

**The best advice?** It is unlikely that a real estate broker will fall within the steering prohibitions contained in Section 1403 of the Dodd-Frank Act and the related final rule if the real estate broker's compensation is only for services as the listing broker and is commensurate with listings where seller financing is not involved.

### **Seller Carry Steering Exemptions**

The prohibitions contained in Section 1403 and the final rule do not apply to seller carry financings if the mortgage originator (i.e., the seller of residential real estate) provides seller financing for the sale of **three or fewer properties in any 12-month period and the following conditions are met:**

- The seller did not construct the home;
- The loan is fully amortizing;
- The seller reasonably determines that the buyer can repay the loan;
  
- The loan has a fixed rate or adjustable rate

that is adjustable after 5 or more years.

### **Ability- to- Repay Requirements**

On **January 10, 2013**, the CFPB issued the final rules implementing Sections 1411, 1412, and 1414 of the Dodd-Frank Act, amending TILA (collectively, Final TILA Rule). **The Final TILA Rule takes effect on January 10, 2014.** The Final TILA Rule follows the statutory mandates contained in the Dodd-Frank Act and requires **“creditors” to assess a consumer’s ability to repay before they make a residential mortgage loan.**

The Final TILA Rule defines the term “qualified mortgage” and creates a presumption that a creditor satisfies the ability-to-repay requirements if the loan falls within the definition of a “qualified mortgage” as set forth in the Final TILA Rule.

Section 1411 of the Dodd-Frank Act defines the term “creditor” as **a person who extends consumer credit more than five (5) times in a calendar year.**

### **What is a qualified mortgage?**

Under Section 1412 of the Dodd-Frank Act and the related final rule, a qualified mortgage is:

- A loan that does not feature negative amortization, interest-only payments, balloon payments, or a term exceeding 30 years;
- A loan in which the total points and fees do not exceed three percent of the total loan amount for loans over \$100,000 (with provision for a sliding scale of acceptable caps on fees for lesser loan amounts); and
- A loan in which the borrower’s income or assets are verified and documented.
- A loan that is originated and held by small creditors operating predominantly in rural or underserved areas is exempt from the prohibition on balloon payments.

**The Rebuttable Presumption** applies only to higher-priced mortgage loans. Legally, **lenders that offer these loans are presumed to have determined that the borrower had an ability to repay the loan.**

A consumer can challenge that presumption by

proving that **the consumer did not, in fact, have sufficient income to pay the mortgage and other living expenses**, and that the lender did not **evaluate** the consumer's ability to repay the loan.

### **Ability to Repay**

Mortgage lenders must **verify the borrower's income, using reasonably reliable third-party records**.

Mortgage lenders should consider the following **eight underwriting factors**:

- Current or reasonably expected income or assets;
- Current employment status;
- The monthly payment on the loan;
- The monthly payment on any simultaneous loan;
- The monthly payment for mortgage-related obligations;
- Current debt obligations, alimony, and child support;
- The monthly debt-to-income ratio, or residual income; and
- Credit history

### **Real estate broker risks in complying with the new federal mortgage reforms.**

How will a real estate broker know whether the seller in a seller carry transaction qualifies for the new licensing exemption contained in ORS 86A.203?

How will a real estate broker know that a seller in a seller carry transaction reasonably determined that the buyer is able to repay the loan as required under Section 1403 of the Dodd-Frank Act and the related final rule?

How will a real estate broker know that a seller in a seller carry transaction has not provided financing more than five (5) times in a calendar year?