**Arizona Association of REALTORS®**



**Essential Skills for a Successful Closing**

**Certification Core Course**

**Instructor Manual**

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**Course Introduction and Learning Objectives**

**Introduction**

This course addresses risk management topics and issues related to handling the

financing, escrow and title aspects of real estate transactions. While often considered

traditional and fundamental parts of every transaction, the manner in which

transactional financing is secured and escrow instructions are set forth plays a critical

role in how the parties’ obligations may be enforced by Arizona courts. A complete

understanding of how the existing case law in Arizona serves to distinguish contractual

obligations from compliance with escrow instructions is a vital element in providing the

highest level of service to your clients, while reducing risk and liability for the parties,

salespersons and brokers involved.

This course accompanies *Arizona Real Estate: A Professional’s Guide to Law and Practice,* by K. Michelle Lind, Esq., General Counsel for the Arizona Association of REALTORS®. Portions of this course have been reprinted from the text. It is highly recommended that students read the full text to gain an understanding of the complexities involved in every real estate transaction. (Note: A second edition of the book was published in 2011)

**Learning Objectives**

*Upon completion of this course, students will be able to:*

• Explain differences in the types of lenders and identify red flags that may indicate predatory lending practices.

• Identify the benefits and risk-reducing functions of the Pre-Qualification and Loan Status Update (LSU) forms provided by AAR.

• Describe the relationship between a sales contract and escrow instructions.

• Identify the risks associated with the provisions of the Commitment for Title

Insurance form.

• Explain potential post-closing risks associated with inadequate title insurance

and forfeiture of a property due to nonpayment.

**Unit 1: Choosing a Lender**

***Timing: 30 minutes total for this unit***

**Learning Objectives:**

• To explain the difference between a mortgage broker and a mortgage banker

• To describe “red flags” that may indicate predatory lending practices

• To describe the disclosures related to transaction financing allowed under the

Privacy Acts

(caution- don’t go into new TRID related content here as it is covered in Unit 2)

**1-1: Lender – Mortgage Broker or Mortgage Banker**

***What risks are associated with failing to understand the difference in how***

***transactions are financed by mortgage brokers and mortgage bankers?***

*Buyers’ failure to obtain financing*

*Failure to provide adequate guidance for a buyer with low to moderate income or less than perfect credit history*

*Others…*

***What’s the difference between a mortgage banker and a mortgage broker?***

A mortgage banker originates, underwrites and funds the loan. A mortgage broker

originates the loan and handles the application but doesn’t underwrite or fund the loan.

***What are some advantages of using a mortgage banker?***

*Trusted name, bigger company*

*Clients may be able to use a bank they already have a relationship with*

*Mortgage bankers may end up actually servicing the payments themselves*

*Others…*

***What are some advantages of using a mortgage broker?***

*May offer more options for a buyer with low to moderate income or less than*

*perfect credit history*

*Often provide more personal attention*

*Will “shop” a variety of products to find the best loan*

*Others…*

**1-2: Identifying Predatory Lending Practices**

***What risks are associated with failing to recognize red flags associated***

***with predatory lending practices?***

*• Transaction may not close*

*• Liability associated with illegal financing practices*

*• Unknowing participation in fraudulent lending practices*

*• Others…*

***What are some red flags that may indicate predatory lending practices?***

*• Offers of cash back after closing*

*• Loan terms much less favorable than advertised*

*• Loans offered for more than the property is worth*

*• Large prepayment penalties*

*• Interest rates much higher than the market average*

*• Exorbitant fees or points due at closing*

*• Lenders failing to fully explain loan terms*

*• Pressure to close quickly*

*• Pressure to inflate income or asset value*

*• Pressure to sign over the deed to a home*

*• Loan documents that differ from what the client was told*

*• Others…*

***How can you help your clients avoid predatory lending practices?***

*• Encourage them to “shop” at least three lenders*

*• Carefully review loan documents*

*• Verify that the lender is licensed and doesn’t have a disciplinary record (you can*

*find this information by contacting the Department of Financial Institutions)*

*• Ensure all the client’s questions related to the loan terms have been answered*

*to their satisfaction*

*• Others…*

**1-3: The Privacy Act**

***What risks are associated with failing to understand the “privacy act”?***

*• Failing to understand the allowed disclosures*

*• Failing to make required disclosures regarding the buyer’s ability to obtain*

*financing*

*• Others…*

***What disclosures are prohibited by the Gramm-Leach-Bliley (GLB) Act?***

*• Disclosure of any nonpublic personal information to a nonaffiliated third party*

*(except under certain circumstances)*

***What types of disclosures are allowed under the GLB Act?***

*• Those necessary to complete a transaction authorized by the consumer*

*• Those made at the consumer’s direction or with their consent*

***What does this mean in practice?***

The lender is not prohibited from disclosing information to the brokers or parties

Involved related to the status of the proposed financing.

***How are brokers and salespersons protected by making the required***

***disclosures regarding financing?***

*• The buyer’s ability to obtain financing is considered material to the transaction*

*and has been deemed NOT confidential by Arizona courts*

*• Article 2 of the REALTOR® Code of Ethics also requires disclosure of facts*

*material to the transaction*

*• Others…*

**Unit 2: The Loan Process**

***Timing: 1 hour, 45 minutes total for this unit***

**Learning Objectives:**

* Will be able to explain the new roles of the REALTOR, lender and escrow in the transaction processing after October 3, 2015

• Will describe the risks associated with failing to properly use the Loan Status

Update (LSU) form

* Will describe the purpose of the Loan Estimate and Closing Disclosure forms

• Will explain what risks are addressed by the Loan Status Update (LSU) form

Understanding The New Roles:

**CREDITOR (LENDER)**

* Collaborate with Settlement Service Provider to collect data
* Deliver the Loan Estimate and Closing Disclosure forms to Buyer
* Liable for the accuracy of information on the Loan Estimate and Closing Disclosure forms
* Increased communication and collaboration with the settlement service provider

**SETTLEMENT SERVICE PROVIDER (ESCROW)**

* Increased communication and collaboration with the creditor (lender)
* Facilitate close of escrow
* Open Escrow
* Settlement Agent still must prepare and provide Settlement Statement to seller

**REALTORS®**

Buyers and sellers will be looking to the REALTOR® for general information about the new rules and forms involved in processing and closing their transactions. REALTORS® should be informed enough to:

* Verify creditor/lender has current purchase contract and any pertinent addenda
* Review Settlement Statement – discuss with client timing and costs
* Direct clients to appropriate individuals for information for loan terms and closing information
* Know who will prepare the Closing Disclosure and deliver the Closing Disclosure (coordinated communication strategies with lender and escrow agent)
* Be aware of whether closings will be impacted by disclosure delivery rules
* Identify any settlement fees that may need to be adjusted at closing
* Manage the escrow process, to ensure done in a timely manner

**2-1: The 2015 Pre-Qualification Form**

***Timing: 5 min***

***What is the purpose of the Pre-Qualification Form?***

Informs the seller whether the buyer has consulted with a lender

Describes the loan buyer can qualify for

Allows the seller to evaluate the buyer’s ability to obtain the necessary financing

**Revisions to Pre-Qualification Form - Released Sept 2015:**

***For your seller-clients, how do you explain the Pre-Qualification Form?***

*• It helps them better evaluate a buyer’s offer.*

*• It may help them determine which offer is more attractive in a multiple offer situation.*

*• It can help them identify possible indications of a buyer’s inability to obtain financing.*

*• It gives them an indication of the buyer’s seriousness and commitment.to fulfilling their obligations in the transaction.*

***For the buyer, what are the advantages of using the Pre-Qualification Form?***

* *It is required by the Purchase Contract*

*It improves the attractiveness of the buyer’s offer.*

*It encourages the buyer to take the necessary steps to start the financing*

*process.*

*It can potentially “swing” a seller in their direction in a multiple offer situation.*

*It can help prepare the buyer for the lending process.*

*It encourages the buyer to meet with a lender early, giving the more time*

*to take note of any “red flags” that may alert them to possible predatory*

*lending practices.*

***Do buyers have to get pre-qualified before submitting an offer?***

The Pre-Qualification Form is now required to be submitted in conjunction with the Residential Resale Real Estate Purchase Contract (Contract) at the time of offer. If a buyer has not consulted with a lender when submitting a Contract, the buyer should simply check the box at line 3 and complete only lines 4-5.

Line 54 of the Residential Resale Real Estate Purchase Contract now requires that an AAR Pre-Qualification Form be attached to the Contract. What should the buyer do if they have not yet obtained a Pre-Qualification form, but nonetheless wish to submit a purchase offer?  
Under these circumstances, the buyer should indicate on line three of the Pre-Qualification Form that “Buyer HAS NOT consulted with a lender.” The buyer should then print their name on line four and sign and date on line five. If the box on line three is marked, the buyer does not complete lines six through 42 of the Pre-Qualification Form.

**2-2: The 2015 Loan Status Update (LSU) Form**

***Timing: 15 min***

**Revisions to the LSU – Released September 2015**

The initial LSU must be delivered within “ten (10) days after Contract acceptance” instead of “five (5)” days.

The reason for this is because TRID requires that a Loan Estimate must be completed by the lender and provided to the borrower three days after the borrower provides to the lender six pieces of information (loan application). And, because lenders have to abide by this timeframe, providing the LSU within five days of contract acceptance would prove very difficult.

Page 2 of the LSU now identifies additional steps in the lending process: (1) the lender receiving the six loan application pieces of information from the buyer; (2) the lender sending the buyer the Loan Estimate; (3) the buyer indicating to the lender an intent to proceed with that lender; (4) the lender providing a Closing Disclosure to the buyer; and (5) the buyer’s receipt of the Closing Disclosure from the lender.

***What risks are associated with failing to properly use the LSU form?***

*The buyer’s failure to convey the LSU may render them in breach of contract*

*The buyer’s obligation to perform is contingent upon obtaining loan approval for the loan described in the LSU.*

*If there’s no LSU, no loan terms are included in the contract, which creates an ambiguity in the loan contingency terms.*

*Others…*

***How does the LSU address risks for seller-clients?***

*It can help them evaluate whether the transaction will close escrow, and if so, whether it will close on time*

*It can help them identify possible indications of a buyer’s inability to obtain financing*

*It gives them an indication of the buyer’s seriousness and commitment to*

*fulfilling their obligations in the transaction.*

***How does the LSU benefit buyer-clients?***

*It demonstrates to the seller their commitment to the transaction*

*It allows them to gauge whether they will be in a position to timely close escrow*

*It helps them better understand the loan process*

**When must the buyer first deliver to seller a completed Loan Status Update?**As evidenced by Section 2e of the Residential Resale Real Estate Purchase Contract, an initial Loan Status Update must be delivered to the seller “within ten days after Contract acceptance.” This is a change from the prior Residential Resale Real Estate Purchase Contract, which required initial delivery of the Loan Status Update within five days after Contract acceptance.

**What should a buyer do if their lender refuses to complete a Loan Status Update?**As is currently the case, the buyer should complete, at a minimum, lines 1-40 of the Loan Status Update. The failure of the buyer’s lender to complete the Loan Status Update is not a potential breach and, therefore, not subject to a cure period notice because the lender is not a party to the Contract.

**Line 39 of the Loan Status Update states “Buyer commits to work with the above referenced Lender on the terms described herein.” Is the term “commits to work with” synonymous with the term “intends to proceed” as used in 12 CFR §1026.19?**No. Intends to proceed is a defined term of art by which a borrower communicates to the lender that they choose to proceed with the loan transaction after having received the Loan Estimate. A buyer can therefore commit to work with a lender via the Loan Status Update and not yet have given formal notice of intent to proceed. If that is the case, the buyer would sign on line 40 of the Loan Status Update, but the box on line 45 would be marked “NO” as that line asks if the “Buyer indicated to Lender an intent to proceed with the transaction after having received the Loan Estimate.”

**Roundtable Discussion**

***How far do you go in helping your seller-clients interpret the LSU?***

While you can relay the information and explain the verbiage used in the form, it’s not

your job to represent the buyer or their lender. You should do your best to advise your

clients about the status of buyer’ loan within the scope of your role as the REALTOR®.

If the information provided in the LSU needs to be clarified, this clarification should be

requested from the lender or the buyer. Keep in mind that a false interpretation of the

LSU – even an unintentional one – may expose you to unnecessary liability.

***What if you get an offer for your seller without a Prequalification form or LSU?***

*• Contact the buyer’s broker and request one*

*• If the form is not forthcoming, you should still present the offer, but advise the seller that they may want to consider declining the offer, or making their acceptance of the offer contingent on receipt of a Pre-Qualification form.*

***What risks are addressed by the use of the LSU form?****•*

* *Failure to close due to changes during the escrow period in the buyer’s ability to*

*obtain financing*

*Failure to complete necessary steps to obtain financing*

*Failure to identify prior-to-funding conditions*

*The buyer’s obligation to perform is contingent upon obtaining loan approval*

*for the loan described in the LSU.*

*The buyer’s failure to timely convey the LSU may render them in breach of contract*

*If there’s no LSU, no loan terms are included in the contract, which creates*

*an ambiguity in the loan contingency terms.*

*Others…*

***How does the use of the LSU form benefit sellers?***

* *Alerts them to potential problems with the buyer’s proposed financing*

*It can help them evaluate whether the transaction will close escrow, and if so, whether it will close on time*

*Keeps them informed during the escrow process*

*May have a significant impact on their decision to accept “backup” offers*

*(contingent on the current buyer’s failure to close)*

*Others…*

Whether or not the LSU form is used during the escrow process, all communications

with the lender, brokers or parties involved should be documented and time and date stamped. Communicating regularly with the lender and keeping detailed

documentation can significantly reduce your liability, should any problems occur.

**2-3: TRID: Closing Forms & Process**

***Timing: 45 min***

The objective of this section is to highlight the changes regarding AAR forms, and provide overview of the LE and CD forms, timelines and new roles.

**Transaction Types Affected:** (note: all closed-end consumer credit transactions)

* Purchase money
* Refinance
* Vacant-land
* Construction-only
* Timeshare

**Transaction Types Exempt:**

* Reverse mortgages
* Home Equity Lines of Credit (HELOCs)
* Chattel-Dwelling/Mobile Home Only loans
* Creditors who originate less than 5 loans in a calendar year

Note: in case you get a question from student: Multi-family commercial – 5 or more

**New Process**

**Residential Resale Real Estate Purchase Contract – September 2015**

* Section 2a: requires the Pre-Qualification Form to be submitted in conjunction with the Contract at the time of offer.
* Section 2b: provides that, three days prior to close of escrow the Buyer must either:

(i) sign all loan documents; or

(ii) deliver to Seller or Escrow Company notice of loan approval without PTD conditions AND date(s) of receipt of Closing Disclosure(s) from Lender; or

(iii) deliver to Seller or Escrow Company notice of inability to obtain loan approval without PTD conditions. The reason (ii) was added is because if the loan documents are not to the escrow company three days prior to the close of escrow, (ii) gives the Seller written assurance by the Buyer that their loan has been approved without PTD conditions, a Closing Disclosure has been issued and the loan documents are expected to be delivered and signed by the Buyer by the close of escrow date.

* Section 2f: requires the buyer to provide the lender with the “Buyer’s name, income, social security number, Premises address, estimate of value of the Premises, and mortgage loan amount sought” within three days after Contract acceptance. The reason for this is because the above information (loan application) triggers TRID timelines and assures the seller that the buyer is moving forward with their financing.
* Page 9 of the Contract: lines have been included for:

(1) each salesperson’s state license number; and

(2) each firm’s state license number. These changes were made because the new Closing Disclosure requires the state license number of the agents and their respective brokerage.

**Instructor Note: this is designed to give an overview of the form contents, not a line by line explanation of the forms**

[**The Loan Estimate:**](http://www.consumerfinance.gov/f/201311_cfpb_kbyo_loan-estimate.pdf) **(replaces TIL statement and GFE)**

* Provided to consumers within 3 business days after submission of loan application
* Provides summary of key loan terms and estimates of loan and closing costs
* Triggered by Loan Application
* Loan Estimate Form Contains:

First Page (type of loan, payments, what cash is required)

* Loan terms – loan amount, interest rate, monthly P&I, prepayment penalty, balloon payment
* Projected payments
* Escrow information/Impounds
* Total estimated costs
* Closing costs
* Cash to close

Second Page (details of the costs; these numbers will appear on the closing disclosure form)

* Estimated settlement fees
* Cash to close, including credits, escrow, and down payment
* Adjustable payment and interest rate tables
* Note: all costs related to title start out with the word “title”

Third Page: (specifics: terms, comparison of the specific loan, costs over life of the loan broken out)

* Comparisons, including APR and total amount of interest
* Other disclosures – appraisal, assumption, servicing transfer
* Borrower acknowledgement and signature (not required)
* From acknowledgement of receipt of the Loan Estimate, consummation is a minimum of 7 days
* [**The Closing Disclosure:**](http://www.consumerfinance.gov/f/201311_cfpb_kbyo_closing-disclosure.pdf) Consumers will receive this form three business days before consummation of a loan. It replaces the final Truth in Lending statement and the HUD-1 settlement statement, and provides a detailed accounting of the transaction.

First Page: (Same as first page of Loan Estimate)

* Loan terms – loan amount, interest rate, monthly P&I, prepayment penalty, balloon payment
* Projected payments
* Escrow information
* Total estimated costs
* Closing costs
* Cash to close

Second Page: (specifics of the cost of the loan) Note: fees will be listed in alphabetical order

* Closing cost details
* All loan costs and other costs paid by borrower, seller and other parties
* Similar to current page 2 of HUD-1

Third Page: (Total closing costs from the Loan Estimate, all considerations) Instructor note: this is the most important page for the consumer/buyer) Note: tolerances will now be called variances

* Calculating cash to close table
* Similar to table on page 2 of Loan Estimate
* Requires comparison to information on Loan Estimate
* Summaries of borrower and seller transaction
* Similar to current page 1 of HUD-1

Fourth Page: (similar to what you saw on the bottom on page 3 of the HUD1 and TIL)

* Loan disclosures
* Assumption
* Demand feature
* Late payment
* Negative amortization
* Partial payments
* Security interest
* Escrow account
* Adjustable payment and interest rate tables
* But, only if applicable to the transaction

Fifth Page:

* Loan calculations
* Total of payments
* Finance charge
* Amount financed
* APR
* Total interest percentage
* Other disclosures
* Appraisal (if applicable)
* Contract details
* Liability after foreclosure
* Refinance
* Tax deductions
* Contact information (real estate agents and brokerage – including license numbers)
* Signature lines (but not required)

**Will the buyer be able to submit a completed loan application to their lender before identifying a specific property?**

No, as of October 3, 2015, a loan application must contain all of the following six pieces of information: Name, income, social security number, property address, estimate of property value, mortgage loan amount sought.

**Does the buyer’s execution of the Loan Estimate qualify as their “intent to proceed” with the loan transaction?**

No, when the buyer signs page 3 of the Loan Estimate, they are only confirming receipt of the form. The buyer’s signature on the form does not evidence their “intent to proceed.”

**Is consummation the same as close of escrow?**

Consummation is defined as the time that a consumer becomes contractually obligated to the lender on the loan. Consummation is not the same as close of escrow which the Contract defines as the time when the deed is recorded at the county recorder’s office.

**What are the risks for the buyer to keep shopping the loan after the loan application has been approved?**

Delay closing

**Unit 3: Escrow Instructions**

***Timing: 60 minutes total for this unit, 15 for each case***

**Learning Objectives:**

• To explain the significance of the escrow instructions

• To describe the relationship between the escrow instructions and the purchase

contract

• To describe how proper drafting of the contract and escrow instructions can

reduce risk for all the parties involved

**Let’s look at some cases:**

***Higgins v. Kittleson*, 1 Ariz. App. 244, 401 P.2d 412 (1965)**

**Case Facts:**

• Higgins owned a ranch (in Montana) and Kittleson owned a motel (in Phoenix).

• The parties entered into an agreement to exchange the properties, with the

ranch valued at $50,000 and the motel at $90,000. Kittleson was to secure a letter from an oil company to purchase the other half of the motel for $45,000.

• Several days after the purchase agreement was executed, Higgins moved into

the motel and began making some repairs.

• A few days later, at the request of Kittleson and the listing brokers, Higgins went

to the Escrow Company to sign some documents. She was told all documents

were preliminary and would remain in escrow until the deal was finalized.

• A deed of trust was subsequently recorded on the Montana ranch and the

Escrow Company also recorded the agreement of sale on the motel.

• Higgins claimed she didn’t know she signed a deed of trust. According to her

testimony, she signed a bunch of papers “in a stack.” In one case, she

remembered signing a paper but said the other words were added later.

• Kittleson never produced a buyer for the second half of the motel and Higgins

subsequently provided notice of her refusal to accept the motel and, in effect,

cancel the contract (she was still within the 30 day acceptance period in the

contract).

**Decision:**

*• In the case of the Escrow Company, they were dismissed as defendants prior to*

*the appeal. Nevertheless, the court’s decision included some discussion of the*

*Escrow Company.*

*• First, the court cited existing case law in clarifying that escrow instructions and*

*the purchase contract are not interchangeable; a binding contract must exist for*

*the escrow instructions to be enforceable.*

*• The court also noted that escrow agents act in a fiduciary capacity, requiring*

*them to treat all parties honestly.*

*• Finally, the court stated that because the Escrow Agent fraudulently recorded*

*the deed (all conditions were not met), the deed conveyed no title.*

**Discussion:**

• ***Assuming this happened today, what liability would you have as***

***Kittleson’s listing agent?***

• ***Why is it important to distinguish between the contract and the***

***escrow instructions?***

***Notes:***

***Young v. Bishop*, 88 Ariz. 140, 353 P.2d 1017 (1960)**

**Case Facts:**

• Young and Bishop negotiated and entered into an escrow agreement to allow

Young to buy Bishop’s property.

• Young was to pay the purchase price to Bishop in installments over three years.

The escrow agreement was “subject to and conditioned upon Supplemental

Trust Instructions,” which were to be submitted at a later time.

• The supplemental instructions were to create an arrangement where Bishop

would allow the title company to hold the title in trust with both Young and

Bishop being listed as beneficiaries.

• The purpose of this was to allow Young to subdivide the property, while still

protecting Bishop’s interest in the unpaid portion of the purchase price.

• Several sets of supplemental instructions were presented to Bishop. He refused

to sign in bad faith and several times tried to delay the transaction to the extent

Young would walk away.

• When Young filed the complaint, he offered to pay the remainder of the

purchase price in addition to the money already paid into escrow.

• Bishop argued “that the escrow agreement was merely a preliminary agreement

to a contract the major terms of which were to be supplied by the supplemental

instructions.” Basically, Bishop argued that without the supplemental

instructions, there was no contract.

**Decision:**

*• The court stated that “a contract of sale of real estate and an escrow agreement*

*are not interchangeable entities.”*

*• The court summarized escrow as “a conveyancing device designed to carry out*

*the terms of a binding contract of sale previously entered into by the parties.”*

*• The court did not find that the contract of sale “was expressly conditioned upon*

*the completion of escrow instructions.”*

*• To summarize, the court stated that while the escrow agreement itself had not*

*been completed due to the failure of the parties to agree upon and submit the*

*necessary supplemental instructions, the contract itself did not set forth the*

*requirement of these supplemental instructions as a condition of the binding*

*agreement between the parties.*

*• The Appellate Court reversed the judgment of the trial court (which had found in*

*favor of the defendant, Bishop.)*

**Discussion:**

• ***How would the situation have changed if the requirement for***

***supplemental escrow instructions had been included in the original***

***contract?***

• ***What is the significance of the court’s definition of escrow as “a***

***conveyancing device…”?***

• ***How can you apply the lesson here to your daily practice to reduce***

***risk and liability for yourself and your client?***

**Notes:**

***Allan v. Martin*, 117 Ariz. 591, 574 P.2d 457 (1978)**

**Case Facts:**

• Allan, a licensed real estate agent, entered into a contract to buy the Martins’

home.

• The closing date specified in the contract was July 31st. Martin stated the

closing date was important because he needed the money and time to prepare

his new home.

• When escrow did not close by July 31st, Allan and Martin agreed (orally) to

extend the closing date to August 15th.

• On August 15th, Martin discovered the money to purchase the property still had

not been paid into escrow.

• On August 16th, Martin signed a letter to cancel escrow if Allan didn’t comply

with the escrow instructions within 13 days, which he did.

• The “thirteen day letter” was specified as a provision (for cancellation) in the

escrow instructions.

**Decision:**

*• The court, citing Young v. Bishop, noted that the sales contract and the escrow*

*arrangement are two separate agreements, the escrow agreement being*

*subject to an enforceable contract.*

*• Although terms within the contract may alter the escrow agreement, the escrow*

*agreement may not alter the underlying contract unless it is explicitly spelled out*

*and agreed upon within the language of the contract.*

*• The court noted the presence of a “time is of the essence” clause within the*

*contract as well as Martin’s statement that the closing date was important. They*

*found that the closing date was “a bargained for term” and was clearly material.*

*• Because of Allan’s failure to perform by the latest date agreed upon by the*

*parties (August 15th), the Martins had the right to treat the contract as cancelled.*

*• The court held that when the contract was cancelled, “the escrow instructions*

*became unenforceable.”*

*• The “thirteen day letter” was merely a formality. The court stated that “nothing*

*in the escrow instructions can revive an already dead underlying contract.”*

**Discussion:**

• ***What is the significance of this case as it relates to the “time is of the***

***essence” clause?***

• ***How are the escrow instructions different from the contract terms?***

• ***If there are certain escrow terms material to the transaction, how***

***should you include them to ensure they are legally enforceable?***

**Notes:**

***Tucson Title Insurance Co. v. D’Ascoli*, 94 Ariz. 230, 383 P.2d 119**

**(1963~~)~~**

**Case Facts:**

• D’Ascoli deposited money ($6,620) with the escrow company (Tucson Title

Insurance Co.) for the purpose of acquiring an $8,000 note secured by a

second mortgage.

• The escrow instructions stated that if the money wasn’t used within 15 days, the

escrow company was to hold it until further instructions were given by D’Ascoli.

• Several other requirements were contained in the escrow instructions to be met

within the 15 day time period specified.

• The money was not used within 15 days, and other requirements were not met.

• The escrow company proceeded to use the money without waiting for

instructions from D’Ascoli (and actually ended up securing a deed on the wrong

property).

**Decision:**

*• The court found the escrow company clearly violated the escrow instructions.*

*• By failing to adhere to the escrow instructions, the escrow company breached*

*its fiduciary duty to D’Ascoli.*

*• The court also stated that any deed secured without complying with the escrow*

*instructions is of no effect.*

**Discussion:**

• ***What is the significance of the fiduciary relationship between an***

***escrow agent and their client?***

• ***How is risk reduced for you and your clients by this decision?***

**Notes:**

***Burkons v. Ticor Title Ins. Co.*, 168 Ariz. 345, 813 P.2d 710 (1991)**

**Case Facts:**

• Burkons, through his power of attorney, entered into an agreement to sell a

parcel of land to an entity, Pyramid. Ticor acted as the escrow agent in the

transaction.

• Most of the purchase price was in the form of a promissory note secured by a

deed of trust.

• The contract was amended to include a provision allowing for a subordination

agreement for the construction loan.

• The escrow instructions “provided that the purchase money note would be

secured by ‘first lien deed of trust.’” The instructions also called for a letter of

intent regarding proposed construction, which was provided by Pyramid.

• Ticor participated in an agreement by which Pyramid took out a construction

loan against the property. At the closing of that loan, money was paid to Ticor.

• Ticor provided a portion of the funds to Pyramid as the down payment on

Burkons’ property. The remainder was paid out in cash to Pyramid.

• Ticor recorded Burkons’ lien in junior position to the construction loan.

• Pyramid never proceeded with construction and defaulted on the payments to

Burkons.

**Decision:**

*• The court held that Ticor violated the escrow instructions by recording the lien*

*holder of the construction loan in first position.*

*• The court cited Tucson Title v. D’Ascoli, in that “an escrow agent which fails to*

*follow the escrow instructions breaches its contract, and the parties to the*

*escrow may recover ‘all damages resulting from any deviation’ from the escrow*

*instructions.”*

*• The court further stated that an escrow agent should be aware of all provisions*

*contained in the escrow documents and, in the case of any ambiguity, should*

*seek clarification from the parties.*

**Discussion:**

• ***What effect does this judgment have on your role in a given***

***transaction?***

• ***How does this case illustrate the importance of clear and***

***unambiguous escrow instructions?***

**Notes:**

**Unit 4: Title Commitment**

***Timing: 1 hour, 30 minutes total for this unit***

**Learning Objectives:**

• To explain the risks associated with failing to identify exceptions to the title

Coverage

• To describe how a detailed review of the title commitment protects the parties,

salespersons and brokers involved in a transaction

• To identify specific areas of concern for buyers reviewing the title commitment

• To explain the implications of buyers failing to take title to a property in the

appropriate form

**4-1: Title Commitment**

***What risks are associated with the Commitment for Title Insurance Form?***

*• Failure to review the form in a timely manner*

*• Failure to recognize provisions precluding buyer’s intended use of the property*

*• Failure to understand the implications of the provisions within the form*

*• Delayed closing*

*• Others…*

***What is the significance of the Title Commitment Form?***

*• Sets forth the conditions under which the title is insured*

*• Sets forth any exceptions to full coverage*

*• Gives the buyer the opportunity to disapprove any exceptions to title coverage*

*• Others…*

***Given the case law reviewed in the previous unit, why is a review of the***

***Title Commitment important?***

*• Goes directly to the buyer’s intended use of the property*

*• May relate directly to conditions spelled out in the sales contract*

*• Incorporates buyer approval of the title commitment as part of the enforceable*

*contract*

*• Others…*

***What risks for licensees and brokers are associated with failing to review***

***the Title Commitment?***

*• Items within the Title Commitment may relate directly to contractual terms and*

*conditions*

*• Failure to recognize property conditions the seller may not be aware of*

*• Failure to identify important disclosures related to property condition*

*• Failure to discover problems that may delay closing*

*• Others…*

***What are the most prevalent “red flags in a Title Commitment?***

*Wrong property description on the policy*

*Tax Liens – usually IRS*

*Second Mortage or HELOC not previously disclosed*

*Undisclosed marital information*

**Title Commitment Quiz**

*Choose the best answer to the following questions,*

**1.** As a buyer’s broker, you can significantly reduce liability associated with the

escrow process by

**a.** Obtaining the title commitment

**b.** Promptly reviewing the title commitment with the buyer \*

**c.** Providing the buyer with general title commitment guidelines

**d.** Reviewing the title commitment within 15 days after closing

**2.** The Commitment for Title Insurance form and any exceptions must be provided

to the buyer. This is required

**a.** By all AAR contracts \*

**b.** By some sellers

**c.** By some lenders

**d.** By most escrow companies

**3.** In a resale transaction using the AAR contract, if the buyer disapproves any

exceptions to the title commitment, they should immediately

**a.** Cancel the contract

**b.** Sue the title company

**c.** Fire the lender

**d.** Provide notice to the seller \*

**4.** The title commitment contains information related to all of the following issues

*EXCEPT*:

**a.** Access

**b.** Easements

**c.** CC&Rs and deed restrictions

**d.** Personal property to be conveyed \*

**5.** The title commitment should be reviewed to identify potential problems that may

**a.** Unfairly benefit the buyer

**b.** Unfairly benefit the seller

**c.** Delay closing \*

**d.** Cancel the contract

**4-2: Title Commitment Sections**

**Schedule A**

***Given the description of Schedule A items, what are you looking for when you review this section?***

*• Proper identification of the property*

*• Accurate title insurance information*

*• Verify the best available title insurance policy will been issued*

**Schedule B**

***What are the risks for buyers failing to review Schedule B of the Title Commitment?***

*• Inadequate title insurance coverage*

*• Failing to obtain coverage for buyer’s intended use of the property*

*• Failing to identify exceptions to coverage*

*• Incurring fees related to uninsured property conditions*

*• Others…*

***What are the buyer’s options if they have concerns related to exceptions***

***within Schedule B?***

*• Seek the advice of an attorney immediately*

*• Negotiate with the title company for the removal of the exception(s)*

*• Seek an endorsement to cover damages resulting from a specific defect*

*• Others…*

**Requirements**

***What is the significance of the requirements section?***

*• Sets forth conditions of title insurance being issued*

*• Sets forth conditions that must be met before escrow can close*

*• Others…*

***How does the judgment set forth in* Allan v. Martin *relate to the***

***requirements section?***

Discuss, as relates to time for performance set forth in the contract

**Exclusions**

***How might failing to understand standard exclusions create risks for you***

***and your buyers?***

*• Conflicts with buyer’s intended use*

*• Failure to identify planned changes under eminent domain*

*• Others…*

**4-3: Specific Title Commitment Issues**

***What risks are associated with failing to review specific title commitment***

***issues?***

*• Failure to identify property conditions material to the transaction*

*• Failure to provide adequate representation*

*• Failure to disapprove items within the allowed time frame*

*• Others…*

**Easements**

**Given the description on page, what is the significance of an easement?**

*• Access beyond control of the buyer*

*• Conflict with planned improvements to the property*

*• May affect entire property*

*• Others…*

**CC&Rs and Other Deed Restrictions**

***What risks are associated with failing to properly review the CC&Rs of an***

***HOA governing a property?***

*• Misrepresentation*

*• Suitability for buyer’s intended use*

*• Feasibility of desired improvements to the property*

*• Failure to disapprove items within the allotted time frame (resale)*

*• Liability associated with failure to comply*

*• Others…*

***Discuss:***

***What experiences have you had with buyers failing to understand***

***or comply with the CC&Rs governing a property? Could the situation have***

***been avoided and, if so, how?***

**Access**

***Under what circumstances might access not be material to a buyer?***

Discuss, possible answers may include the buyer owning an adjacent property, proposed use not requiring access, etc.

***If access to a property is available only through an easement, how would***

***you advise a potential buyer?***

Discuss issues to include control of the easement, buyer’s intended use of the property,

nature of the easement, conditions to be included in the contract, etc.

**Judgments, Liens and Bankruptcy**

***What specific considerations may be at issue with a property subject to***

***judgments, liens or bankruptcy?***

*• Obtaining a clear title*

*• Uninsurable title*

*• Over-encumbered property*

*• Delayed closing*

*• Others…*

**Roundtable Discussion:**

• ***What difficulties have you encountered with exceptions to the title***

***commitment?***

• ***How are buyers and sellers protected by reviewing the title***

***commitment?***

Discuss, include potentially unknown property conditions and disclosures,

requirements for closing escrow, etc.

• ***How are you, as a salesperson or broker, protected by reviewing the***

***title commitment?***

Discuss, include liability related to disclosures, misrepresentation, acting within

the contractual time frames, etc.

**4-4: Forms of Holding Title**

***What risks are associated with the forms of holding title to a property?***

*• Failure to advise buyers to seek appropriate legal, tax and estate planning*

*advice*

*• Seller inability to convey title*

*• Delayed closing*

*• Enforceability issues (title form not included in boilerplate contract)*

*• Others…*

***Under what circumstances might the form of title be especially important?***

*• Unmarried buyers*

*• Multiple investors with varying monetary interest in the property*

*• Clients going through a separation or divorce*

*• Others…*

***What are some potential repercussions of buyers failing to take the proper***

***form of title?***

Discuss, legal aspects

***How are you protected by having buyers seek legal, tax and estate***

***planning advice?***

*• Reduced liability*

*• Possibility of unknown factors*

*• Ensuring buyers make an informed decision*

*• Others…*

**4-5: Deeds**

***What risks are associated with deeds?***

*• Mistakes and omissions*

*• Improper form*

*• Failure to meet legal requirements*

*• Going unrecorded*

*• Others…*

***What is the primary difference in the different kinds of deeds?***

The actual promise made by the seller/grantor

***What are the implications of the different forms of deeds?***

The type of deed may determine the seller’s/grantor’s liability for the condition of the

title, as well as the conditions under which ownership may be transferred.

**Deed Check**

*The following questions may be answered True or False.*

**1.** A Quit Claim Deed is a deed in which the grantor warrants the title against

defects arising during the time of their ownership. (False)

**2.** A deed only effective upon the owner’s death is a Beneficiary Deed. (True)

**3.** The form of deed used most commonly to convey property is a General Warranty

Deed. (True)

**4.** By law, a deed does not have to be in writing. (False)

**5.** A deed containing a defect is deemed to have been duly acknowledged if it has

been recorded for longer than five years. (False)

**6.** A deed in which the grantor does not warrant any interest is a Quit Claim Deed.

(True)

**Unit 5: Post-Closing**

***Timing: 45 minutes total for this unit***

**Learning Objectives:**

• To explain the effect of a title insurance policy

• To describe the conditions under which a property may be sold at a trustee’s sale

• To explain what protection homeowners are afforded under the anti-deficiency

Statutes

**5-1: Title Insurance Policy**

***What are the different types of title insurance policies?***

*(Discuss each)*

*1. Standard*

*2. Plain language*

*3. ALTA*

*4. Extended endorsements*

***What types of issues does the title insurance policy protect against?***

*• Defects that occurred prior to the policy date*

*• Defects in liens and encumbrances*

*• Unmarketability of title*

*• Lack of a right of legal access*

*• Others…*

***How does this protect the buyer?***

*• Indemnifies the buyer in the case of a prior defect that cannot be cured*

*• Title defects of which the buyer was not aware*

*• Prevents the title from being vested in a manner other than that stated in the*

*policy*

*• Others…*

**Roundtable Discussion:**

What is the significance of the different types of title policies?

Under what circumstances would you recommend a buyer obtain additional

coverage through endorsements?

**UNIT 6: RESPA Issues**

Source: Phillip L. Schulman November 2014 NAR conventon

45 total enforcement actions thus far by CFPB

* 1. 12 of 45 involve RESPA

In 2014, 6 are RESPA related

* 1. Many RESPA actions carried over from HUD investigations
  2. Topics include:

Affiliated business arrangements (2)

Captive mortgage reinsurance (5)

Rental of office space (1)

Splitting of fees (1)

Referral fees to salespersons (1)

GFE (1)

Marketing Services Agreement (1)

Lawsuit filed - affiliated business arrangements

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Source: TAR RESPA Roundtable (Course Creators)

**TOWN HALL: MORTGAGE QUESTIONS**

**1.**      **Is it legal for a REALTOR® Association to solicit sponsorships from mortgage lenders for Association functions such as award ceremonies and fundraisers?**

*Yes.  While such events provide something of value to the association, the association is not in a position to refer business to the mortgage lender. Thus, it is legal****.***

***2.***      **If a mortgage company sponsors an educational seminar for brokers and agents (not providing continuing education credit) at Westin La Paloma, is it a violation of RESPA?**

*No. Since it is not for credit hours, it is not a violation of RESPA. If it had provided free continuing education credit then it would defray the expenses of the agent and that would be a RESPA violation.*

***3.***      **After completing a successful transaction, a loan officer receives a card from the buyer’s agent with $100 in it and a note that says “thanks for all your hard work.” Can the loan officer donate the money to a charity to avoid being in violation of RESPA?**

*No. The correct way to avoid the violation would be to return the money directly to the agent.*

***4.***      **A REALTOR® and a lender decide to advertise together to the general public by placing an ad in the newspaper. The lender will pay for 75% of the ad in exchange for 75% of the space.  Is this a RESPA violation?**

*No. But it would be a RESPA violation if the lender used less than 75%.*

***5.***      **Can a real estate licensee be paid a portion of the origination fee if he or she completes the loan application for the borrower?**

*No. The person must not only be employed by a licensed mortgage broker, they must perform numerous other loan services aside from taking the loan application.*

***6.***      **Can a real estate licensee who is also a licensed mortgage broker earn a real estate commission and a loan fee in the same transaction?**

*Yes. The agent must be an employee of a licensed mortgage broker and perform actual work in originating the loan.  Since the person would probably be receiving fees from both the buyer (borrower) and seller, both parties’ written permission and written consent is needed. However, FHA does prohibit this.*

**7.**      **A mortgage company collects a $375 appraisal fee from the borrower but has not issued the good faith estimate (GFE).  Is this a RESPA violation?**

*Yes. The regulations provide that the only charge a lender may impose on a borrower before issuing a GFE is limited to the cost of a credit report.*

***8.***      **A lender gives a $50 Home Depot gift card to a homeowner upon the completion of a loan transaction. Is this a RESPA violation?**

*No. This is not a violation because the homeowner is not a settlement service provider.*

**TITLE/ ESCROW QUESTIONS**

**1.**      **Is it a RESPA violation if an escrow/title company hosts an educational event at their office that includes a paid instructor and food and drinks with REALTORS® receiving CE hours?**

*Yes. A CE class is an item of value and the REALTOR® should pay for the class.  If it is simply a “lunch and learn” with no CE credit, it is not a RESPA violation.*

**2.**      **A real estate agent has referred a tremendous amount of business to a title/escrow agent far more than any other agent in town and the escrow agent sends over a gift certificate for a day at the spa with a note that says “thank you for all of your business and let’s do more together in the future.”  Is this considered a RESPA violation?**

*Yes.  The gift certificate constitutes a thing of value and may be considered in exchange for business. A simple thank you note is acceptable and not in violation.*

3.      **A title/escrow agent and a REALTOR® agree to participate in a booth together at a local event for marketing purposes. The escrow agent gets a big discount for knowing the event coordinator and pays a nominal fee for the booth. Each agrees to bring their own marketing materials and pay for all other advertising and marketing costs 50/50. Is this a RESPA violation?**

*Yes.  The escrow agent and REALTOR® must split the entire event costs 50/50 in every way. The REALTOR® must pay for half the booth and split any and all costs equally.*

**4.**      **If a title company provides lunch at an agent’s open house but they do not attend would this be considered a RESPA violation?**

*Yes. This payment of lunch would be a thing of value for, or in the hopes of, the referral of business.*

**5.**      **When selling bank owned properties is it a RESPA violation for the bank to require the buyer to obtain title insurance from a particular title company?**

*No.  It is not a violation if the bank is paying the for the owner’s policy.  However, if the buyer is willing to pay the owner’s title policy then they are free to choose any title company.  If the bank were still requiring a certain title company then that would be a RESPA violation.*

**6.**      **An LLC is the seller of a property.  The escrow officer handling the transaction is one of the owners of the LLC and this is not disclosed.  Is this a RESPA violation?**

*No this is not a RESPA violation, but does need to be disclosed.*

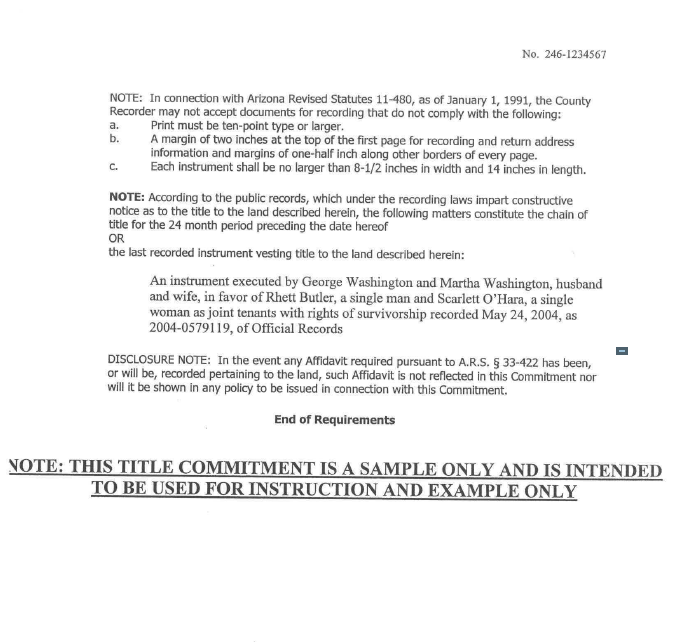
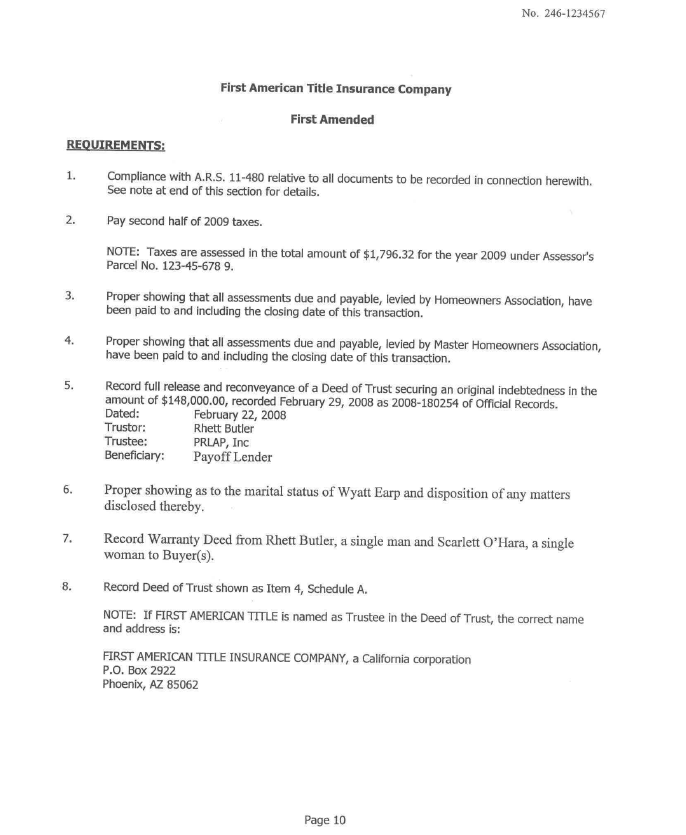
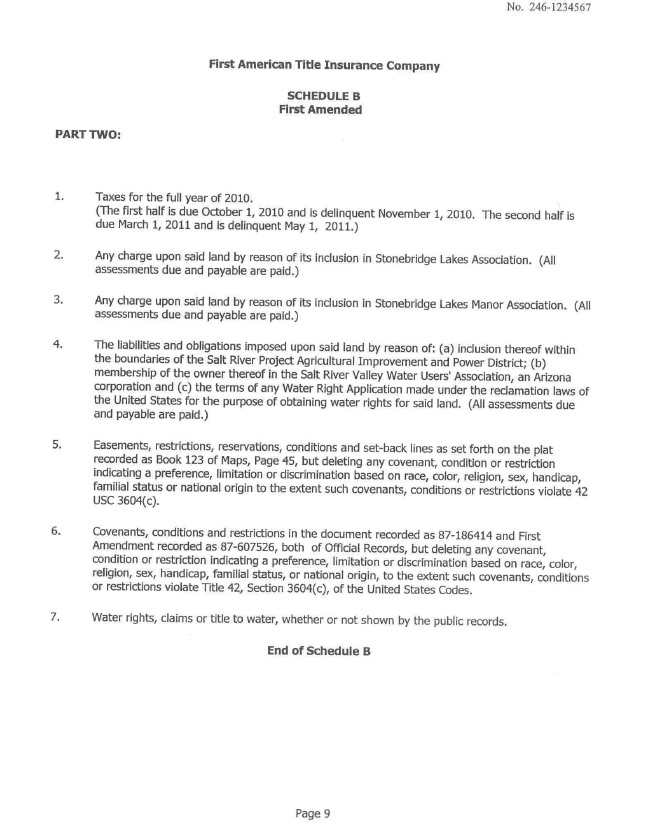
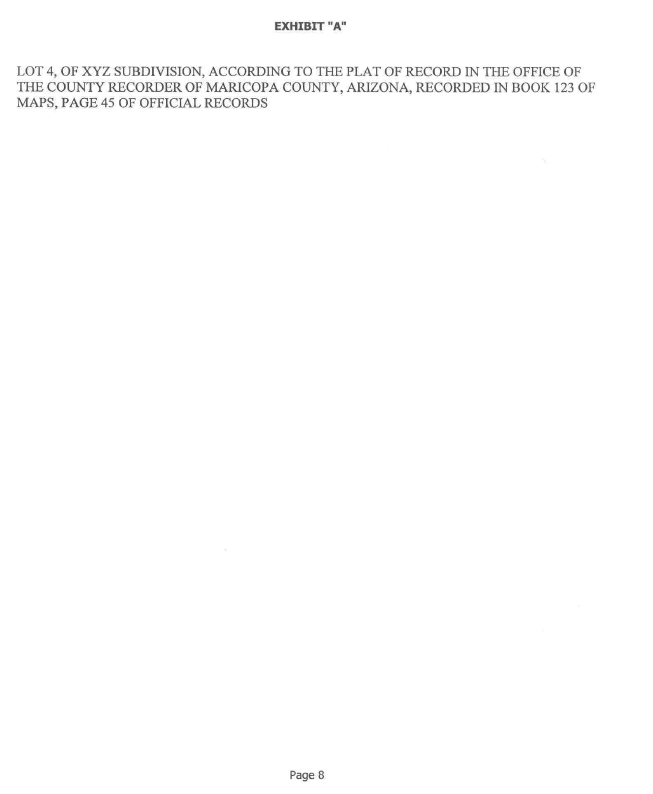
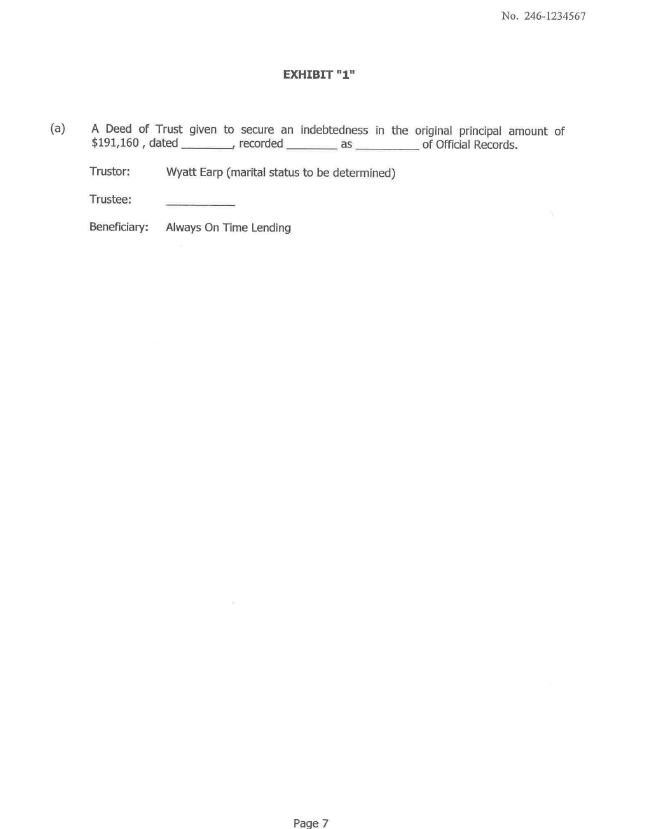
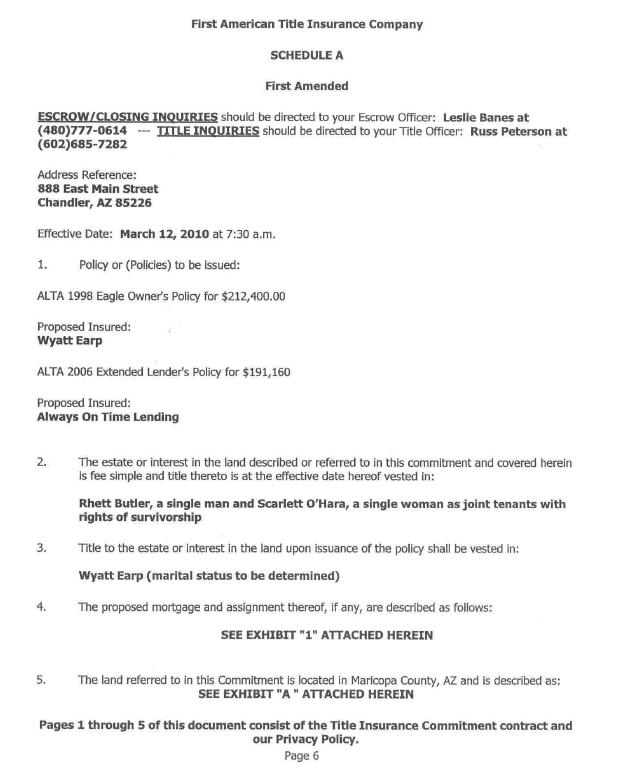
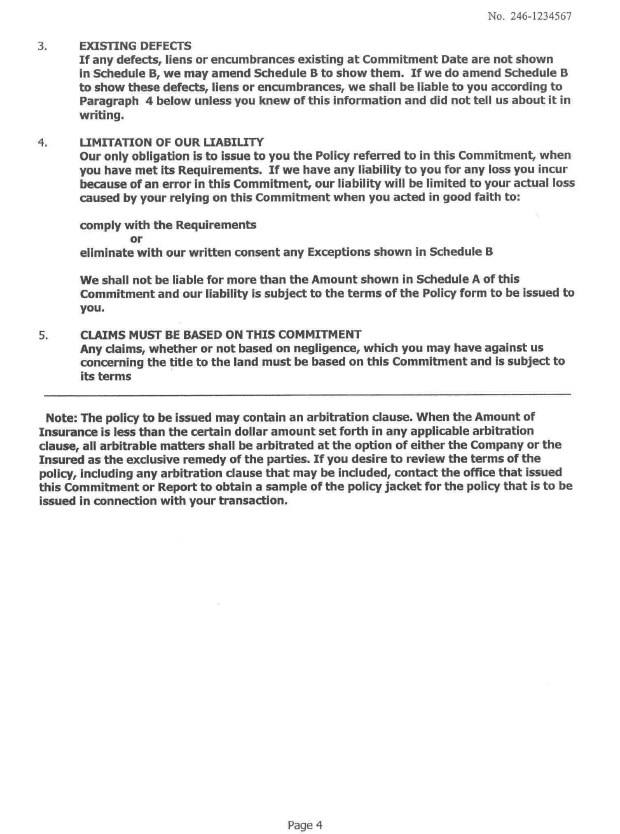
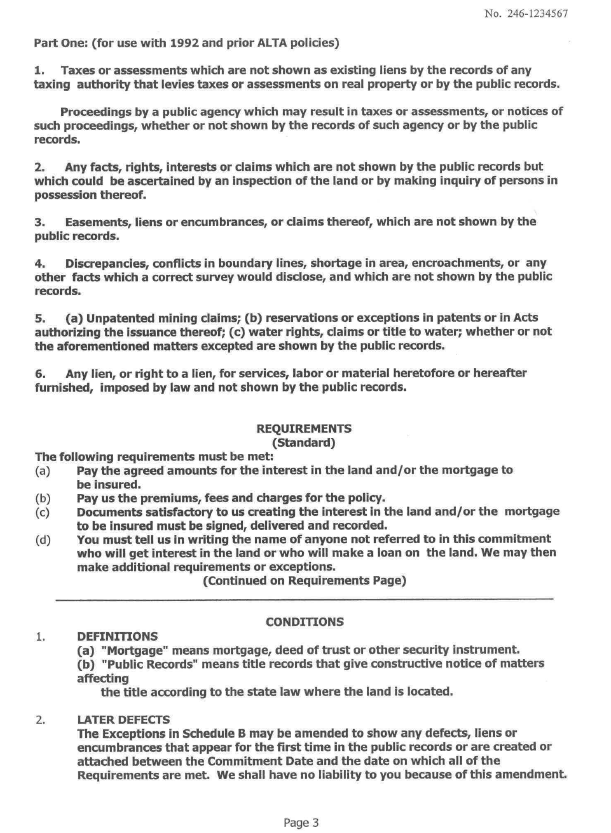
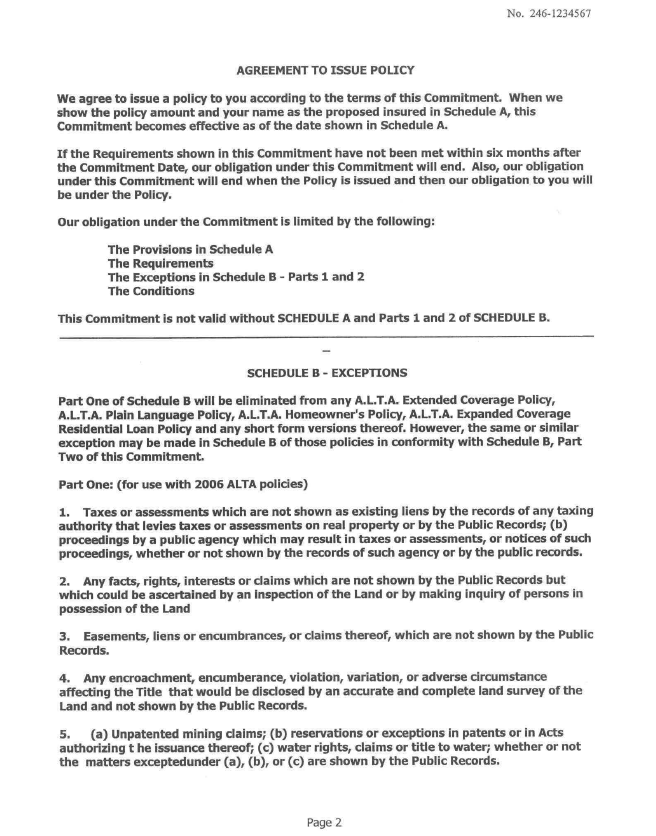
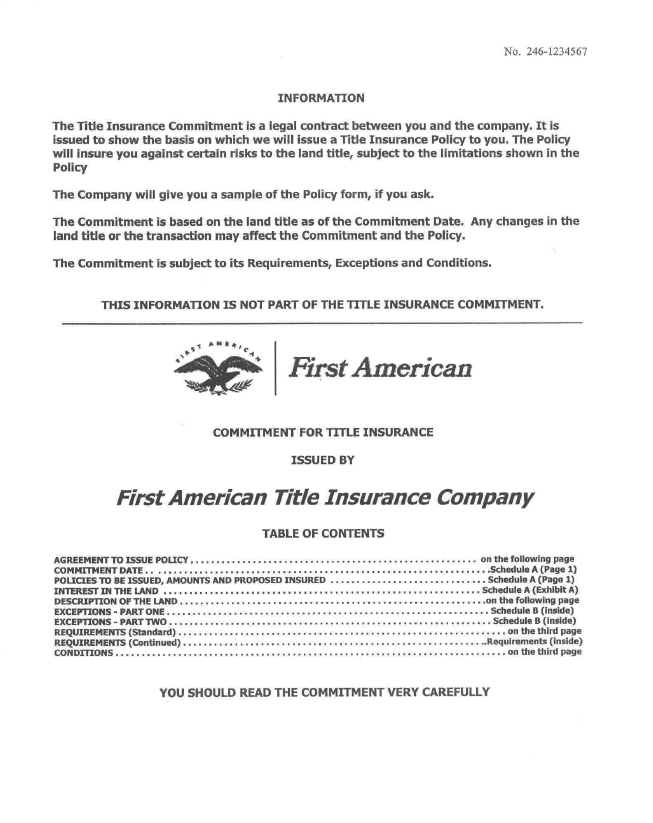
**7.**      **Three real estate companies from a legally licensed title agency to which they all refer business with appropriate disclosures to clients. If the title agency refers out the title work to another title company and receives a referral fee solely for the referral is RESPA being violated?**

*Yes. RESPA requires that actual work be performed. If fees are paid when no work is performed the arrangement is considered to be a sham and RESPA is violated.*

**8.**      **If a HUD-1 closing statement is used to close on an “all cash” real estate transaction does the RESPA rules and regulations apply?**

*No. The following transactions are not covered under RESPA: an all cash sale, a sale where the individual home seller takes back the mortgage, a rental property transaction or other business purpose transaction.*

**REFERENCE MATERIAL**



# Dodd-Frank Act Qualified Mortgage Rule Impacting Seller Carry Back Financing

*by*[SCOTT DRUCKER](http://blog.aaronline.com/author/scottdrucker/)*on FEBRUARY 7, 2013*

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**Original Article Posted on January 14, 2013:**  
On July 21, 2010, President Barak Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protections Act (the “Dodd-Frank Act”), which generally requires all residential mortgage loans, including seller carry back financing, to be offered and negotiated by licensed loan mortgage originators.

Critical to the Dodd-Frank Act is Title XIV, which creates stringent consumer protections designed to shield borrowers against predatory lending practices. While the term “mortgage originator” is defined broadly under the Act, an exemption exists whereby under certain circumstances, property owners offering seller carry back financing are excluded from having to obtain a loan originator’s license provided that the property owner provides mortgage financing for less than a pre-determined amount of properties in any 12 month period. In order to additionally qualify for this Title XIV exemption, the following five requirements must be satisfied:

1. The seller did not construct the home to which the financing is being applied.
2. The loan is fully amortizing, meaning no balloon mortgages are permitted.
3. The seller determines in good faith and documents that the buyer has a reasonable ability to pay back the loan.
4. The loan has a fixed rate or is adjustable after five or more years, subject to reasonable annual and lifetime caps.
5. The loan meets other criteria set by the Federal Reserve Board.

In the event of deviation from these requirements, the buyer has up to three years to rescind the sale and demand a return of all money paid.

On January 10, 2013, the Consumer Financial Protection Bureau implemented an “ability-to-repay rule” that provides guidance to lenders and consumers seeking to comply with the above-referenced Dodd-Frank provisions. The [Consumer Financial Protection Bureau](http://www.timesunion.com/?controllerName=search&action=search&channel=business%2Fpress-releases&search=1&inlineLink=1&query=%22Consumer+Financial+Protection+Bureau%22)’s final rule addressing a consumers’ ability to repay mortgage loans takes effect on January 10, 2014. Pursuant to the rule, all lenders, including seller carry back lenders, must consider and verify, at a minimum, the following eight underwriting standards:

1. Current income or assets;
2. Current employment status;
3. Credit history;
4. The monthly payment for the mortgage;
5. The monthly payments on any other loans associated with the property;
6. The monthly payment for other mortgage related obligations (such as property taxes);
7. Other debt obligations; and
8. The monthly debt-to-income ratio or residual income the borrower would be taking on with the mortgage.

The seller carry back lender must also consider the borrower’s ability to repay both the principal and interest over the long term, not just during a teaser rate period. AAR will keep members abreast of information as it becomes available throughout the year.

# AAR Introduces Four New Forms to Assist With Dodd-Frank Act Compliance

*by*[SCOTT DRUCKER](http://blog.aaronline.com/author/scottdrucker/)*on DECEMBER 2, 2013*

**Scheduled to take effect in January 2014, are provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) that impose new restrictions upon seller-financed transactions.** When required by applicable state or federal law, these provisions mandate that a loan originator for a consumer credit transaction secured by a dwelling must be registered and licensed in accordance with those laws, including the Secure and Fair Enforcement for Mortgage Licensing Act. Although the definition of a “loan originator” under the Dodd-Frank Act is broad in scope, 12 CFR § 1026.36 identifies two categories of seller financing excluded from the “loan originator” definition.

In order to ensure that its members are not facilitating seller financed transactions in violation of the Dodd-Frank Act, the Arizona Association of REALTORS®[**1**](http://blog.aaronline.com/2013/12/aar-introduces-four-new-forms-to-assist-with-dodd-frank-act-compliance/comment-page-1/#FourNewFormsFootnote) (“AAR”) has removed its **Assumption/Carryback Addendum** from the AAR forms library. Taking its place are four new forms, including two forms that enable parties to originate seller-financed transactions in which the seller is able to qualify for one of the two aforementioned exemptions.

The first exemption to the definition of a loan originator requires that: (1) the seller originates financing for only one property in any 12-month period; (2) the seller is a natural person, estate or trust; (3) the seller did not construct the residence on the property; (4) the financing does not result in negative amortization; and (5) the financing has a fixed rate or does not adjust for the first five years. If a seller is able to satisfy each and every one of these requirements, that seller will now utilize the new form titled [**SELLER FINANCING ADDENDUM; Credit Transaction Secured By A Dwelling — Seller providing financing for only one residential property in any 12-month period**](http://www.aaronline.com/wp-content/uploads/2013/12/SAMPLE_Seller-Financing-Addendum_ONLY1PROPERTY_withSA_11-25-2013.pdf).

Requirements of the second exemption include: (1) the seller originates financing for no more than three residential properties in any 12-month period; (2) the seller is a natural person or an organization, including a partnership, corporation, proprietorship, association, cooperative, trust, estate, or government unit; (3) the seller did not construct the residence on the property; (4) the loan is fully amortizing; (5) the financing has a fixed rate or does not adjust for the first five years; and (6) The seller has determined that the borrower has the reasonable ability to repay the loan according to its terms per 12 CFR § 1026.43(c). If a seller is able to satisfy each and every one of these requirements, that seller will now utilize the new form titled[**SELLER FINANCING ADDENDUM; Credit Transaction Secured By A Dwelling — Seller providing financing for three or fewerresidential properties in any 12-month period**](http://www.aaronline.com/wp-content/uploads/2013/12/SAMPLE_Seller-Financing-Addendum_3orFewerProperties_withSA_11-25-2013.pdf).

As previously mentioned, the Dodd-Frank Act provisions governing seller-financed transactions apply only to those consumer credit transactions secured by a dwelling, which is defined as “a residential structure that contains one to four units.” Consequently, sellers originating financing for raw land, commercial properties and other transactions not secured by a dwelling need not utilize Dodd-Frank Act compliant forms. Sellers of this nature will therefore now utilize the new form titled [**SELLER FINANCING ADDENDUM; Credit Transaction Not Secured By A Dwelling**](http://www.aaronline.com/wp-content/uploads/2013/12/SAMPLE_Seller-Financing-Addendum_NotSecuredByDwelling_11-25-2013.pdf).

Finally, a new [**LOAN ASSUMPTION ADDENDUM**](http://www.aaronline.com/wp-content/uploads/2013/12/SAMPLE_Loan-Assumption-Addendum_11-25-2013.pdf) has been released, which is substantially similar to page two of the now retired Assumption/Carryback Addendum with the addition of two important warnings. The first new warning, found on lines 16 through 21, advises the seller of the importance of securing a release of liability from the lender in conjunction with the assumption. The second, found on lines 22 through 25, warns the parties of the risks associated with a due-on-sale clause contained in the seller’s deed of trust (or other conveyance document) and the remedies available to the seller’s lender if the due-on-sale clause is not waived.

1. *AAR would like to thank the members of the Assumption/Carryback Addendum Workgroup, chaired by Martha Appel, for all of their hard work and assistance in the creation of the four new forms referenced in this article. The REALTOR® members of the workgroup include Martha Appel (chair), James Burton, Armando Contla, David Pollesche, Leslie, Pollesche, and Todd Smith. Three additional members of the workgroup who deserve equal praise are John Lotardo, Senior Vice President and General Counsel for Stewart Title & Trust of Phoenix; Richard Mack, Partner at the law firm of Mack, Watson & Stratman; and Amy Swaney, Governmental Relations Officer, Citywide Home Loans. As General Counsel, the author was also involved in the creation of the new forms, along with AAR staff members Jan Steward and Cynthia Frey.*

## Frequently Asked Questions (FAQs)

While real estate licensees will inevitably become more familiar and comfortable with the four new forms, use of the forms will also result in questions. In anticipation of these issues, below is a list of FAQs pertaining to the new forms, along with answers, intended to provide additional guidance.

### Question 1

**Q: Can a seller who is a corporation utilize the exemption by which a seller providing financing for only one residential property in any 12-month period need not be licensed as a loan originator?**

**A:** No. The exemption that enables a seller without a loan originator’s license to offer financing for only one residential property in any 12-month period is only available to a natural person, trust or estate.

### Question 2

**Q: Can a seller who is a corporation utilize the exemption by which a seller providing financing for three or fewer residential properties in any 12-month period need not be licensed as a loan originator?**

**A:** Yes. The exemption that enables a seller without a loan originator’s license to offer financing for three or fewer residential properties in any 12-month period is available to a person or organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust or government unit.

### Question 3

**Q: A seller originated financing on December 15th under the exemption that allows a seller who is not a licensed loan originator to provide financing for only one residential property in any 12-month period. Can that same seller then provide financing to another buyer under the same exemption on January 15th of the following year?**

**A:** No. The subject exemption allows a qualified seller not licensed as a loan originator to provide financing for only one residential property inany 12-month period. The 12-month period does not necessarily run from January 1st to December 31st.

### Question 4

**Q: How can a seller providing financing for three or fewer residential properties in any 12-month period make a reasonable and good faith determination at or before loan origination that the borrower will have a reasonable ability to repay the loan according to its terms?**

**A:** Sellers seeking to determine the borrower’s ability to repay the loan should closely review 12 CFR § 1026.43(c) prior to consummation. 12 CFR § 1026.43(c)(2) states that a creditor must consider the following: (i) the consumer’s current or reasonably expected income or assets, other than the value of the dwelling, including any real property attached to the dwelling, that secures the loan; (ii) if the creditor relies on income from the consumer’s employment in determining repayment ability, the consumer’s current employment status; (iii) the consumer’s monthly payment on the covered transaction, calculated in accordance with paragraph (c)(5) of this section; (iv) the consumer’s monthly payment on any simultaneous loan that the creditor knows or has reason to know will be made, calculated in accordance with paragraph (c)(6) of this section; (v) the consumer’s monthly payment for mortgage-related obligations; (vi) the consumer’s current debt obligations, alimony, and child support; (vii) the consumer’s monthly debt-to-income ratio or residual income in accordance with paragraph (c)(7) of this section; and (viii) the consumer’s credit history.

Pursuant to 12 CFR § 1026.43(c)(4), a creditor must verify the amounts of income or assets that the creditor relies on under § 1026.43(c)(2)(i) to determine a consumer’s ability to repay a covered transaction using third-party records that provide reasonably reliable evidence of the consumer’s income or assets. A creditor may verify the consumer’s income using a tax-return transcript issued by the Internal Revenue Service (IRS). Examples of other records the creditor may use to verify the consumer’s income or assets include: (i) copies of tax returns the consumer filed with the IRS or a State taxing authority; (ii) IRS Form W-2s or similar IRS forms used for reporting wages or tax withholding; (iii) payroll statements, including military Leave and Earnings Statements; (iv) financial institution records; (v) records from the consumer’s employer or a third party that obtained information from the employer; (vi) records from a Federal, State, or local government agency stating the consumer’s income from benefits or entitlements; (vii) receipts from the consumer’s use of check cashing services; and (viii) receipts from the consumer’s use of a funds transfer service.

### Question 5

**Q: When should a seller utilize the form titled SELLER FINANCING ADDENDUM; Credit Transaction Not Secured by a Dwelling?**

**A:** The seller-financing restrictions imposed by the Dodd-Frank Act apply to credit transactions secured by a dwelling. For purposes of the Dodd-Frank Act, dwelling is defined as a residential structure that contains one to four units and includes an individual condominium unit, cooperative unit, manufactured home and mobile home. The form titled SELLER FINANCING ADDENDUM Credit Transaction Not Secured by a Dwelling will therefore primarily be used for sellers providing financing for raw land and commercial buildings.

### Question 6

**Q: How does a seller determine if a transaction is a high-cost mortgage?**

**A:** The Home Ownership and Equity Protection Act identifies three tests to determine if a transaction is a high cost mortgage. Generally speaking, the three tests are as follows:

**TEST ONE** — A transaction is a high-cost mortgage if its APR (measured as of the date the interest rate for the transaction is set) exceeds the Average Prime Offer Rate (APOR) for a comparable transaction on that date by more than:

1. 6.5 percentage points for first-lien transactions, generally;
2. 8.5 percentage points for first-lien transactions that are for less than $50,000 and secured by personal property (e.g., RVs, houseboats and manufactured homes titled as personal property);
3. 8.5 percentage points for junior-lien transactions.

**TEST TWO** — A transaction is a high-cost mortgage if its points and fees exceed the following thresholds:

1. 5 percent of the total loan amount for a loan amount greater than or equal to $20,000;
2. 8 percent of the total loan amount or $1,000 (whichever is less) for a loan amount less than $20,000.

**TEST THREE** — A transaction is a high-cost mortgage if you charge a prepayment penalty:

1. More than 36 months after consummation or account opening; or
2. In an amount more than 2 percent of the amount prepaid.

### Question 7

**Q: Is a speculative home builder capable of utilizing the exemption by which a seller providing financing for only one residential property in any 12-month period need not be licensed as a loan originator?**

**A:** No. If the seller constructed or acted as a contractor for the construction of the residence on the property as part of their ordinary course of business, they are not eligible for this exemption. Similarly, a speculative home builder is not eligible for the exemption pertaining to seller financing for three or fewer properties in any 12-month period.

### Question 8

**Q: If a seller who provides financing for two or three properties in a 12-month period does not comply with the “ability to repay” requirement per 12 CFR § 1026.43(c), what are the possible liabilities to the seller?**

**A:** If a consumer has trouble repaying the seller financed loan, that consumer may claim that the seller failed to make a reasonable, good-faith determination of their “ability to repay” before originating the loan. If the consumer is able to prove this claim in court, the seller financier could be liable for, among other things, monetary damages of up to three years of finance charges and fees paid by the consumer, as well as the consumer’s legal fees. (Note: There is a three-year statute of limitations on affirmative “ability to repay” claims. After three years, consumers can only bring “ability to repay” claims as setoff/recoupment claims in defense to foreclosure proceedings.)

### Question 9

**Q. The LOAN ASSUMPTION ADDENDUM indicates that its intended use is for existing, first position loans. Can this form nonetheless be used to assume more than one loan?**

**A:** Yes. Provided that one of the loans being assumed is in first position, the LOAN ASSUMPTION ADDENDUM can be used to document the assumption of multiple loans. Under those circumstances, the terms of the second loan being assumed would be set forth in the Additional Terms and Conditions section of the Addendum. Alternatively, the parties can elect to complete more than one Loan Assumption Addendum and attach all addenda to the Purchase Contract.

### Question 10

**Q: A Seller Attachment has been added to two of the three new Seller Financing Addenda. Why does it not apply to all three forms?**

**A:** The third form, titled SELLER FINANCING ADDENDUM; Credit Transaction Not Secured By A Dwelling, is the only one of the three seller-financed transactions that does not fall under the provisions of the Dodd-Frank Act. The Seller Attachment was created to advise a seller of certain applicable state and federal laws that must be complied with in a credit transaction secured by a dwelling, and thus governed by the Dodd-Frank Act. Because the SELLER FINANCING ADDENDUM; Credit Transaction Not Secured By A Dwelling pertains to transactions not governed by the Dodd-Frank Act, the Seller Attachment is not applicable.

NAR’s Summary of the Rule <http://www.ksefocus.com/billdatabase/clientfiles/172/4/1714.pdf>.

**NAR Issue Brief: Qualified Mortgage (QM) Rule Summary**

Executive Summary

NAR has been actively involved in shaping the debate and structure of the Qualified Mortgage (QM) Rule issued by the Consumer Financial Protection Bureau (CFPB). The QM rule will largely determines the underwriting standards that the majority of lenders will use to qualify prospective borrowers. NAR achieved a significant victory in obtaining a safe harbor in the QM rule for loans underwritten to the standards required by Fannie Mae/Freddie Mac, the Federal Housing Authority, Veterans Administration and Rural Housing Service (within their respective loan limits) for up to seven years. NAR supported a safe harbor to ensure the wide availability of affordable mortgage credit for qualified borrowers.

Borrowers will still be able to get a private loan as long as the loan does not have risky features and the borrower’s total debt to income (DTI) isn’t over 43%. This means that a borrower’s total debt expense (including total mortgage payment) does not exceed 43% of their gross income (before taxes are withheld). These loans will still receive the QM safe harbor protections.

Highlighted below are some of the issues contained in the QM rule that were of particular concern to NAR. There are many more provisions that may affect the cost or access to credit. NAR will continue to work with CFPB, Congress, and industry partners to address issues that are critical to consumers, our industry, and the real estate market overall.

The rule is scheduled to be effective January 10, 2014.

Key Elements in the QM Rule:

Fees and Points – 3% Cap

One of the factors used to identify a Qualified Mortgage under the Dodd Frank Reform Act, is a determination that the amount of points and fees charged does not exceed 3% of the mortgage value. NAR has expressed specific concerns about the treatment of affiliated and unaffiliated business structures under this provision and worked with

Reps. Huizenga R-MI, Royce R-CA, Clay D-MO, Scott D-GA, to introduce HR 1077 “The Consumer Mortgage Choice Act” or the “3% Cap Bill” addressing these concerns.

The QM rule does require numerous items to be considered in fees and points when determining for purposes of meeting the 3% cap. It establishes circumstances when all or part of appraisal fees will be included and there will be times when private mortgage insurance will be included (but not FHA and other government guarantee or insurance fees). Below are some of the elements of the rule that HR 1077 seeks to change:

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 Affiliate fees and points still count towards 3% cap, disadvantaging firms with affiliates and reducing consumer choice.

 Escrow for property insurance still counts toward the 3% cap when affiliates are involved in the transaction and it still remains unclear whether escrow for taxes is in or out when affiliates are involved though the indication is the CFPB would not count them.

 The CFPB has asked for more information about possible double-counting of Origination Compensation. They recognize the harm of double-counting but apparently view the fees and points cap as a total compensation limit. In other words, they seem to want count all revenues from both consumers and secondary market participants toward the 3% cap or find a way to account for all of this under the 3% cap at least with regard to the loan officer’s compensation. This could have serious potential to affect quality of service and access to credit depending on how it comes out because it will restrict how much and the manner in which loan officers and mortgage brokers can be compensated beyond loan officer compensation rules. It would also affect the bottom line on mortgage transactions.

 Finally, the Bureau is planning on counting “Loan Level Price Adjustments” (LLPAs) toward the cap on fees and points. These adjustments are made by the GSEs to increase the price of loans with low down payments, borrowers with lower credit scores, or both. In some cases, the LLPA can as much as three points alone. If counted towards fees and points, fewer borrowers would qualify for QM loans.

Seller Financing

NAR requested that the individuals offering seller financing not be subject to the QM Rule.

 Seller financers will not be covered by the rule as long as they do five or fewer transactions in any given year. This is a NAR victory, though seller financers still need to follow rules as outlined in the CFPB’s Loan Originator Compensation rule which requires registration of seller financers who complete more than 3 transactions in a single year.

Balloon Loans in Rural Areas

Many rural properties don’t fit typical lending criteria due to a lack of comparable properties and other factors.

NAR supported the proposal to allow balloon mortgages in rural and underserved areas by qualified lenders.

 The rule allows for limited balloon payment loans to be made in rural areas. This flexibility will allow lenders in rural areas to continue to serve their communities.

Small Community Lenders

NAR supports a new qualified mortgage category that offers further flexibility to small lenders.

 Another provision that would apply to rural areas but could apply to others would allow greater flexibility for small community lenders.

Low Dollar Amount Loans

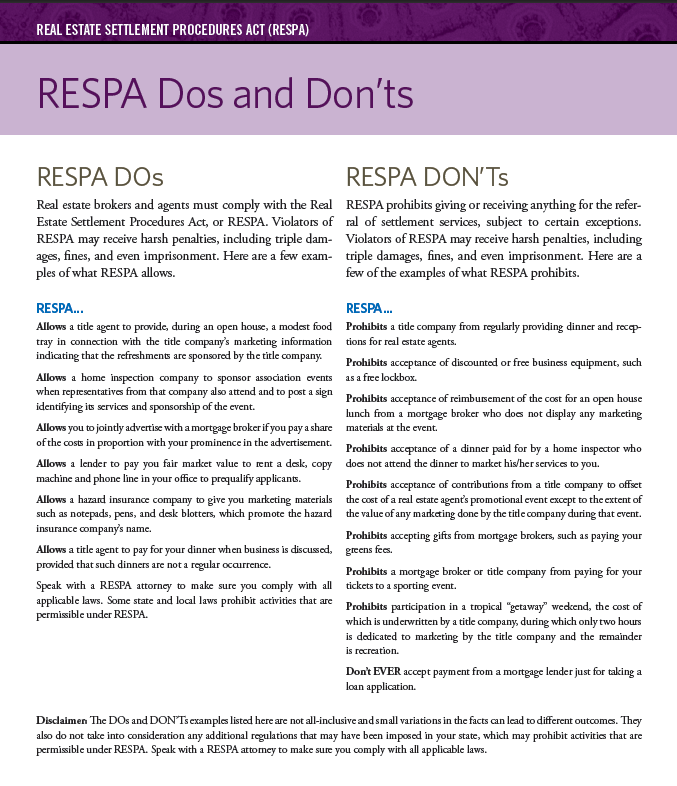
NAR supported efforts to raise the 3% fee cap for low dollar amount loans. The fixed costs of providing a home loan could make it unprofitable for a lender to make a low dollar amount loan with a cap on the fees it is able to charge.

 In a partial victory, the CFPB upped the small loan threshold from the proposed $75,000 to $100,000 and established a tiered fees and points approach that raises the 3% as loans get smaller in size from $100,000.

Underwriting Standards for some Jumbo Loans

Moving forward, the QM rule could impact the availability and costs of mortgages that are over the lending limit congress sets for Fannie, Freddie, and FHA.

“Jumbo loans” are loans above the dollar limits that congress sets for the GSEs and FHA. The limit for Fannie and Freddie is currently any loan greater than $417,000 and $625,500 in high cost areas. For FHA, it is any loan above $729,500. The biggest area of concern with regard to the underwriting standards for QM will be jumbo loans with a DTI ratio in excess of 43%. Although loans with these characteristics represent a relatively small percentage of the market, the new QM rule could affect lending in some high cost areas.



Jan 22 2015

# CFPB Takes Action Against Wells Fargo and JPMorgan Chase for Illegal Mortgage Kickbacks

**Banks to Pay $35.7 Million After Loan Officers Illegally Traded Referrals for Cash and Marketing Services**

**WASHINGTON, D.C. —** Today, the Consumer Financial Protection Bureau (CFPB) and the Maryland Attorney General took action against Wells Fargo and JPMorgan Chase for an illegal marketing-services-kickback scheme they participated in with Genuine Title, a now-defunct title company. The Bureau and Maryland also took action against former Wells Fargo employee Todd Cohen and his wife, Elaine Oliphant Cohen, for their involvement. Genuine Title gave the banks’ loan officers cash, marketing materials, and consumer information in exchange for business referrals. The proposed consent orders, filed in federal court, would require $24 million in civil penalties from Wells Fargo, $600,000 in civil penalties from JPMorgan Chase, and $11.1 million in redress to consumers whose loans were involved in this scheme. Cohen and Oliphant Cohen also will pay a $30,000 penalty.

“Today we took action against two of the nation’s largest banks, Wells Fargo and JPMorgan Chase, for illegal mortgage kickbacks,” said CFPB Director Richard Cordray. “These banks allowed their loan officers to focus on their own illegal financial gain rather than on treating consumers fairly. Our action today to address these practices should serve as a warning for all those in the mortgage market.”

“Homeowners were steered toward this title company, not because they were the best or most affordable, but because they were providing kickbacks to loan officers who referred consumers to them,” said Maryland Attorney General Brian Frosh. “This type of quid pro quo arrangement is illegal, and it’s unfair to other businesses that play by the rules.”

Genuine Title was a Maryland-based title company that offered real-estate-closing services from 2005 until it went out of business in April 2014. As part of the marketing-services-kickback scheme, Genuine Title offered loan officers valuable services to increase the amount of loan business generated. Genuine Title conducted this scheme at several financial institutions. The services the company offered included purchasing, analyzing, and providing data on consumers and creating letters with the banks’ logos that the company had printed, folded, stuffed into envelopes, and mailed. In return, the banks’ loan officers would increase Genuine Title’s profits by referring homebuyers to the company for closing services. This scheme was especially profitable for the loan officers, who generally are paid by commission.

The marketing-services-kickback scheme violated the Real Estate Settlement Procedures Act (RESPA), which prohibits giving a “fee, kickback, or thing of value” in exchange for a referral of business related to a real-estate-settlement service.

### Wells Fargo

The Bureau’s investigation identified more than 100 Wells Fargo loan officers in at least 18 branches, largely in Maryland and Virginia, who participated in this scheme. The Bureau alleges that these loan officers referred thousands of loans to Genuine Title over the course of the scheme. The Bureau alleges that, despite the fact that Wells Fargo had multiple warnings of the illegal arrangements between its loan officers and Genuine Title – including a federal lawsuit explicitly alleging the existence of such agreements – the bank failed to take action to stop the practices and did not have an adequate system in place to identify these violations. Under the proposed consent order filed today, Wells Fargo would be required to pay $10.8 million in redress and $24 million in civil penalties. The Bureau also filed an administrative consent order against Wells Fargo prohibiting future violations.

Wells Fargo employed Todd Cohen as a loan officer from April 2009 through August 2010. The Bureau alleges that, while at Wells Fargo, Cohen not only received marketing materials, he also took substantial cash payments in exchange for referrals. Rather than pay Cohen directly, Genuine Title made payments to Cohen’s then-girlfriend, now-wife, Elaine Oliphant Cohen, in an effort to disguise the kickback nature of the payment. She received tens of thousands of dollars in payments for loans Cohen referred to Genuine Title. Under the proposed consent order filed today, Cohen and Oliphant Cohen would be required to pay a civil penalty of $30,000, and Cohen would be banned from participation in the mortgage industry for two years.

### JPMorgan Chase

The CFPB also found that loan officers at JPMorgan Chase participated in the marketing-services-kickback scheme with Genuine Title. The Bureau alleges that at least six Chase loan officers in three different branches in Maryland, Virginia, and New York were involved. These officers referred settlement business to Genuine Title on almost 200 loans. The Bureau also alleges that Chase did not have an adequate system in place to ensure that its loan officers were following the law. Under the proposed consent order filed today, Chase would pay approximately $300,000 in redress and $600,000 in civil penalties. The Bureau also filed an administrative consent order against Chase prohibiting future violations.

In addition to the loan officers at Wells Fargo and JPMorgan Chase, several loan officers at another financial institution also participated in the scheme with Genuine Title. While Wells Fargo and JPMorgan Chase did not identify or address the illegal conduct, that institution self-identified the problematic practices and terminated the loan officers involved. The institution also cooperated with the CFPB’s investigation and self-initiated a remediation plan. Based on the institution’s behavior, the CFPB has resolved that investigation without an enforcement action, consistent with the CFPB’s [Bulletin on Responsible Business Conduct](http://www.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf).

Source: <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-wells-fargo-and-jpmorgan-chase-for-illegal-mortgage-kickbacks/>