

Residential Seller Financing under the Consumer Loan Act

Financing the sale of residential real estate is regulated at both the state and federal levels. In Washington the Consumer Loan Act, chapter 31.04 RCW and chapter 208-620 WAC, regulates lending money or extending credit for family, personal, or household use. This includes financing residential mortgages and that may include financing the sale of raw land or vacant lots. Regulation under the Consumer Loan Act begins with the licensing process. Licensing is twofold in that both companies and individual mortgage loan originators must license. There are some exemptions from licensing at both the company and individual levels. The company level exemptions are found at RCW 31.04.025¹. The individual level exemptions are found at WAC 208-620-105². See also Interpretive Statement 2010-1³. The Consumer Loan Act implements one federal law concerning residential mortgages: the SAFE Act⁴. This federal law and accompanying regulations⁵ require the state licensing of individuals who act as residential mortgage loan originators.

Under RCW 31.04.025(3) the director may provide a license waiver at the company level if the federal SAFE Act does not apply to the transaction at the individual level. The director interprets this authority in part, in Interpretive Statement 2010-1 by providing that a license waiver is not required if an individual sells the home he or she is living in and carries some or all of the financing for the sale. An individual extending credit on a home they own but do not live in requires additional analysis because that activity does not have an outright exemption from SAFE. When there is not an outright exemption from SAFE, Appendix B in the implementing regulations discusses another concept, habitualness, that when applied to the transaction, may allow a determination that SAFE does not apply. An individual may not be considered a mortgage loan originator under the regulations if they do not engage in the activities of a mortgage loan originator “habitually” or in the “commercial context” or they are not “in the business” of engaging in those activities. An individual seller who declares they do not habitually finance residential mortgages, do not finance residential mortgages in a commercial context, or are not in the business of financing residential mortgages, may be eligible for the license waiver under RCW 31.04.025(3).

To receive a license waiver contact the department directly. The waiver has three conditions:

1. If the seller does not provide the borrower with a Good Faith Estimate pursuant to RESPA⁶, he or she must provide the buyer with a disclosure summary of the loan’s material terms and conditions. Access a compliant form from the department’s web page on Residential Seller Financing. Print, complete, and provide the applicable form to the borrower.
2. In order to foreclose the seller must follow the specific foreclosure process set forth in chapter 61.24 RCW or as otherwise required by Washington law.

¹ <http://app.leg.wa.gov/rcw/default.aspx?cite=31.04.025>

² <http://app.leg.wa.gov/wac/default.aspx?cite=208-620-105>

³ http://dfi.wa.gov/cs/interpretive_statements/consumer_loan/IS-2010-01.pdf

⁴ The Secure and Fair Enforcement for Mortgage Licensing Act of 2008, title V of the Housing and Economic Recovery Act of 2008 (S.A.F.E. Act) (12 U.S.C. 5101 et seq.).

⁵ 12 CFR 1007 (federal regulation) and 12 CFR 1008 (state licensing).

⁶ Regulation X, 12 CFR 1024.

3. The licensing waiver is not available for loans above the state's usury limit of twelve percent.

At the federal level, the federal Truth in Lending Act has been amended and the Consumer Financial Protection Bureau (CFPB) has implemented the amendments in Regulation Z at 12 CFR 1026.36⁷. The amendments provide two exemptions for individual sellers. One is for one sale within 12 months if the seller financier is a natural person, an estate or trust; the other is for three sales within 12 months if the seller financier is an other type of entity. Both include specific loan terms and conditions that must be followed. The Consumer Loan Act license waiver at RCW 31.04.25(3) is not based on the exemptions for seller financing in the federal Truth in Lending Act. The Consumer Loan Act license waiver is based on exemptions from licensing for mortgage loan originators under SAFE and our authority to then waive licensing at the company level. Because mortgage loan originators are regulated separately by the two federal laws the Consumer Loan Act license waiver does not protect a seller financier from potential violations of the seller financier requirements in the Truth in Lending Act requirements at 12 CFR 1026.36. It is your responsibility to determine applicability of the law to your transaction. We encourage you to consult an attorney.

References:

RCW 31.04.025(3): The director may, at his or her discretion, waive applicability of the consumer loan company licensing provisions of this chapter to other persons, not including individuals subject to the S.A.F.E. act, making or servicing loans when the director determines it necessary to facilitate commerce and protect consumers. The director may adopt rules interpreting this section.

WAC 208-620-105: Who is exempt from licensing as a mortgage loan originator under this act?

The following are exempt from licensing as a mortgage loan originator:

- (1) Registered mortgage loan originators;
- (2) Any individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual;
- (3) Any individual who offers or negotiates terms of a residential mortgage loan secured by a dwelling that served as the individual's residence;
- (4) A Washington licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney is compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of such lender, mortgage broker, or other mortgage loan originator;
- (5) Individuals who do not take residential mortgage loan applications or negotiate the terms of residential mortgage loans for compensation or gain or in the expectation of compensation or gain; and
- (6)(a) An employee of a bona fide nonprofit organization who acts as a loan originator only with respect to his or her work duties to the bona fide nonprofit organization, and who acts as a loan originator only with respect to residential mortgage loans with terms that are favorable to the borrower.
(b) Terms favorable to the borrower are terms consistent with loan origination in a public or charitable context, rather than a commercial context.

⁷ Regulation Z (12 CFR 1026) implementing the Truth in Lending Act, 15 USC 1601 et seq.: <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=e0fc2172b2cc42a8dfc9013bf2088ffd&rgn=div5&view=text&node=12:8.0.2.9.18&idno=12>

Regulation H (12 CFR 1008) implementing the Secure and Fair Enforcement for Mortgage Licensing, 12 USC 5101 et seq.:

Appendix B to Part 1008—Engaging in the Business of a Loan Originator: Commercial Context and Habitualness.

(a) Not Engaged in the Business of a Mortgage Loan Originator. The following examples illustrate when an individual generally does not “engage in the business of a loan originator”:

- (1) An individual who acts as a loan originator in providing financing for the sale of that individual's own residence, provided that the individual does not act as a loan originator or provide financing for such sales so frequently and under such circumstances that it constitutes a habitual and commercial activity.
- (2) An individual who acts as a loan originator in providing financing for the sale of a property owned by that individual, provided that such individual does not engage in such activity with habitualness.
- (3) A parent who acts as a loan originator in providing loan financing to his or her child.
- (4) An employee of a government entity who acts as a loan originator only pursuant to his or her official duties as an employee of that government entity, if all applicable conditions in § 1008.103(e)(6) of this part are met.
- (5) If all applicable conditions in § 1008.103(e)(7) of this part are met, an employee of a nonprofit organization that has been determined to be a bona fide nonprofit organization by the state supervisory authority, when the employee acts as a loan originator pursuant to his or her duties as an employee of that organization.
- (6) An individual who does not act as a loan originator habitually or repeatedly, provided that the source of prospective financing does not provide mortgage financing or perform other loan origination activities habitually or repeatedly.