

STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCE AND CORPORATE SECURITIES

In the Matter of

Case No. S-12-0098

ACUITY LENDING CORPORATION,
ROBERT CANCELOSI, AND BRET
COSTELOW,

Respondents.

FINAL ORDER TO CEASE AND DESIST,
FINAL ORDER DENYING EXEMPTIONS
TO THE SECURITIES REGISTRATION
REQUIREMENTS, FINAL ORDER
ASSESSING CIVIL PENALTIES, AND
CONSENT TO ENTRY OF ORDER BY
RESPONDENT BRET COSTELOW.

The Director of the Department of Consumer and Business Services for the State of Oregon (the “Director”) has determined that Bret Costelow (“Costelow”) is liable for certain violations of ORS 59.005 to 59.451, 59.991 and 59.995 (the “Oregon Securities Law”) by Acuity Lending Corporation (“Acuity”) because he was the principal, owner and President of Acuity ; and

Costelow agrees to waive his right to an administrative hearing and to resolve and settle this matter by CONSENTING to entry of this Final Order.

Now, therefore, as evidenced by the authorized signature subscribed on this document, the Director issues the following Final Order.

I. FINDINGS OF FACT

The Director FINDS that:

1. Acuity Lending Corporation (“Acuity”) was at all times material herein an Oregon corporation with a principle place of business at 1225 NW Murray Blvd., Ste. 215, Portland, Oregon 97229. Acuity was formed on or about July 7, 2003 and





1 administratively dissolved on or about September 7, 2012.

2 2. At all times material to this Order, Acuity was in the business of making
3 loans (“Hard Money Loans”) to third-parties for residential and commercial construction
4 projects as well as for land acquisitions (a “Project”).

5 3. Acuity was licensed by the Director as a “mortgage broker” from August
6 15, 2003 to August 22, 2008 (ML # 2970). It was not licensed by the Director as a
7 “broker-dealer” or “salesperson” under the Oregon Securities Law.

8 4. Bret Costelow (“Costelow”) is an Arizona resident with a last known
9 address of 2066 E Champagne, Chandler, AZ 85249. From on or about June 2003 to on
10 or about November 2008, Costelow was an owner, principal and the President of Acuity.
11 Costelow was licensed by the Director as a “mortgage loan originator” to Acuity from
12 August 1, 2003 to August 1, 2010. Costelow was not licensed by the Director as a
13 “broker-dealer” or “salesperson” under the Oregon Securities Law.

14 5. Costelow was responsible for locating and identifying suitable Projects
15 and underwriting Hard Money Loans. After reviewing a Project’s credit score, bank
16 statements, property values, etc., Costelow would prepare a summary report for the
17 Project. Agents and principals of Acuity would then use that summary report among
18 other items to solicit investment in the Project from third-parties. Those solicitations were
19 made, among other things, through newspaper advertisements, direct mail solicitations,
20 Craigslist ads, restaurant tabletop ads, coupon books, or through “cold calls.”

21 6. Investments in the Hard Money Loans were advertised as safe and secure
22 because the loans were made at low loan-to-value ratios, which would allow for quick
23 sale should a Project go into default. As an example, one of Acuity’s advertisement
24 stated:

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WHAT MAKES FIRST TRUST DEED INVESTMENTS SO SAFE?

Acuity Lending strives to make every loan as safe as possible, so we take specific steps to protect you.

Strong Equity Positions. We do not offer high LTV [loan-to-value ratio] loans. The borrowers must have a strong equity position for us to consider these loans. Most loans are under 70% of the value of the property and many are less than 50%.

Full Appraisals. Acuity requires appraisals on every property from a third party state certified and licensed appraiser. We want to be confident in the true value of each individual property.

Title Insurance. We always require Full Extended ALTA Title Insurance to guarantee you are secured with a first position lien on each property.

Ability to Make Payments. The borrower must prove they can make their monthly mortgage payment to Acuity Lending.

7. Investors (“Investors”) were typically promised a return of 8 – 12% on their initial investment as well as a return of their principal at the end of the term of the Hard Money Loan, which was typically one to three years. Investors also received a first trust deed that represented their fractionalized interest in the Project. The Investors were not informed of the known foreseeable risks of investing in a Project.

8. Each Investor typically invested \$100,000 to \$2,000,000 with Acuity. The total number of Investors in a Project varied. Some Projects had as many as 30 - 40 Investors. In total, Acuity solicited and obtained at least \$25,000,000 in Trust Deed Investments from at least 170 Investors. The investments (“Trust Deed Investments”) were not registered by the Director as a “security” under the Oregon Securities Law. The fact that the securities were not registered was not disclosed to Investors.

9. Beginning in 2003, Investors were told by Acuity and its agents that their money would be deposited into a bank account for a specific Project. Money would then



1 go from that individual bank account to the specific Project. From approximately 2003 to
2 2005, all Investor funds were first pooled into one bank account (a “Collective Bank
3 Account”) and then transferred to individual bank accounts for each Project.

4 10. Starting on or about 2005, Acuity utilized a computer software application
5 that allowed Acuity to track the finances of multiple Projects at the same time without
6 having to set up individual bank accounts. Acuity relied on that software to allocate funds
7 to each Project from the Collective Bank Account and stopped using individual bank
8 accounts for each Project. Costelow asserts that this method of managing Investor funds
9 was disclosed to some Investors. The Director finds, however, that that method of
10 managing Investor funds was not disclosed to all Investors.

11 11. In some instances, if a Project was in distress Acuity would transfer
12 money from the Collective Bank Account to the distressed Project even if the Project did
13 not have sufficient funds on reserve.

14 12. From 2003 to early 2008, Acuity regularly made interest and principal
15 payments to Investors after collecting those payments from the borrowers as part of its
16 loan servicing obligations to Investors. Due to the crash in the housing market and credit
17 crunch in 2008, however, Hard Money Loan borrowers were unable to meet their
18 construction deadlines, repay or refinance their loans, or make principal or interest
19 payments. By early 2008, 49 out of 55 Projects were in varying stages of failure. As a
20 result, Acuity stopped making interest and principal payments to Investors on behalf of
21 borrowers, even though it would have been able to make some of those payments if
22 Project funds had not been commingled.

23 13. On or about November 17, 2008, Acuity sought judicial dissolution and
24 the appointment of a receiver with the Multnomah County, Oregon Circuit Court (the
25 “Circuit Court”) to wind-up and liquidate Acuity. On or about November 24, 2008, the
26 Circuit Court appointed a receiver. As part of that dissolution, the Investors retained their



1 first trust deeds.

2 14. On or about April 23, 2013, the Director entered a Final Order by Default
3 against Acuity having concluded that Acuity sold unregistered securities, and sold
4 securities without being licensed to do so. The order also concluded that Acuity omitted
5 to state material facts in connection with the sale of securities in violation of ORS
6 59.135(2) by, among other things, failing to disclose to Investors: 1) the known,
7 foreseeable risks associated with the Hard Money Lending Program; 2) the Trust Deed
8 Investments were securities, 3) Acuity and its agents were not licensed by the Director to
9 sell securities; and 4) that Acuity based its calculation of the loan-to-value ratio for each
10 Project on the value of the property upon completion of the Project, not on the current
11 appraised value of the property.

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13 II. CONCLUSIONS OF LAW

14 The Director CONCLUDES that:

15 15. The Trust Deed Investments described herein are “securities” under ORS
16 59.015(19)(a) because they are “investment contracts” or “real estate paper sold by a
17 mortgage broker.”

18 16. Acuity and its agents sold unregistered securities in Oregon in violation of
19 ORS 59.055. Costelow is liable under ORS 59.115(3) for Acuity’s violations of ORS
20 59.055 because he was the principal, owner, and President of Acuity.

21 17. Acuity and its agents sold securities in Oregon without being licensed in
22 violation of ORS 59.165. Costelow is liable under ORS 59.115(3) for Acuity’s violations
23 of ORS 59.165 because he was the principal, owner, and President of Acuity.

24 18. Acuity and its agents violated ORS 59.135(2) when in connection with the
25 purchase or sale of securities, they made an untrue statement of material fact or omitted
26 to state a material fact necessary in order to make the statements made, in light of the

1 circumstances under which they were made, not misleading. Specifically, Acuity and
2 others did not disclose that 1) the Trust Deed Investments were securities, 2) Acuity and
3 its agents were not licensed by the Director to sell securities, 3) Acuity calculated the
4 loan-to-value ratio not on the basis of the current appraised value of the property, but
5 rather upon the value of the property upon completion of the Project, and 4) all Project
6 funds would be commingled with each other. Costelow is liable under ORS 59.115(3) for
7 Acuity's violations of ORS 59.135(2) because he was the principal, owner, and President
8 of Acuity.

9
10 III. ORDERS

11 The Director ISSUES the following ORDERS:

12
13 Order to Cease and Desist

14 19. Pursuant to the authority of 59.245, the Director ORDERS Costelow to
15 CEASE AND DESIST from violating any provision of the Oregon Securities Law and
16 administrative rules thereunder.

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18 Order Denying the Use of Exemptions to the Securities Registration Requirements

19 20. The Director, pursuant to the authority under ORS 59.045, DENIES
20 Costelow's ability to rely on the exemptions to the securities registration requirements
21 allowed by ORS 59.025 and ORS 59.035.

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23 Additional Orders

24 21. Costelow shall surrender to all Oregon Investors, with no benefit to
25 himself, his current holdings in any Project or interest in Acuity or related or successor
26 entities by December 31, 2013.





1 a) The Director agrees to SUSPEND the collection of \$555,000 of the
2 assessed \$600,000 CIVIL PENALTIES so long as Costelow complies with all terms and
3 conditions of this Order, commits no new violations of the Oregon Securities Law or the
4 Oregon Administrative Rules thereunder, and pays \$45,000 to the Director by December
5 31, 2013;

6 b) The Director agrees to SUSPEND the collection of \$552,000 of
7 the assessed \$600,000 CIVIL PENALTIES so long as Costelow complies with all terms
8 and conditions of this Order, commits no new violations of the Oregon Securities Law or
9 the Oregon Administrative Rules thereunder, and pays \$48,000 to the Director by
10 December 31, 2014;

11 c) The Director agrees to SUSPEND the collection of \$549,000 of the
12 assessed \$600,000 CIVIL PENALTIES so long as Costelow complies with all terms and
13 conditions of this Order, commits no new violations of the Oregon Securities Law or the
14 Oregon Administrative Rules thereunder, and pays \$51,000 to the Director by December
15 31, 2015;

16 d) The Director agrees to SUSPEND the collection of \$546,000 of the
17 assessed \$600,000 CIVIL PENALTIES so long as Costelow complies with all terms and
18 conditions of this Order, commits no new violations of the Oregon Securities Law or the
19 Oregon Administrative Rules thereunder, and pays \$54,000 to the Director by December
20 31, 2016;

21 e) The Director agrees to SUSPEND the collection of \$543,000 of the
22 assessed \$600,000 CIVIL PENALTIES so long as Costelow complies with all terms and
23 conditions of this Order, commits no new violations of the Oregon Securities Law or the
24 Oregon Administrative Rules thereunder, and pays \$57,000 to the Director by December
25 31, 2017; or
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1 f) The Director agrees to SUSPEND the collection of \$540,000 of the
2 assessed \$600,000 CIVIL PENALTIES so long as Costelow complies with all terms and
3 conditions of this Order, commits no new violations of the Oregon Securities Law or the
4 Oregon Administrative Rules thereunder, and pays \$60,000 to the Director by December
5 31, 2018.

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7 IV. AUTHORITY OF DIRECTOR TO SEEK OTHER
8 REMEDIES UNDER OREGON LAW

9 27. This Order is a “Final Order” under ORS 183.310 (6)(b). It not subject to
10 judicial review under ORS chapter 183. Subject to ORS 183.310 (6)(b), the entry of this
11 Order does not limit other remedies that are available to the Director under Oregon Law.

12
13 IT IS SO ORDERED.

14 Dated this 26th day of September, 2013, at Salem, Oregon.

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16 PATRICK M. ALLEN, Director
Department of Consumer and Business Services

17
18 /s/ David Tatman
19 David C. Tatman, Administrator
Division of Finance and Corporate Securities

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CONSENT OF RESPONDENT TO ENTRY OF ORDER

Subject to ORS 59.135(4), I affirm that I have read the foregoing Consent Order and know and fully understand the contents hereof. I voluntarily and without any force or duress, consent to the entry of this Consent Order and will fully comply with its terms and conditions. Before signing this Consent, I was advised of my right to a hearing and waive any right to a hearing that I may have in this matter. I also understand that this Consent Order is a public document.

By: /s/ Bret Costelow
Bret Costelow

State of California

County of San Francisco

Subscribed and sworn before me 09.12.13.

/s/ Pamela Kahn
Notary Public

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