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## ***Due on Sale Clause***

Virtually all mortgages loans made in the United States by institutional lenders in recent years contain a due-on-sale clause. This is in contrast to the wide availability of assumable mortgages in the past. Until 1982, the enforceability of due-on-sale provisions was basically a matter of state, not federal, law. Many States had adopted laws that permitted existing loans to be assumed by buyers whether or not the lender was willing to agree.

In 1982 Congress passed the Garn-St. Germain Depository Institutions Act. Section 341a of the Act (codified in Title 12, U.S. Code, Section 1701j-3) makes the enforceability of due-on-sale provisions a federal issue. The Act provides that if real estate loan documents contain a due-on-sale provision, that provision is enforceable if the property securing the loan is transferred without the lender's consent.

The following is an example of a due-on-sale clause:

**As used in this Section, "Interest in the Property" means any legal or beneficial interest in the property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.**

**"If all or any part of the Property or any Interest in the Property is sold or transferred without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument."**

There are certain exceptions to enforceability of due-on-sale clauses. These are generally contained in Title 12, Code of Federal Regulations, Section 551 (12 U.S.C. 1701j-3 (8) [1 thru 9]). With respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, a lender may not exercise its option pursuant to a due-on-sale clause upon:

- ✚ the creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;
- ✚ the creation of a purchase money security interest for household appliances;
- ✚ a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- ✚ the granting of a leasehold interest of three years or less not containing an option to purchase;
- ✚ a transfer to a relative resulting from the death of a borrower;
- ✚ a transfer where the spouse or children of the borrower become an owner of the property;
- ✚ a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;
- ✚ a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or
- ✚ any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.