

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON**

**for the
APPRAISAL CERTIFICATION AND LICENSURE BOARD**

RECEIVED

IN THE MATTER:

**THE APPRAISAL EXPRESS
CORPORATION AND MICHAEL J.
FREID**

) **PROPOSED ORDER**

JAN 02 2014

)

) OAH Case No.: 1303246

Appraiser Certification
and Licensure Board

) Agency Case No.: 12-2002

)

HISTORY OF THE CASE

On February 20, 2013, the Appraisal Certification and Licensure Board (Board) issued a Notice of Proposed Civil Penalty Assessment to The Appraisal Express Corporation (AEC) and to Michael J. Freid. The notice accused AEC and Mr. Freid, jointly and severally, of directly or indirectly engaging in unregistered appraisal management activity, in violation of Oregon law. AEC and Mr. Freid filed a timely request for hearing on or about March 19, 2013.

The Board referred the case to the Office of Administrative Hearings on April 23, 2013. The case was assigned to Senior Administrative Law Judge Ken L. Betterton.

A telephone pre-hearing conference was held on June 13, 2013. Mr. Freid appeared and represented himself. Senior Assistant Attorney General Warren G. Foote represented the Board. A hearing was scheduled for December 3 and 4, 2013. Because AEC is a corporation, under Oregon law it must be represented in a contested case hearing by an attorney licensed to practice law in the State of Oregon.¹

A hearing was held in Salem, Oregon on December 3, 2013. AEC did not appear with an attorney at the hearing. AEC was declared in default and the Board represented that it would issue a default order against AEC. Mr. Freid appeared and represented himself at the hearing. Mr. Foote represented the Board. Mr. Freid and Gae Lynne Cooper, Interim Board Administrator and former Board Compliance Specialist, testified for the Board. Mr. Freid also testified on his own behalf.

The record closed on December 3, 2013, and the matter was taken under advisement.

ISSUES

(1) Whether Michael J. Freid directly or indirectly engaged in unregistered appraisal management activity, in violation of ORS 674.205(1).

¹ See ORS 9.320; ORS 183.457; OAR 137-003-0550(2); and OAR 137-003-0555.

(2) If Michael J. Freid committed a violation, what civil penalty should be imposed?
ORS 674.995 and OAR 161-006-0175.

EVIDENTIARY RULINGS

Exhibits A1 through A111, offered by the Board, were admitted into evidence without objection. Exhibits R1 through R135, offered by Mr. Freid, were admitted into evidence without objection.

Pleadings P1 through P6 were also made a part of the record.

FINDINGS OF FACT

(1) Michael J. Freid has worked in the real estate appraisal field for many years, primarily in California. He had a dream, as early as 1998, of starting an appraisal management company to provide real estate appraisal services to clients by acting as an intermediary between real estate appraisers and property owners and lenders. Mr. Freid formed a company, AEC, and incorporated it in California on July 3, 2003. (Test. of Freid; Ex. A3.) Mr. Freid is CEO and president of AEC. He is also the sole shareholder in the corporation. AEC currently has no employees. ~~AEC discontinued business operations about September 2012, although the~~ company still exists as a corporation and has not been dissolved. (Test. of Freid.)

(2) AEC operated without serious problems until the financial collapse in the United States that began in the fall of 2008. AEC experienced a severe loss of business and financial distress as a result of that collapse. (Test. of Freid; Ex. R109.)

(3) In an effort to improve his company's financial situation, and to gain an advantage over his competitors, Mr. Freid in late 2008 began the development of a revised and improved software platform to provide services to clients. The platform was launched in August 2010. Because of the complexity of the software in the program, Mr. Freid experienced problems getting the platform to the stage where it was marketable to clients. (Test. of Freid; Ex. R109.)

(4) In the meantime, the United States Congress, in response to the financial collapse, passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). Dodd-Frank, among many provisions related to financial institutions and consumer finance, required states to pass laws requiring the licensure and regulation of appraisal management companies (AMCs). Dodd-Frank gave individual states five years to pass laws to comply with the federal law. (Test. of Cooper.)

(5) Some states, including Oregon, chose to move quickly to comply with Dodd-Frank. The Oregon legislature enacted House Bill (HB) 3624 in a special legislative session in 2010. HB 3624 addressed the licensure and regulation of AMCs, and gave the jurisdiction and oversight authority for AMCs to the Oregon Department of Consumer and Business Services (DCBS). The governor signed HB 3624 into law on March 23, 2010, to become operative on January 1, 2011. (Test. of Cooper; Exs. R1 through R5.) Prior to the passage of HB 3624, Oregon did not regulate AMCs, although the Board did license and regulate individual real estate appraisers. (Test. of Cooper.)

(6) AEC and Mr. Freid started doing appraisal management business in Oregon in approximately 2005. At first, Mr. Freid contacted and developed business relationships with property appraisers in Oregon by mailing them postcards and putting their names on a master list to perform appraisals as he needed them. Later, as the internet became more widely used, he used email to contact and maintain a list of appraisers. AEC and Mr. Freid also performed appraisal management business in California, Louisiana and Indiana. (Test. of Freid.)

(7) DCBS started contacting AMCs and other stakeholders in the spring of 2010 to get feedback and information for drafting administrative rules and civil penalties for violations of the new law. (Test. of Cooper.) As part of that process, DCBS mailed out a letter and survey form to organizations that DCBS believed were performing AMC business in Oregon, to inform the organizations that if they were providing appraisal management in Oregon, they would need to obtain a registration by January 1, 2011, or cease doing business in Oregon. The letter also warned the organizations that if they continued doing business in Oregon after January 1, 2011, and were not registered, they would be subject to civil penalties. The letter informed the organizations that registration would begin about October 1, 2010 in order to meet the January 1, 2011 effective date of the law.² AEC received such a letter and survey dated August 13, 2010, addressed to the company at its business address. (Ex. R135.)

The letter to AEC also read, in part, as follows:

In August, the department plans to adopt administrative rules implementing the registration requirements of the Act. The administrative rules will clarify how to structure a system to verify the competency of independent contractor appraisers, create parameters for a company-driven dispute resolution process, require fingerprinting for certain owners and controlling persons of an AMC, and

² Even though the deadline for an AMC to register was January 1, 2011, DCBS processed late applications for registrations as late as June 14, 2011 without penalty. (Ex. R-117.)

establish a tiered fee system to provide adequate funding, lessen impacts on small businesses, and encourage registration by AMCs doing business in Oregon. * * *.

Please fill out the form enclosed with this letter and e-mail, fax or mail your response to the department. **Please return this survey by September 3, 2010.** If you do not meet the criteria under the Act, please explain why on the enclosed form and return it via e-mail, fax or mail. * * *.

(*Id* at 1.) (Emphasis in original.)

(8) The survey that accompanied each letter contained questions that asked the organization, among other things, the number of instances of real estate appraisal activity the organization provided in Oregon in a calendar year, and provided the organization the opportunity to respond as to why the organization believed it should not need to obtain a registration in Oregon. (Ex. R135 at 2.)

(9) Mr. Freid did not read the August 13, 2010 letter carefully, and he did not complete the survey form and return it to DCBS. If he had read the letter carefully and responded, he would have expressed his opinion that registration fees for small businesses like his should be low, and that regulatory requirements for small businesses needed to be less onerous than for larger operators. (Test. of Freid.)

(10) Following feedback from various stakeholders, DCBS adopted, starting January 1, 2011, a sliding scale registration fee schedule for AMCs, up to \$1,500 per year, depending on the number of transactions the AMC expected to handle. DCBS quickly learned that many AMCs under-reported their transaction levels, and that the sliding scale schedule was not workable. DCBS then adopted a lower fixed registration fee, but that fee structure was too low to financially run the program. (Test. of Cooper.) DCBS also adopted an AMC Sanction Guidelines Grid that, among other things, established a civil penalty for a violation of ORS 674.205(1) (unregistered activity) as \$500 for the first offense, and \$1,000 for the second offense and for each subsequent offense. (Ex. A2.)

(11) Because regulating AMCs more closely aligned with the Board's work with real estate appraisers than it did with work done by DCBS, the legislature and agency officials in 2011 transferred authority to regulate AMCs to the Board, effective January 1, 2012. (Test. of Cooper.)

(12) The Board reviewed the registration fee structure, conferred with stakeholders, and looked at registration fees charged by other states that were drafting or had enacted similar

legislation. The Board established a registration fee of \$2,500 for a two-year period for an AMC, required a criminal background check on principal owners of an AMC business, and required a \$25,000 surety bond for the AMC. The annual premium on a surety bond of \$25,000 ranges from \$450 to \$800. The Board did a survey of registration fees charged by other states, and determined that Oregon's fee of \$2,500 for a two-year period was about in the mid-range of what other states were charging. (Test. of Cooper.)

(13) On June 19, 2012, Board Compliance Specialist Gae Lynne Cooper received an anonymous email that AEC was performing AMC business in Oregon without being registered. Ms. Cooper checked records and discovered that AEC was not registered as an AMC in Oregon, but that the company was registered as an AMC in California. She responded to the anonymous email and asked the sender to call her. A female subsequently telephoned Ms. Cooper and provided additional information. The female was an appraiser in California who was upset because AEC had not paid her for appraisal work she had performed for AEC in California. Ms. Cooper learned that AEC was doing appraisal management business in Washington and Oregon. The female gave Ms. Cooper the names of approximately 10 appraisers in Oregon who had been doing work for AEC. Ms. Cooper contacted those appraisers and confirmed that they had been doing appraisal work for AEC in Oregon. Ms. Cooper and the Board opened an investigation into AEC's and Mr. Freid's AMC activities in Oregon. (Test. of Cooper; Ex. A1.)

(14) Ms. Cooper contacted Mr. Freid on June 25, 2012 concerning unregistered AMC activity in Oregon. Mr. Freid admitted that he had conducted AMC activity in Oregon, and that AEC was not registered in Oregon. He stated that he had never had a complaint filed against him or his company before, and he asked to be given only a verbal warning because he could not afford to get registered in Oregon. He agreed to cooperate with the Board's investigation, and provided records of his business activities to the Board. (Test. of Cooper; Ex. A1.)

(15) Between January 1, 2011 and June 30, 2012, Mr. Freid, through AEC, assigned at least 88 real estate appraisal orders in Oregon through two clients, Americash and UPF Services, with 34 different appraisers in Oregon. (Test. of Cooper; Test. of Freid; *See* Exs. A17, A19, A20, A22, A23, A25 through A103, A106, A108, A110, and A111.)

(16) Mr. Freid and AEC maintained a list of 162 appraisers in Oregon to whom they could assign work, although they actually used fewer than that number. (Ex. A13; Test. of Cooper; Test. of Freid.) As of late June 2012, Mr. Freid and AEC owed 12 Oregon appraisers a total of \$9,915 for work the appraisers had done, but AEC and Mr. Freid could not pay them because of cash flow problems. (Ex. A1 at 3; Test. of Freid.) As of the date of the hearing in this matter, AEC still owed money to appraisers in Oregon for their appraisal work. Mr. Freid

knew that Oregon law requires an AMC to pay an appraiser within 60 days of when the work is performed. (Test. of Freid.)

(17) Mr. Freid followed Dodd-Frank as the act moved through Congress, and the efforts by states to enact laws to comply with the federal law. He has watched the AMC business go from an unregulated one to a highly regulated one, largely as a result of Dodd-Frank. He learned that some states require a registration fee as little as \$500, and that some states do not require a surety bond. Mr. Freid looked at the DCBS website in October 2010 and saw that Oregon required a surety bond. He was unable to obtain a surety bond because of AEC's poor credit rating. (Test. of Freid.)

(18) Mr. Freid believes that Oregon, as well as some other states, are using the registration fees for AMCs and civil penalties for violations of law to close budget gaps that states have experienced as they recover from the 2008 recession. (Test. of Freid; *See* Exs. R85 through R101.)

CONCLUSIONS OF LAW

(1) Mr. Freid engaged in unregistered appraisal management activity.

(2) A civil penalty in the amount of \$87,500 should be imposed.

OPINION

(1) *The violations.*

The Board has alleged that Mr. Freid and AEC engaged in multiple instances of unregistered appraisal management activity in violation of ORS 674.205(1).

The Board has the burden of proof to establish its allegations. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982). The allegations must be proven by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

The Board has broad authority and responsibility to make certain that AMCs and "controlling persons" in AMCs comply with Oregon law. *See* ORS 674.200 *et seq.*

ORS 674.205(1) states:

A person may not directly or indirectly engage in or attempt to engage in business as an appraisal management company or advertise or represent that the entity is an appraisal management company unless the person is:

(a) Registered as an appraisal management company with the Appraisal Certification and Licensure Board[.]

“Appraisal” means the process of developing an opinion of the value of real property in conformance with commonly accepted standards for appraisers. ORS 674.200(1).

“Appraisal management company” is defined in ORS 674.200(2) as follows:

(a) “Appraisal management company” means, in connection with valuing properties collateralizing mortgage loans or mortgages incorporated into a securitization, an external third party that:

(A) Oversees an appraisal panel of more than 15 appraisers in Oregon or at least 25 appraisers in the United States; and

(B) Is authorized by a client to:

(i) Recruit, select and retain appraisers;

(ii) Contract with appraisers to perform appraisal assignments;

(iii) Manage the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided and reimbursing appraisers for services performed; or

(iv) Review and verify the work of appraisers.

“Controlling person” means:

- (a) An owner, officer or director of an appraisal management company;
- (b) An individual authorized by an appraisal management company to enter into a contractual relationship with:
 - (A) A client for the performance of services requiring registration as an appraisal management company; and
 - (B) An appraiser for the performance of appraisals; or
- (c) An individual who possesses, directly or indirectly, the power to direct the management or policies of an appraisal management company.

ORS 674.200(8).

The Board established that in at least 88 instances³ between January 1, 2011 and June 30, 2012, AEC, as an AMC, and Mr. Freid, as a controlling person in AEC, engaged in or attempted to engage in real estate appraisal activity in Oregon, by performing tasks as an AMC or advertising or representing that AEC was an AMC. However, AEC was not registered as an AMC in Oregon. Mr. Freid therefore violated ORS 674.205(1) in at least 88 instances.

Mr. Freid acknowledges that he engaged in unregistered appraisal management activity in Oregon. He defends his actions by arguing that Oregon moved too quickly to enact laws to regulate AMCs, that the law did not give due consideration to the financial impact the law would have on small companies like his, and that Oregon was using registration fees to close its budget gap.

While Mr. Freid's frustrations and opinions are understandable, they have no merit in this matter. Although Congress in 2010 gave states five years to comply with Dodd-Frank, the Oregon legislature made a policy decision to move quickly to enact legislation to comply with the federal law. The legislature gave enforcement and regulatory authority over AMCs first to DCBS and then to the Board. Both DCBS and the Board sought input from AMCs and other stakeholders before those agencies enacted administrative rules and civil penalties. It is unfortunate that Mr. Freid did not carefully read the August 13, 2010 letter he received from DCBS and return the survey. Perhaps his opinions would have influenced the formulation of those rules and civil penalties.

³ The Notice of Proposed Civil Penalty alleged 94 violations. The Board presented evidence as to 88 violations. See Exs. A17, A19, A20, A22, A23, A25 through A103, A106, A108, A110, and A111.

Much of the problems that Mr. Freid and his company experienced stemmed from the nationwide financial collapse in 2008 and its impact on real estate markets and the appraisal industry, and from the company's difficulties getting its new software program operational. However, those problems are beyond the scope of the issues in this matter, and they do not negate the fact that Mr. Freid committed at least 88 violations of ORS 674.205(1).

(2) Civil penalty.

ORS 674.995(1) provides that the Board may impose a civil penalty, not to exceed \$15,000 for each violation, on a person who violates a provision of ORS 674.200 to 674.250.

The Board, pursuant to OAR 161-006-0175, has adopted a Sanction Guidelines Grid that provides for a \$500 civil penalty for the first Board action for a violation of ORS 674.205(1), and for a \$1,000 civil penalty for each subsequent violation.

The Board followed its Grid in assessing a civil penalty in this matter (*i.e.*, \$500 for the first violation and \$1,000 each for the remaining 87 violations.) The Board should impose a civil penalty against Mr. Freid in the amount of \$87,500.

ORDER

I proposed the Board issue the following order:

Michael J. Freid is liable for a civil penalty in the amount of \$87,500.

Ken L. Betterton

Senior Administrative Law Judge
Office of Administrative Hearings