

PARK WATCH[®]

A LEGAL DEVELOPMENTS NEWSLETTER

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A COURTESY FOR OUR FRIENDS AND CLIENTS

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THIS NEWSLETTER CONVEYS GENERAL INFORMATION, NOT LEGAL ADVICE: CONSULT AN ATTORNEY BEFORE RELYING HEREON

SAFE Act: A Reprieve for Park Owners Providing Financing to Needy Buyers

DLO, Inc.: Creative solutions to keep parks efficient, simple and profitable. Proudly specializing in legal representation of Mobilehome Park Owners since 1978
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By: Terry R. Dowdall, Esq.

● **Snap Shot:** *These depressed times mean that older and used mobilehome cannot get financed and hence are not readily marketable unless the park owner makes the loan; sometimes, title devolves to the park owner after foreclosure, eviction or default, such that the park owner cannot sell the mobilehome unless financing is also provided. The S.A.F.E. Act purports to prohibit park owners from helping needy buyers. Sheila Dey of WMA has successfully, single-handedly, sought an exemption for Park owners until S.A.F.E. Act regulations are finalized: THAT could take another two or three years. So the status quo remains in effect for park owners, for now, in California.*

● **The Nature of the Market:** Many owners in California carry a considerable numbers of park-financed homes. This is because, generally, there are no commercially available loans for used mobilehomes. Thus, park owners are often the *only* option in order to facilitate the purchase of the mobilehomes. Park owners' motivations are different than the conventional lender: the park owner has a keener interest in the buyer's success because the mobilehome stays in the park and the buyer has a continuing relationship as a tenant. If anything, the park owner is *more* careful about extending credit than any conventional mobilehome lender; we need a good buyer and *often more importantly, a good tenant.*

● **Anecdotal evidence?** In speaking with a park owner who made twenty-six loans for park-financed homes in the park recently, ALL the buyers fully performed to end of the contract. A sound buyer is only valuable if also a good tenant.

The big difference *today* is that park owners are still

willing and able to make loans to assist the parties to a mobilehome sale when no one else is. Conventional lenders are nowhere to be seen in respect to used and older product. For "older persons" (55+) parks, perhaps this issue is less significant, because the incoming residents often pay in cash, transitioning and down-sizing from larger residences. But for the "all-age" parks and communities with an abundance of smaller and pre-HUD homes, the poor and needy are without *any* financing alternatives without the assistance of the park owner.

The S.A.F.E. Act licensing requirement includes mobilehomes, but sweeps with an overbroad reach. Park owners are deeply ensconced with the interest in success for the buyers of mobilehomes. Default creates huge expense for park owners faced with eviction, abandonment or foreclosure, lost rents and re-sale efforts. Loans are firstly designed to perform; but maximizing economic gain is subordinate to the interest in locating a tenant to occupy the space and pay the rents. The park owner's interests are plainly different from the scope of the remedy in the S.A.F.E. Act and the targets thereof in need of regulation.

Absent an exemption through legislation or regulation, the S.A.F.E. Act on its face purports to apply to park owners making the occasional loan on the home it recovered through eviction, foreclosure or abandonment. For now, new developments give some cause for guarded optimism. In the *Counsel Corner* section of the WMA Reporter, *Sheila Dey* reports that an temporary exemption from the S.A.F.E. Act requirements has been obtained.

HUD has granted the industry, in California specifically, a reprieve from enforcement of the S.A.F.E. Act. On June 21, the California Business,

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Transportation and Housing Agency confirmed HUD's agreement to provide California park owners a temporary exemption for park owners who "occasionally carry back paper on units in their parks that they sell to occupants." As Sheila reports, "as a result of this temporary exemption from S.A.F.E. Act implementation, park owners who make occasional chattel loans may do so without having a Mortgage Loan Originator license and the Consumer Finance Lender license through the Department of Corporations. This is indeed good news since the S.A.F.E. Act provisions in SB 36 affecting licensees of the Department of Corporations take effect on July 31, 2010. However, I must stress that this relief from SAFE Act implementation is only temporary."

In the meantime, S.A.F.E. Act jurisdiction is being transferred to a newly formed federal agency, the **Consumer Financial Protection Bureau**. While it is believed that HUD personnel may go to that agency, still, the delays in issuance of regulations (together with the time for public comment and seeking inroads into a fair application of the law) may be substantial, from eighteen months to perhaps two or three years.

● **Commercial Alternatives Contemplated:** In anticipation of the S.A.F.E. Act, various entrepreneurs are exploring avenues by which to assist the park owner in financing of mobilehomes which cannot be conventionally financed. This may pose very special problems to be overcome.

For example, a licensee, for a fee, might make the loan, and then sell it (after close of escrow) back to the park owner as an assignee. However, according to MHI, the assignee of such loans *must also be licensed*. If the point of dealing with a licensee is to acquire the loan and service it as though the park owner had made it in the first instance, that plan cannot work—the park owner would need to be licensed anyway. Hence, given the uncertainties in the current status of the S.A.F.E. Act and (i) how it is interpreted, (ii) what exemptions will be permitted, and (iii) when it will apply, my opinion is that it is premature to enter into any contractual arrangement of this kind, and when such (if ever) is considered, to have the arrangement *carefully reviewed* by counsel knowledgeable of the S.A.F.E. Act, the California Finance Lenders Law and other applicable state regulations.

We do know that there is a plainly provided exemption for (1) carry-back financing of homeowner-occupied dwellings, and (2) for attorney assisted transactions (so long as there is a pre-existing relation with the attorney and counsel is not hired only for the purpose of the loan itself).

To add to the news, just a day ago, **Barney Frank** issued a letter which is believed to reinforce this position, as respects retailers. That letter is attached. It states:

Given the fact that HUD has yet to publish a final rule addressing implementation of the S.A.F.E. Act, HUD should provide prompt and clear guidance for states where there is some debate or uncertainty as to the need for the registration and licensing of certain individuals.

Unique Status of Manufactured Housing Retailers

We believe that it is important to acknowledge that the manufactured housing industry is uniquely affected by the requirements of the Act. Accordingly, we have concerns that the industry not be adversely affected in ways that are inconsistent with the purposes of the S.A.F.E. Act.

But this does not address community owners. How all this eventually comes into focus remains to be seen. Sheila concludes and cautions:

"So for now we have a reprieve from the provisions of the S.A.F.E. Act. However, if you are making more than the occasional chattel loan on homes you own, you should probably secure a Mortgage Loan Originator license and a Consumer Finance Lender license through the Department of Corporations or locate a consumer finance lender with a Mortgage Loan Originator who will permit you to fund the loans through their licenses."

Hydrants off the Table

● **Update:** Kim Strange, Deputy Director of HCD, that HCD is not going to pursue regulations to require fire sprinklers in new manufactured housing. Kim stated that the reason for their decision was the cost and burden of mandating fire sprinklers at this time was not in the best interests of the industry or consumers.

Emergency Preparedness.

● **Please be advised!** We cannot accept Emergency Preparedness Plan orders after July 30, 2010, due to existing volume and the need for timely production by September 1.

● **Check your local enforcement agency.**

At least one local enforcement agency is demanding submission in August!

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Please feel free to contact Terry R. Dowdall, Esq. for further information and questions.

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER
Governor

Department of Alcoholic Beverage Control
Department of Corporations
Department of Financial Institutions
California Highway Patrol
California Housing Finance Agency
Department of Housing & Community Development
Department of Managed Health Care
Department of Motor Vehicles
California Board of Pilot Commissioners



DALE E. BONNER
Secretary

Department of Real Estate
Department of Transportation
Office of the Patient Advocate
Office of Real Estate Appraisers
Office of Traffic Safety
California Film Commission
California Office of Tourism
Infrastructure and Economic Development Bank
Public Infrastructure Advisory Commission

BUSINESS, TRANSPORTATION AND HOUSING AGENCY

June 21, 2010

Mr. Charles Johaneck
U.S. Department of Housing & Urban Development
451 7th Street, S.W.
Washington, DC 20410

Dear Mr. Johaneck,

On behalf of the Business, Transportation and Housing Agency (BT&H Agency) and, specifically, the Department of Real Estate (DRE) and the Department of Corporations (DOC), we want to thank you and your staff for taking the time on June 9th to work out a few issues surrounding California's implementation of SAFE.

As DRE, DOC, and the BT&H Agency spelled out on that conference call, several different constituency groups have approached us with questions regarding the application of SAFE to their unique activities. We understand from comments made by Housing & Urban Development (HUD) staff during our call that HUD is currently in the process of addressing the issues raised by these same groups, but has not yet made final policy determinations as to the applicability of SAFE to their activities.

Accordingly, in the interim, HUD agreed during our June 9th call that it would be appropriate for California to temporarily exempt the following groups from SAFE implementation pending final policy announcements from HUD:

1. HUD-certified housing counselors.
2. Volunteers and employees of non-profit lenders, such as Habitat for Humanity.
3. Owners of mobile home parks who occasionally carry back paper (chattel loans) on units in their parks that they sell to occupants.

We understand that once HUD clarifies these and other issues in final regulations, further direction will be communicated which may alter the above agreement. Again, we greatly appreciate your willingness to work with us on these issues pending final resolution.

Sincerely,


Marjorie M Berte
Undersecretary

U. S. House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

July 22, 2010

The Honorable Shaun Donovan
Secretary
U.S. Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410

Dear Mr. Secretary:

As the primary authors of the Secure and Fair Enforcement for Mortgage Licensing Act (the S.A.F.E. Act or the Act) in the U.S. House of Representatives, we look to continue a dialogue clarifying Congressional intent with respect to the Act. Specifically this letter addresses the implementation date for state S.A.F.E. Act laws, the application of S.A.F.E. Act to the manufactured housing industry and a de minimis standard for state S.A.F.E. Act licensing and registration.

Guidance on Implementation Date

An area of concern is the date of implementation of S.A.F.E. Act requirements. As you know, Section 1507(a) of the statute requires implementation of a Nationwide Mortgage Licensing System and Registry within one year of the date of enactment. Further, Section 1508(a) gives HUD backup authority to establish a system for the licensing and registration of loan originators in States where such a system is not in place and in compliance with the S.A.F.E. Act within one year of the date of enactment for States whose legislature meets annually or within two years for States whose legislatures meet biennially. As a result, many states must have a licensing system in place by July 31, 2010. Given the fact that HUD has yet to publish a final rule addressing implementation of the S.A.F.E. Act, HUD should provide prompt and clear guidance for states where there is some debate or uncertainty as to the need for the registration and licensing of certain individuals.

Unique Status of Manufactured Housing Retailers

We believe that it is important to acknowledge that the manufactured housing industry is uniquely affected by the requirements of the Act. Accordingly, we have concerns that the industry not be adversely affected in ways that are inconsistent with the purposes of the S.A.F. E. Act. Such purposes include enhanced consumer protections and uniform and streamlined licensing and reporting requirements for mortgage loan originators. We urge HUD to provide guidance about the various concerns of the industry, which include whether certain activities performed by manufactured housing retailers are administrative or clerical in nature (and therefore not covered under the Act) or undertaken for compensation or gain (as defined by the Act) and dual and additional lender licenses (including educational and testing requirements) for personal property finance lenders. We also are concerned that the current structure utilized by the Nationwide Mortgage Licensing System (NMLS) allow for personal property lenders or the retail sales entity (the typical employer of manufactured housing retailers) to sponsor such retailers as loan originators.

De Minimis Standard

We think it is permissible for States to consider a de minimis standard for registration and licensing requirements under the Act. Several states allow for a de minimis standard that exempts seller financed and/or personal investment loan origination where there are five or fewer loans annually. We believe that these types of standards are consistent with S.A.F.E. Act language that requires consideration of the commercial context in which mortgage loan origination activities are undertaken. We also note that such an exemption would be in line with the federal banking agencies' draft final rule implementing the S.A.F.E. Act, (74 FR 27385) that pursuant to language in the Act, exempts from federal registration employees of federally regulated entities who originate five or fewer loans per year.

In addition, we believe that states may consider S.A.F.E. Act de minimis standard language for an individual who acts as a loan originator exclusively for a single federally chartered depository institution. However, we strongly recommend that such individuals also be required to register with the NMLS and obtain a unique identifier (we recognize that operating protocols for NMLS may need to be modified to accommodate this type of registration). Further, in implementing this de minimis exception, we urge the adoption of a reporting process for such individuals to ensure the number of loans originated is at or below the de minimis threshold during any 12 month period and that any originator who wishes to exceed such threshold may only do so after obtaining a loan originator license from the state. Finally, we also strongly recommend that any de minimis standard or other exemptions from the provisions of the Act be revisited by states on an annual basis.

Thank you for your consideration of our views.


BARNEY FRANK
Chairman


SPENCER BACHUS
Ranking Member