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PARK WATCH®

A LEGAL DEVELOPMENTS NEWSLETTER

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S.A.F.E. Act: A 12 Step Program for Compliance

A Practical Approach to Park Lending

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In this Issue:

■ Summary:

The SAFE Act was established to provide minimum standards for licensing of residential mortgage loan originators in order to increase uniformity, improve accountability of loan originators, combat fraud, and improve consumer protections.

The SAFE Act ("SAFE") regulations are now final. Compliance starts NOW*. Clarity is not one of its features. Prolixity is. The "ink" is "still wet" and states have yet to react and interpret it. But it is little comfort that the Act is being enforced "as-is" now. One lender has already been significantly fined.[1] The SAFE publications and articles reviewed to date have summarized the legislation, its key features, its intent. But no one has suggested a step-by-step procedure to assess and decide a strategy— until now.*

So, this newsletter will distill the available alternatives and offer concrete courses of action.[2]

■ Essential Questions to Develop Your Strategy:

Many owners in California are forced to own 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 provide affordable housing opportunity. Federal concerns with lending do not involve park owners; the motivations are different than the commercial lender. The owner has a keen interest in the buyer's *success* because the home remains in the park; the buyer is also a tenant. If anything, the park owner is much more careful about lending. Owners need a good buyer *and a good tenant*. Else, the tenant defaults and once again, the cycle of lost rent, expense and delay is repeated. And concerns with SAFE are market driven; if financing becomes available for used mobilehomes, park owners' needs to provide financing to assist residents will attenuate and SAFE will become a bad memory. However, the current commercial real estate market will be with us to 2016; the residential side, 2019.

Owners can always be advised of possibilities, but want to know, *"what would you do"*? So *we* tell all. In overview, ask these questions:

1. **Do you *finance sales* of mobilehomes in your park?**
2. **If so, do you fit an "Extrinsic Exemption" from SAFE?**
3. **Transfer of title *at inception* of the contract?**
4. **Another "Extrinsic Exemption" -- *Park Leasing*?**
5. **Another "Extrinsic Exemption" – *the Attorney*?**
6. **Can a Loan be Structured in a Different Form to Escape SAFE *(e.g., "contract of sale," "rent to own," "option")*?**
7. **What about an interim exemption until new California Regs are Introduced?**
8. **Should I just obtain an MLO license?**
9. **Is my origination activity *excluded* from MLO licensing?**
10. **For example, is my origination activity outside a "Commercial Context"? "Habitual or Repetitive" ?**
11. **Is there clarification in the HUD APPENDIX?**
12. **Is my origination activity "*De Minimis*"? Does it matter?**

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[1] **IN RE: CONSENT ORDER VANDERBILT MORTGAGE AND FINANCE, INC.** (February 25, 2010) ("VMF shall pay a civil money penalty of **seven hundred fifty thousand dollars ($750,000.00)**; . . .within ten (10) days of the entry of the Consent Order in this matter").

[2] **CAVEAT**: Your lawyer is an ***essential*** component of your plan; this article does **not** constitute legal advice and you cannot rely on this information **without written approval of your attorney**. Reading or relying on this article **does not** create an attorney client relationship with DLO, Inc.; it is a discussion points memorandum, only, for development of a specific park plan. Some of the ideas and strategies may or may not be lawful for your individual circumstances; hence, you need legal advice to determine how you will comply with SAFE.

■ Overview:

Previous Safe Harbor No More: Park owners have enjoyed a hiatus from SAFE until now. Sheila Dey, Executive Director of the Western Manufactured Housing Communities Association (WMA) successfully and single-handedly sought and obtained an exemption for Park owners until SAFE regulations were finalized. On June 21, the California Business, 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 reported, "*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 was good news since the S.A.F.E. Act provisions in SB 36 affecting licensees of the Department of Corporations took effect on July 31, 2010. However, I must stress that this relief from SAFE Act implementation is only temporary.*" Now, owners must deal with SAFE.

The SAFE Regs Are Rife with Ambiguity and Vagueness: The gaping vacuum of detail in the regs is an invitation to test-case litigation, clearly without input from experienced business people.[3] Hair-splitting over irrelevancies seems the preoccupation. *Example:* HUD essentially requires a mortgage loan originator (MLO) license for loan origination activities "to some degree of habitualness or repetition." *What does that mean?* The *Appendix* (the purpose of which is to shed light and provide clear understanding) only parrots the regs themselves and are of virtually no use at all. It reads as if HUD were intentionally, as sport, avoiding a commitment to a reliable, intelligible rule. "Commercial Context" and "Habitually" or "Repeatedly" making loans on one's own property is the essential test. A person is engaging in the business of a MLO if there is a commercial context *and* the acts are "habitual" or "repeated."

Best not to morph SAFE into a Lawyer's Relief Act . . .

Commercial Context. There is a "commercial context" if the motivation is "profit."

Habitualness or Repetition. Not defined. The HUD *Appendix* says a requisite "degree." If there is a "*degree*" of "habitualness" or "repetition," an MLO license is needed.

For park owners desperately seeking to comply with the law and who must finance homes for lack of other financing sources, the regs are a "blank slate" for judicial decisions. Eventual rulings will come down from enforcement actions due to mistakes and ignorance engendered by the nebulous bureaucratic double-speak. Let's not fill the interstitial vacuum. *WMA is setting sights on next year's legislative agenda to determine what can possibly be done* given the political composition of the legislature. Best not to morph SAFE into a Lawyer's Relief Act of 2011 as HUD may wish, and this may happen without thoughtful, preventive thinking —or, in the hands of the wrong lawyer.

[3] This situation is déjà vu. Like the first regs implementing the *Fair Housing Amendments Act of 1988* when WMA and others sought specific clarification for the meaning of "significant services and facilities" required for 55+ parks. HUD refused. Of course, HUD ignored the main ingredient–homogeneity and companionship. Rather than risk defending costly enforcement actions, owners fled senior housing and converted to "all age." HUD did not care. Congress did. In 1995, the "significant services and facilities" test was rescinded altogether, to save senior housing nationwide. Equally misguided execution appears to be the case here.

■ 12 Steps to Determine Your Strategy:

If you plan to provide any financing for mobilehome sales in your park, you care. No one can say a specific number of sales which triggers an MLO license requirement. Here, assume that the park owner has used mobilehomes, usually pre-HUD (prior to 1976, when there were no building standards) and single-wides. These homes are now owned by the park owner because of evictions, abandonments, decease or to fill an empty space due to lack of any dealer interest. These homes make wonderful opportunities for moderate-cost housing. We also assume that no lender will provide financing for them. In order to sell, the owner must provide the financing.

1. Extrinsic Exemptions from SAFE–Introduction:

SAFE applies when an *agreement* calls for delivery of *title* (recordable ownership) after the borrower *performs* its *duties* (payment and no impairment of the security) until a specified date of *maturity*. Labels and document titling is of zero consequence. Hence, "installment sale," "contract of sale," "rent-to-own," "options to buy" (at nominal value after a term of performance of rent payments) -- call it what you will -- are covered. The *key*: *is ownership withheld until the buyer has performed the duties required to obtain the ownership?* So, certain transactions and practices are outside the scope of a "loan."

2. Extrinsic Exemptions from SAFE-- Transfer of title at inception of the contract.

Example. Tenant agrees to buy a single-wide home for $5,000.00. But can only pay $2,500.00 at inception, and is willing to pay $500.00 per month until fully paid. Park owner accepts the down payment, and hands the title to buyer. The loan is not "securitized." It is not covered by SAFE. Remedy for default? Small claims court, not repossession. Strategy: if the tenant cannot afford the home payment, he also probably cannot afford rent, so a default and eviction is expected to follow. More: What stops the tenant from removing the home after recording title? Good screening practices, else, nothing. An owner of the home may remove it. Civ. Code §798.59 (a no-waiver right). However, the home may not be acceptable in other communities and the cost likely squelches removal. Only a recorded legal owner has the right (Health and Safety Code) to prohibit removal of the home. This approach may have appeal for a home $5,000 or less; clearly not more expensive homes. To avoid a re-sale to one who could remove it, an option to re-purchase at a fixed price, first refusal, etc., is a means by which to secure the owners expectations.

3. Extrinsic Exemptions from SAFE-- Park Leasing:

For owners strangled with the political repression of rent control, an increasingly popular and successful strategy is to acquire homes, and then rent them. The rental of the home *qua* dwelling unit entails higher overhead, but it is not regulated in most jurisdictions. And the market rental may be twice or three times the confiscatory artificial subsidy provided to the homeowner. We have been advocating this strategy

since we introduced it by a dinner speech delivered in 1987 to a room of owners frustrated with ridiculous expense of fighting rent control. For some of those listening, they tripled their *pro formas*. The self-absorbed tenants eventually melted away to appreciative renters. The tenants pay fair market rent, never become entitled, and the owner can easily close the park, or subdivide without incumbent resistance, or sell the homes in the future after market forces reduce SAFE to a bad memory.

Many owners do not wish to consider renting, due to the additional costs of operation. However, when the profit from the modest internal investment is considered, it is hard to conceive of a better risk of the resources so many have "parked on the sidelines" waiting out the uncertainty of the current regulatory climate. *Example*: a 100 space park. In a draconian rent control city. Regulated rent, $300.00. Local Apartment rent, ~$1,500.00. With rent control, gross rent is ~$30,000 per month. As a rental community, ~$150,000.00 per month. One can do a lot of additional maintenance for ~$120,000.00 per month.

Unless park-financed, these homes cannot be sold . . .

4. Extrinsic Exemptions from SAFE–the Attorney Exemption:

The regs exclude the services of an attorney conducting the activities of the MLO. This exemption is discussed in great detail below. This option may be the least expensive approach to avoiding all regulatory entanglements: avoiding the risk of defining MLO exclusions, circumventing the arduous process of obtaining and maintaining the MLO license, and precluding disputes, investigation, enforcement, and claims.

5. Can Loans be Structured With Different Labels or Forms to Escape SAFE?

No. A lease option, conditional sale contract, contract of sale, "rent to own," or other installment forms of contract are *not transactions outside the scope of SAFE*. No matter how devised, if title is not transferred until all payments are made, the deal is covered by the term residential mortgage under SAFE. Supplemental to the usual nomenclature of "residential mortgage loans," and typical mortgages and deeds of trust:

> . . . the SAFE Act definition also includes "other equivalent consensual security interest on a dwelling . . . or residential real estate upon which is constructed or intended to be constructed a dwelling," which has the potential for including a broad range of other financing mechanisms. For the purposes of this rule, "equivalent consensual security interests" *specifically include installment sales contracts, consistent with the treatment by many states of such contracts in the same manner as mortgages and purchase money mortgages offered by sellers of residential real estate. While there is no formal recorded lien held by the provider of financing, the fact that the seller holds title to the property until the contract has been paid in full is the practical equivalent of a lien* . . . (Regs at p. 38473)

For some owners, and property management firms in particular, there seems no process by which to avoid licensure. For owners with multiple properties, handling dozens of defaults at a time, licensing is simply required.

For the rest, where none of the *"extrinsic exemptions"* can be used or desired, and several homes are expected to be self-financed, the fool-proof approach (efficient and risk free--*i.e.*, the "insurance policy" approach), will be to retain licensed counsel; arrange a standardized procedure to facilitate and expedite loan origination. The process should "look" about the same as a *pro per* settlement negotiation in an unlawful detainer case, except *building* instead of *ending* the relationship.

6. Will the California Regs Provide Relief?

The regs implement SAFE, the federal law. California's SB36 (Calderon) implemented the SAFE Act itself. The regs allow states to be more stringent than the requirements of SAFE but not less rigorous–SAFE and the regs are the bottom floor of requirements for MLO's. SAFE jurisdiction was transferred to a newly formed federal agency, the Consumer Financial Protection Bureau, established by the Dodd-Frank Act, as of July 21st.

According to one commentator, ". . . the Consumer Finance Protection Bureau will take over from HUD the role of determining who is in need of licensing and requirements, and the agency has the right to improve on the requirements stated in the SAFE Act. They can start by hiring some actual mortgage professionals to assist them in this endeavor. *What my industry does not need is more burdensome polices from very intelligent, well-educated people who have never sat across from a consumer and taken a mortgage application or written a loan.*"

It appears that SB 36 did no more than pass along SAFE into state law. So, focus on the regs is key. Additional clarification of SAFE through state law may be on the way.

In the meantime, the bill to exempt real estate brokers from SAFE (SB 376 (Fuller)), continues as a two year bill in the California legislature. Most used home sales are listed by real estate brokers. The California Department of Real Estate (DRE) was officially opposed to measure. Whatever can be done to improve a park owner's position at the state level must be consistent with the minimum standards of the SAFE regs, they say.

Enabling housing opportunities to those who cannot qualify for a bank loan should be a laudable goal and encouraged. Why any agency would work to squelch low cost affordable housing is unfathomable. Especially amid sever recession. But the nature of turf preservation appears to be blinding the myopic from more important priorities.

7. Obtain a License? SAFE Requirements in as Nutshell (Noble Intentions, Lackluster Execution)

SAFE's purpose is to add consumer protection and reduce fraud by creating minimum federal standards for the licensing and registration of MLO's. SAFE defines the term "mortgage loan originator" as (generally speaking) one who takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan for compensation or gain.

Under the SAFE Act, MLO's must be both (1) licensed by California and (2) registered on NMLS Registry. License applicants must undergo background checks, submit to credit checks, complete and

successfully pass pre-licensing education courses approved by NMLS Registry, meet specific personal character requirements specified in the SAFE Act, and, once licensed, must complete annual continuing education courses approved by NMLS Registry and submit call reports to NMLS Registry annually.

For park owners who are frequently required to provide financing, obtaining the MLO is advised (if an extrinsic exemption strategy discussed above is not adopted). The frequent owner-lender is likely included in the MLO definition, no matter how a deal is structured. While clever programs may be devised to dodge actions defining MLO activity, the exposure to testing the strategy is unavoidable. And many hyper-clever legal strategies prove too clever. Remember, *substance* trumps *form*. If the end result is deemed MLO activity, the procedural form, labeling, or machinations will not matter. For most owners, a "bullet-proof" strategy is the objective. Uncertain and risky interpretations which create exposure to risk (enforcement activity and sanctions) from the federal government are not.

8. Is Your Activity Excluded from MLO Licensing Requirements?

You do not need an MLO license unless engaged in "the business of a loan originator." HUD states,

> *"It is HUD's view that the SAFE Act's distinction between individuals who may meet the definition of "loan originator" (because of the activities they carry out) versus those individuals who "engage in the business" of a loan originator, means that not every individual who acts as a loan originator is necessarily subject to the SAFE Act's licensing and registration requirements." For example, the definitions for the MLO actions of "offering" and "negotiation" of financing is broad and would include the actions of a park owner is financing sales in the park.*

Selling is not charitable, but certainly not profit-driven . . .

The MLO presents ''particular" loan terms. HUD intends to cover the presentation of loan terms that are identified as being prospectively available to similarly situated prospective borrowers. No question: this is what park owners do when, as a last resort, offering financing to enable a sale.

The regs (at p. 38467) seem to offer a glimmer of hope for park owners who very infrequently finance sales of homes in their parks. Says HUD:

> HUD appreciates the concerns of the commenters and agrees that there may be cases where the seller of a property or properties in which the seller has never lived may provide financing for the sale without the seller's acts arising to ''engag[ing] in the business" of a loan originator. While the fact that the seller has not lived in the properties makes it more likely that financing is provided in order to obtain a profit, and therefore makes it more likely that a commercial context is present, the infrequency with which a particular seller undertakes such actions, combined with the fact that it is the individual who is providing the financing (rather than a business entity that regularly provides financing), may mean that the requisite habitualness needed to constitute ''engage[ing] in the business" of a loan originator is absent. However, HUD is unable to state how often an individual may undertake such transactions before the requisite habitualness is met.

But the test is not encouraging and seeking to guess at compliance is a hapless pursuit for high risk takers. The risk averse will not want to test these waters. The two determinants are "commercial context" and "habitualness and repetition." If either is not satisfied, an MLO license is not needed. *Regrettably, there is no guidance about how to make such determination when considering self-financed properties*. Consider HUD's treatment of these elements:

9. If No "Commercial Context," No MLO Needed?

Is there a commercial aspect to the financed transaction? According to HUD, "commercial" refers to intent to try to "profit." A park owner financing the sale of a foreclosed mobilehome is seeking to profit; but the sale is just the end-result of legal action taken to deal with a defaulting tenant/registered owner, vacation or abandonment. Essentially, the park owner is *saddled* with the home and is seeking to *mitigate damage* from non-producing homesites. Selling is not charitable, but certainly not profit-driven or a situation desired by *any* owner. Too, the homes in this category are old and cannot be financed–except by the park owner. Unless park-financed, these homes cannot be sold. Here, the park owner is acting out of a necessity to mitigate the damage. It is not a situation that makes a park owner smile.

Still, "profit" is the HUD standard, and *the action of the park owner is not purely charitable or altruistic–not generally on purpose, anyway*. And if the number of such occurrences is frequent, the park owner is at greater risk. One can imagine the allegation that management has a practice or scheme to drive up rents, to force non-payment, so to get control of the home. Now, compare the park owner seeking to fill spaces in a new section, soliciting buyers, advertising, and encouraging dealers to install homes. The latter is certainly "commercial."

Per HUD, a basic definition of "business" is "a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." [4] It is HUD's view that to engage in the "business" of a loan originator and be subject to licensing under the SAFE Act, an individual must act or hold oneself out as acting as a loan originator with respect to mortgage loan origination activities that are carried out in a commercial context and with some degree of habitualness or repetition." For these reasons, and assuming a literal interpretation of HUD's effort to encompass profit-takers who make loans, park-owner-financed homes will always reflect requisite commercial context.

10. If No "Habitualness or Repetition," No MLO Needed. *What is enough?* A "Degree."

Is the park owner acting as a MLO "habitually or with repetition." The word "Habitual" is typically defined to mean: *"Designating an action or state that lasts for or is repeated over an extended duration."* HUD says:

> "The *requisite habitualness or repetition* of the mortgage loan

[4] HUD cites Black's Law Dictionary 211 (8th ed. 2004).

origination activities may be met if either the individual who acts as a loan originator does so *with a degree of habitualness or repetition*, or if the source of the prospective financing provides such financing or performs other phases of originations of residential mortgage loans with a *degree* of habitualness or repetition."

What? Use of the term "degree" is sheer sophistry. *"Degree"* means a "relative intensity or amount," or "a specific identifiable position in a continuum or series or especially in a process." Legal advice cannot be predicated based on unintelligibility. *Paradoxically, frequency has nothing to do with the underlying purpose of consumer protection.* The more dire the circumstances for the owner, the more serious, favorable and secure the transaction for the consumer. More financed homes means greater care and protection. The worse it gets, the more the owner must give to survive. Performance becomes mission critical compared to the owner selling just one home of 300 filled spaces.

A park owner who finances sales in the park out of necessity, because banks will not do so, is required to deal with each and every non-incoming producing space. Otherwise, the park enterprise will fail. Based on this rational reaction (or put bluntly, an instinct for economic survival) in responding defaults and foreclosures, is there a habit? Is there "an action or state that lasts for or is repeated over an extended duration"?

The park owner's actions will last so long as there is product that no one else will finance. Is it "repeated"? Whether one leaking pipe or 100, the owner competently repairs all and does not a plumber make. But by HUD's lights, it may be "repeated" because no one will finance a used mobilehome. The owner must foreclose, obtain title, refurbish and sell. The buyers cannot pay cash; no bank will finance. But that is a pattern and repetition exists.

More financed homes means greater care and protection. . .

HUD's Preamble to the regs are instructive:

. . . the difficulty for states is with a situation raised by many commenters where a *property owner* is providing *seller financing* in conjunction with *sales of his or her own properties* in *such numbers and perhaps at such frequency* that the owner *appears to be engaged in the business* of a loan originator. While the fact that the seller has not lived in the properties being sold would make it more likely that financing is provided in order to obtain a profit, and would therefore make it more likely that a commercial context is present, the infrequency with which a particular seller undertakes such actions, *combined with the fact that it is the individual who is providing the financing* (rather than a business entity that regularly provides financing), may mean that the requisite habitualness needed to constitute engag[ing] in the ''business" of a loan originator is absent. On the other hand, for example, a builder who *repeatedly acts as a loan originator in the course of selling homes he or she has constructed would almost certainly satisfy the requirements of a commercial context and habitualness or repetition and, accordingly, would be subject to SAFE Act licensing requirements.*

11. Does the APPENDIX Provide Explanation or Basis for Exclusion?

No. 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" . . .

. . . (b) 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."***

* * *

(f) 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****."*

This explanation offers up no more hope than a good guess at what is intended.

12. What About a "De Minimis" Exclusion? Do the "Introductory Comments" to the Regs Exclude Owners?

No. HUD recognized comments from the public as to need for exemption for small park owners. HUD states that:

" . . . other commenters suggested that there should be an exception for sales in *small manufactured housing communities* because it is difficult to obtain institutional loans, because such communities often deal in very few sales per year, and because the staff often has to discuss loan terms with buyers. *A commenter stated that sometimes the manufactured housing community itself acquires title to a manufactured home and needs to be able to carry back a chattel mortgage in order to be able to resell it."* (Regs at p. 38474) " . . . Other commenters stated that originating five or fewer manufactured home loans per year should be exempt; . . .

HUD offers no mercy: "HUD does not have authority to alter the meaning of "dwelling . . ." But the issue is not characterization of the dwelling to be financed, it has to do with the circumstances of the transaction. HUD states that:

" . . . [A]ccordingly, an individual engaging in the business of a loan originator with respect to a loan that is to be secured by a manufactured home, . . . or trailer that is to be used as a residence is subject to licensing under the SAFE Act." (Regs at p. 38475).

Again, no estimation of how many transactions are allowable before the activity would be deemed "habitual." In each case, it would be based on a profit-motive, so the frequency of selling off a park's mobilehomes would constitute the acid test.

■ The Attorney Exclusion:

Use of an attorney for origination activity is exempt from SAFE. The attorney can, by advance planning and agreement, originate (offer, negotiate, and consummate the loan) as an extrinsic exemption. It is not included as MLO activity and no pre-existing relation is required (a change in the final regs). According to HUD, such activity is not engaging in the business of a loan originator; it is encompassed in the practice of law (providing legal services arising in the negotiation and preparation of the documentation).

By establishing parameters on the terms of financing in advance, counsel should be able to *streamline origination* (presentation of specific terms, offers, negotiations, and documentation on referral of the purchaser) with alacrity. ***Why?*** For some owners, the alternatives are less attractive. *Expense, time and continuing compliance requirements are expensive and time consuming*. Specifically, education, testing, licensing, continuing compliance and education, record-keeping, reporting (accounting for sales activities, reporting of profit), federal enforcement and registration, financial resource requirements, obtaining consumer lending licenses and risk of claims and enforcement may by contrast make use of counsel most economical and simple. It appears at this time to be most clear and certain of the means by which to lawfully circumvent all the troubling questions posed by SAFE at this time.

For example, the owner might reduce costs by implementing a standardized procedure. The owner can significantly reduce time and effort, while assuring that the attorney is acting in the place and stead of the MLO, by the handling of a completed application form for tenancy and home purchase (with terms of sale contingent on approval of financing), then refer to the attorney for financing discussions, negotiations and processing, then close escrow. *It must be the attorney who initiates communication with the purchaser as to terms of the loan and provides the loan application, and documentation.*

An owner can assist the purchaser completing an application by explaining the contents of the application, but since it is likely difficult not to, at the same time, engage in a discussion about specific loan terms, the owner is *strongly advised* to avoid providing this service.

There is no reason why the loan *process* cannot be explained by management. Obtaining basic information about the purchaser can be obtained from the application for tenancy forwarded to the attorney for negotiation of terms and preparation of the documentation for submission to escrow. An owner can also order and obtain credit reports. The owner should be able to negotiate and enter into a contract for home purchase, perhaps provide a credit application, and then forward to the attorney for discussion of credit terms with the purchaser, preparation of the documentation, and execution thereof.

The owner should be able to tell the purchaser that the attorney handles credit and loan issues, that the attorney can discuss the terms offered, or has sent an offer ("it is in the mail, but we cannot discuss that or terms with you"), or discuss financing options, affordability, or show pre-prepared general fact sheets, explaining loan language or lending policies, arrange COE or other aspects of the process on the previously agreed terms reached with the attorney. Any specific issues about the purchaser, the loan terms specific to the purchaser's deal, cannot be discussed. Once the purchaser wishes to buy the home, the loan offerings can be presented by the attorney, and if acceptable, documents can be prepared and mailed. When fully executed, owner can deliver them into escrow.

For security of the owner, it is not advised that contracts of sale be used, in which the owner is not recorded as legal owner. It is advised that an escrow process always be used for the transfer of title. The remedies available for foreclosure in the event of default should remain intact.

■ Observations about the "Wet Blanket" thrown on the Economy.

Avoiding the regulatory creep to make park operations efficient is not always possible. While the economy continues to recede, regulations continue to multiply. Avoiding the regulations is not just to strategize with exclusions which give rise to questions of triable fact (the test-case possibility), but to seek shelter with a full categorical exclusion.

It may well be that possible allowable activity will generate claims or enforcement actions and entanglements until the owners, nationwide and less well-advised, adjudicate disputes to shed light on the actual interpretation and judicial reception to the SAFE Act and the regs. Therefore, while the regs speak of activities which do not call for an MLO, the more of the activity shifted to the attorney, the less likely any real conflict will materialize (even disputes the owner can win).

Given the economy, need to fill spaces and vacant homes, and lack of future prospects, many owners are without choice but to finance mobilehome sales. In order to do so, understanding SAFE and the new federal requirements is very important. *One enforcement action alone, inclusive of defense costs, disgorgement, rescission, and possible penalties, will exceed any budget to cover home disposition losses.* The owner's plan should avoid conduct giving rise to triable issues of fact–so as to steer clear of any activities within the scope of SAFE unless a license is obtained first.

The *risk* is not worth the gamble.

Adverse Action Letters, New Federal requirements of Dodd-Frank Act

Declining an applicant based on a credit score just got more complicated. Please review your rejection form letter and determine if you are in compliance.

URGENT! Compliance Required August 15, 2011.

In July, the Federal Reserve Board published a rule amending the model notices for adverse action of an applicant for tenancy. This was necessitated by the "Dodd-Frank Wall Street Reform and Consumer Protection Act" (Dodd-Frank) for adverse action notices.

The Equal Credit Opportunity Act (ECOA) makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, or age (provided the applicant has the capacity to contract), because all or part of an applicant's income derives from public assistance, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act. "Regulation B"[5] implements the ECOA.

The ECOA[6] generally requires a creditor (including a park owner) to notify the prospective purchaser of a rejection of tenancy (an "adverse action"). The adverse action could include a loan application for purchase of a mobilehome (if an attorney is acting as the

[5] 12 CFR part 202.

[6] Section 701(d)

originator, notice would come from that office). The Federal Credit Reporting Act (FCRA) [7] also requires an adverse action notice when an adverse action is based in whole or in part on information in a consumer report. The adverse action provisions in both the ECOA and the FCRA require disclosures to be given to consumers.

The ECOA adverse action provisions are implemented in "Regulation B." Model notices in Regulation B include the content required by both the ECOA and the FCRA, so that persons can use the model notices to comply with the adverse action requirements of both statutes.

The effective date of the FRB's rule is August 15, 2011; Dodd-Frank requires compliance on and after July 21, 2011. The Mobilehome Residency Law requires written notice to the parties when a purchaser is declined. The overlay of the federal law also requires disclosures where a credit report was obtained and used in the process of screening the applicant. The final rule amends the adverse action model notices to include the disclosure of credit scores and related information if a credit score is used in taking adverse action, in order to reflect this new requirement of the Fair Credit Reporting Act (FCRA) as amended by Dodd-Frank.

Dodd-Frank Act amends the FCRA to require that creditors disclose the following information on FCRA adverse action notices:

(1) a numerical credit score used in making the credit decision;
(2) the range of possible scores under the model used;
(3) up to four key factors that adversely affected the consumer's credit score (or up to five factors if the number of inquiries made with respect to that consumer report is a key factor);
(4) the date on which the credit score was created; and
(5) the name of the person or entity that provided the credit score.

Safe Harbors. A creditor receives a safe harbor for compliance with Regulation B for proper use of the model forms (see paragraph 5 of Appendix C). [8] ¶3 of Appendix C states, however, that the model forms are illustrative and may not be appropriate for all. But using the form as a model with additional non substantive text can be settled with your counsel and then applied as management's practices warrant.

When you base a denial on reports from multiple consumer reporting agencies, the FRB expects you to replace the general reference to "this consumer reporting agency" in the appropriate model form with a more specific reference to the name of the consumer reporting agency from which you obtained the score being disclosed, to avoid ambiguity and consumer confusion. Moreover, Dodd-Frank requires disclosure of the source of the credit score. Thus, the FRB does not believe that a general reference to "this consumer reporting agency" would satisfy the requirements of Dodd-Frank when you base an adverse action decision on reports from multiple consumer reporting agencies.

Disclosure that credit score has been used. Model forms say: "We also obtained your credit score from this consumer reporting agency and used it in making our credit decision." You may use the model form language stating that you "used" a credit score, even if it is not clear whether a credit score was considered. But you cannot change the language to "may have used."

Many park owners use a combination of information, from amount of income, to use of a credit report but not a specific score. Disclosure of the credit score is required if a credit score was used in deciding to reject the purchaser. You are required to disclose that score unless it served no basis whatsoever in formulating the rejection of tenancy; else it must be disclosed. If a credit score was not available, that fact can be stated as well–which is recommended, as the failure to have a score is indicative of a lack of confidence in the applicant's ability to pay rent. *Civ. Code* §798.74.

Dodd-Frank Act expressly requires disclosure of the top four (or five) key factors that adversely affected the credit score, whether or not the effect was substantial. Providing this information is the responsibility of the creditor taking the adverse action. If a creditor is using a credit score from a consumer reporting agency, the consumer reporting agency is in the best position to identify the key factors that affected the score, and the creditor may rely on that information in its disclosure. But even if the consumer reporting agency does not provide the key factors with the credit score, it is still the responsibility of the creditor to disclose the top four (or five) key factors that adversely affected the credit score.

Caveat. Disclosing the key factors does not satisfy the requirement to disclose *specific reasons for denying* tenancy. While a key factor(s) that adversely affected the score may be the same as a specific reason(s), some specific reasons may not relate to a credit score: for example, reasons such as low income, short duration of employment, or issues concerning a previous residency (*Civ. Code* §798.74). Disclosure of both the (1) key factors and (2) specific reasons (even if all the same) is necessary to comply with the statutes.

The Model Forms May Not Be Rearranged. Why?

1. It is appropriate to disclose the consumer report information first because the primary purpose of the adverse action notice is to alert a consumer that adverse action was taken as a result of the consumer report.
2. The content logically progresses from more general consumer report information to more specific credit score information.
3. Because a creditor may still use the model forms when not using the consumer's credit score, providing the credit score information at the end of the forms make it easier for these creditors to delete that information from the forms.

Disclosing credit score information on a separate document. The credit score information must be contained in the rejection letter. Providing a form with credit score information separate from the rejection letter violates Dodd-Frank Act (attachment is not enough).

Joint applications. More and more applicants are submitting a joint application to prove up sufficient income. You may provide the rejection letter to only one applicant. You must provide notice to the primary applicant when readily identifiable–generally the predominant source of the income; or the applicant intending to reside full time in the mobilehome. Not "so far so good," though. **Note** that the FCRA requires notice to "any consumer" (applicant) where rejection is based in any part on a consumer report. Given privacy issues, owners should provide separate rejection notices to each applicant with only the individual's credit score on each notice. Else, the co-applicants would be receiving confidential information about another applicant.

Guarantors and Co-signers. A guarantor or co-signer is not

[7] Section 615(a) of the FCRA, 15 U.S.C. 1681m(a)

[8] http://www.gpo.gov/fdsys/pkg/FR-2011-07-15/html/2011-17585.htm

deemed an applicant and does not receive the rejection letter. The applicant receives the rejection notice even if the rejection is only due to the guarantor/co-signer consumer report. Dodd-Frank Act does not say whether the notice should include a guarantor / co-signer's credit score. Due to privacy concerns, such credit scores should not be disclosed.

A sample of a rejection notice, from the "safe harbor" Appendix, follows. These forms should be used immediately. Form C-1 contains the *Fair Credit Reporting Act* disclosure as required by law. This form is directly from the regs and is a sample, among others–but none should be modified more than necessary, and then *only with approval of your attorney*. Other forms apply if the consumer report was, alone, the sole basis for the denial of tenancy. As *Civ. Code* §798.74 provides specific reasons for denial in addition to credit reports and ratings, a more comprehensive form is set forth here for illustration.

****

Form C-1-Sample Notice of Action Taken and Statement of Reasons Statement of Credit Denial, Termination or Change

Date:----------
Applicant's Name:----------
Applicant's Address:----------

Description of Account, Transaction, or Requested Credit:
Description of Action Taken:

Part I--Principal Reason(s) for Credit Denial, Termination, or Other Action Taken Concerning Credit - This section must be completed in all instances.

----Credit application incomplete
----Insufficient number of credit references provided
----Unacceptable type of credit references provided
----Unable to verify credit references
----Temporary or irregular employment
----Unable to verify employment
----Length of employment
----Income insufficient for amount of credit requested
----Excessive obligations in relation to income
----Unable to verify income
----Length of residence
----Temporary residence
----Unable to verify residence
----No credit file
----Limited credit experience
----Poor credit performance with us
----Delinquent past or present credit obligations with others
----Collection action or judgment
----Garnishment or attachment
----Foreclosure or repossession
----Bankruptcy
----Number of recent inquiries on credit bureau report
----Value or type of collateral not sufficient
----Other, specify:----------

Part II--Disclosure of Use of Information Obtained From an Outside Source

Our credit decision was based in whole or in part on information obtained in a report from the consumer reporting agency listed below. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency.

Name:----------
Address:----------
[Toll-free] Telephone number:----------

We also obtained your credit score from this consumer reporting agency and used it in making our credit decision. Your credit score is a number that reflects the information in your consumer report. Your credit score can change, depending on how the information in your consumer report changes.

Your credit score:---------- Date:----------
Scores range from a low of----------to a high of----------
Key factors that adversely affected your credit score:
---------- ----------
---------- ----------
[Number of recent inquiries on consumer report, as a key factor]
If you have any questions regarding your credit score, you should contact [entity that provided the credit score] at:
Address:----------
[Toll-free] Telephone number:----------

Our credit decision was based in whole or in part on information obtained from an affiliate or from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, no later than 60 days after you receive this notice, for disclosure of the nature of this information.

If you have any questions regarding this notice, you should contact:
Creditor's name:----------
Creditor's address:----------
Creditor's telephone number:----------
Notice: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

Does the FAA (Federal Arbitration Act) Trump Rent Control?

FAA Displaces Impediments to Arbitration, and Any State or Local Law Specially Scrutinizing Arbitration Clauses.
By: Terry R. Dowdall, Esq.

■ ***Summary:*** *Amid state and federal cases striking down arbitration and reference clauses, the U.S. Supreme Court holds, 5-4, that an arbitration clause barring class action proceedings is enforceable and must be honored to uphold Congressional intent favoring arbitration. What else may pose repugnant interference with the right to arbitrate?* ***Local rent control disputes, as administrative process, appear to be able to be subject to arbitration.***

■ **Facts:** *AT&T Mobility v. Concepcion*, was filed as a class action based on a claim that a "free" cell phone was not free, as the customer had to pay a $30.00 tax. Vincent and Liza Concepcion claimed fraud due to the sales tax. The contracts provided for arbitration, which barred any class proceeding. The complaint was consolidated with a class action in federal district court. AT&T sought arbitration on an individual basis. The 9th Circuit Court of Appeals affirmed the trial court's denial of arbitration.

■ **Ruling**: The Supreme Court held that the Federal Arbitration Act preempts California law, which snubs class arbitration waivers. Says opinion-author Justice Scalia: "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

■ **Impact**: According to the Court, any state case law or statute that stands in the way of arbitration is invalid. Recently, the California Courts have refused to enforce even valid reference and arbitration clauses in "failure to maintain" actions; holding that such procedures would result in a duplication of effort, inconsistent rulings, wasted court time, or that such agreements were not enforceable due to the claims excluded or included, costs, or procedural impediments to a fair hearing for the residents. Now, arbitration is back; reference is out.

The courts have also required arbitration of *employment claims*, previously the purview of state agencies. *And, if federal arbitration provisions take precedence over state disputes, then do they also trump inconsistent local regulations, such as rent control?* A brief legal analysis points to a right to arbitrate rent disputes.

Several cases have trumped state laws which arbitration has displaced. Arbitration is a process that does not displace the substantive law. It provides for a *different decision-maker* and streamlined rules; it also strictly delimits the right of appeal. But so long as the party may vindicate the statutory cause of action in the "arbitral forum," the statute will continue to serve both its remedial and deterrent function (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 (1985)).

■ ***It does not matter that rent controls call for an administrative hearing and decision-making process***. The court has held that arbitration would trump administrative process. The supreme court rejected arguments that conflict between the arbitration clause and the underlying rights disregarded where the dispute is resolved by agency rather than the courts . agency proceedings are administrative rather than judicial. *Preston v. Ferrer*, 552 U.S. 346 (2008).

It is clear that the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration. Another example: the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but the courts have held that claims under both may be subject to compulsory arbitration. (*Shearson/ American Express Inc. v. McMahon*, 482 U.S. 220 (1987). In California, the FAA preempted the Labor Code which provided that actions for collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate." *Perry v. Thomas*, 482 U.S. 483 (1987) (""state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted").

Even the procedural requisites for entering the contract are controlled by the FAA, trumping state and local laws which specifically require certain forms of disclosure and conspicuousness. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), a Montana law declaring an arbitration clause unenforceable unless notice that the contract is subject to arbitration appears in underlined capital letters on the first page of the contract was preempted by the FAA. Courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions.

The MRL calls for consent to arbitration clauses in the rules and regulations. (*Civ. Code* §798.25.5: *"Any rule or regulation...unilaterally adopted...without...consent...and....purports to deny...a trial by jury or which would mandate binding arbitration... shall be void and unenforceable"*). This clause is not necessarily preempted by the FAA, since an "agreement" is always required.

However, the notion that the arbitration clause must be separately initialed is not a necessary requirement of the arbitration agreement. And, the arbitration clause is usually in the rental agreement, not the rules and regs. Absent a requirement that an owner obtain special consent for *every* clause of a rental agreement, the enforceability of an arbitration clause cannot turn on whether the owner received specific consent to arbitration, or whether the arbitration clause is more prominently displayed, or in different color text. The arbitration clause is as enforceable as any other provision of the rental agreement.

■ **FAA Arbitration Procedure Displaces the Local Rent Board:** *It would therefore appear that the FAA allows for an arbitration clause that need not be separately agreed to by a resident, and that the FAA arbitration procedure displaces the powers of the local rent board*. With a substantial number of residents, this will likely result in a fairer result, especially compared to the localities in which the city council has not just passed a rent control law, but reserved for itself the duty of deciding rents (deciding each park owner's right to a rent adjustment). Certainly, an impartial arbitrator will be acting without the same political influences and patent bias of the city council.

The FAA arbitration clause will also be useful in other disputes, such as possible claimed defects, business practice disputes, class action claims, and mass-joinder claims (such as failure to maintain claims).

So, possible use of arbitration agreements has become more reliable as a result of federal law developments. This is very important to the park owner, who finds it more and more difficult to obtain equal justice in the courts and especially before rent control agencies. A neutral arbitrator is the most reasonable way to assure fairness in a dispute resolution system. My recommendation is to amend clauses to refer to AT&T holdings. Resolving rent disputes with arbitration instead of biased rent control boards and commissions is possible with widespread use of FAA arbitration clauses.

Be Careful When Videotaping

Post a sign to Avoid Misunderstandings.

Case brief: *Reher v. Vivo*, Docket: 10-2180 (7th Cir. 9/7/11)

To avoid misunderstandings about why management may install a video taping system for common areas, *post signs to notify users of monitoring* for protection of property and unauthorized usage. In this case, the confusion caused an arrest by local police.

Plaintiff was operating a video camera in public park, perhaps because of the presence of a former domestic partner. An angry crowd accused him of videotaping their children in a public park and called police, who arrested him for disorderly conduct. The charges were eventually dropped and plaintiff sued the officers under federal civil rights laws (42 U.S.C. 1983). Plaintiff alleged the police arrested him without probable cause (in violation of the 4th amendment). The district court ruled for the officers. ***Affirmed on appeal***. While videotaping is not a crime in Illinois, one officer had probable cause to believe that plaintiff was guilty of disorderly conduct and the other could have reasonably believed there was probable cause.

Please feel free to contact our offices for further information and questions.

Southern Cal.: 714.532.2222 Northern Cal.: 916.444.0777