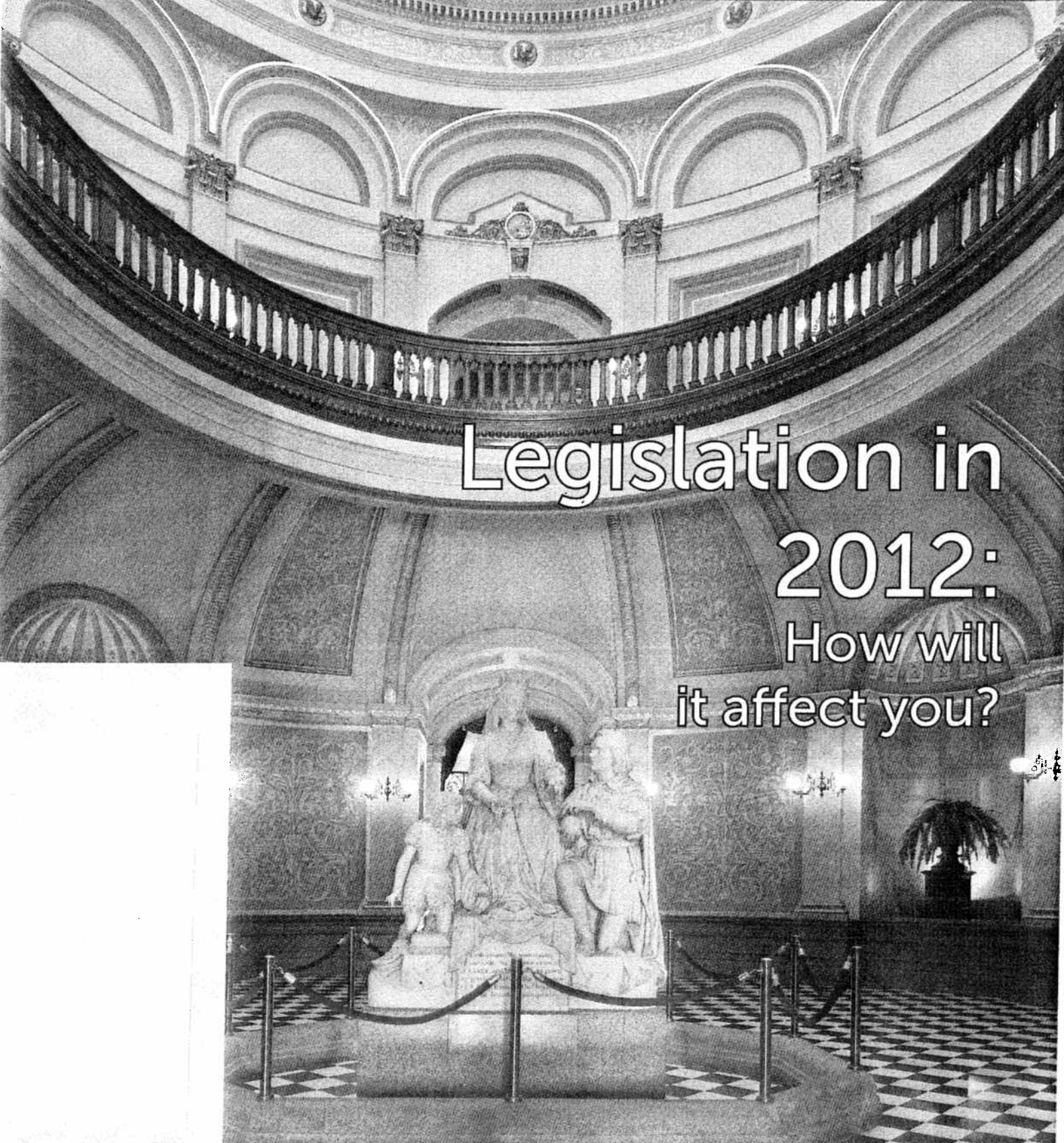


# reporter

December  
2011

WMA



Legislation in  
2012:  
How will  
it affect you?

## SAFE Act: A 12 Step Program for Compliance



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The SAFE Act was established to protect consumers by requiring licensing of residential mortgage loan originators. The reprieve from compliance for parkowners ended with publication of the implementing regulations for the Act.

The SAFE Act regulations are now final and now effective. However, as it concerns parkowners, the regulations are not clear, though verbose. And violations may be costly.<sup>1</sup> For parkowners who sell and finance park-owned mobilehomes, a strategy for compliance with this law is immediately required. No one has suggested a step-by-step procedure for assessment of strategy - until now. Here, we will distill the available alternatives and offer concrete courses of action.<sup>2</sup>

**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 attorney 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 Dowdall Law Offices, A.P.C., WMA, or any attorneys affiliated with WMA. This article discusses alternatives to consider when developing a specific compliance plan. Some ideas and strategies discussed may not be allowable

### Assumptions and the Parkowners' Plight

Many community owners must offer financing to assist residents in selling their homes. Hiring an MLO licensee is just too costly. Older mobilehomes selling in the \$10,000 range cannot be commercially financed. And buyers cannot afford an all-cash purchase. Hence the older mobilehomes cannot be sold without the parkowner's help. Residents in every older mobilehome in the state are in this position. Too, where the parkowner acquires mobilehomes after default, abandonment or foreclosure, the home cannot be resold without park financing. And such housing is a genuine affordable housing opportunity.

Thus, parkowners are the only option for financing these affordable housing opportunities. Instead of facilitating these opportunities, the federal government has only burdened the market further with SAFE Act compliance requirements. The owner has a keen interest in the buyer's *success* because

in your circumstances. Only legal advice from your own retained attorney can guide you to comply with the SAFE Act, the regulations and California counterparts.

the home remains in the park; the buyer is also a tenant. If anything, the parkowner is much more careful about lending. Owners need a good buyer *and a good tenant*. We will see however, that the U.S. Department of Housing and Urban Development (HUD) uses a test scrutinizing the amount of sales, rather than the seller's intentions, to govern inclusiveness of the regulations (which ignores the real intent for the SAFE Act).

Concerns with SAFE are market driven; if financing becomes available for used mobilehomes, parkowners need to provide financing to assist residents will be satisfied and SAFE will become a bad memory. However, the current commercial real estate market will be with us to 2016; the residential side, 2019. And, there is the possibility of obtaining a modicum of relief from the California legislature (SB 376, Fuller). For now, these are merely hopes. Today, however, owners want to know, "*what would you do*"? The first option is to hire an MLO licensee to originate the loan. When this option is not feasible, ask these questions:

1. Do you finance sales of mobilehomes in your park?
2. If so, do you fit an "Extrinsic Exemption" from the SAFE Act?
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 regulations? (e.g., "contract of sale," "rent to own," "option")?

7. What about an interim exemption until new California regulations 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?

### Overview and Background

Previous Safe Harbor No More: Parkowners have enjoyed a hiatus from SAFE until now. Sheila Dey, Executive Director of WMA, successfully and single-handedly sought and obtained an exemption for parkowners until SAFE regulations were finalized. On June 21, 2010, the California Business, Transportation and Housing Agency confirmed HUD's agreement to provide California parkowners a temporary exemption for parkowners who "occasionally carry back paper on units in their parks that they sell to occupants." As Sheila then reported, "*as a result of this temporary exemption from SAFE Act implementation, parkowners 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 SAFE Act provisions in SB 36, Statutes of 2009 Chapter #160, affecting licensees of the Department of Corporations took effect on July 31, 2010. However, I must stress that this relief from SAFE Act imple-*

*mentation is only temporary.*" Now, owners must deal with the SAFE Act.

### The SAFE Act Regulations Are Ambiguous and Vague

The absence of detail in the regulations creates a vacuum inviting test-case litigation. It looks like a Lawyer's Relief Act. The regulations have no definiteness and no link to the reality of business experience.<sup>3</sup> Rather, it appears that HUD has distilled its own view of the language but not the purpose of SAFE<sup>4</sup>. But it serves no prudent business interest to become entangled in a test case. Flirting with the periphery of statutory interpretation or liability-enhancing strategy may exhilarate the intellect of a lawyer: but for parkowners? Eh, not so much. Owners must focus on a strategy to categorically exclude sale and finance activities from SAFE Act jurisdiction.

<sup>3</sup> 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 policies from very intelligent, well-educated people who have never sat across from a consumer and taken a mortgage application or written a loan." Richard Booth, *Final Rule on SAFE Act Doesn't Protect Consumers*, July 11, 2011, <http://www.americanbanker.com/bankthink/-1039915-1.html?zkPrintable=true> (last visited November 10, 2011).

<sup>4</sup> This situation is déjà vu. Like the first regulations 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.

The Consumer Finance Protection Bureau (CFPB) has taken over responsibility for the SAFE Act as of July 21, 2011. HUD is no longer responsible for enforcement of the SAFE Act. The HUD final regulations do remain in place and are now enforced by CFPB.

### For Parkowners, the Test for Inclusion is Uncertain

The HUD regulations, which will be enforced by CFPB, essentially requires a mortgage loan originator (MLO) license for loan origination activities for self-owned property where there is "some degree of habitualness or repetition." *What does that mean?* The *Appendix* to the Regulations (the purpose of which is to provide clear understanding) only parrots the regulations themselves. The HUD regulations intentionally decline to provide any clear cut examples, or any form of bright line standard. "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."

The HUD regulations state that **commercial context** exists if the motivation is for "profit." Damage control, avoiding loss, mitigating damages, all these and other reactive strategies of parkowners in dealing with mobilehomes acquired in the park do not neutralize an underlying "profit" motive. "Profit" in this context is to be contrasted by "charity." If there is a commercial context (always), the next test is whether there is **habitualness or repetition**. These terms are not defined. So, the HUD *Appendix* could be consulted for clearer definition and examples.

Ah, the *Appendix* states there must be a requisite "degree" of "habitualness" or "repetition." If there is a "degree" of "habitualness" or "repetition," an MLO license is needed [sarcastic epithet deleted].

Okay, so the regulations are a "blank slate." Eventual rulings will be handed down by the CFPB due to actions of myopic bravado, mistakes and ignorance engendered by all this nebulous bureaucratic double-speak. Let someone else fill the interstitial vacuum. Let's remember that *WMA is setting sights on the 2012 legislative session for relief and clarity at the state level*. An interim plan for the California parkowner, until the outcome of the legislative effort is known, is the prudent strategy. SAFE does not have to be the Lawyer's Relief Act of 2011. That decision is for each parkowner to consider based on competent legal advice. Your choices will be from the following alternatives.

### 12 Steps to Determine Your Strategy

Assume you own pre-HUD code mobilehomes (manufactured before 1976). The mobilehomes were acquired involuntarily (evictions, abandonments, deceased tenant, or to fill an empty space no dealer would). These homes make wonderful affordable housing opportunities for working people. Assume buyer cannot afford an all-cash purchase. We know that no lender will finance them. In order to sell, owner must provide the financing. An MLO licensee will charge \$1,000.00 for the transaction. You are willing to sell the home for \$3,000. This needlessly drives up the cost to buyer. Parkowner could finance the home. But no one's

crystal ball can foretell the number of sales that will trigger the MLO license requirement. That will be a judicial decision based on the facts and circumstances. Let's assume you do not wish to litigate against CFPB to find out.

### 1. Extrinsic Exemptions from SAFE—Introduction, Coverage

All deferred title exchanges are covered. SAFE applies when an *agreement* calls for delivery of *title* (recordable ownership) after the borrower *performs* its *duties* (payment) until a specified date of *maturity*. Document labels, names or descriptions are of zero consequence. Hence, "installment sale," "contract of sale," "rent-to-own," "options to buy" and "lease options" (sale at nominal value after a term of performance) - call it what you will - are covered.<sup>5</sup> The key: is to transfer of title and ownership withheld until buyer has performed? Still, certain transactions and practices are outside the scope of a secured obligation covered by SAFE. I call these the "extrinsic exemptions." Parkowner financing is contemplated to entail the delivery of title after a course of payments. Such a loan is the type governed by the SAFE Act.

### 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. But can only pay \$2,500 at inception, and is willing to pay \$500 per

<sup>5</sup> 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. This form of agreement has frustrated many parkowners. For example, on default, the remedies available for breach of a contract of sale are very limited. It is also advised that an escrow agent always be hired for the transfer of title.

month until fully paid. Parkowner accepts the down payment, and hands the title to buyer.

This loan is not “securitized.” Delivery of full title and ownership occurs at the very beginning of the contract. Delivery of title is not deferred. It is not covered by SAFE. What if the tenant defaults? The remedy is 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.

What stops the tenant from removing the home after recording title? Good screening practices, else, nothing. An owner of the home may remove it (*Civil Code* §798.59) which cannot be waived, even by agreement<sup>6</sup>. However, the home may not be acceptable in other communities and the cost likely squelches removal. Only a recorded legal owner has the right to prohibit removal of the home. *Health and Safety Code* §18099.5.<sup>7</sup> This approach may have appeal for a home \$5,000 or less; but clearly not a prudent approach for more expensive homes. To avoid a resale of a home that would be accepted in other parks, to one who could afford to remove it, an option to re-purchase at a fixed price, first refusal, etc., is a means by which to secure the owner’s expectations.

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<sup>6</sup> See *Civil Code* §§798.19, 798.77. It is well understood that as a matter of public policy, resident rights under the *Mobilehome Residency Law* cannot be waived, even by agreement.

<sup>7</sup> “(a) Except as otherwise provided in subdivision (b), no person shall move, permit to be moved, or cause to be moved, any manufactured home, mobilehome, . . . from the situs indicated on the registration card, without first obtaining the written consent of the legal owner and of each junior lienholder, if any.”

### 3. Extrinsic Exemptions from the S.A.F.E -- Park Leasing

Consider an alternate strategy not involving resale or financing. Especially for owners located in a weak market area, or strangled with repressive rent controls, an increasingly popular and successful strategy is to rent the park-owned mobilehomes. The rental of the home does entail higher overhead, but it is not regulated under mobilehome rent control in most jurisdictions. And the market rental may be three times the artificially imposed rent subsidy enjoyed by the homeowners. I have been advocating this strategy since introduced at a dinner speech I delivered in 1987 to a group of Inland Empire parkowners frustrated with court fights against rent control. Some of the owners who had been listening reported to me that years later they tripled their *pro formas*. What happened? The homeowners eventually sold and moved and were replaced with appreciative renters. There are many other benefits to park owned rentals.

Many owners do not wish to consider renting, due to the increased intensity in management cost. However, when the profit from the modest investment is considered, it is hard to conceive of a better use of resources which so immediately produces a large return.

### 4. Extrinsic Exemptions from the SAFE Act—the Attorney Exemption

The regulations exclude the services of an attorney conducting the activities of the MLO. 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.

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 regulations). According to the HUD regulations, 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 of terms in advance, counsel should be able to *streamline origination* (presentation of specific terms, offers, negotiations, and documentation on referral of the purchaser) quickly. 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 trou-

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bling questions posed by SAFE at this time.

### 5. Can Loans be Structured With Different Labels or Forms to Escape the S.A.F.E Act?

Can a restructuring, overhauling or renaming of the deferred obligation escape the teeth of the SAFE Act? In other words, can a *really* expensive lawyer find a way to “exalt form over substance”? 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 transfer is deferred until payments are first 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, HUD tells us this:

*... 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 . . . (Regulations*

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 arrange a standardized procedure to facilitate and expedite loan origination with a knowledgeable attorney.

### 6. Will the California Law Provide Relief?

Can the owner just wait until the California Legislature acts on proposed bills sponsored by the WMA? Yes. If parkowner decides not to finance homes until there is certainty in legal procedure, withdrawal from the market is totally proper and exactly what the federal government would require. Loss of affordable housing opportunities for the needy will result: however, this is the result of the overreach of the SAFE Act and regulations. HUD was simply “tone deaf” to their punishment of all housing providers and needy home-seekers alike (who need housing the most). And we have not yet seen the end of new regulations. New regulations dealing with loan servicing and modification are expected from the Consumer Financial Protection Bureau, established by the Dodd-Frank Act, which assumed responsibility for SAFE Act enforcement as of July 21, 2011.

WMA sponsored an exemption for real estate brokers (SB 376 (Full-

er)), which continues as a two year bill in the California Legislature. The concept of this proposed law was to exempt sale of used mobile-homes which are usually listed by real estate brokers. However, the California Department of Real Estate officially opposed. Now, new efforts are being made by WMA to find meaningful relief to the plight of owners and residents alike, when trying to finance homes for which no commercial lending is available. The results of these efforts are yet to be seen; but since owner and residents should stand united on this issue, the only real source of potential frustration would have to be the California bureaucracy. Enabling housing opportunities to those who cannot qualify for a bank loan should be a laudable goal and encouraged. So we will see.

### 7. Obtain a License? The SAFE Act Requirements in as Nutshell

The SAFE Act 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 parkowners who are frequently required to provide financing, ob-

taining 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. In California, a licensed real estate broker can obtain their MLO from the Department of Real Estate and their Consumer Finance Lender license through the Department of Corporations for the purpose of the SAFE Act compliant loans. DRE licensees cannot make personal property loans through their DRE license, but they can obtain their MLO through DRE. Note also that Section 22054 of the California Financial Code states that bona fide conditional contracts of sale for the disposition of personal property are exempt from the Consumer Finance Lenders law.

#### 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 regulations state:

*“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 parkowner is financing sales in the park.*

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 parkowners do when, as a last resort, offering financing to enable a sale. The regulations (at p. 38467) seem to offer a glimmer of hope for parkowners 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 “engage[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.”*

This “test” is not encouraging: guessing at compliance is but 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 the HUD regulations, “commercial” refers to intent to try to “profit.” A parkowner 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 parkowner 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 parkowner. Unless park-financed, these homes cannot be sold. Here, the parkowner is acting out of a *necessity to mitigate the damage*. It is not a situation that makes a parkowner smile. No matter, according to the regulations.

Still, “profit” is the HUD regulatory standard, and *the action of the parkowner is not purely charitable or altruistic—not generally on purpose, anyway.* And if the number of

such occurrences is frequent, the parkowner 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 parkowner 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.”<sup>8</sup> 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 parkowner 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 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 such 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. *Frequency* is determined by market forces, including tenant performance. It is not the *volition* of the parkowner. But a *habit* is *volitional*. Hence, the test of “habitualness” as defined by *frequency* is nonsense.

In fact, the worse the market, the more the owner must give up to survive; i.e., the greater the investment in the parkowner’s own property which must be made. A parkowner who must finance will deal with 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 not a habit.

HUD’s Preamble to the regulations 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.***

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*(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.***

<sup>8</sup> HUD cites Black’s Law Dictionary 211 (8th ed. 2004).

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 Regulations Exclude Owners?

No. HUD recognized comments from the public as to need for exemption for small parkowners. 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.” (Regulations 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.”*  
(Regulations 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 litmus test.

## Observations about the “Wet Blanket” thrown on the Economy

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

*“One enforcement action alone, inclusive of defense costs, disgorgement, rescission, and possible penalties, will exceed any budget for loss and damage.”*

The owner’s plan should avoid conduct giving rise to any “triable issues of fact”—to steer clear of any activities within the scope of SAFE.

Given the economy, the 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 the SAFE Act and the new federal requirements is very important. Determining a prudent strategy is essential. Proceeding through the 12 steps above is the first step toward these goals. ■

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