

STATE LEGISLATION



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A New Challenge for Community Owners

The ability of mobilehome park owners and management companies to offer retail financing to assist prospective residents in buying mobilehomes has been vexing for the past 30 years. On the one hand, in order to stimulate occupancy rates and attract new and hopefully more luxurious homes into a park, the park owner has a tremendous incentive to offer, or at least to facilitate, the financing for such homes. On the other hand, the regulatory requirements involved in directly extending such financing is often not worth the expense, inconvenience, regulatory red tape, and potential liability.

In the past, a few park owners may have simply operated “under the radar,” carrying back paper on deals on a “catch as catch can” basis. The obvious problem with this is that it is not a legal means to operate. Of course when you show up on the radar, getting caught is neither good for one’s business reputation or bank account.

A few community owners may have tried to “thread the needle” by at least operating under a DRE real estate broker’s license. The problem is that relying on a DRE licensee does not necessarily provide enough comfort to make it a cost effective venture. Even where the park owner’s activities are conducted under a DRE broker’s license, fulfilling the requirements of the DRE is daunting in the context of financing transactions given the necessity of an escrow, the need to maintain “trust accounts”, recording requirements, etc.

Now, along comes Senate Bill 36 (“SB 36”), recently signed into law by the Governor, which constitutes a wrinkle of enormous substance and significance.

SB 36 is California’s version of the

state legislation that was mandated for all states and territories in the United States by the Secure and Fair Enforcement Mortgage Licensing Act of the Housing and Economic Recovery (“SAFE Act”) of 2008. The SAFE Act was enacted in the wake of the subprime mortgage fiasco. Its purpose is to enhance consumer protection and to reduce fraud in mortgage loan transactions.

As a result of this federal legislation, all 50 states and 5 territories are required to put into place a licensing system for mortgage loan originators that meets the minimum requirements of the SAFE Act. On a federal level, there is a Nationwide Mortgage Licensing System and Registry (“NMLS&R”) created to streamline the licensing process, with oversight by the Department of Housing & Urban Development.

The California implementation of the SAFE Act is now found in SB 36, which codifies vast changes to the Business and Professional Code and the Financial Code and adds Section 18034 to the Health and Safety Code. Per the federal mandates, under SB 36, each person who fits the definition of mortgage loan originator must meet certain minimum pre-licensing and continuing education requirements in order to engage in that business.

“Mortgage Loan Originator” means any individual who, for compensation or gain, takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan. SB 36 also requires recipients of such a license endorsement as a mortgage loan originator to use or disclose a specified unique

identifier provided by the NMLS&R in advertisements and certifications of that mortgage loan originator.

SB 36 expressly covers mobilehome and trailers, whether or not they are attached to real property. Indeed, SB 36 covers any "residential mortgage loan," which means *any* loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling, or residential real estate upon which a dwelling is constructed or intended to be constructed.

New section 18034 of the Health and Safety Code, states that a dealer is not required to be licensed as a mortgage loan originator if that dealer simply performs administrative or clerical tasks on behalf of a person who meets the definition of a mortgage loan originator, so long as the dealer or sales person does not accept compensation from the

mortgage loan originator, or from his or her agent. Even this narrow exception may go away when HUD finishes its rule making (probably in a few months).

Although SB 36 would by its own terms "take effect immediately," no one would actually be required to obtain a Mortgage Loan Originator license under either the California Finance Lenders Law or the California Residential Mortgage Lending Act before July 1, 2010, nor would any Mortgage Loan Originator license endorsement under the Real Estate Law be required before December 1, 2010. Because a willful violation of any of the provisions of SB 36 would be a crime, the bill imposes a state-mandated local program.

SB 36 appears to have closed the window on various traditional methods that park owners might have used to provide financing by pursuing a joint venture, or other means of any behind-the-scenes involvement, making these

techniques largely illegal.

For instance, Section 22154 of the Financial Code is amended by SB 36 to prohibit any licensee from conducting the business of making loans within any office, room, or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, except as is authorized *in writing* by the Commissioner, upon the Commissioner's finding that the character of the other business is such that the granting of authority would not facilitate evasions of the statute.

Additionally, per amended Financial Code Section 22155, no finance lender, broker or mortgage loan originator licensee may transact the business license or make any loan under any other name or at any other place of business than that named in the license, except pursuant to a currently effective *written order* of the Commissioner authorizing the name or other place of business.

The stern nature of these provisions, and the apparent desire to draw very bright and fixed lines essentially "walling off" the mortgage loan originator, suggests that any arrangement whereby a park owner seeks to be behind the scenes assisting in financing will no longer pass muster.

In other words, opportunities to operate outside the system are being severely curtailed by SB 36. It appears now that previous viable methods such as joint venturing will now be entirely prohibited. Additionally, given the advent of the NMLS&R and the requirement that each mortgage loan originator use a unique identifier, it will become even more imperative to comply with the law. A park owner will need to engage a licensed finance lender or other mortgage loan originator to facilitate financing. ■

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