



Points of Interest

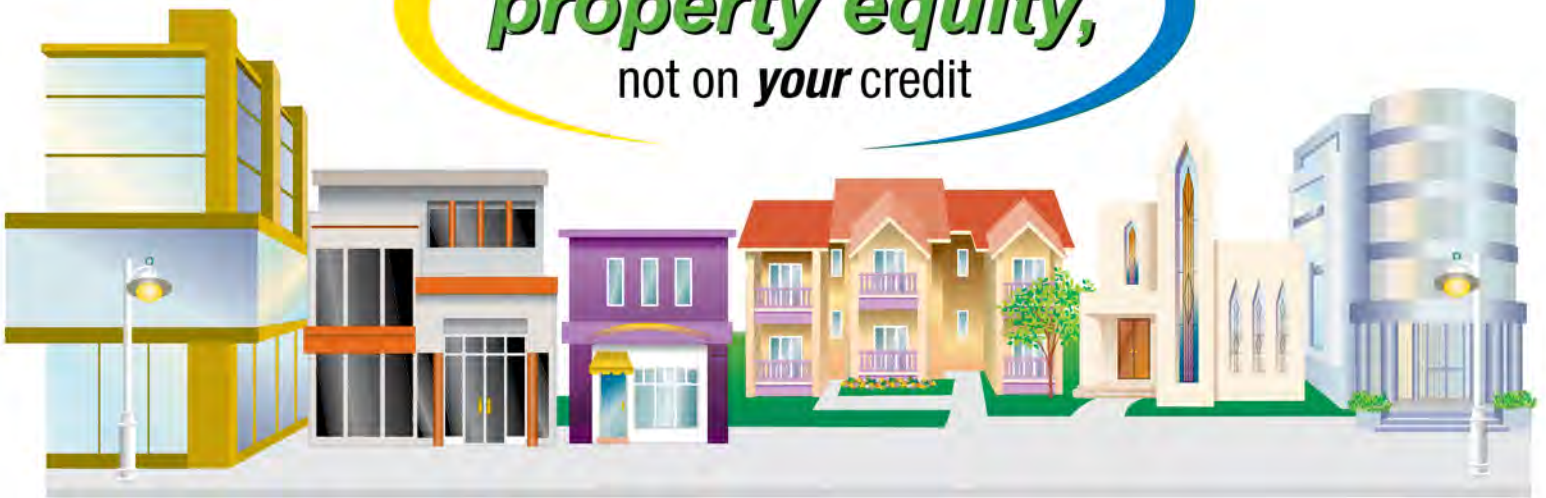
A Publication of the California Mortgage Association

Spring 2019



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From the President

By David Herzer • 2018-2019 CMA President

The Work of the CMA Continues in 2019

There is no time better than now to be a member of the California Mortgage Association. Our Lobbyists are actively working on our behalf to protect our interests in Sacramento, your Board of Directors have hired a new General Counsel, and our Education Committee keeps putting on extremely valuable seminars. We receive great value for our membership dues!

The Legislature in Sacramento continues to churn out more and more laws with which we must keep abreast. It is projected that 1,800 bills will be passed this year alone. The new Privacy Act will be the most restrictive in the world and the Committee in charge of writing the attendant regulations is calling for industry input. Our Lobbyists, Mike Belote and Mike Arnold, will be attending focus groups and giving our industry's input. While they cannot change what is sure to be some onerous regulations, they can help to make compliance with this new law less daunting.

Also, the Department of Business Oversight is working on regulations relating to the new disclosure requirements for commercial loans. While they have already

succeeded in exempting loans secured by real estate from these new regulations, they are still working to ensure that no consumer protection language creeps into the remaining regulations for unsecured loans. This is important because we do not want consumer protection rules to become any part of commercial lending.

Our Lobbyists are also working with the Department of Real Estate on what appears to be misunderstanding of AB 4970, the High-Cost Loan rule. Our Lobbyists will be meeting with the Department to provide them with insight into how the law should be interpreted. This cuts to the heart of the business purpose lending exemption, which must be protected at all cost.

Next, your CMA Board of Directors has elected a new General Counsel, Robert Finlay who is a Partner at Wright, Finlay & Zak, LLP. There is a wonderful article on Robert in the following pages of this *Points of Interest*. Please read it and welcome to Robert Finlay!

Robert replaces our interim General Counsel Patric Kelly who did a wonderful job. Thank

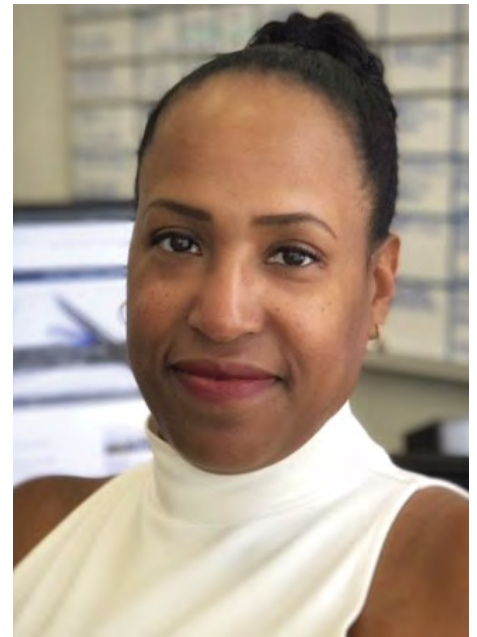
you to Patric Kelly for a job well done and for your service and dedication to CMA!

I really want to thank Lori Randich and the Education Committee for all of their hard work. The Winter Seminar in Newport Beach was by all reports a resounding success with great presentations on consumer lending, loan underwriting, and Keynote Session presented by Dr. Christopher Thornberg.

We can all look forward to the Spring Seminar coming up April 25 and 26 at the stately Saint Francis Hotel in San Francisco. The seminar topics range from construction lending to defending against loan fraud and will certainly energize, entertain and educate the best of the best in the private money lending business.

So I look forward to seeing all of you in San Francisco. Don't forget to arrive early for the Wednesday night networking cocktail party. You might do some business with your fellow CMA members! 📍





From the Editor

By Mayumi Bowers • Editor, *Points of Interest*

Spring is a time for new and fresh starts and coming from under and out of the winter shell. I hope everyone is doing just that, starting 2019 fresh, coming out from under your 2018 reporting (including your HMDA report) and looking forward to the rest of the year.

We, at CMA, are also enjoying a fresh start with the announcement of the new General Counsel. In addition, to freshen the Board of Directors, CMA will be holding elections at the next seminar. This edition includes all of the candidates running for the available seats. And of course, we hope that you will find the articles beneficial to your business practices. Enjoy! 🌱



Save the Dates:

▶ CMA Spring '19 Seminar ◀

April 24-26, 2019
Westin St. Francis
San Francisco, CA

▶ CMA Summer '19 Seminar ◀

July 25-26, 2019
Hilton San Diego Resort & Spa
San Diego, CA

▶ CMA Fall '19 Seminar ◀

October 24-25, 2019
Aria Resort & Casino
Las Vegas, NV

▶ CMA Winter '20 Seminar ◀

January 23-24, 2020
Fashion Island Hotel
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The Phillip M. Adleson Education Award

As the most highly recognized, and primary provider of education in the private money lending field, CMA presents the Phillip M. Adleson Education Award to acknowledge and recognize individuals who have made outstanding contributions to education in our industry.

The award was first presented to the late Phil Adleson as the “CMA Education Award.” As intended, the award now continues as “The Phillip M. Adleson Education Award.”

CMA congratulates the 2018 recipient of the award,

Richard C. Temme



SACRAMENTO SUMMARY

By Michael J. Arnold & Michael Belote, Esq.
Legislative Advocates



January 7 marked the return of the California legislature to Sacramento for the effective beginning of the 2019-2020 two-year session. Much has been made of the increasingly blue tint to the Assembly and Senate, which are now basically three-quarters Democrat. Recently a Republican Assembly member switched parties and became a Democrat, and it is possible that more will follow. Arithmetically, it becomes more difficult to defeat a Democratic author's bill on the floor of the Assembly and Senate, or to pass a Republican bill if there is any appreciable Democratic opposition.

Two months into the new session, it is possible also to identify key issues which will confront legislators this year. There are at least four large-scale issues which will be of interest to CMA members: privacy, Dynamex, housing, and taxation. Each of these issues is the subject of multiple bills in the pile of nearly 2600 proposals introduced this year, all of which have been read by the CMA legislative advocates for evaluation by the Legislative Committee.

Privacy: Last year the legislature passed AB 375, which may constitute the most expansive privacy law in the world. Later technical amendments were made in SB 1121. The bills contained a delayed operative date of January 1, 2020, in order to provide additional opportunity to refine the law in this incredibly complex area.

Privacy may well be the most hotly-contested issue in this legislative year. Business groups have identified hundreds of changes they would like to see enacted this year, and privacy advocates are equally active in urging the legislature not to weaken the protections of last year's bills. The stakes are high: other states are now considering adopting laws similar to California's, and groups are asking Congress to step in and pass some sort of national law to avoid a patchwork of state laws.

Very fundamental issues are being debated, like the definition of "consumer," exemptions from the law for fraud protection and more, and the degree to which consumers will be authorized to sue for violations.

The first line of inquiry is whether a given business is subject to the new law. Clearly any business with greater than \$25 million in annual gross revenue is covered, but other coverage tests are more difficult to follow. For example, the law covers businesses which collect personal information on 50,000 or more consumers. Seems like a lot, but does each click on a website, where information is stored about the contact, count towards the 50,000?

CMA will be monitoring the progress of the privacy debate very closely, and will be prepared to provide information to members as the 2020 implementation date approaches.

Dynamex: Last spring the California Supreme Court released their decision in *Dynamex v. Superior Court*. The decision, which deals with classification of employees vs. independent contractors, landed like a thunderbolt in the business community. The court moved away from common-law tests of employment vs. independent contractors in use in California for decades, in favor of a three-part test described as "ABC." The "B" test is particularly problematic, because it holds that if a worker is performing tasks which constitute the usual course of business of the hiring entity, the worker is by definition an employee.

The Dynamex issue is only slightly less contentious than privacy. Entire portions of the "gig economy," like drivers for Lyft and Uber, may see their business models upended. Imagine the range of businesses which historically have utilized independent contractors! What's more, the decision appears to be retroactive, putting businesses in jeopardy with obviously no ability to change what happened in the past.

Competing bills would codify Dynamex, which will be strongly opposed by the business community, or restore the pre-Dynamex common law factors of employment, which will be strongly opposed by labor. Is there a middle ground? Stay tuned.

Housing: Legislative issues come and go, and sometimes it takes time for an issue to reach critical mass with policymakers. That time clearly has arrived in California, where the housing shortage is on the mind of every elected official in Sacramento. Dozens of bills have been introduced to address the issue, ranging from new sanctions for local governments which do not create their fair shares of housing, to faster processing of CEQA lawsuits, to new tax credits for housing. As one of the important sources for housing finance, CMA will be involved with the debate, which is so critical to the future of the California lifestyle and business climate.

Taxation: Everyone agrees that a recession will occur at some point in the future, and that California is dangerously dependent on wealthy taxpayers to fund the operation of government. After that, there is precious little common ground on solutions. Should the progressivity of our income tax laws be flattened, even if it means more taxes from the less wealthy? Should we modify Proposition 13 to create a split roll property tax system? That proposal has already qualified for the November 2020 ballot, unless proponents can be persuaded to withdraw the initiative in favor of some legislative solution. Should we expand the sales tax base to cover services, which might well affect CMA member services? Amazingly, this might be the most intractable issue of all of those discussed above.

If all of this is not important and timely enough to merit legislative involvement and support for CMA, what is? 🗣️







Ninth Circuit Expands Time for a Borrower to Sue to Enforce Rescission of a Loan Under TILA



by
Michael S. Kelley, Esq.
Wright, Finlay & Zak, LLP



by
Robert T. Finlay, Esq.
Wright, Finlay & Zak, LLP

For years, mortgage lenders defended TILA rescission actions by arguing that the notice of rescission or action was untimely and/or barred by applicable statute of limitation. In 2015, the U.S. Supreme Court dealt lender's efforts a severe blow when it held that the notice of rescission could be issued at any time within three (3) years after the loan closed, not file suit to rescind within three years, as the industry had argued (*Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015)). Just recently on December 6, 2018, the Ninth Circuit issued an opinion that further weakened the lenders' position (*Hoang v. Bank of America, N.A.*, F.3d, Case No. 17-35993, 2018 WL 6367268 (9th Cir. 2018)). Specifically, the Ninth Circuit expanded the time for a borrower to sue to enforce rescission of a loan if a lender fails to wind up the loan after a notice of rescission.

Under the Truth in Lending Action ("TILA"), borrowers have the right to rescind certain loans within three business days after consummation of the loan. 15 U.S.C. § 1635(a). However, if the lender fails to make the required disclosures under TILA, the deadline for borrowers to rescind the loan expands to three years from consummation of the loan. 15 U.S.C. § 1635(f). In its' 2015

Jesinoski decision the Supreme Court held that under TILA, a borrower only has to notify a lender of his or her intent to rescind within three years. The borrower is not required to bring suit within the three years to effectuate the rescission. A simple notice is all that is required. The

continued on page 8



Supreme Court explained, “so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years.” *Jesinoski*, 135 S. Ct. at 792.

Under TILA, if a borrower provides notice within the three years, a creditor must take steps to “wind up”¹ the loan within 20 days of the notice. 15 U.S.C. § 1635(b). However, as is often the case, what if the lender fails to act to wind up the loan as required by TILA? In *Hoang v. Bank of America, N.A.*, F.3d , Case No. 17-35993, 2018 WL 6367268 (9th Cir. 2018), the Ninth Circuit answered the following question: “when a borrower effectively rescinds a loan under TILA, but no steps are taken to wind up the loan, when must suit be brought to enforce that rescission?” *Id.* at *3.

In *Hoang*, the district court ruled that a claim to enforce rescission is governed by the one-year statute of limitations for TILA damages claim. On appeal, the Ninth Circuit rejected the district court’s application of the one-year statute of limitations that applies to TILA damage claims. The Ninth Circuit reasoned, “TILA provides for both legal damages and equitable relief but only includes a statute of limitations for legal damages relief. The statute does not suggest that the statute of limitations for legal damages relief is also applicable to claims for equitable remedies. If Congress intended that statute to apply, Congress surely knew how to draft the statute accordingly.” *Id.* at *4.

Because TILA does not provide a statute of limitations for rescission enforcement claims, case law requires federal courts to borrow a limitations period from analogous state law. In *Hoang*, the Ninth Circuit looked to its host state, Washington, as a guide. The Ninth Circuit ultimately used Washington’s six (6) year statute of limitations for contract actions. The Court reasoned,

Under Washington’s general contract law, the statute of limitations sets forth a six-year limitation period for

an “action upon a contract in writing, or liability express or implied arising out of a written agreement.” The loan agreement between Hoang and the Bank is a contract in writing. An action to rescind that loan (under TILA or otherwise) arises out of that written agreement. Because TILA rescissions necessarily require a contract to be rescinded, contract law provides the best analogy and we adopt the general contract law statute of limitations.

Id. at *4 (citation omitted). In summary, the Ninth Circuit concluded that “[a]pplication of Washington’s longer six-year contract statute of limitations would actually further TILA’s purpose, which is to protect consumers from predatory lending practices and promote the informed use of credit.” *Id.*



Therefore, under *Jesinoski* and *Hoang*, a borrower has up to three years to provide notice of rescission of the loan. If the lender fails to wind up the loan, the borrower has another six years to bring an action to enforce the rescission. Thus, a borrower can have to up nine years *from consummation of the loan* to enforce rescission under TILA. Although this is a decision by the Ninth Circuit, which applied Washington state law, borrowers will certainly rely on *Hoang* and argue that the Ninth Circuit’s reasoning should apply to their specific case. The statute of limitations to enforce a rescission claim may be shorter or *longer* than six years depending on the breach of contract statute of limitations for each specific state.

There are several take-away from the decisions in *Jesinoski* and *Hoang*. First, a lender/servicer should quickly and carefully review any notice of rescission or even an indication of rescission from the Borrower. Second, if a borrower properly rescinds the loan under TILA, the lender/servicer has twenty days to “wind up” the loan. Third, if there is a question about whether the lender provided the required TILA disclosures or if the borrower timely and properly gave notice of his or her intent to rescind, the lender should consider immediately filing a declaratory relief action to resolve those disputes at that time instead of waiting years for the borrower to file an action to enforce the rescission.

Disclaimer: The above information is intended for information purposes alone and is not intended as legal advice.

Endnote:

¹ 15 U.S.C. § 1635(b) states,

When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor’s obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value.

Wright, Finlay & Zak, LLP specializes in mortgage-related litigation, compliance and regulatory matters for its clients throughout the Western United States, including California, Nevada, Arizona, Washington, Utah and Oregon. If you have any questions regarding this issue or any other matter, please contact Robert Finlay at rfinlay@wrightlegal.net or Michael Kelley at mkelley@wrightlegal.net.

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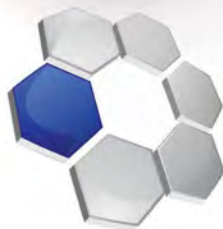


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CANDIDATE CLOSE-UP

CMA Board of Directors elections are under way. Ballots have been mailed to Regular (voting) Members, and are due back to CMA Headquarters no later than April 24, 2018.



Name: Mark Forbes

Company: F. E. Forbes Company

Company Location: Berkeley, California

Years in the Industry: 33

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): 31

Describe Your Business.

Small balance Commercial & Residential business purpose private money loans in California.



Name: David Herzer

Company: Herzer Financial Services, Inc.

Company Location: Redwood City, CA

Years in the Industry: 35

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): 22

Describe Your Business.

Hard money lending for construction, fix and flip, consumer and commercial.



Name: Joffrey Long

Company: Southwest Mortgage

Company Location: Granada Hills

Years in the Industry: 43

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): 25

Describe Your Business.

Making, arranging, selling, and servicing private money loans.



Name: Sandy MacDougall

Company: Mortgage Vintage, Inc.

Company Location: Newport Beach, CA

Years in the Industry: 11

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): 11

Describe Your Business.

Private Money Loans and Trust Deed Investments.



Name: David Nesoralla

Company: Dryden Capital Inc.

Company Location: Novato CA

Years in the Industry: 30

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): 20

Describe Your Business.

We lend using a CFL as well as fractional investments including, construction and commercial loans.



Name: Lori Randich

Company: Redwood Mortgage

Company Location: San Francisco Bay Area

Years in the Industry: 28

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): Over 15

Describe Your Business.

Private mortgage lender.



Name: Richard Selzer

Company: Realty World Selzer Home Loans

Company Location: Ukiah CA

Years in the Industry: 43

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): 38

Describe Your Business.

Full service real estate office, providing sales, loans, property management and maintenance.



Name: Shafiq Taymuree

Company: Stonecrest

Company Location: San Jose, CA

Years in the Industry: 24

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): 15

Describe Your Business. Lending on California real estate and managing multiple funds.

Acquisition of distressed real estate nationwide in our acquisition funds.



Name: Elsie Wu

Company: Abundance Capital

Company Location: Milpitas, CA

Years in the Industry: 10

Years CMA Member (Including CTDBA, MAC, CIMBA, or MI memberships): 5

Describe Your Business.

Private money loans.





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Neal S. Butala
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[Winter, 2019 Attendee]

This activity is approved for Minimum Continuing Legal Education Credit by the State Bar of California in the amount of 12 hours. The CMA certifies that this activity conforms to the standards for approved education activities prescribed by the MCLE Rules of the State Bar of California.

2019 SPRING SEMINAR ■ APRIL 24th - 26th 2019

San Francisco

A night-time photograph of the San Francisco skyline, featuring the Golden Gate Bridge and various skyscrapers illuminated against a dark sky. The city lights reflect on the water in the foreground.

GENERAL INFORMATION

LOCATION:

The CMA Spring Seminar will be held April 24-26, 2019 at the Westin St. Francis, located at 335 Powell Street, San Francisco, CA 94102. For room reservations, call the hotel at (415) 397-7000 or (800) 937-8461. Ask for the "CMA 2019 Spring Seminar" rate. (Room rate is \$289 per night Single/Double) through April 3, 2019 or until sold out. Valet parking is \$68 + tax per night.

SEMINAR FEES:

Full registration includes seminar events, materials, cocktail/networking receptions and Friday lunch. The Pool Manager's Group requires an additional fee.

	Registration received on or before April 11, 2019	Registration received from April 12, 2019 to date of seminar
CMA Member	\$495	\$595
Additional Attendee Same Company	\$395	\$495
Non-Member	\$695	\$795
Pool Manager's Focus Group* + Lunch	\$ 65	N/A
Registration Total	\$ _____	\$ _____
PAC Raffle Tickets (voluntary; \$20 or more)	\$ _____	\$ _____
TOTAL ENCLOSED	\$ _____	\$ _____

*Must register by 4/11/19. Limited to regular CMA members who pre-register and who are Pool Manager's Focus Group Members.

REFUND POLICY:

Cancellations received in writing on or before April 11, 2019 will receive a credit toward a future seminar. Cancellations received in writing on or after April 11, 2019 will not receive a credit or refund.

CMA DISCLAIMER STATEMENT:

Views, statements, information, and materials provided at CMA seminars do not necessarily reflect the views of the California Mortgage Association, its Officers, Directors, or Members. When considering any document, opinion, publication, or other material obtained from CMA or from any CMA event, attendees and recipients of the information are advised to seek qualified counsel as to the suitability of that material or information for their own business operation or use.

MISCELLANEOUS:

Please wear name badges to all functions. Tickets are required for various events. Please be courteous of others and place cell phones on silent mode. Program and speakers are subject to change without notice.

2019 SPRING SEMINAR ■ APRIL 24th - 26th 2019

San Francisco



San Francisco



Wednesday, April 24, 2019

6:00 pm – 8:00 pm

Opening Night Mixer Separate Registration Requested – No Additional Fee

Join the crowd - start your networking and socializing Wednesday night at The Burger Bar, a half block from the Westin St. Francis. On the 6th floor of the Macy's building (251 Geary Street, San Francisco, CA 94102) overlooking Union Square, you'll enjoy drinks, appetizers and fun - all included in your seminar registration fees. (Separate reservation requested.)



Thursday, April 25, 2019

7:30 am – 8:30 am

Continental Breakfast

7:30 am – 5:00 pm

Seminar Registration

8:00 am – 10:00 am

Exhibitor Set-up

10:00 am – 6:00 pm

Exhibitor Fair Open

Special "Members Only" Focus Group Sessions

8:30 am – 10:00 am

Construction Lending Focus Group

Michael Arnold, CMA Legislative Advocate | Moderated by K. Bradley Rogerson, Esq., Partner, Hanson Bridgett LLP | and by Dave Herzer, CMA President

"Fix and Flip" and construction lending have long been what we do. As private lenders, we get it done better and faster! This special focus group will feature a deep-dive discussion on AB 1384, the CMA-sponsored legislation to **increase the \$2.5 million limit on DRE construction loans** and help your business grow. Other important topics in construction lending will also be discussed. If you do rehab or construction lending, you'll want to be here. **Attendance limited to CMA members only.**

10:00 am – 10:15 am

15 Minute Networking Break

10:15 am – 11:45 am

NEW! Broker Knowledge Round Tables

Moderated by Sandy MacDougall, President and Founder, Mortgage Vintage

Back by popular demand, a special session with your non-fund private lender colleagues. Organized in the ever-popular round table format, you will both contribute ... and learn, in a lively, energetic format. Each table will be moderated by a practitioner, with an attorney to help with the legal questions. Bring your ideas, your questions and your knowledge. You won't be disappointed! **Attendance limited to CMA members only.**

10:30 am – 12:30 pm

Pool Manager's Focus Group

Glenn Goldan, President, ReProp Financial | Stephen Pollack, CEO, Anchor Loans | K. Bradley Rogerson, Esq., CMA Securities Counsel

Meeting only open to qualified Pool Managers Focus Group members who pre-register by April 11, 2019

Join us for the annual State of the Industry Report, including audit and associated trends, as reported by CPA's David Duner, Spiegel Accountancy Corp., and Armanino LLP. Beeta Lecha of Spiegel Accountancy Corp will discuss the Tax Cuts & Jobs Act of 2017 and its effect on mortgage funds, investors, originators and servicers. Kevin Kim of Geraci Law will review the proper sale and reporting of loans from your fund. Also covered will be a group discussion on converting trust deed investors into mortgage fund investors. If you manage a mortgage fund, you won't want to miss this session. **Doors lock at 10:45. Separate registration and fee required. Lunch is included.**

San Francisco

Thursday, April 25, 2019

Regular Sessions Open to All

11:45 am – 1:00 pm

Lunch, On Your Own

1:00 pm – 2:20 pm

Defining Agency Relationships. And Collecting Your Fee!

Dennis Doss, General Manager, DossLaw | **Joffrey Long, President, Southwest Mortgage** | **Bobby Ritter, President, Bay Sierra Financial, Inc.**

You arrange a loan – and expect to get paid. You need a good loan brokerage agreement. But what about AGENCY? Who do you work for? What if **YOU** fund the loan? Or **YOUR FUND** funds the loan? The same disclosure won't work. Many loan brokerage agreements are flat-out wrong! They "disclose" something that's not even true – or worse, fail to disclose what is. "Off the rack" agreements sometimes contain clauses that don't even apply to private money. Find out which "7 bad clauses" in agreements you may need to avoid, and which good ones protect you, and better yet – help you get paid! Dennis, Joffrey and Bobby have studied this for years. A sample agency/brokerage agreement will be provided.

2:20 pm – 2:40 pm

20 Minute Networking Break

2:40 pm – 3:40 pm

2019 Legal and Regulatory Review – Part 1 of 2

T. Robert Finlay, Esq., CMA General Counsel | **Jason Goldstein, Shareholder, Buchalter** | **Moderated by Michelle R. Rodriguez, Esq., General Counsel, Woodland Hills Mortgage Corp** | **and by Joffrey Long, President, Southwest Mortgage**

CMA General Counsel Robert Finlay and Attorney Jason Goldstein will provide updates on laws, regulations, enforcement issues and significant cases that impact your operations. Legal and Regulatory Review is moderated by Michelle Rodriguez and Joffrey Long, both mortgage practitioners, who will help bring you the latest developments WITH practical applications of great importance to your business. Presented in two separated sessions, Part 2 of this program is presented Friday at 1:30 pm.

3:40 pm – 4:00 pm

20 Minute Networking Break

4:00 pm – 5:00 pm

California Legislative Report

Michael Belote, CMA Legislative Advocate | **Michael Arnold, CMA Legislative Advocate** | **Noah Furie, CMA Legislative Chair**

What is our state legislature up to? How about a sales tax on services (including loan origination and loan servicing fees); removing commercial property from Prop 13 protection (the "split roll"); and legislative responses to the Dynamex decision, challenging independent contractor pay & benefits? These and many other critical bills have already been introduced. CMA's legislative efforts become even more important as the composition of State Government changes. Our top Legislative Team will bring you the CMA assessment of these challenging business-changing issues.

5:00 pm – 6:30 pm

Extended Cocktail/Networking Sponsored by S.B.S. Trust Deed Network



Not a CMA member yet?

Why not?

YOU NEED TO JOIN!





Friday, April 26, 2019

7:30 am – 8:30 am
7:30 am – 4:00 pm
7:30 am – 4:00 pm

Continental Breakfast in Exhibitor Area
Registration
Exhibitor Fair Open

8:30 am – 10:00 am

Starting a Mortgage Fund

Glenn Goldan, President, ReProp Financial | Dennis Doss, General Manager, DossLaw | Moderated by Bobby Ritter, President, Bay Sierra Financial, Inc.

It's not just **should** you start a fund? It's **how** do you do it right? How do you transition into your first fund ... or perhaps start a new one? We'll help you decide. And save you a lot of time, trouble and money if you *do* move forward with a fund. Moving from licensing, management, vendors, documentation and organization ... to costs, ERISA, and leverage, Dennis, Glenn and Bobby will cover all of this from different vantage points. Even if you already have a fund, or don't yet plan to start one, you'll gain important information here.

10:00 am – 10:30 am

30 Minute Networking Break

10:30 am – 12:00 pm

Combatting Loan Fraud

Cynthia Long, Sr. Vice President and Regional Counsel, Old Republic Title Co. | Moderated by Steve Rexrode, Vice President, Cushman Rexrode

The sophistication of fraudsters has increased exponentially in the past five years – having expanded way beyond using white-out on original documents. This is not your father's loan fraud, and catching it is harder than ever. Today, you need to worry about wire fraud, phishing, identity theft, and more. Cynthia Long, Regional Counsel for Old Republic Title Co. has seen it all. She'll share current trends in loan fraud, and the tools you need to help you catch it.

12:00 pm – 1:30 pm

Luncheon and General Business Meeting

1:30 pm – 2:30 pm

2019 Legal and Regulatory Review – Part 2 of 2

K. Bradley Rogerson, Esq., Partner, Hanson Bridgett LLP | Nema Daghbandan, Esq., Partner, Geraci LLP | Moderated by Michelle R. Rodriguez, Esq., General Counsel, Woodland Hills Mortgage Corp | and by Joffrey Long, President, Southwest Mortgage

The continuation of Thursday's 2019 Legal and Regulatory review, presented by a panel of legal and practical experts, and moderated by two of our most highly regarded presenters, Michelle Rodriguez, and Joffrey Long. These are filled with "worth the whole seminar" moments. Keep up with changes in laws and regs, and more importantly, practical ways to deal with them.

2:30 pm – 3:00 pm

30 Minute Networking Break

3:00 pm – 4:30 pm

Building Income Streams - Ideas to Help Your Business Thrive

Glenn Goldan, President, ReProp Financial | Angelica D. Gardner, President, Asher Evan Investments | Moderated by Steven Belleville, Dir. of Marketing, Redwood Mortgage Corp.

The best kind of business income comes in steadily and reliably each and every month. This program focuses on helping you achieve long-term income and growth, offering **tons of ideas** on servicing spreads, originator incentives, loan structures and new loan products, all leading to higher profitability. Join our team of top practitioners and walk away with new ways to not only grow your business now, but to build long term value.

4:30 pm

Seminar Concludes

CMA SAN FRANCISCO 2019 REGISTRATION FORM

	Registration received on or before April 11, 2019	Registration received from April 12, 2019 to date of seminar
CMA Member	\$495	\$595
Additional Attendee Same Company	\$395	\$495
Non-Member	\$695	\$795
Pool Manager's Focus Group* + Lunch	\$ 65	N/A
Registration Total	\$ _____	\$ _____
PAC Raffle Tickets (voluntary; \$20 or more)	\$ _____	\$ _____
TOTAL ENCLOSED	\$ _____	\$ _____

*Must register by 4/11/19. Limited to regular CMA members who pre-register and who are Pool Manager's Focus Group Members.

Advanced registration is recommended. Call to confirm space availability. Please check all applicable boxes.

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Get free tickets when you register online!

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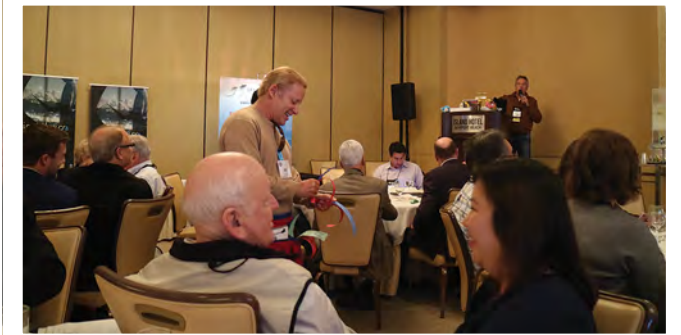
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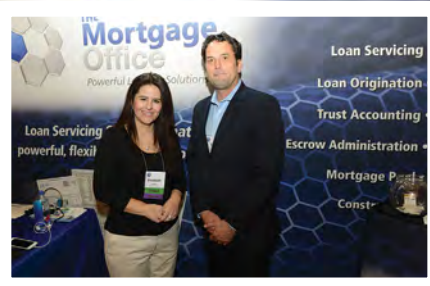
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Robert Finlay Named California Mortgage Association General Counsel

He brings over 24 years of experience in mortgage transaction and litigation practice and a strong commitment to serving the industry.



by
Odell Murry
MAI Financial Services, Inc.

We are thrilled to welcome Robert Finlay as the new General Counsel for the California Mortgage Association.

Robert, a founding member of Wright, Finlay & Zak law firm in 2002, has an extensive legal background in the real estate mortgage industry, including over 24 years of experience representing loan originators, servicers, and investors in mortgage litigation. He's an active member of many key mortgage organizations, including the California Mortgage Association (CMA), California Mortgage Bankers Association (CMBA) and Mortgage Bankers Association (MBA). He also has served multiple roles, including president and a board member, of the United Trustees Association (UTA).

Through his legal work, Robert has researched, authored, and provided valuable input on many important amicus briefs for the mortgage industry in recent years. Robert also has devoted significant time to legislative issues affecting the mortgage industry. In 2012, as president of the UTA, Robert was actively involved in efforts to protect the interests of the mortgage industry with regard to the California Homeowner's Bill of Rights. A year later, Robert was named the Chair of the UTA's Legislative Committee, a position he has held for the past six years. In 2018, Robert worked closely with Mike Belote

and other industry lobbyists to lessen the impact of the renewed HOBR bill.

While Robert's legal resume is very impressive, we were just as impressed by his commitment to service to his clients. He says he learned the importance of customer service from years of working as a waiter in restaurants from high school right through law school. Through the reactions of customers, he received immediate feedback from the value of good customer service, and he quickly enjoyed finding ways to go the extra mile for his customers.

"It helped me be the attorney that I am," Finlay said. "Those lessons that I learned absolutely have carried over to the philosophy that I and the firm share – that customer service is number one."

It is a philosophy that has served his firm well. When he and others founded Wright, Finlay & Zak in 2002, the firm was just six attorneys, all located in California. It now has some 60 attorneys spread out between offices in other states – Washington, Oregon, Arizona, Nevada, and Utah. Robert says his firm's experience in multiple states may help him, as General Counsel, provide association members information about legal changes and trends in the mortgage industry and mortgage laws in other states, as well as California. He also hopes he may be able to use his multi-state connections

to recruit additional members who operate in multiple states.

Robert is very aware of that he is taking over a position that was held by Phil Adleson until Adleson's passing in 2017. He shares the feelings of all of us at the California Mortgage Association that Phil is sorely missed. Robert only hopes that he can provide the same level of service and legal expertise as Phil, and he will do all he can to continue Phil's legacy.

"There's no way I could replace Phil," Robert said. "I don't think there's an army of lawyers that could replace Phil."

Robert strongly believes his role is not just to represent the California Mortgage Association in the industry and in the public, but to share the information he has about the legal landscape of mortgage and lending laws with its members. He says it's not enough to stay on top of the latest legal developments, but to share that information with CMA members and others in the industry.

"I think it's critical for me to keep tabs on new laws that affect my clients and affect organizations that I'm involved in, as well as new case decisions, and try to put those in plain language for the members so they can understand how this impacts them

continued on page 31

Robert Finlay – continued from page 30

and what they need to do because of the changes in the law,” he said.

When not at work, he enjoys spending time with his wife, Mary, and their four children. He also enjoys woodworking and tennis.

Please join us in welcoming Robert to his new role in the California Mortgage Association. We believe he will provide exceptional legal expertise and service to the Association for many years to come. 🌐

Wright, Finlay & Zak, LLP specializes in mortgage-related litigation, compliance and regulatory matters for its clients throughout the Western United States, including California, Nevada, Arizona, Washington, Utah and Oregon. You can contact Robert Finlay at rfinlay@wrightlegal.net or (949) 477-5050.

Odell Murry is founder and president of MAI Financial Services Inc., a private-mortgage

company and institutional commercial mortgage broker. He is also past president of the California Mortgage Association. Murry originates life-insurance-company institutional and private-mortgage loans on apartments, industrial, retail and most other income-producing commercial real estate. He also serves as chairman of the National Advisory Board of the University of Massachusetts W.E.B. Du Bois Center. You can contact Odell Murry at OMurry@MAIFunding.com or (866) MAI-FUND.



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Priority of Liens On California Real Property



by
Norma J. Williams, Esq.
Williams & Associates



Part 2: Subordination Agreements

Part 1 of this article, published in the Fall 2018 Issue, contained an overview of the general California rules of lien priority and some common priority disputes involving deeds of trust. This Part 2 discusses parties' voluntary alteration of their priorities using Subordination Agreements and is focused on subordinations in loan transactions only.

Subordination Defined

As stated in Part 1, California's "first in time, first in right" rule, combined with the effect of the recording laws, results in a document having priority based on the time of its recording, subject to compliance with other rules regarding notice. Subordination is the act by which a beneficiary that has a senior lien based on the general priority rules, voluntarily agrees, for consideration, that its lien would be junior to a lien that is subsequently recorded.

Common Scenarios / Other Relationships Distinguished

Subordination Agreements can arise in a variety of contexts in the financing of commercial real estate and present a number of issues. Subordination Agreements are used in many situations including those among leases and as between loans and leases. In the loan scenario, there are three main transactions in which subordinations take place.

- The first is seller financing in which the seller agrees that its loan will be subordinated to a construction loan to be later obtained by the buyer/borrower. In these situations, the law is highly protective of the subordinating seller.
- The second is seller financing in which the seller agrees that its loan will be subordinated to any type of loan to be later obtained by the buyer/borrower.
- The last is when any lender agrees that its loan will later become subordinate to another loan. An example of the this would be an agreement by a HELOC that it will later subordinate to a refinance loan.

There are several other transactions that have characteristics similar to Subordination Agreements but differ from them. In a payment subordination, the parties agree that one (or more) creditor(s) will be paid prior to any payment being made to another creditor(s). Unlike the loan subordination scenario that is the subject of this article, it is the debt claim and not the lien on a particular asset that is being subordinated. Both types of subordinations, as well as other aspects of relationships among creditors, may be addressed in a more complex agreements such as an Intercreditor Agreement.

General Classification of Subordination Agreements

Subordination Agreements are generally classified as either executory or executed. Subordinations may also be "automatic."

Executory Subordination Agreement/Financing Seller Subordinating to Construction Loan

An executory subordination is a promise by the senior lender that it will subordinate its lien to a later created lien. The promise may be in a separate agreement, a clause in a senior lender's deed of trust, or, in the case of seller financing, a clause in the purchase and sale agreement. In order for the executory agreement to be specifically enforceable, it must be sufficiently specific, certain and reasonable so that a court can compel the senior lender to execute the later Agreement if it does not do so.

The Executory Subordination Agreement is subject to general contract law and must be reasonable and certain. At a minimum, the agreement must specify the maximum principal amount, interest rate, term, and the mode of repayment of the subordinating loan. As stated above, there must be consideration for the agreement. In order to be certain and

continued on page 33

reasonable, the Agreement should also include the payment terms, the purpose of the loan, and the allowable amount of fees and other charges. The agreement is subject to the covenant of good faith and fair dealing implied in every contract in California.

When a seller who provides financing agrees to subordinate to a later construction loan, the requirements for certainty are even more stringent. Absent sufficient specificity, courts may not specifically enforce an executory agreement of the seller to later subordinate. The reasons for this relate to the risk to which the seller's lien is exposed. Prior to completion of construction, the property is over-encumbered since its value without improvements will be less than the total amount of the loans. If the borrower defaults on its construction obligations, sellers generally cannot take over and complete construction or make payments on the construction loan in order to avoid foreclosure of the construction loan. Also, although a seller financier who subordinates to a construction loan can pursue a borrower post-foreclosure (an exception to the purchase money loan anti-deficiency restriction), the borrower may not have sufficient assets to make pursuit of the deficiency worthwhile. Thus, the courts have required more specificity for specific performance of a seller's executory agreement to subordinate to a construction loan, especially as against unsophisticated sellers. In general, the courts have looked to the entire circumstances of the financing, the seller's risk and the seller's understanding of the risk. Thus cases, considering different circumstance have required 1) even greater specificity as to loan terms, e.g. minimum and maximum repayment term; 2) maximum loan to value or construction cost ratios; 3) a requirement that the construction loan funds only be used for construction purposes or for other specific uses; 4) a description of the improvements to be built on the property; 5) a requirement that the construction lender be obligated to give the seller notice and opportunity to cure all defaults on the construction loan; and 6) a firm commitment for permanent financing as

a condition precedent to subordinating and the terms of that permanent financing. The seller may also want to require that the buyer/borrower post a completion bond.

The courts are generally not as demanding in the requirements for certainty in Subordination Agreements for other (non-construction) purchase assistance loans and specific performance may be granted where there is less specificity.

It is generally advisable that the form of Subordination Agreement that will be later executed be attached to the executory agreement as an exhibit.

Executed Subordination Agreement

Executed subordination refers to the status when both deeds of trust have been recorded. The legal question raised is as to the effect of the terms of the Subordination Agreement previously entered into between the subordinating lienholder and the borrower. If the terms of the loan that acquired priority as a result of the subordination (e.g. the construction loan) do not meet the terms of the Subordination Agreement and those terms are known to the construction lender, the construction lender can lose priority under contract law as stated above or based on lack of bona fide encumbrancer status.

Automatic Subordination Agreement

Another type of subordination, sometimes described as executory and sometimes as executed, is the "automatic subordination." This may be in a separate agreement, a purchase and sale agreement with seller financing or in a deed of trust. The provision states that the lien of the lender will automatically be subordinate to a later executed deed of trust without any further action on the part of the subordinating lienholder. Automatic Subordination Agreements are disfavored by institutional lenders (who will not rely on them to assure priority of their later-created Deed of Trust) and title companies

(who will not rely on them to insure the priority of the later-created Deed of Trust). Those entities will generally require that a separate Subordination Agreement specifically describing the subsequent loan be recorded at the time the subsequent loan is recorded. The form often used for this is the California Land Title Association Subordination Agreement that is found on many title companies' websites.

It is noted that "fractionalized" notes and deeds of trust issued in private loan transactions involving multiple investors cannot contain automatic subordination clauses. California Business & Professions Code Section 10238(d).

Requirements for Subordination Agreements Involving Loans Under \$25,000

California law, in Civil Code Sections 2953.1-2953.5, contain special requirements for Subordination Agreements if either the subordinating lien or the lien acquiring priority is less than \$25,000. These requirements go to required language, font sizes and notices. Covered Subordination Agreements that do not meet these requirements are voidable as specified in the statute. While the statutory language is only required for those under \$25,000, it is not uncommon to see the statutory language reflected in non-covered Subordination Agreements.

Circuity of Priorities

Circuity of priorities is an issue faced by lenders that arises when a senior beneficiary subordinates to a junior lien in a situation where there are intervening junior liens. This issue might arise, for example when lenders who make second mortgages or equity lines are asked to subordinate their liens to later refinance liens. The issue is demonstrated when there are three liens on a property, A, the first, B, the second and C, the third. If A subordinates to C, what are the relative

priorities among the A, B and C after the subordination? One result could be that A becomes subordinate to B as well as to C (the absolute priority approach). However, California and most jurisdictions follow the partial subordination, approach which would leave B in a neutral position and only subordinate A to the extent it will not result in a windfall to B or penalize B by causing it to be junior to a greater amount of debt. B's lien would not be affected by the agreement between A and C, to which it was not a party. This determination is important, for example, in the event of a sale that produces an amount that is insufficient to pay off all liens.

Clearly, the prudent thing to do in this situation, prior to entering into the Subordination Agreement, would be for A and C to obtain a Preliminary Report to determine if there are intervening liens and to obtain a Title Policy insuring the priority after the recording. A, the senior lender can then choose not to subordinate or require

that any intervening liens be satisfied before it will subordinate. The senior lender can also require that the Subordination Agreement contain language that makes its subordination ineffective if there are intervening liens that would have priority over its lien. 🌐

Norma J. Williams, Esq. is a commercial real estate attorney whose practice focuses

on finance, purchase and sale and leasing transactions. She is a frequent speaker and author, has drafted major commercial real estate legislation and has held leadership positions in local, state and national real estate bar associations. She received her B.A. degree magna cum laude from Wesleyan University and her J.D. degree from UC Berkeley School of Law. Contact: njwilliams@willassoc.com; (213) 996-8464.





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What You Need to Know About Mortgage Funds



by
Kevin S. Kim
Geraci LLP

Mortgage funds or pools were once a top-tier vehicle for real estate investing reserved primarily for institutional investors and hedge funds, but recently, more private lenders are incorporating mortgage funds into their operational portfolio.

Here's some insight into mortgage funds.

Why You Want to Open a Mortgage Fund

The primary reason that mortgage brokers and lenders choose to build a mortgage fund is to increase revenue.

Lenders make significantly more money with a mortgage fund. While mortgage brokers receive origination fees and points, mortgage funds provide the opportunity to earn origination fees, plus arbitrage or income participation from the fund, and additional fees, such as management and servicing fees.

Mortgage funds also significantly increase production, as fund managers are allowed to choose, approve, and fund the loans themselves, without individual investor approval. This process provides managers with the flexibility to quickly fund more deals and increase production and revenue, typically growing their income by 20-30%.

Mortgage funds are also a benefit to lenders because they offer more protection

against risk exposure. A mortgage fund requires detailed risk disclosures to prospective investors that protect lenders from the legal risks associated with these types of investments.

Why Investors Prefer Mortgage Funds

Investors prefer mortgage funds to direct investing because it provides a passive investment into multiple types of real estate assets, without the headaches typically associated with directly purchasing notes or funding deals.

Mortgage funds provide investors the option to invest in various types of real estate that offer different returns, diversifying their portfolio as a hedge against risk. Investors can typically receive better returns through diversification than they would otherwise see with direct investment.

With a diversified pool of properties, it means the investors' money is working around the clock. It also provides more insulation from risk because the money is invested in a pool of loans rather than just one loan. This setup leads to better returns in the aggregate.

A fund structure also protects investors from the risk of loss by defaulted borrowers, borrower lawsuits, and other foreclosure-related risks. In a pool, a default usually

doesn't affect an investor's capital, unlike a direct investment, where the entire amount of capital invested and revenue stream is placed at risk during a default.

How a Mortgage Fund Works

A mortgage fund or mortgage pool is typically constructed as a Limited Liability Company which sells membership interests in the company. Investors into the fund receive revenue from the returns of the fund's loan activities.

The LLC is typically operated by a management company that brokers loans to the fund and oversees day-to-day operations and assets. In exchange for management services, the company is compensated with management fees, origination fees, servicing fees, while also participating in the interest income.

The majority of mortgage funds rely on federal exemptions to avoid registration with the SEC. Although not typically considered a security, shares of an investment pool or fund can sometimes trigger SEC or state regulatory oversight. Specific federal rules allow exemptions to these business models, with the four most relied upon exemptions being:

- **Reg D Rule 506B** – Allows up to 35 non-accredited investors nationwide. Prohibits advertising.
- **Reg D Rule 506C** – Permits advertising but limits the fund to raise capital nationwide from verified accredited investors only.
- **Reg A Tier 2** – Permits funds to advertise and raise capital from an unlimited number of non-accredited investors with SEC approval of offering docs and periodic reporting.
- **Reg S** – Permits American funds to raise capital overseas. Advertising overseas is permitted.

The Risks and Challenges of a Mortgage Fund

First off, running a mortgage fund is NOT a part-time job. A mortgage fund is critical

to scaling and growing a private lender's business. This growth may require more staff, software, vendors, and additional marketing to fully advance the opportunity that a fund presents.

Some key mortgage fund pieces include upgraded accounting and legal help, loan servicing software and service provider, fund supervision, staffing, and investor relations and marketing to ensure you have a steady pipeline of investors ready to help grow your fund.

Funds may also face obstacles related to liquidity, cash flow, and liability. Typically, mortgage funds establish set reserves, along with cash-flow guidelines that help protect the fund in case of defaults. Funds usually task CPAs with putting safeguards in place to protect the fund from leveraging too much capital or funding individual loans above 10% of the funds' portfolio.

Starting a Mortgage Fund

Private lenders, brokers, and other non-conventional lenders seeking to create a mortgage pool should begin by evaluating the information on how to best proceed. The starting point includes consulting with a law firm that understands the complexities involved with setting up a fund and the law surrounding securities offerings and exemptions on both a state and federal level.

A mortgage fund can significantly increase revenue, create new opportunities, and scale production and originations, but without the proper guidance, a mortgage fund not established correctly, could cause headaches, both financially and legally, for both the fund manager and investor. 🌐

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MORTGAGE INDUSTRY INFORMATION, OPINIONS & TIPS

DRE: This and That

The DRE has recently been doing cleanup of some of the more archaic regulations, including the old requirement that the Broker/Corporation maintain the original Salesperson or Broker-Associate license certificates. It has been many years since printed licenses were provided to the licensee by the Department and since they stopped mailing the hard copy the licensee was required to download a copy of the license and provide it to the broker of record. This is no longer required and the broker doesn't have to keep a copy of the license. However, it is still the rule that each Broker/Corporation must have a contract, which includes a compensation agreement and supervision requirements. This extends to ALL licensees, even spouses who are licensed to the Broker/Corporation. No, the marriage license isn't enough of a contract in this case! And, the Broker-of-Record and/or Corporation license should still be displayed in a location where the public can easily see it. In addition, either the Fair Lending or Fair Housing poster must be prominently displayed, depending on your licensed activities.

Another recent change is the requirement that all Broker-Associates working for another Broker/Corporation be registered to the responsible broker. Since January 2018 this had to be accomplished by both the Broker-Associate and the sponsoring broker completing and signing the RE-215 form. In the past months, the DRE

has made this registration available via e-licensing on their website at www.dre.ca.gov. This is so much better, as it is a simple and quick way to add the Broker-Associate, as are other tasks that can be completed via e-licensing. Make sure you are using e-licensing to add Salespersons to your license, to change mailing/office addresses for licensees, and to renew licenses. Unfortunately, at this time no changes or licensing for Corporations can be accomplished via e-licensing, but I'm assured that the Department is working to add capabilities for Corporation changes/licensing soon.

On the audit front, the DRE has hired several new auditors across the state in the last year and they are very busy with auditing mostly escrow, property management and private money mortgage brokers (in other words, companies with trust accounts). They are also revisiting those companies who were cited in audits over the last few years for a follow-up examination. If you have ever received a Cite and Fine from the Department, expect a call for another audit soon. And, whatever you do, make sure you are ready!

Another issue that has arisen recently is the topic of "Business-Purpose Loans." The DRE has always agreed that the NMLS endorsement is not required for either the originator or the processor if the loan is not for "personal, household or family use," but that definition is for NMLS

endorsement requirements only. The DRE assures me that if the loan is secured by a 1-4 residential, owner-occupied property, it doesn't matter what the loan is used for, they will still follow all of the rules and regulations regarding this type of property. We are seeing more and more violations being cited for this. Expect the DRE to come out with more information about their stance on this issue.

And, not to sound like a broken record, but trust accounting is still the biggest problem found in DRE audits. I cannot tell you how often I find brokers who "think" they have a trust account and find out that the account is not, and never was, a trust account. Or the broker who "thinks" the account is reconciled when they don't understand the concept and necessity for a three-way account reconciliation (much less understanding what that term even means).

Finally, make sure you are filing your reports on time and accurately. Audits are triggered for late filing or incomplete or inaccurate filing. Check, recheck and triple check that you are filing on time and that the reports are done right. 📌

Pam Strickland can be reached at pam@pamstrickland.com Call her before the DRE calls you to make sure you are in compliance with DRE rules and regulations and could survive an audit.



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The California Mortgage Association welcomes the following members who are new to the association:

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art@equitybridge.com
Regular Member

Kirk Mulhearn
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BENEFITS OF MEMBERSHIP

CMA is one of the fastest growing statewide associations and we thank all our members for their support! You are encouraged to share with your nonmember colleagues all of the membership benefits and reasons you belong to the association. Encourage them to join – applications can be found on the CMA Web site – www.californiamortgageassociation.com, or by calling the headquarters office at (916) 239-4080.

Please remember to share information about the Focus Groups that are provided to members only.

Additional information can be found on the CMA website. There are many exciting educational programs being planned and the Spring Educational Seminar in San Francisco in April, 2019 is the next program being offered.

Thank you again for all of your support and contributions to CMA and the private loan industry! ☺





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