

Mortgage Reform and Anti-Predatory Lending Act, H.R.1728 to Pose Problems for Real Estate Investors if Passed

[On behalf of Dornish Law Offices, PC](#) | Jun 1, 2009 | [All, Real Estate Practice](#)

By Bradley S. Dornish, Esq.

Just when real estate investors are consumed with local rental and state ordinances, we have received news from National REIA of a bill passed by the U.S. House of Representatives on May 7, 2009 and working its way through the Senate which poses concerns for real estate investors on a national level. The Bill, known as the “Mortgage Reform and Anti Predatory Lending Act, numbered H.R. 1728, sounds as though it would be a great thing. Nobody likes a predatory lender any less than a real estate investor. But tucked within the 216 pages of this bill (I wish I were kidding) are provisions which make real estate investors who give financing to their buyers subject to many of the same rules facing residential mortgage lenders and banks.

First, let me say that I can’t begin to summarize over two hundred pages of potential new law in a single article, but you can read the whole thing if you dare at www.Thomas.gov. The full text, a good summary and the legislative history updated regularly are all available on Thomas, named for Thomas Jefferson to reflect his desire to get the law to the people.

Okay, you read and didn’t understand the bill, or you just want the key facts. How will this law affect investors if it is passed? To start, the Act plans to impose certain, specific obligations on mortgage originators and lenders. There is only one exception I see to the definition of a mortgage originator which could apply to an investor offering seller financing. That exception, in Section 101 of the Act, subsection (cc) (3)(E) excludes from the definition of a mortgage originator subject to the proposed Truth in Lending requirements a person, estate or trust that provides mortgage financing for only the sale of one property in any 36 month period.

However, that exception is further limited to apply only if the loan fully amortizes, with no balloon, and requires the seller to determine under the Act that the buyer has the reasonable ability to repay the loan.

The reasonable ability to repay requires the lender to obtain verification of income, like pay stubs, and presumably verification of other debt from a credit report or equivalent. If not under the limited exception, the lender would also have to provide full Truth in Lending disclosures in connection with the Seller financed loan, and for a first mortgage, either set up an escrow account at a federally insured bank or savings institution, or have the borrower execute a special form for escrow waiver.

The Act would also prohibit or limit many prepayment penalties, bar mandatory arbitration provisions and waivers of statutory causes of action by consumers, and limit and condition late payment fees.

What this means is a lot more work for a real estate investor who provides financing for consumers to purchase and owner occupy residential real estate if this bill becomes law as it is. This bill won't mean the end of seller financing in residential sales, but it will require sellers to dot more "I"s and cross more "T"s when making such loans. And if Seller/lenders don't follow the requirements of the Act, borrowers will have a right to rescind the transaction, which can even be a defense to a foreclosure action. Prudent sellers won't be doing seller financing under this bill if it becomes law without hiring lawyers to help them cross those "T"s and dot those "I"s.

Taking National REIA's advice, we should all lobby our U.S. Senators from Pennsylvania, Robert Casey and Arlen Specter, to amend the bill to create a small business exemption from the Act for small real estate investors who improve our cities and towns one home at a time. With such an exemption, we can keep helping others to realize their dreams of home ownership without entering the world of Federal Banking regulatory compliance. It is too late to contact our Representatives, because the House already passed the bill in May. Go to www.senate.gov to get phone numbers, addresses and e-mail links for the Senators.

I'll be heading to the National REIA midyear meeting on June 25, and hope to have more information on this law and the coordinated national effort to limit its application to real estate investors after that meeting, if we aren't too late by then.

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