



# Real Estate Bulletin

DEPARTMENT OF REAL ESTATE

FALL 2020

Vol. 79, No. 2

## Commissioner's Message



As I write my first message as the Commissioner of the Department of Real Estate (DRE), I am keenly aware of the talented group of leaders who filled this seat before me. Their dedicated commitment to public service has been crucial to protecting consumers. I am honored to have the opportunity to carry on that tradition.

Fulfilling that responsibility during these challenging times requires adaptability. DRE's online services will be invaluable to licensees and consumers, and we are continuously assessing additional functions we can offer "virtually." As the world changes to adapt to new health restrictions and guidelines, so will DRE with how we conduct examination administrations. Our exam centers are state-of-the-art, but in this climate, we are moving to a "new normal," both in terms of the physical health and safety of staff and examinees, as well as an increased

urgency to advance technology.

Going forward, COVID-19's influence on the workplace will have a lasting impact. For years, the design profession and organizational psychologists have advocated for collaborative work spaces and desks without partitions. The wisdom of such environments is now being called into question. The need for vast space to accommodate staff will have to be revisited by all organizations as we transition to a more remote workforce. All of these dynamics create a compelling context within which to operate as a licensee.

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## eLicensing: Speed and Simplicity

Due to COVID-19, the Department of Real Estate (DRE) is experiencing longer than normal processing timeframes. Quite often, staff receive calls from applicants and licensees inquiring about possible alternatives to expedite their licensing transactions. For those of you who are not already aware, DRE's eLicensing system offers an online platform that, among other things, allows for applicant/license change transactions, license renewals, and the printing of real estate license certificates, all easily completed on DRE's website.

User-friendly features include a customized selection menu of eLicensing options specific to the conditions of each license, automated fee payment and processing options, status tracking of online transactions, and email confirmations. After the successful completion of an eLicensing transaction, the license record will be updated in real-time and be available for viewing on DRE's website immediately.

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**REAL ESTATE BULLETIN**

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## COMMISSIONER'S MESSAGE (CONTINUED FROM PAGE 1)

Through my work in licensing, I have found that professions and regulators have similar core values: a fair and balanced marketplace with practitioners who adhere to high standards and have access to opportunity. For DRE, we contribute to those values most effectively when we serve as an essential source of information for both licensees and consumers. Providing robust, timely, and relevant information to licensees is particularly important, as it is much more cost effective to prevent violations of Real Estate Law rather than to prosecute them.

## eLICENSING: SPEED AND SIMPLICITY (CONTINUED FROM PAGE 1)

eLicensing can be used to:

- Schedule a salesperson and broker exam date after an application is qualified and processed
- Change exam mailing address
- View exam records, exam date, time and location
- View exam results and request duplicate schedule and result notices
- Print a license application after passing the exam
- Confirm if your license has been issued
- Print salesperson, broker and officer license certificates, and mortgage loan originator license endorsement certificates
- Request to add or change a salesperson's affiliating broker
- Add or change main office and mailing address
- Update contact information, i.e. phone numbers and email address
- Broker-associate affiliation processing
- Broker, salesperson, and officer renewal transactions\*

The importance of communicating to licensees is a high priority of mine. Hopefully, this publication underscores that commitment and you take away a couple of items that assist you in your day-to-day business. I look forward to crafting my next Commissioner's Message and continuing to share information that helps fulfill our respective missions.

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DRE's online services will be invaluable to licensees and consumers, and we are continuously assessing additional functions we can offer “virtually.”

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All of these options are available to you at a touch of a button 24 hours a day, 7 days a week. To use eLicensing, you must register by creating a user name and password.

As you can see there are many benefits to using eLicensing. We know once you try it, you will encourage your colleagues to use it too!

\*License renewals may not be filed using eLicensing if you hold a restricted license or you are an officer applying to renew an expired corporation on a late basis.





## Loan Modifications and Advance Fees

The Department of Real Estate (DRE) has been receiving many inquiries following the unprecedented measures being taken to slow the spread of COVID-19. In particular, DRE staff have received calls from industry members looking to innovate and pursue new or different business opportunities within the consumer financial services arena. We understand that industry members are also feeling the financial distress of these times and are looking for ways to stay in business or seek different prospects.

It does not seem long ago that we dealt with the fallout from the mortgage meltdown that led to loan modification related complaints and subsequent actions by the Department. In times such as these, we cannot be educated or prepared enough, and we are mindful that certain consumer protection laws were created following the last mortgage meltdown and are still in place today, particularly, Senate Bill (SB) 94 (Calderon, Chapter 630, Statutes of 2009) and the requirements of the Real Estate Law related to loan modification and forbearance services.

An advance fee is a fee, regardless of form, that is claimed, demanded, charged, received, or collected by a real estate licensee for services requiring a license before fully completing the service the licensee contracted to perform or represented would be performed per Business & Professions Code (Bus. & Prof. Code) section 10026. [Note that neither advance fees nor the services to be performed can be separated or divided into components.] Demanding, charging, receiving, or collecting an advance fee for residential loan modification and forbearance services, taking any wage assignment or lien on property to secure payment for the service, or taking any power of attorney from the borrower is a violation of the Real Estate Law and is a misdemeanor offense.

SB 94 also put into place disclosure requirements for those performing those services, even if not for an advance fee. Real estate licensees negotiating residential loan modification or forbearance services are required to provide a specific disclosure to borrowers, found in Bus. & Prof. Code section 10147.6, stating that the borrower can get those services for free through their own effort with the lender or through free Housing and

(CONTINUED ON PAGE 5)





## LOAN MODIFICATIONS AND ADVANCE FEES (CONTINUED FROM PAGE 4)

Urban Development (HUD) counselors. Violation of that section is a violation of the Real Estate Law and a misdemeanor offense. Additionally, a real estate licensee performing these services must have the appropriate and approved mortgage loan originator endorsements if the loan purpose was personal, family, or household use under the SAFE Act.

If the loan is secured by commercial property (that is, property other than residential one-to four-unit property), the following rules apply:

- Negotiating commercial loan modification or forbearance service requires licensing as an attorney or a real estate broker. A real estate salesperson or broker-associate may perform these activities under the supervision of the responsible broker.
- Real estate licensees entering into business arrangements with attorneys must ensure compliance with the Real Estate Law and the California State Bar rules.
- Only a real estate broker may contract for an advance fee per Bus. & Prof. Code section 10085.5.
- If a real estate broker wishes to collect an advance fee for a commercial loan modification or forbearance service, the advance fee agreement, verified accounting formats, and any advertising or promotional materials related to that agreement, must be submitted to DRE at least 10 calendar days in advance of its use per Bus. & Prof. Code

section 10085. Failure to do so is a violation of the Real Estate Law and a misdemeanor offense.

- Advance fee agreements, verified accounting formats, and advertising or promotional materials must follow certain requirements. See Commissioner's Regulations 2970 and 2972 for detailed requirements.
- Any advance fees collected must be placed into a trust account. The broker may only draw fees earned from the trust account when certain conditions are met and must provide accounting details to the borrower at the end of each calendar quarter and when the contract has been completely performed. Further detail can be found in Bus. & Prof. Code section 10146. A violation of that section is presumed to be a violation of Penal Code sections 506 and 506a related to embezzlement, and the borrower may recover treble damages and attorney's fees for amounts misapplied.

If you are interested in pursuing a different type of consumer financial business, we urge you to consult with competent legal counsel who can provide advice as to proper licensure and legal requirements, and prepare legal documents for your use.

We at DRE are confident that the real estate industry will be innovative during these times while still protecting the health and safety of industry, clients, and customers and maintaining the consumer protection requirements within the Real Estate Law.





## Lesser-Known Mortgage Loan Related Violations

Department of Real Estate (DRE) staff are often asked about the common violations found from audits, broker office surveys, and investigations. The focus of this article is to discuss commonly found issues, concerns, and lesser-known requirements.

### Business Activity Reports

**FALSE:** The Business Activity Report is only required of mortgage loan originators.

**TRUE:** The Business Activity Report is required of all brokers who make (lend), arrange (broker), or service one or more loans in a year that are secured by one to four residential units per Business & Professions Code (Bus. & Prof. Code) section 10166.07. For example, brokers who arrange loans for investor borrowers who fix and flip residential properties must file a Business Activity Report.



### Signing the Mortgage Loan Disclosure Statement

**FALSE:** The Mortgage Loan Disclosure Statement may be electronically signed.

**TRUE:** Although the California Uniform Electronic Transmissions Act allows many documents to be electronically signed, the Mortgage Loan Disclosure Statement that must be provided to borrowers per

Bus. & Prof. Code section 10240 — and the Lender/Purchaser Disclosure statement that must be provided to private money lenders per Bus. & Prof. Code section 10232.4 — must be personally signed.

### Threshold Reports by Private Money Brokers

**FALSE:** Only private money brokers that meet the level of private money loan negotiation or servicing must complete the trust fund status reports if handling trust funds.

**TRUE:** All private money brokers must complete trust fund status reports if handling trust funds per Bus. & Prof. Code section 10232.25; however, only those who meet the level of private money loan origination or servicing activity must submit the reports to DRE.

### Mortgage Broker Origination Agreement

**FALSE:** Real estate licensees performing mortgage broker services should have borrowers sign mortgage loan origination agreements that state the brokers are acting as independent contractors and not acting as the borrowers' agents.

**TRUE:** Mortgage brokers are always acting as an agent when performing licensed acts for another or others. Mischaracterizing that relationship as one of an independent contractor — and not as an agent — can be viewed as misrepresentation, dishonest dealing, and a breach of fiduciary. If transactions involve loans secured by residential property between one and four units, real estate licensees owe fiduciary duties to the borrowers per Civil Code section 2923.1. This is true even if the real estate licensees are also representing the lenders. To represent that real estate licensees are not agents of the borrowers through use of these mortgage loan origination agreements is a violation of that Civil Code section, and becomes a violation of the Real Estate Law.

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## LESSER-KNOWN MORTGAGE LOAN RELATED VIOLATIONS (CONTINUED FROM PAGE 6)

Additionally, if mortgage brokers are acting as agents for lenders in these same residential mortgage transactions and attempt to write away the brokers' agency to the borrowers, then mortgage brokers can be viewed as acting for more than one party in a transaction without the consent of all parties, a violation of Bus. & Prof. Code section 10176(d).

### Waiving Loan Contingencies

**FALSE:** Real estate licensees should recommend clients release loan contingencies prior to closing in real estate purchase transactions, even though the loans have not funded.

**TRUE:** Releasing loan contingencies before loan funding places buyer/borrower clients at risk. Most often, buyers do not have sufficient cash funds to close transactions should the loans not be approved and funded in time. This places a risk to buyers of losing earnest money deposits, being subject to liquidated damages, or worse. Real estate licensees should consult with appropriate counsel to determine the best way to submit offers and subsequent agreements to make certain timeframes, contingencies, and — most importantly — the clients' interests are being protected.

### All Cash Offers

**FALSE:** Real estate licensees may submit all cash offers to purchase property even though the licensees know their clients will need loans to fund the deal.

**TRUE:** Real estate brokers place their clients and their own licenses at risk when submitting offers with known false information, as it is a form of misrepresentation and fraud. If buyers express interest in submitting an all cash offer, licensees should take the time to validate the funds before submitting an offer.

### Pre-Qualification versus Pre-Approval

**FALSE:** Real estate brokers providing mortgage broker services may represent that they have the ability to pre-approve loans.

**TRUE:** There is a distinction between a pre-qualification and a pre-approval, although they are mistakenly used

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#### LESSER-KNOWN MORTGAGE LOAN RELATED VIOLATIONS (CONTINUED FROM PAGE 7)

interchangeably. Lenders have the ability to pre-approve loans, as they are the ones to approve loan funding based on their underwriting criteria. Mortgage brokers may pre-qualify borrowers for a particular loan based on preliminary borrower data, but may not pre-approve a loan that is not funded by that brokers' own funds.

#### Brokers' Limited Liability Company (LLC) as the Lender

**FALSE:** Real estate brokers can use LLC's that are owned or managed by them to fund loans, but do not need to disclose to the parties their relationship with the LLC or disclose the funds are broker-controlled funds because the real estate brokerages are separate entities from the LLC.

**TRUE:** If real estate brokers have ownership in LLC's or manage LLC's that will be lenders in transactions, real estate brokers must disclose those relationships to borrowers. This includes disclosing and getting consent for the agency relationships to the LLC and to the borrower per Bus. & Prof. Code section 10176(d), disclosing the ownership interest in the LLC to the parties as a material fact per Bus. & Prof. Code section 10176(a), and disclosing to the borrower that the funds are broker-controlled funds through the mortgage loan disclosure statement per Bus. & Prof. Code sections 10240, 10241, and 10241.2.

Real estate licensees are encouraged to review the resources available through DRE's website under the Real Estate Business Resources page to make certain they are compliant in their real estate transactions.





## Helpful or Illegal? When helping clients crosses the line

*By the Contractors State License Board*

Real estate licensees often help clients spruce up their property prior to putting it on the market. However, sometimes that assistance requires a contractor's license issued by the California Contractors State License Board (CSLB). To avoid inadvertently acting in the capacity of a contractor, follow the guidelines outlined below.

- You can recommend licensed contractors for the homeowner to interview and hire.
- You cannot provide or oversee bids for a construction project.
- You cannot manage the project, e.g., arrange contractors' work schedules and maintain oversight of a construction project.

In California, all construction that costs \$500 or more in combined labor and materials must be performed by a contractor licensed in the correct classification. For example, curb appeal is important, but will require a landscaping license; plumbing repairs will require a plumbing license; and painting will require a painting license. CSLB issues licenses in 44 classifications that encompass all types of home improvement.

CSLB recommends that you encourage your clients to always hire an appropriately licensed contractor, ensure that the contractor's license is in good standing, and confirm that the contractor carries workers' compensation if they have employees, otherwise the homeowner may be liable if someone is hurt while working on their property. Please note that roofing contractors must have workers' compensation whether or not they have employees.

Hiring unlicensed contractors puts your clients at risk by exposing them to legal liabilities, preventing them from pulling required building permits, and reducing the consumer protections available to them if a problem arises. Additionally, unpermitted work completed by unlicensed contractors must be disclosed to prospective buyers when the house is listed for sale, which may cause legal complications for buyers and sellers.

Your clients can begin their search for a licensed contractor using CSLB's Find My Licensed Contractor feature, which allows searches for licensed contractors in a certain geographic area by classification. They can also check the status of a license on CSLB's website or by calling (800) 321-CSLB (2752).

Other tips that you can share with clients about hiring contractors include:

- Get at least three written bids to compare cost.
- Make sure the contractor provides a detailed written contract signed by both the homeowner and the contractor. Be wary of signing electronic devices; if you do sign one, ask for a paper copy immediately.
- Confirm that the contractor pulls all required building permits.
- Never pay more than 10% down or \$1,000, whichever is less (except in cases where the licensee has a blanket performance and payment bond on file with CSLB).
- Don't pay in cash.
- Don't let payments get ahead of the work.
- Make sure the building department inspects the completed work.
- Don't make the final payment until you're satisfied with the job and the building department has completed its inspection.

As you continue to help your clients, please protect yourself and them by encouraging them to hire only licensed contractors and to follow CSLB's consumer tips. For more information, please visit CSLB's website.





## Compensating Balances and Other Considerations Received in Trust Accounts

According to Commissioner's Regulation (Reg.) 2830, as an agent of the client, a real estate broker "...owes a fiduciary duty to the client regarding the handling of the trust. Any benefit received by the broker relating to the broker's handling of client funds in trust belongs to the client by law, and the broker must pass that benefit along to the client."

During numerous audit examinations, Department of Real Estate (DRE) auditors often encounter real estate brokers engaging in an "earnings credit relationship" with the financial institution from the trust funds available in the bank account in connection with the broker's licensed activity. Bank charges are often offset by funds available in the trust fund account as reflected on the Bank Account Analysis Statement.

Under Reg. 2830(a), unless in possession of written permission from the client, it is unlawful for any real estate broker, including any corporate broker, to receive, directly or indirectly, any commission, compensation, or other consideration, whether personal or professional, from any person or institution other than the client as an inducement for the placement of a trust fund account in accordance with Section 10145 of the Business and Professions Code (Bus. & Prof. Code).

Furthermore, Reg. 2830(b) defines a "compensating balance" as a balance maintained in a checking account or other account in a bank or other recognized depository in the name of a real estate broker for the purpose of paying bank fees on a separate trust fund account.

Under Bus. & Prof. Code 10145(a)(1), real estate brokers performing activities requiring a license are required to place funds from others into (1) a neutral escrow depository; (2) the hands of the broker's principal; or (3) into a trust fund account maintained by the broker in California. All funds deposited by the broker in a trust fund account must be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

	February 3, 2018 (d)	January 28, 2017	January 26, 2016	January 2015
Income Statement Data				
Net sales	\$ 913,380			\$ 1,133,644
Cost of sales (including buying, distribution, and occupancy costs)	533,350	205,933	212,800	212,800
Gross profit	380,030	38,475	39,282	39,282
Selling expenses	20,000	152,760	229,588	229,588
General and administrative expenses	78	3,511	5,236	5,236
Income from operations	1,407	156,271	234,824	234,824
Other income, net	9,485	58,310	87,541	87,541
Income before income taxes	9,778	97,961	147,283	147,283
Provision for income taxes	\$ 9,707	\$ 2.04	\$ 3.06	\$ 3.06
Net income	\$ 1.86	\$ 2.03	\$ 3.06	\$ 3.06
Basic earnings per share	\$ 1.85	\$ 1.75	\$ 1.94	\$ 1.94
Diluted earnings per share	\$ 1.75			
Dividends declared per share (a)				
Selected Operating Data				
Stores open at end of period		467		
Average sales per square foot		1,700	1,447	1,447
Average sales per store (000's)		(7.2)		
Comparable store sales change				
Balance Sheet Data				
Working capital	\$ 262,678	\$ 287,841	\$ 255,271	\$ 33,820
Long-term debt	\$ 21,853	\$ 18,092	\$ 17,777	\$ 17,777
Total assets	\$ 539,116	\$ 579,847	\$ 572,777	\$ 572,777
Total liabilities	\$ 396,248	\$ 430,119	\$ 412,777	\$ 412,777

If a real estate broker engages in an earnings credit relationship with the bank from the trust funds available in the bank account in connection with the broker's licensed activity, the broker must disclose in writing to all owners of the trust funds maintained in the bank account. If the broker fails to have written authorization from all the clients, they would be in violation of Bus. & Prof. Code section 10176(g) and Reg. 2830 for Secret Profits/ Earnings Credits.

For activities requiring a real estate license, a licensee is required to disclose to their contracting parties the full amount of compensation, commissions, or profit earned pursuant to Bus. & Prof. Code section 10176(g).

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# Real Estate Bulletin

## COMPENSATING BALANCES AND OTHER CONSIDERATIONS RECEIVED IN TRUST ACCOUNTS (CONTINUED FROM PAGE 10)

The following are also considered inducements for the placement of trust funds:

- Receiving or requesting payment of business expenses, including, but not limited to, rent, employee salaries, furniture, copiers, facsimile machines, automobiles, telephone services or equipment, or computers.
- Receiving or requesting receipt of any form of consideration intended for the benefit of the broker, rather than the trust account itself, including cash, below market rate loans, automobile charges, or merchandise or merchandise credits.
- Receiving or requesting to receive the time of any employee of the bank or other recognized depository for any service unrelated to the trust account.

- Receiving or requesting expenditures for food, beverages, and entertainment.

In addition, bank charges incurred in a trust fund bank account should not be disbursed from funds belonging to the beneficiaries of the trust account. Brokers can make a separate arrangement with the bank to have bank charges paid from the broker's general business account to avoid trust fund shortages in the trust account.

Unless in possession of written permission from the beneficiaries of the trust account, the activities mentioned above are deemed to be inducements and are in violation of the Real Estate Law and Commissioner's Regulations.







# COVID-19 CALLING ALL CALIFORNIANS!

Every Californian can safely help their community during these difficult times. Here are some ways you can make a difference:



## Deliver Meals

Vulnerable seniors are at greatest risk amid COVID-19. Let's help keep them safe and cared for. Contact your local Meals on Wheels organization, visit [www.mealsonwheelsamerica.org](http://www.mealsonwheelsamerica.org).



## Donate to a shelter or food bank

During this time organizations are running low on food items, help them stay well stocked for those in need. Visit [www.serve.ca.gov](http://www.serve.ca.gov) to find one near you.



## Volunteer at a food bank

Food banks are in great need of volunteers to help pack and sort food. They are taking precautions to prioritize volunteer safety. Visit California Association of Food Banks at [www.CAfoodbanks.org](http://www.CAfoodbanks.org)



## Support Nonprofits

Nonprofit organizations serving vulnerable communities – like seniors and low-income families – need your help. Find a fund to donate to nonprofits in your community on the Philanthropy California COVID-19 Response Page: [www.philanthropyca.org/covid-19-response](http://www.philanthropyca.org/covid-19-response).



## Wellness Checks

Check on Older Neighbors with a Call, Text or Talk through the door



## Hygiene Kits

Create hygiene kits and drop off at a shelter for people experiencing homelessness to help them stay healthy.



## Donate Blood

Donated blood has decreased dramatically. Healthy, eligible donors are urged to come out and give to ensure there's lifesaving blood on the shelves for those who need it most. Visit the American Red Cross: [www.redcrossblood.org/give.html/find-drive](http://www.redcrossblood.org/give.html/find-drive)





**TAKE THE  
CENSUS TODAY!**

**(844) 330-2020**

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For all the latest real estate information for consumers, licensees, examinees, and developers, visit the DRE website and follow us on **Facebook** and **Twitter**.

[www.dre.ca.gov](http://www.dre.ca.gov)

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We'd like to hear from you!

 Email us at [editor@dre.ca.gov](mailto:editor@dre.ca.gov)

