



Real Estate Bulletin

Real Estate MATTERS!

A Message from Acting Commissioner Barbara J. Bigby

DRE Thanks the Exam Study Subject Matter Experts

On December 8, 2011, I was proud to join Jeff Davi, the 22nd Real Estate Commissioner, to honor those “volunteers” from various walks of the real estate industry and education community who served as our subject matter experts in the real estate License Examination Validation Study. The License Examination Validation Study required the special assistance of a panel of industry subject matter experts, each of whom brought definitive sources of knowledge and expertise to the most crucial components of the project. As a panel participant, each person voluntarily gave his/her time and expertise to the project without compensation and with much sacrifice, both monetarily and personal. This study, which was just recently concluded, was the most comprehensive that I have witnessed in my 40+ years of experience at the DRE.

Our volunteers, who

represented all real estate business specialties, traveled tens of thousands of miles, racked up hundreds of frequent flyer miles, clocked in months of meeting days, and pored over thousands of questions, issues and concerns, deliberating the merits of each while determining which test items should appear in the new real estate salesperson and broker examinations. They made it their mission to ensure that the study concluded with a comprehensive, meaningful and relevant review of the practical knowledge levels required to enter the real estate profession, and then focused their efforts on developing real estate license examinations that would appropriately test and measure the knowledge levels of salesperson and broker license applicants. With electronic examinations launched statewide, the results of our collective efforts will soon be reflected in new examination standards.

So, in the not too distant future, when you meet someone newly licensed and you pause to think, “Wow, this person is a credit to our profession!” you should extend your appreciation to:

Larry Black	RSL Financial Services, Inc.
John Cribb	San Luis Obispo Realty
Lawrence “Larry” Fargher	Realcom Associates
Vernon “Vern” Hansen	Vern Hansen Broker Risk Management Services, Inc.
Franklin “Frank” Nelson	Office Manager-Broker Associate, RE/MAX All Stars Realty-Corona
Peter Ogilvie	First Residential Mortgage Corporation
Jeannette “Jeanne” Radsick	Century 21 Hometown Realty
Bruce Southstone	Instructor, Cabrillo College
Suzanne Yost	Broker Associate, Alain Pinel Realtors
David Zigal	Prime Global Realty Corporation, Prime Pacific Global Management Corporation, and United Property Sales, Inc.
Bill McKnight	CA Certified Residential Real Estate Appraiser, Appraisal ACE
Ted Faravelli Jr.	T.E. Faravelli & Associates

During the long course of this project,

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REAL ESTATE BULLETIN

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Exam Study

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these individuals represented the pinnacle of professional excellence and a cooperative mastery of open communications. Their enthusiastic spirit and formidable determination made a substantial contribution to the quality of the project and its outcomes. They absolutely have raised the bar for entry into the real estate business.

We are also indebted to the real estate associations and broker offices who offered us their generous hospitality during this project. The staff at each location warmly welcomed our subject matter expert group and hosted our meetings using their facilities, free of charge, on countless occasions enabling us to achieve optimal results at the best possible value. It is with our gratitude that we acknowledge the following meeting sponsors:

- ❖ San Mateo Association of Realtors®
- ❖ Santa Clara Association of Realtors®
- ❖ Silicon Valley Association of Realtors®
- ❖ North Bay Association of Realtors®
- ❖ Alain Pinel Realtors®, Los Gatos

Any successful partnership between the public and private sectors depends on the *people* involved with the project. The License Examination Study is one such project where the government obligation to determine a candidate's license eligibility by qualifying and testing his/her fundamental knowledge was exceptionally complemented with the consummate contributions of our interdisciplinary, subject matter expert team members. We thank you all. 🏠



Pictured Left to Right: David Zigal, Sherryl Hackney (DRE), Holly Hatada (contractor-CPS), Vern Hansen, Barbara Bigby (DRE), Peter Ogilvie, John Cribb, Bruce Southstone, Suzanne Yost, Jeff Davi, Ted Faravelli Jr., Jeanne Radsick, Larry Black, Frank Nelson, Shelly Harkins (DRE), and Larry Fargher.

Short Sale Transactions: The “Lawfulness” of Fees Charged to Buyers

The California Department of Real Estate (DRE) has written about short sale transactions in alerts and past editions of the Real Estate Bulletin. One persistent question that the DRE receives on the subject of short sales is whether fees can be charged to a buyer in a transaction to compensate a short sale negotiator, or to provide additional compensation to a broker, for the work necessary to accomplish a short sale. California Senate Bill 458 (2011), which was signed by Governor Brown and became effective in July 2011, prohibits short sale lenders from requiring the seller(s) to pay any additional compensation - aside from the proceeds of the sale- in exchange for the written consent to the sale.

The Requirements for Licensure, Transparency, Written Disclosure, and Actual Service(s)

The Real Estate Law does not expressly prohibit the payment of short sale negotiator fees by a buyer as long as the purported short sale negotiator is properly licensed under California law, and there is an understanding by and full written disclosure to all parties in the transaction, including the short sale and originating lenders.

To ensure that there is no confusion, mystery, or lack of transparency with respect to such fees, the compensation should be disclosed to all parties in writing, both in the purchase agreements and in the escrow instructions, and the fees must be properly documented in the appropriate line item(s) in the HUD 1 closing statement.

Also, if any of those fees will be collected in advance, special “advance fee” laws and rules apply. Those include the requirement that licensees submit an advance fee contract to the DRE and receive a “no objection” from the department before collecting any fees in advance, and specific trust funding handling requirements for such fees.

Whenever additional transaction fees are negotiated in a transaction, licensees should be alert to possible violations of the federal Real Estate Settlement Procedures Act (RESPA), which requires that some actual services be provided. To avoid even the appearance of a violation of RESPA, the specific services that are provided in the transaction, that are over and above the services encompassed and covered in the commission agreement, should be well-documented. Stated a bit differently, the fees cannot be simply “junk” or “bogus” fees, but they must be for some services performed.

Payments that would certainly be challenged as “unearned” fees would occur in such cases where a buyer paid a licensee




monies where no work was done. In any event, the answer to the question as to whether a fee was “earned” or “unearned” would be fact-driven.

A more complete discussion of the RESPA rules is beyond the scope of this writing. DRE does not enforce the provisions of RESPA, and the case law focusing on the RESPA statutes continues to evolve.

The Ninth Circuit Court of Appeals, in the case of *Martinez v. Wells Fargo Home Mortgage*, 598 F. 3d 549 (2010), held that the unearned fees section of RESPA prohibits only the practice of giving or accepting money where no service whatsoever is performed in exchange for that money. But that ruling differs from a more expansive interpretation by the U.S. Department of Housing and Urban Development (HUD), which enforced RESPA. Moreover, the U.S. Supreme Court has accepted for consideration two RESPA cases, and the Supreme Court may opine on this issue of unearned fees, as well as fee splitting.

In addition to familiarizing themselves with RESPA, licensees are well-advised to review relevant sections of the California Real Estate Law (for example, see Sections 10176 and 10177 of the California Business and Professions Code, which cover “dishonest dealing”, fraud, “secret or undisclosed amount[s] of compensation”, “false promises”, and misrepresentations, among other things), prior to collecting any additional fees from buyers to ensure that they do not find themselves in violation of state and/or federal law.

For a comprehensive overview of the requirements relating to short sale transactions, licensees should review the Spring 2010, Fall 2010 and the Fall 2011 editions of DRE’s Real Estate Bulletin, as well as several industry and consumer alerts available on the DRE’s Web site located at www.dre.ca.gov. 

2011 Legislative Summary

October 9, 2011 marked the end of the first year of the 2011/2012 legislative session. In the first year of his third term, Governor Brown acted on 889 bills. He signed 760, vetoed 128, and he allowed one bill to become law without his signature.

The continued downturn in the real estate market resulted in the signing of several bills that greatly expanded consumer protections in real estate transactions and increased the authority of the Department of Real Estate (DRE) to safeguard the public interests in real estate matters. The following legislative summaries are of bills that affect real estate licensees and subdividers. These summaries are intended to alert you to pertinent changes to the law. You are encouraged to consult the statutes for complete information. Copies of the bills can be obtained online at <http://www.leginfo.ca.gov/bilinfo.html>. Please note that "SB" refers to a Senate Bill and "AB" to an Assembly Bill. The name appearing after the bill number is the name of the author. All statutes are effective January 1, 2012, unless otherwise noted.

Signed Legislation

AB 208 by Assembly Member Fuentes (D – Los Angeles).

Land use: subdivision maps: expiration dates.

The Subdivision Map Act (Map Act) establishes a statewide regulatory framework for controlling the subdividing of land, which generally requires a subdivider to submit, and have approved, a tentative map by the city and/or county in which the land is situated. The Act requires an approved tentative or vesting tentative map to expire 24 months after its approval, or after an additional period of time prescribed by a local ordinance, not to exceed 12 months.

This urgency measure went into effect upon signing and extends by 24 months the expiration date of any approved tentative map or vesting map that has not expired as of the effective date of the bill.

AB 771 by Assembly Member Butler (D – Torrance).

Common interest developments: requests for documents: fees.

The Davis-Stirling Act (the Act) requires sellers of residential real property in common interest developments (CIDs) to provide basic information to prospective buyers about the structure, operation and management of the homeowners' association (HOA) that operates the CID. The Act also requires that the HOA provide these documents and materials to owners, upon request, and specifies that this information be provided within designated timeframes and at a reasonable cost.

This bill requires that the seller also provide a copy of the minutes of the most recent 12 months' worth of meetings of the HOA's board of directors if requested by the purchaser. Additionally, this bill requires a HOA to provide to the seller a written or electronic estimate of the fees that will be assessed to provide the specified documents. The HOA is allowed to collect a "reasonable" fee based on the HOA's cost for procuring,

preparing, reproducing, and delivering the requested documents, but the bill prohibits charging additional fees for electronic delivery of these documents.

AB 1424 by Assembly Member Perea (D – Fresno).

Delinquent taxes: license suspensions.

This bill requires the State Board of Equalization (BOE) and the Franchise Tax Board (FTB) to each make publicly available a list of the 500 largest tax delinquencies in excess of \$100,000. This bill also requires a state licensing agency, including DRE, to suspend the professional or occupational licenses, certificates, registrations, or permits held or maintained by a tax debtor who is on the FTB or BOE list of largest tax delinquencies. Most of the provisions of this bill become effective July 1, 2012.

SB 4 by Senator Calderon (D – Montebello). Mortgages: foreclosures: notices.

This bill requires that property owners and bidders of foreclosed property be provided with additional information about key aspects of the foreclosure process. Beginning April 1, 2012, this bill requires that two paragraphs be added to the Notice of Trustee Sale informing potential bidders of specified risks and informing the property owner about how to obtain information regarding any postponement of the sale.

SB 6 by Senator Calderon (D – Montebello). Real estate: appraisal and valuation.

This bill makes it illegal for a real estate licensee to knowingly or intentionally misrepresent the value of real property or to provide an opinion of value of residential real property to a lender wherein the licensee has an economic interest in the property.

SB 53 by Senator Calderon (D – Montebello). Real estate licensees: disciplinary authority: notice requirements.

This bill makes several changes to California's Real Estate Law giving DRE more enforcement tools to combat mortgage fraud and other real estate misconduct. Furthermore, the bill adds safeguards to protect consumers who seek out services from real estate licensees and makes technical changes intended to clarify certain provisions of Real Estate Law.

Specifically, this bill:

- Authorizes the Real Estate Commissioner (the Commissioner) to issue citations and/or fines of up to \$2,500 to both licensees and unlicensed persons found to have violated the Real Estate Law.
- Authorizes the Commissioner to apply to the Superior Court for an order to enforce an administrative subpoena that the DRE issued to a licensee.
- Allows the Commissioner, under certain circumstances, to acknowledge the existence of an investigation or proceeding against an unlicensed person or licensee.
- Requires any real estate broker who engages in escrow activities for five or more transactions in a calendar year

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or whose escrow activities equal or exceed \$1 million in a calendar year to file a report with DRE documenting the number of escrows conducted and the dollar volume escrowed during the calendar year in which the threshold was met. The bill also authorizes the Commissioner to assess penalties when a broker fails to file required reports with DRE. This provision becomes effective July 1, 2012.

- Allows the Commissioner to delay the renewal of the real estate licenses of licensees who have violated specified provisions of the Real Estate Law.
- Requires real estate licensees that engage in multi-lender loans to provide information to their investors regarding the provisions of law under which they are operating.
- Finally, this bill would provide statutory authority to the Commissioner to request specified information from the DMV and for DMV to provide the requested information to DRE.

SB 110 by Senator Rubio (D – Bakersfield). Real property disclosures: mining operations.

Existing law requires a seller or the seller's agent of real property to disclose to buyers any material facts that would have a significant and measurable effect on the value or desirability of the property. This bill requires "expert reports" used to fulfill natural hazard disclosure requirements in residential sales to include a "Notice of Mining Operations" if the subject property is located within one mile of a mine operation.

SB 150 by Senator Correa (D – Santa Ana). Common interest developments: rentals.

This bill, irrespective of a change in the Covenants, Conditions and Restrictions (CC&Rs), allows an owner in a common interest development (CID) to retain the right to rent or lease his or her unit, if that right to rent was vested at the time ownership of the unit commenced. The bill also requires the disclosure of any rental restrictions in the CID's governing documents to a potential buyer.

SB 209 by Senator Corbett (D – San Leandro). Common interest developments: electric vehicle charging stations.

This bill prescribes that a provision of any of the governing documents of a CID would be void if it prohibits or restricts the installation or use of an electric vehicle charging station. Furthermore, the bill provides that homeowners' associations have the authority to set reasonable restrictions on those stations and would impose requirements with respect to an association's approval process for those stations. The bill would provide that an association that violates the bill's provisions would be liable for damages and a civil penalty.

SB 563 Committee on Transportation and Housing. Common interest developments: meetings.

The Davis-Stirling Common Interest Development Act (the Act), governs the establishment and management of CIDs. The Act prescribes requirements for meetings of the board of directors of a homeowners' association (HOA) that manages the development. The Act currently requires that notice of the time and location of such meetings to be given to the members (home owners) of the HOA at least 4 days prior to the meeting.

This bill requires that notice of such meetings, which will be held solely in executive session, be given to members of the HOA at least 2 days prior to the meeting. Furthermore, this bill provides that - if a member consents - this notice may be provided to the member electronically. The bill also permits these meetings to be conducted by teleconference.

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Electronic examination locations are expanding!

We are pleased to report that our newest Electronic Examination Site opened on September 21st in the city of La Palma, in the greater Los Angeles area. This state of the art electronic exam facility is located at 1 Centerpoint Drive, Suite 370, in La Palma, California. This new site accommodates 96 examinees at electronic workstations, has lockers available for use by examinees, and has free parking! La Palma is the third electronic examination site for DRE; we opened the Oakland District Office site in August of 2009, followed by the Fresno District Office site in December of 2009.

The computer-based system allows examinees to take the real estate salesperson and broker examinations and receive their results immediately following completion of the test. In addition, qualified candidates who have submitted a Combination Examination and License Application, and who pass their exam, can be issued a temporary license which allows them to immediately go to work. The successful examinees receive their license identification number as part of this authorization and the DRE public information on the Web site is immediately updated.

The electronic examination system is in an easy-to-use format, where exam workstations contain only a computer monitor and mouse; keyboards are not used. The activation of the workstation occurs with the assignment of a mouse to an examinee. Examinees are able to navigate back and forth through the questions and choose answers by pointing and clicking with the mouse. Other benefits include testing tools such as a clock which counts down the individual's exam time and a counter which tracks the number of questions answered and of those remaining.

The next electronic exam site will serve the San Diego region. 🏠

Recent HUD Actions Focus on the Federal Real Estate Settlement Procedures Act and the Payment of Illegal Referral Fees - Real Estate Licensees at Risk

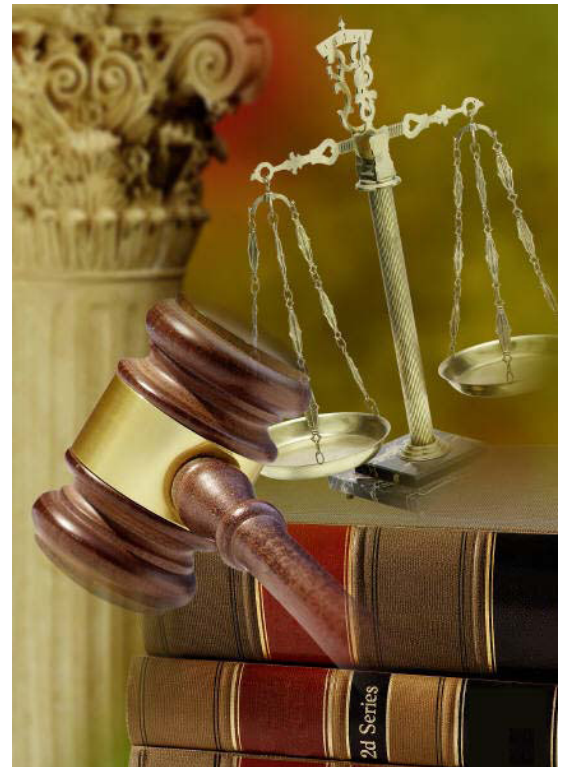
The U.S. Department of Housing and Urban Development (HUD) recently entered into a settlement agreement with Fidelity National Financial, Inc. (FNF) based on allegations that FNF failed to comply with Federal Real Estate Settlement Procedures Act (RESPA). Specifically, HUD alleged that FNF, through its subsidiaries, paid fees for the referral of settlement service business in violation of RESPA. Real estate brokerages entered into Application Service Provider Agreements which provided the real estate brokerages with access to TransactionPoint, a web-based platform that automates the real estate transaction from listing to closing, and allows the real estate brokers to select real estate settlement providers for a particular real estate transaction. The real estate brokerages, in turn, entered into Sub-License Agreements with subsidiaries of FNF to enable FNF's subsidiaries to be listed in TransactionPoint as a provider of the settlement services. As part of the Sub-License Agreement, HUD alleged that FNF's subsidiaries paid the real estate brokers a fee for each referral of real estate settlement services. While FNF did not admit wrong-doing in the case, it agreed to make a payment to HUD for \$4.5 million to resolve the matter.

This case should serve as an educational tool and reminder for real estate licensees. Licensees must be careful when entering into arrangements with settlement providers or their affiliates that result in compensation back to the licensee. Great care is needed when engaging in transactions with settlement service providers that result

in payments for orders placed with those providers. If a real estate licensee is offered some type of benefit or payment to steer business to a settlement provider, a licensee should not take the word of the entity or person who makes the offer that the activity is RESPA compliant. Every licensee must do his or her own research to ensure any offer from a settlement service provider is RESPA-compliant. A simple start is to ask the service provider if a legal analysis that their activity is RESPA-compliant has been done and, if so, get a copy of the analysis. Every licensee should also follow up with his or her own counsel and HUD before entering into any agreement with a settlement service provider that will provide any type of benefit to the licensee.

If a real estate licensee is found by HUD to have violated RESPA, the finding of a violation may be used by the Department of Real Estate as a basis for disciplinary action. Education and diligence are the keys to avoiding violations. The following excerpts are an excellent starting point to avoid violations:


RESPA Section 8(a) (12 U.S.C. Section 2607(a)) provides that:



“No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement to or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.”

RESPA Section 8(b) (12 U.S.C. Section 2607 (b)) provides that:

“No person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.”


For more information on RESPA and to review a copy of the HUD settlement agreement visit www.hud.gov and enter "Fidelity" into the search function. 

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Investigation Notices

Have you received a Corrective Action Letter or a notice that you are under formal investigation by the DRE regarding mortgage loan activities?

Please call the DRE contact person listed on the letter or notice so that the matter can be resolved.

Failing to comply with Real Estate Law will result in disciplinary action being filed against your real estate license that will become part of your public record. 

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SB 458 by Senator Corbett (D – San Leandro). Mortgages: deficiency judgments

Existing law prohibits a lender from pursuing a deficiency judgment under a note secured by a first deed of trust or first mortgage for a dwelling of not more than four units in any case in which the property is sold for less than the amount owed with written consent from the lender. Furthermore, existing law specifies that once the lender provides written consent for the short sale of the property, the borrower is released from the obligation to pay the first-lien holder the remaining balance of the loan in the future.

This bill, among other things, expands anti-deficiency protections for all mortgages or deeds of trust, provided that the holder of the mortgage or deed of trust consents to the short sale. In cases where a borrower secured a loan with multiple properties, this bill would clarify that a lender's right to pursue the other collateral pledged as security by the borrower is unaffected by the lender's agreement to short sale the borrower's home.

SB 510 by Senator Correa (D – Santa Ana). Real estate brokers: corporate officers: designating branch managers

This bill would authorize an employing real estate broker or corporate designated broker officer to appoint a licensee as a manager of a branch office or division of the employing broker's or employing corporate designated broker officer's real estate business and delegate to that manager responsibility to oversee and supervise operations and licensed activities. The branch manager shares the potential license discipline for violations of the Real Estate Law occurring at the branch. The bill also specifies that whenever an appointment of a branch manager is terminated or changed, the employing broker or corporate designated broker officer must immediately notify DRE.

SB 706 by Senator Price (D – Los Angeles). Business and professions.

This bill makes numerous changes to California's Real Estate Law intended to enhance DRE's enforcement authority to provide increased protections to consumers. Specifically, this bill:

- Provides that public protection is the highest priority for DRE in exercising its licensing, regulatory, and disciplinary functions.
- Requires the DRE to disclose on its internet Web site the status of every license issued, including information on accusations, suspensions and revocations.
- Allows the DRE to enter into a settlement with a licensee or applicant without first filing an accusation or statement of issues.
- Allows the DRE to request that an administrative law judge direct a licensee found to have violated the Real Estate Law to pay the costs associated with the investigation and enforcement action.
- Allows the DRE to charge a licensee, who has been issued a restricted license, a fee for the costs associated with monitoring that licensee, while he or she is on restricted status.
- Allows the DRE to recover the cost of processing the petition of a restricted or revoked licensee who requests to have his or her license restrictions removed or license reinstated.
- Allows the DRE to automatically suspend a real estate license and/or mortgage loan originator (MLO) license endorsement of a licensee who has been incarcerated after a felony conviction.

- Requires a licensee to report to DRE when he or she has been indicted, charged with a felony, convicted of a crime, or had another license disciplined by another licensing agency. Furthermore, failure to report such action would constitute a cause for license disciplinary action.

SB 837 by Senator Blakeslee. (R – San Luis Obispo). Residential real property disclosures.

Existing law requires that all non-water conserving plumbing fixtures in commercial and residential properties built and available for use prior to 1994 be replaced with water-conserving fixtures by either 2017 or 2019, depending on the type of property.

For single-family residential properties, existing law imposes a requirement that noncompliant fixtures be replaced with water-conserving fixtures on or before January 1, 2017 and requires sellers of such properties, on or after that date, to disclose both the requirement to replace noncompliant fixtures and whether the property includes any noncompliant fixtures.

This bill adds a disclosure of "water-conserving plumbing fixtures" to the statutorily-required seller's transfer disclosure statement (TDS) to ensure buyers are made aware of the above requirements. 🏠





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2012 Law Book

Each year, the Real Estate Law Book and CD is updated to reflect changes in laws and regulations.

The 2012 Real Estate Law Book and CD will be available online free of charge on January 1, 2012, and in print for purchase near late January 2012. This important reference for licensees contains:

- ❖ The Real Estate Law (from the Business and Professions Code);
- ❖ The Real Estate Commissioner’s Regulations (from the California Code of Regulations);
- ❖ Portions of the Administrative Procedure Act (from the Government Code); and
- ❖ Pertinent excerpts from various California Codes.

The cost will be \$25, plus tax. **Orders will be accepted after January 1, 2012.** To order, submit a [RE 350 Publications Request form](#), which is available online at www.dre.ca.gov.

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Real Estate Bulletin

WINTER 2011

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