

Department of Real Estate

The Essential Elements of an Advance Fee Agreement

The advance fee agreement, verified accounting format, and all other materials used in advertising, promoting, soliciting, and negotiating the advance fee agreement – such as solicitation materials and advertisements – must be submitted to the Department of Real Estate (DRE) not less than ten calendar days before publication or other use. The agreement and materials must be sent to:

**Department of Real Estate
Mortgage Loan Activities
P. O. Box 187000
Sacramento, CA 95818**

An advance fee agreement and corresponding materials cannot be used and advance fees cannot be collected until the Department of Real Estate informs the broker it has no objection to the use of the advance fee agreement and materials by the broker.

Advance fee agreements must be submitted by DRE-licensed brokers. If advance fees will be collected by a corporation, the corporation must be licensed by DRE before submitting for review. A DBA must be licensed if used in the agreement.

An advance fee agreement must be in contract form - with spaces for dating and execution by broker and principal(s) - and must include the broker (or corporation) license identification number.

The agreement must obligate the principal to pay, at a specified time, a specified advance fee.

The agreement must obligate the broker to use the advance fee to fund specified services for the principal's benefit. The agreement must set forth a specific, complete description of the service to be provided. If the broker will provide more than one service, the services can be arrayed vertically, with a description of each service. The agreement must allocate estimated portions of the advance fee to each of the services the broker will provide .

The agreement must obligate the broker to complete the advance fee services by a specified date.

The agreement may not characterize any portion of the advance fee as non-refundable. The advance fee remains the property of the principal(s) and is refundable to the extent it is not expended for the services specified in the agreement. The agreement should contain refund language for the portions of the advance fee not expended should the contract be cancelled or if the advance fee services are not performed.

The agreement cannot contain any provision that purports to relieve or exempt the person collecting the advance fee from any obligation to fulfill verbal agreements and representations made by employees and agents of the person contracting for the advance fee.

The agreement must be in not less than 10-point type.

The advance fee agreement must contain the following notice in not less than 10-point bold type:

Notice: The amount or rate of fees specified in this agreement for services is not fixed by California law. Fees are set by each broker individually and are subject to negotiation between the client (principal) and the broker.

If the broker will change the advance fee amount or the amount of the fee that will be allocated to each of several services, the agreement must be submitted to the Department for review before it is used.

The agreement must obligate the broker to deposit the advance fee into a trust account and provide the principal(s) with the verified accountings required by Business and Professions Code §10146. The trust account number and depository must be identified in the agreement.

The verified accounting must be signed by the broker beneath the following attestation: "I hereby represent and attest that this is a true and accurate accounting".

The verified accounting must also include at least the following:

- (a) The name of the agent.
- (b) The name of the principal.
- (c) Description of the services rendered or to be rendered.
- (d) Identification of the trust fund account into which the advance fee has been deposited.
- (e) The amount of the advance fee collected.
- (f) The amount allocated or disbursed from the advance fee for each of the following:
 - (1) In providing each of the services enumerated under (c) above.
 - (2) Commissions paid to field agents and representatives.
 - (3) Overhead costs and profit.
- (g) In cases in which disbursements have been made for advertising, a copy of the advertisement, the name of the publication, the number of the advertisements actually published and the dates that they were carried.
- (h) In the case of an advance fee for the arrangement of a loan secured by a real property or a business opportunity, a list of the names and addresses of the persons to whom information pertaining to the principal's loan requirements were submitted and the dates of the submittal.

FOR LOAN MODIFICATION, SHORT SALE AND SIMILAR SERVICES

The agreement must identify if it is for *residential* or *commercial* services. (Note: Effective October 11, 2009, advance fees for residential loan modifications are prohibited.)

The agreement and verified accounting format must include the lender name, address and loan account number.

Short sale agreements must describe whether the services include or exclude submitting a buyer's offer to purchase. If the services include submitting a buyer's offer to purchase, a copy of the listing agreement should also be submitted to the Department for review.

An advance fee cannot be collected when prohibited by California Civil Code Section 2945.1(b)(3); therefore, the advance fee agreement must contain the following notice in not less than 10-point, bold type:

Notice: California Civil Code Section 2945.1(b)(3) prohibits any real estate licensee from claiming, demanding, charging, collecting or receiving any compensation from a person whose residence is in foreclosure until all of the promised services have been fully performed and completed. DO NOT SIGN THIS AGREEMENT IF A NOTICE OF DEFAULT HAS BEEN RECORDED AGAINST THE PROPERTY.

The following certification must ALSO be included in the advance fee agreement in not less than 10-point, bold type.

PRINCIPAL/BORROWER CERTIFIES THAT A NOTICE OF DEFAULT HAS NOT BEEN RECORDED AGAINST THE PROPERTY

Initials of Principal(s)

References: Business and Professions Code §§ 10026, 10027, 10085, 10085.5, 10085.6 & 10146, Civil Code § 2945 et seq., and Regulations 2970 & 2972.