



# Real Estate Bulletin

Real Estate MATTERS!

## Use of Fictitious Business Names in Real Estate Licensed Activities

A real estate broker or corporation may use a fictitious name in the conduct of real estate licensed activities if the broker or corporate licensee has first obtained a license from the Department of Real Estate (DRE) bearing the fictitious name.

The Broker/Corporation Unit in the Licensing Section receives a high volume of broker/corporation change applications requesting the addition of a fictitious business name to a particular real estate license. The processing time to issue a license with a new fictitious business name is delayed if the application is incomplete, the supporting documents are not in a proper format, or the fictitious business name does not comply with the Real Estate Law or Real Estate Commissioners' Regulations.

DRE approval of a fictitious business name is governed, in part, by Business

and Professions Code (B&P) §10159.5 and Real Estate Commissioner's Regulation 2731. A fictitious business name may only be added to the license of a broker or corporation licensee, and may not be added to a license of a real estate salesperson.

In order to add a fictitious business name to a broker or corporation license, the appropriate application form (RE 204 for a broker, RE 204A for a corporation) must be submitted to the DRE along with a copy of the fictitious business name statement which bears the "filed" stamp from the county clerk in the county in which the applicant's main office is located. The requesting broker or corporation must be listed as the registrant on the fictitious business name statement. The DRE does not charge any fee to process a fictitious business name license request.

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## Brokers: Be Vigilant About Your Trust Fund Accounts!

Fiscal Year 2010-2011 was a busy year for DRE auditors. DRE auditors conducted 683 audits in the fiscal year ending 6/30/11 and found trust fund shortages totaling \$10,736,771.13. These shortages were found almost exclusively on audits of brokers involved in property management, broker escrow and private money mortgage loan activities. Some other facts about these 2010-2011 audits:

- Fifty of the audits completed had shortages of \$10,000 or more.
- 42% of the property management audits performed had trust fund shortages, with shortages totaling \$5,343,398.55. 42% of these audits had major findings.
- 39% of the broker escrow audits performed had trust fund shortages, with shortages totaling \$4,162,011.44. 73% of these audits had major findings.
- 27% of private money mortgage loan audits performed had trust fund shortages, with shortages totaling \$692,481.63. 67% of these audits had major findings.

A disconcerting fact is that half of these large trust fund shortages had the primary cause of shortage as Commingling/Conversion, meaning that trust funds were used by the licensee for personal/business use. In many cases, this use of trust funds was blatant and intentional. In other cases, the broker in charge simply did not supervise operations, creating

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**Trust Fund Accounts**

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an environment where payment and deposit errors or improper disbursements and transfers could take place (nearly 40% of the above cases included citation of a lack of supervision).

As examples of blatant misuse of trust funds this fiscal year, DRE auditors have had recent cases of altered bank statements designed to hide large trust fund shortages from the auditor, use of trust funds to pay company business expenses (including, but not limited to, payroll and tax levies), use of trust funds to purchase properties, cars, and meals, pay for bail, and withdrawal of trust funds as cash. Auditors have also found non-deposit and embezzlements of cash rents.

In other cases, brokers in charge fully relied on others to maintain trust accounts without a system of oversight, including review of transactions and monthly reconciliation of records and bank statements, which resulted in loss of accounting control and substandard recordkeeping, errors, and misuse of funds by others. In the past fiscal year, Audits found many cases where a broker's failure to maintain proper records and recordkeeping procedures, separation of duties, and oversight resulted in trust fund shortages over \$50,000. In other cases, fully relying on others to perform trust fund accounting and handling is found to be just as dangerous. A broker who is not active, competent or proficient in accounting oversight should avoid trust fund handling.

The bottom line of the above statistics: If your business handles trust funds, especially if you are in the property management, broker escrow, or private money mortgage loan business, you need to be extra vigilant! A substantial percentage of our audits find trust fund shortages when brokers are conducting these activities. For additional information, please visit DRE's Web site at [http://www.dre.ca.gov/pdf\\_docs/brkrcomp.pdf](http://www.dre.ca.gov/pdf_docs/brkrcomp.pdf) to view the Broker Compliance Evaluation Manual. 



## SAFE Act Final Rule Filed

On June 30, 2011, the Department of Housing and Urban Development (HUD) filed its Final Rule on the SAFE Mortgage Licensing Act (24 CFR Parts 30 and 3400).

The following is a summary of matters clarified by the Final Rule and is not a representation of the Final Rules in its entirety:

There cannot be circumvention of SAFE Act licensing by separating the prongs of “taking an application” from “offers or negotiates” within the definition of activities performed by a mortgage loan originator (MLO). For example, a person cannot use a “straw man” to take an application from a borrower, then separately negotiate the loan in order to avoid SAFE Act licensing.

Individual property owners providing financing in the sale of their own properties are excluded from SAFE Act licensing.

Employees of federal, state, and local governments and housing finance agencies providing housing assistance that do not act in a commercial context are excluded from SAFE Act licensing.

Bona fide nonprofit organizations are excluded from SAFE Act licensing (Organizations must meet the definition of a “bona fide nonprofit organization”).

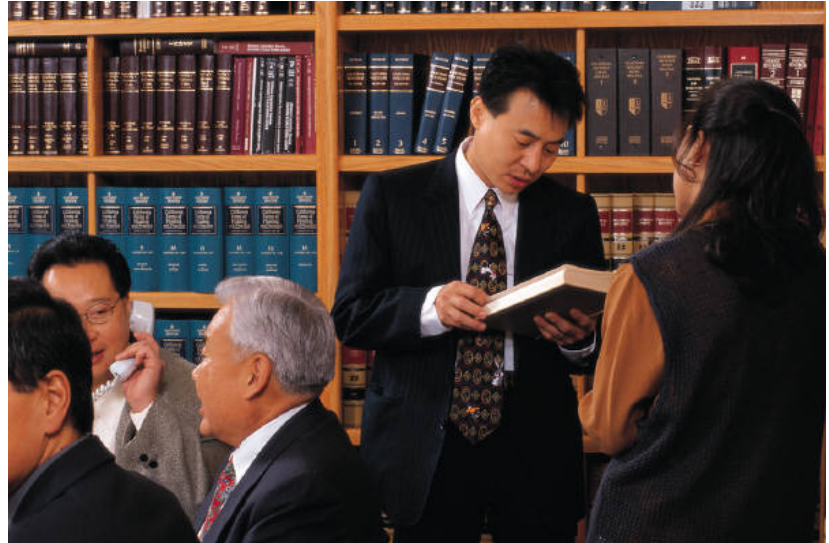
Expunged or pardoned convictions may be considered when a state regulatory agency makes the determination of financial responsibility, character, and general fitness for purposes of licensing an MLO.

Individuals originating loans secured by manufactured homes, mobile homes, recreational vehicles, house boats, or trailers used as residences are mortgage loan originators for purposes of the SAFE Act.

To be excluded from SAFE Act licensing, a loan processor or underwriter must be an employee of an MLO and perform only clerical or support duties at the direction of and subject to the supervision and instruction of the MLO. Furthermore, there must be an actual nexus between the MLO’s direction, supervision, and instruction and the loan processor or underwriter’s activities.

HUD commented that whether or not housing counselors or financial advisors were included in the definition of a mortgage loan originator depended on the acts being performed by the individuals.

HUD has deferred comments regarding whether or not third-party loan modification specialists and loan servicers are included in SAFE Act licensing to the



Consumer Finance Protection Bureau (CFPB); DRE, however, has established that persons who perform third-party loan modification activities need the MLO license endorsement while loan servicers do not. The CFPB will be established this year with its Final Rules regarding the Dodd-Frank Wall Street Reform and Consumer Protection Act to follow.

For the complete SAFE Act Final Rule with HUD’s comments, please see HUD’s Web site at <http://hud.gov/offices/hsg/ramh/safe/safeprule.pdf>.


### Attention 866 Filers

If you are not actively performing residential mortgage loan activity (including servicing, funding, brokering, and buying/selling/exchanging notes), then remember to cancel your RE 866 Mortgage Loan Activity Notification by accessing the DRE Web site’s MLO tab and clicking on the RE 866 Filing and/or Amendment link.

Broker sole-proprietors and broker corporations should be keeping track of 2011 fiscal year activities for next year’s Business Activity Report. Please review Business and Professions Code §10166.07 for what information will be required in the Report.

### Attention Those Filing Call Reports

The first Mortgage Call Report (MCR) was due May 15, 2011, and the second one was due August 14, 2011. If the MCR was not filed in a timely manner, NMLS placed a deficiency on your MLO record. In order to clear that deficiency, the MCR must be filed through NMLS.

Further updates will be included in the Frequently Asked Questions on the MLO page of the DRE’s Web site at [www.dre.ca.gov/lic\\_safe.html#14](http://www.dre.ca.gov/lic_safe.html#14). 

## Short Sale Transactions

As we all know, the real estate market is constantly changing and the fraudsters, as well as others who have no regard for the law, seem to have an innate ability to change with the times.

Over the past six years, we have experienced a sequence of troubling issues in the real estate marketplace. It started with adjustable rate mortgages and stated income loans, where prudent underwriting standards were ignored and borrowers were placed into loans that they couldn't possibly repay.

Following that period, when housing prices started to drop, we began to experience offers that often exceeded the listing price by as much as \$100,000 with inflated appraisals to support the transaction, and containing stand alone addendums directing the extra cash to be paid back to the buyer or to a handyman. The extra cash would end up back in the pockets of the perpetrators of the transaction.

The next wave came with loan modification fraud, where unscrupulous individuals offered loan modifications, in exchange for a hefty advance fee, to borrowers who were unable to remain current on their loans. Once the advance fee was collected, little was done to secure a loan modification for the distressed borrower.

During this past year a number of issues have occurred in the marketplace in the area of short sales. This article will primarily focus on issues that are within the DRE's jurisdiction, and is not necessarily inclusive of other issues that licensees may face in the area of civil liability, or with other regulators, such as the Federal Trade Commission in their enforcement of the Mortgage Assistance Relief Services Rule, or the U.S. Department of Housing and Urban Development (HUD) in their enforcement of the

Real Estate Settlement Procedures Act. Following is a summary of several of the areas where DRE disciplinary action may result:

### Unlicensed Short Sale Negotiators

Unless an institution or individual is otherwise exempt, a California real estate broker license is required to engage in the negotiation of short sales between borrowers and lenders. Business and Professions Code (B&P) §10137 makes it unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing activities requiring a real estate license who is not either a licensed real estate broker, or a real estate salesperson licensed in the broker's employ. A violation of this section constitutes grounds for disciplinary action against the broker paying the compensation.

### Common Exemptions

The most common exemptions to the licensing requirement include licensed California attorneys engaged in the practice of law, as opposed to the individual simply being an attorney and marketing short sale services. In addition, federally insured lenders and wholly owned subsidiaries of those lenders are exempt when they are regulated by either the Office of Thrift Supervision or the Office of the Comptroller of the Currency. Also, individuals acting on their own behalf as a principal do not need a real estate license to negotiate short sale agreements with respect to property they own.

### Not Exempt:

One example of companies and individuals who are not exempt include real estate salespersons, who may only perform short sale services under the supervision of their employing broker. We have encountered salespersons

who think that they can set up their own short sale negotiation companies and collect additional fees on the side. As a result, we have filed accusations against them.

Non-licensed corporations, LLC's, partnerships, and any other unlicensed business operation also are not exempt from the real estate licensing requirement. This incidentally includes out of state corporations and LLC's. The fact that a company is not located in this state does not provide them with special status to enable them to negotiate short sales in California.

There is no exemption for attorneys who are not specifically engaged in the practice of law with clients in their short sale operations. As an example, attorneys who set up satellite companies and use unlicensed entities and individuals to solicit and negotiate short sales are not exempt from the real estate licensing requirement.

### Advance fees

Some Short Sale Negotiators have been requiring fees up front from the buyers or sellers to initiate short sale negotiations. Not only is a California Real Estate Broker License required, but all of the advance fee provisions contained in the Real Estate Law apply.

In order to collect advance fees in any real estate transaction, a broker's advance fee agreement must be on file with the DRE and a no objection letter must have been issued by the DRE.

Assuming this requirement is met, the advance fees must be placed into a trust account until they are earned, which of course will be in accordance with the agreement that the DRE has reviewed. Further, there must be reports to principals on disbursements from the trust accounts stating what services were provided and the amount withdrawn from the account.

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## Short Sales Transactions Continued from page 4

### Property Flipping

In the current short sale market, there is a new twist on an old theme when it comes to flipping properties and generating cash for the perpetrators, who oftentimes are committing fraud on lending institutions. In the worst cases, these transactions involve submitting low purchase offers supported by broker price opinions and utilizing straw buyers for the initial transaction. There is then a double escrow of the property to an ultimate buyer at a higher price generating an immediate profit. This is done without advising the lender of the second transaction at the higher price.

Transactions, such as the one described above, are nothing less than lender fraud, and not only will these transactions result in license discipline, but there have been federal criminal prosecutions initiated for defrauding federally insured lending institutions.


### Hidden Surcharges

In addition to all of the above, there are other short sale violations involving hidden surcharges, generating causes for disciplinary action against the licensees involved. This includes licensees charging buyers a hidden fee to make an offer, sometimes paid to a short sale negotiator who is nothing more than an alter ego of the licensee. Schemes can also involve padding transaction fees to rebate monies to the seller that are hidden from the lender. We also see stand alone addenda in transactions providing instructions as to how monies are to be handled outside of escrow and hidden from the lender. This "technique" is often used to pay off junior loans on a property, or to pay the seller a sum of cash outside of escrow. These fees are normally hidden and are not reflected on the HUD 1.

### Combating Short Sale Fraud

The Department has been active in combating short sale fraud on a number of fronts. First, recognizing that prevention is one of the best paths to reduce the occurrences of misconduct. The Department has sent messages on fraud alerts and scams to over 400 lenders so that they can guard against the practices described in this article. Secondly, we have sought out lenders with short sale fraud complaints of which we have become aware seeking cooperation in our disciplinary actions, thus protecting a victim to the fraud. In addition, we have attended law enforcement fraud seminars throughout the state focusing attention on short sale fraud. Finally, we have established contacts with state and federal regulators, and prosecutors, with case information and short sale education.

The Department has published several consumer and industry alerts on the subject of short sale fraud as well as other topics and they are all available for review on the Department's Web site at [www.dre.ca.gov](http://www.dre.ca.gov). Just key "short sale" into the site search function to retrieve all pertinent information.

In order to stay current on these topics, please check the Web site regularly, and promptly report to the DRE any unlawful activity that you observe in the marketplace. All real estate fraud, not just short sale fraud, harms everyone in the industry who is competing for business, as well as homeowners by creating reduced property values. Together, we can make a difference. 


## DRE'S Education and Research Section is Going Green!

The Education and Research Section recently completed an environmentally friendly and paperless modernization project involving the renewal of continuing education (CE) offerings by course providers.

Prior to the implementation of this project, the Department would mail renewal applications to CE course providers 90 days before their approved offering was set to expire, pursuant to Commissioner's Regulation 3009(a). Now course providers will receive a renewal reminder by email to them 120 days prior to the offering's expiration date, along with the link to our Web site to obtain all the necessary forms required to complete the renewal process.

To begin the project, all approved CE course providers were notified by mail of the email collection process. From there, hundreds of email addresses from primary and secondary contacts for CE course providers were gathered. Department forms were also revised to include an area to collect a provider's email address.

The impact of this project is spread across many facets. First and foremost, customer service has increased with the ability to offer course providers timely and instant notification for proper renewal procedures. Second, the Department has decreased its expenses in paper, postage and staff time, due to the project's paperless component. Lastly, and thinking globally, the Department is doing its part to reduce our carbon footprint for a healthier environment.

If you are a continuing education course provider and need to update your contact information, please contact the Education Section at (916) 227-0894. 

## Fictitious Business Names Continued from page 1

To avoid delays, licensees should carefully read the instructions that accompany the broker/corporation change form. Before submitting the appropriate application form, please ensure that all required information on the form is properly and legibly completed. Some of the most common causes for processing delays are:

- ❖ The submission of incomplete application forms;
- ❖ The fictitious business name statement does not bear the county clerk's "filed" stamp;
- ❖ The broker or corporation license name does not appear as the registrant on the fictitious business name statement;
- ❖ The business address is different on the fictitious business name statement from that of the main office address of the broker or corporation; and/or
- ❖ The fictitious business name entered on the application differs from the name on the fictitious business name statement.

The DRE often receives fictitious business name statements which state that the business is conducted by a limited liability company (LLC), or in which those words or initials appear in the fictitious name itself. The Real Estate Law does not contain any provisions which authorize the issuance of a license to an LLC. Therefore, any fictitious business name application containing the words limited liability company or the initials LLC would be misleading or cause confusion and cannot be processed or approved by DRE.

Furthermore, the Real Estate Law does not authorize the issuance of a license to a partnership. However, B&P Section 10137.1 states that "[n]othing...shall preclude a partnership from performing acts for which a real estate license is

required, provided every partner through whom the partnership so acts is a licensed real estate broker".

Also, the DRE cannot approve any fictitious business name request which states that an individual real estate broker will be doing business as a real estate corporation. Only a corporate broker can conduct business under a fictitious corporate name.

In addition, fictitious business name requests cannot be approved where the fictitious business name:

- ❖ Contains the name of a licensee who/which had been previously revoked;
- ❖ Contains or implies the name of a real estate salesperson, unless the broker or corporation name is included in the fictitious business name;
- ❖ Implies a corporation when a corporation does not exist (in accordance with 17910.5 of the Business and Professions Code);
- ❖ Implies a partnership when a partnership does not exist;
- ❖ Implies that the business is conducted by a trust;
- ❖ Contains words such as bank, banker, savings association, or trust company without a letter of authorization from the Department of Financial Institutions;
- ❖ Contains a word such as "insurance" without a letter of authorization from the Department of Insurance;
- ❖ Contains the word "escrow" or any name which implies that escrow services are provided without the term "a non-independent broker escrow" following the fictitious business name;
- ❖ Contains words which imply or closely mirror the name of a federal agency without a letter of authorization from the particular agency; and/or
- ❖ Contains misleading names or




names which constitute or may constitute false advertising.

Please note that if you are a licensed broker working as a broker-salesperson (or broker-associate) in the employ of a broker or corporation, your employing broker's fictitious business name is not required on your license.

Questions regarding fictitious business name additions can be directed to the Licensing Section at 877-373-4542.

A fictitious business name cannot be used by the licensee until the name has been added to the license and appears on DRE's Web site. It is suggested that a fictitious business name request be submitted as early as possible prior to the date you intend to use the name, since processing time for adding a fictitious business name can vary depending on the workload in the Broker/Corporation Unit.

Please help us to help you avoid delays by making certain that you submit a properly completed change application and fictitious business name statement. This will serve to eliminate any unforeseen problems that may affect the process.

For additional information, please see form RE 282 entitled "Fictitious Business Name Information." 

*First published in Winter 2001 - updated, edited and revised by Summer Bakotich, Senior Deputy Commissioner*

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LICENSE OR EXAM ID#

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## Real Estate Bulletin

FALL 2011

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