



Real Estate Bulletin

Real Estate MATTERS!

Upcoming Licensing Changes


Branch or Division Manager Appointments

Effective July 1, 2012, pursuant to Business and Professions Code (B&P) Section 10164, an employing real estate broker or corporate designated broker officer **may** 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 appointed manager will share with the employing broker or corporate designated broker officer the liability of potential license discipline should violations of the Real Estate Law occur at the branch or division location.

While the appointment of a branch or division manager is completely voluntary under B&P §10164, a broker or designated broker choosing to appoint a branch or division manager must follow the guidelines set forth by B&P §10164. A licensee cannot be appointed as a manager if the licensee holds a restricted license or has ever been subject to a bar order. If the branch or division manager is a salesperson, the salesperson must have at least two years of full-time real estate experience within five years preceding the appointment. Whenever an appointment of a branch or division manager is terminated or changed, brokers or corporate designated broker officers should immediately notify the DRE in writing.

DRE's Licensing Unit has developed a new form titled, "Branch or Division Manager Appointment" (RE 242), which will be used by a broker or corporate designated broker officer to appoint or terminate branch or division managers. This new form will be available on our Web site no later than July 1, 2012. Licensees wishing to add or cancel branch offices should continue to use the Branch Office Application (RE 203).

Online License Certificates

In conjunction with our on-going efforts to continue to streamline processing, DRE will be implementing an online printing process for license certificates during the summer of 2012. The Department will continue to provide licensees with a pocket identification card, but license certificates will only be available for printing from the DRE Web site. Licensees who renew using **eLicensing** will receive notification at the conclusion of their **eLicensing** transaction that their license certificate is available for printing. Applicants who do not utilize **eLicensing** will receive notification that their license certificate is available for printing when they receive their pocket identification card. In order to print a license certificate, licensees will need to register on **eLicensing** by setting up a username account and password. Stay tuned for more information on this exciting new process! 

"New Business Opportunities" – Checking with Your Regulatory Agencies

Today, the Internet is the greatest vehicle for the movement of information. While some information is legitimate, many Web sites and advertisements are fraudulent and dishonest, luring unsuspecting individuals to give their personal information or entire life savings to scammers. Similarly, real estate brokers and salespersons should be cautious when sharing and selling business ideas on the Internet. Real estate licensees can be just as susceptible to potential scams by adopting a "new business opportunity" – a seemingly legal business model - as their own. In doing so, licensees can expose themselves to disciplinary action against their real estate licenses and MLO endorsements, and potential civil and criminal penalties.

In recent years, for example, a business model surfaced that purported to allow licensees to help consumers with modifying their loans by bundling the consumers' loans and purchasing the loans in bulk from lenders through the use of "investor" funds. After investigating many of these businesses, DRE found that such "investors" never existed, the bulk purchase of the loans was impossible, and licensees illegally took advance fees from consumers.

More recently, a business model surfaced that purported to help homeowners stay in their homes by allowing straw buyers to purchase the homes via short sale, with the understanding that the buyers would allow the former owners to live in the property as renters after the sale closed. Some even included a promise to sell or deed the property back to the former owner. After investigating these transactions, DRE found that the lenders would never have agreed

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REAL ESTATE BULLETIN

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New Business Opportunities Continued from page 1

to the short sales had they known the former owners were going to be living in the home and paying rent to the new buyers. This led to disciplinary action against the agents involved for misrepresentation to a lender and/or fraud.

At first glance, the above models seemed plausible and legal, but in practice, consumers became victims and licensees lost their livelihoods.

How can you tell if a business model is legal?


The Internet crosses state lines, so the first way to verify that a “good idea” is lawful is to review state and federal regulations.

The DRE maintains an online library of information on the DRE Web site under the Publications tab, including the Real Estate Law Book and the Reference Book. The Broker Compliance Evaluation Manual and Mortgage Loan Broker Compliance Manual cover important points to maintain compliance with the law. The DRE has also posted consumer and industry alerts and press releases to alert consumers and licensees of current topics such as loan scams and short sale scams, among many others. Bulletins are released every quarter as an educational resource with information on current trends in the marketplace and recent changes in the law.

The Consumer Finance Protection Bureau (CFPB) is a federal consumer bureau working to educate consumers against abusive practices and enforce federal consumer financial laws, including the Dodd-Frank Act of 2010 and the Real Estate Settlement Procedures Act (RESPA). The CFPB releases regulations, guidance documents and other important information to the members of the public and industry through its Web site, www.consumerfinance.gov.

The Federal Trade Commission (FTC) is another resource for finance-related matters, as it exercises authority over the financial marketplace, products and services offered to consumers by persons other than banks, federal credit unions, thrifts, non-profit organizations, and others. The FTC issued the Mortgage Assistance Relief Services (MARS) Rule in 2009 to protect distressed homeowners from mortgage relief scams. The FTC provides information on recent FTC actions against financial scams. Review of the MARS Rule and other federal financial laws can be found on the FTC’s Web site www.ftc.gov.

Questions you may want to ask yourself are many: Is it worth your livelihood if the type of business is not legal? Does the business model involve possible misrepresentation or fraud? You should consult with an attorney who can appropriately advise you on any potential violations you may bring upon yourself if you continue with the business model.

If you have been approached by an individual or company by pamphlet, by an email or through a seminar inviting you to become involved in an illegal activity, please report this to the DRE. These types of operations often create or foster unfair business practices and/or provide an unlawful advantage over real estate licensees, as well as create distrust with consumers who need assistance. 

Fees Collected For Eviction Protection Services

Recent audits have found that brokers in the property management business are providing a purported Eviction Protection Service to owners and are collecting fees monthly from owner funds to cover this service. These fees, usually ranging between \$7 - \$25/month in the cases we have seen, are collected monthly from owners under the terms of property management agreements. In return, if a tenant is to be evicted at a future date, the owner would not be charged for the costs of the eviction process.

Essentially, it is like an insurance protection provided by the broker to property owners against eviction costs. In cases we have seen, the money is treated by brokers as income and disbursed monthly at the time of collection of management fees, even though an eviction has not taken place.

The first question is, "Are these eviction protection funds trust funds?" Trust funds are defined in the Department of Real Estate Reference Book as follows:

"Trust funds are money or other things of value that are received by a broker or salesperson on behalf of a principal or any other person, and which are held for the benefit of others in the performance of any act for which

a real estate license is required."

In this case, rents and other property-related collections are received on behalf of an owner and held in the future performance of acts related to the management of property for compensation. If a real estate licensee is managing a property for compensation, these collections are trust funds. As trust funds, these monies must be held in a trust account in the name of the broker or the

These eviction protection funds are trust funds

broker's dba, and must remain there until utilized on behalf of the owner (in this case, used to cover costs of an eviction). If such expenditures do not come to pass, the funds will need to be refunded to the principal owner from the appropriate trust account(s). As trust funds, these monies must be accounted for in accordance with the Real Estate Law and Commissioner's Regulations.

The next question is whether these fees are advance fees. An advance fee is defined as: "... a fee, regardless of the form, that is claimed, demanded, charged, received, or collected by a licensee for services requiring a license, or for a listing, as that term is defined in Section 10027, before fully completing the service the licensee contracted to

perform or represented would be performed. Neither an advance fee nor the services to be performed shall be separated or divided into components for the purpose of avoiding the application of this division."

We have heard arguments which attempt to say that the fee collected is for the eviction

protection service, which is not an act for which a license is required. It is the Department of Real Estate's position that the fees collected relate to the service of managing the property itself, and the breaking down of this service into components (including the eviction handling component) cannot be done to avoid the advance fee requirements. Therefore, the DRE does consider fees collected for the eviction handling component-as an

attendant to property management- to be an advance fee. A licensee collecting such a fee must handle the funds as trust funds and comply with the advance fee provisions of Business and Professions Code (B&P) Section 10085 (Advance Fee Agreement and Materials) and Commissioner's Regulations 2970 (Advance Fee Materials) and 2972 (Advance Fee Accountings). Therefore, a licensee must submit the advance fee agreement and solicitation materials to the Department for review prior to their use, and receive a letter stating there is no objection to the use of the materials. The funds must only be expended for the promised services and periodic accountings of the disposition of the advance fees must be provided to the owner.

To summarize, funds collected by a broker for providing an Eviction Protection Service in the course of managing a property for compensation from an owner must be handled and accounted for as trust funds. These funds must be held in a trust account in the name of the broker or the broker's dba, and must remain there until utilized on behalf of the owner. These funds should not be paid out of the trust account until expended for the purpose of paying the costs of an eviction, or until refunded to the owner. Advance fee provisions of the Real Estate Law and Commissioner's Regulations must also be followed. 🏠



Credit Repair Services Performed by Real Estate Brokers — An Advisory to Licensees

By Wayne Bell, Chief Counsel and Mark Tutera, Special Investigator

In the present California residential real estate environment, where many current or potential homeowners and/or renters have debt and credit challenges, real estate brokers may and oftentimes do offer and provide credit repair services along or in conjunction with real estate-related work.

Advertisements for such debt relief and credit repair are plentiful, and include solicitations such as “Want to Own Your Own Home? We Can Help”, “Rent to Own Homes and Credit Repair”, and “Rent an Apartment with Debt Consolidation”.

While an in-depth discussion of the California and Federal credit repair laws is beyond the scope of this article, it is important to note that California has a broad “Credit Services Act” (Civil Code Section 1789.10 and those sections which follow) and there is also a comprehensive Federal law entitled “The Credit Repair Organization Act” (15 USCA Section 1679 and the following sections). The Federal Act covers credit repair organization, as defined, services through the use of interstate commerce. (The California Department of Consumer Affairs has an excellent and informative legal guide on the State and Federal laws pertaining to credit repair services. It can be accessed at www.dca.ca.gov/publications/legal_guides/cr-9.shtml.)

Both the California and Federal Acts contain requirements for consumer disclosures, written contracts, and numerous protections against false and misleading statements. They also *both contain prohibitions against charging or receiving any money or other*

consideration before fully performing the credit repair services the “repairer” has agreed to perform. Stated otherwise, both the California and Federal laws preclude the collection of “advance fees” for credit repair services.

Significant sanctions and remedies are available under both of the Acts for violations.

While the Federal law does not have an exclusion or exemption for real estate brokers, the State law does. Section 1789.12 (b) (4) of the Civil Code specifically provides that the following persons are excluded from the requirements set forth in the California Act:

“Any person licensed as a real estate broker performing an act for which a real estate license is required under the Real Estate Law...and who is acting within the course and scope of that license”.

Since California law provides an exemption for real estate brokers and the Federal law does not expressly do so, the DRE wanted to provide some notes of warning and guidance to its licensees.

Cautionary Notes for Real Estate Licensees

1. If the Federal Act applies (e.g., the person offering the credit repair services uses *any instrumentality of interstate commerce or the mails* to sell, provide, or perform – or represent that he, she or it can or will sell, provide or perform – any identified credit repair services, in return for the payment of money or other valuable consideration), the California law exemption for a real estate broker will *not* relieve a broker from the Federal law requirements and prohibitions. *That would include the prohibition against the charging or collection of fees in advance of services being performed.*

Licensees should carefully and closely review the case of *Rannis v. Fair Credit Lawyers, Inc.*, 489 F.Supp.2d 1110 (2007), in which a U.S. District Court in California held that the “attorney”

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exemption under the California Credit Services Act did not exempt an attorney from the obligations under the Federal Credit Repair Organization Act where the attorney used interstate commerce and the U.S. mail regarding client advice and representation to correct his clients' credit reports.

The Federal court stated that the "Defendant's argument that the California statute controls the matters at issue and that the [Federal Act] must be read to include an exemption for attorneys must fail...Defendant provides no applicable authority for the proposition that a federal statute should be altered or affected by the California statute". Moreover, and importantly, the Court held that "to the extent that the California statute suggests that all attorneys are exempt from the behavior regulated by the [Federal Act], the statute is inconsistent with the [Federal Act] and must be disregarded".

2. The exclusion and exemption from the California Credit Services Act for real estate brokers is narrowly drawn. The language suggests that only where a real estate broker is performing an act or acts for which a real estate license is required - see Sections 10131 of the California Business and Professions Code - and engaging in "related" credit repair services that are incidental to the real estate activities, the State law exemption would apply.

Therefore, if the credit repair services were not incidental to licensed real estate activities, or if the credit repair services are "isolated" from or "unrelated"

to the real estate broker's real estate business (and licensed activities), the real estate broker would need to comply with the California "Credit Services Act". *That would include registering with the California Department of Justice and obtaining a surety bond.*


For that reason, if a real estate broker is performing "stand alone" credit repair services for a consumer which are unrelated to real estate work for that consumer, the broker must comply with the strict requirements of the California Act, as well as the Federal Act (unless the latter is not applicable - see the discussion above under Cautionary Note 1).

3. If a real estate broker is not covered by the terms of the Federal Act which may be questionable and/or extremely difficult to prove given the breadth of its coverage, and the decision in the Rannis decision discussed above with respect to lawyers; (and which conclusion of non-coverage should be based on a careful and competent legal determination after performing an "interstate commerce" and related "instrumentality" analysis based on all of the applicable facts), **and is** exempt from the terms of the California Credit Services Act, the broker may be able to accept advance fees for such credit repair services if, and only if, he, she or it fully complies with the rules of the California Real Estate Law and regulations of the Real Estate Commissioner with respect to the collection of such fees in advance of services being performed.

Advance Fees

As noted above, if a real estate broker is not covered by the applicable terms of the Federal Act and is also exempt from the State Act, that broker *may* lawfully collect advance fees. But under the Real Estate Law and attendant regulations, such fees can be collected by a real estate broker (or salesperson working with the broker) *only where* (i) a written Advance Fee Agreement - with necessary supporting materials - has been submitted to and reviewed by the Real Estate Commissioner/DRE, (ii) a no-objection letter is issued by the department to the broker, and (iii) the advance fees are properly handled as "Trust Funds" belonging to person who paid those fees. Any unearned fees must be repaid to that person.

A violation of the California Real Estate Law and the rules and regulations on advance fees constitutes grounds for disciplinary action against a real estate licensee, as well as grounds for civil liability and criminal proceedings. Also, it should be noted that the issuance of a no-objection letter does not constitute the DRE's approval and/or endorsement of the advance fee agreement, supporting materials, or the services to be rendered. If a licensee were to suggest such approval and/or endorsement, that would be a misrepresentation.

In addition to considering the cautionary and advisory notes above, real estate licensees who perform credit repair services in connection with their real estate businesses would be wise to contact and consult with a qualified attorney or other subject matter professionals regarding their coverage under, or release or exemption from, the strict obligations of the Federal and State credit repair laws. 

Petitions and Applicable Fees

When deemed appropriate, the Real Estate Commissioner has the authority to issue a restricted license to an applicant whose past actions warrant closer scrutiny by the Department, but prove not serious enough to preclude licensure altogether. Once a restricted license is issued, the Commissioner has the right to suspend the license without a hearing - if the Commissioner believes the restricted licensee is violating the law. In essence, restricted licensees lose their right to due process prior to a license suspension. Existing law also allows a real estate licensee who has been issued or granted a restricted license to petition the Real Estate Commissioner to have the restriction removed.

The reasons why a licensee is issued a restricted license vary. Oftentimes a restricted license is issued to an applicant who has a prior criminal conviction. For example, an applicant may have a misdemeanor petty theft conviction that occurred some years ago which resulted in a fine and unsupervised probation for a couple of years. Once probation was completed, the applicant applied for a real estate salesperson license. Because of the petty theft conviction, the applicant is denied a plenary (unrestricted) license, but is granted a restricted


salesperson license which will allow the Commissioner to immediately suspend the license should the licensee prove unworthy of the public's trust by committing another crime, or for violating the Real Estate Law.

Another common example that may result in a restricted license is when an existing licensee is negligent when acting in a licensed capacity. For example, a real estate broker, who has been in the real estate business for a very long time, is approached by a real estate salesperson to become the broker of record for the rental property management company that the salesperson had been operating under the purview of another broker. The salesperson claims to have had a falling out with that broker and needs another broker to continue working. While the broker has no experience in property management, the broker is assured by the salesperson that they have been conducting property management activities in a professional manner for several years and have not experienced any problems. The broker agrees to this arrangement and is paid a monthly fee for allowing his broker license to be used to "legitimize" the property management operation. Since the broker knows little about the property management business, or the regulations pertaining to trust fund handling and recordkeeping, the broker does not reasonably supervise the property management's operations. Time passes and someone files a complaint against the property management company. An investigation ensues, and an audit is conducted that uncovers serious trust fund handling and other real estate violations. As the responsible broker of record, the broker's license is revoked but the broker is granted a right to a restricted license.

In the first example, the applicant was never issued a "plenary" license; instead the applicant was issued a

By Joe Carrillo, Managing Deputy Commissioner IV
"restricted" license. In the second example, the broker was issued a "plenary" license and then it was revoked. After a certain period of time has elapsed, both of these individuals will have the right to petition the Department for the issuance of a plenary license. In the first example, the applicant may petition to have the restrictions "removed" from her license so that she is issued a plenary license. In the second example, the broker may petition to "reinstate" his original plenary broker license.

Due to recent legislation, as of May 1, 2012, a petition application fee is required on all petition applications. Pursuant to Senate Bill 706 and Business and Professions Code Section 10186(e), all restricted or revoked licensees who submit a petition application for reinstatement, or who petition for removal of restrictions on their real estate license, will be required to submit a \$800 fee to cover the reasonable costs of processing the petition. The Petition Application (RE 506) is located at DRE's Web site www.dre.ca.gov. (Note: When petitioning for the reinstatement or removal of restrictions for both an officer license and a related corporate license, only one petition fee is required.)

The petitioner must prove that he or she has satisfied the criteria of rehabilitation set forth in the Commissioner's Regulation 2911 and/or 2912. If the applicant proves that he or she has satisfied the criteria of rehabilitation to the satisfaction of the Commissioner, the applicant will be granted the right to apply for a plenary license. If the applicant fails to prove that he or she has satisfied the criteria of rehabilitation, his or her petition will be denied. Whether the petition is granted or denied, the \$800 fee is not refundable. Also, the \$800 fee does not include the cost of obtaining a new license should the petition be granted. 



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Real Estate Bulletin

SUMMER 2012

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