

Date of Hearing: June 27, 2011

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Mike Eng, Chair

SB 53 (Calderon & Vargas) – As Amended: June 15, 2011

SENATE VOTE: 38-0

SUBJECT: Real Estate Licensees

SUMMARY: Makes several changes to California's Real Estate Law to give the Department of Real Estate (DRE) more enforcement tools to take action against mortgage fraud and other real estate violations, add safeguards to protect consumers who seek services from real estate licensees, and make technical changes to portions of the Real Estate Law. Specifically, this bill:

- 1) Provides that, in a case where a licensee ignores or refuses to obey an order of the court or obey a subpoena, the Commissioner of DRE may apply directly to the Superior Court (without the need for the Attorney General to act as the Commissioner's attorney) and the Court may issue an order requiring the licensee to appear before the Commissioner to produce documentary evidence or to give evidence regarding an investigation. Failure of the licensee to obey the order of the Court may be punished by the Court as contempt.
- 2) Grants authority to DRE to issue citations and/or citations and fines, capped at \$2,500 per violation, to licensees found to have violated provisions of the Real Estate Law. Licensees may appeal the findings of any such citation through an administrative hearing process conducted according to current law governing administrative hearings. The Commissioner may apply to superior court for an order to comply, as specified. Failure to comply shall be subject to disciplinary action, as specified. A license may not be renewed if fines are unpaid or citation terms have not been met. Fines must be deposited into the Real Estate Fund's Recovery Account, to be made available upon legislative appropriation to reimburse consumers for losses resulting from violations of the Real Estate Law.
- 3) Specifies that nothing prevents the Commission from also issuing an order to desist and refrain from engaging in a specific business activity or activities or an order to suspend all business operations to a person who is engaged in continued or repeated violations of the Real Estate Law.
- 4) Provides that, after the filing of a desist and refrain order, a bar order, or the commencement of a formal disciplinary action by the Commissioner, and upon a finding by the Commissioner that action is warranted for the protection of the public and that failure to act is likely to result in grievous harm to the public, the Commissioner may make information public confirming the fact of an investigation or proceeding regarding a licensee or unlicensed person believed to be engaging in activities for which a real estate license is required. Any release that contains the identity of the person or business under investigation shall include language explaining that the person or business is entitled to a public hearing on the merits of the order or accusation. The release may also clarify the procedural aspects and current status of the investigation or proceeding.
- 5) Requires, beginning July 1, 2012, a real estate broker who engages in escrow activities for five or more transactions within a year, as specified, or whose escrow activities equal or

exceed \$1 million in a calendar year, to file with DRE a report within 60 days providing certain information, as specified. The real estate broker may file consolidated reports if the broker is subject to this bill's provisions and specified current-law requirements to report to DRE. Failure to report incurs a penalty of \$50 per day up to the 30<sup>th</sup> day, after which daily fines increase to \$100 up to a total of \$10,000. The Commissioner may suspend or revoke the license of a broker who fails to pay, and may bring court action to collect payment.

- 6) Exempts the reports specified above from specified public disclosure. Pursuant to this exemption, this bill makes findings to demonstrate the interest being protected, stating that in order to allow DRE to fully accomplish its goals, it is imperative to protect the interests of those persons submitting information to DRE to ensure that any personal or sensitive business information that this bill requires those persons to submit is protected as confidential information.
- 7) Provides, beginning July 1, 2012, that the Commissioner may delay renewal of a license pursuant to any acts as specified under current law for which the Commissioner may suspend, revoke or deny the issuance of a license, and that any decision to delay renewal of a license shall toll the expiration of that license until the results of any pending disciplinary actions against the licensee are final, or until the licensee voluntarily surrenders his, her or its license, whichever is earlier.
- 8) Specifies that the Commissioner may also delay renewal of a license pursuant to any acts as specified under current law for which the Commissioner may suspend, revoke or deny the issuance of a license, even though the licensee has fulfilled the requirements for licensure pursuant to current law, including fulfilling continuing education requirements.
- 9) Requires a real estate broker to submit a copy of information in the real estate broker's transaction file relative to securities qualification, or exemption from securities qualification, pursuant to a transaction involving secured notes on real property, to any investor from whom the real estate broker obtains funds in connection with the transaction or other provision of law pertaining to these types of transactions, within 10 days of receipt of those funds. Recasts and updates certain provisions and clarifies the repeal of specified provisions relative to these transactions.
- 10) Provides that DRE may obtain copies of full-face engraved pictures or photos of individuals directly from DMV for purposes of enforcing the Real Estate Law and the Subdivided Lands Law.
- 11) Makes clarifying and technical changes to certain enforcement provisions of the Real Estate Law, and contains double-jointing language with SB 6 (Ron Calderon and Vargas).

#### EXISTING LAW

- 1) Establishes in the Business, Transportation and Housing Agency (BT&H) the Department of Real Estate (DRE), the chief officer of which is the Real Estate Commissioner (Commissioner) and specifies that the Commissioner, through the Department, is responsible for the regulation of real estate transactions and licensure of real estate agents, brokers and salespersons.

- 2) Provides that the Commissioner shall enforce the provisions of the Real Estate Law and has full power to regulate and control the issuance and revocations, both temporary and permanent, of all licenses to be issued, and to perform all other acts and duties provided under the Real Estate Law. (Business and Professions Code (BPC) § 10071)
- 3) Makes any person, including officers, directors, agents or employees of corporations, who willfully violates or knowingly participates in the violation of the Real Estate Law shall be guilty of a misdemeanor punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the county jail not exceeding six months, or by a fine and imprisonment. (BPC § 10185)
- 4) Provides that the Attorney General (AG) shall render to the Commissioner opinions upon all questions of law relating to the construction or interpretation of the Real Estate Law, or arising in the administration thereof that may be submitted to him by the Commissioner. The AG shall also act as the attorney for the Commission in all actions and proceedings brought by or against him under or pursuant to any provision of the Real Estate Law. (BPC § 10079)
- 5) Provides that any board, bureau, or commission within the DCA may establish, by regulation, a system for the issuance to a licensee of a citation which may contain an order of abatement or an order to pay an administrative fine assessed by the board, bureau, or commission where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto. Specifies the procedures to be followed in both the issuance of the citation and fine, and appeal of the citation or fine assessment. This citation and fine authority, however, does not prevent a board, bureau, or commission from establishing by statute their own citation and fine authority, as long as it is consistent with the aforementioned procedures. (BPC § 125.9)
- 6) Provides that any board, bureau, or commission within the DCA may in addition to the administrative citation system authorized by Section 125.9 (as against licensees, Item #5, above), may also be established by regulation for issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee under the jurisdiction of that board, bureau, or commission. The administrative citation system shall meet the requirements of Section 125.9 above. However, the establishment of an administrative citation system for unlicensed activity does not preclude the use of other enforcement statutes for unlicensed activities at the discretion of the board, bureau, or commission. (BPC § 148)
- 7) Requires a real estate broker who intends or reasonably expects in a successive 12 month period to negotiate a combination of 10 or more transactions, as specified, in an aggregate amount of more than \$1,000,000, shall file reports as specified to DRE within 90 days after the end of the broker's fiscal year or any additional time as the Commissioner may allow for filing for good cause. (BPC § 10232.2)
- 8) Provides that the Commissioner may suspend or revoke a real estate license, or deny the issuance of a license to an applicant, who has violated any or the provisions of the Real Estate Law as specified, or other laws as specified, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director or

person owning 10 percent or more of the corporation's stock has violated any of those provisions as specified. (BPC § 10177)

- 9) Entitles the applicant for a real estate license to continue operating under his or her existing license after its expiration date, if not previously suspended or revoked, and they have complied with other requirements as specified. Provides that if the Commissioner determines that the applicant has not complied with continuing education (CE) then the Commissioner may allow for an extended period of time for compliance, or advise the licensee that their license may expire for noncompliance and of their right to a hearing. (BPC § 10156.2)
- 10) Makes it unlawful for any person to offer or sell any security in an issuer transaction unless the sale has been qualified or the security or transaction is exempted or is not subject to qualification, as specified. Exempts from qualification a transaction that involves the sale of a series of notes secured directly by an interest in real property or the sale of undivided interest in a note secured directly by real property equivalent to a series transaction. Requires a real estate broker to indicate in the real estate broker's transaction file the provisions of law pertaining to qualification or exemption from qualifications under which a transaction is being conducted and requires the broker to file certain information with the Commissioner relative to conducting these transactions that are exempt from qualification. (BPC §§ 10237-10239.4)

FISCAL EFFECT: Unknown.

COMMENTS:

Purpose of this bill. According to the authors, this bill makes several changes to California's Real Estate Law to give DRE more enforcement tools and add safeguards to protect consumers who seek services from real estate licensees. This bill also makes technical changes intended to clean up certain portions of the Real Estate Law.

Background. Current law requires real estate brokers to retain copies of all books, accounts, and records related to any transaction for which a real estate broker license is required. Brokers are required to retain these materials for at least three years, and to make them available for examination, inspection, and copying by the Commissioner or his or her designated representative.

If, after appropriate notice, a real estate broker refuses to allow access, DRE may seek an administrative subpoena to compel the production of the materials. If a broker continues to refuse access, DRE may seek to enforce the subpoena in a Superior Court. However, because the law requires DRE to be represented by the Department of Justice (DOJ) in all civil court matters, DRE must request, and DOJ must agree, to represent DRE in cases where DRE seeks to enforce a subpoena in a Superior Court. The problem then becomes time sensitive. Often DOJ lacks sufficient resources to expedite these cases, which allows rogue real estate brokers who refuse to produce their records to continue to operate.

This bill authorizes DRE to go to court directly to enforce an administrative subpoena.

Current law allows the DRE Commissioner to enforce the Real Estate Law by granting him or her full power to regulate and control the issuance and revocation of all real estate licenses, and to perform all other acts and duties necessary to enforce the Real Estate Law. However, the Real Estate Law lacks any provision that authorizes DRE to issue an on-the-spot citation, or a "fix-it ticket," to a licensee found to have violated a provision of the Real Estate Law. If a DRE auditor or investigator identifies a violation during a routine audit or investigation, the auditor or investigator must return to the office and write up his/her findings, then send those findings up the chain of command for review and approval. In all but the most serious cases, DRE sends a letter to the licensee once the auditor or investigator's findings have been approved, informing the licensee of the violation(s), and ordering corrective action to be taken.

This bill gives DRE citation and fine authority patterned on current law cite and fine authority for deferred deposit transactions and DCA boards, chiropractors, and osteopathic physicians. Fines would be capped at \$2,500 per violation, and would be imposed in lieu of, rather than in addition to, other discipline. Fines collected would be deposited into the Real Estate Fund's Recovery Account. Failure to pay a fine would result in disciplinary action.

This bill gives DRE authority to release the identities of those under investigation. To protect the rights of those who are innocent until proven guilty, DRE's authority would be limited to situations in which failure to disclose the information is likely to lead to grievous harm to the public. The DRE would also have to include language in each of its releases explaining that the persons under investigation are innocent until proven guilty, and that they are entitled to a public hearing on the merits of DRE's accusation.

The DRE lacks authority to determine which of its licensed brokers engage in escrow activities pursuant to this exemption, nor does it require these licensees to notify DRE about their volume of escrow business. Without access to information about the activities of its licensees, DRE is limited to using consumer complaints to help prioritize which of its licensees to examine. During the last year alone, real estate licensees were found to have mishandled over \$2.5 million in trust fund deposits. It is unknown what volume of mishandled money went undetected. Providing DRE with specific information about its licensees will help give the department a better sense of the activities in which its licensees are engaging. This, in turn, will help DRE identify potential problems before they result in harm to consumers.

This bill requires any real estate broker who engages in escrow activities for five or more transactions in a calendar year pursuant to current law exemption from the Escrow Law, or whose escrow activities pursuant to that exemption equal or exceed \$1 million in a calendar year, to file a report with the DRE documenting the number of escrows conducted and the dollar volume escrowed during the calendar year in which the threshold was met.

Current Real Estate Law authorizes the Commissioner to suspend or revoke the license of a real estate licensee, or deny the issuance of a license to a real estate applicant, who has engaged in one or more of several prohibited acts. However, the Commissioner lacks the authority to deny the renewal of a license application submitted by a real estate licensee who is under DRE investigation for having engaged in behavior that would warrant a license suspension or revocation. This creates a situation in which DRE must renew the license of a licensee that has paid his or her renewal fee and completed his or her continuing education requirements, even when DRE plans to issue an accusation to that individual suspending or revoking his or her license.

Recent press accounts have criticized DRE for continuing to license individuals known to be engaging in acts that would disqualify them from licensure.

This bill grants DRE the ability to deny a license renewal to an individual known or suspected to have engaged in or to be engaging in acts that would disqualify them from licensure. Individuals denied a renewal pursuant to this provision would have appeal rights, just as they would if the DRE were required to re-issue their license, and then pursue a license suspension or revocation. This measure also makes a conforming change to ensure that a licensee's license does not automatically renew upon payment of the renewal fee and certification by a licensee that he or she has complied with his or her continuing education requirements.

Article 6 of Chapter 3 of Part 1 of the Real Estate Law, titled, "Claim of Exemption from Securities Qualification," was added to the codes in 2003, as part of a bill that was intended to replace the formerly existing Articles 6 and 6.5. A recent review of Article 6 identified a handful of changes that would correct, update, and clarify the operation of the Article, while better informing investors who purchase interests in multi-lender loans about the rules under which the real estate brokers selling those loans operate.

This bill makes needed cleanup changes and adds a provision to require real estate licensees that engage in multi-lender loans to provide information to their investors regarding the provisions of law under which they operate. Licensees are already required to document this information in their files. This bill requires that it be provided to investors.

For many years, DRE had access to driver's license and vehicle registration information from the DMV. The DRE used this information to help it identify and locate individuals upon whom it sought to issue subpoenas, desist and refrain orders, and accusations, and when interviewing victims of real estate fraud or other real estate violations, in order to properly identify the individuals with whom these victims interacted.

In 2001, DMV changed its policies regarding access to its records by limiting such access to sworn peace officers. This technically cut the DRE off from the records, because none of the DRE's personnel are sworn peace officers. Despite the 2001 change to DMV's policy, some DRE offices continued receiving access to the DMV records until very recently. That changed in late 2010, when DMV began more formally enforcing its policies, and terminated all access to its records by DRE employees. Without access to DMV information, DRE lacks access to photographs of persons it needs to investigate, and those on whom the department seeks to serve process. The DMV's records can also help DRE identify the most recent address of a licensee or individual improperly acting without a license.

This measure provides statutory authority for DRE to request DMV information, and for DMV to provide the requested information to DRE.

Support. The California Mortgage Association notes, "Coming on the heels of the greatest boom and bust cycles in California real estate history, we have seen unfortunate violations of the Real Estate law by a small but significant segment of licensees. To uphold consumer confidence in real estate licensees, it is important that the DRE be given the tools to effectively and efficiently enforce the law."

The Escrow Institute of California remarks that this bill "is an important first step for the DRE to identify who among their R/E licensees are conducting escrows so as to evaluate and determine if any appropriate regulatory measures and follow up may be required."

Related Legislation. SB 706 (Price) makes numerous enforcement enhancements to DRE and the Office of Real Estate Appraisers (OREA); requires licensing boards to post information about licensees on the Internet, as specified; and, makes updating and conforming changes. This bill is pending in Assembly Business, Professions and Consumer Protection Committee.

AB 278 (Hill) authorizes the DRE Commissioner to promulgate regulations authorizing the issuance of citations and fines to DRE licensees and unlicensed persons engaging in activities for which a real estate license is required. This bill is pending in Senate Business, Professions and Economic Development Committee.

Previous legislation. SB 1737 (Machado) Chapter 286, Statutes of 2008, allows DRE to ban from real estate-related employment for up to three years anyone found guilty of violating the Real Estate Law or any crime related to the qualification or duties of a licensee. The bill allows DRE to suspend or revoke a license if the licensee provides an inaccurate opinion of value for a short sale for specified purposes, and requires notice to all parties in a real estate transaction when the same person arranges financing and acts as the buyer's agent, seller's agent or both.

AB 1830 (Lieu, Bass, Nava and Wolk) of 2008 authorizes the Commissioners of DRE, the Department of Financial Institutions, and the Department of Corporations to suspend or revoke licenses for violations of specified federal lending laws or regulations, and defines the term "higher-priced mortgage loan," as specified. This bill was vetoed.

AB 2454 (Emmerson) Chapter 279, Statutes of 2008, increases the limit on the amount for which the Recovery Account may be liable and deletes obsolete provisions relating to a cause of action brought prior to January 1, 1980.

AB 840 (Emmerson) Chapter 140, Statutes of 2007, authorizes the Commissioner to suspend or revoke the license of a real estate licensee or a mineral, oil and gas licensee, or deny issuance of the license to an applicant, if the applicant or licensee has been found guilty of a felony or a crime substantially related to the qualification, functions, or duties of the real estate license or the mineral, oil and gas license.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Realtors  
California Mortgage Association (CMA)  
Escrow Institute of California

Opposition

None on file.

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