



Real Estate Bulletin

CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS • BUREAU OF REAL ESTATE

WINTER 2016

Vol. 75, No. 4



Wayne S. Bell
Commissioner

Commissioner's Message

I wish you a very happy 2017, showered with good health, success, happiness, the development of important relationships, and supportive colleagues, friends and family. As many readers of the Real Estate Bulletin know, it was in 1917 that California's first real estate license law (and the first in the nation) was signed by Governor William D. Stephens and went into effect. In another Bulletin later in the year, I will provide some thoughts on - and pay tribute to - the first Real Estate Commissioner, Freeman H. Bloodgood, who was appointed and took office in 1917.

In the current Real Estate Bulletin, I want to share some of the things that have transpired since the publication of our Fall 2016 Bulletin and comment about the importance of increasing housing supply and affordability.

Appointment of a New Chief Deputy. The first piece of news is that the California Bureau of Real Estate (CalBRE) has a new Chief Deputy Commissioner. On November 14, Governor Brown appointed Dan Sandri as our Chief Deputy. Dan began his employment with the California Department of Real Estate in September 1988, and he has worked with the Department and CalBRE for a combined 28 years. His career with us began in San Francisco as an Auditor I. Thereafter, he received a number of promotions and rose to the position of CalBRE's Chief Auditor. Dan has also been a valued member of the our Executive Team for 6 years, has been involved in CalBRE's strategic planning processes, has a solid knowledge of the California Real Estate Law and Commissioner's Regulations, as well as accounting and auditing principles, has performed outreach to consumers and CalBRE stakeholders, and has written materials for the Real Estate Bulletin and CalBRE's website. We at CalBRE are excited to welcome such an experienced and outstanding public servant as our new Chief Deputy.

Consumer and Industry Outreach/Engagement. In addition to our ongoing efforts to promote consumer protection and to reach out to consumer groups around the State, we continue to encourage and foster a dialogue with the real estate, building and timeshare industries. For example, and focusing on some of my efforts as Commissioner (and noting that many others at CalBRE are deeply involved in such outreach and engagement) since writing my last message, I have (i) spoken at a Legislative Town Hall for consumers in Sonoma, (ii) made a presentation on "Recent Enforcement Cases and Preventing, Detecting, and Reporting Real Estate Fraud" at an annual fraud awareness forum sponsored by the Ventura County Real Estate Fraud Advisory Team, (iii) given a speech at the Yolo County Senior Resource and Crime Prevention Fair, in Woodland, California, and (iv) provided commentary [at the Delta Association of Realtors Installation of the President and Directors in Brentwood (Contra Costa County), California] about California's housing gap and how Realtors and CalBRE can and must work together, and have a collective responsibility, to effectively police the real estate industry in California. And in November, 2016, I provided opening session remarks -- and was a discussant at a session on "The Economics of Housing Affordability" -- at The Real Estate Summit: Housing Affordability and

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**REAL ESTATE BULLETIN**

Official Publication of the California
Bureau of Real Estate
Vol. 75, No. 4 – Winter 2016

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Consumer Information (877) 373-4542

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Los Angeles, CA 90013-1105
Consumer Information (877) 373-4542

COMMISSIONER'S MESSAGE (CONTINUED FROM PAGE 1)

California's Future. The summit was organized and put on in Los Angeles by the Center for California Real Estate, and videos of sessions from that summit can be accessed at: <http://www.centerforcaliforniarealestate.org/information/videos.html>.

A Note About the Importance of Housing (that Californians Can Afford) to California's Vitality. I want to share with you a couple of the points made regarding housing and its significance at the summit on real estate. First, I noted that "while some see housing in a vacuum, housing is not a stand-alone issue. It is wedded to and inter-related with educational and employment opportunities, physical and emotional health, economic development, traffic commutes and congestion – and impacts on roads, highways, and air quality, family stability, and the broader well-being of families and communities". Second, I pointed out that "when housing supply is increased and made affordable for more Californians, including the financially vulnerable and those with middle class incomes, the State is enriched".

I am pleased that the two largest stakeholders of CalBRE (organized real estate and the homebuilding industry) are working hard to help develop an increased and expanding, and to foster an environment that will produce an enhanced, housing supply in the State that Californians can afford.

In this new year, as always, we at CalBRE will continue to look for ways to develop tools and provide guidance, and to streamline and improve our processes, including through the use of technology, in order to better serve the public, our licensees, timeshare developers and operators, and the builders who apply for and obtain public reports for the housing subdivisions they develop. And we welcome the opportunity to engage with licensees, consumers, stakeholders, and public service partners in a thoughtful discourse about how CalBRE can add value (including a discussion about the topics and issues you would like us to cover in future Bulletins or website reports) and have a meaningful impact in safeguarding and promoting the public interests in real estate matters. Thank you for your continued involvement with, and support of, CalBRE.

The REAL ESTATE BULLETIN (ISSN 07347839) is published quarterly by the State of California, Bureau of Real Estate, 1651 Exposition Boulevard, Sacramento, CA, 95815, as an educational service to all real estate licensees in the State under the provisions of section 10083 of the Business and Professions Code. Reproduction, in whole or in part, is authorized with attribution to the Bureau of Real Estate.

Begin the New Year With Some CalBRE 'Housekeeping'

By Jeff Oboyski, Licensing Manager, Bureau of Real Estate

It's that time of year again when we find ourselves gathered at holiday festivities, spending time with family and friends, and toasting to last year's victories and accomplishments. Before you head out to secure that first listing of 2017, dust off the open house sign, or enter the employ of a new broker, there's no better time to do some housekeeping to make sure your real estate information/records are current with the California Bureau of Real Estate (CalBRE).

Here are a few things you may want to consider:

Locate your real estate license. Whether you're an active real estate agent or you've been out of the business for a while and preparing for a return in 2017, you need to know where your license is. The license certificate of a real estate salesperson must be retained at the main business office of the real estate broker to whom the salesperson is licensed. (See Commissioner's Regulation 2753.) If you have either misplaced or are unable to locate your license certificate, you can print out a new certificate through CalBRE's eLicensing online system (<https://secure.dre.ca.gov/elicensing/>).

Review and confirm your contact information. Every real estate broker and salesperson licensee is required to provide to the Commissioner his or her current office or mailing address, phone number, and e-mail address that he or she uses to perform any activity that requires a real estate license. (See Business and Professions Code Section 10162.) Furthermore, the statute provides that every real estate broker and salesperson licensee is required to inform the Commissioner of any changes to this information no later than 30 days after making the change. Once again, your contact information on file with CalBRE can be reviewed and updated using CalBRE's eLicensing (<https://secure.dre.ca.gov/elicensing/>), and selecting "Update Your Information."

Review and confirm your business address. Every broker, except those acting in the capacity of a salesperson to another broker, must maintain on file with the Commissioner the address of his or her principal place of business for brokerage activities and the address of

each branch business address office. Brokers working in the capacity of a salesperson to another broker must maintain on file with Commissioner the address of the business location where they expect to conduct most of the activities for which a license is required. A real estate salesperson must maintain on file with the Commissioner, when applicable, the address of the principal business office of the broker to whom the salesperson is at the time licensed. (See Commissioner's Regulation 2715.) The easiest and most efficient way to confirm which business address you currently have on file with CalBRE is to access CalBRE's Public License Information web page (www2.dre.ca.gov/PublicASP/pplinfo.asp) and view your online public license record. Once again, any changes that need to be made to your business address can be done using CalBRE's eLicensing (<https://secure.dre.ca.gov/elicensing/>).

Check the expiration date of your real estate license. Quite often, Bureau staff receive calls from frantic licensees because they forgot to renew their license. Licenses should be renewed prior to the expiration date listed on the license; however, life certainly gets busy and you may suddenly realize your license is about to expire. Brokers and salespersons can use CalBRE's eLicensing (<https://secure.dre.ca.gov/elicensing/>) or submit their renewal applications 90 days prior to the license expiration date. Your renewal is considered on time if your eLicensing transaction is completed or your application is postmarked before midnight on the date your license expires.

In addition to the items listed above, we encourage you to periodically check out the Bureau's website at www.calbre.ca.gov. It is also recommended that throughout the year you look at the web page titled "Licensee Alerts and Advisories" (www.dre.ca.gov/Licensees/Advisories.html) to keep apprised of issues affecting both real estate licensees as well as consumers in California.

As we look forward to 2017, CalBRE's Licensing program sincerely wishes you all the best and continued success throughout the year. Should you have any questions, please call us toll free at (877) 373-4542.



2016 Legislative Update

September 30, 2016, marked the end of the two-year legislative session. There were 1,059 bills sent to Governor Brown in 2016. The Governor signed approximately 900 bills into law or allowed them to become law without his signature, and he vetoed 159 bills. Here are legislative summaries of recently signed bills that affect real estate licensees and subdividers.

For more information, please consult the statutes at the California Legislative Information website, <http://leginfo.ca.gov>. All statutes are effective January 1, 2017, unless otherwise noted.

Assembly Bill (AB) 73 (Waldron, Chapter 548, Statutes of 2016)

No Required Disclosure of HIV/AIDS, *already in effect via urgency status.*

This bill amends the required disclosures within Civil Code Section 1710.2 to specify that a prior occupant's HIV-positive status or death from AIDS-related complications does not require disclosure. AB 73 went into effect upon filing with the Secretary of State on September 24, 2016.

AB 685 (Irwin, Chapter 177, Statutes of 2016)/Real Estate Law Technical Clean-up

AB 685 makes many nonsubstantive changes and clarifications to Real Estate Law. Most of the amendments within this bill update the Real Estate Law and a portion of the Corporations Code with gender neutral language, completing a transition begun many years ago. The bill also clarifies that a licensee of California Bureau of Real Estate (CalBRE) may refer to his or her role as a "salesperson," "salesman," or "saleswoman," and includes other technical changes.

AB 1381 (Weber, Chapter 854, Statutes of 2016)

Outdoor Advertising Representative Exemption from Real Estate Licensing

This bill exempts defined representatives of outdoor advertising firms from the Real Estate Law's license requirements. A representative employed by a corporation, partnership, or limited liability company that engages in outdoor advertising need not obtain a real estate license if he or she acts on behalf of his or her employer in negotiating the purchase, sale, or lease of real property for the sole purpose of displaying, accessing, or operating outdoor advertising. Specified insurance is required for the exempted transactions.

AB 1645 (Dababneh, Chapter 62, Statutes of 2016)/Reinsurance of Mortgage Guaranty Insurance

Section 12640.9 of the Insurance Code addresses limits on a mortgage guaranty insurer's coverage for a class of insurance involving a mortgage, deed of trust, or other instrument constituting a first lien or charge against residences. This bill permanently repeals the cap on the level of risk a mortgage guaranty insurer may incur without reinsuring that risk.

AB 1650 (Frazer, Chapter 142, Statutes of 2016)

Disclosure of Real Estate License ID Numbers, *effective January 1, 2018*

AB 1650 revises the disclosure requirements for real estate licensees when advertising licensee services. Specifically, this bill requires licensees to disclose their name and responsible broker's identity on all solicitation materials, as specified. This bill also exempted "for sale," rent, lease, "open house," and directional signs that display the responsible broker's identity, but do not refer to an employed licensee's name. Additionally, this bill deletes exemptions to existing disclosure requirements for print and electronic media advertising, "for sale" signs, and classified rental advertisements on the radio.

AB 1750 (Dodd, Chapter 125, Statutes of 2016)/Extension of Civil Code Definitions

Currently, Section 2079.7 of the Civil Code relates to the Environmental Hazards Booklet that must be provided to buyers in certain transactions. This bill applies the definitions that appear in Section 2079.13 of the Civil Code to this existing statute.

2016 LEGISLATIVE UPDATE (CONTINUED FROM PAGE 4)

AB 1807 (Bonta, Chapter 558, Statutes of 2016) and AB 2330 (Ridley-Thomas, Chapter 614, Statutes of 2016) Removal of Discipline From CalBRE Website; Reporting of Broker-to-Broker Employment Contracts; effective January 1, 2018

These two bills were joined with duplicate language; AB 2330 is the bill that will go into effect.

AB 2330 requires the Real Estate Commissioner to establish a petition process to remove license discipline information from CalBRE's website after petition by a disciplined licensee. The Commissioner may grant the petition upon the licensee's showing that the subject discipline is 10 years or older, he or she has been rehabilitated and no longer poses a consumer risk, and he or she tenders a fee sufficient to defray the cost of an investigation associated with the petition. Regulations to clarify these requirements are authorized by the bill.

AB 2330 also requires reporting and tracking of broker associates: Those brokers who contract to act as salespersons for another broker. Employing brokers and broker associates will be required to notify CalBRE upon entering or ending such contracts, and CalBRE will track these relationships.

AB 2416 (Wilk, Chapter 135, Statutes of 2016)/Escrow Agents and Employees: Extension of Consumer Protections

The existing Civil Code includes consumer protections under the Consumer Credit Reporting Agencies Act, applicable to escrow agents and individual escrow service employees, but with a provision that "sunset" the protections on January 1, 2017. This bill extends that "sunset" date to January 1, 2022.

Senate Bill (SB) 710 (Galgiani, Chapter 224, Statutes of 2016)/Responsible Broker Identity in Advertisements

This bill revised the statutory definition of "responsible broker's identity" when used in relation to real estate advertising. Specifically, this bill defines "responsible broker's identity" to mean either the name, or the name and associated CalBRE license identification number, instead of both the name and license number.

SB 1150 (Leno, Chapter 838, Statutes of 2016)/Successors in Interest to Decedent's Estate Assuming a Mortgage

SB 1150 prohibits mortgage servicers (servicers) from foreclosing on a home when an individual provides reasonable documentation that the original borrower has died and that the survivor is the rightful successor in interest (successor). This bill also requires the servicer to provide information about the mortgage loan to the successor within 10 days and to allow the successor to either assume the loan or apply to assume the loan through a foreclosure prevention alternative. Additionally, this bill authorizes a successor to sue for injunctive relief and economic damages for violations of this new law.

SB 1196 (Hill, Chapter 800, Statutes of 2016)/CalBRE Oversight Hearing "Trailer Bill"

Following the March 2016 oversight hearing for CalBRE, this bill requires CalBRE to undergo another review process by January 1, 2021. This bill also authorizes the Real Estate Commissioner to suspend the license of a real estate licensee who has entered a guilty plea for a felony or a crime related substantially to the qualifications, functions, or duties of a real estate licensee where a significant delay of sentencing may occur.

New P.O. Box Address for Mortgage Loan Activities Unit

California Bureau of Real Estate's Mortgage Loan Activities (MLA) unit has a new P.O. Box address:

P.O. Box 137015
Sacramento, CA 95813-7015

Please send all future MLA correspondence, including self-dealing statements, proposed advance fee materials, proposed Mortgage Loan Disclosure Statement and Lender/Purchaser Disclosure Statement submissions, residential mortgage loan reports (RE 857), mortgage loan advertising submissions (RE 884), and threshold and multilender reports, to the new address.



What California Real Estate Licensees Should Know About the California Real Estate Law and the Federal RESPA Before Claiming, Demanding, Receiving, or Paying Compensation, Including a Fee or Commission, or Other Consideration, for a Referral(s)

By Wayne S. Bell, California Real Estate Commissioner, and Summer B. Goralik, former Special Investigator, California Bureau [and previously Department] of Real Estate

The California Bureau of Real Estate (CalBRE) receives a number of inquiries from licensees regarding the payment or acceptance of, and/or claim for, referral fees in connection with their real estate licensed activities. Referral fees are specifically covered by State and federal laws. The primary laws are the State of California Real Estate Law (Real Estate Law) (California Business and Professions Code [B&P] 10000 et seq.), administered and enforced by CalBRE, and the federal Real Estate Settlement Procedures Act (RESPA), administered and enforced by the U.S. Consumer Financial Protection Bureau (CFPB) since 2010. These laws are not entirely parallel, and this can lead to a fair amount of confusion and concerns for licensees with regard to referral fees. In other words, it is possible for a California real estate broker to claim, demand, pay or receive a lawful referral fee in accordance with State law, but then find himself or herself in violation of RESPA at the same time. The anomaly here is that if a California real estate licensee has complied with California law but is found by the CFPB to have violated RESPA, the finding of violation may also be used by CalBRE as a basis for disciplinary action. Because of this possibility and as a result of the regulatory incongruity, CalBRE will in many instances receive inquiries from licensees wanting to discuss and explore the legality of various referral payment arrangements.

The authors have endeavored in this article to provide some clarity with reference to this subject by addressing the specific California laws that control claims and

demands for – and the payment or receipt of — referral fees and other compensation involving real estate licensees. Moreover, this article emphasizes the importance to California real estate licensees to look beyond California law with regard to the lawfulness of fees and compensation for referrals. As the title of the article urges, licensees should know and/or learn, and then comply with the other related laws. In order to provide some pertinent assistance to licensees, this writing also explores some of the relevant commonalities and differences between the Real Estate Law and RESPA through the review of certain examples involving real estate licensees and referral fee activities.¹ The authors hope that this article will supply licensees with a basic but reliable road map to properly navigate through the State and federal laws by providing illustrations and steps which might or should be considered before engaging in any referral fee-type activities and potentially violating the pertinent statutes and regulations.

Specific California Statutory Prohibitions and Restrictions on Referral Fees, Commissions, and Other Consideration are Contained in Section 10177.4 of the B&P

There is only one section of the Real Estate Law which specifically addresses “referral” fee activities, and that is section 10177.4 of the B&P. Pursuant to section 10177.4, the CalBRE may suspend or revoke the license of a real estate licensee for claiming, demanding or

¹The genesis for this article was the many questions received by CalBRE on issues pertaining to “referral fees”, and the understanding that many of the questions could not be answered by reference to California law alone. It is important to note that any and all examples included in this article, or statements made in reference to such examples, in connection with RESPA and/or any other State law or federal code or regulation, should not be exclusively or categorially relied upon for purposes of ensuring RESPA compliance or compliance with such other State or federal laws, since they are not interpreted or enforced by CalBRE. For questions or concerns regarding RESPA, please refer to 12 USC §2601 et seq. and 12 CFR §1024 et seq., and the CFPB’s website, which provides informational materials, bulletins and other RESPA guidance.

WHAT CALIFORNIA REAL ESTATE LICENSEES SHOULD KNOW (CONTINUED FROM PAGE 6)

receiving a fee, commission, or other consideration as compensation or inducement for the referral of customers to an escrow agent, title insurer, underwritten title company, home protection company, structural pest control firm, and/or controlled escrow company.

Essentially, this is California's "anti-kickback" and anti-steering law regulating real estate brokers and salespersons in the course of real estate licensed activities. Any referral of customers by a real estate licensee to any person or entity covered by B&P Section 10177.4 must be for "free", wherein no compensation or other consideration is paid or received in exchange for the referral of business. This State law restriction applies to all types of real estate transactions, including – without restriction – to the purchase, sale, or lease of residential, commercial, or vacant land.

Referral Scenario 1. A real estate broker operates a large brokerage, and also owns an underwritten title company. The broker offers his salespeople a five hundred dollar (\$500) bonus whenever they refer clients to his title company and title services are purchased. In this fact situation, a salesperson would violate B&P Section 10177.4 if he or she participates in the real estate broker's referral fee arrangement by referring customers to a title insurer in exchange for compensation.

Referral Scenario 2. An alternate, prohibited scenario using the basic concept above would be a title insurer giving a real estate broker a fifty-dollar (\$50) gift card every time the broker refers a real estate client to the title company for the purchase of title insurance in a real estate transaction. As was the case in Scenario 1 above, this arrangement is unlawful under B&P Section 10177.4.²

While the statutory words "fee" and "commission" are clear, the term "other consideration" (proffered as compensation or inducement) is not defined. However, "consideration" means something of value, including

any gain, advantage, or benefit. Therefore, in addition to direct and obvious referral fee payments, the receipt of more subtle forms of consideration (where there is something of value, benefit, or advantage) can violate section 10177.4.

Exemptions from the "Other Consideration" Rule

There are exemptions under B&P Section 10177.4(b) relating to "other consideration", and that phrase or language does not include the following:

- 1.) Bona fide payments for goods or facilities actually furnished, or services actually performed, by a real estate licensee as long as the payments are reasonably related to the value of the goods, facilities, or services provided (Note: Without providing any concrete examples of the provision of services, facilities, or goods with "value", in concept it could include work performed by a licensee, apart from his or her real estate licensed services, but related to and in connection with the real estate settlement process. In any event, the "value" provided must be real and not illusory);
- 2.) "Furnishing of documents, services, information, advertising, educational materials, or items of a like nature that are customary in the real estate business and that relate to the product or services of the furnisher and that are available on a similar and essentially equal basis to all customers or the agents of the customers of the furnisher";
- 3.) "Moderate expenses for food, meals, beverages, and similar items furnished to individual licensees or groups or associations of licensees within a context of customary business, educational, or promotional practices pertaining to the business of the furnisher"; and
- 4.) "Items of a character and magnitude similar to those in paragraphs (2) and (3) [above] that are promotional of the furnisher's business customary in the real estate business"

²Any referral fee or payment arrangement involving a California title insurer or underwritten title insurance company, or question involving the same, should be separately reviewed for compliance under RESPA, as well as the California Insurance Code, and referred to the proper regulatory authorities; namely, the CFPB and the California Department of Insurance, respectively.



WHAT CALIFORNIA REAL ESTATE LICENSEES SHOULD KNOW (CONTINUED FROM PAGE 7)

and similarly and essentially equally available “to all customers, or agents of the customers, of the furnisher”.

It is imperative to note that B&P Section 10177.4 focuses on restricting referral fee activities for real estate brokers and salespersons *in the course of real estate licensed activities*. “Other consideration” paid to a licensee may be permissible under the Real Estate Law if the licensee is performing services outside of, and separate from, his or her real estate licensed capacity. For example, a real estate broker, who is also an escrow officer employed by an independent escrow company, may refer clients to the escrow company, as long as he or she is only compensated for the escrow services performed, and not the referral of business (as a real estate licensee) to the escrow company.³ In this example, the real estate licensee is receiving a bona fide payment for non-real estate licensed services actually performed – as opposed to the referral of business.

It should be noted here that the facts of the particular transactions are the critical determinant and will be carefully reviewed by CalBRE when assessing if “other consideration” paid or received by a real estate licensee is lawful under B&P Section 10177.4.

As suggested by the first referral scenario above, some real estate licensees also have ownership interests in entities that offer services in connection with real estate transactions. And that includes licensed escrow corporations, title companies, home protection companies, and structural pest control firms.

In the interest of – and with reference to the spirit of — full disclosure and transparency, real estate licensees are well advised to disclose their (or their broker’s [if the licensee is a salesperson or a broker acting as a broker associate under a broker]) ownership interest(s) in any entity whose real estate related services they recommend to their principals. Such disclosure is also well advised with respect to any familial (where related by blood or

marriage), business, or special relationships that referring licensees have with the real estate related services.

An Additional California Real Estate Law Code Section Applicable to Referral Compensation

Another California statute which has an impact on referral fee activity is B&P Section 10176(g). Under this section, a real estate licensee must disclose the full amount of compensation, commission, or profit under any agreement authorizing or employing the licensee to do any acts for which a license is required, prior to or coincident with the signing of an agreement evidencing the meeting of minds of the contracting parties. This is regardless of the form of the agreement, whether evidenced by documents in an escrow or by any other or different procedure. Put another way, all compensation, including any lawful referral fee(s), paid to or claimed by a licensee, must be fully disclosed to his or her principal in writing. Otherwise, the licensee may be in receipt of secret or undisclosed compensation, commission payments, or profit and thus in violation of the Real Estate Law. Moreover, a lack of disclosure might lead to other charges, such as fraud, intentional misrepresentation, conspiracy to defraud, negligence, and/or dishonest dealing.

Other California Real Estate Law Provisions Touching On the Issue of Referral Fees

The other provisions found in the Real Estate Law which play a part in the regulation of referral fees are primarily broad restrictions on real estate compensation. These restrictions largely depend on the payor, payee, and whether or not licensed activity is performed. To illustrate, B&P Section 10137 provides that a real estate salesperson can only be compensated for real estate acts through his or her employing or responsible broker. That prohibits a real estate salesperson from receiving pay, a commission or a lawful referral fee directly from another person. If a lawful referral fee will be paid to any salesperson, including a

³Any referral fee or payment arrangement involving a California independent escrow agent, or question involving the same, should be separately reviewed for compliance with RESPA as well as the California Financial Code, and referred to the proper regulatory authorities; namely, CFPB and California Department of Business Oversight, respectively.

WHAT CALIFORNIA REAL ESTATE LICENSEES SHOULD KNOW (CONTINUED FROM PAGE 8)

broker acting as a salesperson, in any real estate transaction, then it must be paid first through the responsible broker. The only exception to that rule is that a California broker may pay a commission to a broker in another State, provided that no other applicable California or federal laws are violated. Also, pursuant to B&P Section 10137, a real estate broker cannot employ and/or compensate an unlicensed person to perform acts requiring a real estate license. This is an important code section to read and understand when it comes to referral fee activity, since a violation would make both the broker and unlicensed person culpable under the Real Estate Law.

Illustration of Lawful vs. Unlawful “Referral Fee(s)” to an Unlicensed Person: A real estate broker asks his former client, Mr. Seller (an unlicensed person), to refer his friends or family members who are or may be in need of real estate services to him for real estate licensed services. Subsequently, Mr. Seller provides the broker with the name and number of his sister who wants to sell her home and the broker pays Mr. Seller a referral fee after he lists and sells the property.

Thereafter, Mr. Seller begins to solicit all of his friends (and their friends) who need help either buying or selling real property, and the broker pays him a fee each time a referral is made.

While the first referral is lawful under California law, as long as absolutely no licensed acts (e.g., solicitation, negotiation) were performed by the unlicensed person, the subsequent referrals are unlawful and violate the Real Estate Law.

Since the unlicensed person (in his activities after the first referral) solicited prospective buyers and sellers of real

property in exchange for compensation (referral fees in the illustration above), he performed acts requiring a real estate license under B&P Section 10131.⁴ Essentially, the unlicensed person (Mr. Seller) went from a casual finder who made a mere introduction to being in the business of real estate solicitation. Similarly, in the example above, the broker compensated the unlicensed person to solicit prospective real estate clients on the broker’s behalf, in violation of B&P Section 10137. Thus, in the subsequent referrals discussed above, the broker and unlicensed person have violated California’s real estate licensing laws and are not only subject to administrative discipline and/or potential monetary fines, but could also be subject to criminal penalties since unlicensed activity is a criminal act under the Real Estate Law (B&P Sections 10130, 10138, and 10139).

As the example above illustrates, any compensation, referral fee, or other payment made to an unlicensed person by a real estate licensee must be done with extreme caution. While a one-time referral based upon a simple introduction of the parties by an unlicensed person may be lawful (depending on the circumstances involved, and especially where there is a “mere introduction”), a pattern of referrals may suggest an unlawful real estate solicitation business by an unlicensed person in exchange for compensation.

Commencing a Discussion and Basic Analysis of RESPA

As stated above, it is necessary for California real estate licensees to take note that while the payment of a fee to an unlicensed person for the mere referral of clients to a real estate broker may be potentially lawful under the

⁴Pursuant to B&P Section 10131, a real estate broker is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others: (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity. (b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities. (c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government. (d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity. (e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof. (Emphasis added)



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Real Estate Law, it may still be prohibited by RESPA depending on the type of real estate transaction and the parties involved.⁵

This will be explored in more detail shortly and will hopefully provide and emphasize *this article's crucial cautionary message to real estate licensees that even when their licensed "referral" conduct complies with the California Real Estate Law, their referral fee activities may still run afoul of applicable federal law.*

The real confusion for California real estate licensees on the subject of referral fees, compensation and other consideration really begins when consideration is given to issues of RESPA compliance and the discovery that some California compliant activities may only be allowed depending on the type of real estate transaction, the individual or entity involved, and if other certain federally defined conditions are met.

Because RESPA is extremely complex, detailed, multi-faceted, and it is interpreted and enforced by an agency of the federal government, much of what will be provided in this article relative to RESPA are brief summarizations that are customized towards relevant activities involving California real estate licensees and the specific referral arrangements referenced in this article.

For a more in-depth understanding of RESPA, please refer to the federal code and regulations, as well as the CFPB's website (www.cfpb.gov), and published reference materials regarding the federal act.⁶

As discussed above, the federal law interpreted and enforced by the CFPB (and previously by the U.S.

Department of Housing and Urban Development) that primarily controls referral fee activities in real estate transactions is RESPA. It was passed by Congress in 1974 and became effective the following year. It has been amended significantly since its enactment, and has been implemented by regulation.

Among other things, RESPA was enacted to protect consumers through a variety of federally mandated disclosures which are intended to create a fair and transparent real estate settlement process wherein buyers and borrowers are properly informed of the costs involved and encouraged to shop around for settlement service providers.

It is in this spirit that *RESPA prohibits the payment of referral fees and kickbacks on certain real estate transactions in order to prevent settlement service providers from increasing settlement costs charged to the consumer* (see "CFPB Consumer Laws and Regulations RESPA"⁷). It is these federal rules and restrictions that help "level the playing field" for consumers of secured credit in everyday real estate transactions.

In order to establish how and when RESPA impacts California real estate licensees and referral fee activities, one must first understand exactly which parties and transactions it controls. RESPA regulates certain "settlement service" providers in the real estate settlement process involving a "federally related mortgage loan" secured against residential real property. Pursuant to RESPA, a settlement service is any service provided in connection with a prospective or actual settlement. (12 CFR §1024.2(b)). This essentially covers any service

⁵In addition to the Real Estate Law, California real estate licensees are well advised that the proper regulatory authorities (those which oversee the activities of settlement service providers -- e.g., escrow agents, title insurers, and home protection companies) involved in a real estate transaction should be contacted to ensure RESPA and State regulatory compliance.

⁶The information contained in this article regarding RESPA was gathered from a review of the applicable federal code sections and regulations, 12 USC §2601 et seq. and 12 CFR §1024 et seq., respectively, from the following publication available on the CFPB's website: http://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf, and the CFPB's most recent bulletin and/or informational material regarding RESPA, http://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements1.pdf.

⁷CFPB Consumer Laws and Regulations are available on the CFPB's website: http://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf.

WHAT CALIFORNIA REAL ESTATE LICENSEES SHOULD KNOW (CONTINUED FROM PAGE 10)

provided in connection with a real estate settlement, and includes, without limitation, the rendering of services by a real estate agent or real estate broker, mortgage broker, lender, home protection company, title insurer, casualty insurer, or escrow agent (12 USC §2602(3)).

A “federally related mortgage loan” is broadly defined under RESPA as any loan, including a refinance loan, that is secured by a first or subordinate lien on residential real property, upon which a one-to-four family structure, manufactured home, or individual unit in a condominium or cooperative is located or is to be constructed using the loan proceeds. Therefore, most purchase money, refinance, junior, property improvement, and reverse mortgage loans, as well as home equity lines of credit, are covered under RESPA if they are made in whole or in part by a lender covered under the federal law which includes, but is not limited to, a lender which is either regulated, or whose deposits or accounts are insured, by any agency of the federal government⁸ (12 CFR §1024.2).

Some examples of loans that do not fall under RESPA are loans for commercial, business, or agricultural purposes, and loans involving vacant land or unimproved property (where no loan proceeds will be used to construct a one-to-four residential structure).⁹ (12 CFR §1024.5(b)). Another example of a real estate transaction that falls outside the scope of RESPA would be an “all cash” transaction where no financing is obtained in connection with the purchase of residential real property.

Based upon the above definitions and limitations, RESPA applies to real estate and mortgage related transactions involving a federally related mortgage loan secured against residential real property, and thus, the activities of real estate licensees (i.e., real estate broker, real estate salesperson, and/or mortgage loan originator)

are almost always subject to the federal requirements. For example, a real estate purchase transaction involving a mortgage loan, made by any national bank whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC), secured against residential real property, would fall under RESPA. In turn, any referral payment arrangement in connection with that transaction involving a compensable referral made by and/or between a real estate agent or broker, mortgage broker, or any other covered settlement service provider would be prohibited unless specifically exempt under the federal law.

Further Discussion of the Prohibition on Referral Fees and Kickbacks Covered under Section 8(a) of RESPA (12 USC § 2607)¹⁰

Section 8(a) of RESPA states that “no person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.”

A “thing of value” is not restricted to the payment or receipt of monies or commissions, and may include, without limitation, fees, salaries, things, discounts, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, sales or rentals at special prices or rates, trips, and the like. (12 CFR §§ 1024.14(d)). In other words, under RESPA, a thing of value could almost be anything if given or accepted in exchange for, or conditioned upon, the referral of business.

Also, the “agreement or understanding” between the parties, which need not be written or even verbalized, may be established by a practice, pattern or course of

⁸Please see 12 USC §2601 et seq., and to 12 CFR §1024 et seq., for a complete list of qualifying lenders, creditors, and dealers that are subject to (or exempt under) RESPA.

⁹If the loan proceeds will be used to locate a manufactured home or construct a structure on vacant or unimproved real property within two years from the date of settlement, and the loan will be secured by a lien against the property, the loan is covered by RESPA (12 CFR §1024.5).

¹⁰Section 8(b) of RESPA (12 USC §2607(b), along with 12 CFR §1024.14(c) which is not covered in this article), prohibits the splitting of certain charges and unearned fees by settlement service providers in qualifying real estate transactions.



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conduct, and any “thing of value” repeatedly received in connection with the volume or value of the business referred, may be evidence that it is made pursuant to an agreement or understanding for the referral of business. (12 CFR § 1024.14(e)). Thus, RESPA essentially regulates any unwritten understanding that referrals are expected in exchange for a thing of value which may be repeatedly given. Furthermore, the concept of “referral” is also far reaching and may include “any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business”. Additionally, a referral may occur “whenever a person paying for a settlement service or business incident thereto is required to use a particular provider of a settlement service or business incident thereto”. (12 CFR §§1024.14(f)(1) and 1024.14(f)(2)). So, given the above elements, it should be evident that RESPA’s prohibition on referral fees is in fact quite broad and casts a very large net over the referral fee activities of California real estate licensees.

On the other hand, RESPA does define (and exclude) some payment arrangements or activities which are not prohibited. Two such payment activities, which are not prohibited by RESPA’s restrictions, and are similar to permissible activities found in the Real Estate Law, are the following:

- “A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed”. (12 CFR § 1024.14(g)(1)(iv));

- “Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer

settlement services or business incident thereto”. (12 CFR §1024.14(g)(1)(vi)).

Other notable exceptions to RESPA include:¹¹

- “A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers, or between mortgage brokers)” (12 CFR §1024.14(g)(1)(v)); and

- Affiliated business arrangements as long as specific conditions are met, including but not limited to, the delivery of an affiliated business arrangement disclosure which complies with RESPA, where no person making the referral has required any person to use a particular settlement provider, and the only thing of value received from the referral arrangement is a return on ownership percentage or franchise relationship. (12 CFR §1024.15 et seq.).

Given the aforementioned rules, limitations, exceptions, exemptions, and parameters of State and federal law, and the very broad scope of RESPA, it should be clear that while they play a significant role in the regulation of referral compensation, those laws are not uniform.

Some Fact Scenarios Highlighting the Similarities in and Differences Between the California Real Estate Law and RESPA (and the Need to Reach Out to other Applicable Regulatory Authorities)

In order to demonstrate how the State and federal laws intersect, and where they are similar and different, with regard to their impacts on California real estate licensees, the following situations are offered:

1. An escrow agent co-sponsors, and splits the costs for food and beverages for a real estate luncheon with

¹¹For a complete listing of exemptions, exclusions or permissible activities under RESPA, please refer to 12 USC §2601 et seq. and 12 CFR §1024 et seq.

WHAT CALIFORNIA REAL ESTATE LICENSEES SHOULD KNOW (CONTINUED FROM PAGE 12)

a real estate industry association wherein the escrow agent is also promoting their escrow business to real estate licensees. The receipt of such “consideration” (i.e., moderate expenses for food and beverages) by the licensee(s) in accordance with the customary promotional practice described is permitted under California’s Real Estate Law B&P Section 10177.4(b). Similarly, this scenario may be authorized under RESPA as long as the activities are “normal” promotional activities that are not conditioned on the referral of business and “do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto”. (12 CFR §1024.14(g)(1)(vi)). However, if the escrow agent paid for the entire real estate luncheon, and promoted their services, this activity would violate the California Real Estate Law and most likely the requirements of RESPA.¹²

2. A real estate broker pays a referral fee to an unlicensed person who provided her with the name and contact information of a potential client seeking real estate services (a one-time referral). This singular event and activity would be permitted under the California Real Estate Law as long as the unlicensed person did not perform any acts requiring a real estate license. However, if the subsequent real estate transaction that ensued between the broker and client (who was referred to the broker) involved the purchase of residential real property and the origination of a federally related mortgage loan by a RESPA-covered lender, then the payment of said referral fee by the real estate broker to the unlicensed person is prohibited under RESPA. In contrast, if the residential real property was purchased in all-cash by the client, then RESPA would not apply.

3. A real estate broker often refers his buyers to a mortgage loan originator licensed by CalBRE and receives a referral fee in return. While this referral fee is not specifically prohibited under the California Real

Estate Law, this activity is in violation of RESPA since the latter does not exempt such referral fee arrangements between real estate brokers and mortgage brokers. Please note that pursuant to the Real Estate Law (i.e., B&P 10166.01 et seq.), the referring real estate broker must be a licensed mortgage loan originator in order to receive a lawful referral fee in exchange for the referral of customers to a mortgage loan originator.

4. A Southern California real estate broker refers his client to a real estate broker located in Northern California. The Northern California broker lists and sells the client’s property and pays the referring broker a referral fee at the close of the escrow. This activity is not precluded by the Real Estate Law. Specifically, B&P Section 10177.4 does not disallow referral fees paid to or between real estate brokers. Likewise, this referral fee arrangement and payment would likely be allowed under RESPA since the latter exempts payment or referral arrangements between cooperating brokers.

5. A real estate broker has an ownership interest in an independent escrow company. On every real estate transaction that he conducts, the broker discloses his/her ownership interest in the escrow company and provides a disclaimer that the client is not required to use the escrow company. In those instances when the broker’s clients choose or agree to use the subject escrow company, the broker does not receive any referral fee from the escrow company. This activity, which has become increasingly common, is allowed under B&P Section 10177.4, since the only consideration received by the broker is a return on the ownership interest in connection with bona fide payments for reasonably related goods and services (i.e., escrow services) actually performed. A key point in this fact situation is the broker’s disclosure of ownership interest in the escrow company to all parties. If fully and properly disclosed, this activity is permissible under the Real Estate Law and similar to the “affiliated business arrangements” under RESPA, for which there is a federal exemption.

¹²Any referral fee or payment arrangement involving a California independent escrow agent, or any question involving the same, should be separately reviewed for compliance with RESPA as well as with the California Financial Code, and referred to the proper regulatory authorities; namely, the CFPB and California Department of Business Oversight, respectively.



WHAT CALIFORNIA REAL ESTATE LICENSEES SHOULD KNOW (CONTINUED FROM PAGE 13)

However, all of the federal requirements, including the required affiliated business arrangement disclosure, must first be satisfied before the activity may be deemed lawful.¹³

6. A real estate broker receives a referral fee from a structural pest control company (i.e., termite company) for referring a principal to that company in connection with a real estate transaction involving a commercial property.¹⁴ This activity would be unlawful under the Real Estate Law since B&P Section 10177.4 is not restricted to residential property and a broker is receiving a fee for the referral of a customer to a settlement service provider referenced therein. To the contrary, RESPA would not apply in this case since the transaction does not involve residential property. It may be helpful to remember that RESPA covers a wide range of settlement service providers involved in residential-only transactions while the Real Estate Law applies to a limited subset of settlement service (real estate related service) providers involved in all types of real estate transactions.

The above scenarios are only a few examples of many types of referral fee related activities engaged in by California real estate licensees, and much like the materials covered in this article, are not meant to be exhaustive in terms of permissible or prohibited acts. The most important message to keep in mind is that California licensees must carefully scrutinize their activities for State law and federal RESPA compliance since the laws controlling referral fees and payment activities are not always parallel, and the federal restrictions are in fact rather broad in their application. Further, a violation of any of these laws could mean license discipline (i.e., restriction, suspension, revocation, and/or debarment) and/or monetary fines on the State level, or criminal sanction, and/or even loftier administrative, civil or criminal penalties on the federal

level. And a violation of either State law or RESPA could result in a violation of both. Moreover, a violation of such laws by a real estate licensee could lead to litigation against that licensee based on an unlawful business act or practice, an unfair business act of practice, or some other basis, under the State's Unfair Competition Law, which is contained in B&P Section 17200 et seq.

In order to ensure full and complete regulatory and legal compliance, it is important that a California licensee ask the right questions, refer to the correct laws, and take appropriate steps before engaging in any referral fee activity or payment arrangement(s). What follows are some questions, points, considerations, and/or steps a real estate licensee might take before referring customers to certain settlement service providers, paying, claiming, or receiving referral fees, and/or participating in any referral or payment arrangement:

- 1.) Is residential real property involved?
- 2.) Is the buyer obtaining a loan to be secured as a lien against the real property?
- 3.) If the transaction involves residential real property AND a federally related mortgage loan, as defined by RESPA, then this activity is subject to RESPA. A licensee must refer to RESPA, 12 USC §2601 et seq., and federal regulations, 12 CFR §1024 et seq., in order to determine if the activities are prohibited or exempt.
- 4.) If the activity is lawful and/or exempt under RESPA, is an unlicensed person or entity referring business to a real estate licensee in exchange for compensation? Reference should be made to the Real Estate Law in connection with a review of the activities of the unlicensed person to ensure that no licensed acts will be performed in exchange for compensation.

¹³As mentioned above, but which needs to be emphasized and repeated here is that any referral fee or payment arrangement involving a California independent escrow agent, or question involving the same, should be separately reviewed for compliance with RESPA as well as the California Financial Code, and referred to the proper regulatory authorities; namely, the CFPB and California Department of Business Oversight, respectively.

¹⁴Any referral fee or payment arrangement involving a California structural pest control firm should be separately reviewed for compliance with RESPA, as well as with the California Business and Professions Code, and discussed with the proper regulatory authorities; namely, the CFPB and the California Structural Pest Control Board, respectively.

WHAT CALIFORNIA REAL ESTATE LICENSEES SHOULD KNOW (CONTINUED FROM PAGE 14)

5.) Will a real estate licensee demand, claim or receive a fee, commission or other consideration for the referral of customers to a settlement service provider covered by B&P Section 10177.4? Or is the consideration claimed or received by the licensee exempt under B&P Section 10177.4(b)? As was suggested with regard to question 4 immediately above, licensees should refer to the Real Estate Law and/or contact CalBRE to review and/or discuss the activities and possible exemptions or violations involved.

6.) If the activity is permissible and/or exempt under B&P Section 10177.4, is all lawful compensation or consideration paid to the licensee by the employing or responsible real estate broker in accordance with B&P Section 10137?

7.) If a California real estate licensee is offered some kind of benefit or payment to steer business to a settlement provider, a licensee should not blindly accept the word of the entity or person who makes the offer that the activity is in compliance with RESPA. Every licensee must do his or her diligence and conduct his or her own research to ensure any offer from a settlement service provider is RESPA compliant. A good place to start would be to ask the service provider if a legal analysis that their activity is in compliance with RESPA has been prepared, and, if so, the licensee should ask to obtain a copy of the analysis and then independently assess its correctness.

8.) Licensees must also understand that CalBRE and the CFPB will examine the substance of, and circumstances surrounding, the payments for the referral of business and, therefore, endeavors to shield improper referral fees

by (mis)labeling them or calling them something other than they are would be of no value in defending the fees or payment arrangements.

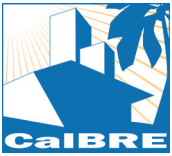
Conclusion

As was stated earlier in this article, the motivation behind this piece was to highlight and clarify some of the fundamental components of the California Real Estate Law and RESPA with respect to compensation and fees for referrals involving real estate related activities. Due to the fact that multiple statutes may be involved, it is prudent for California real estate licensees to carefully review the relevant laws and discuss these types of activities with legal counsel before engaging in any referral fee or payment arrangements. Similarly, as a matter of best practices, real estate brokers should implement clear policies and procedures governing referral fee activities in their offices so their employees are clearly aware of permissible and prohibited conduct.

Finally, while this article was not intended to be (and is by no means) a comprehensive treatment or discussion on the topic of referral fees, the authors hope that it has broadened the general understanding of California real estate licensees about the level of compliance required when engaged in referral fee activities. It is the authors' sincere hope that licensees will adhere to a thoughtful course of action before engaging in referral fee activities in order to safely determine that their actions are lawful in accordance with the California Real Estate Law as well as RESPA (and any other applicable State regulatory laws and rules), and thus avoid any prohibited or financially deleterious behavior.

Endnote re: a Federal Court Challenge to the CFPB and Discipline Imposed by the Agency

In October 2016, the CFPB survived a constitutional challenge, but a federal appeals court took away certain power from its director and threw out a \$109 million penalty levied by the CFPB against PHH Corp., a New Jersey mortgage lender. The CFPB imposed discipline on the company for referring customers to insurers who then purchased reinsurance from a PHH subsidiary. In applying the penalty, the CFPB determined those payments were part of an illegal kickback scheme, in violation of RESPA. PHH argued that the premiums paid were for a legitimate purpose. The Court found that the CFPB violated the mortgage company's due process rights by reversing a long-standing interpretation of real estate law without notice and then retroactively applying its new standard to impose violations. The Court held that the CFPB acted improperly in retroactively applying the law, violating "the bedrock due process principle that the people should have fair notice of what conduct is prohibited". The CFPB is, as of the writing of this article, considering its options for further review of the case, which is *PHH Corp. v. Consumer Financial Protection Bureau*, 15-1177, U.S. Court of Appeals, District of Columbia Circuit.



Official Publication of the California Bureau of Real Estate

CALIFORNIA BUREAU OF REAL ESTATE
1651 EXPOSITION BOULEVARD
SACRAMENTO, CA 95815

Real Estate Bulletin

VOL. 75, NO. 4

WINTER 2016

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E-mail us at Editor@dre.ca.gov.