

**Senate Bill No. 1240**

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Passed the Senate August 21, 2008

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*Secretary of the Senate*

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Passed the Assembly August 14, 2008

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*Chief Clerk of the Assembly*

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This bill was received by the Governor this \_\_\_\_\_ day  
of \_\_\_\_\_, 2008, at \_\_\_\_\_ o'clock \_\_\_\_M.

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*Private Secretary of the Governor*

## CHAPTER \_\_\_\_\_

An act to amend Section 10148 of, to add Sections 10131.9, 10131.91, 10131.92, 10131.93, 10131.94, and 10131.95 to, and to repeal Section 10131.8 of, the Business and Professions Code, relating to real estate.

## LEGISLATIVE COUNSEL'S DIGEST

SB 1240, Machado. Real estate: brokers and salespersons.

Existing law, the Real Estate Law, provides for the licensure and regulation of real estate brokers and real estate salespersons by the Real Estate Commissioner, and makes a willful violation of that law a crime. Existing law authorizes the commissioner to, upon his or her own motion, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within the state.

Existing law defines a real estate broker as a person who, among other things, 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. Existing law requires a real estate broker engaging in that activity who meets certain criteria to annually notify the Department of Real Estate in writing.

This bill would delete that notification requirement and instead require a real estate broker who, among other things, makes, arranges, or services loans secured by residential real property to notify the department in writing, as specified, to pay specified penalties for failing to provide that notification, and to notify the department when he or she is no longer subject to this requirement. The bill would also require these brokers to keep documents and records that will enable the commissioner to determine whether specified functions performed by them comply with the Real Estate Law. The bill would authorize the commissioner to inspect and examine or audit the business documents and records of a real estate broker or salesperson in this regard after reasonable notice. The bill would also authorize the commissioner to require special reports from time to time from these brokers.

This bill would require a broker who makes, arranges, or services 8 or more of these loans in a calendar year to file annually various reports with the department commencing January 1, 2010, would impose various duties on the accountants preparing those reports, and would authorize the commissioner to cause an examination and report to be made and to charge the broker for 1 ½ times the cost thereof, if the broker fails to timely file those reports. The bill would require the commissioner to examine the affairs of these brokers, and the brokers and salespersons acting under them, for compliance with the Real Estate Law, as specified, and would authorize the commissioner to impose penalties against those brokers or salespersons based on the findings of those examinations. The bill would enact other related provisions.

This bill would require that the penalties collected pursuant to its provisions be deposited into the Recovery Account in the Real Estate Fund and be available for expenditure, as specified, upon appropriation by the Legislature.

Because a willful violation of provisions of this bill would be a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

*The people of the State of California do enact as follows:*

SECTION 1. Section 10131.8 of the Business and Professions Code is repealed.

SEC. 2. Section 10131.9 is added to the Business and Professions Code, to read:

10131.9. (a) A real estate broker who acts pursuant to Section 10131.1 or subdivision (d) or (e) of Section 10131, and who makes, arranges, or services loans secured by real property containing one to four residential units, shall notify the department within 30 days of the effective date of this section or upon commencing that activity, whichever is later. The notification shall be made in writing on a form that is acceptable to the commissioner.

(b) A real estate broker who fails to notify the department pursuant to subdivision (a) shall be assessed a penalty of fifty dollars (\$50) per day for each day written notification has not been received, up to and including the 30th day after the first day of the assessment penalty. On and after the 31st day, the penalty is one hundred dollars (\$100) per day, not to exceed a total penalty of ten thousand dollars (\$10,000), regardless of the number of days, until the department receives the written notification.

(c) The commissioner may suspend or revoke the license of a real estate broker who fails to pay a penalty imposed pursuant to this section. In addition, the commissioner may bring an action in an appropriate court of this state to collect payment of that penalty.

(d) All penalties paid or collected under this section shall be deposited into the Recovery Account of the Real Estate Fund and shall, upon appropriation by the Legislature, be available for expenditure for the purposes specified in Chapter 6.5 (commencing with Section 10470).

SEC. 3. Section 10131.91 is added to the Business and Professions Code, to read:

10131.91. (a) A real estate broker who acts pursuant to Section 10131.1 or subdivision (d) or (e) of Section 10131, and who makes, arranges, or services eight or more loans in a calendar year that are secured by real property containing one to four residential units, shall, commencing January 1, 2010, annually file with the department all of the following reports, as applicable, within 90 days after the end of the broker's fiscal year or within any additional time as the commissioner may allow for filing for good cause:

(1) The report of an agreed-upon procedures engagement, prepared by a licensed California independent public accountant, which shall be submitted for every broker's license under which a residential mortgage loan is made, arranged, or serviced during the fiscal year. The agreed-upon procedures engagement report shall provide a summary of procedures performed by the independent accountant, and any findings noted, and shall be conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants and standards adopted by the California Board of Accountancy. An accountant engaged to perform an agreed-upon procedures engagement report in accordance with this section shall make no

representation regarding the sufficiency of the procedures developed by the commissioner in accordance with subdivision (b).

(2) A business activities report, which shall contain within its scope all of the following information for the fiscal year, relative to the business activities of the broker and those of any other brokers and real estate salespersons acting under that broker's supervision:

(A) Name and license number of the supervising broker and names and license numbers of the real estate brokers and salespersons under that broker's supervision. The report shall include brokers and salespersons who were under the supervising broker's supervision for all or part of the year.

(B) A list of the real estate-related activities in which the supervising broker and the brokers and salespersons under his or her supervision engaged during the prior year. This listing shall identify all of the following:

(i) Activities relating to mortgages, including arranging, making, or servicing.

(ii) Other activities performed under the real estate broker's or salesperson's license.

(iii) Activities performed under related licenses, including, but not limited to, a license to engage as a finance lender or a finance broker under the California Finance Lenders Law (Division 9 (commencing with Section 22000) of the Financial Code), or a license to engage as a residential mortgage lender or residential mortgage loan servicer under the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000) of the Financial Code).

(C) A list of the forms of media used by the broker and those under his or her supervision to advertise to the public, including print, radio, television, the Internet, or other means.

(D) For fixed rate loans made, brokered, or serviced, all of the following:

(i) The total number, aggregate principal amount, lowest interest rate, highest interest rate, and a list of the institutional lenders of record. If the loan was funded by any lender other than an institutional lender, the broker shall categorize the loan as privately funded.

(ii) The total number and aggregate principal amount of covered loans, as defined in Section 4970 of the Financial Code.

(iii) The total number and aggregate principal amount of loans for which RE Form 885 or an equivalent is required.

(E) For adjustable rate loans made, brokered, or serviced, all of the following:

(i) The total number, aggregate principal amount, lowest beginning interest rate, highest beginning interest rate, highest margin, and a list of the institutional lenders of record. If the loan was funded by any lender other than an institutional lender, the broker shall categorize the loan as privately funded.

(ii) The total number and aggregate principal amount of covered loans, as defined in Section 4970 of the Financial Code.

(iii) The total number and aggregate principal amount of loans for which RE Form 885 or an equivalent is required.

(F) For all loans made, brokered, or serviced, the total number and aggregate principal amount of loans funded by institutional lenders, and the total number and aggregate principal amount of loans funded by private lenders.

(G) For all loans made, brokered, or serviced, the total number and aggregate principal amount of loans that included a prepayment penalty, the minimum prepayment penalty length, the maximum prepayment penalty length, and the number of loans with prepayment penalties whose length exceeded the length of time before the borrower's loan payment amount could increase.

(H) For all loans brokered, the total compensation received by the broker, including yield spread premiums, commissions, and rebates, but excluding compensation used to pay fees for third-party services on behalf of the borrower.

(I) For all mortgage loans made or brokered, the total number of loans for which a mortgage loan disclosure statement was provided in a language other than English, and the number of forms provided per language other than English.

(J) For all mortgage loans serviced, the total amount of funds advanced to be applied toward a payment to protect the security of the note being serviced.

(K) For purposes of this section, an institutional lender has the meaning specified in paragraph (1) of subdivision (c) of Section 10232.

(3) If the broker establishes one or more trust fund accounts with an aggregate value of at least two hundred fifty thousand dollars (\$250,000) during the course of the fiscal year pursuant to Section 10145, the report of a review by a licensed California independent public accountant of trust fund financial statements, conducted in accordance with generally accepted accounting practices, which shall include within its scope the following information for the fiscal year relative to the business activities of the broker:

(A) The receipt and disposition of all funds of others to be applied to the making of loans and the purchasing of promissory notes or real property sales contracts.

(B) The receipt and disposition of all funds of others in connection with the servicing by the broker of the accounts of owners of promissory notes and real property sales contracts including installment payments and loan or contract payoffs by obligors.

(C) A statement, as of the end of the fiscal year, which shall include an itemized trust fund accounting of the broker and confirmation that the trust funds are on deposit in an account, or accounts, maintained by the broker at a financial institution.

(b) On or before September 1, 2009, the commissioner shall develop a list of agreed-upon procedures for use by licensed independent public accountants in performing the agreed-upon procedures engagement reports referenced in paragraph (1) of subdivision (a). The commissioner is authorized to adopt regulations prescribing the form and content of the reports described in subdivision (a).

(c) An independent accountant who is engaged to prepare the reports required by subdivision (a) shall notify the commissioner in the event of the termination or voluntary withdrawal of the independent accountant from the engagement. Notification shall be made within 30 calendar days of the termination or withdrawal.

(d) Notwithstanding subdivision (a), a broker subject to this section who, together with those he or she supervises, makes, arranges, or services 100 or fewer loans in a calendar year that are secured by real property containing one to four residential units, shall file the report specified in paragraph (1) of subdivision (a) every other year for the two prior fiscal years. For purposes of this subdivision, a loan that is not closed shall not count toward the

total number of loans described herein. A loan that is arranged and serviced, or is made and serviced, by the same real estate licensee shall count as a single loan. The commissioner may adopt regulations specifying the schedule for submission of these reports.

(e) A broker that files more than one report in a calendar year pursuant to this section shall consolidate the reports into a single submission when filing the reports with the commissioner.

(f) A broker subject to this section and Section 10232.2 may file consolidated reports that include all of the information required under this section and Section 10232.2. Those consolidated reports shall clearly indicate that they are intended to satisfy the requirements of both sections.

(g) If a broker subject to this section fails to timely file the reports required under this section, the commissioner may cause an examination and report to be made and may charge the broker one and one-half times the cost of making the examination and report. In determining the hourly cost incurred by the commissioner for conducting an examination and preparing the report, the commissioner may use the estimated average hourly cost for all department audit staff performing audits of real estate brokers. If a broker fails to pay the above amount within 60 days of the mailing of a notice of billing, the commissioner may suspend the broker's license or deny renewal of that license. The suspension or denial shall remain in effect until the above amount is paid or the broker's right to renew a license has expired. The commissioner may maintain an action for the recovery of the above amount in any court of competent jurisdiction.

(h) The reports described in this section are exempted from any requirement of public disclosure by paragraph (2) of subdivision (d) of Section 6254 of the Government Code.

SEC. 4. Section 10131.92 is added to the Business and Professions Code, to read:

10131.92. (a) A real estate broker who acts pursuant to Section 10131.1 or subdivision (d) or (e) of Section 10131, and who makes, arranges, or services loans secured by real property containing one to four residential units, shall keep documents and records that will properly enable the commissioner to determine whether the residential mortgage brokerage, servicing, and lending functions performed by the broker comply with this division and with all rules and orders made by the commissioner under this division.

These documents shall include, at a minimum, the documents described in Section 10148. Upon request of the commissioner, a real estate broker shall file an authorization for disclosure to the commissioner of financial records of his or her licensed business pursuant to Section 7473 of the Government Code.

(b) Notwithstanding subdivision (a) of Section 10148, the business documents and records of real estate brokers described in subdivision (a) and real estate salespersons acting under those brokers are subject to inspection and examination or audit by the commissioner, at his or her discretion, after reasonable notice. That real estate broker or salesperson shall, upon request by the commissioner and within the time period specified in that request, allow the commissioner, or his or her authorized representative, to inspect and copy any business documents and records. The commissioner may suspend or revoke the license of the broker or salesperson if he or she fails to produce documents or records within the time specified in the request.

(c) Inspection and examination or audit reports prepared by the commissioner's duly designated representatives pursuant to this section are not public records. Those reports may be disclosed to the officers or directors of a licensee that is the subject of the report for the purpose of corrective action. That disclosure shall not operate as a waiver of the exemption specified in subdivision (d) of Section 6254 of the Government Code.

SEC. 5. Section 10131.93 is added to the Business and Professions Code, to read:

10131.93. (a) As often as the commissioner deems necessary and appropriate, the commissioner shall examine the affairs of each real estate broker who is required to file reports with the department pursuant to Section 10131.91 for compliance with this division. These examinations shall also include a review of the affairs of all real estate brokers and real estate salespersons acting under the supervision of each real estate broker who is required to file reports with the department pursuant to Section 10131.91. The commissioner shall appoint suitable persons to perform these examinations. The commissioner and his or her appointees may examine the books, records, and documents of the licensee, and may examine the licensee's officers, directors, employees, or agents under oath regarding the licensee's operations. The commissioner may cooperate with any agency of the state or federal government,

other states, agencies, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation. The commissioner may accept an examination conducted by one of these entities in place of an examination by the commissioner under this section, unless the commissioner determines that the examination does not provide information necessary to enable the commissioner to fulfill his or her responsibilities under this division.

(b) The commissioner may impose a penalty against a real estate broker or real estate salesperson whose affairs are examined or reviewed pursuant to subdivision (a) based on the findings of the examination or review. The commissioner may suspend or revoke the license of a real estate broker or real estate salesperson who fails to pay that penalty. In addition, the commissioner may bring an action in an appropriate court of this state to collect payment of the penalty.

(c) Penalties collected pursuant to subdivision (b) shall be deposited into the Recovery Account of the Real Estate Fund and shall, upon appropriation by the Legislature, be available for expenditure for the purposes specified in Chapter 6.5 (commencing with Section 10470).

(d) The statement of the findings of an examination conducted pursuant to this section shall belong to the commissioner and shall not be disclosed to anyone other than the licensee, law enforcement officials, or other state or federal regulatory agencies for further investigation and enforcement. Reports required of licensees by the commissioner under this division and results of examinations performed by the commissioner under this division are the property of the commissioner.

SEC. 6. Section 10131.94 is added to the Business and Professions Code, to read:

10131.94. A real estate broker who acts pursuant to Section 10131.1 or subdivision (d) or (e) of Section 10131, and who makes, arranges, or services loans secured by real property containing one to four residential units shall make any special reports to the commissioner that the commissioner may, from time to time, require.

SEC. 7. Section 10131.95 is added to the Business and Professions Code, to read:

10131.95. A real estate broker shall notify the department when he or she is no longer subject to the notification requirements of Section 10131.9. If a broker has already made reports required by Section 10131.91 within the year, he or she shall continue reports for that year, but shall notify the department prior to the expiration of that year that he or she will no longer be servicing or arranging loans for which reports are required. The department's records, including those which may be disclosed by calling the license information telephone number of the department, may then be appropriately updated.

SEC. 8. Section 10148 of the Business and Professions Code is amended to read:

10148. (a) Notwithstanding Section 10131.92, a licensed real estate broker shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required. The retention period shall run from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. After notice, the books, accounts, and records shall be made available for examination, inspection, and copying by the commissioner or his or her designated representative during regular business hours; and shall, upon the appearance of sufficient cause, be subject to audit without further notice, except that the audit shall not be harassing in nature.

(b) The commissioner shall charge a real estate broker for the cost of any audit, if the commissioner has found, in a final desist and refrain order issued under Section 10086 or in a final decision following a disciplinary hearing held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that the broker has violated Section 10145 or a regulation or rule of the commissioner interpreting Section 10145.

(c) If a broker fails to pay for the cost of an audit as described in subdivision (b) within 60 days of mailing a notice of billing, the commissioner may suspend or revoke the broker's license or deny renewal of the broker's license. The suspension or denial shall remain in effect until the cost is paid or until the broker's right to renew a license has expired.

The commissioner may maintain an action for the recovery of the cost in any court of competent jurisdiction. In determining the cost incurred by the commissioner for an audit, the commissioner may use the estimated average hourly cost for all persons performing audits of real estate brokers.

SEC. 9. The Legislature finds and declares that Sections 4 and 5 of this act, which add Sections 10131.92 and 10131.93, respectively, to the Business and Professions Code, impose a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

In order to allow the Department of Real Estate to fully accomplish its goals, it is imperative to protect the interests of those persons submitting information to the department to ensure that any personal or sensitive business information that this act requires those persons to submit is protected as confidential information.

SEC. 10. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.







Approved \_\_\_\_\_, 2008

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*Governor*