

Assembly Bill No. 260

Passed the Assembly September 10, 2009

Chief Clerk of the Assembly

Passed the Senate September 8, 2009

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2009, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 10177 of the Business and Professions Code, to add Section 2923.1 to the Civil Code, and to amend Section 50505 of, to add Sections 1242, 14961, and 22346 to, and to add Division 1.9 (commencing with Section 4995) to, the Financial Code, relating to lending.

LEGISLATIVE COUNSEL'S DIGEST

AB 260, Lieu. Lending.

(1) The Real Estate Law provides for the licensure and regulation of real estate brokers and salespersons by the Real Estate Commissioner. Existing law authorizes the commissioner to suspend or revoke the license of a real estate licensee or corporation, or to deny the issuance of a license to an applicant or corporation, for specified violations.

This bill would further authorize the commissioner to suspend or revoke those licenses, or to deny issuance of those licenses, upon a violation of specified federal lending laws or regulations or upon the violation or failure to comply with specified provisions of state law relating to mortgages.

(2) Existing law imposes certain limitations and prohibitions on licensed persons, as defined, with respect to the making of a covered loan, defined as a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust, and as specified. Existing law does not regulate or define the term “higher-priced mortgage loan.”

This bill would establish “higher-priced mortgage loans,” as defined, as a new category of regulated loans. The bill would, among other things, limit prepayment penalties and prohibit provisions for negative amortization. The bill would prohibit a licensed person, as defined, from making false, deceptive, or misleading statements or representations in connection with higher-priced mortgage loans. The bill would also, among other things, prohibit a mortgage broker, as defined, who arranges higher-priced mortgage loans with prepayment penalties from

receiving a compensation that exceeds certain amounts. The bill would provide that a violation of the provisions regulating higher-priced mortgage loans by a licensed person is also a violation of the person's licensing law. The bill would authorize a licensing agency or the Attorney General to enforce the provisions regulating higher-priced mortgage loans. The bill would authorize civil penalties in an amount up to \$10,000 against a licensed person who willfully and knowingly violates the provisions regulating higher-priced mortgage loans, and would nullify prepayment penalties or yield spread premiums that violate these provisions. The bill would also establish specified duties for mortgage brokers performing mortgage brokerage services for higher-priced mortgage loans. The bill's provisions would apply to higher-priced mortgage loans originated on or after July 1, 2010.

(3) Existing law imposes certain limitations and prohibitions on specified licensees, including commercial banks, credit unions, finance lenders, and residential mortgage lenders, with respect to the making of consumer loans.

This bill would provide that a violation of specified federal lending laws or regulations by those licensees is also a violation of the licensing law of the licensee.

The bill would also provide that a mortgage broker, as defined, providing mortgage brokerage services, as defined, to a borrower is the fiduciary of the borrower, and any violation of the broker's fiduciary duties is a violation of the mortgage broker's licensing law and specified civil penalty and liability provisions. The bill would further provide that this fiduciary duty includes a requirement that the mortgage broker place the economic interest of the borrower ahead of his or her own economic interest.

(4) Because a violation of the bill's provisions by certain licensees may be punished as crimes under the licensing law of the licensees, 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 10177 of the Business and Professions Code is amended to read:

10177. The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, 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 or controlling 10 percent or more of the corporation's stock has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or a salesperson, by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for a real estate license, license renewal, or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

(c) Knowingly authorized, directed, connived at, or aided in the publication, advertisement, distribution, or circulation of a material false statement or representation concerning his or her designation or certification of special education, credential, trade organization membership, or business, or concerning a business opportunity or a land or subdivision, as defined in Chapter 1 (commencing with Section 11000) of Part 2, offered for sale.

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

(e) Willfully used the term “realtor” or a trade name or insignia of membership in a real estate organization of which the licensee is not a member.

(f) Acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, or has either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and only upon an express finding of a violation of law by the agency or entity.

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

(i) Has used his or her employment by a governmental agency in a capacity giving access to records, other than public records, in a manner that violates the confidential nature of the records.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(k) Violated any of the terms, conditions, restrictions, and limitations contained in an order granting a restricted license.

(l) (1) Solicited or induced the sale, lease, or listing for sale or lease of residential property on the ground, wholly or in part, of loss of value, increase in crime, or decline of the quality of the schools due to the present or prospective entry into the neighborhood of a person or persons having a characteristic listed in subdivision (a) or (d) of Section 12955 of the Government Code,

as those characteristics are defined in Sections 12926 and 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code.

(2) Notwithstanding paragraph (1), with respect to familial status, paragraph (1) shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in paragraph (1) shall be construed to affect Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5 of the Civil Code, relating to housing for senior citizens. Subdivision (d) of Section 51 and Section 1360 of the Civil Code and subdivisions (n), (o), and (p) of Section 12955 of the Government Code shall apply to paragraph (1).

(m) Violated the Franchise Investment Law (Division 5 (commencing with Section 31000) of Title 4 of the Corporations Code) or regulations of the Commissioner of Corporations pertaining thereto.

(n) Violated the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code) or the regulations of the Commissioner of Corporations pertaining thereto.

(o) Failed to disclose to the buyer of real property, in a transaction in which the licensee is an agent for the buyer, the nature and extent of a licensee's direct or indirect ownership interest in that real property. The direct or indirect ownership interest in the property by a person related to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee has a special relationship shall be disclosed to the buyer.

(p) Violated Article 6 (commencing with Section 10237).

(q) Violated any provision of any of the following federal acts or regulations:

(1) The federal Real Estate Settlement Procedures Act, as amended (12 U.S.C. Sec. 2601 et seq.).

(2) The federal Truth in Lending Act, as amended (15 U.S.C. Sec. 1601 et seq.).

(3) The federal Home Ownership Equity Protection Act (15 U.S.C. Sec. 1639).

(4) Any regulation promulgated under any of the federal acts cited in paragraph (1), (2), or (3).

(r) Violated or failed to comply with Chapter 2 (commencing with Section 2920) of Title 14 of Part 4 of Division 3 of the Civil Code, related to mortgages.

If a real estate broker that is a corporation has not done any of the foregoing acts, either directly or through its employees, agents, officers, directors, or persons owning or controlling 10 percent or more of the corporation's stock, the commissioner may not deny the issuance of a real estate license to, or suspend or revoke the real estate license of, the corporation, provided that any offending officer, director, or stockholder, who has done any of the foregoing acts individually and not on behalf of the corporation, has been completely disassociated from any affiliation or ownership in the corporation.

SEC. 2. Section 2923.1 is added to the Civil Code, to read:

2923.1. (a) A mortgage broker providing mortgage brokerage services to a borrower is the fiduciary of the borrower, and any violation of the broker's fiduciary duties shall be a violation of the mortgage broker's license law. This fiduciary duty includes a requirement that the mortgage broker place the economic interest of the borrower ahead of his or her own economic interest. A mortgage broker who provides mortgage brokerage services to the borrower owes this fiduciary duty to the borrower regardless of whether the mortgage broker is acting as an agent for any other party in connection with the residential mortgage loan transaction.

(b) For purposes of this section, the following definitions apply:

(1) "Licensed person" means a real estate broker licensed under the Real Estate Law (Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code), a finance lender or broker licensed under the California Finance Lenders Law (Division 9 (commencing with Section 22000) of the Financial Code), a residential mortgage lender licensed under the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000) of the Financial Code), a commercial or industrial bank organized under the Banking Law (Division 1 (commencing with Section 99) of the Financial Code), a savings association organized under the Savings Association Law (Division 2 (commencing with Section 5000) of the Financial Code), and a credit union organized under the California Credit Union Law (Division 5 (commencing with Section 14000) of the Financial Code).

(2) “Mortgage broker” means a licensed person who provides mortgage brokerage services. For purposes of this section, a licensed person who makes a residential mortgage loan is a “mortgage broker,” and subject to the requirements of this section applicable to mortgage brokers, only with respect to transactions in which the licensed person provides mortgage brokerage services.

(3) “Mortgage brokerage services” means arranging or attempting to arrange, as exclusive agent for the borrower or as dual agent for the borrower and lender, for compensation or in expectation of compensation, paid directly or indirectly, a residential mortgage loan made by an unaffiliated third party.

(4) “Residential mortgage loan” means a consumer credit transaction that is secured by residential real property that is improved by four or fewer residential units.

(c) The duties set forth in this section shall not be construed to limit or narrow any other fiduciary duty of a mortgage broker.

SEC. 3. Section 1242 is added to the Financial Code, to read:

1242. Any licensee who violates any provision of any of the following federal acts or regulations violates this division:

(a) The federal Real Estate Settlement Procedures Act, as amended (12 U.S.C. Sec. 2601 et seq.).

(b) The federal Truth in Lending Act, as amended (15 U.S.C. Sec. 1601 et seq.).

(c) The federal Home Ownership Equity Protection Act (15 U.S.C. Sec. 1639).

(d) Any regulation promulgated under any of the federal acts in subdivision (a), (b), or (c).

SEC. 4. Division 1.9 (commencing with Section 4995) is added to the Financial Code, to read:

DIVISION 1.9. HIGHER-PRICED MORTGAGE LOANS

4995. The following definitions shall apply for purposes of this division:

(a) “Higher-priced mortgage loan” has the meaning set forth in Part 226 of Title 12 of the Code of Federal Regulations.

(b) “Licensed person” means a real estate broker licensed under the Real Estate Law (Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code), a finance lender or broker licensed under the California Finance Lenders Law

(Division 9 (commencing with Section 22000)), a residential mortgage lender licensed under the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000)), a commercial or industrial bank organized under the Banking Law (Division 1 (commencing with Section 99)), a savings association organized under the Savings Association Law (Division 2 (commencing with Section 5000)), and a credit union organized under the California Credit Union Law (Division 5 (commencing with Section 14000)).

(c) “Mortgage broker” means a licensed person who provides mortgage brokerage services. For purposes of this division, a licensed person who makes home loans is a “mortgage broker,” and subject to the requirements of this division applicable to mortgage brokers, only with respect to transactions in which the licensed person provides mortgage brokerage services.

(d) “Mortgage brokerage services” means arranging or attempting to arrange, as exclusive agent for the borrower or as dual agent for the borrower and lender, for compensation or in expectation of compensation, paid directly or indirectly, a higher-priced mortgage loan made by an unaffiliated third party.

4995.1. Notwithstanding any other provision of law, the maximum amount of a prepayment penalty that may be imposed by a licensed person in connection with a higher-priced mortgage loan shall not exceed 2 percent of the principal balance prepaid, for prepayment of the loan during the first 12 months following loan consummation or 1 percent of the principal balance prepaid, for prepayment of the loan during the second 12 months following loan consummation.

4995.2. (a) This division shall apply to any licensed person who in bad faith attempts to avoid the application of this division by doing either of the following:

(1) Dividing any loan transaction into separate parts for the purpose and with the intent of evading the provisions of this division.

(2) Any other subterfuge.

(b) Notwithstanding any other provision of law, a licensed person shall not make, or cause to be made, any false, deceptive, or misleading statement or representation in connection with a higher-priced mortgage loan.

(c) A mortgage broker who arranges only higher-priced mortgage loans shall disclose that fact to a borrower, both orally and in writing, at the time of initially engaging in mortgage brokerage services with that borrower.

(d) A mortgage broker who provides mortgage brokerage services shall not steer, counsel, or direct a borrower to accept a loan at a higher cost than that for which the borrower could qualify based upon the loans offered by the persons with whom the broker regularly does business.

(e) (1) A mortgage broker who provides mortgage brokerage services for a borrower shall not receive compensation, including a yield spread premium, fee, commission, or any other compensation, for arranging a higher-priced mortgage loan with a prepayment penalty that exceeds the compensation that the mortgage broker would otherwise receive for arranging that higher-priced mortgage loan without a prepayment penalty.

(2) When providing mortgage brokerage services for a borrower, a mortgage broker shall receive the same compensation for providing those services whether paid by the lender, borrower, or a third party.

(f) No licensed person shall recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a higher-priced mortgage loan that refinances all or any portion of the existing loan or debt.

(g) A licensed person shall not make a higher-priced mortgage loan that contains a provision for negative amortization. This subdivision shall not preclude a licensed person from entering into a subsequent agreement with a borrower to capitalize payments as a means of permitting a borrower to cure or prevent a delinquency.

(h) A licensed person who makes a higher-priced mortgage loan and who, when acting in good faith, fails to comply with this section, shall not be liable if the licensed person establishes either of the following:

(1) Within 90 days of the loan closing and prior to the institution of any action against the licensed person under this section, the licensed person did all of the following:

(A) Notified the borrower of the compliance failure.

(B) Tendered appropriate restitution.

(C) Offered, at the borrower's option, either to make the higher-priced mortgage loan comply with the requirements of this division or change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a higher-priced mortgage loan subject to the provisions of this division.

(D) Within a reasonable period of time following the borrower's election of remedies, took appropriate action based on the borrower's choice.

(2) (A) The compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid those errors, and within 120 days after receipt of a complaint or the discovery of the compliance failure or the licensed person's receipt of written notice of the compliance failure, the licensed person did all of the following:

(i) Notified the borrower of the compliance failure.

(ii) Tendered appropriate restitution.

(iii) Offered, at the borrower's option, either to make the higher-priced mortgage loan comply with the requirements of this division or change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a higher-priced mortgage loan subject to the provisions of this division.

(iv) Within a reasonable period of time following the borrower's election of remedies, took appropriate action based on the borrower's choice.

(B) For purposes of this subdivision, examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors.

4995.3. (a) Any licensed person who violates any provision of this division shall be deemed to have violated that person's licensing law.

(b) The licensing agency may, by order and after appropriate administrative hearing, prohibit licensees under this division from engaging in acts or practices in connection with higher-priced mortgage loans that the licensing agency finds to be unfair, deceptive, or designed to evade laws of this state.

(c) A violation of Section 2923.1 of the Civil Code in connection with a higher-priced mortgage loan is a violation of this division.

(d) A violation of the provisions of Part 226 of Title 12 of the Code of Federal Regulations, relating to prepayment penalties in connection with higher-priced mortgage loans, is a violation of this division.

(e) The provisions of this division may be enforced only by the Attorney General or the licensed person's licensing agency. Any licensed person who willfully and knowingly violates any provision of this division shall be liable for a civil penalty of not more than ten thousand dollars (\$10,000) for each violation.

(f) A prepayment penalty or yield spread premium provision of a higher-priced mortgage loan that violates this division shall be unenforceable.

4995.4. The provisions of this division shall apply to higher-priced mortgage loans originated on or after July 1, 2010.

4995.5. The provisions of this division are severable. If any provision of this division or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

4995.6. Nothing in this division shall be construed to affect any other rights or remedies otherwise available under the law.

SEC. 5. Section 14961 is added to the Financial Code, to read:

14961. Any licensee that violates any provision of any of the following federal acts or regulations violates this division:

(a) The federal Real Estate Settlement Procedures Act, as amended (12 U.S.C. Sec. 2601 et seq.).

(b) The federal Truth in Lending Act, as amended (15 U.S.C. Sec. 1601 et seq.).

(c) The federal Home Ownership Equity Protection Act (15 U.S.C. Sec. 1639).

(d) Any regulation promulgated under any of the federal acts in subdivision (a), (b), or (c).

SEC. 6. Section 22346 is added to the Financial Code, to read:

22346. Any licensee that violates any provision of any of the following federal acts or regulations violates this division:

(a) The federal Real Estate Settlement Procedures Act, as amended (12 U.S.C. Sec. 2601 et seq.).

(b) The federal Truth in Lending Act, as amended (15 U.S.C. Sec. 1601 et seq.).

(c) The federal Home Ownership Equity Protection Act (15 U.S.C. Sec. 1639).

(d) Any regulation promulgated under any of the federal acts in subdivision (a), (b), or (c).

SEC. 7. Section 50505 of the Financial Code is amended to read:

50505. Any person who violates any provision of any of the following federal acts or regulations violates this division:

(a) The federal Real Estate Settlement Procedures Act, as amended (12 U.S.C. Sec. 2601 et seq.).

(b) The federal Truth in Lending Act, as amended (15 U.S.C. Sec. 1601 et seq.).

(c) The federal Home Ownership Equity Protection Act (15 U.S.C. Sec. 1639).

(d) Any regulation promulgated under any of the federal acts in subdivision (a), (b), or (c).

SEC. 8. 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 _____, 2009

Governor