AMENDED IN SENATE MARCH 23, 2009

AMENDED IN SENATE MARCH 9, 2009

SENATE BILL No. 94

Introduced by Senator Calderon

January 22, 2009

An act to amend ~~Sections 10085.5 and~~ *Section* 10177 of, and to add ~~Section~~ *Sections 10085.6 and* 10147.6 to, the Business and Professions Code, to amend Section 2945.1 of, and to add Sections 2944.6 and 2944.7 to, the Civil Code, and to amend Sections 22161 and 22301 of, and to add Sections 1243, 14962, and 50002.5 to, the Financial Code, relating to mortgage loans.

LEGISLATIVE COUNSEL'S DIGEST

SB 94, as amended, Calderon. Mortgage loans.

(1) The Real Estate Law provides for the regulation and licensure of real estate brokers and real estate salespersons by the Real Estate Commissioner. The California Finance Lenders Law provides for the regulation and licensure of finance lenders and brokers by the Commissioner of Corporations. The California Residential Mortgage Lending Act provides for the regulation and licensure of residential mortgage lenders and servicers by the Commissioner of Corporations. The Banking Law provides for the regulation of state commercial banks by the Commissioner of Financial Institutions. The California Credit Union Law provides for the regulation of state credit unions by the Commissioner of Financial Institutions. A willful violation of specified provisions of those acts is a crime.

This bill would prohibit ~~any person~~ *a real estate licensee* from charging, contracting for, or receiving an advance fee, as defined, for performing services for borrowers in connection with the modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property~~, unless the person is a licensed real estate broker and has complied with the Real Estate Law, except as specified~~ *and would make a violation of that prohibition a misdemeanor. By creating a new crime, the bill would impose a state-mandated local program*. The bill would also prohibit finance lenders and brokers, residential mortgage lenders and servicers, and state-chartered commercial banks and credit unions from charging, contracting for, or receiving any interest or charge for performing services for borrowers in connection with the modification of the terms of, or the negotiation of another form of forbearance or forgiveness in connection with, a loan secured directly or collaterally by a lien on single-family residential real property.

This bill would require any person who, for compensation, solicits customers for, or offers to perform, mortgage loan modifications or other forms of mortgage loan forbearance to provide a specified 14-point bold type statement regarding loan modification fees, and would prohibit those persons from demanding or receiving any preperformance compensation, as specified, requiring any security as collateral for final compensation, or taking a power of attorney from a borrower. The bill would also provide that a real estate licensee who fails to comply with specified provisions related to mortgages, including the loan modification provisions, would be subject to disciplinary action by the Real Estate Commissioner. The bill would add to the California Finance Lenders Law a prohibition on making any false, deceptive, or misleading statement, representation, or omission in the course of a licensee's lending or brokering activities.

Because a violation of these provisions by certain licensees may be punished as crimes under their respective licensing laws, this bill would impose a state-mandated local program.

(2) Existing law defines a foreclosure consultant as a person who offers, for compensation, to perform specified services for a homeowner relating to a foreclosure sale, and imposes regulations upon foreclosure consultants when servicing a foreclosure sale, as specified. Existing law excludes specified persons from the definition of a foreclosure consultant, including a person licensed under the Real Estate Law when making a direct loan or engaging in specified acts, and a person licensed to make loans as a finance lender, subject to the authority of the Commissioner of Corporations to terminate this exclusion, as specified.

This bill would instead specify that a real estate licensee and a finance lender are excluded from the definition of a foreclosure consultant when acting under the authority of that person's license, and would delete the commissioner's authority to terminate the finance lender's exclusion. The bill would also delete obsolete statutory references from those provisions.

(3) 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.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

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

~~SECTION 1. Section 10085.5 of the Business and Professions Code is amended to read:~~

~~10085.5. (a) It shall be unlawful for any person to claim, demand, charge, receive, collect, or contract for an advance fee (1) for soliciting lenders on behalf of borrowers or performing services for borrowers in connection with loans to be secured directly or collaterally by a lien on real property, before the borrower becomes obligated to complete the loan, (2) for performing services for borrowers in connection with the modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property, or (3) for performing any other activities for which a license is required, unless the person is a licensed real estate broker and has complied with the provisions of this part.~~

~~(b) This section does not prohibit the acceptance or receipt of an advance fee by any bank, savings association, credit union, industrial loan company, or person acting within the scope of a license issued to that person pursuant to Division 9 (commencing with Section 22000) of the Financial Code, in connection with loans to be secured directly or collaterally by a lien on real property. This section does not apply to charges made by title insurers and controlled escrow companies pursuant to Chapter 1 (commencing with Section 12340) of Part 6 of Division 2 of the Insurance Code.~~

~~(c) A violation of this section is a public offense punishable by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail for a term not to exceed six months, or by both that fine and imprisonment, or if by a corporation, the violation is punishable by a fine not exceeding fifty thousand dollars ($50,000).~~

SECTION 1. Section 10085.6 is added to the Business and Professions Code, to read:

10085.6. (a) Notwithstanding any other provision of law, it shall be unlawful for any licensee to claim, demand, charge, receive, collect, or contract for an advance fee for performing services for borrowers in connection with the modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property.

(b) A violation of this section is a public offense punishable by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail for a term not to exceed six months, or by both that fine and imprisonment, or if by a corporation, the violation is punishable by a fine not exceeding fifty thousand dollars ($50,000).

SEC. 2. Section 10147.6 is added to the Business and Professions Code, to read:

10147.6. (a) Any licensee who solicits customers for the purpose of helping negotiate a mortgage loan modification or other form of mortgage loan forbearance for a fee or other form of compensation, or who otherwise offers to perform these services for a borrower for a fee or other form of compensation, shall provide the following to the borrower, as a separate statement, in not less than 14-point bold type, prior to entering into any fee agreement with the borrower:

IT IS NOT NECESSARY TO PAY A THIRD PARTY TO ARRANGE FOR A LOAN MODIFICATION OR OTHER FORM OF FORBEARANCE FROM YOUR MORTGAGE LENDER OR SERVICER. YOU MAY CALL YOUR LENDER DIRECTLY TO ASK FOR A CHANGE IN YOUR LOAN TERMS. NONPROFIT HOUSING COUNSELING AGENCIES ALSO OFFER THESE AND OTHER FORMS OF BORROWER ASSISTANCE FREE OF CHARGE. A LIST OF NONPROFIT HOUSING COUNSELING AGENCIES APPROVED BY THE

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) IS AVAILABLE FROM YOUR LOCAL HUD OFFICE OR BY VISITING WWW.HUD.GOV.

(b) If loan modification or other mortgage loan forbearance services are offered or negotiated in one of the foreign languages set forth in Section 1632 of the Civil Code, a translated copy of the statement in subdivision (a) shall be provided to the borrower in that foreign language.

SEC. 3. 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 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. 4. Section 2944.6 is added to the Civil Code, to read:

2944.6. (a) Notwithstanding any other provision of law, any person who solicits customers for the purpose of helping negotiate a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation, or who otherwise offers to perform these services for a borrower for a fee or other compensation, shall provide the following to the borrower, as a separate statement, in not less than 14-point bold type, prior to entering into any fee agreement with the borrower:

IT IS NOT NECESSARY TO PAY A THIRD PARTY TO ARRANGE FOR A LOAN MODIFICATION OR OTHER FORM OF FORBEARANCE FROM YOUR MORTGAGE LENDER OR SERVICER. YOU MAY CALL YOUR LENDER DIRECTLY TO ASK FOR A CHANGE IN YOUR LOAN TERMS. NONPROFIT HOUSING COUNSELING AGENCIES ALSO OFFER THESE AND OTHER FORMS OF BORROWER ASSISTANCE FREE OF CHARGE. A LIST OF NONPROFIT HOUSING COUNSELING AGENCIES APPROVED BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) IS AVAILABLE FROM YOUR LOCAL HUD OFFICE OR BY VISITING WWW.HUD.GOV.

(b) If loan modification or other mortgage loan forbearance services are offered or negotiated in one of the foreign languages set forth in Section 1632, a translated copy of the statement in subdivision (a) shall be provided to the borrower in that foreign language.

SEC. 5. Section 2944.7 is added to the Civil Code, to read:

2944.7. Notwithstanding any other provision of law, it shall be unlawful for any person who solicits customers for the purpose of helping negotiate a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation, or who otherwise offers to perform these services for a borrower for a fee or other compensation, to do any of the following:

(a) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.

(b) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.

(c) Take any power of attorney from the borrower for any purpose.

SEC. 6. Section 2945.1 of the Civil Code is amended to read:

2945.1. The following definitions apply to this chapter:

(a) "Foreclosure consultant" means any person who makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner do any of the following:

(1) Stop or postpone the foreclosure sale.

(2) Obtain any forbearance from any beneficiary or mortgagee.

(3) Assist the owner to exercise the right of reinstatement provided in Section 2924c.

(4) Obtain any extension of the period within which the owner may reinstate his or her obligation.

(5) Obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a deed of trust or mortgage on a residence in foreclosure or contained that deed of trust or mortgage.

(6) Assist the owner to obtain a loan or advance of funds.

(7) Avoid or ameliorate the impairment of the owner's credit resulting from the recording of a notice of default or the conduct of a foreclosure sale.

(8) Save the owner's residence from foreclosure.

(9) Assist the owner in obtaining from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, the remaining proceeds from the foreclosure sale of the owner's residence.

(b) A foreclosure consultant does not include any of the following:

(1) A person licensed to practice law in this state when the person renders service in the course of his or her practice as an attorney at law.

(2) A person licensed under Division 3 (commencing with Section 12000) of the Financial Code when the person is acting as a prorater as defined therein.

(3) A person licensed under Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code when the person is acting under the authority of that license, as described in Section 10131 or 10131.1 of the Business and Professions Code.

(4) A person licensed under Chapter 1 (commencing with Section 5000) of Division 3 of the Business and Professions Code when the person is acting in any capacity for which the person is licensed under those provisions.

(5) A person or his or her authorized agent acting under the express authority or written approval of the Department of Housing and Urban Development or other department or agency of the United States or this state to provide services.

(6) A person who holds or is owed an obligation secured by a lien on any residence in foreclosure when the person performs services in connection with this obligation or lien.

(7) Any person licensed to make loans pursuant to Division 9 (commencing with Section 22000) of the Financial Code when the person is acting under the authority of that license.

(8) Any person or entity doing business under any law of this state, or of the United States relating to banks, trust companies, savings and loan associations, industrial loan companies, pension trusts, credit unions, insurance companies, or any person or entity authorized under the laws of this state to conduct a title or escrow business, or a mortgagee which is a United States Department of Housing and Urban Development approved mortgagee and any subsidiary or affiliate of the above, and any agent or employee of the above while engaged in the business of these persons or entities.

(9) A person licensed as a residential mortgage lender or servicer pursuant to Division 20 (commencing with Section 50000) of the Financial Code, when acting under the authority of that license.

(c) Notwithstanding subdivision (b), any person who provides services pursuant to paragraph (9) of subdivision (a) is a foreclosure consultant unless he or she is the owner’s attorney.

(d) “Person” means any individual, partnership, corporation, limited liability company, association or other group, however organized.

(e) “Service” means and includes, but is not limited to, any of the following:

(1) Debt, budget, or financial counseling of any type.

(2) Receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation secured by a lien on a residence in foreclosure.

(3) Contacting creditors on behalf of an owner of a residence in foreclosure.

(4) Arranging or attempting to arrange for an extension of the period within which the owner of a residence in foreclosure may cure his or her default and reinstate his or her obligation pursuant to Section 2924c.

(5) Arranging or attempting to arrange for any delay or postponement of the time of sale of the residence in foreclosure.

(6) Advising the filing of any document or assisting in any manner in the preparation of any document for filing with any bankruptcy court.

(7) Giving any advice, explanation or instruction to an owner of a residence in foreclosure which in any manner relates to the cure of a default in or the reinstatement of an obligation secured by a lien on the residence in foreclosure, the full satisfaction of that obligation, or the postponement or avoidance of a sale of a residence in foreclosure pursuant to a power of sale contained in any deed of trust.

(8) Arranging or attempting to arrange for the payment by the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, of the remaining proceeds to which the owner is entitled from a foreclosure sale of the owner’s residence in foreclosure. Arranging or attempting to arrange for the payment shall include any arrangement where the owner transfers or assigns the right to the remaining proceeds of a foreclosure sale to the foreclosure consultant or any person designated by the foreclosure consultant, whether that transfer is effected by agreement, assignment, deed, power of attorney, or assignment of claim.

(f) “Residence in foreclosure” means a residence in foreclosure as defined in Section 1695.1.

(g) "Owner" means a property owner as defined in Section 1695.1.

(h) "Contract" means any agreement, or any term thereof, between a foreclosure consultant and an owner for the rendition of any service as defined in subdivision (e).

SEC. 7. Section 1243 is added to the Financial Code, to read:

1243. (a) No bank shall directly or indirectly charge, contract for, or receive any interest or charge of any nature for performing services for a borrower in connection with either of the following:

(1) The actual or attempted modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property.

(2) The actual or attempted negotiation of another form of forbearance or forgiveness in connection with a loan secured directly or collaterally by a lien on single-family residential real property.

(b) Nothing in this section precludes a bank from doing either of the following:

(1) Collecting interest or other charges pursuant to the terms of a loan that has been modified.

(2) Accepting payment from a federal agency in connection with the federal Homeowner Affordability and Stability Plan or other federal plan intended to help reduce foreclosures.

SEC. 8. Section 14962 is added to the Financial Code, to read:

14962. (a) No credit union shall directly or indirectly charge, contract for, or receive any interest or charge of any nature for performing services for a borrower in connection with either of the following:

(1) The actual or attempted modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property.

(2) The actual or attempted negotiation of another form of forbearance or forgiveness in connection with a loan secured directly or collaterally by a lien on single-family residential real property.

(b) Nothing in this section precludes a credit union from doing either of the following:

(1) Collecting interest or other charges pursuant to the terms of a loan that has been modified.

(2) Accepting payment from a federal agency in connection with the federal Homeowner Affordability and Stability Plan or other federal plan intended to help reduce foreclosures.

SEC. 9. Section 22161 of the Financial Code is amended to read:

22161. (a) No person shall make a false, deceptive, or misleading statement, representation, or omission in the course of his or her lending or brokering activities.

(b) No person shall advertise, print, display, publish, distribute, or broadcast, or cause or permit to be advertised, printed, displayed, published, distributed, or broadcast in any manner, any statement or representation with regard to the business subject to the provisions of this division, including the rates, terms, or conditions for making or negotiating loans, that is false, misleading, or deceptive, or that omits material information that is necessary to make the statements not false, misleading, or deceptive, or in the case of a licensee, that refers to the supervision of the business by the state or any department or official of the state.

SEC. 10. Section 22301 of the Financial Code is amended to read:

22301. (a) No licensee shall directly or indirectly charge, contract for, or receive any interest or charge of any nature with respect to a loan of five thousand dollars ($5,000) or more unless the loan is made.

(b) Notwithstanding subdivision (a), whenever a loan of five thousand dollars ($5,000) or more is not consummated because of the borrower’s failure to disclose outstanding liens or other information essential to making the loan or solely because of the borrower’s failure to complete the loan in accordance with the loan application, a licensee may charge, contract for, and receive an amount equal to the actual expenses incurred by the licensee in connection with the preparation for the loan.

(c) No licensee shall directly or indirectly charge, contract for, or receive any interest or charge of any nature for performing services for a borrower in connection with either of the following:

(1) The actual or attempted modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property.

(2) The actual or attempted negotiation of another form of forbearance or forgiveness in connection with a loan secured

directly or collaterally by a lien on single-family residential real property.

(d) Nothing in this section precludes a licensee from doing either of the following:

(1) Collecting interest or other charges pursuant to the terms of a loan that has been modified.

(2) Accepting payment from a federal agency in connection with the federal Homeowner Affordability and Stability Plan or other federal plan intended to help reduce foreclosures.

SEC. 11. Section 50002.5 is added to the Financial Code, to read:

50002.5. (a) No licensee shall directly or indirectly charge, contract for, or receive any interest or charge of any nature for performing services for a borrower in connection with either of the following:

(1) The actual or attempted modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property.

(2) The actual or attempted negotiation of another form of forbearance or forgiveness in connection with a loan secured directly or collaterally by a lien on single-family residential real property.

(b) Nothing in this section precludes a licensee from doing either of the following:

(1) Collecting interest or other charges pursuant to the terms of a loan that has been modified.

(2) Accepting payment from a federal agency in connection with the federal Homeowner Affordability and Stability Plan or other federal plan intended to help reduce foreclosures.

SEC. 12. 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.

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