

**ASSEMBLY BILL**

**No. 2**

**Introduced by Assembly Members Lieu, Bass, and Nava  
(Principal coauthor: Assembly Member Price)**

(Principal coauthor: Senator Wolk)

**(Coauthors: Assembly Members Carter, Chesbro, Coto, Eng,  
Furutani, Huffman, Jones, Krekorian, Bonnie Lowenthal, Ma,  
John A. Perez, Ruskin, Salas, Saldana, Swanson, and Yamada)**

(Coauthors: Senators DeSaulnier and Florez)

February 5, 2009

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 2, as introduced, 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.

(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, would nullify prepayment penalties or yield spread premiums that violate these provisions, would make a licensed person who violates these provisions liable to the borrower in the amount of the borrower’s actual damages, and would authorize the court to award court costs and attorney’s fees to a prevailing plaintiff. 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.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

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

1 SECTION 1. Section 10177 of the Business and Professions  
2 Code is amended to read:

3 10177. The commissioner may suspend or revoke the license  
4 of a real estate licensee, or may deny the issuance of a license to  
5 an applicant, who has done any of the following, or may suspend  
6 or revoke the license of a corporation, or deny the issuance of a  
7 license to a corporation, if an officer, director, or person owning  
8 or controlling 10 percent or more of the corporation’s stock has  
9 done any of the following:

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

15 (b) Entered a plea of guilty or nolo contendere to, or been found  
16 guilty of, or been convicted of, a felony, or a crime substantially  
17 related to the qualifications, functions, or duties of a real estate  
18 licensee, and the time for appeal has elapsed or the judgment of  
19 conviction has been affirmed on appeal, irrespective of an order  
20 granting probation following that conviction, suspending the  
21 imposition of sentence, or of a subsequent order under Section  
22 1203.4 of the Penal Code allowing that licensee to withdraw his

1 or her plea of guilty and to enter a plea of not guilty, or dismissing  
2 the accusation or information.

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

10 (d) Willfully disregarded or violated the Real Estate Law (Part  
11 1 (commencing with Section 10000)) or Chapter 1 (commencing  
12 with Section 11000) of Part 2 or the rules and regulations of the  
13 commissioner for the administration and enforcement of the Real  
14 Estate Law and Chapter 1 (commencing with Section 11000) of  
15 Part 2.

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

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

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

37 (h) As a broker licensee, failed to exercise reasonable  
38 supervision over the activities of his or her salespersons, or, as the  
39 officer designated by a corporate broker licensee, failed to exercise

1 reasonable supervision and control of the activities of the  
2 corporation for which a real estate license is required.

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

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

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

11 (l) (1) Solicited or induced the sale, lease, or listing for sale or  
12 lease of residential property on the ground, wholly or in part, of  
13 loss of value, increase in crime, or decline of the quality of the  
14 schools due to the present or prospective entry into the  
15 neighborhood of a person or persons having a characteristic listed  
16 in subdivision (a) or (d) of Section 12955 of the Government Code,  
17 as those characteristics are defined in Sections 12926, 12926.1,  
18 subdivision (m), and paragraph (1) of subdivision (p) of Section  
19 12955, and Section 12955.2 of the Government Code.

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

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

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

37 (o) Failed to disclose to the buyer of real property, in a  
38 transaction in which the licensee is an agent for the buyer, the  
39 nature and extent of a licensee's direct or indirect ownership  
40 interest in that real property. The direct or indirect ownership

1 interest in the property by a person related to the licensee by blood  
2 or marriage, by an entity in which the licensee has an ownership  
3 interest, or by any other person with whom the licensee has a  
4 special relationship shall be disclosed to the buyer.

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

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

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

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

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

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

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

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

27 2923.1. (a) A mortgage broker providing mortgage brokerage  
28 services to a borrower is the fiduciary of the borrower, and any  
29 violation of the broker's fiduciary duties shall be a violation of the  
30 mortgage broker's license law. This fiduciary duty includes a  
31 requirement that the mortgage broker place the economic interest  
32 of the borrower ahead of his or her own economic interest. A  
33 mortgage broker who provides mortgage brokerage services to the  
34 borrower owes this fiduciary duty to the borrower regardless of  
35 whether the mortgage broker is acting as an agent for any other  
36 party in connection with the residential mortgage loan transaction.

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

38 (1) "Licensed person" means a real estate broker licensed under  
39 the Real Estate Law (Part 1 (commencing with Section 10000) of  
40 Division 4 of the Business and Professions Code), a finance lender

1 or broker licensed under the California Finance Lenders Law  
2 (Division 9 (commencing with Section 22000) of the Financial  
3 Code), a residential mortgage lender licensed under the California  
4 Residential Mortgage Lending Act (Division 20 (commencing  
5 with Section 50000) of the Financial Code), a commercial or  
6 industrial bank organized under the Banking Law (Division 1  
7 (commencing with Section 99) of the Financial Code), a savings  
8 association organized under the Savings Association Law (Division  
9 2 (commencing with Section 5000) of the Financial Code), and a  
10 credit union organized under the California Credit Union Law  
11 (Division 5 (commencing with Section 14000) of the Financial  
12 Code).

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

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

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

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

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

30 1242. Any licensee who violates any provision of any of the  
31 following federal acts or regulations violates this division:

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

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

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

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

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

3  
4 DIVISION 1.9. HIGHER-PRICED MORTGAGE LOANS

5  
6 4995. The following definitions shall apply for purposes of  
7 this division:

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

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

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

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

34 4995.1. Notwithstanding any other provision of law, the  
35 maximum amount of a prepayment penalty that may be imposed  
36 by a licensed person in connection with a higher-priced mortgage  
37 loan shall not exceed 2 percent of the principal balance prepaid,  
38 for prepayment of the loan during the first 12 months following  
39 loan consummation or 1 percent of the principal balance prepaid,

1 for prepayment of the loan during the second 12 months following  
2 loan consummation.

3 4995.2. (a) This division shall apply to any licensed person  
4 who in bad faith attempts to avoid the application of this division  
5 by doing either of the following:

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

9 (2) Any other subterfuge.

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

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

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

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

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

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

38 (g) A licensed person shall not make a higher-priced mortgage  
39 loan that contains a provision for negative amortization. This  
40 subdivision shall not preclude a licensed person from entering into

1 a subsequent agreement with a borrower to capitalize payments  
2 as a means of permitting a borrower to cure or prevent a  
3 delinquency.

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

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

11 (A) Notified the borrower of the compliance failure.

12 (B) Tendered appropriate restitution.

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

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

22 (2) (A) The compliance failure was not intentional and resulted  
23 from a bona fide error notwithstanding the maintenance of  
24 procedures reasonably adopted to avoid those errors, and within  
25 120 days after receipt of a complaint or the discovery of the  
26 compliance failure or the licensed person's receipt of written notice  
27 of the compliance failure, the licensed person did all of the  
28 following:

29 (i) Notified the borrower of the compliance failure.

30 (ii) Tendered appropriate restitution.

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

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

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

4 4995.3. (a) Any licensed person who violates any provision  
5 of this division shall be deemed to have violated that person's  
6 licensing law.

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

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

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

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

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

26 (g) Notwithstanding subdivision (e), a borrower may bring a  
27 civil action against a licensed person to recover actual damages  
28 that occur as the result of a violation of this division and may  
29 recover reasonable attorney's fees and costs if he or she prevails  
30 in the action.

31 4995.4. The provisions of this division shall apply to  
32 higher-priced mortgage loans originated on or after July 1, 2010.

33 4995.5. The provisions of this division are severable. If any  
34 provision of this division or its application is held invalid, that  
35 invalidity shall not affect other provisions or applications that can  
36 be given effect without the invalid provision or application.

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

38 14961. Any licensee that violates any provision of any of the  
39 following federal acts or regulations violates this division:

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

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

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

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

9 SEC. 6. Section 22346 is added to the Financial Code, to read:  
 10 22346. Any licensee that violates any provision of any of the  
 11 following federal acts or regulations violates this division:

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

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

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

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

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

22 50505. Any person who violates any provision of ~~the~~ *any of*  
 23 *the following federal acts or regulations violates this division:*

24 (a) ~~The federal Real Estate Settlement Procedures Act, as~~  
 25 ~~amended (12 U.S.C.A. U.S.C. Sec. 2601 et seq.), or any regulation~~  
 26 ~~promulgated thereunder, violates this division.~~

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

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

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

33 SEC. 8. No reimbursement is required by this act pursuant to  
 34 Section 6 of Article XIII B of the California Constitution because  
 35 the only costs that may be incurred by a local agency or school  
 36 district will be incurred because this act creates a new crime or  
 37 infraction, eliminates a crime or infraction, or changes the penalty  
 38 for a crime or infraction, within the meaning of Section 17556 of  
 39 the Government Code, or changes the definition of a crime within

1 the meaning of Section 6 of Article XIII B of the California  
2 Constitution.

O