Because she found that the Commissioner is authorized to set a rate of return, Judge Janavs also focused on section 2645.6(a), which establishes a 10% lower boundary rate of return for property and casualty insurance. Exercising an "arbitrary and capricious" standard of review, Judge Janavs found that "there is substantial evidence in the record to support the 10% lower boundary reasonable rate determination for the rollback year...."

In a related ruling, Judge Janavs found that each insurer is constitutionally entitled to a full-blown, company-specific Administrative Procedure Act evidentiary hearings on its rollback exemption petition, at which it may "proffer all relevant evidence to show that the 10% rate of return and the minimum premium produced by the formula is confiscatory as to it." As such, the so-called "relitigation ban" in section 2646.4(e) is invalid. Further, the standard applicable to rollbacks is not "deep hardship or insolvency" but "whether the insurer is left with a reasonable rate of return, though at the lower boundary of the range of reasonable rates."

As a result of her 85-page ruling invalidating most of DOI's rollback regulations, Judge Janavs declared that Commissioner Garamendi's order requiring 20th Century to refund 12.203% of premiums paid during the Proposition 103 rollback period, plus interest, to be null and void.

Both Garamendi (through outside counsel Michael J. Strumwasser and Fredric Woocher) and intervenor Voter Revolt have appealed Janavs' decision to the Second District Court of Appeal; both have also filed a petition asking the California Supreme Court to take the case directly from the superior court.

In other Proposition 103 litigation, the California Supreme Court recently granted review in two cases challenging Commissioner Garamendi's authority to scrap former Commissioner Roxani Gillespie's rollback regulations and adopt his own. On March 25, the Supreme Court agreed to review the Second District Court of Appeal's decisions in ***Safeco Insurance Co. v. Garamendi***, 14 Cal. App. 4th 1141 (1992) *[13:1 CRLR 86]*, and ***State Farm Mutual Automobile Insurance Co. v. Garamendi***, 15 Cal. App. 4th 546 (1993). If the Court agrees to take the *20th Century* case directly from the superior court, it may delay its ruling in these two cases.

DEPARTMENT OF REAL ESTATE

Commissioner: Clark E. Wallace (916) 739-3684

The Real Estate Commissioner is appointed by the Governor and is the chief officer of the Department of Real Estate (DRE). DRE was established pursuant to Business and Professions Code section 10000 *et seq.*; its regulations appear in Chapter 6, Title 10 of the California Code of Regulations (CCR). The commissioner's principal duties include determining administrative policy and enforcing the Real Estate Law in a manner which achieves maximum protection for purchasers of real property and those persons dealing with a real estate licensee. The commissioner is assisted by the Real Estate Advisory Commission, which is comprised of six brokers and four public members who serve at the commissioner's pleasure. The Real Estate Advisory Commission must conduct at least four public meetings each year. The commissioner receives additional advice from specialized committees in areas of education and research, mortgage lending, subdivisions and commercial and business brokerage. Various subcommittees also provide advisory input.

DRE primarily regulates two aspects of the real estate industry: licensees (as of September 1992, 260,133 salespersons and 115,613 brokers, including corporate officers) and subdivisions. Certified real estate appraisers are not regulated by DRE, but by the separate Office of Real Estate Appraisers within the Business, Transportation and Housing Agency.

License examinations require a fee of $25 per salesperson applicant and $50 per broker applicant. Exam passage rates averaged 56% for salespersons and 48% for brokers (including retakes) during the 1991–92 fiscal year. License fees for salespersons and brokers are $120 and $165, respectively. Original licensees are fingerprinted and license renewal is required every four years.

In sales, or leases exceeding one year in length, of any new residential subdivisions consisting of five or more lots or units, DRE protects the public by requiring that a prospective purchaser or tenant be given a copy of the "public report." The public report serves two functions aimed at protecting purchasers (or tenants with leases exceeding one year) of subdivision interests: (1) the report discloses material facts relating to title, encumbrances, and related information; and (2) it ensures adherence to applicable standards for creating, operating, financing, and documenting the project. The commissioner will not issue the public report if the subdivider fails to comply with any provision of the Subdivided Lands Act.

The Department publishes three regular bulletins. The *Real Estate Bulletin* is circulated quarterly as an educational service to all current licensees. The *Bulletin* contains information on legislative and regulatory changes, commentaries, and advice; in addition, it lists names of licensees who have been disciplined for violating regulations or laws. The *Mortgage Loan Bulletin* is published twice yearly as an educational service to licensees engaged in mortgage lending activities. Finally, the *Subdivision Industry Bulletin* is published annually as an educational service to title companies and persons involved in the building industry.

DRE publishes numerous books, brochures, and videos relating to licensee activities, duties and responsibilities, market information, taxes, financing, and investment information. In July 1992, DRE began offering one-day seminars entitled "How to Operate a Licensed Real Estate Business in Compliance with the Law." This seminar, which costs $10 per attendee and is offered on various dates in a number of locations throughout the state, covers mortgage loan brokering, trust fund handling, and real estate sales.

The California Association of Realtors (CAR), the trade association joined primarily by agents and brokers working with residential real estate, is the largest such organization in the state; CAR projects a 1992 total membership of 126,000. CAR is often the sponsor of legislation affecting DRE. The four public meetings required to be held by the Real Estate Advisory Commission are usually scheduled on the same day and in the same location as CAR meetings.

MAJOR PROJECTS

CPIL Visits DRE. In March, Center for Public Interest Law intern Matt Wakefield spoke with several DRE officials regarding the Department's current projects and future goals. Highlights from those conversations include the following.

• According to DRE Commissioner Clark Wallace, DRE has no plans to propose a new license classification system based upon the various segments of the industry in which licensees currently practice. Under that type of system, applicants would be tested on the specific standards for the area(s) in which they intend to practice, as opposed to the current comprehensive test which is primarily aimed

at licensees who work in the residential sector. According to Wallace, any such proposal to modify or change the current licensing scheme would face resistance from the industry, which contends that licensees would feel they would have to obtain too many licenses in order to continue present activities.

• Wallace also noted that DRE's Real Estate Recovery Account has been paying out $1.5–$2 million per year to victims of fraud by licensees. Although he referred to the Account as the "reserve of last resort," Wallace acknowledged that the Department should be doing more to publicize the availability of the Account for consumers who have obtained a judgment against a licensee but are unable to obtain satisfaction of that judgment. *[12:1 CRLR 126]*

• DRE is considering changing its testing format, possibly within the next five to ten years, to a computerized testing format. Currently, DRE draws from a pool of 2,700 questions to use on the 150-question salesperson exam; 300 questions are used on the broker's exam.

• DRE Chief Deputy Commissioner John Liberator commented on the Department's Long-Range Plan for 1992–95. Under the plan, the general objective of DRE's Administrative Services Section is to provide financial management, personnel, electronic data processing, training, and business services, and to assist licensees and the public in examinations, licensing, education, and research activities; the general objective of DRE's Enforcement Section is to seek compliance with the Real Estate Law by investigating complaints and recommending action thereon in a consistent and equitable manner; the general objective of DRE's Legal Section is to administratively prosecute violations of the Real Estate Law and Subdivided Lands Law, provide in-house legal services to DRE, and process applications for payment from the Real Estate Recovery Account; and the general objective of DRE's Audits Section is to protect consumers through financial compliance audits of real estate licensees and subdivision developments.

• DRE legal counsel Larry Alamao explained that the Department receives approximately 10,000 complaints each year; according to Alamao, the most common complaint is from someone who has been subjected to rude or discourteous behavior by a licensee. Approximately 10% of the complaints received reach the legal counsel's office for formal disciplinary action; over one-third of those cases are subsequently settled. Cases which proceed to disciplinary action often involve negligence or misrepresentation by a licensee.

• According to Real Estate Recovery Account legal counsel Thomas Lasken, DRE receives approximately 120 applications each year for compensation from the Account; DRE pays on approximately 45% of the claims received. Claims are rejected if DRE determines that the consumer has not obtained a final judgment finding that a licensee committed fraud, misrepresentation, or deceit made with intent to defraud, among other things; if the consumer did not pursue someone else who is liable; or if the debt was discharged in bankruptcy. Lasken explained that 12% of licensees' fees are deposited in the Recovery Account. Under current law, a judgment creditor may recover only $20,000 from the Account per claim, per licensee. In addition, DRE will pay a maximum of $100,000 per licensee to satisfy all claims against that licensee. Since the Account's creation in 1964, DRE has paid out over 1,300 claims totalling approximately $17 million.

No Compensation for Self-Referrals. The Spring 1993 *Real Estate Bulletin* noted that a real estate broker is permitted to conduct his/her own escrows, under Financial Code section 17006(a)(4), provided he/she is acting in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required. However, the *Bulletin* reminded licensees that a broker may not compensate his/her salesperson for referring clients to the broker's escrow service. In such a case, DRE contends that both the salesperson and the broker may be subject to discipline.

DRE Rulemaking. On March 19, the Commissioner published notice of his intent to amend sections 2810.1, 2792.16, 2792.18, 2820.2, 2831, 2831.1, 2832.1, 2834, 2840, 2841, 2842.5, 2848, 2949.01, 2951, 3006, 3010, and 3010.5, repeal sections 2819.85, 2820.3, 2820.4, 2821.1, 2822.1, 2822.2, 2822.3, 2822.4, 2823, and 2823.1, and adopt new sections 2790.2, and 2840.1, Chapter 6, Title 10 of the CCR. Following is a summary of the proposed actions.

• ***Adoption of section 2790.2 and amendment of section 2810.1.*** Under Business and Professions Code section 11018.12, DRE may issue a conditional public report even though a final map has not been approved by the local legislative body if (1) the application for the final public report is qualitatively complete and all requirements for issuance of a final public report have been met except for certain specified unmet requirements for issuance, or (2) the application for the final public report is not qualitatively complete but DRE determines that any unmet requirements for issuance of a final public report are likely to be timely satisfied. Proposed section 2790.2 would—among other things—authorize the Commissioner to issue a conditional public report if the application for the final public report for the subdivision is qualitatively complete except for one or more uncorrected deficiencies or inadequacies or unmet requirements which the Commissioner determines are likely to be corrected or met during the term of the conditional public report. The conditional public report could be issued only if the application is sufficiently qualitatively complete to establish the material elements of the set-up of the offering to be made under authority of the conditional public report.

Amendments to section 2810.1 would allow such conditional public reports for time-share projects.

• ***Amendment of section 2792.16.*** Existing section 2792.16(d) provides that the governing board of a homeowner association may not increase a regular annual assessment by an amount per subdivision interest which is more than 20% greater than the regular assessment for the immediately preceding fiscal year without approval of a majority of a quorum of the homeowners at a meeting, or election of the owners; the section makes no reference to the prior distribution of specified financial information and provides no definition of the term "quorum." The proposal would amend section 2792.16(d) to make it consistent with Civil Code section 1366(a) by requiring the governing body to prepare and distribute to all members a copy of the association's operating budget containing specified information and obtain the approval of more than 50% of the owners of the association in an election which meets the requirements of specified statutes prior to any increase in assessments.

• ***Amendment of section 2792.18.*** Existing section 2792.18 provides for various classes of voting rights for homeowner associations. DRE's proposed amendment would clarify the applicability of such provisions by eliminating superfluous language which was inadvertently retained following a recent amendment to the section.

• ***Repeal of section 2819.85.*** Existing section 2819.85 provides for the submission of a copy of any advertising proposed to be used with the offering of an interest in a land project defined as a subdivision

consisting of a large number of unimproved lots located in rural area and offered for residential purposes. DRE proposes to repeal this requirement on the basis that it is no longer necessary.

• ***Amendment of section 2820.2 and repeal of sections 2820.3, 2820.4, 2821.1, 2822.1, 2822.2, 2822.3, 2822.4, 2823, 2823.1.*** Presently, sections 2820 through 2823.1 establish objectives, criteria, and procedures for the evaluation of the impact upon the environment of subdivision projects for which public reports must be obtained from DRE under the Subdivided Lands Act, Business and Professions Code section 11000 *et seq.* Under existing section 2820.2, the issuance of a final or preliminary public report by DRE under the Subdivided Lands Act constitutes the approval of a discretionary project for purposes of the California Environmental Quality Act. Accordingly, any subdivision project that has not been subject to environmental evaluation by a local agency is subject to such evaluation conducted by DRE under the procedures delineated in sections 2820 through 2823.1.

This proposal would amend section 2820.2 to provide that issuance of a final or preliminary public report does not constitute the approval of a discretionary project, so that subdivision projects that have not been subject to environmental evaluation by a local agency would no longer be subject to such evaluation conducted by DRE. DRE also proposes to repeal the existing environmental impact evaluation procedures set forth in sections 2820.3, 2820.4, 2821.1, 2822.2, 2822.3, 2822.4, 2823, and 2823.1. Under this proposal, the criteria and procedures required by Public Resources Code section 21082 would be provided by existing sections 2820, 2820.1, 2821, and 2822, and section 2820.2 as amended.

• ***Amendment of sections 2831 and 2831.1.*** Existing section 2831 provides that every broker must keep a record of all trust funds received, but generally relates that requirement only to those funds maintained in the broker's trust fund accounts. Existing section 2831.1 provides that every broker must keep a separate record of each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account, and interest, if any, earned on the funds deposit. DRE's proposed amendment to sections 2831 and 2831.1 would clarify the duty of a broker under each regulation to maintain appropriate records of all trust funds received, whether or not they are deposited into the broker's trust account.

• ***Amendment of section 2832.1.*** This section currently prohibits a real estate broker from making a disbursement from his/her trust fund account if it would "short" the account, without prior written consent of all the owners of the funds in the account; such a shortage is tantamount to the lending of one person's funds to another. DRE's proposed amendment would add to the existing regulation a requirement that a broker obtain the written consent of all owners of funds in the trust fund account prior to making any disbursement which would create a shortage. The proposal would clarify the fiduciary duty of a broker to disclose to that principal all material facts surrounding the transaction so that a principal can make an intelligent and knowing choice on his/her behalf.

• ***Amendment of section 2834.*** This section currently specifies the persons, other than the broker, who may be authorized to make a withdrawal from an individual and corporate broker's trust fund account. The regulation specifies that the authorization must be in writing when the broker is an individual. However, the regulation does not impose a similar requirement on the designated officer of a corporate broker, who is responsible for the supervision and control of all the activities conducted on behalf of the corporation by its officers and employees as necessary to ensure full compliance with the Real Estate Law. DRE's proposed amendment to section 2834 would provide that there must also be a written authorization from the designated officer of the corporation as a condition of allowing someone other than the designated officer to make a withdrawal from the trust account. As such, the requirement for a written delegation of authority to make a withdrawal from a trust account would be the same for both individual brokers and corporate brokers.

• ***Amendment of sections 2840 and 2841 and adoption of section 2840.1.*** Existing law requires real estate brokers who negotiate loans secured by a lien on real property to provide a disclosure statement to the borrower before the borrower becomes obligated on the loan. Business and Professions Code section 10241 specifies the information required to be included as part of the disclosures; section 2840, Title 10 of the CCR, contains the current form approved by the Commissioner referred to in section 10241. DRE proposes to amend the present regulation to include, among other things, a second alternative approved form. The purpose for approval of the latter form is to allow lenders required to provide a Good Faith Estimate under federal law to be able to also meet the requirements for disclosure under Business and Professions Code sections 10240 and 10241 by using just one form.

• ***Amendment of section 2842.5.*** AB 3342 (Chapter 1055, Statutes of 1992) amended Business and Professions Code section 10240 to change the timeframe in which a real estate broker must deliver certain loan disclosures to the borrower; prior to its amendment, section 10240 required delivery of the statement prior to the time when the borrower becomes obligated to complete the loan. Regulatory section 2842.5, which implements the timing of the delivery of the statement, currently provides that the licensee shall not obtain the signature of a prospective borrower on any listing or other instrument which purports to obligate the prospective borrower in any respect until a completed disclosure statement has been signed by the prospective borrower. DRE's proposed amendments to section 2842.5 would bring the section into conformity with the new law under AB 3342.

• ***Amendment of section 2848.*** Section 2848 specifies certain types of advertising which, if done by a real estate broker in connection with arranging a mortgage loan, are considered false, misleading, or deceptive. DRE's proposed amendments would provide that a representation of a simple annual interest rate without an equally prominent disclosure of the annual percentage rate is considered false, misleading, or deceptive.

• ***Amendment of section 2949.01.*** Current law requires real estate brokers who negotiate a specified number and amount of loans in one calendar year or who collect a specified amount of money in a calendar year while servicing the loans to submit specified annual and quarterly reports to DRE; section 2949.01 specifies the format for submitting such reports. DRE's proposed amendment would change certain footnote references in the regulation; according to DRE, these footnotes are not currently in the correct location.

• ***Amendment of section 2951.*** Existing section 2951 provides that the provisions of certain regulations shall apply to the handling of funds and keeping of records by brokers not licensed under the Escrow Law but who are acting in the capacity of an escrow holder in certain transactions in which the broker is performing acts for which a real estate license is required. DRE proposes to amend section 2951 to include section 2831.2, requiring reconciliation of records, as one of the regulations which shall apply to such activity.

• ***Amendment of sections 3006, 3010, and 3010.5.*** Existing law requires a real estate licensee, when renewing his/her license, to complete 45 classroom hours in

approved continuing education (CE) courses. Existing law authorizes the Real Estate Commissioner to adopt standards for and approve CE courses. Current regulations do not authorize denial of approval for a specific course offering based upon prior violations. For example, a course sponsor could completely change the content of a course and refuse to give refunds to students; if that course is a one-time offering, there would be no remedy for the sponsor's violation. More importantly, if that sponsor then applies for approval of a different course, current regulations do not allow DRE to deny the application even though the likelihood of a repeat violation is high. The proposed rulemaking would allow the Commissioner to deny approval to a CE applicant based upon the applicant's prior CE violations; the proposal would also allow the Commissioner to withdraw approval of a previously-approved course based upon violations occurring in another course offered by the same sponsor.

On May 4, DRE conducted a public hearing on these proposals. After making minor amendments, the Commissioner adopted all of the proposed rules; DRE is currently compiling the rulemaking file for submission to the Office of Administrative Law (OAL).

Other DRE Rulemaking. On April 1, OAL approved DRE's proposal to adopt new sections 2814, 2815, 2817, 2835, and 2847.3, and amend sections 2715, 2742, 2770.1, 2792.16, 2792.17, 2792.22, 2792.23, 2800, 2806, and 2970, Chapter 6, Title 10 of the CCR. However, OAL disapproved DRE's proposed amendments to section 2792.20 and part of the amendments to section 2806; DRE does not plan to pursue those two actions any further. Among other things, the approved regulatory action specifies the standards, including disclosure requirements, applicable to qualified resort vacation club projects; describes certain short-term deposits which do not constitute commingling with the meaning of Business and Professions Code section 10176(e); requires any corporation which is licensed under the authority of Business and Professions Code section 10211 to remain at all times in good legal standing with the Office of the Secretary of State; and specifies acceptable terms for use by real estate brokers in advertising in California for a loan secured by real property. *[13:1 CRLR 88]*

LEGISLATION

SB 914 (Leonard). Existing law requires the Director of the Office of Real Estate Appraisers to adopt regulations governing the process and procedure of applying for a real estate appraiser license and real estate appraiser certificate, including necessary experience requirements. *[11:4 CRLR 140]* This bill would provide that a holder of a valid real estate broker license shall be deemed to have completed appraisal license application requirements upon proof that he/she has accumulated 1,000 hours of experience in the valuation of real property. *[A. CPGE&ED]*

AB 647 (Frazee). Existing law requires that an application by an aggrieved person to DRE for payment from the Recovery Account specify that the application was mailed or delivered to the Department no later than one year after the underlying judgment became final. As introduced February 23, this bill would change that requirement to no later than one year after the most recent judgment became final. *[A. F&I]*

AB 1535 (Caldera). Existing law requires specified trust funds reports to be filed with the Real Estate Commissioner by real estate brokers who negotiate or collect payments or provide servicing with respect to certain loan transactions or real property sales contracts if the annual dollar volume thereof exceeds a prescribed threshold. Existing law also requires real estate brokers who are exempt from making these trust funds reports to the Commissioner, because their annual dollar volume does not exceed that threshold, to complete these reports according to specified requirements, and retain them on file at the broker's office, where they would be available for inspection by representatives of the Commissioner on 24 hours' notice. As amended April 13, this bill would change the requirements for completing those reports. *[S. B&P]*

AB 1718 (Peace). Under existing law, it is unlawful for a real estate broker to employ an unlicensed person to perform acts for which a license is required, for an unlicensed person to perform specified acts for which a real estate license is required, and for a person to advertise as a real estate broker without being licensed. As amended May 17, this bill would authorize the Real Estate Commissioner to levy an administrative fine for a violation of those provisions after first having issued a desist and refrain order, as specified. The fines would be credited to the continuously appropriated Recovery Account in the Real Estate Fund. *[A. F&I]*

AB 1846 (Peace). Under existing law, provisions regulating transactions in trust deeds and real property sales contracts, real property securities dealers, and real property loans, as specified, do not apply to any person whose business is that of acting as an authorized representative, agent, or loan correspondent of any person or employee thereof doing business relating to specified state and federal financial institutions and other entities, including pension trusts, or when making loans qualified for sale to those institutions. As amended April 28, this bill would additionally provide that those provisions do not apply to any person who is an approved lender, mortgagee, seller, or servicer for specified federal agencies or entities when making a loan to be sold to, or serviced on behalf of and subject to audit by, any of those agencies or entities with respect to those loans. *[A. Floor]*

AB 1902 (Knowles). Existing law requires an applicant for a real estate broker license to successfully complete one of several specified courses on subjects relating to real estate. As amended May 17, this bill would include among the list of specified courses a course on mortgage loan brokering and lending.

Existing law requires real estate licensees to comply with continuing education requirements. These include requiring an applicant for license renewal to successfully complete 45 clock hours of CE on specified subjects. This bill, upon the initial renewal of all real estate licenses after December 31, 1994, would require a real estate broker, as part of the 45 clock hours of CE, to complete a three-hour course in trust fund accounting and handling and a three-hour course in fair housing. This bill would also require a real estate broker, for all subsequent renewals after the initial renewal, to successfully complete 45 clock hours of CE in specified courses, during the four-year period preceding the renewal application. *[A. Floor]*

AB 2151 (Aguiar). Existing law requires any defined representative of an equity purchaser, deemed to be the agent, employee or both of an equity purchaser, to provide specified proof of real estate licensure and bonding to the equity seller, and certain sworn statements regarding this licensure and bonding to all parties to the contract. As introduced March 5, this bill would exclude certain representatives who are licensed real estate professionals from these requirements. *[A. Jud]*

AB 2293 (Frazee). Under existing law, real estate brokers engaging in certain activities with respect to transactions involving real property that meet certain criteria are subject to specified requirements as to advertising, reporting, and trust funds. As amended May 13, this bill would remove the specified requirements relating to advertising.

Existing law requires a real estate broker, prior to the use of any proposed ad-

vertisement in connection with specified activities, to submit a copy of the advertising to the Real Estate Commissioner for clearance. Existing law exempts from this requirement advertising that is used exclusively in connection with an offering authorized by permit issued pursuant to provisions applicable to real property securities dealers or the corporate securities law. This bill instead would authorize a broker to submit a copy of the advertising to the Commissioner for approval, subject to a fee. The bill would delete the exemption relating to real property securities dealers and corporate securities.

Existing law regulates certain out-of-state land promotions and defines the term "accessible urban subdivision" for those purposes. Existing law, with specified exceptions, makes the sale or lease, or offering for sale or lease, of lots in out-of-state subdivisions subject to provisions regulating real property securities dealers. This bill would delete the term "accessible urban subdivision" and instead would define and regulate the sale or lease, or offering for sale or lease, of lots in an "improved out-of-state residential subdivision" and an "improved out-of-state timeshare project." The bill would revise the applicability of the law regulating real property securities dealers to those out-of-state land promotions. The bill would also provide that with respect to out-of-state land promotions the final permit issued shall be for one year. The bill would make changes respecting service of process on nonresident applicants.

Existing law authorizes the Commissioner to issue a preliminary permit for an accessible urban subdivision. This bill instead would refer to a preliminary permit for an improved out-of-state residential subdivision and authorize the Commissioner to issue a conditional permit for an improved out-of-state residential subdivision.

Existing law makes it unlawful for owners or subdividers to use or distribute any advertisement concerning subdivided lands which contains a false or misleading statement. This bill would allow owners, subdividers, or their agents or employees, prior to the use, publication, and distribution of any advertisement concerning subdivided lands to submit the advertisement to DRE for approval, accompanied by a fee. *[A. LGov]*

SB 172 (Deddeh). Existing law requires a real estate broker who negotiates a loan secured by a lien on real property to deliver to the borrower a written statement containing specified information concerning the loan. As amended May 4, this bill would require specified notices prior to a borrower becoming obligated on any loan secured by a dwelling that provides for balloon payments if any agreement includes a promise, representation, or similar undertaking to extend or seek the extension of the term of the loan or refinancing of the loan. *[S. Floor]*

SB 945 (Hart). Existing law requires every licensed real estate broker to have and maintain a definite place of business in California to serve as his/her office for the transaction of business. As amended April 12, this bill would exempt from that requirement a licensed real estate broker whose licensable California activities are limited to collecting payments or performing services, in connection with loans secured by a first lien on real property, for specified investors. The bill would also provide that a license issued to a real estate broker operating from a location outside California pursuant to this exemption shall be conditioned upon the licensee agreeing in writing to either (1) make the licensee's books, accounts, and files available to the Commissioner in California, or (2) pay the reasonable expenses for travel, meals, and lodging of the Commissioner incurred during any investigation made at the licensee's location outside California. *[S. Floor]*

SB 307 (Beverly). Under existing law, if private mortgage insurance or mortgage guaranty insurance is required as a condition of a loan secured by a deed of trust or mortgage on real property, the lender or person making or arranging the loan is required to notify the borrower whether or not the borrower has the right to cancel the insurance, and if the borrower has that right, to notify the borrower in writing of certain information. Under existing law, except when prohibited by a statute, regulation, or rule of an institutional third party applicable to notes or evidence of indebtedness secured by a deed of trust or mortgage and purchased by the institutional third party, if a borrower requests termination of private mortgage insurance or mortgage guaranty insurance issued as a condition to the extension of credit in the form of a loan evidenced by a note or other evidence of indebtedness secured by a deed of trust or mortgage on real property, and if specified conditions are satisfied, the borrower may terminate future payments.

As amended May 17, this bill would specify that the latter provision does not apply to any note or evidence of indebtedness providing certain private mortgage insurance or mortgage guaranty insurance where the premiums are paid by the lender and not charged to the borrower separately and in addition to the interest payments on the note or evidence of indebtedness. The bill would provide that if representations are made by the lender or the person arranging the loan to the borrower with respect to the deductibility of mortgage interest for income tax purposes, then the lender or the person arranging the loan shall advise the borrower in writing that the borrower should consult with the borrower's tax advisors with respect to the deductibility. The bill would also provide that if the borrower does not have the right to cancel the insurance because the premiums are paid by the lender, the lender or the person making or arranging the loan shall notify the borrower in writing, at the time of application for the loan, that the lender will purchase mortgage insurance for the lender's benefit, that the borrower does not have the right to cancel the insurance, and that cancellation of the insurance will not reduce the borrower's monthly obligation. *[S. Jud]*

AB 1195 (Moore). Existing law requires certain instruments, before they are recorded, to be acknowledged by the person executing them and the acknowledgement certified as prescribed by law, except as specified. Existing law also permits the execution to be proved by a subscribing witness or as provided in specified provisions of law and certified as prescribed by law. As amended May 3, this bill would exempt any mortgage, deed of trust, or security agreement from the provision permitting proof of execution of an instrument by a subscribing witness or as provided in specified provisions of law. *[A. Floor]*

LITIGATION

In ***Carleton v. Tortosa***, No. C013153 (Mar. 25, 1993), the Third District Court of Appeal considered whether a real estate broker had a duty to advise her client that the client's real estate transactions could have adverse tax consequences. Plaintiff Ernest Carleton, an experienced real estate investor, employed defendant Mary Tortosa, a real estate broker, in the sale of two residential rental properties and the purchase of two residential rental properties. Carleton executed listing agreements, real estate disclosure statements, and real estate purchase contracts which advised him that Tortosa's responsibilities as a broker did not include giving advice on tax consequences of the transactions. After the transactions were completed, Carleton was informed by his accountant that he had incurred a tax liability of approximately $34,000 because the transactions were not structured to qualify as tax-deferred exchanges under Internal Revenue Code section 1031.

Carleton then brought this professional negligence action, alleging in substance that Tortosa "failed to exercise reasonable care and skill in undertaking her duties as a broker" by neglecting to warn him that his transactions could have adverse tax consequences and by failing to structure the transactions as tax-deferred exchanges. Tortosa filed a motion for summary judgment on the ground "plaintiff cannot establish duty or breach of duty as a matter of law." The trial court granted the motion, holding that the nature of the fiduciary relationship between Carleton and Tortosa did not include a separate responsibility on the part of Tortosa to advise Carleton on tax matters, but rather specifically excluded the provision of tax advice from the scope of Tortosa's duty to Carleton.

On appeal, the Third District affirmed. Among other things, the court rejected Carleton's claim that the use of "boilerplate disclaimers" in the listing agreements, disclosure forms, and purchase contracts stating that a real estate broker is not responsible for giving tax advice did not relieve Tortosa of the duty to warn Carleton that his proposed transactions had substantial tax consequences. The court disagreed, finding that the documents Carleton signed explicitly informed him that he should consult an appropriate professional if he desired legal or tax advice; advised him to carefully read all agreements to assure that they adequately express his understanding of the transaction; and reiterated that a real estate agent is a person qualified to advise about real estate, and that if legal or tax advice is desired, he should consult a competent professional. According to the court, these documents negated Carleton's claim of duty.

In response to Carleton's claim that the "boilerplate" language in his contracts stating that Tortosa was not responsible for giving tax advice was adhesive and thus should be disregarded, the court found that even if a contract is adhesive in nature, it remains fully enforceable unless (1) all or part of the contract falls outside the reasonable expectations of the weaker party, or (2) it is unduly oppressive or unconscionable under applicable principles of equity. Referring to Civil Code section 2375, the court noted that the legislature determined that buyers and sellers of real estate should rely on professionals other than real estate brokers for tax advice; accordingly, the court found that any expectation on the part of Carleton that Tortosa would provide such information or "issue-spot" tax problems was not reasonable. Moreover, the court held that none of the contractual terms were either "unduly oppressive" or "unconscionable."

Carleton alternatively contended that any contractual provision relieving real estate brokers of a duty to recognize and alert a client to the potential tax consequences of a transaction violates public policy. According to Carleton, "current real estate practice" dictates that a real estate professional has a duty to recognize tax consequences of a transaction and to structure tax-deferred exchanges when appropriate. Carleton further claimed that, because brokers hold themselves out to the public as possessing special knowledge in real estate transactions and "given the evolution of the real estate profession into new and emerging fields," public policy requires brokers to have a duty to recognize and advise clients of the tax consequences of their transactions and of the need for tax-deferred exchanges. According to the court, this contention fails because the legislature has determined that public policy expects sellers and buyers to obtain tax advice from professionals other than real estate brokers. Civil Code section 2375 mandates that buyers and sellers be told: "A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional." In light of this provision, the court "decline[d] to conclude that public policy requires real estate brokers to provide tax advice when the Legislature has determined that such advice should be sought from other competent professionals."

DEPARTMENT OF SAVINGS AND LOAN

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The Department of Savings and Loan (DSL) is headed by a commissioner who has "general supervision over all associations, savings and loan holding companies, service corporations, and other persons" (Financial Code section 8050). DSL holds no regularly scheduled meetings, except when required by the Administrative Procedure Act. The Savings and Loan Association Law is in sections 5000 through 10050 of the California Financial Code. Departmental regulations are in Chapter 2, Title 10 of the California Code of Regulations (CCR).

MAJOR PROJECTS

LAO Recommends Major Changes to DSL. In its *Analysis of the 1993–94 Budget Bill*, the Legislative Analyst's Office (LAO) noted that the Wilson administration has proposed total expenditures of $691,000 in 1993–94 for DSL; this is $2.3 million, or 77%, less than estimated current-year expenditures. According to LAO, the proposed budget reflects the administration's decision to reduce the regulatory and administrative functions of DSL by downsizing it from a department to office status within the Business, Transportation and Housing Agency, and reducing authorized staff from 38 positions in 1992–93 to three positions in 1993–94. LAO explained that the Administration's decision is based in part on the 1989 enactment of the federal Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which had the impact of significantly reducing the number of state-chartered savings and loans; the number of state-chartered associations has declined from 130 in 1989–90 to 27 at the end of 1992. LAO also noted that the decline in assessment revenues (which are determined on the basis of an association's asset size) which support DSL's activities has been even more significant, as a proportionally greater number of the large associations have ceased to be state-chartered; the current assessment roll consists primarily of small associations that pay only the minimum assessment of $20,000 per year.

LAO also noted that a state charter no longer confers a significant benefit because FIRREA removed most economic advantages of being licensed by the state. According to LAO, there is no need and no benefit for the state to continue a regulatory program that has been, for all practical purposes, supplanted by the federal government; under FIRREA, federal regulators examine all S&Ls—including those that are state-chartered—for compliance with all applicable federal laws and regulations. These examinations make the state's examination virtually duplicative of, and secondary in importance to, federal examinations.

In light of these facts, LAO recommended that legislation be enacted by July 1, to become effective January 1, 1994, terminating the state-chartered savings and loan association program; existing state-chartered S&Ls could convert to another charter authorized to operate in California—such as federally-chartered S&Ls, state-chartered thrifts, or state- or federally-chartered banks.

However, if the legislature decides to continue the state-charter program, LAO recommended that DSL inform the legislature on how the proposed budgetary reductions will be implemented, and how its proposal will affect the state's ability to