Commissioner finds they are misleading. As introduced March 1, this bill would specifically authorize the Insurance Commissioner to examine policy forms and to prohibit the use of forms that are deceptive or misleading. *[S. InsCl&Corps]*

AB 1782 (Tucker). Existing law prohibits certain discriminatory practices by admitted insurers, as specified. As amended July 8, this bill would create, in DOI, an Insurance Availability Study Commission for specified purposes. The bill would specify membership and require a report to be issued to the Governor, legislature, and Insurance Commissioner no later than October 1, 1995. The bill would appropriate $500,000 from the Insurance Fund for specified purposes. These provisions would be repealed on January 1, 1996. *[S. InsCl&Corps]*

SB 286 (Presley), as amended August 19, is no longer relevant to the Department of Insurance.

LITIGATION

On December 8, the Second District Court of Appeal handed a major victory to Proposition 103 supporters in ***Amwest Surety Insurance Company v. Wilson***, 20 Cal. App. 4th 1275, on the issue of the extent to which the legislature may amend the provisions of law added by Proposition 103, the insurance rate reform initiative passed by the voters in 1988. Section 8(b) of the initiative states that the legislature may amend it only to "further its purposes." In this matter, the Commissioner and Proposition 103 sponsor Voter Revolt contend that the legislature's passage of AB 3798 (Johnston) (Chapter 562, Statutes of 1990), which exempted surety companies from the rollback and prior approval provisions of Proposition 103, does not "further the purposes" of the initiative and is thus beyond the authority of the legislature. *[13:2&3 CRLR 130; 11:3 CRLR 133–34]*

In a 2–1 decision, the Second District found that the proposition expressly applies to "all insurance on risks or on operations in this state, except those listed in Section 1851." At the time Proposition 103 was enacted, Section 1851 exempted certain types insurance from the ratesetting provisions of the initiative, but not surety insurance. Thus, the court found that "[t]he plain meaning of Proposition 103 is that surety is subject to its requirements....The Legislature's 'finding' that AB 3798 'furthers the purpose of Proposition 103 by clarifying the applicability of the proposition to surety insurance,' fails to rationally justify the Legislature's action. It in effect declares that Proposition 103 was not *intended* to cover surety, despite its clear language to the contrary. On the other hand, if the Legislature concluded that Proposition 103 rate regulations *should not* apply to surety, then it is evident the amendment does not further the purposes of the initiative as adopted by the people. In either case, the conclusion is that AB 3798 is invalid" (emphasis original).

Significantly, the court noted that the legislature's "plenary" power is "subject to the exception of the powers of initiative and referendum which are reserved to the people" under article II, section 10(c) of the California Constitution. The court cited a long line of California Supreme Court cases which have "jealously guarded" the initiative process and the people's initiative power, and quoted *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208 (1978) for the rule that "the power of initiative must be liberally construed...to promote the democratic process" ("the initiative is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end").

At this writing, the insurance industry is expected to petition the California Supreme Court for review of the *Amwest* decision. More than AB 3798 is at stake for the industry. Last year, insurers succeeded in convincing the legislature to pass and the Governor to sign three other bills which arguably fail to "further the purposes" of Proposition 103: AB 1086 (Campbell) (Chapter 1219, Statutes of 1993), which—despite Proposition 103's application of California antitrust law to insurers—permits insurers to circulate among themselves data collected by industry trade associations; SB 871 (Johnston) (Chapter 646, Statutes of 1993), which requires the Insurance Commissioner to act on rate change applications within 180 days or the changes are deemed approved; and SB 905 (Maddy) (Chapter 1248, Statutes of 1993), which allows insurance agents and brokers to keep the 15%–25% commissions they earned during the 1988–89 rollback year. *[13:4 CRLR 117]* Both Commissioner Garamendi and the Proposition 103 Enforcement Project are considering challenges to the three 1993 bills.

Another major Proposition 103 case is still pending before the California Supreme Court. The final brief in ***20th Century Insurance Company v. Garamendi***, No. S032502, was filed on August 25, but—at this writing—oral argument has yet to be scheduled. The *20th Century* case is a direct appeal from Los Angeles County Superior Court Judge Dzintra I. Janavs' February 1993 invalidation of the Commissioner's regulations implementing Proposition 103's rollback requirement. *[13:4 CRLR 122; 13:2&3 CRLR 139–40]*

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 1993, 255,158 salespersons and 115,974 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 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

DRE Rulemaking Update. On November 8, the Office of Administrative Law (OAL) approved the Commissioner's proposed amendments to sections 2810.1, 2792.16, 2792.18, 2820.2, 2831, 2832.1, 2834, 2840, 2841, 2842.5, 2848, 2949.01, 2951, 3006, 3010, and 3010.5, repeal of sections 2819.85, 2820.3, 2820.4, 2821.1, 2822.1, 2822.2, 2822.3, 2822.4, 2823, and 2823.1, and adoption of section 2840.1, Chapter 6, Title 10 of the CCR. Among other things, the regulatory action, which became effective on December 8, revises the procedures necessary to increase a regular assessment of members of a homeowner's association, clarifies the applicability of provisions governing voting rights, eliminates the requirement of submitting advertising prior to distribution, provides that the issuance of a final or preliminary public report does not constitute approval of a discretionary project, clarifies that section 2831 applies to all trust funds, provides that a broker must obtain written consent of all owners of funds in an account before making any disbursement which would create a shortage, and makes other changes affecting the authority to make withdrawals, mortgage loan disclosure, advertising, and continuing education. Proposed new section 2790.2, which was originally submitted with these regulations, was withdrawn by DRE prior to OAL's determination. *[13:4 CRLR 125; 13:2&3 CRLR 141]*

LEGISLATION

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 647 (Frazee). Existing law requires that an application by an aggrieved person to DRE for payment from the Real Estate 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 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 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 advertisement 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 distribu-

tion of any advertisement concerning subdivided lands to submit the advertisement to DRE for approval, accompanied by a fee. *[A. LGov]*

SB 172 (Russell). 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 August 31, 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. *[A. F&I]*

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 July 13, 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. *[A. W&M]*

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 June 7, 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 the lender or the person arranging the loan makes any representation to the borrower with respect to the deductibility of the payment of the mortgage insurance costs for income tax purposes, that person shall also 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 allow a lender or other person arranging a loan who offers private mortgage insurance or mortgage guaranty insurance to make that insurance available to the borrower, as specified, and if the insurance is required for the loan and both types are offered, to provide a specified comparison. 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. *[A. F&I]*

LITIGATION

In ***California Real Estate Loans, Inc. v. Clark Wallace, as Real Estate Commissioner***, No. A059552 (Sept. 29, 1993), the First District Court of Appeal considered an appeal by California Real Estate Loans, Inc. (CREL) from a judgment denying its petition for writ of mandate, in which it challenged the revocation of its real estate broker's license by the Real Estate Commissioner. The revocation was based on the Commissioner's determination that a civil judgment had been entered against CREL based on fraud, misrepresentation, or deceit within the meaning of Business and Professions Code section 10177.5, which states that when a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation, or deceit with reference to any transaction for which a license is required, the Commissioner may suspend or revoke the license of such real estate licensee. In particular, the First District considered CREL's argument that the Commissioner's action violates Business and Professions Code section 10179, which in some circumstances requires "guilty knowledge" by a broker before the broker may be disciplined for the wrongful acts of its agents.

CREL was licensed as a corporate real estate broker and acted primarily as a residential real estate loan broker; Glen Russell, a licensed real estate salesperson, was an employee, officer, and shareholder of CREL. Russell was contacted by Judith Smith, a real estate salesperson employed by First Marin Realty, Inc., to arrange a second mortgage for the purchase of a home by her client, Steven Reiner. Despite Russell's assurances to Reiner that the loan would be approved and funded by the close of escrow, it was not; eventually, when the loan was approved, the interest rate was higher than that quoted by Russell. Reiner sued Russell, CREL, Smith, and First Marin for fraud and breach of contract. After a court trial, judgment was entered in favor of Reiner and against all four defendants; Reiner was awarded general damages, punitive damages, and a refund of the real estate loan commission paid to CREL and Russell. The trial court's decision was affirmed on appeal in an unpublished decision.

DRE filed an accusation against Russell, CREL, Smith, and First Marin, alleging that cause for license suspension or revocation existed pursuant to section 10177.5. Smith and Russell stipulated to discipline without a hearing. DRE held an administrative hearing on the accusation against CREL and First Marin. The administrative law judge issued a proposed decision finding that the judgment against CREL was clearly based on fraud, misrepresentation, or deceit under section 10177.5, and proposing the revocation of CREL's license; the accusation against First Marin was subsequently dismissed. The Commissioner adopted the proposed decision, except for one condition against CREL. CREL petitioned for a writ of mandate directing the Commissioner to vacate his decision and dismiss the accusation. The trial court denied the petition, and judgment was entered against CREL; the court noted that the DRE Commissioner concluded that the underlying judgment against CREL clearly satisfied the requirements of section 10177.5. Although the judgment itself did not mention fraud, misrepresentation, or deceit, the trial court's statement of decision in that action and the appellate court's unpublished opinion affirming the judgment confirm the Commissioner's conclusion. The trial court found that Russell and CREL, as

licensed loan brokers and agents, had a fiduciary duty to Reiner which they breached in several ways; the trial court listed instances of Russell's misrepresentation of, or failure to disclose, material facts, in reckless disregard of Reiner's rights. When the First District affirmed the underlying action, it held that the evidence of "multiple instances of malfeasance" by Russell supported the finding that Russell and CREL breached their fiduciary duty.

On appeal in the disciplinary matter, CREL argued that a broker may not be disciplined under section 10177.5 when its liability in the underlying action is vicarious. CREL's argument was based on Business and Professions Code section 10179, which provides that no violation of any of specified provisions by any real estate salesperson or employee of any licensed real estate broker shall cause the revocation or suspension of the license of the employer unless it appears upon a hearing by the Commissioner that the employer had "guilty knowledge" of such violation. CREL argued that since there was no evidence that it had "guilty knowledge" of Russell's misconduct, revocation of its license violated section 10179.

In affirming the trial court's decision, the First District noted that when an accusation is based on disciplinary charging statutes that condition discipline upon a wrongful act or omission by a licensee, the act or omission must be proved at an administrative hearing; however, when an accusation is based on section 10177.5, the express language of the statute makes the underlying judgment itself the operative fact upon which the disciplinary action is imposed, not the acts or omissions of the licensee which led to that judgment. Thus, the court noted that if the elements of fraud have been proved in the civil action, collateral estoppel principles bar the licensee from attempting to relitigate those facts at the administrative proceeding.

The court noted that section 10177.5 is stated in absolute terms: when a final judgment is obtained against any real estate licensee, the Commissioner may suspend or revoke the license of such real estate licensee—the statute does not exempt judgments against a broker based on vicarious liability. Therefore, the court noted that although statutes on similar subjects must be considered together, section 10179 cannot be read to limit or qualify section 10177.5. According to the court, section 10179 requires guilty knowledge by a broker before a violation of specified provisions by the broker's salesperson can cause revocation or suspension of the broker's license; the ordinary common sense meaning of the term "violation" is a failure to comply with rules or requirements; and an accusation based on section 10177.5 is based on the existence of a judgment against a licensee, not on a "violation" of the charging statutes.

The First District also addressed CREL's claim that the Commissioner did not file a timely accusation within the statute of limitations. Business and Professions Code section 10101 requires the accusation to be filed not later than three years from the occurrence of the alleged grounds for disciplinary action, unless the acts or omissions with which the licensee is charged involve fraud, misrepresentation or a false promise, in which case the accusation shall be filed within one year after the date of discovery by the aggrieved party of the fraud or within three years after the occurrence thereof, whichever is later. CREL acknowledged that the accusation in this case was filed within three years of the date the judgment against it became final; nevertheless, CREL contended that the accusation was not timely, reasoning that the event beginning the limitations period is the licensee's act of misconduct, not the date of final judgment. In rejecting CREL's argument, the court noted that because the ground for license revocation in this case was the final civil judgment against CREL, not the acts or omissions underlying that judgment, the accusation was timely filed.

On December 30, the California Supreme Court denied CREL's petition for review of the First District's decision.

DEPARTMENT OF SAVINGS AND LOAN

Interim Commissioner:
Keith Paul Bishop
(213) 897-8202

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). 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). The Department, which has been recently downsized by the Wilson administration *[13:4 CRLR 128]*, now consists of three employees and regulates only 15 state-chartered S&L institutions.

LEGISLATION

SB 202 (Deddeh). Existing law provides that no savings association or subsidiary thereof, without the prior written consent of the Savings and Loan Commissioner, shall enter into certain specified transactions. As introduced February 4, this bill would instead provide that no savings association or subsidiary thereof, without the prior written consent of the Commissioner, and except as otherwise permitted by law, shall enter into those specified transactions. *[S. BC&IT]*

SB 161 (Deddeh). Existing law requires financial institutions to furnish depositors, if not physically present at the time of the initial deposit into an account, with a statement concerning charges and interest not later than 10 days after the date of the initial deposit. As introduced February 1, this bill would instead require the statement to be furnished not later than seven business days after the date of the initial deposit. With respect to an increase in the rate of account charges or a variance in the interest rate, the bill would reduce the notice time from fifteen days prior to date of change or variance to seven business days.

The bill would also make technical, clarifying changes in provisions specifying the maximum percentage of assets that an association chartered by this state under the Savings Association Law, including a savings bank, may invest in specified loans made for agricultural, business, commercial, or corporate purposes. *[S. BC&IT]*

AB 320 (Burton). Existing law does not prescribe interest rates for bank credit card accounts, but prohibits defined usurious interest rates for any loan or forbearance made by a nonexempt lender. As introduced February 4, this bill would prescribe a maximum interest rate or finance charge which could be charged on credit card accounts issued by a bank, savings association, or credit union. Except as otherwise provided, the interest rate or finance charge assessed with respect to any account for which charges may be added by the use of a bank credit card shall not exceed an annual rate equal to 10% plus the savings account interest rate paid by the financial institution issuing the card. *[A. F&I]*

AB 1995 (Archie-Hudson), as introduced March 5, would authorize state-chartered banks, savings associations, and credit unions to restructure a loan or extend credit terms and obligations to minority or women business enterprises in accordance with safe and sound financial operations. Any loan so restructured or