

LEGISLATIVE UPDATE—FINANCIAL INSTITUTIONS AND CONSUMER FINANCIAL SERVICES

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This article lists and discusses 2008 bills that affect financial institutions, including those related to providing financial services to consumers. Only those bills noted as chaptered have been enacted into law.¹ It is not intended to be exhaustive, either in terms of scope or effect, of the bills addressed. Please examine the full text of any measure of interest to you.

FINANCIAL INSTITUTIONS

Assembly Bill No. 1301 (Gaines): Financial Institutions (Enacted: Chapter 125)

AB 1301 begins the process of modernizing the California Banking Law, which has not been substantially changed since 1951. California's Corporations Law was overhauled in 1977, but the state's banking law was never brought into alignment with these changes.

Existing law provides that various financial institutions, including banks, commercial banks, and trust companies, are licensed and regulated by the Department of Financial Institutions. This bill revises various provisions applicable to these financial institutions, including the powers, prohibited practices, and penalties that apply to banks.

In an attempt to modernize banking laws, the bill authorizes rule-making related to the acceptance of electronic filings of applications and reports. It also provides limitations on a bank's ability to hold obligations made by a person and securities issued by that same person. It authorizes the formation of a bank to facilitate a merger or an acquisition of control, with commissioner approval. The bill also reduces the applicable minimum of specified eligible assets of a bank from another country from five percent of the bank's adjusted liabilities to one percent. The bill also requires the commissioner to examine state banks and foreign banks once per year, although specified state and foreign banks would be required to be examined according to federal standards.

Assembly Bill No. 2749 (Gaines): Financial Institutions; Disclosure and Reporting (Enacted: Chapter 501)

AB 2749 continues the process of modernizing the California Banking Law in connection with AB 1301, discussed above. Again, the following is provided by way of brief overview.

The measure consolidates certain powers of the Commissioner in one section of the Financial Code, and in so doing, it clarifies and updates those powers, in part by adding new definitions to the law. It also conforms changes in the Financial Code by changing references in the Public Records Act and Information Practices Act.

Senate Bill No. 1007 (Machado): Exchange Facilitators (Enacted: Chapter 708)

Existing law provides for licensing and regulating various financial institutions by the Commissioner of Financial Institutions or the Commissioner of Corporations but does not specifically license or regulate persons engaged in the facilitation of like-kind exchanges of property pursuant to federal tax law.

This measure requires the Commissioner of Corporations to license and regulate exchange facilitators, as defined, and would provide various enforcement powers to the commissioner in that regard. It exempts financial institutions and title insurers, controlled escrow companies, and underwritten title companies from the licensing requirement, but it requires those exempt persons to notify the commissioner and to comply with bonding and insurance requirements applicable under the bill to licensed exchange facilitators.

The measure also provides that a facilitator is a fiduciary with respect to all money, property, and instruments received from a client, and that the facilitator shall invest money received from clients in investments that meet the reasonable standards that are applicable to persons acting as fiduciaries under existing California law.

The bill also prohibits facilitators from making material misrepresentations or acting fraudulently or dishonestly, and it provides for a private right of action for any violations.



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MR. WEBB HAS DEVELOPED A COMMERCIAL PRACTICE, HAVING REPRESENTED PLAINTIFFS AND DEFENDANTS IN TRIALS INVOLVING COMMERCIAL, CONSTRUCTION, ENVIRONMENTAL, PROFESSIONAL MALPRACTICE, INSURANCE COVERAGE, INSURANCE DEFENSE, PRODUCTS LIABILITY, LABOR AND EMPLOYMENT AND PERSONAL INJURY. MR. WEBB LECTURES ON THE UNIFORM COMMERCIAL CODE AT THE SAN FRANCISCO LAW SCHOOL.

Financial Institutions and Consumer Financial Services

These provisions are viable until January 1, 2014, at which point they will be repealed.

MORTGAGE LENDING

Assembly Bill No. 69 (Lieu): Mortgage Lending: Reporting (Enacted: Chapter 277)

AB 69 allows the Department of Corporations to request residential loan servicing data from its licensees. This information is to be posted in the aggregate.

Assembly Bill No. 180 (Bass): Mortgage Lending: Mortgage Foreclosure Consultants (Enacted: Chapter 278)

Existing law defines a mortgage foreclosure consultant as a person who, for compensation, offers to perform specified services for a homeowner in anticipation of a foreclosure sale. Civ. Code § 2945. Among other things, the bill requires the contract with a mortgage foreclosure consultant to be written in the same language spoken by the parties when entering into the contract in describing services or negotiating the contract (i.e., if other than English). The consultant may not take a power of attorney except to inspect documents. The contract may be cancelled upon three days written notice to an address provided by the consultant.

AB 180 permits a homeowner to cancel the contract (which must now be in writing) within five days by e-mail, mail, or facsimile. The measure also prohibits a consultant from taking a power of attorney for any purpose. Finally, and perhaps most importantly, the bill requires all consultants to register with the Department of Justice and to post a \$100,000 bond.

Senate Bill No. 1055 (Machado): Taxation: Cancellation of Indebtedness: Mortgage Debt Forgiveness (Enacted: Chapter 282)

Under existing law, if a taxpayer borrows money from a commercial lender and the lender later cancels (“forgives”) the debt, the taxpayer may have to include the cancelled amount as income for tax purposes. At the time that the taxpayer borrowed the money, the loan proceeds were not required to be included as income because the taxpayer had an obligation to repay the lender. The subsequent forgiveness renders the former loan proceeds reportable because there is no longer an obligation to repay the lender. This makes a short sale (which involves loan forgiveness) a less attractive option for the borrower.

This measure brings California’s personal income tax laws into partial conformity with federal law and provides that borrowers are not required to report up to \$250,000 (or \$125,000 for married individuals filing separately) of the amount of debt forgiven by a lender resulting from short sales and refinances as

income, so long as the loan is secured by the borrower’s principal residence. This measure only affects discharged debt that occurs between January 1, 2007 and January 1, 2009.

Senate Bill No. 1065 (Correa): Home Financing Programs (Enacted: Chapter 283)

Existing law permits a city or county to administer a home financing program to acquire, contract, and enter into advance commitments to acquire home mortgages made or currently held by financial institutions. However, the city or county cannot refinance the home mortgage unless it is in connection with a substantial remodeling of the home. This bill permits the city or county to also refinance home mortgages. It is an urgency measure and went into effect on September 25, 2008.

Senate Bill No. 1137 (Perata): Residential Mortgage Loans: Foreclosure Procedures (Enacted: Chapter 69)

SB 1137 requires lenders to contact homeowners and explore restructuring options before initiating the foreclosure process. It also provides tenants with double the amount of time now afforded to them to move from a foreclosed property. It also contains a provision designed to prevent neighborhoods from becoming rundown by requiring owners to maintain foreclosed properties.

Senate Bill No. 1511 (Ducheny): Common Interest Developments: Mortgages: Successors in Interest (Enacted: Chapter 527)

This law provides that upon request by an association, the mortgagee or trustee of a property is to provide the association with the name and address of anyone who purchases that property at a foreclosure sale. The information must be provided within 15 business days following the date the trustee’s deed is recorded.

Assembly Joint Resolution No. 45 (Coto): Mortgage Loans: Conforming Loan Limit (Enacted: Chapter 81)

The United States Congress and the President temporarily increased the federal conforming loan limit to \$729,750, from \$417,000, as part of the 2008 Economic Stimulus Act. Assembly Joint Resolution 45 urges the President and Congress to permanently increase the federal conforming loan limit to the limits set forth in the 2008 Economic Stimulus Act in order to better reflect California’s high home prices and to stimulate the economy.

REAL ESTATE

Assembly Bill No. 2020 (Fuentes): Residential Property Contracts: Liquidated Damages (Enacted: Chapter 665)

This bill affects the amount of liquidated damages available

Continued on Page 35

to a seller of a large-project residential condominium unit. Existing law provides that a provision in a contract to purchase and sell residential property that states that all or any part of a payment made by the buyer shall constitute liquidated damages upon the buyer's failure to consummate the sale is valid to the extent of the payment actually made. With respect to the sale of an attached residential condominium unit located within a structure of 10 or more residential condominium units, a liquidated damages clause of not more than three percent of the purchase price is deemed valid unless otherwise substantiated by the buyer. However, if the amount actually paid as liquidated damages exceeds three percent, then the seller must perform an accounting of costs and revenues related, and fairly allocable to, the construction and sale of the unit, including any costs arising from buyer's default, within 60 days after the final close of escrow. The seller must then refund any amount previously retained as liquidated damages in excess of either three percent of the contract price or the amount of the seller's losses as set forth in the accounting.

The bill provides that the liquidated damages threshold is raised to six percent if the attached residential condominium unit is (1) located in a structure of 20 or more units; (2) is more than eight stories high; (3) is located in a high density infill development; and (4) the purchase price is greater than \$1,000,000 (indexed for the change in median price of a single family residence in California).

Assembly Bill No. 2025 (Silva): Commercial Real Property; Disposition of Personal Property Left by Tenant Following Termination of Tenancy (Enacted: Chapter 161)

Existing law provides procedures for disposition of personal property left by a tenant following the termination of a lease. This bill retains the statutory scheme as it pertains to residential property, but it creates a separate body of law dealing with a commercial tenancy by adding Chapter 5.5 to the Civil Code. The bill increases the monetary threshold to the lesser of \$750 or one dollar per square foot of the premises occupied by the tenant.

Senate Bill No. 1604 (Machado): Escrow Agents' Fidelity Corporation (Enacted: Chapter 285)

Under existing law, the Commissioner of Corporations licenses and regulates persons engaged in business as escrow agents unless specifically exempted. Licensed escrow agents must be members of the Escrow Agents' Fidelity Corporation (Fidelity Corporation), a nonprofit corporation established to indemnify its members against loss. The Fidelity Corporation is funded by

fees and assessments on its members. This regulatory scheme is known as the Escrow Law.

The Escrow Law limits the coverage provided by Fidelity Corporation to certain types of transactions and provides that indemnity coverage for other transactions must be provided by escrow agents through bonding requirements. The Escrow Law requires that escrow agency employees and various other persons obtain a certificate from Fidelity Corporation as a condition of employment or compensation. The Escrow Law requires Fidelity Corporation to deny an application for a certificate, or to revoke the certificate under certain circumstances. It also requires a licensee under the Escrow Law to submit an annual audit report to the Commissioner (as well as various other financial reports that the Commissioner may require). Existing law requires independent accountants who prepare certain reports in that regard to provide copies directly to the Commissioner. The Escrow Law also specifies the types of financial institution accounts that are allowable depositories for moneys deposited in escrow with a licensee.

This bill requires any private insurance coverage of a member (which also covers a loss that would be covered by Fidelity Corporation) to be applied as primary coverage. It also allows a person whose certificate application has been denied or whose certificate has been revoked to reapply for a certificate after a specified time, provided that the person has satisfied all obligations to Fidelity Corporation under any prior arbitration award or judgment. This bill requires a licensee who engages an independent accountant or third-party contractor to reconcile trust account records and to request that the accountant or third-party contractor immediately notify the Commissioner and Fidelity Corporation of the occurrence of various events or discoveries. Finally, the bill requires notification of the Commissioner and Fidelity Corporation of any account closures or specified overdrafts in cases where licensees have agreements with financial institutions to establish trust accounts.

Senate Bill No. 1737 (Machado): Real Estate: Brokers and Salespersons (Enacted: Chapter 286)

The existing Real Estate Law provides for the licensure and regulation of real estate brokers and real estate salespersons by the Real Estate Commissioner, and it provides that a willful violation of that law is a crime. It authorizes the Commissioner to direct a person to desist and refrain from activities that are in violation of that law and also authorizes the Commissioner to suspend or revoke the license of a real estate licensee who has been guilty of specified acts. It further requires listing and selling agents, as defined, to provide sellers and buyers in a residential real property transaction

Financial Institutions and Consumer Financial Services

with a disclosure form containing general information on real estate agency relationships. Existing law also requires the listing or selling agent to disclose to the buyer and seller whether he or she is acting as the buyer's agent exclusively, the seller's agent exclusively, or as a dual agent representing both the buyer and the seller.

This measure authorizes the Commissioner to suspend or bar a person from a position of employment, management, or control for a specified period if the commissioner finds that the suspension or bar is in the public interest and that the person has committed or caused a violation of the Real Estate Law or a rule or order of the commissioner, as specified. The bill also authorizes the Commissioner to impose that discipline if the person has been convicted of, or pleaded *nolo contendere* to, a crime, or has been held liable in a civil action by final judgment or any administrative judgment by any public agency. Discipline is also appropriate if the crime or civil or administrative judgment involves an offense of dishonesty, fraud, or deceit, or any other offense reasonably related to the qualifications, functions, or duties of a person engaged in the real estate business. In addition, the bill authorizes the Commissioner to suspend or revoke the license of a real estate licensee who has been guilty of generating an inaccurate opinion of the value of residential real property, requested in connection with a debt forgiveness sale, in order to manipulate the lienholder to reject the proposed debt forgiveness sale or to acquire a financial or business advantage, as specified, or both.

The measure also requires a person or entity that arranges financing in connection with a sale, lease, or exchange of real property, and acts as an agent with respect to that property, to make a written disclosure of those roles within 24 hours to all parties to the sale, lease, or exchange, as well as any related loan transaction. This bill provides that local governments are not entitled to reimbursement for enforcement proceedings.

CORPORATIONS

Senate Bill No. 1409 (Ackerman): Corporations: Annual Reports (Enacted: Chapter 177)

SB 1409 incorporates a recent Securities and Exchange Commission rule permitting corporations to provide annual reports and proxy materials to shareholders in electronic form.

PRIVACY

Assembly Bill No. 372 (Salas): Personal Information (Enacted: Chapter 151)

Existing law allows consumers to put security freezes on their credit reports by mailing a request via certified mail and permits

credit agencies to charge no more than \$10 to \$12 for the service. AB 372 permits a consumer to mail the request by regular mail. Upon receiving the request, the agency must place a freeze within three business days. The measure provides that the agency may charge fees of no more than \$10 for those under age 65 and \$5 for those over 65 for placing and temporarily or permanently lifting such freezes.

Assembly Bill No. 2059 (Nunez): Mailed Solicitations: Do Not Call List (Enacted: Chapter 738)

Existing law prohibits a company from soliciting by telephone anyone on the national do not call list for a prize, or to rent, sell, exchange, promote, gift, or lease goods or services, to offer or solicit credit, to seek marketing information, or to sell or promote investment, insurance, or financial services. However, existing law does not prohibit a company from mailing a subscriber on the do not call list and seeking to obtain the subscriber's express written permission for the company to make the otherwise prohibited calls.

AB 2059 has two provisions, each affecting the form in which a company may solicit express permission to contact a subscriber by telephone. The first pertains to those not on the national do not call list. This provision indicates that the company must clearly and conspicuously identify the entity that is requesting permission to call, the telephone number to which the calls will be placed, and a notice that the subscriber may be contacted by a telephone solicitor. The second provision applies to those subscribers on the national do not call list. A written request mailed to these people must include the identity of the sender, the identity of the entity requesting to call, the telephone number to which the calls will be placed, and a place for signature of the subscriber.

LOCAL GOVERNMENT

Senate Bill No. 1287 (Hollingsworth): Local Government: Records: Riverside County (Enacted: Chapter 117)

Existing law authorizes the Los Angeles County Board of Supervisors to adopt a resolution authorizing the county recorder to notify the party or parties executing a deed, quitclaim deed, or deed of trust. This bill also authorizes the Riverside County Board of Supervisors to adopt such a resolution.

Senate Bill No. 1396 (Cox): Local Government: Recording Fees (Enacted: Chapter 405)

Existing law provides for the Real Estate Fraud Prosecution Trust Fund (the "Fund"), created to support district attorneys and local law enforcement agencies in determining, investigating, and

prosecuting real estate fraud crimes. There has not been a change to the recording fee or to the list of recordable documents that are considered real estate instruments since this law was enacted in 1995.

SB 1396 allows county supervisors to increase county real estate document fees from \$2 to \$3. The funds raised will be placed in the Fund to combat and prosecute fraud. ■

Endnotes

1 Because Governor Schwarzenegger vetoed a large number of bills in 2008, this update is much shorter than in past years.

Continued from page 8 . . . Franchise Law Developments

on appeal to a court of competent jurisdiction for any such error. Cable Connection, Inc. v. DIRECTV, Inc., 143 Cal. App. 4th 207, 213 (2006).

The arbitrators followed the rules of the AAA. Those rules require that the arbitrators make an initial determination as to whether the agreement to arbitrate permits classwide arbitration. Following the issuance of this initial determination, the AAA rules direct the arbitrators to stay the proceeding for thirty days to allow for either party to seek confirmation or vacation of the initial determination. In *Cable Connection*, the arbitrator panel determined that because the arbitration agreement was silent on the issue of classwide arbitration, California procedural law governed the issue and permitted the plaintiffs to proceed on a classwide basis.

DIRECTV petitioned to vacate the award in the trial court arguing, among other things, that the arbitrators exceeded their authority by incorporating California procedural law into the arbitration agreement and by making errors of law and legal reasoning. The trial court vacated the award on those grounds. *Cable Connection* sought relief in the court of appeal, which reversed:

The language in the arbitration agreement at issue here, that the arbitrators ‘shall not have the power to commit errors of law or legal reasoning,’ has no effect on the availability of judicial review for errors of law. While the agreement varied in this respect from the typical arbitration agreement contemplated by the *Moncharsh* court, in which the arbitrators are not constrained to follow the rule of law, still the review which may be conducted by the courts is limited by statute. . . In addition, of course, the arbitration agreement at issue here provided that ‘the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error [of law or legal reasoning].’ Suffice it to say, however, that we are

in accord with the appellate courts that have previously considered the effect of similar language and concluded that parties cannot contractually expand the jurisdiction of the trial courts to permit review of arbitration awards for legal error. *Id.* at 218-219.

DIRECTV petitioned for review in the California Supreme Court. While the case was pending there, the United States Supreme Court weighed in on the issue when interpreting the Federal Arbitration Act (FAA) in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 1 (2008). There, the U.S. Supreme Court held that the FAA’s grounds for vacatur and modification of arbitral awards reflect the exclusive grounds for judicial review of arbitral decisions and cannot be expanded by contract or otherwise. In issuing its decision, the U.S. Supreme Court stated that “[i]n holding the § 10 and § 11 grounds exclusive with regard to enforcement under the FAA’s expedited judicial review mechanisms, this Court decides nothing about other possible avenues for judicial enforcement of awards.” *Id.* at 1.

Exactly five months later, the California Supreme Court issued its decision in *Cable Connection, Inc. v. DIRECTV*, availing itself of the U.S. Supreme Court’s recognition that “the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations.” *Cable Connection*, 44 Cal.4th at 1354. The California Supreme Court decided that unlike the FAA and the decisions interpreting it, the California Arbitration Act and the *Moncharsh* line of cases “center[] not on statutory restriction of the parties’ contractual options, but on the parties’ intent and the powers of the arbitrators as defined in the agreement.” *Id.* The *Cable Connection* decision continued:

These factors support the enforcement of agreements for an expanded scope of review. If the parties constrain the arbitrators’ authority by requiring a dispute to be decided according to the rule of law, *and* make plain their intention that the award is reviewable for legal error, the general rule of limited review has been displaced by the parties’ agreement. Their expectation is not that the result of the arbitration will be final and conclusive, but rather that it will be reviewed on the merits at the request of either party. That expectation has a foundation in the statutes governing judicial review, which include the ground that ‘[t]he arbitrators exceeded their powers.’ *Id.*

Based on this distinction between the FAA and the California Arbitration Act, the California Supreme Court reversed the