

Assembly Bill No. 489

CHAPTER 732

An act to add Division 1.6 (commencing with Section 4970) to the Financial Code, relating to lending.

[Approved by Governor October 10, 2001. Filed
with Secretary of State October 11, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

AB 489, Migden. Loans secured by real property.

Existing law provides for regulation of banks and savings associations by the Department of Financial Institutions. Existing law provides for regulation of real estate brokers by the Department of Real Estate. Existing law provides for regulation of finance lenders and residential mortgage lenders by the Department of Corporations. Existing law provides that willful violations of provisions governing savings associations, real estate brokers, and residential mortgage lenders are crimes.

This bill would impose various requirements on consumer loans secured by specified real property, defined as "covered loans." The bill would prohibit various acts in making covered loans, including the following: failing to consider the financial ability of a borrower to repay the loan, financing specified types of credit insurance into a consumer loan transaction, recommending or encouraging a consumer to default on an existing consumer loan in order to solicit or make a covered loan that refinances the consumer loan, and making a covered loan without providing the consumer a specified disclosure. The bill would provide that a violation of its provisions would be subject to a civil penalty.

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

SECTION 1. Division 1.6 (commencing with Section 4970) is added to the Financial Code, to read:

DIVISION 1.6. _____

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

4970. For purposes of this division:

(a) "Annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the federal Truth in



Lending Act and the regulations adopted thereunder by the Federal Reserve Board.

(b) (1) “Covered loan” means a consumer loan in which the original principal balance of the loan does not exceed two hundred fifty thousand dollars (\$250,000) in the case of a mortgage or deed of trust, and where one of the following conditions are met:

(A) For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than eight percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

(B) The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount.

(2) The dollar amount specified in paragraph (1) shall be adjusted every five years in accordance with the California Consumer Price Index.

(c) “Points and fees” shall include the following:

(1) All items required to be disclosed as finance charges under Sections 226.4(a) and 226.4(b) of Title 12 of the Code of Federal Regulations, including the Official Staff Commentary, as amended from time to time, except interest.

(2) All compensation and fees paid to mortgage brokers in connection with the loan transaction.

(3) All items listed in Section 226.4(c)(7) of Title 12 of the Code of Federal Regulations, only if the person originating the covered loan receives direct compensation in connection with the charge.

(d) “Consumer loan” means a consumer credit transaction that is secured by real property located in this state used, or intended to be used or occupied, as the principal dwelling of the consumer that is improved by a one-to-four residential unit. “Consumer loan” does not include a reverse mortgage, an open line of credit as defined in Part 226 of Title 12 of the Code of Federal Regulations (Regulation Z), or a consumer credit transaction that is secured by rental property or second homes. “Consumer loan” does not include a bridge loan with a maturity of less than one year if the purpose of the loan is a bridge loan connected with the acquisition or construction of a dwelling intended to become the consumer’s principal dwelling.

(e) “Original principal balance” means the total initial amount the consumer is obligated to repay on the loan.

(f) “Licensing agency” shall mean the Department of Real Estate for licensed real estate brokers, the Department of Corporations for licensed



residential mortgage lenders and licensed finance lenders and brokers, and the Department of Financial Institutions for commercial and industrial banks and savings associations and credit unions organized in this state.

(g) “Licensed person” means a real estate broker licensed under the Real Estate Law (Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code), a finance lender or broker licensed under the California Finance Lenders Law (Division 9 (commencing with Section 22000)), a residential mortgage lender licensed under the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000)), a commercial or industrial bank organized under the Banking Law (Division 1 (commencing with Section 99)), a savings association organized under the Savings Association Law (Division 2 (commencing with Section 5000)), and a credit union organized under the California Credit Union Law (Division 5 (commencing with Section 14000)). Nothing in this division shall be construed to prevent any enforcement by a governmental entity against any person who originates a loan and who is exempt or excluded from licensure by all of the licensing agencies, based on a violation of any provision of this division. Nothing in this division shall be construed to prevent the Department of Real Estate from enforcing this division against a licensed salesperson employed by a licensed real estate broker as if that salesperson were a licensed person under this division. A licensed person includes any person engaged in the practice of consumer lending, as defined in this division, for which a license is required under any other provision of law, but whose license is invalid, suspended or revoked, or where no license has been obtained.

(h) “Originate” means to arrange, negotiate, or make a consumer loan.

(i) “Servicer” has the same meaning provided in Section 6 (i)(2) of the Real Estate Settlement Procedures Act of 1974.

CHAPTER 2. PROHIBITED ACTS

4973. The following are prohibited acts and limitations for covered loans:

(a) (1) A covered loan shall not include a prepayment fee or penalty after the first 36 months after the date of consummation of the loan.

(2) A covered loan may include a prepayment fee or penalty up to the first 36 months after the date of consummation of the loan if:

(A) The person who originates the covered loan has also offered the consumer a choice of another product without a prepayment fee or penalty.



(B) The person who originates the covered loan has disclosed in writing to the consumer at least three business days prior to loan consummation the terms of the prepayment fee or penalty to the consumer for accepting a covered loan with the prepayment penalty and the rates, points, and fees that would be available to the consumer for accepting a covered loan without a prepayment penalty.

(C) The person who originates the covered loan has limited the amount of the prepayment fee or penalty to an amount not to exceed the payment of six months' advance interest, at the contract rate of interest then in effect, on the amount prepaid in any 12-month period in excess of 20 percent of the original principal amount.

(D) A covered loan will not impose the prepayment fee or penalty if the covered loan is accelerated as a result of default.

(E) The person who originates the covered loan will not finance a prepayment penalty through a new loan that is originated by the same person.

(b) (1) A covered loan with a term of 5 years or less may not provide at origination for a payment schedule with regular periodic payments that when aggregated do not fully amortize the principal balance as of the maturity date of the loan.

(2) For a payment schedule that is adjusted to account for the seasonal or irregular income of the consumer, the total installments in any year shall not exceed the amount of one year's worth of payments on the loan. This prohibition does not apply to a bridge loan. For purposes of this paragraph, "bridge loan" means a loan with a maturity of less than 18 months that only requires payments of interest until the time when the entire unpaid balance is due and payable.

(c) A covered loan shall not contain a provision for negative amortization such that the payment schedule for regular monthly payments causes the principal balance to increase, unless the covered loan is a first mortgage and the licensed person discloses to the consumer that the loan contains a negative amortization provision that may add principal to the balance of the loan.

(d) A covered loan shall not include terms under which periodic payments required under the loan are consolidated and paid in advance from the loan proceeds.

(e) A covered loan shall not contain a provision that increases the interest rate as a result of a default. This provision does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration for the indebtedness.



(f) (1) A person who originates covered loans shall not make or arrange a covered loan unless at the time the loan is consummated, the person reasonably believes the consumer, or consumers, when considered collectively in the case of multiple consumers, will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources, other than the consumer's equity in the dwelling that secures repayment of the loan. In the case of a covered loan that is structured to increase to a specific designated rate, stated as a number or formula, at a specific predetermined date not exceeding 37 months from the date of application, this evaluation shall be based upon the fully indexed rate of the loan calculated at the time of application.

The consumer shall be presumed to be able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, do not exceed 55 percent of the consumer's monthly gross income, as verified by the credit application, the consumer's financial statement, a credit report, financial information provided to the person originating the loan by or on behalf of the consumer, or any other reasonable means.

(2) No presumption of inability to make the scheduled payments to repay the obligation shall arise solely from the fact that at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, exceed 55 percent of the consumer's monthly gross income.

(3) In the case of a stated income loan, the reasonable belief requirement in paragraph (1) shall apply, however, for stated income loans that belief may be based on the income stated by the consumer, and other information in the possession of the person originating the loan after the solicitation of all information that the person customarily solicits in connection with loans of this type. A person shall not knowingly or willfully originate a covered loan as a stated income loan with the intent, or effect, of evading the provisions of this subdivision.

(g) A person who originates a covered loan shall not pay a contractor under a home-improvement contract from the proceeds of a covered loan other than by an instrument payable to the consumer or jointly to the consumer and the contractor or, at the election of the consumer, to a third-party escrow agent for the benefit of the contractor in accordance with terms and conditions established in a written escrow agreement signed by the consumer, the person who originates a covered loan, and the contractor prior to the disbursement of funds. No payments, other than progress payments for home-improvement work that the consumer certifies is completed, shall be made to an escrow account or jointly to



the consumer and the contractor unless the person who originates the loan is presented with a signed and dated completion certificate by the consumer showing that the home-improvement contract was completed to the satisfaction of the consumer.

(h) It is unlawful for a person who originates a covered loan to recommend or encourage a consumer to default on an existing consumer loan or other debt in connection with the solicitation or making of a covered loan that refinances all or any portion of the existing consumer loan or debt.

(i) A covered loan shall not contain a call provision that permits the lender, in its sole discretion, to accelerate the indebtedness. This prohibition does not apply if repayment of the loan has been accelerated in accordance with the terms of the loan documents (1) as a result of the consumer's default, (2) pursuant to a due-on-sale provision, or (3) due to fraud or material misrepresentation by a consumer in connection with the loan or the value of the security for the loan. A licensed person shall not refinance or arrange for the refinancing of a consumer loan such that the new loan is a covered loan that is made for the purpose of refinancing, debt consolidation or cash out, that does not result in an identifiable benefit to the consumer, considering the consumer's stated purpose for seeking the loan, fees, interest rates, finance charges, and points.

(j) (1) A covered loan shall not be made unless the following disclosure, written in 12-point font or larger, has been provided to the consumer no later than three business days prior to signing of the loan documents of the transaction:

CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE

If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.

Mortgage loan rates and closing costs and fees vary based on many other factors, including your particular credit and financial circumstances, your earnings history, the loan-to-value requested, and the type of property that will secure your loan. Higher rates and fees may be justified depending on the individual circumstances of a particular consumer's application. You should shop around and compare loan rates and fees.

This particular loan may have a higher rate and total points and fees than other mortgage loans and is, or may be, subject to the additional disclosure and substantive protections under Division 1.6 (commencing with Section 4970 of the Financial Code. You should consider



consulting a qualified independent credit counselor or other experienced financial adviser regarding the rate, fees, and provisions of this mortgage loan before you proceed. For information on contacting a qualified credit counselor, ask your lender or call the United States Department of Housing and Urban Development's counseling hotline at 1-888-466-3487 or go to www.hud.gov/fha/sfh/hcc for a list of counselors.

You are not required to complete any loan agreement merely because you have received these disclosures or have signed a loan application.

If you proceed with this mortgage loan, you should also remember that you may face serious financial risks if you use this loan to pay off credit card debts and other debts in connection with this transaction and then subsequently incur significant new credit card charges or other debts. If you continue to accumulate debt after this loan is closed and then experience financial difficulties, you could lose your home and any equity you have in it if you do not meet your mortgage loan obligations.

Property taxes and homeowner's insurance are your responsibility. Not all lenders provide escrow services for these payments. You should ask your lender about these services.

Your payments on existing debts contribute to your credit ratings. You should not accept any advice to ignore your regular payments to your existing creditors.

(2) It shall be a rebuttable presumption that a licensed person has met its obligation to provide this disclosure if the consumer provides the licensed person with a signed acknowledgment of receipt of a copy of the notice set forth in paragraph (1).

(m) (1) A person who originates a covered loan shall not steer, counsel, or direct any prospective consumer to accept a loan product with a risk grade less favorable than the risk grade that the consumer would qualify for based on that person's then current underwriting guidelines, prudently applied, considering the information available to that person, including the information provided by the consumer.

A person shall not be deemed to have violated this section if the risk grade determination applied to a consumer is reasonably based on the person's underwriting guidelines if it is an appropriate risk grade category for which the consumer qualifies with the person.

(2) If a broker originates a covered loan, the broker shall not steer, counsel, or direct any prospective consumer to accept a loan product at a higher cost than that for which the consumer could qualify based on the loan products offered by the persons with whom the broker regularly does business.

(n) A person who originates a covered loan shall not avoid, or attempt to avoid, the application of this division by doing the following:



(1) Structuring a loan transaction as an open-end credit plan for the purpose of evading the provisions of this division when the loan would have been a covered loan if the loan had been structured as a closed end loan.

(2) Dividing any loan transaction into separate parts for the purpose of evading the provisions of this division.

(o) A person who originates a covered loan shall not act in any manner, whether specifically prohibited by this section or of a different character, that constitutes fraud.

CHAPTER 3. ENFORCEMENT

4974. (a) Any compliance failure that was not willful or intentional and resulted from a bona fide error, that occurred notwithstanding the maintenance of procedures reasonably adopted to avoid those errors, including, but not limited to, those involving clerical, calculation, computer malfunction and programming, and printing errors shall be corrected no later than 45 days after receipt of the complaint or discovery of the error. A person who originates a covered loan shall not be administratively, civilly, or criminally liable for a bona fide error corrected pursuant to this section. An error in legal judgment is not a bona fide error under this section.

(b) If a person who originates covered loans makes a loan where the person knew of and showed reckless disregard for a violation of this division by a broker, the person and broker shall be jointly and severally liable for all damages awarded under this division with respect to the broker's unlawful conduct.

This section does not impose or transfer liability for a breach of the broker's fiduciary duty.

4975. (a) (1) Any licensed person who violates any provision of Section 4973, 4979.6, or 4979.7 shall be deemed to have violated that person's licensing law.

(2) After any action under Section 4978.5 resulting in a conviction, the licensing agency may bring a proceeding to suspend the license of the licensed person for not less than six months and not more than three years.

(b) After any action under Section 4978.5 resulting in a second or subsequent conviction, the licensing agency may bring a proceeding to permanently revoke the license of the licensed person or impose any lesser licensed sanction for at least three years.

(c) A licensing agency may exercise any and all authority and powers available to it under any other provisions of law, to administer and enforce this division. A licensing agency may charge and collect



reasonable costs for enforcing this division. However, nothing in this subdivision shall authorize the imposition or collection of charges or fees that duplicate charges or fees authorized under any other provision of law.

(d) Nothing in this section shall be construed to impair or impede a licensing agency's authority under any other provision of law.

4977. (a) A licensing agency may, after appropriate notice and opportunity for hearing, by order levy administrative penalties against a person who violates any provision of this division, and the person shall be liable for administrative penalties of not more than two thousand five hundred dollars (\$2,500) for each violation. Except for licensing agencies exempt from the provisions of the Administrative Procedure Act, any hearing shall be held in accordance with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and the licensing agency shall have all the powers granted under that act.

(b) Any person who willfully and knowingly violates any provision of this division shall be liable for a civil penalty of not more than twenty-five thousand dollars (\$25,000) for each violation which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the licensing agency in any court of competent jurisdiction.

(c) A licensing agency may exercise any and all authority and powers available to it under any other provisions of law, to administer and enforce this division, including, but not limited to, investigating and examining the licensed person's books and records, and charging and collecting the reasonable costs for these activities. The licensing agency shall not charge a licensed person twice for the same service. Any civil, criminal, and administrative authority and remedies available to the licensing agency pursuant to its licensing law may be sought and employed in any combination deemed advisable by the licensing agency to enforce the provisions of this division.

(d) If the licensing agency determines that it is in the public interest, the licensing agency may include, in any action for penalties authorized by subdivision (b), a claim for relief in addition to the penalties, including a claim for restitution or disgorgement, and the court shall have jurisdiction to award the additional relief.

(e) Nothing in this section shall be construed to impair or impede the Attorney General from representing a licensing agency in bringing an action to enforce this division at the request and on behalf of the licensing agency.

(f) In any action brought by the licensing agency, or the Attorney General acting at the request and at the behest of the licensing agency,



under this division in which a judgment against a person is rendered, the licensing agency or the Attorney General shall be entitled to recover costs which, in the discretion of the court, may include an amount representing reasonable attorney's fees and investigative expenses for services rendered for deposit in the appropriate fund of that licensing agency.

(g) The amounts collected under subdivisions (a) and (b) shall be deposited in the appropriate fund of the licensing agency to be used by that licensing agency, subject to appropriation by the Legislature, for the purposes of education and enforcement in connection with abusive lending practices.

4978. (a) A person who fails to comply with the provisions of this division is civilly liable to the consumer in an amount equal to any actual damages suffered by the consumer, plus attorneys fees and costs. For a willful and knowing violation of this division, the person shall be liable to the consumer in the amount of fifteen thousand dollars (\$15,000) or the consumers actual damages, whichever is greater, plus attorneys fees and costs.

(b) A provision in a covered loan that violates this division is unenforceable. A court in which any action is brought by, or on behalf of, an aggrieved consumer for relief may issue an order or injunction to reform the terms of the covered loan to conform to the provisions of this division. The court may, in addition to any other remedy, award punitive damages to the consumer upon a finding that such damages are warranted pursuant to Section 3294 of the Civil Code.

(c) Nothing in this section is intended, nor shall be construed, to abrogate existing common law provisions prohibiting double recovery of damages.

4978.6. A person who originates covered loans shall inform any employee, who originates covered loans on behalf of the person, of the administrative, civil, and criminal penalties for a violation of this division.

4979. Upon request, a person who originates a covered loan shall provide the licensing agency or the consumer, at no cost, documentation regarding his or her loan that clearly demonstrates whether any loan is a covered loan. This documentation shall include, but not be limited to, full disclosure of the original principal balance, the annual percentage rate, and the total points and fees, as defined in Section 4971.

4979.5. (a) A person who provides brokerage services to a borrower in a covered loan transaction by soliciting lenders or otherwise negotiating a consumer loan secured by real property, is the fiduciary of the consumer, and any violation of the person's fiduciary duties shall be a violation of this section. A broker who arranges a covered loan owes



this fiduciary duty to the consumer regardless of who else the broker may be acting as an agent for in the course of the loan transaction.

(b) Except for a broker or a person who provides brokerage services, no licensed person or subsequent assignee shall have administrative, civil, or criminal liability for a violation of this section.

4979.6. A person who originates a covered loan shall not make a covered loan that finances points and fees in excess of one thousand dollars (\$1,000) or 6 percent of the original principal balance, exclusive of points and fees, whichever is greater.

4979.7. On and after July 1, 2002, a person who originates a consumer loan shall not finance, directly or indirectly, into a consumer loan transaction or finance to the same borrower within 30 days of a consumer loan transaction any credit life, credit disability, credit property, or credit unemployment insurance premiums, or any debt cancellation or suspension agreement or contract fees, provided that insurance premiums, debt cancellation, or suspension fees calculated and paid on a monthly basis shall not be considered financed by the person originating the loan. For purposes of this section, credit insurance does not include a contract issued by a government agency or private mortgage insurance company to insure the lender against loss caused by a mortgagor's default.

4979.8. The provisions of this division shall not impose liability on an assignee that is a holder in due course. The provisions of this division shall not apply to persons chartered by Congress to engage in secondary mortgage market transactions.

SEC. 3. The provisions of this act shall apply to a consumer loan applied for on or after July 1, 2002.

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

