

AMENDED IN ASSEMBLY MARCH 28, 2008

CALIFORNIA LEGISLATURE—2007—08 REGULAR SESSION

**ASSEMBLY BILL**

**No. 2359**

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**Introduced by Assembly Member Jones**

February 21, 2008

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~~An act to amend Section 4970 of the Financial Code, relating to covered loans.~~ *An act to amend Section 2953 of the Civil Code, to amend Section 1281 of the Code of Civil Procedure, and to repeal and add Section 4979.8 of the Financial Code, relating to loans.*

LEGISLATIVE COUNSEL'S DIGEST

AB 2359, as amended, Jones. ~~Covered loans.~~ *Loans.*

*(1) Existing law regulates the process of foreclosing on real property subject to a mortgage or deed of trust. Existing law provides that any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by any instrument creating a lien on real property, whereby the borrower agrees to waive specified rights or privileges conferred upon him or her shall be void. Existing law excepts from these provisions any deed of trust, mortgage, or other liens given to secure the payment of bonds or other indebtedness authorized or permitted to be issued by the Commissioner of Corporations or made by a public utility, as specified.*

*This bill would prohibit a broker, trustee, or mortgagee, or his or her agent, beneficiary, or assign from requiring as a condition of an agreement regarding a high-cost loan, subprime loan, or nontraditional mortgage, as defined, that a borrower or an applicant for the loan waive any rights, remedies, obligations, or procedures of California law with respect to a residential mortgage or mortgage foreclosure.*

*This bill would also prohibit a broker, trustee, or mortgagee, or his or her agent, beneficiary, or assign from refusing to enter into an agreement with a borrower or an applicant regarding a high-cost loan, subprime loan, or nontraditional mortgage solely because he or she refuses to waive rights, remedies, obligations, or procedures provided for in those provisions. The bill would also provide that the exercise by a borrower or applicant of the right to refuse to waive legal rights, remedies, obligations, or procedures, including a rejection of an agreement to arbitrate, shall not affect any other term of the agreement. This bill would also place on the broker, trustee, or mortgagee or his or her agent, beneficiary, or assigns, the burden of proving that any waiver of rights, remedies, obligations, or procedures of California law with respect to these loans, including any agreement to arbitrate a claim or dispute, was knowingly and voluntarily made by the borrower or applicant and was not a condition of the agreement. This provision would apply to an agreement to waive any rights, remedies, obligations, and procedures of California law with respect to those loans, including an agreement to arbitrate, that is entered into, altered, modified, renewed, or extended on or after January 1, 2009.*

*(2) Under existing law, a written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, except upon those grounds that exist for the revocation of any contract.*

*This bill would specify that provision would not apply to any arbitration agreement that is involuntary, unconscionable, against public policy, or otherwise unenforceable.*

*(3) Existing law imposes certain limitations and prohibitions on licensed persons, including real estate brokers, finance lenders, residential mortgage lenders, and financial institutions, with respect to consumer loans and covered loans, as defined. Existing law exempts an assignee that is a holder in due course from liability under these provisions regulating consumer and covered loans. Existing law exempts persons chartered by Congress to engage in the secondary mortgage market from the provisions regulating consumer and covered loans.*

*This bill would delete that exemption from liability for an assignee that is a holder in due course and the exemption for persons chartered by Congress to engage in the secondary mortgage market. The bill would instead make any subsequent holder or assignee of a high-cost loan, subprime loan, or nontraditional mortgage subject to all affirmative claims and any defenses with respect to the loan that the*

consumer could assert against the creditor, as defined, who originated the loan, as specified.

(4) This bill would also make other conforming, nonsubstantive, technical changes to those provisions.

Existing law imposes certain limitations and prohibitions on licensed persons, including real estate brokers, finance lenders, residential mortgage lenders, and financial institutions, with respect to consumer loans and covered loans, as defined. Existing law defines a covered loan as a consumer loan that does not exceed the federal conforming loan limit, as specified, and either the interest rate exceeds a specified percentage rate or the total points and fees payable by the consumer will exceed 6% of the total loan amount. Violations of these limitations and prohibitions by licensed persons are deemed to be violations of the person’s licensing law and may be punishable by, among other things, criminal action, disciplinary action, civil liability, and the imposition of administrative and civil penalties up to \$25,000, as specified.

This bill would provide that a covered loan includes those specified loans where the total points and fees payable by the consumer will exceed 5% of the total loan amount. Because violations of the limitations and prohibitions relative to covered loans may be punished as crimes under certain licensed persons’ licensing laws, redefining the term “covered loan” would expand the scope of these crimes and thereby impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes-no. State-mandated local program: yes-no.

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

- 1     SECTION 1. The Legislature finds and declares that it is the
- 2     public policy of the State of California to ensure that homeowners
- 3     and prospective home buyers have the full benefit of the rights,
- 4     remedies, obligations, and procedures of California law with
- 5     respect to agreements regarding high-cost loans, subprime loans,
- 6     and nontraditional mortgages, and that homeowners and applicants
- 7     for those loans shall not be deprived of those rights, remedies,

1 obligations, or procedures by the use of coerced and involuntary  
2 waivers. It is the purpose of this act to ensure that any agreement  
3 between (a) a broker, trustee, or mortgagee or their agents,  
4 beneficiaries, or assigns and (b) a borrower or applicant for a  
5 loan that purports to waive any rights, remedies, obligations, or  
6 procedures under California law regarding a high-cost loan,  
7 subprime loan, or nontraditional mortgage is a matter of voluntary  
8 consent and not coercion.

9 The Legislature finds and declares that involuntary contractual  
10 waiver provisions with respect to a high-cost loan, subprime loan,  
11 or nontraditional mortgage, including, but not limited to, an  
12 agreement to arbitrate a dispute, that limit or purport to limit a  
13 borrower's or applicant's access to any administrative complaint  
14 or dispute resolution procedure of the State of California or any  
15 other public agency, including, but not limited to, the right to file  
16 and pursue a complaint against a licensed person or entity, to file  
17 and pursue a civil action, or to limit the authority of the State of  
18 California or other public agency to investigate and pursue claims  
19 alleging violation of law or regulations, imposed as a condition  
20 of a loan, are against the public policy of this state.

21 SEC. 2. Section 2953 of the Civil Code is amended to read:

22 2953. (a) Any express agreement made or entered into by a  
23 borrower at the time of or in connection with the making of or  
24 renewing of any loan secured by a deed of trust, mortgage, or other  
25 instrument creating a lien on real property, whereby the borrower  
26 agrees to waive the rights, or privileges conferred upon him or her  
27 by Sections 2924, 2924b, 2924c of the Civil Code or by Sections  
28 580a or 726 of the Code of Civil Procedure, shall be void ~~and of~~  
29 ~~no effect~~. The provisions of this section shall not apply to any deed  
30 of trust, mortgage, or other liens given to secure the payment of  
31 bonds or other evidences of indebtedness authorized or permitted  
32 to be issued by the Commissioner of Corporations; or is made by  
33 a public utility subject to the provisions of the Public Utilities Act.

34 (b) A broker, trustee, or mortgagee, or his or her agent,  
35 beneficiary, or assign shall not require as a condition of an  
36 agreement regarding a high-cost loan, subprime loan, or  
37 nontraditional mortgage that a borrower or an applicant for the  
38 loan waive any rights, remedies, obligations, or procedures of  
39 California law with respect to a residential mortgage or mortgage  
40 foreclosure, including, but not limited to, the right to file and

1 *pursue an administrative complaint or invoke a dispute resolution*  
2 *procedure of the state or any other public agency, the right to file*  
3 *and pursue an administrative complaint or other proceeding*  
4 *against a licensed person or entity, or to file and pursue a civil*  
5 *action, or require as a condition of an agreement that the borrower*  
6 *or applicant limit the authority of the state or any other public*  
7 *agency to investigate and pursue claims alleging violation of law*  
8 *or regulations.*

9 (c) *A broker, trustee, or mortgagee, or his or her agent,*  
10 *beneficiary, or assign shall not refuse to enter into an agreement*  
11 *with a borrower or an applicant regarding a high-cost loan,*  
12 *subprime loan, or nontraditional mortgage solely because he or*  
13 *she refuses to waive rights, remedies, obligations, or procedures*  
14 *provided for in this section. The exercise by a borrower or*  
15 *applicant of the right to refuse to waive legal rights, remedies,*  
16 *obligations, or procedures, including a rejection of an agreement*  
17 *to arbitrate, shall not affect any other term of the agreement.*

18 (d) *Any waiver of rights, remedies, obligations, or procedures*  
19 *of California law with respect to a high-cost loan, subprime loan,*  
20 *or nontraditional mortgage by a mortgagor or trustor, or applicant*  
21 *for that loan, shall be knowing and voluntary, and shall not be a*  
22 *condition of the agreement. Any waiver, including an agreement*  
23 *to arbitrate a dispute with respect to that loan, that is required as*  
24 *a condition of the agreement in violation of this section, shall be*  
25 *deemed involuntary, unconscionable, against public policy, and*  
26 *unenforceable.*

27 (e) *A broker, trustee, or mortgagee or his or her agent,*  
28 *beneficiary, or assigns has the burden of proving that any waiver*  
29 *of rights, remedies, obligations, or procedures of California law*  
30 *with respect to a high-cost loan, subprime loan, or nontraditional*  
31 *mortgage, including any agreement to arbitrate a claim or dispute,*  
32 *was knowingly and voluntarily made by the borrower or applicant*  
33 *and was not a condition of the agreement. This subdivision shall*  
34 *apply to an agreement to waive any rights, remedies, obligations,*  
35 *and procedures of California law with respect to those loans,*  
36 *including an agreement to arbitrate, that is entered into, altered,*  
37 *modified, renewed, or extended on or after January 1, 2009.*

38 (f) *For purposes of this section, the following definitions shall*  
39 *apply:*

1 (1) “Creditor” has the same meaning as “lender” as defined  
2 in Section 3500.2 of Title 12 of the Code of Federal Regulations  
3 and includes a mortgage broker.

4 (2) “High-cost loan” means a consumer loan in which the  
5 original principal balance of the loan does not exceed the most  
6 current conforming loan limit for a single-family first mortgage  
7 loan established by the Federal National Mortgage Association  
8 in the case of a mortgage or deed of trust, and where one of the  
9 following conditions is met:

10 (A) For a mortgage or deed of trust, the annual percentage rate  
11 at consummation of the transaction will exceed by more than 8  
12 percentage points for first lien loans, or by more than 10  
13 percentage points for subordinate lien loans, the yield on treasury  
14 securities having comparable periods of maturity on the 15th day  
15 of the month immediately preceding the month in which the  
16 application for the extension of credit is received by the creditor.

17 (B) The total points and fees payable by the consumer at or  
18 before closing for a mortgage or deed of trust will exceed 5 percent  
19 of the total loan amount.

20 (3) “Subprime loan” or “subprime mortgage” means a loan  
21 secured by a dwelling that is, or will be, the consumer’s principal  
22 dwelling and in which the annual percentage rate exceeds the  
23 greater of either of the following:

24 (A) If the loan is a closed-end loan, the difference between the  
25 annual percentage rate for the loan and the yield on treasury  
26 securities having comparable periods of maturity is either equal  
27 to or greater than (i) 3 percentage points if the loan is secured by  
28 a first lien mortgage or deed of trust or (ii) 5 percentage points if  
29 the loan is secured by a subordinate lien mortgage or deed of trust.  
30 If the loan is an open-end credit plan, the difference between the  
31 annual percentage rate for the loan and the yield on treasury  
32 securities having comparable periods of maturity is equal to or  
33 greater than 3 percentage points, regardless of whether the  
34 open-end credit plan is secured by a first or subordinate lien  
35 mortgage or deed of trust. Without regard to whether the loan is  
36 subject to or reportable under the provisions of the federal Home  
37 Mortgage Disclosure Act (HMDA) (12 U.S.C. Sec. 2801 et seq.),  
38 the difference between the annual percentage rate and the yield  
39 on treasury securities having comparable periods of maturity shall  
40 be determined using the same procedures and calculation methods

1 applicable to loans that are subject to the reporting requirements  
2 of the HMDA.

3 (B) The difference between the annual percentage rate for the  
4 loan and the annual yield on conventional mortgages published  
5 by the Board of Governors of the Federal Reserve System, as  
6 published in the Federal Reserve Statistical Release (H.15) or any  
7 publication that may supersede it, is either equal to or greater  
8 than (i) 1.75 percentage points, if the loan is secured by a first lien  
9 mortgage or deed of trust or (ii) 3.75 percentage points, if the loan  
10 is secured by a subordinate lien mortgage or deed of trust.

11 (4) “Nontraditional loan” or “nontraditional mortgage” means  
12 a mortgage product that allows a consumer to defer payment of  
13 principal and, sometimes, interest, as set forth in the “Interagency  
14 Guidance on Nontraditional Mortgage Product Risks” (71 Fed.  
15 Reg. 58609 (Oct. 4, 2006)).

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

17 (A) All items included in the definition of finance charge in  
18 Sections 226.4 (a) and 226.4 (b) of Title 12 of the Code of Federal  
19 Regulations, except interest or the time price differential.

20 (B) All items described in Section 226.32(b)(1)(iii) of Title 12  
21 of the Code of Federal Regulations.

22 (C) All compensation paid directly or indirectly to a mortgage  
23 broker from any source, including, but not limited to, any payment  
24 of a yield spread premium, and including a payment to a mortgage  
25 broker that originates a loan in its own name in a table-funded  
26 transaction.

27 (D) The cost of all premiums financed by the creditor directly  
28 or indirectly for any credit life, credit disability, credit  
29 unemployment or credit property insurance, or any other life or  
30 health insurance, or any payments financed by the creditor directly  
31 or indirectly for any debt cancellation or suspension agreement  
32 or contract, except that insurance premiums or debt cancellation  
33 or suspension fees calculated and paid in full on a monthly basis  
34 shall not be considered financed by the creditor.

35 (E) The maximum prepayment fees and penalties that may be  
36 charged or collected under the terms of the loan documents.

37 (F) All prepayment fees or penalties that are incurred by the  
38 borrower if the loan refinances a previous loan made or currently  
39 held by the same creditor or an affiliate of the creditor.

1 (G) For open-end loans, the points and fees are calculated by  
 2 adding the total points and fees known at or before closing,  
 3 including the maximum prepayment penalties that may be charged  
 4 or collected under the terms of the loan documents, plus the  
 5 minimum additional fees the consumer would be required to pay  
 6 to draw down an amount equal to the total credit line.

7 (6) “Points and fees” shall not include the following:

8 (A) Taxes, filing fees, recording fees, and other charges and  
 9 fees paid or to be paid to public officials for determining the  
 10 existence of or for perfecting, releasing, or satisfying a security  
 11 interest.

12 (B) Bona fide and reasonable fees paid to a person other than  
 13 the creditor or an affiliate of the creditor for fees for tax payment  
 14 services, flood certification, pest infestation and flood  
 15 determination, appraisal fees, fees for inspections performed prior  
 16 to closing, credit report fees, survey fees, attorney’s fees if the  
 17 consumer has the right to select the attorney from an approved  
 18 list or otherwise, notary fees, escrow charges, so long as not  
 19 otherwise included in the definition of finance charge in  
 20 subparagraph (A) of paragraph (5), title insurance premiums, and  
 21 fire and hazard insurance and flood insurance premiums, provided  
 22 that the conditions in Section 226.4(d)(2) of Title 12 of the Code  
 23 of Federal Regulations are met.

24 SEC. 3. Section 1281 of the Code of Civil Procedure is  
 25 amended to read:

26 1281. ~~A~~(a) Except as provided in subdivision (b), a written  
 27 agreement to submit to arbitration an existing controversy or a  
 28 controversy thereafter arising is valid, enforceable, and irrevocable,  
 29 save except upon such those grounds as that exist for the revocation  
 30 of any contract.

31 (b) Subdivision (a) does not apply to any arbitration agreement  
 32 that is involuntary, unconscionable, against public policy, or  
 33 otherwise unenforceable.

34 SEC. 4. Section 4979.8 of the Financial Code is repealed.

35 ~~4979.8. The provisions of this division shall not impose liability~~  
 36 ~~on an assignee that is a holder in due course. The provisions of~~  
 37 ~~this division shall not apply to persons chartered by Congress to~~  
 38 ~~engage in secondary mortgage market transactions.~~

39 SEC. 5. Section 4979.8 is added to the Financial Code, to read:

1 4979.8. (a) Notwithstanding any other provision of law, a  
 2 consumer may assert against any subsequent holder or assignee  
 3 of a high-cost loan all claims and defenses that the consumer could  
 4 assert against the creditor who originated the loan for violations  
 5 of subdivisions (a) to (f), inclusive, of, subdivisions (i) and (k) of,  
 6 and subdivisions (l) to (p), inclusive, of, Section 4973, as proposed  
 7 to be amended by AB 1830 of the 2007–08 Regular Session.

8 (b) Notwithstanding any other provision of law, a consumer  
 9 may assert against any subsequent holder or assignee of a  
 10 subprime loan or nontraditional mortgage all claims and defenses  
 11 that the consumer could assert against the creditor who originated  
 12 the loan for violations of subdivisions (a) to (c), inclusive, of,  
 13 subdivisions (e) to (h), inclusive, of, subdivisions (j) to (l), inclusive,  
 14 of, and subdivisions (n) and (o) of, Section 4973.2, as proposed  
 15 to be added by AB 1830 of the 2007–08 Regular Session.

16 (c) Notwithstanding any other provision of law, a consumer  
 17 may assert against any subsequent holder or assignee of a  
 18 high-cost loan, subprime loan, or nontraditional mortgage all  
 19 claims and defenses that the consumer could assert against a  
 20 broker for violations of subdivisions (b) to (e), inclusive, of Section  
 21 10133.25 of the Business and Professions Code, for violations of  
 22 subdivisions (b) to (e), inclusive, of Section 22168, and for  
 23 violations of subdivisions (b) to (e), inclusive, of Section 50513,  
 24 as those sections are proposed to be added by AB 2880 of the  
 25 2007–08 Regular Session.

26 (d) A subsequent holder or assignee’s liability under  
 27 subdivisions (a), (b), and (c) shall be limited to amounts required  
 28 to reduce or extinguish the consumer’s liability under the loan,  
 29 plus any additional amounts required to recover costs and  
 30 disbursements, including reasonable attorney’s fees and costs.

31 (e) For purposes of this section, the term “creditor” has the  
 32 same meaning as “lender,” as defined in Section 3500.2 of Title  
 33 12 of the Code of Federal Regulations and includes a mortgage  
 34 broker.

35 SECTION 1.—Section 4970 of the Financial Code is amended  
 36 to read:

37 4970.—For purposes of this division:

38 (a) “Annual percentage rate” means the annual percentage rate  
 39 for the loan calculated according to the provisions of the federal

1 ~~Truth in Lending Act and the regulations adopted thereunder by~~  
2 ~~the Federal Reserve Board.~~

3 ~~(b) “Covered loan” means a consumer loan in which the original~~  
4 ~~principal balance of the loan does not exceed the most current~~  
5 ~~conforming loan limit for a single-family first mortgage loan~~  
6 ~~established by the Federal National Mortgage Association in the~~  
7 ~~case of a mortgage or deed of trust, and where one of the following~~  
8 ~~conditions are met:~~

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

15 ~~(2) The total points and fees payable by the consumer at or~~  
16 ~~before closing for a mortgage or deed of trust will exceed 5 percent~~  
17 ~~of the total loan amount.~~

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

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

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

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

28 ~~(d) “Consumer loan” means a consumer credit transaction that~~  
29 ~~is secured by real property located in this state used, or intended~~  
30 ~~to be used or occupied, as the principal dwelling of the consumer~~  
31 ~~that is improved by a one-to-four residential unit. “Consumer loan”~~  
32 ~~does not include a reverse mortgage, an open line of credit as~~  
33 ~~defined in Part 226 of Title 12 of the Code of Federal Regulations~~  
34 ~~(Regulation Z), or a consumer credit transaction that is secured by~~  
35 ~~rental property or second homes. “Consumer loan” does not include~~  
36 ~~a bridge loan. For purposes of this division, a bridge loan is any~~  
37 ~~temporary loan, having a maturity of one year or less, for the~~  
38 ~~purpose of acquisition or construction of a dwelling intended to~~  
39 ~~become the consumer’s principal dwelling.~~

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

3 (f) “Licensing agency” shall mean the Department of Real Estate  
4 for licensed real estate brokers, the Department of Corporations  
5 for licensed residential mortgage lenders and licensed finance  
6 lenders and brokers, and the Department of Financial Institutions  
7 for commercial and industrial banks and savings associations and  
8 credit unions organized in this state.

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

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

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

38 SEC. 2. No reimbursement is required by this act pursuant to  
39 Section 6 of Article XIII B of the California Constitution because  
40 the only costs that may be incurred by a local agency or school

1 ~~district will be incurred because this act creates a new crime or~~  
2 ~~infraction, eliminates a crime or infraction, or changes the penalty~~  
3 ~~for a crime or infraction, within the meaning of Section 17556 of~~  
4 ~~the Government Code, or changes the definition of a crime within~~  
5 ~~the meaning of Section 6 of Article XIII B of the California~~  
6 ~~Constitution.~~

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