

AMENDED IN SENATE AUGUST 18, 2000
AMENDED IN SENATE AUGUST 7, 2000
AMENDED IN SENATE JULY 6, 2000
AMENDED IN SENATE JUNE 7, 2000
AMENDED IN ASSEMBLY JANUARY 11, 2000
AMENDED IN ASSEMBLY MARCH 17, 1999

CALIFORNIA LEGISLATURE—1999–2000 REGULAR SESSION

ASSEMBLY BILL

No. 244

Introduced by Assembly Member Ackerman

February 1, 1999

An act to add Section 25118 to the Corporations Code, relating to usury.

LEGISLATIVE COUNSEL'S DIGEST

AB 244, as amended, Ackerman. Corporations: evidences of indebtedness.

The California Constitution prohibits usury, which is the loan or forbearance of any money, goods, or things at a rate of interest in excess of specified ceilings, but exempts certain transactions and lenders from these provisions, and allows the Legislature to exempt additional classes of persons by statute. Existing statutory law, the Corporate Securities Act of 1968, provides that certain evidences of indebtedness, and their purchasers or holders, are exempt from state usury laws if the evidence of indebtedness is issued in compliance with specific

provisions. Existing statutory law also provides that the usury exemption is applicable to an evidence of indebtedness issued in accordance with these provisions regardless of whether subsequent to its issuance the evidence of indebtedness is determined by a court of competent jurisdiction to be a security.

This bill would provide that certain evidences of indebtedness in an amount of at least \$300,000 *at the time of issuance*, and the purchasers or holders thereof, shall be exempt from the usury provisions of the California Constitution under certain circumstances, as specified. This bill would state that these exemptions apply regardless of whether the evidence of indebtedness or guaranty is determined by a court of competent jurisdiction not to be a “security,” but would clarify that these exemptions do not extend to evidences of indebtedness issued or guaranteed by an individual, a revocable trust, or a partnership with general partners, as specified.

This bill would state legislative intent that the standards contained in these provisions are approved with respect to commercial loans only and do not reflect any judgment by the Legislature regarding loans for personal, family, or household purposes and that the exemption contained therein shall not affect the application of existing licensing requirements, laws regarding unfair, unlawful, or deceptive acts or practices, or the applicability to a successor in interest to the originating lender.

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

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

1 SECTION 1. Section 25118 is added to the
 2 Corporations Code, to read:
 3 25118. (a) An evidence of indebtedness issued by an
 4 entity or guaranteed by an entity that is an affiliate (as
 5 defined in Section 150) of the borrower that, on the day
 6 the evidence of indebtedness issued or guaranty is first
 7 issued or entered into, has total assets of at least two
 8 million dollars (\$2,000,000) according to its then most



1 recent financial statements, and the purchasers or
2 holders thereof, shall be exempt from the usury
3 provisions of the Constitution. The financial statements
4 referred to in the preceding sentence shall be:

5 (1) As of a date not more than 90 days prior to the date
6 the evidence of indebtedness or guaranty is first issued or
7 entered into.

8 (2) Prepared:

9 (A) In accordance with generally accepted
10 accounting principles and, if the entity has consolidated
11 subsidiaries, on a consolidated basis.

12 (B) In accordance with the rules and requirements of
13 the Securities and Exchange Commission, whether or not
14 required by law to be prepared in accordance with those
15 rules and requirements.

16 (b) Any one or more evidences of indebtedness, and
17 the purchasers or holders thereof, shall be exempt from
18 the usury provisions of the Constitution if either of the
19 following applies:

20 (1) The evidences of indebtedness aggregate *at the*
21 *time of issuance* at least three hundred thousand dollars
22 (\$300,000) in original face amount, or, if the evidences of
23 indebtedness are purchased with original issue discount,
24 they are purchased for an aggregate purchase price *at the*
25 *time of issuance* of at least three hundred thousand dollars
26 (\$300,000).

27 (2) The evidences of indebtedness are issued pursuant
28 to a bona fide written commitment for the lending to the
29 issuer of at least three hundred thousand dollars
30 (\$300,000), or the provision of *a line of credit* to the issuer
31 ~~on a revolving basis in a maximum in a~~ principal amount
32 of at least three hundred thousand dollars (\$300,000). The
33 exemption provided by this paragraph shall not be
34 affected by a subsequent event of default or other event
35 not in the lender's control that has relieved or may relieve
36 the lender from its commitment.

37 (c) Any evidence of indebtedness described in
38 subdivisions (a) or (b), and the purchasers or holders
39 thereof, shall be entitled to the benefits of the usury
40 exemption contained in this section regardless of



1 whether, at any time after the evidence of indebtedness
2 or guaranty upon which the exemption is based is first
3 issued or entered into, the evidence of indebtedness or
4 guaranty is determined by a court of competent
5 jurisdiction not to be a “security.”

6 (d) This section creates and authorizes a class of
7 transactions and persons pursuant to Section 1 of Article
8 XV of the California Constitution.

9 (e) This section shall not apply to:

10 (1) Any evidence of indebtedness issued or
11 guaranteed (if the guaranty is part of the consideration
12 for the indebtedness) by an individual, a revocable trust
13 having one or more individuals as trustors, or a
14 partnership in which, at the time of issuance, one or more
15 individuals are general partners.

16 (2) Any transaction subject to the limitation on
17 permissible rates of interest set forth in paragraph (1) of
18 the first sentence of Section 1 of Article XV of the
19 California Constitution.

20 (f) The exemptions created by this section shall only
21 be available in a transaction which meets either of the
22 following criteria:

23 (1) The lender and either the issuer of the
24 indebtedness or the guarantor, as the case may be, or any
25 of their respective officers, directors, or controlling
26 persons, or, if any party is a limited liability company, the
27 managers as appointed or elected by the members, have
28 a preexisting personal or business relationship.

29 (2) The lender and the issuer, or the lender and the
30 guarantor, by reason of their own business and financial
31 experience or that of their professional advisers, could
32 reasonably be assumed to have the capacity to protect
33 their own interests in connection with the transaction.

34 (g) For purposes of this section, “preexisting personal
35 or business relationship” and “capacity to protect their
36 own interests in connection with the transaction” as used
37 in subdivision (f) shall have the same meaning as, and be
38 determined according to the same standards as, specified
39 in paragraph (2) of subdivision (f) of Section 25102 and
40 its implementing regulations provided that, solely with



1 respect to this section, a lender or purchaser who is
2 represented by counsel may designate that person as its
3 professional adviser whether or not that person is
4 compensated by the issuer or guarantor, as long as that
5 person has a bona fide attorney-client relationship with
6 the lender or purchaser.

7 SEC. 2. It is the intent of the Legislature that the
8 standards contained in Section 1 of this act are approved
9 with respect to commercial loans only. They do not
10 reflect any judgment by the Legislature regarding loans
11 for personal, family, or household purposes. No inference
12 should be drawn from those standards as to the
13 appropriate treatment of any loans other than loans for
14 commercial purposes that qualify for the exemption
15 provided therein.

16 It is also the intent of the Legislature that the
17 exemption contained in Section 1 of this act shall not
18 affect the application of any other provision of law that
19 (1) requires any person in connection with a transaction
20 described in Section 1 to comply with applicable licensing
21 requirements, (2) protects parties to a transaction
22 described in Section 1 from unfair, unlawful, or deceptive
23 acts or practices, or (3) affects the availability of the
24 exemption provided by Section 1 to a successor in interest
25 of the originating lender of a loan described therein.

