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# Business Associations and Professions

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# Business Associations and Professions

## Business Associations and Professions; Uniform Limited Partnership Act

Corporations Code §§15501, 15502, 15503, 15504, 15505, 15506, 15507, 15508, 15509, 15510, 15511, 15512, 15513, 15514, 15515, 15516, 15517, 15518, 15519, 15520, 15520.5, 15521, 15522, 15523, 15524, 15525, 15525.5, 15526, 15527, 15528, 15529, 15530, 15531, 15532 (repealed); §§15511, 15512, 15513, 15514, 15515, 15516, 15517, 15521, 15522, 15523, 15524, 15525, 15526, 15527, 15528, 15531, 15532, 15533, 15534, 15535, 15536, 15537, 15541, 15542, 15543, 15544, 15551, 15552, 15553, 15554, 15561, 15562, 15563, 15564, 15565, 15566, 15571, 15572, 15573, 15574, 15575, 15581, 15582, 15583, 15584, 15585, 15591, 15592, 15593, 15594, 15595, 15596, 15597, 15598, 15601, 15602, 15611, 15612, 15613, 15614, 15621, 15622, 15623 (new); Government Code §§12213, 12214, 12215 (new); §12209 (amended).

AB 362 (Imbrecht); STATS. 1981, Ch 807

(Effective January 1, 1983)

Support: Department of Corporations, State of California; Western Building Material Dealers Association

*Regulates formation of limited partnerships; establishes requirements for certificates of limited partnership, amendment, dissolution, and cancellation; restricts the use of certain names; requires in-state office and records; regulates meetings of partners of limited partnerships; makes provisions for service of process; allows a partner's contribution to be in the form of services; establishes the manner in which partners must share in profits, losses, and distributions; regulates assignment of limited partnership interests; establishes the procedure for dissolution and winding up of a limited partnership; defines the rights and liabilities of limited and general partners; regulates foreign limited partnerships transacting intrastate business in California; provides for a class action against the limited partnership or general partners.*

In 1949, California enacted the Uniform Limited Partnership Act.<sup>1</sup> Chapter 807 represents an extensive revision of the law governing the

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1. See CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15501-15532). See generally REVISED UNIFORM LIMITED PARTNERSHIP ACT (1976) (many of the provisions of Chapter 807 are similar to the Revised Uniform Limited Partnership Act).

formation, finances, distributions, withdrawals, and dissolution of limited partnerships in California and the rights and liabilities of those who form limited partnerships.<sup>2</sup> Chapter 807 also introduces new law regulating foreign limited partnerships that transact business in California.<sup>3</sup> Finally, Chapter 807 allows for class actions on behalf of all limited partners<sup>4</sup> to enforce any claim common to them against the partnership.<sup>5</sup> Chapter 807 has drawn heavily from the Revised Uniform Limited Partnership Act<sup>6</sup> and California law regulating corporations<sup>7</sup> with the result that the California limited partnership is treated more like the modern partnership or corporation which it so closely resembles.<sup>8</sup>

### *Formation and Business*

Prior to the enactment of Chapter 807, a limited partnership was formed by recording in the county recorder's office<sup>9</sup> a certificate of limited partnership setting forth specified aspects of the relationships among the partners.<sup>10</sup> Chapter 807 provides that to form a limited partnership, the partners must execute a partnership agreement and the general partner<sup>11</sup> must execute, acknowledge,<sup>12</sup> and file a certificate of limited partnership<sup>13</sup> that sets forth specified information.<sup>14</sup> In addition, a limited partnership is formed at the time the certificate is filed with the Secretary of State.<sup>15</sup> Furthermore, a copy of the certificate certified by the Secretary of State is conclusive evidence of formation

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2. Compare CAL. CORP. CODE §§15511-15623 with CAL. STATS. 1949, c. 383, §1, at 688 (enacting CAL. CORP. CODE §§15501-15532).

3. See CAL. CORP. CODE §§15591-15598.

4. See *id.* §15511(j) (definition of limited partner).

5. See *id.* §§15601-15602.

6. Compare *id.* §§15511-15623 with REVISED UNIFORM LIMITED PARTNERSHIP ACT (1976).

7. Compare CAL. CORP. CODE §§101, 110, 113, 149, 1501, 1503, 1504, 1700, 1702 with *id.* §§15511-15623.

8. Compare CAL. CORP. CODE §§101, 110, 113, 149, 1501, 1503, 1504, 1700, 1702 with *id.* §§15511-15623.

9. See CAL. STATS. 1970, c. 839, §1, at 1573 (amending CAL. CORP. CODE §15502).

10. With the enactment of Chapter 807, the information required to be in a certificate of limited partnership is considerably lessened. Compare CAL. CORP. CODE §15521 with CAL. STATS. 1970, c. 839, §1, at 1573.

11. See CAL. CORP. CODE §15521(a). See *id.* §15511(h) (definition of general partner).

12. See *id.* §15511(a) (definition of acknowledged).

13. See *id.* §§15521(a), 15524(a)(1), 15524(a)(5), 15524(b).

14. See *id.* §15521(a)(1)-(6). The certificate must contain the name of the limited partnership, the street address of the principal executive office or an office within California, the name and address of the agent for service of process, the term for which the partnership is to exist, and any other information which the general partners decide to include. Much of the information that prior law required to be in the certificate is now found in Chapter 807 as a series of presumptions concerning the arrangements between the partners in the event that there is no agreement to the contrary. Compare *id.* §15536(a)-(f) with CAL. STATS. 1970, c. 839, §1, at 1573 (amending CAL. CORP. CODE §15502).

15. See CAL. CORP. CODE §15521(b).

and prima facie evidence of the existence of the limited partnership.<sup>16</sup> Prior to the enactment of Chapter 807, the certificate of limited partnership was required to be filed in the office of the recorder of the county where the principal place of business of the partnership was located.<sup>17</sup> In contrast, Chapter 807 makes filing with a county recorder in this state permissive<sup>18</sup> but retains certain presumptions created by the recording of the certificate in the office of the county recorder.<sup>19</sup>

Prior law enumerated the circumstances requiring an amendment to the certificate of limited partnership<sup>20</sup> and specified that a certificate of amendment had to be signed and acknowledged by all members of the partnership.<sup>21</sup> Chapter 807 requires that a certificate of limited partnership be amended by filing a certificate of amendment<sup>22</sup> executed and acknowledged by all general partners within thirty days of: (1) a change in the name of the limited partnership,<sup>23</sup> (2) a change in either the street address of the principal executive office,<sup>24</sup> or, if not located in this state, the address of an office within this state,<sup>25</sup> (3) a change in the address of a general partner or the partner's withdrawal,<sup>26</sup> (4) a change in the address of the agent for service of process or the appointment of a new agent for service of process,<sup>27</sup> (5) the admission of a general partner,<sup>28</sup> or (6) the discovery, by any of the general partners, of any false or erroneous material statement contained in the certificate or an amendment to the certificate.<sup>29</sup> In addition, Chapter 807 gives the general partners the right to amend the certificate of limited partnership in any other manner deemed appropriate.<sup>30</sup> Any partner who files a certificate of limited partnership, certificate of amendment, certificate of dissolution,<sup>31</sup> or certificate of cancellation<sup>32</sup> that contains a material misstatement of fact is subject to liability for the misrepresentation if

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16. *See id.* §15521(c).

17. *See* CAL. STATS. 1970, c. 839, §1, at 1574.

18. *See* CAL. CORP. CODE §15521(d).

19. *See id.* For example, recording creates a conclusive presumption in favor of any bona fide purchaser or encumbrancer for value of the partnership real property located in that county, that the persons named as general partner in the certificate are all general partners of the partnership.

20. *See* CAL. STATS. 1963, c. 870, §6, at 2113 (amending CAL. CORP. CODE §15524).

21. *See* CAL. STATS. 1976, c. 424, §1, at 1085 (amending CAL. CORP. CODE §15525).

22. *See* CAL. CORP. CODE §§15522(a), 15524(a)(2), (5), (6).

23. *See id.* §15522(b)(1).

24. *See id.* §15522(b)(2)(A).

25. *See id.* §15522(b)(2)(B).

26. *See id.* §15522(b)(3).

27. *See id.*

28. *See id.* §15522(b)(4).

29. *See id.* §15522(b)(5).

30. *See id.* §15522(c).

31. *See id.* §15523(a)(1). *See* text accompanying note 119 *infra*.

32. *See id.* §15523(b)(1).

that partner knew or should have known that the statement was false, or became false, and failed to file the required amendment within the time allowed.<sup>33</sup> Liability will be imposed only if the aggrieved individual relied on the misstatement.<sup>34</sup> If any partner fails to execute a certificate required by Chapter 807, any other partner may execute and file the appropriate certificate with the Secretary of State.<sup>35</sup>

### *Name, Office, and Records*

Existing law prohibits the use of the name of a limited partner in the name of the partnership unless it is also the name of a general partner or the partnership had been doing business under that name prior to the admission of the limited partner.<sup>36</sup> Chapter 807 prohibits a limited partnership from using a name that is the same as, or closely resembles, the name of any established limited partnership.<sup>37</sup> Chapter 807 allows a limited partnership or a person intending to organize a limited partnership to reserve a name with the Secretary of State for a period of sixty days.<sup>38</sup> Finally, Chapter 807 requires that the name of each limited partnership contain, without abbreviation, the words "limited partnership."<sup>39</sup> Thus, the common California practice of abbreviating the word "limited" in the name of the limited partnership<sup>40</sup> no longer is allowed.<sup>41</sup>

Existing law allows a limited partnership to carry on any business other than the banking or insurance business.<sup>42</sup> In addition, Chapter 807 forbids a limited partnership from engaging in business as a trust company.<sup>43</sup> Furthermore, the name of the limited partnership may not contain the words "trust" or "trustee."<sup>44</sup>

Prior to the enactment of Chapter 807, limited partnerships were not required to maintain any office or records in this state.<sup>45</sup> Chapter 807

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33. See CAL. CORP. CODE §15522(d)-(e). Liability may only be imposed upon a limited partner if he or she is the one who files the certificate. See *id.* §15522(f).

34. See *id.* §15522(d). Chapter 807 relieves any partner from liability if the required amendment is filed within the specified time. See *id.* §15522(e).

35. See *id.* §15525.

36. See *id.* §15512(b).

37. See *id.* §15512(c).

38. See *id.* §15513; CAL. GOV'T CODE §12215.

39. See CAL. CORP. CODE §15512(a).

40. See Letter from Executive Committee of the Business and Corporations Law Section of the Los Angeles County Bar Association to the Chairman of the Partnership Committee of the State Bar of California 9 (Feb. 3, 1981) (copy on file at *Pacific Law Journal*).

41. See CAL. CORP. CODE §15512(a).

42. See *id.* §15516.

43. See *id.*

44. See *id.* §15512(d).

45. See CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15001-15700).

mandates that all limited partnerships maintain an office<sup>46</sup> and an agent for service of process within California.<sup>47</sup> In addition, Chapter 807 requires that specified records be kept and maintained at the required in-state office.<sup>48</sup>

### *Meetings*

Prior law made no provisions relating to partnership meetings.<sup>49</sup> Chapter 807 regulates the time, place, notice, and adjournment of meetings of limited partnerships.<sup>50</sup> Meetings may be held at any place fixed in the partnership agreement.<sup>51</sup> If no place is stated in the agreement, the meetings must be held at the principal executive office of the partnership<sup>52</sup> or, if not located in California, at the in-state office set forth in the certificate.<sup>53</sup> A meeting may be called by the general partners or by limited partners holding more than ten percent of the interests of all limited partners on matters on which they are allowed to vote.<sup>54</sup> If the partners are required or permitted to take any action at a meeting, each partner entitled to vote must be given written notice stating the place, date, and time of the meeting, not less than ten nor more than sixty days, before the date of the meeting.<sup>55</sup> No business other than that stated in the notice may be transacted at the meeting.<sup>56</sup> If the general partners fail to give notice of a meeting within twenty days after receipt of a valid request for a meeting, the person entitled to call the meeting may give the notice or may request that the superior court of that county order that the general partner give the notice.<sup>57</sup> If a meeting is adjourned to another time or place not more than forty-five days from the date of adjournment, notice is not required provided that the new time and place are announced at the adjourned meeting.<sup>58</sup> A

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46. See CAL. CORP. CODE §15514(a) (the office need not be a place of business).

47. See *id.* §15514(b).

48. See *id.* §15515(a)-(f). At this office, the limited partnership is required to maintain all of the following records: (1) a current list of the name, address, contributions, and share in losses and profits of each partner; (2) copies of the certificate of limited partnership and any certificates which amend it; (3) copies of the federal, state, and local income tax returns of the limited partnership for the six most recent years; (4) copies of the original partnership agreement and any amendments of this agreement; (5) financial statements of the limited partnership for the six most recent years; and (6) any other books and records for at least the past three years. See *id.*

49. See CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15001-15700).

50. See CAL. CORP. CODE §15537.

51. See *id.* §15537(a).

52. See *id.*

53. See *id.*

54. See *id.* §15537(b).

55. See *id.* §15537(c)(1). See also *id.* §15537(c)(2).

56. See *id.* §15537(c)(1), (f).

57. See *id.* §15537(c)(3). See generally *id.* §305.

58. See *id.* §15537(d).

meeting of the partners which is not properly noticed may be validated if a quorum is present, in person or by proxy,<sup>59</sup> and each person entitled to vote but not present signs, before or after the meeting, a waiver of notice, consent to the meeting, or approval of the minutes.<sup>60</sup> Attendance at the meeting will constitute a waiver of notice unless the person in attendance makes an objection to the transaction of any business for lack of proper notice at the beginning of the meeting.<sup>61</sup> Provision is also made under Chapter 807 for approval of any action without a meeting.<sup>62</sup>

### *Service of Process*

The Uniform Limited Partnership Act as enacted by California in 1949,<sup>63</sup> made no provision for service of process upon a limited partnership.<sup>64</sup> In addition to all existing methods of service,<sup>65</sup> Chapter 807 allows a limited partnership to be served with process by delivery of the appropriate documents to (1) any individual designated as an agent of the limited partnership,<sup>66</sup> (2) any general partner,<sup>67</sup> or (3) if the designated agent or general partner is a corporation, any person named in the latest certificate of the corporate agent,<sup>68</sup> or any officer of the corporate general partner.<sup>69</sup> If a showing is made to the court by affidavit that service cannot be made through the exercise of reasonable diligence either because the agent for service of process has resigned or cannot be found at the designated address, the court may order that the service be made by delivering a copy of the process for each defendant to the Secretary of State.<sup>70</sup> The Secretary of State is required to record the service and notify the limited partnership at its principal executive office.<sup>71</sup> If service of process is made to the Secretary of State, it is considered to be complete on the tenth day after delivery.<sup>72</sup>

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59. *See id.* §15537(g)(1) (unless otherwise provided in the partnership agreement, a quorum consists of a majority in interest of the limited partners represented in person or by proxy). *See also id.* §§15511(m) (definition of majority in interest), 15537(i) (use of proxies).

60. *See id.* §15537(e).

61. *See id.*

62. *See id.* §15537(h).

63. *See* CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15501-15700).

64. *Id.*

65. *See* CAL. CIV. PROC. CODE §413.10.

66. *See* CAL. CORP. CODE §15527(b)(1).

67. *See id.*

68. *See id.* §15527(b)(2). *See generally id.* §15505.

69. *See id.* §15527.

70. *See id.* §15527(c)(1).

71. *See id.* §15527(c)(2)-(d)(1).

72. *See id.* §15527(c)(1).

*Finances*

Existing law allows a partner's contribution to the limited partnership to be in the form of cash or other property.<sup>73</sup> Chapter 807 allows a general partner to make a contribution in the form of services rendered, a promissory note, or other obligation to contribute property or to perform services in consideration of the receipt of a partnership interest.<sup>74</sup> A limited partner's contribution may be in any of these forms other than an obligation to perform future services.<sup>75</sup> Prior to the enactment of Chapter 807, no provision was made for the manner in which partners were to share in profits, losses, and distributions, in the absence of an agreement.<sup>76</sup> Chapter 807 requires that in the absence of a contrary provision in the limited partnership agreement, the profits and losses of the partnership be allocated among the partners in proportion to the contributions of each partner.<sup>77</sup> Similarly, in the absence of applicable provisions in the partnership agreement, distributions which are a return of capital must be made in proportion to the contribution of each partner.<sup>78</sup> Any distribution which is not a return of capital must be made in proportion to the division of profits.<sup>79</sup>

*Assignment of Partnership Interests*

Existing law classifies an interest in a limited partnership as personal property<sup>80</sup> and assignable.<sup>81</sup> Chapter 807 expressly authorizes the partners to agree to restrict the assignment of limited partnership interests.<sup>82</sup> If an assignment is made, the assignee is entitled only to the distributions to which the assignor would be entitled.<sup>83</sup> The assignee does not acquire the status or the powers of a partner unless there is a provision in the partnership agreement authorizing the acquisition of these powers or unless all the other partners consent.<sup>84</sup> A limited partner who assigns all or part of a limited partnership interest continues to be a limited partner until the assignee attains limited partner status.<sup>85</sup>

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73. Compare *id.* with CAL. STATS. 1949, c. 383, §1, at 674, 690 (enacting CAL. CORP. CODE §15502).

74. See CAL. CORP. CODE §15551.

75. See *id.*

76. See CAL. STATS. 1949, c. 383, §1, at 674, 688-97.

77. See CAL. CORP. CODE §15553.

78. See *id.* §15554.

79. See *id.*

80. See *id.* §15571.

81. See *id.* §15572.

82. See *id.*

83. See *id.*

84. See *id.* §§15572, 15574(a)-(b).

85. See *id.* §15572. The assignor is always liable for certain actions. See *id.* §§15522(d), 15566, 15574(c).



An assignee who becomes a limited partner is liable for all obligations of the assignor unless the obligation was not known to the assignee at the time the limited partner status was acquired and could not be ascertained from the partnership agreement.<sup>86</sup> Chapter 807 also allows a judgment creditor of any partner to apply to the courts to charge the debtor's partnership interest with payment of the unsatisfied judgment with interest.<sup>87</sup> Through this process, the judgment creditor may acquire the status of an assignee of the debtor's limited partnership interest.<sup>88</sup>

### *Distributions and Withdrawals*

Prior to the enactment of Chapter 807, there was no express provision granting a partner the right to receive distributions from the limited partnership.<sup>89</sup> Chapter 807 defines the rights and liabilities of a partner with respect to distributions and withdrawals.<sup>90</sup> With the enactment of Chapter 807, a partner has the right to receive distributions prior to withdrawal from, and the dissolution of, the limited partnership to the extent, and at the times specified in the partnership agreement.<sup>91</sup> Unless otherwise agreed, a general partner may withdraw from the limited partnership at any time by giving written notice to all other partners.<sup>92</sup> If a general partner withdraws in violation of the partnership agreement, Chapter 807 allows the limited partnership to recover damages from the withdrawing partner for breach of contract and, in addition to other remedies, may offset all damages against any distributions to which the withdrawing partner is entitled.<sup>93</sup> Unless otherwise agreed, a limited partner may withdraw at any time by giving at least six months prior written notice to each general partner.<sup>94</sup> Upon withdrawal, a limited partner is entitled to receive any distributions to which he or she is entitled and, within a reasonable time, the fair value of his or her interest in the limited partnership.<sup>95</sup>

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86. *See id.* §15574(b).

87. *See id.* §15573.

88. *See id.*

89. *See* CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15001-15700).

90. *See* CAL. CORP. CODE §§15561-15566.

91. *See id.* §15561.

92. *See id.* §15562(a). The rights and liabilities of a withdrawing general partner are determined as though withdrawal was an event terminating the general partner's status. *See id.* §§15542, 15562(b).

93. *See id.* §15562(a). Unless otherwise agreed, a withdrawal by a general partner prior to the expiration of the term of the limited partnership is a breach of the partnership agreement. *See id.*

94. *See id.* §15563.

95. *See id.* §15564.

Chapter 807 gives a partner entitled to receive a distribution from the partnership the status of a creditor and allows the partner all the remedies entitled a creditor.<sup>96</sup> A limited partner, however, who is unable to secure the return of his or her contribution from the partnership, is no longer entitled to seek dissolution of the partnership as under prior law.<sup>97</sup>

### *Dissolution*

Prior to the enactment of Chapter 807, the events which caused the dissolution of a limited partnership were not specified.<sup>98</sup> In addition, no provisions were made for winding up the affairs of a dissolved partnership.<sup>99</sup> Prior law, however, did give a limited partner the right to seek dissolution and winding up by judicial decree.<sup>100</sup> Furthermore, a system of priorities for payment of liabilities and distribution of partnership assets subsequent to dissolution was established.<sup>101</sup>

Chapter 807 specifies that a limited partnership is dissolved upon the happening of any of the following: (1) unless otherwise provided in the partnership agreement, written consent of all general partners and a majority in interest of the limited partners,<sup>102</sup> (2) termination of the status of the sole general partner unless the partners agree in writing to continue the business of the limited partnership and to the appointment of one or more general partners,<sup>103</sup> (3) a decree of judicial dissolution,<sup>104</sup> or (4) as otherwise provided in the partnership agreement.<sup>105</sup> Chapter 807 allows a partner to seek a judicial decree of dissolution only if it is not practicable to carry on the business in conformity with the partnership agreement,<sup>106</sup> there is some misconduct on the part of the general partners,<sup>107</sup> or liquidation is necessary to protect the rights or interests of the complaining partner or partners.<sup>108</sup> In addition, Chapter 807 provides that the winding up of the affairs of a dissolved partnership may be conducted by the general partners or, if there are

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96. *See id.* §§15565, 15584.

97. *Compare id.* with CAL. STATS. 1949, c. 383, §1, at 674, 692 (enacting CAL. CORP. CODE §15516).

98. *See* CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15001-15700).

99. *Id.*

100. *See* CAL. STATS. 1949, c. 383, §1, at 674, 691 (enacting CAL. CORP. CODE §15510).

101. *See* CAL. STATS. 1949, c. 383, §1, at 674, 691 (enacting CAL. CORP. CODE §15514).

102. *See* CAL. CORP. CODE §15581(b).

103. *See id.* §15581(c).

104. *See id.* §§15581(d), 15582.

105. *See id.* §15581(a).

106. *See id.* §15582(a).

107. *See id.* §15582(b).

108. *See id.* §15582(c).

none, by the limited partners.<sup>109</sup> A court may order the winding up of the affairs of a dissolved limited partnership upon the petition of three or more creditors or of a limited partner or partners representing at least five percent of the interests of the limited partners.<sup>110</sup>

Unless otherwise agreed, a limited partner who winds up the affairs of the partnership pursuant to Chapter 807 is entitled to reasonable compensation.<sup>111</sup> After dissolution, Chapter 807 requires that the assets of a limited partnership be distributed, first, to creditors, including partners who are creditors, in satisfaction of liabilities of the limited partnership;<sup>112</sup> second, to partners and former partners in satisfaction of liabilities for distributions<sup>113</sup> and; third, to partners in the manner established in the partnership agreement.<sup>114</sup> Even though dissolution has taken place, a general partner retains the power to bind a limited partnership by doing any act appropriate for winding up partnership affairs<sup>115</sup> or through any transaction which would bind the partnership if dissolution had not taken place, provided that the other party had previously extended credit to the partnership and had no knowledge or notice of the dissolution or had known of the partnership prior to dissolution and had no knowledge or notice of the dissolution.<sup>116</sup>

Prior law required a certificate of limited partnership to be cancelled when the partnership was dissolved or when limited partners became general partners.<sup>117</sup> Upon the dissolution of a limited partnership, Chapter 807 requires that a certificate of dissolution be filed in the office of the Secretary of State.<sup>118</sup> The certificate must contain the name of the limited partnership, the Secretary of State's file number, the event causing and the date of the dissolution.<sup>119</sup> Upon completion of the winding up of the affairs of the limited partnership, a certificate of cancellation of certificate of limited partnership must be filed<sup>120</sup> containing the same information as the certificate of dissolution and any other information the partners filing the certificate determine should be

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109. *See id.* §15583(a).

110. *See id.* §15583(b).

111. *See id.* §15583(c).

112. *See id.* §15584(a).

113. *See id.* §§15561, 15564, 15565, 15584(b).

114. *See id.* §§15536, 15584(c).

115. *See id.* §15585(a).

116. *See id.* §15585(b).

117. *See* CAL. STATS. 1963, c. 870, §6, at 2110, 2113 (amending CAL. CORP. CODE §15524).

118. *See* CAL. CORP. CODE §§15523(a)(1), 15524(a)(3), (5), (6). The certificate must be filed by the general partners unless there are no general partners remaining. In that event, the certificate must be filed by the limited partners conducting the winding up of the partnership affairs. *See id.* §§15523(a)(1), 15581(c).

119. *See id.* §15523(a)(2).

120. *See id.* §15524(a)(4), (5), (6).

included.<sup>121</sup>

### *Rights and Liabilities of Limited Partners*

Existing law allows a new limited partner to be admitted to the partnership after it has been formed.<sup>122</sup> Prior to the enactment of Chapter 807, no criteria for admission of a new limited partner was specified.<sup>123</sup> In addition, prior law gave limited partners the right to demand and inspect certain records of, and information pertaining to, the affairs of the partnership.<sup>124</sup> The liability of a limited partner was restricted to those instances when the partner participated in the control of the business.<sup>125</sup> Furthermore, a person who contributed to a business in the erroneous belief that he or she was a limited partner, was not subject to liability provided that upon discovering the mistake, the individual renounced all interest in the profits of the business or other compensation.<sup>126</sup>

With the enactment of Chapter 807, a new limited partner may acquire an interest directly from the partnership only upon compliance with the partnership agreement or with the written consent of all the partners.<sup>127</sup> The name, address, contribution, and share of profits and losses of the new limited partner must be added to the appropriate partnership records.<sup>128</sup> Chapter 807 also gives a limited partner the right to inspect and copy any records that the partnership is required to maintain.<sup>129</sup> A limited partner, upon reasonable demand, may also obtain at the expense of the partnership, copies of (1) federal, state, or local income tax or information returns for each year,<sup>130</sup> (2) names and addresses of all partners and their contribution and share in profits and losses,<sup>131</sup> (3) the certificate of limited partnership and all attendant documents,<sup>132</sup> and (4) the original partnership agreement and any amendments to the agreement.<sup>133</sup> In addition, the general partners promptly must furnish a limited partner with a copy of any amendment executed

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121. See *id.* §§15523(b), 15581(c).

122. See *id.* §15531(a).

123. See CAL. STATS. 1967, c. 896, §1, at 2346 (amending CAL. CORP. CODE §15508).

124. See CAL. STATS. 1949, c. 383, §1, at 674, 691 (enacting CAL. CORP. CODE §15510).

125. See CAL. STATS. 1979, c. 373, §57, at 1250, 1272 (amending CAL. CORP. CODE §15507).

126. See CAL. STATS. 1949, c. 383, §1, at 674, 691 (enacting CAL. CORP. CODE §15511).

127. See CAL. CORP. CODE §15531(a)(1). There are different requirements for the assignment of a limited partner's interest. See *id.* §15574.

128. See *id.* §§15515(a), 15531(b).

129. See *id.* §§15515, 15534(b).

130. See *id.* §15534(b)(2).

131. See *id.* §§15515(a), 15534(a).

132. See *id.* §§15515(b), 15534(a).

133. See *id.* §§15515(d), 15534(a).

by a general partner pursuant to a power of attorney from that limited partner.<sup>134</sup> The general partners also are required to provide all limited partners with the information necessary to complete federal and state income tax or information returns.<sup>135</sup> Furthermore, if the partnership has more than thirty-five limited partners, the general partners must issue an annual report to each of the partners containing a balance sheet current to the close of the fiscal year, an income statement, and a statement of changes in financial position for the fiscal year.<sup>136</sup> A limited partner or partners holding at least five percent of the interests of the limited partners has the right, upon request, to an income statement of the limited partnership for the initial three-month, six-month, or nine-month period of the current fiscal year.<sup>137</sup> Chapter 807 provides that a waiver of any of these rights to information by a partner is not enforceable.<sup>138</sup> In addition to any existing remedies for failure of the general partners to supply required information, Chapter 807 empowers a court of competent jurisdiction to compel the preparation and delivery of any required financial statements.<sup>139</sup>

Chapter 807 restricts the liability of a limited partner for the obligations of the partnership to those instances when (1) the limited partner is named as a general partner in the certificate, or, (2) the limited partner, in addition to the exercise of rights and powers as a limited partner, participates in the control of the business.<sup>140</sup> To subject a limited partner to liability on the ground of participation in the control of the business, the aggrieved individual must have actual knowledge of the participation and control and believe that the limited partner is a general partner.<sup>141</sup> An individual who contributes to a business in the erroneous but good faith belief that he or she is a limited partner no longer is required to renounce all of their profits to escape liability.<sup>142</sup> The contributor is not liable for any subsequent obligations if upon learning of the mistake, he or she files the required certificate of limited

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134. *See id.* §15534(d).

135. *See id.* §15534(e).

136. *See id.* §15534(c)(1).

137. *See id.* §15534(c)(2) (the request must be made 30 days after the end of the requested period).

138. *See id.* §15534(h).

139. *See id.* §15534(f). If the court finds that the failure of the partnership to prepare and deliver the required financial statements was without just cause, the reasonable expenses, including attorneys' fees, of the partner bringing the action may be awarded. *See id.* §15534(g).

140. *See id.* §15532(a).

141. *See id.* Chapter 807 adds several activities to those already existing, which are deemed not to consist of control of the business. *See id.* §15532(b).

142. Compare *id.* §15533(a) with CAL. STATS. 1949, c. 383, §1, at 674, 691 (enacting CAL. CORP. CODE § 15511).

partnership with the Secretary of State.<sup>143</sup> The contributor is liable, however, to all third persons who transacted business with the purported limited partnership before the certificate was filed and who believed that the contributor was a general partner at the time of the transaction.<sup>144</sup>

### *Rights and Liabilities of General Partners*

Prior law required the written consent of all partners to the admission of a new general partner.<sup>145</sup> With the enactment of Chapter 807, the written consent of only the general partners is required for the admission of a new general partner.<sup>146</sup> Existing law specifies the events which will cause the termination of a general partner's status.<sup>147</sup> Chapter 807 sets forth the following new circumstances that may lead to the termination of the status of a general partner: (1) termination of a trust which gives rise to the status of the general partner;<sup>148</sup> (2) if the general partner is a separate partnership, the dissolution of that partnership;<sup>149</sup> (3) if the general partner is a corporation, the filing of a certificate to wind up and dissolve, or a certificate of dissolution;<sup>150</sup> (4) if the general partner is an estate, distribution of the entire interest of the estate in the limited partnership;<sup>151</sup> (5) the filing of specified bankruptcy actions against the general partner;<sup>152</sup> or (6) engaging in certain activities related to bankruptcy.<sup>153</sup> Prior law provided that insanity terminated the status of a general partner.<sup>154</sup> Chapter 807 conditions the termination of the status of a general partner based on insanity on the issuance of an order of a court of competent jurisdiction declaring that the general partner is incompetent to manage his or her person or estate.<sup>155</sup>

### *Foreign Limited Partnerships*

Prior law made no provisions concerning foreign limited partner-

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143. See CAL. CORP. CODE §15533(a).

144. See *id.* §15533(b).

145. See CAL. STATS. 1963, c. 870, §3, at 2110-111 (amending CAL. CORP. CODE §15509).

146. See CAL. CORP. CODE §15541.

147. See *id.* §§15542(a)-(b), 15542(e)(1)-(2).

148. See *id.* §15542(f).

149. See *id.* §15542(g).

150. See *id.* §15542(h).

151. See *id.* §15542(i).

152. See *id.* §15542(c)-(d).

153. See *id.* §15542(c).

154. See CAL. STATS. 1974, c. 1096, §3, at 2323 (amending CAL. CORP. CODE §§15520, 15520.5).

155. See CAL. CORP. CODE §15542(e)(2).

ships<sup>156</sup> conducting business in this state.<sup>157</sup> With some exceptions, Chapter 807 treats foreign limited partnerships in the same manner as limited partnerships organized in California.<sup>158</sup> Chapter 807 provides that the organization and internal affairs of a foreign limited partnership and the liability of the limited partners are governed by the laws of the state or country where the partnership is located.<sup>159</sup> A foreign limited partnership may not be denied the opportunity to do business in this state because of a difference between the laws of the state or country where it is organized and the laws of California.<sup>160</sup> A foreign limited partnership is required to register with the Secretary of State prior to transacting intrastate business in California<sup>161</sup> but is not required to file a copy of the certificate of limited partnership and all amendments.<sup>162</sup> The registration of a foreign limited partnership may be cancelled by filing a certificate of cancellation with the Secretary of State.<sup>163</sup> Cancellation, however, does not terminate the authority of the Secretary of State to accept service of process with respect to causes of action arising out of the foreign limited partnership's transaction of business in California.<sup>164</sup> Failure to register precludes a foreign limited partnership from maintaining any action, suit, or proceeding in any California court,<sup>165</sup> although it does not invalidate any contract of the partnership, or prevent it from defending in an action.<sup>166</sup> Furthermore, a limited partner of a foreign limited partnership may not be held liable because the partnership transacted business in this state without registering with the Secretary of State.<sup>167</sup> If twenty-five percent of the limited partners of the foreign limited partnership reside in California, Chapter 807 provides that the limited partners of the foreign limited partnership will have the same rights as limited partners of partnerships formed in this state.<sup>168</sup> Finally, the Attorney General of California may bring an action to restrain a foreign limited partnership from

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156. *See id.* §15511(g) (definition of foreign limited partnership).

157. *See* CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15001-15700).

158. *Compare* CAL. CORP. CODE §§15511-15585 *with id.* §§15591-15598.

159. *See id.* §15591(a).

160. *See id.*

161. *See id.* §15592. The information required to be set forth in the application is similar to that which limited partnerships must put in the certificate of limited partnership. *Compare id.* §15592(a)-(f) *with id.* §15521.

162. *See id.* §15592.

163. *See id.* §15596.

164. *See id.*

165. *See id.* §15597(a).

166. *See id.* §15597(c).

167. *See id.* §15597(d).

168. *See id.* §15594.

transacting business in violation of the provisions of Chapter 807.<sup>169</sup>

### *Class Actions*

Prior law did not provide for class actions on behalf of the limited partners of a partnership.<sup>170</sup> Chapter 807 allows a limited partner to bring a class action to enforce any claim common to all the limited partners against the limited partnership or any or all general partners.<sup>171</sup> Each limited partner, however, must be given an opportunity to exclude himself from the class.<sup>172</sup> The prerequisites for bringing a class action against a limited partnership are that the plaintiff (1) must allege that he or she was a partner at the time the cause of action arose or received the interest from someone who was a partner at that time,<sup>173</sup> (2) must attempt to secure from the general partners the action that is desired or the reasons for not taking the action,<sup>174</sup> and (3) must inform in writing the limited partnership or the general partners of the ultimate facts of the cause of action against each defendant or deliver to the limited partnership or the general partners a true copy of the complaint which the plaintiff intends to file.<sup>175</sup> Once an action is filed, Chapter 807 gives the defendant the right to move that the court order the plaintiff to furnish security for the defendant's reasonable expenses, including attorney's fees, not exceeding \$50,000.<sup>176</sup> The defendant is not required to file any pleading until ten days after the motion for security is decided.<sup>177</sup>

### *Conclusion*

Chapter 807 represents the first major revision in the law of limited partnerships in California since the enactment of the Uniform Limited Partnership Act in 1949. Chapter 807 introduces new law regulating the formation, finances, distributions, withdrawals, and dissolution of limited partnerships and the rights and liabilities of those who form limited partnerships. In addition, Chapter 807 regulates foreign limited partnerships and allows for class actions on behalf of all the lim-

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169. *See id.* §15598.

170. *See* CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15001-15700).

171. *See* CAL. CORP. CODE §§15601-15602.

172. *See id.* §15601.

173. *See id.* §15602(a)(1). Chapter 807 allows a plaintiff to circumvent this requirement in circumstances where the plaintiff acquired the interest before the subject of the action was known to the public. *See id.* §15602(a)(1)(A)-(E).

174. *See id.* §15602(a)(2).

175. *See id.*

176. *See id.* §15602(b)-(d).

177. *See id.* §15602(f).



ited partners to enforce any claim common to them against the partnership.

**Business Associations and Professions; Corporate Securities Law of 1968—civil penalties, ancillary relief, actions under the Federal Commodity Exchange Act**

Corporations Code §25201 (repealed); §§25535, 25536 (new); §§25102, 25103, 25214, 25232.2, 25240, 25242, 25243, 25244, 25530, 25532 (amended).

AB 1518 (Imbrecht); STATS. 1981, Ch 1120

(Effective November 1, 1981)

Support: Department of Finance

The purpose of Chapter 1120 is to eliminate regulation of specific securities transactions in order to encourage capital formation for small businesses and residential construction.<sup>1</sup> Chapter 1120 modifies the Corporate Securities Law of 1968<sup>2</sup> to exempt certain transactions involving not more than thirty-five persons from the qualification requirements of the Corporate Securities Law.<sup>3</sup> Chapter 1120 also allows the state to seek civil penalties from violators of the Corporate Securities Law,<sup>4</sup> empowers a court to grant ancillary relief in actions for injunctions,<sup>5</sup> and grants the California Commissioner of Corporations<sup>6</sup> (hereinafter referred to as the Commissioner) the authority to act under the Federal Commodity Exchange Act.<sup>7</sup> Finally, Chapter 1120 removes agents of broker-dealers from specified exemptions and requirements under the Corporations Code.<sup>8</sup>

Existing law exempts a number of transactions from the qualification requirements of the Corporate Securities Law.<sup>9</sup> Prior law exempted, among other transactions,<sup>10</sup> an offer or sale, in a transaction not involving a public offering, of a general partnership, joint venture, or limited

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1. See CAL. STATS. 1981, c. 1120, §17, at —. See generally Comment, *California Corporate Securities Law: Small Business Capital Formation and Investment Protection*, 13 PAC. L.J. 459 (1982).

2. See generally CAL. CORP. CODE §§25000-35302.

3. See *id.* §25102(f)(1).

4. See *id.* §25535(a).

5. See *id.* §25530(a).

6. See *id.* §25005 (definition of Commissioner).

7. See *id.* §25536(a).

8. See *id.* §§25214, 25232.2, 25240, 25242, 25243, 25244, 25246, 25532.

9. See generally CAL. CORP. CODE §25102.

10. See, e.g., §§25102(a)-(e), (g)(1), 25103.

partnership interest or of any beneficial interest in a trust that was a "security"<sup>11</sup> if after the sale and issuance the trust interest was owned by no more than five persons.<sup>12</sup> Chapter 1120 deletes this particular exemption and instead exempts any offer or sale of a security in a *transaction*, other than an offer or sale to a pension or profit-sharing trust of the issuer,<sup>13</sup> if (1) the sale of the security is not made to more than thirty-five persons, including persons not in California,<sup>14</sup> (2) all the purchasers either have a preexisting personal or business relationship with the offeror or its partners, officers, directors, or controlling persons *or* reasonably could be assumed to have the capacity to protect their own interest in connection with the transaction,<sup>15</sup> (3) each purchaser represents that the purchase is for his or her own account or for a trust account of which the purchaser is trustee and not with a view to or for sale in connection with any distribution of the security,<sup>16</sup> *and* (4) the offer and sale is not accomplished by the publication of any advertisement.<sup>17</sup> The Commissioner by rule may require that the issuer file a notice of transaction, provided that failure to comply does not affect the availability of the transaction.<sup>18</sup>

Existing law allows the Commissioner to bring an action for injunctive relief if the Commission determines that a person has violated or is about to violate a provision of the Corporate Securities Law.<sup>19</sup> The court is authorized to grant a preliminary or permanent injunction, a restraining order, or writ of mandate.<sup>20</sup> Chapter 1120 allows the Com-

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11. *See id.* §25019 (definition of security).

12. *See* CAL. STATS. 1980, c. 579, §3, at — (amending CAL. CORP. CODE §25102).

13. *Compare* CAL. CORP. CODE §25102(f) with CAL. STATS. 1980, c. 579, §3, at — (amending CAL. CORP. CODE §25102).

14. CAL. CORP. CODE §25102(f)(1). The number of purchasers is exclusive of banks, savings and loan associations, trust companies, insurance companies, investment companies, any officer, director or affiliate of the issuer, or any other purchaser as the Commissioner designates by rule. A husband and wife, together with any custodian or trustee acting on behalf of a minor child is counted as one person. In addition, a partnership, corporation or an organization, which was not formed for the purpose of purchasing the security, is counted as one person.

15. *Id.* §25102(f)(2) (the assumption of capacity to protect their interest may be made by reason of the business or financial experience of the purchasers; their professional advisors who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly).

16. *Id.* §25102(f)(3).

17. *Id.* §25102(f)(4).

18. *See id.* (if the issuer fails to file the notice within fifteen business days after the demand of the Commissioner, the issuer must file the notice and pay the Commissioner a fee equal to the fee payable had the transaction been qualified under California Corporation Code Section 25110).

19. *See id.* §25530(a). *See generally* *Blake v. Pallan*, 554 F.2d 947 (9th Cir. 1977); *People v. Witzerman*, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972); CAL. CIV. CODE §§3420-3423 (preventive relief); CAL. CIV. PROC. CODE §§525-535 (injunctions); B. WITKIN, SUMMARY OF CALIFORNIA LAW CORPORATIONS §201, at 4476; Comment, *The Definition of a Security Under the California Corporate Securities Law of 1968: The Risk Capital Formula*, 6 PAC. L.J. 683 (1975).

20. *See* CAL. CORP. CODE §25530(a).

missioner, in addition, to seeking any appropriate ancillary relief<sup>21</sup> including claims for restitution and disgorgement on behalf of the persons injured by the conduct underlying the action.<sup>22</sup> Moreover, prior to the enactment of Chapter 1120 a violator of the Corporate Securities Law could be liable in a civil action only to the party harmed by the violation.<sup>23</sup> Chapter 1120 provides that a person<sup>24</sup> who violates any provision of the Corporate Securities Law may be liable for a civil penalty of not more than \$2,500.<sup>25</sup> This action may be brought by the Commissioner in any court of competent jurisdiction.<sup>26</sup> Finally, Chapter 1120 specifically authorizes the Commissioner to take any actions allowed under the Commodity Exchange Act<sup>27</sup> in accordance with a 1979 amendment to the Act that authorizes state security administrators to institute enforcement proceedings under the Commodity Exchange law.<sup>28</sup>

Prior to the enactment of Chapter 1120 the Corporate Securities Law exempted an agent<sup>29</sup> of a broker-dealer<sup>30</sup> from the necessity of obtaining a certificate<sup>31</sup> if the broker-dealer was exempt.<sup>32</sup> Chapter 1120 no longer allows this exemption for the agent.<sup>33</sup> Chapter 1120 also deletes the reference to agents of broker-dealers from the provisions dealing with suspensions,<sup>34</sup> applications for certificates,<sup>35</sup> surrender of certificates,<sup>36</sup> representations with certificates,<sup>37</sup> revocation of certificates,<sup>38</sup> and various violations of the Corporate Securities Law.<sup>39</sup> In a

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21. *See id.*

22. *See id.* §25530(b).

23. *See generally id.* §§25500-25510 (civil liability for violations of Corporate Securities Law).

24. *See id.* §25013 (definition of person).

25. *See id.* §25535(a). *See also id.* §25535(b) (this remedy is not exclusive and may be employed in any combination with any other authorized relief).

26. *See id.* §25535(a).

27. *See generally* Commodity Exchange Act, c. 369, §§1-19, 42 STAT. — (1922) (current version at 7 U.S.C. §§1-14 (1976)).

28. *See id.*, c. 369, §6d, 42 STAT. 998 (1922) (current version at 7 U.S.C. §13(a)-2 (1976)) (authorized actions by state securities administrators); CAL. CORP. CODE §25536(a). *See also* CAL. CORP. CODE §25536(b) (this authorization for action by the Commissioner does not limit in any way the Commissioner's other powers).

29. *See* CAL. CORP. CODE §25003 (definition of agent).

30. *See id.* §25004 (definition of broker-dealer).

31. *See id.* §§25200 (conditions for exemption from necessity of a certificate), 25210 (necessity of a certificate).

32. *See* CAL. STATS. 1968, c. 88, §2, at 265 (enacting CAL. CORP. CODE §25201). *See generally* B. WITKIN, SUMMARY OF CALIFORNIA LAW *Corporations* §235(2), at 4504.

33. *See* CAL. STATS. 1981, c. 1120, §3, at — (repealing CAL. CORP. CODE §25201).

34. *Compare* CAL. STATS. 1979, c. 665, §8, at 2048 *with* CAL. CORP. CODE §25214; *compare* CAL. STATS. 1973, c. 390, §13, at 848 *with* CAL. CORP. CODE §25232.2.

35. *Compare* CAL. STATS. 1968, c. 88, §2, at 275 *with* CAL. CORP. CODE §25240.

36. *Compare* CAL. STATS. 1968, c. 88, §2, at 276 *with* CAL. CORP. CODE §25242.

37. *Compare* CAL. STATS. 1968, c. 88, §2, at 277 *with* CAL. CORP. CODE §25243.

38. *Compare* CAL. STATS. 1968, c. 88, §2, at 277 *with* CAL. CORP. CODE §25244.

39. *Compare* CAL. STATS. 1973, c. 390, §18, at 849 *with* CAL. CORP. CODE §25532.

related change, Chapter 1120 makes it unlawful for an agent or broker-dealer, whether holding a certificate or not, to require consent or authorization of the spouse of the buyer or seller as a condition of sale or purchase of securities.<sup>40</sup> Prior to Chapter 1120 it was unlawful to require that consent only if the agent or broker-dealer held a certificate.<sup>41</sup>

Existing law provides that certain changes in preemptive rights will be considered exempt from the qualification requirements of the Corporate Security Law.<sup>42</sup> Chapter 1120 clarified the language dealing with preemptive rights by specifically including any addition or deletion of preemptive rights as among those transactions exempted from the qualification requirements.<sup>43</sup>

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40. See CAL. CORP. CODE §25246.

41. See CAL. STATS. 1974, c. 347, §4, at 679 (enacting CAL. CORP. CODE §25246).

42. See CAL. CORP. CODE §25103(e)(8). See generally 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 293 (1978); 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 207 (1977).

43. See CAL. CORP. CODE §25103(e)(8).

## **Business Associations and Professions; Uniform Durable Power of Attorney Act**

Civil Code §2307.1 (repealed); §§2357, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423 (new); §2356 (amended).

AB 329 (McAlister); STATS. 1981, Ch 511

Support: Business Law, Estate Planning, Trust, and Probate Sections of the State Bar

Opposition: California Bankers Association

Prior law provided for a limited durable power of attorney by allowing a person to designate another as his or her agent or attorney in fact by a writing showing the principal's intent that the authority conferred be exercisable notwithstanding subsequent incapacity of the principal.<sup>1</sup> The authority of the agent to act, however, was limited to one year after the incapacity of the principal occurred<sup>2</sup> and, in transactions involving real property, to property that was the principal's residence.<sup>3</sup> Chapter 511 replaces this provision for a limited durable power of attorney with the Uniform Durable Power of Attorney Act

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1. CAL. STATS. 1979, c. 234, §1, at 488 (enacting CAL. CIV. CODE §2307.1).

2. *Id.* (amending CAL. CIV. CODE §2356).

3. CAL. STATS. 1979, c. 234, §1, at 488 (enacting CAL. CIV. CODE §2307.1).

(hereinafter referred to as the Uniform Act).<sup>4</sup> Under the Uniform Act, a durable power of attorney<sup>5</sup> does not expire automatically one year after a disability or incapacity to the principal occurs but continues indefinitely unless otherwise specified in the durable power of attorney.<sup>6</sup> Furthermore, all acts done by an attorney in fact pursuant to a durable power of attorney during any period of incapacity of the principal are binding upon the principal and successors in interest to the same extent as if the principal were competent.<sup>7</sup> In addition, Chapter 511 provides for court review and enforcement of the duties of an attorney in fact.<sup>8</sup>

### *Relationship to Specified Fiduciaries*

Chapter 511 defines the relations between an attorney in fact and a court appointed fiduciary.<sup>9</sup> When the court of the principal's domicile appoints a guardian<sup>10</sup> or a conservator<sup>11</sup> of the estate or other fiduciary charged with the management of some or all of the principal's property or all of the principal's property except specified exclusions<sup>12</sup> and the appointment is made subsequent to an execution of a durable power of attorney, the attorney in fact is accountable to both the fiduciary and the principal.<sup>13</sup> Furthermore, the fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if not incapacitated.<sup>14</sup> When a conservator is appointed by a California court, however, the conservator may revoke or amend a power of attor-

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4. See CAL. CIV. CODE §2406. See generally *id.* §§2356, 2357, 2400-2407, 2410-2423; see also CAL. CIV. CODE §2400(b) (a printed form of a durable power of attorney sold in California for use by a person who does not have the advice of legal counsel must include specified written notice regarding the powers conveyed under a durable power of attorney and the rights of the principal); CAL. STATS. 1981, c. 511, §5, at — (transitional provision states that Chapter 511 does not apply to a power of attorney created prior to the operative date of the Act unless under the applicable choice of law rules the validity of a durable power of attorney executed outside California is to be determined under the law of California); *Recommendations Relating to Uniform Durable Power of Attorney Act*, 15 CAL. L. REVISION COMM'N REPORTS 359 (1980) [hereinafter cited as *Recommendations*].

5. CAL. CIV. CODE §2400(a) (definition of durable power of attorney). See also *id.* §§2356(e), 2400(a) (extent of application of Uniform Act to proxy given for the exercise of voting rights).

6. Compare CAL. CIV. CODE §2400(a), (b) with CAL. STATS. 1979, c. 234, §1, at 488 (enacting CAL. CIV. CODE §2307.1). See also 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW. *Agency and Employment* §§191-231 (8th ed. 1973); *Recommendations*, *supra* note 4, at 359-60.

7. CAL. CIV. CODE §2401. See also *Recommendations*, *supra* note 4, at 377 (definition of incapacity).

8. See generally CAL. CIV. CODE §§2410-2423.

9. See *id.* §2402. See also *Recommendations*, *supra* note 4, at 367.

10. See BLACK'S LAW DICTIONARY 635 (5th ed. 1979) (definition of guardian).

11. See *id.* at 277 (definition of conservator).

12. See CAL. CIV. CODE §2402(a). See also *Recommendations*, *supra* note 4, at 378 ("fiduciary" described in subsection (a) does not include a guardian of the person only, thus distinguishing it from subsection (b) where the authority of a principal to nominate extends to both a guardian of the person and conservators and guardians of estates).

13. See CAL. CIV. CODE §2402(a).

14. *Id.*

ney only if the court where the conservatorship proceeding is pending authorizes or requires the action.<sup>15</sup> A principal may use a durable power to express a preference regarding any future court appointee charged with the care and protection of the principal's person or estate<sup>16</sup> by nominating a guardian or conservator of the person, estate, or both, for consideration by the court if protective proceedings are later commenced.<sup>17</sup>

*Court Review and Enforcement of Duties of Attorney in Fact*

Chapter 511 declares that it is the intent of the legislature that all powers of attorney be exercisable free of judicial intervention.<sup>18</sup> Powers of attorney created after December 31, 1981, however, will be subject to the jurisdiction of the courts of California invoked pursuant to provisions under Chapter 511 for court review and enforcement of the duties of an attorney in fact or otherwise invoked pursuant to law.<sup>19</sup> A petition<sup>20</sup> may be filed in the superior court of the county where the attorney in fact is a resident<sup>21</sup> (1) to determine whether the power of attorney<sup>22</sup> is still effective,<sup>23</sup> (2) to pass on the acts or proposed acts of the attorney in fact,<sup>24</sup> (3) to compel the attorney in fact to submit an accounting to the principal, the spouse of the principal, the conservator of the person or estate or both, or to such other persons as the court in its discretion may require,<sup>25</sup> or (4) to declare that the power of attorney is terminated.<sup>26</sup> The power of attorney will be declared terminated if the court determines that the attorney in fact has violated or is unfit to perform the fiduciary duties,<sup>27</sup> that at the time of the determination the principal<sup>28</sup> lacks the capacity to give or revoke a power of attorney,<sup>29</sup>

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15. *Id.*

16. *See id.* §2402(b).

17. *See id.* (nominations made regarding conservatorship proceedings in California will have the effect provided in Section 1810 of the Probate Code and the court shall give effect to the most recent writing executed in accordance with Section 1810 of the Probate Code, whether or not the writing is a durable power of attorney).

18. *Id.* §2423.

19. *Id.* *See id.* §§2410(a) (definition of attorney in fact), 2420(b) (this article is not applicable to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, agents, and representatives). *See generally id.* §§2410-2423; CAL. STATS. 1981; c. 511, § 5, at —.

20. *See id.* §2415 (filing of a petition).

21. *Id.* §2414 (if the attorney in fact is not a resident of California the petition may be filed in any county of the state).

22. *See id.* §2410(b) (definition of power of attorney).

23. *Id.* §2412(a).

24. *Id.* §2412(b).

25. *Id.* §2412(c).

26. *Id.* §2412(d).

27. *Id.* §2412(d)(1).

28. *See id.* §2410(c) (definition of principal).

29. *Id.* §2412(d)(2).

and that the termination of the power of attorney is in the best interests of the principal or the principal's estate.<sup>30</sup> A petition may be filed for one or more of these purposes by the attorney in fact,<sup>31</sup> the principal,<sup>32</sup> the spouse or child of the principal,<sup>33</sup> the conservator of the person or estate of the principal,<sup>34</sup> any person who would take the property under the laws of intestate succession if the principal died at the time that the petition is filed,<sup>35</sup> or either the court investigator<sup>36</sup> or the public guardian of the county where the power of attorney was executed or where the principal resides.<sup>37</sup> A power of attorney, however, may expressly eliminate the authority of any of these persons, except a conservator of the principal's estate,<sup>38</sup> to petition the court if the power of attorney is executed by the principal at a time when the principal has the advice of a lawyer<sup>39</sup> and the approval of the lawyer is included in the instrument that constitutes the power of attorney.<sup>40</sup>

Upon the filing of a petition, the clerk must set the petition for hearing<sup>41</sup> and the petitioner, at least thirty days before the time set, must serve notice of the time and place of the hearing<sup>42</sup> and a copy of the petition on the attorney in fact if not the petitioner,<sup>43</sup> the principal if not the petitioner,<sup>44</sup> and on any other person the court requires.<sup>45</sup> The court has the authority to make all other orders and decrees and take all other action necessary to dispose of the matters presented in the petition,<sup>46</sup> including the appointment of a guardian ad litem<sup>47</sup> to represent the interests of a missing or incapacitated principal.<sup>48</sup> An appeal

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30. *Id.* §2412(d)(3).

31. *Id.* §2411(a).

32. *Id.* §2411(b).

33. *Id.* §2411(c).

34. *Id.* §2411(d).

35. *Id.* §2411(e).

36. *See* CAL. PROB. CODE §1454 (appointment and qualifications of a court investigator).

37. CAL. CIV. CODE §2411(f), (g).

38. *Id.* §2421(b). *See also id.* §2422.

39. *Id.* §2421(a)(1) (lawyer must be licensed to practice law in the state where the power of attorney is executed).

40. *Id.* §2421(a)(1), (2).

41. *Id.* §2417(a).

42. *Id.* §2417(b). *See also id.* §2417(c) (service), (d) (proof of compliance).

43. *Id.* §2417(b)(1).

44. *Id.* §2417(b)(2).

45. *Id.* §2417(b)(3).

46. *Id.* §2413. *See id.* §§2416 (dismissal of petition if it appears that the proceeding is not necessary to protect the interests of the principal), 2417(f) (the court for good cause may shorten the time required for the performance of the scheduling of a hearing, service of process, or proof of compliance with these scheduling and service requirements), 2417(g) (award of attorney's fees). *See also id.* §2417(e) (petition proceedings shall be governed whenever possible by these court enforcement provisions and where these provisions are not applicable Division 3 of the California Probate Code shall apply).

47. BLACK'S LAW DICTIONARY 635 (5th ed. 1979) (definition of guardian ad litem).

48. CAL. CIV. CODE §2418 (California Code of Civil Procedure Sections 373 and 373.5 do not

may be taken from any final order regarding termination of the power of attorney, actions of the attorney in fact, dismissal of a petition, or denial of a motion to dismiss.<sup>49</sup>

### *Termination of Power of Attorney*

Existing law provides that unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by revocation by the principal,<sup>50</sup> the death of the principal,<sup>51</sup> or the incapacity of the principal to contract.<sup>52</sup> Any bona fide transaction entered into with an agent by a person acting without actual knowledge<sup>53</sup> of the revocation, death, or incapacity, however, is binding upon the principal or the principal's successors in interest.<sup>54</sup> Chapter 511 provides that these provisions are subject to the Uniform Act<sup>55</sup> and that under a *durable* power of attorney an agent's power may continue after incapacity of the principal to contract.<sup>56</sup>

In addition, Chapter 511 provides that the death of the principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency of the attorney in fact or other person<sup>57</sup> who acts in good faith under the power.<sup>58</sup> When a principal becomes incapacitated subsequent to the execution of a *non-durable* power of attorney, the incapacity does not revoke<sup>59</sup> or terminate the agency of the attorney in fact or other person who acts in good faith under the power without actual knowledge of the incapacity.<sup>60</sup>

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apply to the appointment of a guardian ad litem under the court enforcement provisions of Chapter 511). *See also id.* §2420 (the remedies provided under the Uniform Act are cumulative and non-exclusive).

49. *Id.* §2419.

50. *Id.* §2356(a)(1).

51. *Id.* §2356(a)(2).

52. *Id.* §2356(a)(3).

53. *Id.* §2357 (definition of lack of actual knowledge when a principal is an absentee as defined in Section 1403 of the Probate Code).

54. *Id.* §2356(b). *See also id.* §2356(c) (nothing in this section shall affect existing law on revocation of a power of attorney under California Civil Code Section 1216).

55. *Id.* §2356(d). *See also Recommendations, supra* note 4, at 365.

56. *Compare id.* §2356(a), (b) with CAL. CIV. CODE §2400(a).

57. *See Recommendations, supra* note 4, at 378-79 (the language "or other persons" refers to persons who transact business with the attorney in fact under the authority conferred by the power).

58. CAL. CIV. CODE §2403(a). *See also id.* §2404 (affidavit of good faith reliance and protection of record title).

59. *See Recommendations, supra* note 4, at 379 (this section deals only with the effect of a principal's death or incompetency as a revocation of a power of attorney; it does not relate to an express revocation of a power of attorney or to a power of attorney that expires according to its terms).

60. CAL. CIV. CODE §2403(b).



*Conclusion*

By enacting the Durable Power of Attorney Act Chapter 511 allows for a power of attorney to continue after a principal's incapacity to contract.<sup>61</sup> In addition, Chapter 511 provides for court review and enforcement of the duties of an attorney in fact under the Uniform Act.<sup>62</sup> The durable power is a useful device because it avoids the need to establish a trust for a person of modest means and the need for a costly court-supervised conservatorship in the event of the person's future incapacity.<sup>63</sup> Accordingly, the durable power is a form of senility insurance<sup>64</sup> for a person who is unwilling or unable to transfer assets to establish a trust comparable to that available to relatively wealthy persons who use funded revocable trusts.<sup>65</sup>

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61. *See id.* §2400.

62. *See id.* §§2410-2423.

63. *See Recommendations, supra* note 4, at 357.

64. *See Recommendations, supra* note 4, at 357.

65. *See Recommendations, supra* note 4, at 357.

**Business Associations and Professions; foreign banking law**

Civil Code §9 (amended); Commercial Code §3123 (amended); Financial Code §§276, 1750, 1751, 1751.5, 1751.9, 1752, 1753, 1754, 1755, 1756, 1756.1, 1756.2, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1780, 1781 (repealed); §§114, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1725, 1726, 1727, 1728, 1729, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1775, 1780, 1781, 1782, 1783, 1784, 1785 (new); §§275, 360, 400, 420, 507, 542, 545, 546, 602, 692.1, 702, 752, 759, 771, 776, 1226, 1500.1, 1501, 1503, 1702, 1710, 1800, 1801, 1802, 1803, 1804, 1805, 1819, 1823, 1826, 1854, 1854.1, 1900, 1901, 1936, 2053, 2071, 2094, 3100, 3103, 3360, 3370, 3539, 12100, 33100 (amended); Government Code §§16500.5, 53635.5 (amended); Revenue and Taxation Code §§23044, 25107 (new).

SB 285 (Vuich); STATS. 1981, Ch 67

(*Effective June 16, 1981*)

Support: Department of Finance

SB 499 (Garcia); STATS. 1981, Ch 825

(*Effective September 26, 1981*)

Support: Bank of America; Department of Finance; Franchise Tax Board

AB 1059 (Bosco); STATS. 1981, Ch 444

Support: State Department of Banking

AB 2164 (Bosco); STATS. 1981, Ch 816

*Repeals laws relating to foreign banking corporations; enacts a new, comprehensive framework for licensure and regulation of foreign banks in California that includes licensing procedures, definition of terms, powers of the Superintendent of Banks, division of offices into classes with specified privileges and restrictions, insurance requirements of the Federal Deposit Insurance Corporation, maintenance and pledge of assets, reports to the Superintendent of Banks, relocations and closures, and enforcement; provides procedures for transition from the old to the new banking law.*

Prior to Congressional enactment of the International Banking Act of 1978 (hereinafter referred to as the IBA),<sup>1</sup> there were no federal provisions regulating the activities of agencies and branches<sup>2</sup> of foreign nation banks in the United States.<sup>3</sup> Unlike their domestic counterparts, foreign agencies and branches were supervised only by the licensing state and thus were free from federal regulations governing agencies and branches of domestic banks.<sup>4</sup> To promote competitive equality between domestic and foreign banking institutions in the United States,<sup>5</sup> the IBA created a dual state-federal system for licensing and regulating offices of foreign nation banks in the United States that is similar to the system for domestic banks.<sup>6</sup> Among many significant provisions, the IBA permits the establishment of federally licensed foreign nation agencies and branches, for the first time giving foreign nation banks the option of federal or state licensing.<sup>7</sup>

In conformity with the IBA and in recognition of the significant role that foreign nation banks play in the economy of California, Chapter 67 updates, clarifies, and expands provisions governing the licensing

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1. International Banking Act of 1978, PUB. L. NO. 95-369, 96 STAT. 607 (codified at 12 U.S.C. §§3101-3108 (1978)).

2. *See id.* §3101(1), (3) (1978) (An agency maintains credit balances, pays out checks, and loans money, but does not accept deposits. A branch can accept deposits.). *Compare id.* with CAL. FIN. CODE §1700(a), (b) (definition of state agency and branch office).

3. *See* Brundy & Key, *Implementation of the International Banking Act*, 65 FED. RES. BULL. 785, 785-86 (1979) [hereinafter cited as Brundy & Key].

4. *See* Brundy & Key, *supra* note 3, at 786.

5. *See* Brundy & Key, *supra* note 3, at 786.

6. *See* State Banking Department Report, Highlights of International Banking Legislation (copy on file at the *Pacific Law Journal*) [hereinafter cited as Banking Report]. *See generally* Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977).

7. *See generally* Brundy & Key, *supra* note 3, at 785.

and regulation of foreign nation banks,<sup>8</sup> making them competitive with California domestic banks, enabling them to contribute more effectively to California's economy,<sup>9</sup> and providing a viable choice between federal and state licensing.<sup>10</sup>

### *Classifications*

Chapter 67 divides the offices<sup>11</sup> of foreign banks<sup>12</sup> that are licensed in California into specified classes<sup>13</sup> with new privileges and responsibilities paralleling those of the IBA.<sup>14</sup> Prior to the enactment of Chapter 67, foreign nation<sup>15</sup> banks<sup>16</sup> fell into two general categories: those with unlimited deposit-taking powers<sup>17</sup> and those that could only accept deposits from a foreign country or foreign person.<sup>18</sup> Foreign state<sup>19</sup> banks<sup>20</sup> were not allowed to accept deposits.<sup>21</sup> In addition, all foreign banks could buy, sell, pay, or collect bills of exchange, issue letters of credit, receive money for transmission by draft, check, cable or otherwise, and make loans.<sup>22</sup> Chapter 67 creates six classifications for offices of foreign banks: (1) the *representative office* whose sole function is to provide information about the bank and solicit loan business<sup>23</sup> while not transacting commercial banking business (hereinafter referred to as "transact business");<sup>24</sup> (2) the *nondepository agency* that can transact all business except receiving deposits;<sup>25</sup> (3) the *depository agency* that

8. See generally CAL. JUR. *Banks* §§17-21 (3d ed. 1974) (the law regarding foreign banks prior to enactment of Chapter 67).

9. See CAL. STATS. 1981, c. 67, §27, at —.

10. See generally Banking Report, *supra* note 6.

11. See CAL. FIN. CODE §1700(p) (office, with respect to a foreign bank, means any agency, branch, or representative office).

12. See *id.* §1700(i) (foreign banks means foreign nation banks and foreign state banks). Chapter 67, however, is primarily concerned with regulation of state offices of foreign nation banks. See generally Banking Report, *supra* note 6.

13. See CAL. FIN. CODE §1701.

14. See 12 U.S.C. §§3101-3103 (1978). See also Banking Report, *supra* note 6.

15. See CAL. FIN. CODE §1700(j) (any nation other than the United States, including any territory, trust territory, dependency, or possession of the United States or other nation).

16. See *id.* §1700(k) (any bank other than a bank organized under the laws of a state of the United States, or a national bank that maintains its head office in a state of the United States).

17. See CAL. STATS. 1980, c. 1298, §3, at — (amending CAL. FIN. CODE §1756.1).

18. See *id.* 1980, c. 1298, §4, at — (amending CAL. FIN. CODE §1756.2).

19. See CAL. FIN. CODE §1700(t) (any state of the United States or the District of Columbia).

20. See *id.* §1700(l) (a bank organized under the laws of any state other than California, or a national bank that maintains its head office in any state other than California).

21. See CAL. STATS. 1979, c. 1028, §6, at 3527 (amending CAL. FIN. CODE §1756).

22. See *id.* 1979, c. 1028, §6, at 3527.

23. See generally Banking Report, *supra* note 6.

24. See CAL. FIN. CODE §§1700(r), 1755(a)(6). See also *id.* §105 (A commercial bank is authorized to receive deposits; lend money with or without security; discount or deal in bills, notes, or other commercial paper; buy and sell for the account of customers and, if eligible for investment, for its own account, securities, gold and silver bullion, foreign coins, and bills of exchange; and generally transact a commercial banking business.).

25. See *id.* §1700(o).

transacts business but can only accept deposits from a foreign nation, agency, or instrumentality of a foreign nation, or a person<sup>26</sup> that resides, is domiciled, and maintains a principal place of business in a foreign nation;<sup>27</sup> (4) the *limited branch office* that transacts business but can only accept deposits allowed a depository agency<sup>28</sup> and deposits permitted by the Board of Governors of the Federal Reserve System in accordance with the Federal Reserve Act;<sup>29</sup> (5) the *wholesale branch office* that transacts business but can only accept deposits permitted a depository agency,<sup>30</sup> deposits of \$100,000 or more, and deposits that, as determined by the Superintendent of Banks (hereinafter referred to as the Superintendent),<sup>31</sup> do not constitute retail deposit activities of the type that would require Federal Deposit Insurance Corporation ("FDIC") insurance;<sup>32</sup> and (6) the *retail branch office* that transacts business, including accepting deposits without limitation.<sup>33</sup> Agencies and limited and wholesale branch offices are also permitted to maintain credit balances subject to regulations prescribed by the Superintendent.<sup>34</sup>

### *Licensing*

Chapter 67 retains the requirement that offices of foreign banks operating in California be licensed by the Superintendent.<sup>35</sup> Under Chapter 67, however, there are more provisions governing the issuance of a state license.<sup>36</sup> Offices of foreign banks must be licensed specifically as a representative, agency, or branch office.<sup>37</sup> A foreign bank cannot engage in representational functions unless it is licensed to maintain a

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26. See *id.* §1755(a)(2)(C) (definition of person in this context).

27. See *id.* §§1700(e), 1755(a)(2). Compare *id.* with CAL. STATS. 1980, c. 1298, §4, at — (amending CAL. FIN. CODE §1756.2).

28. See text accompanying note 27 *supra*.

29. See CAL. FIN. CODE §§1700(n), 1755(a)(3). See also 12 U.S.C. §3103(a)(2)(B) (1978) (Edge Act deposits; the Edge Act provides for federal chartering of corporations to engage in international or foreign banking).

30. See text accompanying note 27 *supra*.

31. See CAL. FIN. CODE §§210, 215 (definition and powers and duties of Superintendent of Banks).

32. See *id.* §§1700(u), 1755(a)(4).

33. See *id.* §1700(s). Compare *id.* with CAL. STATS. 1980, c. 1298, §3, at — (amending CAL. FIN. CODE §1756.1). See also Banking Report, *supra* note 6 (projected activities of the different classifications as projected by the State Banking Department, sponsor of Chapter 67).

34. See CAL. FIN. CODE §1755(a)(5). See also Banking Report, *supra* note 6 (credit balances generally entail liabilities of an agency of a foreign bank to its customers).

35. Compare CAL. FIN. CODE §§1726, 1750 with CAL. STATS. 1978, c. 965, §111, at 2993 (amending CAL. FIN. CODE §1751). But see CAL. FIN. CODE §1753(a)(2) (federal agencies and branches do not have to be licensed by the superintendent to maintain offices in California).

36. Compare CAL. FIN. CODE §§1726(b), 1753(b) with CAL. STATS. 1973, c. 858, §16, at 1556 (amending CAL. FIN. CODE §1754).

37. See CAL. FIN. CODE §§1726(a)(1), 1753(a)(2).

representative, agency, or branch office,<sup>38</sup> and cannot transact business unless it is licensed to maintain an agency or branch office.<sup>39</sup> Furthermore, Chapter 67 expressly states that, except for representative offices, a foreign bank may not be concurrently licensed to maintain offices of different classes.<sup>40</sup> In addition, a foreign bank located in California may not maintain a state agency or branch office concurrently with a federal agency<sup>41</sup> or branch office,<sup>42</sup> however, the bank may maintain a state *representative* office concurrently with a federal agency or branch office.<sup>43</sup> A foreign bank licensed to maintain two or more agencies or branch offices must designate one of them as its primary office.<sup>44</sup>

To be approved for licensure under Chapter 67, a foreign bank must file with the Superintendent an application containing information required by the Superintendent.<sup>45</sup> The Superintendent will approve the application only after finding that the bank, any controlling person,<sup>46</sup> the directors and executive officers,<sup>47</sup> and the proposed management of the office are of good character and sound financial standing.<sup>48</sup> A finding of bad character would be warranted by:<sup>49</sup> (1) a conviction or plea of *nolo contendere* for a crime involving an act of fraud or dishonesty;<sup>50</sup> (2) a judgment in any civil action based upon conduct involving an act of fraud or dishonesty;<sup>51</sup> or (3) the suspension or revocation of any professional, occupational, or vocational license based upon conduct involving an act of fraud or dishonesty.<sup>52</sup> Willfully making a false or misleading statement of a material fact in any report, application, or other proceeding, or willfully omitting a material fact which was required is also evidence of bad character,<sup>53</sup> as is willfully committing, aiding, abetting, counseling, commanding, inducing, or procuring a violation of any provision of Chapter 67 or regulation or order issued under Chapter 67.<sup>54</sup> The Superintendent also may consider any other

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38. *See id.* §1725(a).

39. *See id.* §1750(a)(2).

40. *See id.* §1708.

41. *See* 12 U.S.C. §2101(5) (1978); CAL. FIN. CODE §1700(g) (definition of a federal agency).

42. *See* CAL. FIN. CODE §1707. *See also* 12 U.S.C. §3101(6) (1978) (definition of a federal branch); CAL. FIN. CODE §1700(h).

43. *See* CAL. FIN. CODE §§1725(c), 1726(a)(2).

44. *See id.* §1714. *See also id.* §1700(q) (definition of a primary office).

45. *See id.* §1703.

46. *See id.* §§700(b), (d), 1700(d) (definition of controlling person).

47. *See id.* §1700(f) (definition of executive officer).

48. *See id.* §§1704(b)(1) (the superintendent may, in the absence of credible evidence to the contrary, presume good character and sound financial standing), 1726(b)(1), 1753(b)(1)

49. *See id.* §1704(b)(2).

50. *See id.* §1704(b)(2)(A).

51. *See id.* §1704(b)(2)(B).

52. *See id.* §1704(b)(2)(C). *See also id.* §1704(a) (act includes, without limitation, omissions).

53. *See id.* §1704(b)(2)(D).

54. *See id.* §1704(b)(2)(E).

relevant information in determining bad character.<sup>55</sup> Moreover, before approving the application, the Superintendent must find that the financial history and condition of the bank are satisfactory<sup>56</sup> and the management of the bank as well as the proposed management of the office are adequate,<sup>57</sup> that the office will be beneficial to the public,<sup>58</sup> and that it appears the bank will comply with applicable laws, regulations, and orders.<sup>59</sup> In addition, if the foreign bank is applying for approval to establish and maintain an agency or branch office, its plan must afford reasonable promise of success.<sup>60</sup> Furthermore, the Superintendent must determine that the foreign bank fulfills California's reciprocity requirement<sup>61</sup> that prohibits a foreign bank from establishing a state branch unless the home country of the foreign bank permits California banks and national banks headquartered in California to establish agencies, branches, or subsidiaries in their country.<sup>62</sup> When the application has been approved and all conditions to the issuance of a license for that particular class of office have been fulfilled, the Superintendent must issue the license.<sup>63</sup>

Prior to the enactment of Chapter 816, a foreign bank could be issued a license only if it designated<sup>64</sup> the Superintendent and his or her successors as the bank's agent upon whom process could be served.<sup>65</sup> Under Chapter 816,<sup>66</sup> a foreign bank will not be issued a license until it has irrevocably appointed the Superintendent as the bank's attorney to receive service of lawful process in any noncriminal judicial or administrative proceeding that occurs after the appointment has been filed with the Superintendent.<sup>67</sup> In the case of a representative office, the proceeding must arise out of the bank's activities in the state.<sup>68</sup> A foreign bank that has not filed an appointment with the Superintendent will be deemed by the maintenance of its office to have appointed the Superintendent as the bank's attorney to receive service of process in noncriminal proceedings.<sup>69</sup> Service may be made by leaving a copy of

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55. *See id.* §1704(c).

56. *See id.* §§1726(b)(2), 1753(b)(2).

57. *See id.* §§1726(b)(3), 1753(b)(3).

58. *See id.* §§1726(b)(5), 1753(b)(5).

59. *See id.* §§1726(b)(4), 1753(b)(4).

60. *See id.* §1753(b)(5).

61. *See* CAL. STATS. 1979, c. 1028, §6, at 3527 (amending CAL. FIN. CODE §1756).

62. *See* CAL. FIN. CODE §1753(b)(7).

63. *See id.* §§1726(c), 1753(c).

64. *See* CAL. STATS. 1978, c. 965, §111, at 2993 (amending CAL. FIN. CODE §1751) (this designation must be contained in an executed writing).

65. *See id.* 1978, c. 965, §111, at 2993.

66. *Compare* CAL. FIN. CODE §1710 with CAL. STATS. 1981, c. 67, §4, at —.

67. *See* CAL. FIN. CODE §1710(a)(1), (b)(1).

68. *See id.* §1710(a)(1), (2).

69. *See id.* §1710(a)(2), (b)(2).

the process at any office of the Superintendent.<sup>70</sup> For service of process to be effective, the party making the service must send notice of service and a copy of the process by registered or certified mail to the bank at its last address on file with the Superintendent, and must file an affidavit of compliance with these procedures before the return date or within the time allowed by the court or administrative agency.<sup>71</sup>

Under prior law, representative offices of foreign banks were licensed to individuals and not considered a place of business of the bank.<sup>72</sup> Chapter 67 requires the *bank* to be licensed to maintain a representative office.<sup>73</sup> Thus, when a person establishes or maintains an office in California as representative of a foreign bank, the bank is considered as establishing and maintaining the office.<sup>74</sup> Moreover, Chapter 67 only permits foreign state banks to maintain a representative office;<sup>75</sup> a foreign state bank cannot be licensed to transact business in California.<sup>76</sup> This provision appears to limit the powers of foreign state banks more severely than prior law; while not allowing foreign state banks to accept deposits, prior law under foreign banking corporation regulations permitted other types of business transactions.<sup>77</sup> Chapter 67 also states that foreign nation banks will not be licensed to maintain an agency or branch office unless qualified to transact intrastate business in California.<sup>78</sup>

### *Deposits and Assets*

Depository agencies and limited and wholesale branch offices that are not insured by the FDIC are required by Chapter 67 to give notice of this fact in the manner requested by the Superintendent.<sup>79</sup> In addition, to maintain competitive equality between foreign nation banks and California domestic banks subject to various state and federal reg-

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70. *See id.* §1710(c).

71. *See id.*

72. *See* CAL. STATS. 1973, c. 858, §17, at 1556 (amending CAL. FIN. CODE §1780); *id.* 1951, c. 364, at 923 (enacting CAL. FIN. CODE §1781).

73. *See* CAL. FIN. CODE §1725(b)(1).

74. *See id.* §1725(b)(2).

75. *See id.* §1709.

76. *See id.* §1750(a)(1).

77. *Compare id.* §§1709, 1750(a)(1) with CAL. STATS. 1979, c. 1028, §6, at 3527 (amending CAL. FIN. CODE §1756). However, it is the policy in California not to allow any type of interstate banking activity except representative offices and Edge Act Corporations. *See* Banking Report, *supra* note 6.

78. *See* CAL. FIN. CODE §1751. *See also* CAL. CORP. CODE §§2100-2116 (provisions governing intrastate business).

79. *See* CAL. FIN. CODE §1758. A retail branch office *must* be insured by the FDIC in accordance with the provisions of the Federal Deposit Insurance Act. *Compare* CAL. FIN. CODE §1752 with CAL. STATS. 1980, c. 1298, §3, at — (amending CAL. FIN. CODE §1756.1). *See also* 12 U.S.C. §§1811-1832 (1978) (provisions governing the Federal Deposit Insurance Corporation).

ulations,<sup>80</sup> foreign banks with depository agencies or branch offices *not* subject to these regulations must comply with regulations prescribed by the Superintendent involving maximum interest rates on deposits, prepayment of time deposits, and other related matters.<sup>81</sup> For purposes of the Office of Administrative Law,<sup>82</sup> the Superintendent has unlimited power to adopt or repeal a regulation applied to the foreign bank without specifically describing the need for immediate action if it is found that the action is necessary for the preservation of the public peace, health and safety, or general welfare.<sup>83</sup>

Under existing law, foreign nation banks licensed to transact business in California must keep the assets of the California business separate from assets belonging to out-of-state business, and creditors of the California business are entitled to priority to the California assets over other creditors.<sup>84</sup> Additionally, existing law requires that a foreign bank with a state agency or branch in California pledge a determined amount of its assets to protect against risks to domestic deposits in an operation whose activities, assets, and personnel are primarily outside the jurisdiction of the United States.<sup>85</sup> Under prior law, the foreign bank was required to deposit cash or certain kinds of securities with the State Treasurer in an amount determined adequate by the Superintendent for the performance of the bank's obligations in California.<sup>86</sup> As a general practice, foreign banks have been required to deposit cash or securities amounting to \$500,000 for each state agency or branch deposit, cash or securities amounting to not less than the capital required of a national bank organizing at the same location, or five percent of the adjusted total liabilities of the agency or branch.<sup>87</sup>

Chapter 67 requires<sup>88</sup> that foreign nation banks licensed to transact business in California must deposit with an approved depository<sup>89</sup> eli-

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80. See CAL. FIN. CODE §1759(a) (regulations are imposed by the Depository Institutions Deregulation Committee, Regulation Q of the Board of Governors of the Federal Reserve System, and Part 329 of the regulations of the Federal Deposit Insurance Corporation).

81. See *id.*

82. See CAL. GOV'T CODE §§11340-11445.

83. See CAL. FIN. CODE §1759(b).

84. Compare CAL. FIN. CODE §1760(a), (b) with CAL. STATS. 1951, c. 364, at 920 (enacting CAL. FIN. CODE §1753).

85. See Banking Report, *supra* note 6.

86. See CAL. STATS. 1978, c. 965, §111, at 2993 (amending CAL. FIN. CODE §1751).

87. See Banking Report, *supra* note 6.

88. Compare CAL. FIN. CODE §1761 with CAL. STATS. 1978, c. 965, §111, at 2993; CAL. STATS. 1978, c. 965, §112, at 2994 (enacting CAL. FIN. CODE §1751.5); CAL. STATS. 1978, c. 965, §112.1, at 2994 (enacting CAL. FIN. CODE §1751.9); CAL. STATS. 1978, c. 965, §113, at 2995 (amending CAL. FIN. CODE §1752).

89. See CAL. FIN. CODE §1761(a)(3) (a bank incorporated in California or national bank headquartered in California, selected by the foreign bank and approved by the superintendent, that has filed an agreement with the superintendent to comply with all applicable provisions, regulations, and orders).



gible assets worth not less than the applicable minimum.<sup>90</sup> The applicable minimum is determined periodically by the Superintendent as the amount necessary for the maintenance of sound financial condition or for the protection of creditors or the public interest.<sup>91</sup> The applicable minimum for a branch office, however, must be at least five percent of the adjusted liabilities<sup>92</sup> of the bank.<sup>93</sup> The amount of adjusted liabilities is computed for the period in the manner and on the basis prescribed by the Superintendent.<sup>94</sup> Eligible assets include cash,<sup>95</sup> specified securities,<sup>96</sup> any negotiable certificates of deposit issued by a United States bank, a national bank, or a United States branch office of a foreign nation bank that has a maturity of one year or less and is payable in the United States,<sup>97</sup> any commercial paper payable in the United States that is rated P-1 or its equivalent by a nationally recognized rating service provided that rating conflicts are resolved in favor of the lower rating,<sup>98</sup> any banker's acceptance payable in the United States and eligible for a discount with a Federal Reserve bank,<sup>99</sup> and any other asset determined eligible by the Superintendent.<sup>100</sup> Eligible assets are valued at the lesser of market or par.<sup>101</sup> An asset is not eligible if the issuer of the instrument is affiliated with the foreign bank, is either domiciled in the home country of the foreign bank or controlled by a bank or other person domiciled there, or is controlled by the country.<sup>102</sup>

The procedure by which a foreign bank deposits and withdraws eligible assets<sup>103</sup> and the depository receives, holds, or releases the assets and files reports is determined by the Superintendent.<sup>104</sup> The bank cannot withdraw the assets<sup>105</sup> and the depository cannot release them

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90. *See id.* §1761(c)(1).

91. *See id.* §1761(a)(2).

92. *See id.* §1761(a)(1) (liabilities of the bank's business in California, excluding accrued expenses, liabilities to any office or majority-owned subsidiary of the bank, and any other liabilities excluded by the superintendent).

93. *See id.* §1761(a)(2). *See also* Brundy & Key, *supra* note 3, at 796 (as a condition of insurance, an insured branch must pledge assets to the FDIC equal to ten percent of total liabilities; an asset pledge of up to five percent to the state authorities may be deducted from the FDIC pledge).

94. *See* CAL. FIN. CODE §1761(b)(1).

95. *See id.* §1761(a)(4)(A).

96. *See id.* §1761(a)(4)(B). *See also id.* §1542 (types of securities).

97. *See id.* §1761(a)(4)(C).

98. *See id.* §1761(a)(4)(D).

99. *See id.* §1761(a)(4)(E).

100. *See id.* §1761(a)(4)(F).

101. *See id.* §1761(b)(2).

102. *See id.* §1761(a)(4). In this context, to be affiliated means to control, be controlled by, or be under common control. *See also id.* §§1761(a)(4)(F), 700(b) (definition of control).

103. *See id.* §1761(f)(1).

104. *See id.* §1761(f)(2).

105. *See id.* §1761(d)(1).

without the prior approval of the Superintendent or, in the case of the depository, without the Superintendent's request.<sup>106</sup> A foreign bank that ceases to be licensed to transact business in California must maintain its deposit for the length of time determined by the Superintendent as necessary for protection of creditors of the bank's California business and the public interest.<sup>107</sup> Unless the Superintendent has suspended or revoked the license of the bank or taken possession of its California business or property, however, any foreign bank that maintains its required deposit is entitled to receive any income paid on the eligible assets.<sup>108</sup> If the Superintendent does take possession of the bank's property or business, the Superintendent is considered the liquidator and upon his or her order the depository must release the banks assets to the Superintendent.<sup>109</sup> If a foreign bank fails to pay a judgment creditor of its business in the state,<sup>110</sup> and the Superintendent has not taken possession of the bank's property and business, a state or federal court may order the depository to release the assets to the Superintendent, in which case the Superintendent will dispose of them for the benefit of the creditor.<sup>111</sup> Eligible assets deposited at an approved depository are considered pledged to the Superintendent, who is deemed to have a security interest in them, for the benefit of the creditors of the foreign bank's California business.<sup>112</sup> In addition, the assets are free from any lien, charge, right of set off, credit, or preference in connection with any claim the depository has against the bank.<sup>113</sup>

Existing law also requires that a California branch office of a foreign bank maintain assets for the purpose of ensuring the protection of depositors and creditors in the event of liquidation.<sup>114</sup> Prior law required a foreign bank to hold assets in an amount not less than 108 percent of its adjusted total liabilities.<sup>115</sup> Chapter 67 states that the bank shall maintain eligible assets<sup>116</sup> in an amount determined by the Superintendent as necessary for the maintenance of sound financial condition, or

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106. *See id.* §1761(d)(2).

107. *See id.* §1761(c)(2).

108. *See id.* §1761(e).

109. *See id.* §1761(h)(1).

110. *See id.* §1761(h)(2) (In this context, "judgment creditor of its business in this state" is a person who won from the bank a money judgment that arose out of the bank's business in California, has been entered by a state or federal court, is final in that all possibility of direct attack by way of appeal, new trial motion or motion to vacate, or petition for extraordinary writ has been exhausted, and that has remained unpaid for at least 60 days after becoming final.).

111. *See id.*

112. *See id.* §1761(g)(1).

113. *See id.* §1761(g)(2).

114. *See* Banking Report, *supra* note 6. Compare CAL. FIN. CODE §1762 with CAL. STATS. 1980, c. 1298, §3, at — (amending CAL. FIN. CODE §1756.1).

115. *See* CAL. STATS. 1980, c. 1298, §3, at —.

116. *See* CAL. FIN. CODE §1762(a)(2) (as defined in text accompanying note 100 *supra* plus

the protection of the public interest or the creditors of the bank's California business, but not to exceed 108 percent of adjusted liabilities.<sup>117</sup> The assets are to be held at branch offices in California or other places approved by the Superintendent.<sup>118</sup> The amount of eligible assets and adjusted liabilities are computed for the period, in the manner, and on the basis prescribed by the Superintendent.<sup>119</sup> The Superintendent can order the bank to place all or part of the assets the bank is required to hold in the custody of a California domestic bank or national bank headquartered in California designated by the Superintendent if he or she determines that it is necessary for maintenance of sound financial condition, protection of the bank's California creditors, or for protection of the public interest.<sup>120</sup>

### *Bookkeeping and Public Records*

Chapter 67 requires that each foreign bank keep books, accounts, and other business records of an office at the office or other place approved by the Superintendent,<sup>121</sup> and that each foreign bank file reports with the Superintendent in the manner and time as requested.<sup>122</sup> In addition, whenever the Superintendent requests a report from California domestic banks,<sup>123</sup> a report also must be requested from foreign nation banks licensed to transact business in California.<sup>124</sup> When the foreign nation bank files the report with the Superintendent, the bank must also publish a statement of the condition of its business in the state<sup>125</sup> in a city newspaper, or county newspaper if there is no city newspaper, of general circulation where the bank is licensed to main-

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any reserves that the bank maintains with respect to its California business as required by the Board of Governors of the Federal Reserve System).

117. See *id.* §1762(c). See also *id.* §1762(a)(1) (adjusted liabilities as defined in note 92 *supra*).

118. See *id.* §1762(c).

119. See *id.* §1762(b).

120. See *id.* §1762(d).

121. See *id.* §1706. Compare *id.* with CAL. STATS. 1951, c. 364, at 920 (enacting CAL. FIN. CODE §1753).

122. See CAL. FIN. CODE §1705(a). Compare CAL. FIN. CODE §1705(b) with CAL. STATS. 1951, c. 364, at 921 (enacting CAL. FIN. CODE §1760) (the superintendent has more discretion under Chapter 67 than prior law concerning the specific information required and whether the report must be verified).

123. See CAL. FIN. CODE §1931.

124. See *id.* §1757(a).

125. "Business in the state" with respect to a foreign nation bank licensed to maintain one or more agencies or branch offices in California includes the aggregate business of all the California offices. See CAL. FIN. CODE §1700(c). This provision conforms California law to the IBA. Historically the superintendent has treated state agencies of the same foreign bank separately for purposes of the California Banking Law. In addition, for purposes of the FDIC regulations relating to maintenance and pledge of assets, a foreign bank may now treat all of its insured branches in California as one entity. See Banking Report, *supra* note 6. See generally Brundy & Key, *supra* note 3.

tain its primary office.<sup>126</sup>

In order to encourage international banking in California,<sup>127</sup> Chapter 825 states that banks<sup>128</sup> with international banking facilities (hereinafter referred to as IBF)<sup>129</sup> will no longer be bound by law<sup>130</sup> requiring businesses which derive income from both within and without the state to pay income tax on apportionment of their total worldwide income.<sup>131</sup> Under Chapter 825, an IBF maintained by a bank within California shall be considered located without the state in determination of the bank's income subject to tax; thus, commercial banks in California will not have to pay state tax on income derived from the IBF.<sup>132</sup> In addition, for determination of the property, payroll, and sales factors of the bank, intangible personal property and sales attributable to the IBF will be reflected on the segregated books and records of the IBF.<sup>133</sup>

### *Surrender of License, Closure, and Relocation*

A foreign bank may not transfer or assign its license.<sup>134</sup> A foreign bank may, however, voluntarily surrender its license by filing the license and a report with the Superintendent, provided that the bank surrender all its licenses.<sup>135</sup> A voluntary surrender of a license is effective on the 30th day after the license and report are filed with the Superintendent unless the Superintendent specifies an earlier date.<sup>136</sup> If a proceeding to revoke or suspend the license is pending at the time the license and report are filed with the Superintendent, or a proceeding to revoke or suspend the license or to impose conditions upon the surrender of the license is instituted before the lapse of the 30-day period, the voluntary surrender becomes effective when and in the manner ordered by the Superintendent.<sup>137</sup>

Before a foreign bank can close a licensed office, the Superintendent must approve the closing,<sup>138</sup> except when it is in accordance with the

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126. See CAL. FIN. CODE §1757(b).

127. See CAL. STATS. 1981, c. 825, §1, at —.

128. See CAL. REV. & TAX CODE §25107(b) (definition of bank in this context).

129. See *id.* §23044 (definition of international banking facility).

130. See *id.* §25101.

131. See *id.* §25107(a).

132. See *id.*

133. See *id.* See also CAL. STATS. 1981, c. 825, §§5, 6, at — (applies to computation of taxes for income years ending on or after December 3, 1981 and is to be repealed January 1, 1989).

134. See CAL. FIN. CODE §1711.

135. See *id.* §1775(a).

136. See *id.* §1775(b)(1).

137. See *id.* §1775(b)(2).

138. See *id.* §§1729(a)(1), 1763(a)(1).

procedure for voluntary surrender of a license.<sup>139</sup> The Superintendent may approve the application for approval to close the office only upon a finding that the closing will not be substantially detrimental to the public convenience and advantage.<sup>140</sup> If the office is an agency or branch office, the Superintendent must find, in addition to a finding that the closure will not be unsafe or unsound,<sup>141</sup> that it is *necessary* in the interests of the safety and soundness of the bank or that it will not be substantially detrimental to the public convenience and advantage.<sup>142</sup> When the application for closure has been approved and all conditions precedent to closing fulfilled, the bank may close the office and must immediately surrender the license to the Superintendent.<sup>143</sup> The procedure for relocation of a licensed office of a foreign bank is substantially the same as that for closure,<sup>144</sup> except that in addition to prior approval from the Superintendent to relocate the office, the bank must also have received a license authorizing it to maintain the office at the new site.<sup>145</sup> Moreover, the Superintendent must determine that in addition to not being substantially detrimental to the public convenience and advantage in the area primarily served by the office at the old site, relocation to the new site will promote the public convenience and advantage.<sup>146</sup> In the case of an agency or branch office, the Superintendent also must make determinations of safety and soundness for both removal from the old site and relocation to the new,<sup>147</sup> and must find that the bank's plan to relocate the office appears reasonably certain of success.<sup>148</sup> When the application for approval to relocate has been approved and conditions precedent to the issuance of the appropriate license fulfilled, the Superintendent will issue the license.<sup>149</sup> Immediately after relocation, the bank must surrender the old license to the Superintendent.<sup>150</sup>

### *Enforcement*

Under prior law, a person or foreign bank violating any applicable provision was guilty of a misdemeanor, or perjury in the case of a will-

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139. *See id.* §§1729(a)(2), 1763(a)(2). *See* text accompanying notes 135-137 *supra*.

140. *See* CAL. FIN. CODE §1729(b).

141. *See id.* §1763(b)(1).

142. *See id.* §1763(b)(2).

143. *See id.* §§1729(c), 1763(c).

144. *See id.* §§1727, 1754. *See* text accompanying notes 138-143 *supra*.

145. *See* CAL. FIN. CODE §§1727(a), 1754(a).

146. *See id.* §§1727(b)(1), (2)(A), (B), 1754(b)(1)(B), (2)(B), (C).

147. *See id.* §1754(b)(1)(B), (2)(B).

148. *See id.* §1754(b)(2)(A).

149. *See id.* §§1727(c), 1754(c).

150. *See id.* §§1727(d), 1754(d).

ful false statement made to the Superintendent, and was liable to the state in the sum of \$100 per day for each day the violation continued.<sup>151</sup> Under Chapter 67, if the Superintendent finds after notice and hearing that a person has violated any provision of Chapter 67 or any authorized regulation or order of the Superintendent, the Superintendent may order the violator to pay a civil penalty to the Superintendent in a sum specified by the Superintendent but not exceeding \$100 for each violation or, if the violation is continuing, \$100 a day for each day it continues.<sup>152</sup>

The procedure for suspension and revocation of a license is much more extensive under Chapter 67 than under prior law.<sup>153</sup> The Superintendent, after notice and a hearing, may issue an order suspending or revoking the license of a foreign bank if any of the following is found to be true:<sup>154</sup> (1) violation of any applicable law, regulation, or order;<sup>155</sup> (2) business transaction in an unsafe or unsound manner;<sup>156</sup> (3) unsafe or unsound conditions;<sup>157</sup> (4) the bank has ceased operation of its office;<sup>158</sup> (5) the bank is insolvent in that it has ceased to pay its debts in the ordinary course of business, it cannot pay its debts as they become due, or its liabilities exceed its assets;<sup>159</sup> (6) the bank has suspended payment of its obligations, made an assignment for the benefit of its creditors, or admitted in writing its inability to pay its debts as they become due;<sup>160</sup> (7) the bank has applied for, or a person has applied against the bank for, adjudication of bankruptcy or reorganization, arrangement, or other relief under any bankruptcy, reorganization, insolvency, or moratorium law, and either the relief has been granted or the bank by an affirmative act has approved of or consented to the action;<sup>161</sup> (8) a receiver, liquidator, or conservator has been appointed for the bank, or a similar proceeding initiated where the bank is domiciled;<sup>162</sup> (9) the bank or its authority to transact banking business where domiciled has been suspended or terminated;<sup>163</sup> or (10) any new fact or condition has occurred since the bank was li-

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151. See CAL. STATS. 1951, c. 364, at 922 (enacting CAL. FIN. CODE §§1761, 1762, 1763).

152. See CAL. FIN. CODE §1780.

153. Compare *id.* §§1781-1785 with CAL. STATS. 1951, c. 364, at 921 (enacting CAL. FIN. CODE §1755).

154. See CAL. FIN. CODE §1781. See also *id.* §1782.

155. See *id.* §1781(a).

156. See *id.* §1781(b).

157. See *id.* §1781(c).

158. See *id.* §1781(d).

159. See *id.* §1781(e).

160. See *id.* §1781(f).

161. See *id.* §1781(g).

162. See *id.* §1781(h).

163. See *id.* §1781(i).

censed to transact business in California that would have been grounds for denying the application.<sup>164</sup> The bank has thirty days after an order is issued suspending or revoking its license to file an application for a hearing on the order with the Superintendent.<sup>165</sup> The order will be rescinded if the Superintendent does not begin the hearing within fifteen business days after the application is filed, or within the time agreed to by the bank, or if the Superintendent does not affirm, modify, or rescind the order within thirty days after the hearing.<sup>166</sup> The bank can also apply to the Superintendent to modify or rescind the order, but the Superintendent will not grant the application unless he or she finds it in the public interest and it appears the bank will comply with all applicable provisions, regulations, and orders if relicensed.<sup>167</sup> The bank does *not* give up its right to petition for judicial review of the order, however, if it does not apply to the Superintendent for a hearing or to modify or rescind the order.<sup>168</sup> If the license to maintain an office is suspended or revoked, the bank must surrender the license immediately to the Superintendent.<sup>169</sup>

Chapter 67 also permits the Superintendent to take possession of the bank's California property and business<sup>170</sup> until the bank is either liquidated or resumes business<sup>171</sup> in California if, with respect to a foreign nation bank licensed to transact business in California, the Superintendent finds the factors considered for suspension or revocation of a license<sup>172</sup> to be true, and it is determined that taking immediate possession is necessary for the protection of the creditors of the bank's California business or the public interest.<sup>173</sup> If the Superintendent takes possession of the foreign bank's California property and business, it must either be conserved or liquidated according to the procedure followed for a California domestic bank.<sup>174</sup> When the Superintendent completes the liquidation, any remaining assets must be transferred to the state in accordance with court orders unless an office of the bank in

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164. *See id.* §1781(j).

165. *See id.* §1781(b)(1).

166. *See id.*

167. *See id.* §1784(a).

168. *See id.* §§1782(b)(2), 1784(b).

169. *See id.* §1783.

170. *Compare* CAL. FIN. CODE §3103 *with* CAL. STATS. 1978, c. 965, §134, at 3006 (Under Chapter 816, when the superintendent takes possession of the property and business of any bank, he or she must give notice to persons holding assets of the bank. Notice is not a prerequisite, however, to taking possession. Persons with notice or knowledge of the seizure will not have a lien or charge upon any of the bank's assets).

171. *See* CAL. FIN. CODE §1785(a) (upon the consent of the superintendent, the bank may resume business according to conditions prescribed by the superintendent).

172. *See* text accompanying notes 155-164 *supra*.

173. *See* CAL. FIN. CODE §1785(a).

174. *See id.* §1785(c). *See also id.* §§3103-3125, 3126-3132, 3160-3163, 3220-3225.

another state is in liquidation and its assets appear insufficient to pay its creditors in full.<sup>175</sup> In this case, the court will order the Superintendent to transfer to the liquidator of that office whatever amount of the remaining assets appears necessary to satisfy the insufficiency.<sup>176</sup> If there are two or more offices and the remaining assets are insufficient to meet their need, the court will order the Superintendent to distribute the remaining assets among the liquidators of the offices in a manner deemed equitable by the court.<sup>177</sup> The bank whose property and business have been possessed can apply within ten days to the superior court of the county where the bank's primary office is located to enjoin further proceedings.<sup>178</sup> The court may require the Superintendent to show cause why further proceedings should not be enjoined and, after hearing, may grant the injunction and order the Superintendent to surrender to the bank its property and business, dismiss the bank's application, or make any further order as may be just.<sup>179</sup> Either the Superintendent or the bank may appeal the judgment of the court according to the procedure followed for appeals from the judgment of a superior court.<sup>180</sup> An appeal by the Superintendent will operate as a stay of the judgment, and he or she will not be required to post bond.<sup>181</sup>

### *Miscellaneous*

Chapter 444 increases and adds various fees and charges relative to the regulation of banks.<sup>182</sup> Chapter 67 maintains the exemption for foreign banks from the California Constitution usury limits,<sup>183</sup> and provides that federal agencies and branches of foreign banks are governed by federal laws and regulations.<sup>184</sup> In addition, Chapter 67 specifies the following types of activities for which the restrictions placed on transacting business are not applicable:<sup>185</sup> (1) any foreign bank may carry on the types of intrastate activities allowed foreign corporations;<sup>186</sup> (2) any foreign bank may make state loans secured by liens on

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175. *See id.* §1785(d).

176. *See id.*

177. *See id.*

178. *See id.* §1785(b)(1).

179. *See id.*

180. *See id.* §1785(b)(2). *See also* CAL. CIV. PROC. CODE §904.1.

181. *See* CAL. FIN. CODE §1785(b)(2).

182. *See* CAL. STATS. 1981, c. 444, §§1-25, at —. *Compare* CAL. FIN. CODE §§1702, 1800 with CAL. STATS. 1981, c. 67, §§4, 9, at —.

183. *See* CAL. FIN. CODE §1716. *Compare id.* with CAL. STATS. 1980, c. 1298, §5, at — (enacting CAL. FIN. CODE §1765). *See also* CAL. CONST., art. XV, §1.

184. *See* CAL. FIN. CODE §1750(b)(1).

185. *See id.* §1750(b).

186. *See id.* §1750(b)(2). *See also* CAL. CORP. CODE §191(d).



real property located in California;<sup>187</sup> and (3) any foreign bank may transact a limited trust business as permitted under trust company regulations for foreign corporations.<sup>188</sup> Moreover, under Chapter 67 a foreign bank is not considered to be transacting business solely because a majority-owned subsidiary of the bank transacts business in California.<sup>189</sup> Chapter 67 also lists numerous provisions pertaining to California domestic banks that, with specified qualifications, will apply to foreign banks licensed to transact business in California.<sup>190</sup> Finally, Chapter 67 provides rules of priority to apply when its provisions conflict with provisions applicable to banks in general.<sup>191</sup>

### *Transition*

Chapter 67 delineates extensive guidelines for the transition from the old banking law.<sup>192</sup> Offices of foreign banks that immediately preceded the transition date were licensed in California but did not have the Superintendent's approval to accept deposits under the reciprocity provision<sup>193</sup> or from foreign nations and persons<sup>194</sup> are deemed under Chapter 67 to be licensed to maintain nondepository agencies.<sup>195</sup> Offices that had the Superintendent's approval to accept deposits from foreign nations and persons are deemed licensed to maintain depository agencies,<sup>196</sup> and offices that were licensed under the reciprocity provision are deemed licensed to maintain retail branch offices.<sup>197</sup> If a foreign bank was licensed to maintain more than one office, of which at least one but not all had the Superintendent's approval to either accept deposits under the reciprocity provision or from foreign nations and persons, all the offices of that bank are deemed licensed to maintain retail branch offices in the case of reciprocity and depository agencies in the case of foreign nations and persons.<sup>198</sup> If an individual was licensed to maintain an office as representative of a foreign bank,<sup>199</sup> the bank is deemed licensed to maintain a representative office.<sup>200</sup> In all

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187. See CAL. FIN. CODE §1750(b)(3). Compare *id.* with CAL. STATS. 1951, c. 364, at 921 (enacting CAL. FIN. CODE §1757).

188. See CAL. FIN. CODE §§1750(b)(3), 1755(b). See also *id.* §1503.

189. See *id.* §1750(c).

190. See *id.* §1756(a), (b).

191. See *id.* §1756(c).

192. See CAL. STATS. 1981, c. 67, §§28-33, at —.

193. See CAL. STATS. 1979, c. 1028, §6, at — (amending CAL. FIN. CODE §1756).

194. See CAL. STATS. 1980, c. 1298, §4, at — (amending CAL. FIN. CODE §1756.2).

195. See CAL. STATS. 1981, c. 67, §29, at —.

196. See *id.* §30, at —.

197. See *id.* §31, at —.

198. See *id.* §32, at —.

199. See CAL. STATS. 1973, c. 858, §17, at — (amending CAL. FIN. CODE §1780).

200. See CAL. STATS. 1981, c. 67, §33, at —.

cases the bank must surrender to the Superintendent the old license, and the Superintendent will issue to the bank the appropriate license under Chapter 67.<sup>201</sup> Finally, Chapter 67 states that a cause of action or proceeding relating to a law affected by Chapter 67 will not be affected by the repeal or amendment of that law.<sup>202</sup>

### *Conclusion*

In summary, Chapter 67 retains the two types of agencies previously existing in California law, the nondepository and depository, changes California law to distinguish between wholesale and retail branches of foreign banks in a manner similar to federal law, and maintains the status quo for foreign state banks in the form of the representative office.<sup>203</sup> Instead of requiring maintenance of assets in an amount not less than 108 percent of adjusted total liabilities, Chapter 67 only requires branches of foreign nation banks to maintain assets in an amount up to 108 percent of adjusted total liabilities.<sup>204</sup> Rules for pledge of assets are clarified so that a branch office of a foreign bank is required to deposit with an approved depository eligible assets equal to five percent or more of adjusted total liabilities and an agency office less than five percent.<sup>205</sup> Requirements for deposit insurance are stated,<sup>206</sup> and detailed provisions for licensing<sup>207</sup> and enforcement, including seizure of the bank's property and reduction of a violation from a misdemeanor to a civil offense, are set forth.<sup>208</sup> Chapter 67 also outlines procedures for relocation, closure, and surrendering licenses.<sup>209</sup> Although Chapter 67 generally makes the law regulating foreign banks licensed in California compatible with the IBA, there are certain areas in which federal licenses may be more attractive.<sup>210</sup> In particular, the Comptroller of the Currency does not impose any asset maintenance rule on federal branches or agencies of foreign banks.<sup>211</sup> Additionally, the Comptroller does not impose a reciprocity requirement on federal branches of foreign banks.<sup>212</sup> Thus, a federally-licensed bank can operate in California without being subject to California's reciprocity

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201. *See id.* §§28-33, at —.

202. *See id.* §34, at —.

203. *See* text accompanying notes 11-34 *supra*. *See also* Banking Report, *supra* note 6.

204. *See* text accompanying notes 114-120 *supra*.

205. *See* text accompanying notes 88-102 *supra*.

206. *See* text accompanying notes 79-83 *supra*.

207. *See* text accompanying notes 35-78 *supra*.

208. *See* text accompanying notes 151-181 *supra*.

209. *See* text accompanying notes 134-150 *supra*.

210. *See generally* Brundy & Key, *supra* note 3; Banking Report, *supra* note 6.

211. *See* Brundy & Key, *supra* note 3, at 795.

212. *See* Brundy & Key, *supra* note 3, at 795.

law.<sup>213</sup>

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213. See Brundy & Key, *supra* note 3, at 795.

## **Business Associations & Professions; nonprofit corporations**

Civil Code §331 (amended); Corporations Code §§9225, 9415, 9416 (repealed); §§6019, 7516, 9415, 9420, 9621, 10847 (new); §§5056, 5121, 5213, 5220, 5223, 5233, 5236, 5311, 5340, 5510, 5511, 5523, 5527, 5611, 5613, 5813, 5911, 6010, 6012, 6015, 6610, 6611, 7111, 7121, 7211, 7220, 7223, 7311, 7510, 7511, 7521, 7527, 7611, 7613, 7813, 7911, 8010, 8012, 8015, 8018, 8019, 8322, 8610, 8611, 9121, 9151, 9212, 9221, 9243, 9320, 9410, 9411, 9412, 9414, 9417, 9513, 9620, 9631, 9640, 9913, 9915, 9920, 10250, 10840, 10844, 12205 (amended); Education Code §§94306, 94307, 94308 (repealed); §94306 (new); §39363.5 (amended, repealed, and new)

AB 1516 (Imbrecht); STATS. 1981, Ch 587

Support: Department of Corporations; Department of Finance

AB 2200 (Imbrecht); STATS. 1981, Ch 570

Support: Church State Council; Department of Finance

*Revises definitions of members of nonprofit corporations to include persons who have the right to vote for the selection of delegates; requires verified statement of officers or board members to change status of unincorporated associations; enumerates guidelines for corporate bylaws; provides terms for officers and directors; permits suits for removal of directors based on the number of corporate members; provides guidelines for self-dealing transactions; permits loans to corporate officers under certain conditions; requires regular meetings to be held when directors are to be elected; restricts adjournment of meetings for longer than forty-five days; provides for equal space in distribution of election materials; removes notice-defect provision in challenging the validity of an election; establishes ninety days as record date for determining members entitled to notice of meetings; revises provisions dealing with mergers; provides for corporate action without meetings where members consent.*

The apparent objective of Chapters 587 and 570 is to remedy the difficulties that arose in applying prior law to the divergent types of nonprofit corporations<sup>1</sup> by making comprehensive revisions regarding

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1. See generally 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *New Legislative History* §30A, at 27 (Supp. 1980); 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 282 (1979).

nonprofit public benefit,<sup>2</sup> nonprofit mutual benefit,<sup>3</sup> and nonprofit religious<sup>4</sup> corporations.<sup>5</sup> Included are substantial changes in terms for officers and directors,<sup>6</sup> loans to corporate officers,<sup>7</sup> meetings and elections,<sup>8</sup> and provisions dealing with mergers.<sup>9</sup>

### *Organization and Bylaws*

Under prior law, articles filed to change the status of an existing unincorporated association to a nonprofit public benefit, nonprofit mutual benefit, or nonprofit religious corporation had to be accompanied by an affidavit of any two officers or governing board<sup>10</sup> members of the association stating that the incorporation was approved by the association in accordance with its rules and procedures.<sup>11</sup> Chapter 587 requires this statement of approval to be contained in a verified statement<sup>12</sup> of any two officers or governing board members.<sup>13</sup> In addition, Chapter 587 specifically permits the following provisions relating to the management of the corporation to be included in the bylaws of religious corporations:<sup>14</sup> meeting procedure,<sup>15</sup> duties and compensation of directors,<sup>16</sup> elections,<sup>17</sup> appointments of committees and officers,<sup>18</sup> criteria for determining members of record,<sup>19</sup> making of reports and financial statements to members,<sup>20</sup> and setting and collecting of dues and fees.<sup>21</sup>

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2. See CAL. CORP. CODE §§5060, 5111 (nonprofit public benefit corporation means a corporation that is organized under the Nonprofit Public Benefit Corporation Law, formed for any public or charitable purpose).

3. See *id.* §§5059, 7111 (nonprofit mutual benefit corporation means a corporation that is organized under the Nonprofit Mutual Benefit Corporation Law, formed for any lawful purpose that does not contemplate any distribution of any gains, profits, or dividends to any member).

4. See *id.* §§5061, 9111 (nonprofit religious corporation means a corporation that is organized under the Nonprofit Religious Corporation Law, formed primarily or exclusively for any religious purposes).

5. See generally 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 282 (1979).

6. See CAL. CORP. CODE §§5220, 7220.

7. See *id.* §5236.

8. See generally *id.* §§5510, 5511, 5523, 5527, 7510, 7511, 7516, 7521, 7527, 9410, 9411, 9420.

9. See generally *id.* §§6010, 6012, 6015, 6019, 8010, 8012, 8015, 8018, 8019.

10. See *id.* §5038 (definition of board).

11. See CAL. STATS. 1979, c. 724, §§11.5, 72.6, 128.7, at 2232, 2272, 2313 (amending CAL. CORP. CODE §§5121, 7121, 9121).

12. See CAL. CORP. CODE §5076 (definition of verified).

13. See *id.* §§5121(c), 7121(c), 9121(c).

14. See *id.* §9151.

15. *Id.* §9151(c)(2).

16. *Id.* §9151(c)(3).

17. *Id.*

18. *Id.* §9151(c)(4).

19. *Id.* §9151(c)(6).

20. *Id.* §9151(c)(7).

21. *Id.* §9151(c)(8).

*Directors and Management*

Under existing law, the elected officers of nonprofit corporations serve at the pleasure of the board, except as otherwise provided in the articles or bylaws.<sup>22</sup> Under Chapter 587, if the articles or bylaws provide for the election of any officer by the members of a nonprofit public benefit corporation, the term of the office is one year unless the articles or bylaws specify a different term,<sup>23</sup> but may not exceed three years.<sup>24</sup> Furthermore, existing law provides that the director must be elected by the members for a term not exceeding three years<sup>25</sup> unless a provision in the bylaws permits selection or designation of a director rather than by election.<sup>26</sup> In contrast, the term of a director of a nonprofit public benefit or nonprofit mutual benefit corporation *without members* may be as long as six years.<sup>27</sup>

Prior to the enactment of Chapter 587, a nonprofit public benefit corporation having over 500 members was required to give each nominee for director an equal amount of space in a publication owned or controlled by the corporation when the corporation published any material soliciting a vote for a particular nominee.<sup>28</sup> Chapter 587 provides that if a corporation with 500 or more members distributes any written material at the expense of the corporation relating to a nominee for director, it must make available at its expense the same amount of space in the same material to every other nominee.<sup>29</sup>

Finally, Chapter 587 revises provisions regarding a challenge to the validity of an election, and the appointment or removal of a director of nonprofit public benefit and nonprofit mutual benefit corporations.<sup>30</sup> Under prior law, if the only defect in the election was the failure to give notice as provided in the corporation's articles or bylaws and if no action challenging the validity of the election or the appointment or removal of a director was commenced within nine months after an election, the election was conclusively presumed valid in the absence of fraud.<sup>31</sup> Chapter 587 removes the notice-defect provision, maintaining the validity of any election, appointment, or removal unless contested

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22. *See id.* §5213(b).

23. *See id.* §5213(c).

24. *See id.*

25. *See id.* §5220(d).

26. *See id.* §5220(a) (absent specification in the bylaws, the term is one year).

27. *See id.* §§5220(a), 7220(a).

28. *See* CAL. STATS. 1978, c. 567, §5, at 1782 (amending CAL. CORP. CODE §5523).

29. *See* CAL. CORP. CODE §5523.

30. *See id.* §§5527, 7527.

31. *See* CAL. STATS. 1979, c. 724, §§41.8, 101.8, at 2256, 2297 (amending CAL. CORP. CODE §§5527, 7527).

by properly authorized persons at regular or special meetings.<sup>32</sup>

Under existing law, a suit to remove a director of a nonprofit public benefit corporation from office based on the commission of fraudulent or dishonest acts, gross abuse of authority or discretion, or breach of a corporate duty<sup>33</sup> may be brought by the Attorney General,<sup>34</sup> a director, or a group twice the authorized number<sup>35</sup> of members.<sup>36</sup> Chapter 587 broadens the class of members who may institute the legal proceedings to remove a director by permitting twice the authorized number *or* twenty members, whichever is less, to bring the suit.<sup>37</sup> In addition, Chapter 587 provides new rules for the removal of directors of a nonprofit mutual benefit corporation.<sup>38</sup> When the total number of votes entitled to be cast for a director is less than 5,000, a suit may be brought by twice the authorized number<sup>39</sup> of members or twenty members, whichever is less, or a director.<sup>40</sup> When the total number of votes is 5,000 or more, the suit may be instituted by twice the authorized number of members or 100 members, whichever is less, or a director.<sup>41</sup>

Under existing law, the board of nonprofit public benefit and nonprofit mutual benefit corporations is authorized to vacate the office of a director who has been declared of unsound mind by a final court order or who has been convicted of a felony.<sup>42</sup> Chapter 570 also permits the board to vacate the office when the director has failed to attend the specified number of meetings if the bylaws allow for removal of a director at the time of election who has missed a specified number of required meetings.<sup>43</sup> Furthermore, Chapter 570 deletes provisions giving the superior court the power to appoint a provisional director when the directors of a nonprofit religious corporation are equally divided so that the status of corporate property is in jeopardy.<sup>44</sup>

Prior to the enactment of Chapter 587, a director of a nonprofit public benefit or nonprofit religious corporation who had entered into a

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32. See CAL. CORP. CODE §§5527, 7527.

33. See *id.* §5223(a). See also *id.* §5230.

34. See *id.* §5223(b).

35. See *id.* §5036 (definition of authorized number).

36. See CAL. STATS. 1978, c. 567, §§5, 6, at 1762, 1833 (amending CAL. CORP. CODE §5223).

37. See CAL. CORP. CODE §5223(a).

38. See *id.* §7223(b)(2), (b)(3). See generally 19 AM. JUR. 2d §1111 (1965) (remedies to obtain removal).

39. See CAL. CORP. CODE §5036; 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Definitions and General Provisions* §30A(b), at 30 (Supp. 1980).

40. See CAL. CORP. CODE §7223(b)(1), (2).

41. *Id.* §7223(b)(3).

42. See *id.* §§5221, 7221.

43. See *id.* §9221.

44. See CAL. STATS. 1981, c. 570, §3, at — (repealing CAL. CORP. CODE §9225).

self-dealing transaction<sup>45</sup> without the approval of the Attorney General<sup>46</sup> or had entered into the transaction for his or her own benefit<sup>47</sup> without the prior approval or authorization by a majority vote of the directors<sup>48</sup> could be liable for damages or required to take any action that the court in its discretion determined would provide an equitable remedy to the corporation.<sup>49</sup> Chapter 587 eliminates lack of approval or authorization by the Attorney General or the directors as a condition to liability in a self-dealing transaction;<sup>50</sup> when a self-dealing transaction has occurred, the court will fashion a remedy after taking into account benefits received by the corporation and the good faith of the directors.<sup>51</sup>

Under existing law, a nonprofit public benefit corporation is not allowed to make any loans of money or property to or guarantee any obligation of any director or officer unless approved by the Attorney General.<sup>52</sup> This provision, however, is subject to two exceptions:<sup>53</sup> (1) loans can be made to a director or officer for expenses reasonably anticipated to be incurred in the performance of his or her duties as an officer or director, provided that reimbursement can be made in the absence of the loan,<sup>54</sup> and (2) loans of money can be made to cover life insurance premiums on the life of a director or officer if repayment is secured with the proceeds of the policy.<sup>55</sup> Chapter 587 creates another exception by permitting loans to be made for the benefit of an officer when the loan is necessary in the judgment of the board to provide financing for the purchase of the principal residence of the officer to secure the services of the officer for the corporation.<sup>56</sup> The loan, however, must be secured by real property located in the state.<sup>57</sup>

### *Members*

Under existing law, a "member" of a nonprofit corporation includes any person who has the right to vote in the election of the corporate

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45. *See id.* 1980, c. 1155, §4, at — (amending CAL. CORP. CODE § 5233).

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See* CAL. CORP. CODE §§5233(h), 9243(h). *See generally id.* §§5233(h)(1), (2), (3), 9243(h)(1), (2), (3).

51. *See id.* §§5233(h), 9243(h). *See generally id.* §§5233(h)(1), (2), (3), 9243(h)(1), (2), (3).

52. *See* CAL. CORP. CODE §5236(a).

53. *See id.*

54. *See id.*

55. *See id.* §5236(b).

56. *See id.* §5236(c).

57. *See id.*

directors<sup>58</sup> or on the disposition of all or substantially all of the corporate assets, a proposed merger, or dissolution.<sup>59</sup> Chapter 587 adds to this definition any person who has the right to vote for the selection of delegates possessing voting rights.<sup>60</sup>

Under prior law, nonprofit public benefit and nonprofit mutual benefit corporations could establish criteria for membership, including wide discretion of the directors in establishing the value of consideration for membership,<sup>61</sup> partial and full payment provisions.<sup>62</sup> Chapter 587 deletes these membership requirements, providing instead that memberships may be issued by a corporation for no consideration or for a consideration determined by the board.<sup>63</sup>

In addition, a member was not allowed to profit from the transfer of a membership or any right deriving from the membership.<sup>64</sup> Chapter 587 strictly prohibits *any* transfer for *value* or a membership or any right arising from a membership.<sup>65</sup>

### *Meetings and Voting*

Prior to the enactment of Chapter 587, if not otherwise provided in the bylaws, regular meetings of nonprofit public benefit and nonprofit mutual benefit corporate members took place annually or, if meetings were provided in the bylaws, at least every three years.<sup>66</sup> Directors were to be elected at these regular meetings unless chosen in another lawful manner.<sup>67</sup> Chapter 587 eliminates the annual and third-year meeting requirements and leaves the timing of regular meetings to be fixed in the bylaws.<sup>68</sup> In each year that directors are to be elected, however, meetings must be held conducting the election, announcing the results of the election, or transacting any other proper business.<sup>69</sup> Moreover, Chapter 587 permits special meetings of members to be called for any lawful purpose by five percent or more of the members.<sup>70</sup>

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58. See *id.* §5047 (definition of director).

59. See *id.* §5056 (definition of member); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Definition of General Provisions* §30D(a), at 29-30 (Supp. 1980).

60. See CAL. CORP. CODE §5056(a).

61. See CAL. STATS. 1979, c. 724, §§32, 89, at 2247, 2286 (amending CAL. CORP. CODE §§5311, 7311).

62. See *id.*

63. See CAL. CORP. CODE §5311, 7311.

64. See CAL. STATS. 1978, c. 567, §7, at 1894 (amending CAL. CORP. CODE §9320).

65. See CAL. CORP. CODE §9320(a).

66. See CAL. STATS. 1979, c. 724, §§38, 98, at 2250, 2291 (enacting CAL. CORP. CODE §§5510, 7510).

67. See *id.* 1979, c. 724, §§38, 98, at 2250, 2291 (amending CAL. CORP. CODE §§5510, 7510).

68. See CAL. CORP. CODE §§5510(b), 7510(b).

69. See *id.*

70. See *id.* §§5510(e), 7510(e).



The board may fix, or the bylaws may specify, a date as the record date for determining the members entitled to notice of any meeting of members of nonprofit public benefit or nonprofit mutual benefit corporations.<sup>71</sup> Under prior law, the record date could not be more than sixty days nor less than ten days before the date of the meeting.<sup>72</sup> Chapter 587 allows for an extension of the record date to not more than ninety days before the date of the meeting.<sup>73</sup>

Under existing law, when a meeting of members of nonprofit public benefit or nonprofit mutual benefit corporations was adjourned to another time or place, notice of the adjournment was not required if the time and place of the subsequent meeting was announced at the meeting at which the adjournment occurred.<sup>74</sup> Formerly, if the adjournment was for more than forty-five days or if after the adjournment a new record date was fixed, notice of the adjourned meeting to each member of record entitled to vote at the meeting was required.<sup>75</sup> Chapter 587 strictly prohibits the adjournment of a meeting for more than forty-five days.<sup>76</sup> Furthermore, if a new record date is fixed for notice or voting after the adjournment, a notice of the adjourned meeting is required to be given to each member who, on the record date for notice of the meeting, is entitled to vote at the meeting.<sup>77</sup> In addition, Chapter 587 conditions the validity of any approval required by nonprofit mutual benefit corporation members regarding voluntary dissolution<sup>78</sup> on the inclusion in the notice of meeting or in any written waiver of notice of a statement describing the general nature of the proposal.<sup>79</sup>

Finally, Chapter 587 brings provisions governing nonprofit mutual benefit and nonprofit religious corporations into conformity with similar provisions applicable to nonprofit public benefit corporations law<sup>80</sup> by providing that an action required or permitted to be taken by the corporate members may be taken without a meeting if all the members individually or collectively consent in writing.<sup>81</sup> The consent must be filed with the minutes of the proceedings of the members and is of the

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71. See *id.* §§5611(a), 7511(a).

72. See CAL. STATS. 1979, c. 724, §§43, 102, at 2256, 2297 (amending CAL. CORP. CODE §§5611, 7611).

73. See CAL. CORP. CODE §§5611(a), 7611(a).

74. See *id.* §§5511(d), 7511(d) (unless provided otherwise in by-laws).

75. See CAL. STATS. 1979, c. 724, §§39, 99, at 2250-51, 2291-93 (amending CAL. CORP. CODE §§5511, 7511).

76. See CAL. CORP. CODE §§5511(d), 7511(d).

77. See *id.* §§5511(d), 7511(d).

78. See generally *id.* §8610 (voluntary dissolutions).

79. See *id.* §7511(f). Compare *id.* §5511(f) with *id.* §7511(f) (approval is not required in nonprofit public benefit corporations). See also *id.* §§7222, 7224, 7233, 7812, 8610, 8710.

80. See *id.* §5516. Compare *id.* with *id.* §§7516, 9420.

81. See *id.* §§7516, 9420.

same force and effect as a unanimous vote of the members.<sup>82</sup>

### *Merger and Voluntary Dissolution*

Prior to the enactment of Chapter 587, in the absence of written consent of the Attorney General, a nonprofit public benefit corporation could merge only with another public benefit corporation.<sup>83</sup> Chapter 587 permits a public benefit corporation to merge with any domestic corporation, foreign corporation, or foreign business corporation,<sup>84</sup> except that without prior written consent of the Attorney General, merger is permitted only with another public benefit corporation, religious corporation, or foreign nonprofit corporation whose articles provide that its assets are irrevocably dedicated to charitable, religious, or public purposes.<sup>85</sup> Similarly, if a nonprofit mutual benefit corporation did not obtain the written consent of the Attorney General, prior law authorized merger only with another mutual benefit corporation, foreign corporation, foreign business corporation, or domestic corporation.<sup>86</sup> If this written consent was obtained, it also could merge with a public benefit or religious corporation.<sup>87</sup> Chapter 587 provides that a mutual benefit corporation can merge with *any* domestic corporation, but must still acquire the written consent of the Attorney General to merge with a public benefit or religious corporation.<sup>88</sup>

For both nonprofit public benefit and nonprofit mutual benefit corporations, prior law required that the principal terms of a merger be approved by the board and by members of each class of shareholders that had different rights upon merger of the corporations seeking to merge.<sup>89</sup> Chapter 587 eliminates the necessity for board approval and specifies that the principal terms of the merger must be approved by the members of each class of the constituent corporations *and* by every other person whose approval of an amendment of articles of incorporation is required by the articles.<sup>90</sup> Similarly, Chapter 587 provides that if an amendment to a merger agreement changes any of the principal

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82. *Id.* §§7516, 9420.

83. *See* CAL. STATS. 1978, c. 567, §5, at 1793 (amending CAL. CORP. CODE 6010).

84. *See* CAL. CORP. CODE §6010(a).

85. *See id.* *See also id.* §9640(a) (similar provision for nonprofit religious corporations).

86. *See* CAL. STATS. 1979, c. 724, §112, at 2302-03 (amending CAL. CORP. CODE §8010).

87. *See id.* 1979, c. 724, §112, at 2203.

88. *See* CAL. CORP. CODE §8010. *See also* §9640(b) (analogous provisions apply to nonprofit public benefit and nonprofit mutual benefit corporations with the exception of consent of the Attorney General, agreement and approval of merger, and approval and amendments to principal terms of the merger).

89. *See* CAL. STATS. 1979, c. 724, §§58, 115, at 2262, 2303-04 (amending CAL. CORP. CODE §§6012, 8012).

90. *See* CAL. CORP. CODE §§6012, 8012. *See also id.* §§9620 (amending of articles of incorporation in nonprofit religious corporations), 9913.

terms of the agreement, approval by the members or any other persons required by the articles is necessary.<sup>91</sup> Finally, Chapter 587 specifies that certain provisions relating to the approval of a merger apply to agreements of merger entered into between a nonprofit corporation and a business corporation.<sup>92</sup>

Prior to the enactment of Chapter 587, a voluntary dissolution of a nonprofit public benefit or nonprofit mutual benefit corporation required either a vote of the majority of all the members<sup>93</sup> or approval of the board and the members.<sup>94</sup> Chapter 587 requires approval of the majority of members to dissolve.<sup>95</sup> Furthermore, if a dissolution is approved, Chapter 587 provides that a certificate verifying the dissolution must be signed and verified by a majority of directors, or by members authorized by "approval" or a majority of the members.<sup>96</sup>

#### *Required Records, Reports to Directors and Members*

Under existing law, every nonprofit mutual benefit corporation must furnish to its members and directors an annual statement of certain transactions and indemnifications.<sup>97</sup> Under prior law, a statement was required for any covered transaction (excluding compensation of officers and directors) during the previous fiscal year that involved more than \$40,000,<sup>98</sup> or that was one of a number of specified transactions in which the same interested person had a direct or indirect material financial interest,<sup>99</sup> and when the aggregate total of the transactions involved more than \$40,000.<sup>100</sup> Chapter 587 increases the report limitation to \$50,000 for both singular<sup>101</sup> and aggregate<sup>102</sup> transactions.<sup>103</sup>

#### *Nonprofit Medical, Hospital, or Legal Services Corporations*

Chapter 570 establishes regulations that govern self-dealing transac-

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91. *See id.* §§6015(a), 8015(a). *See also id.* §9915.

92. *See id.* §§6019 (if constituent is a nonprofit public benefit corporation, Corporation Code Sections 6011, 6012, 6014, 6015 apply; if constituent is a nonprofit mutual benefit corporation, Corporation Code Sections 8011, 8011.5, 8012, 8014, 8015 apply; if constituent corporation is a nonprofit religious corporation, Corporation Code Sections 6014, 6015, 9640(c), (d) apply; if constituent corporation is a business corporation, Corporation Code Sections 1101, 1101.1, 1103, 1104 apply); 8019.

93. *See* CAL. STATS. 1978, c. 567, §§4, 5, at 1745, 1812; CAL. STATS. 1980, c. 1155, §24, at —.

94. *See id.* 1978, c. 567, §§4, 5, at 1745, 1812; CAL. STATS. 1980, c. 1155, §24, at —.

95. *See* CAL. CORP. CODE §§6610(a), 8610(a).

96. *See id.* §§6611(b), 8611(b).

97. *See id.* §8322(d)(1).

98. *See* CAL. STATS. 1980, c. 1155, §23, at — (amending CAL. CORP. CODE §8322).

99. *See* CAL. CORP. CODE §8322(d)(1).

100. *See* CAL. STATS. 1980, c. 1155, §23, at —.

101. *See* CAL. CORP. CODE §8322(d)(1).

102. *See id.*

103. *See id.*

tions for nonprofit hospital services<sup>104</sup> that are similar to nonprofit public benefit<sup>105</sup> and nonprofit religious corporations.<sup>106</sup> Under prior law, the Insurance Commissioner or, if the Insurance Commissioner was joined as an indispensable party, the corporation, its directors, or its officers could bring an action in superior court for remedies in self-dealing transactions.<sup>107</sup> The action only could be filed within two years after the complaint was filed with the Insurance Commissioner or, if no notice was filed, ten years after the cause of action had accrued.<sup>108</sup> Chapter 570 retains the two year statute of limitations if a written notice of complaint is filed<sup>109</sup> but provides that if no notice is filed, then the action must be filed within three years after the transaction occurs.<sup>110</sup> The Insurance Commissioner, however, is allowed ten years after the transaction occurs to file the action.<sup>111</sup>

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104. *See id.* §10840.

105. *See generally id.* §5233.

106. *See id.* §10840. *See generally id.* §9243.

107. *See* CAL. STATS. 1979, c. 665, §1.3, at 2039-40 (amending CAL. CORP. CODE §10844).

108. *See id.*

109. *See* CAL. CORP. CODE §10844(e).

110. *See id.*

111. *Id.*

## **Business Associations and Professions; loans—consumer finance lenders**

Business and Professions Code §§6854, 10133.1 (amended); Civil Code §§1632, 2945.1 (amended); Commercial Code §9203 (amended); Financial Code §§24000, 24001, 24002, 24003, 24004, 24005, 24006, 24007, 24051, 24051.1, 24051.5, 24052, 24053, 24054, 24055, 24200, 24202, 24203, 24206, 24207, 24208, 24209, 24210, 24211, 24212, 24400, 24401, 24402, 24403, 24404, 24405, 24406, 24407, 24408, 24408.5, 24409, 24410, 24411, 24412, 24413, 24414, 24450, 24451, 24452, 24453, 24454, 24455, 24456, 24457, 24458, 24459, 24460, 24461, 24462, 24463, 24464, 24465, 24466, 24467, 24468, 24469, 24470, 24471, 24472, 24473, 24474, 24600, 24601, 24602, 24603, 24604, 24605, 24606, 24607, 24608, 24609, 24609.1, 24609.2, 24610, 24611, 24612, 24650, 24651 (repealed); §§24000, 24000.1, 24000.2, 24001, 24002, 24003, 24004, 24005, 24006, 24007.5, 24008, 24008.1, 24009, 24010, 24050, 24051.1, 24051.5, 24052, 24052.1, 24053, 24054, 24055, 24056, 24200, 24201, 24201.1, 24202, 24203, 24206, 24207, 24208, 24209, 24210, 24211, 24212, 24400, 24401, 24402, 24403, 24404, 24405, 24406, 24407, 24408, 24409,

24410, 24411, 24412, 24413, 24414, 24415, 24416, 24450, 24450.1, 24451, 24451.1, 24451.2, 24451.3, 24452, 24453, 24454, 24455, 24456, 24457, 24458, 24458.1, 24458.2, 24458.3, 24458.4, 24458.5, 24458.6, 24459, 24460, 24461, 24462, 24463, 24464, 24466, 24467, 24468, 24469, 24470, 24471, 24472, 24473, 24474, 24475, 24480, 24481, 24482, 24600, 24601, 24602, 24603, 24604, 24605, 24606, 24608, 24609, 24610, 24611, 24612, 24613, 24614, 24615, 24615.7, 24616, 24617, 24618, 24651, 24652 (new); §§12100, 18027, 22050 (amended); Insurance Code §1643 (amended); Penal Code §639 (amended); Revenue and Taxation Code §23184 (amended).

SB 140 (Maddy); STATS. 1981, Ch 724

Support: Department of Consumer Affairs; Department of Corporations; Department of Finance

Article XV of the California Constitution limits the rate of interest lenders may charge on loans and exempts certain lenders from its limitations.<sup>1</sup> Under Article XV, a nonexempt lender may not charge a rate of interest higher than 10% per year on loans made for personal, family, or household purposes.<sup>2</sup> The constitution exempts virtually all *institutions* in the business of lending money from this restriction on interest rates.<sup>3</sup> Lenders that are exempt include banks, savings and loan associations, credit unions, personal property brokers, and licensed pawnbrokers.<sup>4</sup> In 1979, the voters of California adopted Proposition 2 which amended Article XV to permit the Legislature to create new classes of lenders exempt from the limitation on interest rates contained in the constitution.<sup>5</sup> Chapter 724 creates a new class of exempt lenders known as consumer finance lenders and enacts the Consumer Finance Lenders Law.<sup>6</sup> Lenders licensed under the Consumer Finance Lenders Law are restricted to negotiating consumer loans<sup>7</sup> defined as loans intended by the borrower primarily for personal, family, or household purposes.<sup>8</sup>

Existing law authorizes other institutions, for example, banks and

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1. CAL. CONST. art. XV, §1.

2. *Id.* art. XV, §1, cl. 1.

3. *See generally* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* §§374-380 (8th ed. 1973).

4. *See* CAL. CONST. art. XV, §1, cl. 2.

5. *See* CAL. STATS. 1979, Res. Chap. 49, §1, at 4860 (amending CAL. CONST. art. XV, §1 to include among the list of exemptions "any other class of persons authorized by statute"). *See generally* Bosko & Larmore, *Practice Under the New California Usury Law*, 55 CAL. ST. BAR J. 58 (Feb. 1980).

6. CAL. FIN. CODE §24000.

7. *Id.* §23009.

8. *Id.* §24007.5.

personal property brokers, to make consumer loans as well.<sup>9</sup> Chapter 724 appears to have been enacted primarily for the benefit of personal property brokers.<sup>10</sup> Personal property brokers are limited by statute to fixed interest rates which they may charge on loans under \$10,000.<sup>11</sup> Some personal property brokers borrow the money they lend to their customers from banks.<sup>12</sup> When the interest *banks* charge on loans is raised, personal property brokers who borrow from banks experience a profit reduction on loans made under \$10,000 at fixed rates.<sup>13</sup> This has the predictable effect of reducing the availability of consumer loans from personal property brokers. One of the legislative objectives for enacting Chapter 724 is to assure an adequate supply of credit to consumers in the state.<sup>14</sup> Thus, Chapter 724 permits any personal property broker to become licensed as a consumer finance lender upon payment of a small transfer fee.<sup>15</sup>

The interest rate a personal property broker may charge on loans is determined by reference to a schedule of variable fees based on unpaid principal balance.<sup>16</sup> As an alternative, a personal property broker may charge a flat rate of 19.2% per year.<sup>17</sup> Chapter 724 permits consumer finance lenders to charge interest rates identical to the fixed rates charged by personal property brokers<sup>18</sup> but as a third alternative, consumer finance lenders may charge a floating rate equal to 10% per year plus the discount rate established by the Federal Reserve Bank of San Francisco.<sup>19</sup> In addition to these charges, a consumer finance lender may collect an acquisition fee on loans under \$2,500.<sup>20</sup> As with personal property brokers, consumer finance lenders may pass insurance premiums on to the borrower for credit life and disability insurance.<sup>21</sup>

Loans negotiated by a personal property broker must be secured by

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9. *See id.* §§105 (no restriction on types of loans), 22009 (no restriction on types of loans).

10. *See generally* CAL. STATS. 1981, c. 724, §§14, 15, at — (any reference in any statute to personal property brokers is also a reference to consumer finance lenders; personal property brokers may become licensed as consumer finance lenders upon payment of a five dollar transfer fee, whereas applicants who are not personal property brokers must pay \$300).

11. *See* CAL. FIN. CODE §§22451, 22451.1.

12. *See* National Consumer Finance Association, [1981] FINANCE FACTS Y.B. 65 (1981).

13. The interest banks may charge is one percent more than the discount rate at the federal reserve bank in the federal reserve district where the bank is located. *See* *Hiatt v. San Francisco Nat'l Bank*, 361 F.2d 504, 506-607 (9th Cir. 1966); 12 U.S.C. §85 (1976 & Supp. III 1979).

14. *See* CAL. FIN. CODE §24000.1(a).

15. CAL. STATS. 1981, c. 724, §15, at —.

16. *See* CAL. FIN. CODE §22451.

17. *See id.* §22451.1.

18. *See id.* §§24451, 24451.1.

19. *See id.* §22451.1.

20. *Id.* §24451.3 (the fee will be the lesser of five percent of the principal amount, or \$50).

21. *Compare id.* §22458.1 with *id.* §24458.1 (a lender is limited to specified premium rates and a borrower is free to obtain insurance elsewhere if he or she prefers).

either personal property or an assignment of wages.<sup>22</sup> Under Chapter 724, loans made by consumer finance lenders may be *unsecured*<sup>23</sup> or secured by wages, personal property, *or* real property.<sup>24</sup>

Chapter 724 contains provisions relating to consumer finance lenders' license applications, annual reports and assessments, bookkeeping records, permissible practices, and various rules and regulations.<sup>25</sup> The Commissioner of Corporations (hereinafter referred to as the Commissioner) is granted authority to enforce these provisions and may investigate suspected violations, conduct hearings, compel testimony, subpoena evidence, and bring criminal actions against offenders.<sup>26</sup> The Commissioner may suspend or revoke the license of lenders who fail to comply with any rule or falsify their application for a license.<sup>27</sup> A lender's license also may be revoked if the Commissioner finds that the lender has repeatedly made loans that borrowers are unable to repay because the repayment terms are not commensurate to the borrowers' financial situations.<sup>28</sup> In addition to license revocation or suspension, and possible criminal penalties, if a lender negotiates a loan where the interest rates or charges contracted for exceed the amounts permitted by Chapter 724, the loan is void and no person has any right to collect the charges or the principal.<sup>29</sup>

The new Consumer Finance Lenders Law does not apply to loans over \$10,000, a feature it shares with the Personal Property Brokers Law.<sup>30</sup> Chapter 724 prohibits lenders from circumventing the loan regulations contained in the new law simply by making a loan in excess of \$10,000 and then allowing the borrower to immediately repay a set amount.<sup>31</sup> Finally, Chapter 724 repeals the Small Loan Law<sup>32</sup> which regulated procedures and interest rates for loans under \$1,000.<sup>33</sup>

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22. *Id.* §22009.

23. *See id.* §24471.

24. *Id.* §24007.5.

25. *See generally* CAL. FIN. CODE §§24200-24482.

26. *See generally id.* §§24601, 24605, 24606, 24610, 24613.

27. *Id.* §24615(a)(1)-(3).

28. *See id.* §24615(a)(4).

29. *See id.* §24651.

30. *See id.* §24053.

31. *See id.* §24054.

32. *See* CAL. STATS. 1951, c. 364, §§24000-24651, at 1146-1157.

33. *See* CAL. STATS. 1965, c. 1202, §2, at 3023 (amending CAL. FIN. CODE §24451).

## **Business Associations and Professions; industrial loan companies**

Financial Code §§18372, 18373, 18520.1, 18523.1, 18523.2 (new); §§18368, 18520, 18523, 18535 (amended).

SB 275 (Sieroty); STATS. 1981, Ch 373

Support: Department of Corporations; Industrial Loan and Thrift Association of California

The Thrift Guaranty Corporation of California<sup>1</sup> (hereinafter referred to as the Guaranty Corporation) acts to secure the thrift obligations<sup>2</sup> of member industrial loan companies.<sup>3</sup> Chapter 373 provides for changing the loan guaranty amount,<sup>4</sup> increases the initial assessment required of members,<sup>5</sup> and specifies an additional ground for the taking of possession of the property and business of an industrial loan company.<sup>6</sup>

Prior to the enactment of Chapter 373 the Guaranty Corporation insured the obligations of each member to a maximum of \$10,000 for each account.<sup>7</sup> Chapter 373 allows the California Commissioner of Corporations<sup>8</sup> (hereinafter referred to as the Commissioner) to order the guaranteed amount raised to \$20,000.<sup>9</sup> Upon the determination that the amount in the guaranty fund is in excess of one percent of the total outstanding thrift obligations of all members, the Commissioner must order the increase within fifteen days.<sup>10</sup> An order by the Commissioner raising the amount to \$20,000, however, will not have any effect on the obligations of a member company if the Commissioner has taken possession of the property and business of that company before

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1. See CAL. FIN. CODE §18475 (definition of Thrift Guaranty Corporation of California).

2. See *id.* §18477 (definition of thrift obligations). See also *id.* §§18013 (definition of outstanding loans and obligations), 18014 (definition of obligations).

3. *Id.* §18520; see *id.* §§18476(a) (definition of members), 18003 (definition of industrial loan company). See generally Waxman, *The Mortgage Banker-Industrial Loan Company: A New Exempt Lender*, 6 PAC. L.J. 1 (1975).

4. See CAL. FIN. CODE §§18520, 18520.1, 18523.1, 18523.2.

5. See *id.* §18535.

6. See *id.* §18372(b).

7. See CAL. FIN. CODE §18523 (thrift obligations that will be guaranteed by the Guaranty Corporation); CAL. STATS. 1976, c. 964, §2, at 2249 (enacting CAL. FIN. CODE §18520).

8. See CAL. FIN. CODE §18002 (definition of Commissioner).

9. See *id.* §18520.1. See also *id.* §18523.1 (if the Commissioner orders the change to the \$20,000 amount, that amount will be substituted in California Finance Code Sections 18490, 18491, 18506, 18520 and 18523).

10. See *id.* §18520.1.



the date of the order.<sup>11</sup>

Prior law required a new member<sup>12</sup> to the Guaranty Corporation to pay \$50,000 into the guaranty fund.<sup>13</sup> Chapter 373 increases this amount to \$100,000.<sup>14</sup> In addition, when a controlling interest,<sup>15</sup> or fifty percent or more of the stock of a company, is transferred and that company contributed less than \$100,000 to the fund to become a member, the member must pay the fund the amount necessary to bring the contribution of the company up to \$100,000 or one percent of the member's total outstanding thrift obligations whichever is less.<sup>16</sup> The requirement to raise the contribution upon a transfer will not apply, however, if the transfer is between affiliated companies of specified holding companies<sup>17</sup> or if the change of ownership is to the transferor's ancestors, descendants, spouse, or custodians, or the trustees of either the transferors or the transferees.<sup>18</sup>

The Industrial Loan Law<sup>19</sup> requires the Commissioner to take and retain possession of the property and business of an industrial loan company until it resumes business, if business was suspended, or is liquidated if any of thirteen specifically enumerated conditions exist.<sup>20</sup> Chapter 373 adds a new condition which allows the Commissioner to take possession of a company's property and business when there is a deficiency in the net worth of the company, exclusive of good will.<sup>21</sup> When the worth of a company is less than ninety percent of the aggregated sum of outstanding investment certificates, divided by the fraction that is the investment certificates ratio<sup>22</sup> permitted by the Commissioner, exclusive of those hypothecated with the issuing company, the Commissioner will issue an order directing the company to make good an alleged deficiency.<sup>23</sup> The company may be allowed a

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11. *Id.* §18523.2. *See generally id.* §§18368, 18372 (conditions under which the Commissioner may take possession of a company).

12. *See id.* §18476(b) (definition of new member).

13. *See* CAL. STATS. 1978, c. 602, §3, at 2040 (amending CAL. FIN. CODE §18535).

14. *See* CAL. FIN. CODE §18535(a).

15. *See id.* §18535(b) (controlling interest is any percentage of stock which allows control of the management of the company).

16. *See id.* (if the company was a member prior to January 1, 1982 this requirement will not apply until January 1, 1987).

17. *See id.* (the holding company must be exempt from the qualification requirement of California Corporation Code Section 25130 of the Corporate Security Law of 1968 by California Corporation Code Sections 25101(a) or (b)).

18. *See id.*

19. *See generally id.* §§18000-18705.

20. *See id.* §18368. *See generally* *Coronet Credit Corp. v. West Thrift Co.*, 244 Cal. App. 2d 631, 53 Cal. Rptr. 433 (1966); *In re Peoples Finance and Thrift Co. of San Diego*, 61 Cal. App. 2d 11, 141 P.2d 742 (1943).

21. *See* CAL. FIN. CODE §18372(a).

22. *See id.* §18373 (definition of investment certificates ratio).

23. *Id.* §18372(a).

specified time not exceeding 120 days to remedy the deficiency.<sup>24</sup> If the deficiency is not remedied within the time allowed, the Commissioner *may* take possession of the company.<sup>25</sup> The Commissioner *must* take possession if the deficiency is not remedied within 120 days of the order to make good the deficiency.<sup>26</sup>

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24. *See id.* §18372(b).

25. *See id.*

26. *See id.*

## **Business Associations and Professions; real estate licensees**

Business and Professions Code §10473.1 (repealed and new); §10473 (amended).

AB 1096 (Sher); STATS. 1981, Ch 445

Support: California Association of Realtors; Department of Finance

Existing law establishes a separate account in the Real Estate Fund<sup>1</sup> (hereinafter referred to as the Fund) to compensate aggrieved persons<sup>2</sup> for acts of fraud, misrepresentation, deceit, or conversion of trust funds committed by real estate licensees (hereinafter referred to as licensees) who personally are unable to respond to a final judgment for damages.<sup>3</sup> The Real Estate Commissioner on behalf of the Fund and the licensee on his or her own behalf are authorized to defend any actions brought against the Fund to recover damages remaining unpaid upon a judgment against the licensee.<sup>4</sup> When the underlying judgment is by default, stipulation, or consent, or when the original action against the licensee was defended by a trustee in bankruptcy, the aggrieved party has the burden of proving the fraud, misrepresentation, deceit, or conversion of trust funds.<sup>5</sup> In all other cases, the judgment against the licensee creates a rebuttable presumption affecting the burden of producing evidence of the underlying cause of action.<sup>6</sup> In addition, the California Supreme Court has held that the licensee has the right to relitigate the merits of the claim underlying the judgment notwith-

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1. *See* CAL. BUS. & PROF. CODE §10470.

2. *See* *Middelsteadt v. Karpe*, 52 Cal. App. 3d 297, 302, 124 Cal. Rptr. 840, 843 (1975) (definition of aggrieved persons).

3. *See* generally *Robinson v. Murphy*, 96 Cal. App. 3d 763, 766, 158 Cal. Rptr. 246, 248 (1979); CAL. BUS. & PROF. CODE §10471.

4. *See* CAL. BUS. & PROF. CODE §§10473, 10473.1.

5. *See id.* §10473.

6. *See id.* (the ultimate burden of the aggrieved party is to prove that a valid cause of action exists within the purview of statutory provisions allowing recovery from the Fund).

standing contrary principles of res judicata.<sup>7</sup>

Chapter 445 specifically eliminates the licensee's right to relitigate any issues finally adjudicated in the underlying action in the proceeding against the Fund.<sup>8</sup> While the licensee may defend an action against the Fund on his or her own behalf, the issues of fraud, misrepresentation, deceit, or conversion of trust funds are conclusive regarding the licensee.<sup>9</sup> Chapter 445 however, reserves to the Commissioner the right to relitigate any material issues that were determined in the underlying action.<sup>10</sup>

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7. *See* *Deas v. Knapp*, 29 Cal. 3d 69, 76-80, 623 P.2d 775, 778-779, 171 Cal. Rptr. 823, 826-827 (1981) (the Court ruled that if either the Commissioner or the licensee introduces evidence from which the fraud may be found nonexistent, the presumption disappears and the aggrieved person has the burden of proving the cause of action).

8. *Compare* CAL. BUS. & PROF. CODE §10473.1 with CAL. STATS. 1976, c. 271, §9, at 568.

9. *See* CAL. BUS. & PROF. CODE §10473.1.

10. *See id.* §10473.