MISSISSIPPI LEGISLATURE
REGULAR SESSION 2003

By: Representative Guice
To: Banks and Banking; Judiciary A

HOUSE BILL NO. 1451

AN ACT TO AMEND SECTION 75-67-103, MISSISSIPPI CODE OF 1972, TO REVISE DEFINITIONS UNDER THE SMALL LOAN REGULATORY LAW TO INCLUDE A DEFINITION FOR THE TERM "OTHER CHARGES"; TO AMEND SECTIONS 75-67-119 AND 75-17-25, MISSISSIPPI CODE OF 1972, TO PROVIDE REMEDIES AND PENALTIES FOR CONTRACTING FOR AND RECEIVING UNLAWFUL OTHER CHARGES; TO PROVIDE THAT THE REMEDIES AND PENALTIES PROVIDED FOR UNDER THIS ACT ARE EXCLUSIVE; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 75-67-103, Mississippi Code of 1972, is amended as follows:

75-67-103. The following words and phrases, when used in this article, shall, for the purposes of this article, have the meanings respectively ascribed to them in this section, except where the context clearly describes and indicates a different meaning:

(a) "Person" means and includes every natural person, firm, corporation, copartnership, joint-stock or other association or organization, and any other legal entity whatsoever.

(b) "Licensee" means and includes every person holding a valid license issued under the provisions of the Small Loan Privilege Tax Law [Sections 75-67-201 through 75-67-243] of this state, except those specifically exempt by the provisions of this article, who, in addition to any other rights and powers he or it might otherwise possess, shall engage in the business of lending money either directly or indirectly, to be paid back in monthly installments or other regular installments for periods of more or less than one (1) month, and whether or not the lender requires security from the borrower as indemnity for the repayment of the loan.
(c) "Occasional lender" means a person making not more than one (1) loan in any month or not more than twelve (12) loans in any twelve-month period.

(d) "Commissioner" means the Commissioner of Banking and Consumer Finance of the State of Mississippi.

(e) "Department" means the Department of Banking and Consumer Finance of the State of Mississippi.

(f) "Records" or "documents" means any item in hard copy or produced in a format of storage commonly described as electronic, imaged, magnetic, microphotographic or otherwise, and any reproduction so made shall have the same force and effect as the original thereof and be admitted in evidence equally with the original.

(g) "Other charges" means any amounts contracted for or received by any licensee or other person in connection with a loan, other than finance charges as defined in Section 75-17-25.

SECTION 2. Section 75-67-119, Mississippi Code of 1972, is amended as follows:

75-67-119. (1) If any finance charge in excess of that expressly permitted by Section 75-17-21 is contracted for or received, all finance charges and other charges shall be forfeited and may be recovered, whether the contract be executed or executory. If any finance charge is contracted for or received that exceeds the maximum finance charge authorized by law by more than one hundred percent (100%), the principal and all finance charges and other charges shall be forfeited and any amount paid may be recovered by suit; and, in addition, the licensee and the several members, officers, directors, agents, and employees thereof who shall have participated in such violation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than One Thousand Dollars ($1,000.00) and not less than One Hundred Dollars ($100.00), in the discretion of the court; and, further, the Commissioner of
Banking and Consumer Finance shall forthwith cite such licensee to show cause why its license should not be revoked and proceedings thereon shall be as is specifically provided in the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243).

(2) (a) If any licensee or other person violates any provision of this article or any rule or regulation promulgated under this article or any provision of Title 75, Chapter 17 of the Mississippi Code of 1972, or contracts for or receives, or participates in contracting for or receiving, other charges in violation of any applicable statutory or common law duty, or which are otherwise unlawful for any reason:

(i) All those other charges plus interest accrued on those charges at the rate of eight percent (8%) per annum shall be forfeited and may be recovered, whether the contract is executed or executory;

(ii) If the other charges subject to forfeiture under this section exceed Five Hundred Dollars ($500.00), all finance charges additionally shall be forfeited and may be recovered;

(iii) If the other charges subject to forfeiture under this section exceed One Thousand Five Hundred Dollars ($1,500.00), all principal additionally shall be forfeited and may be recovered.

(b) If the other charges subject to forfeiture under this section are found by the trier of fact and the court to have been contracted for or received as a result of fraud, then an award of three (3) times the other charges subject to forfeiture or One Thousand Dollars ($1,000.00), whichever is greater, plus reasonable attorney’s fees may be made in addition to the penalties provided in this subsection (2).

(3) The right to recover the penalties provided in subsection (2)(a)(ii) and (iii) shall accrue only after:
(a) Written notice of the violation is given to the licensee by certified mail addressed to the licensee’s place of business as shown in the credit transaction documents, or that notice is given by certified mail to the licensee’s agent for service of process; and

(b) Thirty (30) days have elapsed since receipt of that notice by the licensee and the violation has not been corrected by refund or by credit to the borrower’s remaining obligation in the amount required by subsection (2)(a)(i).

In the case of multiple violations involving a common violation affecting more than one hundred (100) borrowers, the licensee must notify the commissioner and correct the violation as to each affected borrower within thirty (30) days after receipt of a borrower notice, but the commissioner may extend the time for correction for good reason.

The penalties provided for in subsection (2)(a)(ii) and (iii) shall not apply if it is proven by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, except that the licensee may be required to correct the error by refund or credit to the borrower’s remaining obligation in the amount required by subsection (2)(a)(i). Failure to refund or give credit for an unlawful other charge within thirty (30) days after receipt of a borrower notice or, in the case of multiple violations, failure to give the commissioner the required notice within the specified time, shall give rise to a rebuttable presumption that the violation was not the result of a bona fide error for purposes of subsection (2).

The penalties provided for in subsection (2)(a)(ii) and (iii) shall not apply if the licensee discovers the problem itself or is notified of the problem by the commissioner and within sixty (60) days after discovering the violation, and before the receipt of
written notice of the violation from the borrower as provided in this subsection, the licensee notifies the affected borrower of the violation and either refunds or gives credit in the amount required by subsection (2)(a)(i).

(4) Except as provided in subsection (5) of this section, the remedies and penalties provided in this section shall be the exclusive remedies and penalties for all claims against a licensee or any other person for contracting for or receiving any finance charge in excess of that expressly permitted by Section 75-17-21, or for violation of any provision of this article or any rule or regulation promulgated under this article or any provision of Title 75, Chapter 17 of the Mississippi Code of 1972, or for contracting for or receiving, or participating in contracting for or receiving, other charges in violation of any applicable statutory or common law duty, or which are otherwise unlawful.

(5) The remedies and penalties provided in this section are supplemental to the defense provided in Section 75-67-127(3) and to the enforcement powers conferred upon the commissioner.

SECTION 3. Section 75-17-25, Mississippi Code of 1972, is amended as follows:

75-17-25. (1) The term "finance charge" as used in this section, Sections 75-17-1, 75-17-11, 75-17-13, 75-17-15, 75-17-17, 75-17-19, 75-17-21, 75-17-23, 75-17-27, 75-17-29, 75-17-33, 63-19-43, 75-67-127 and 75-67-217 means the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including, but not limited to, interest, brokerage fees, finance charges, loan fees, discount, points, service charges, transaction charges, activity charges, carrying charges, time price differential, finders fees or any other cost or expense to the debtor for services rendered or to be rendered to the debtor in making, arranging or negotiating a loan of money or an extension of credit and for the accounting, guaranteeing, endorsing,
collecting and other actual services rendered by the lender;

provided, however, that recording fees, motor vehicle title fees, attorney's fees, insurance premiums, fees permitted to be charged under the provisions of Section 79-7-7, service charges as provided in Section 81-19-31, and with respect to a debt secured by an interest in land, bona fide closing costs and appraisal fees incidental to the transaction shall not be included in the finance charge.

Subject to the other provisions of this section, Sections 75-17-1, 75-17-13, 75-17-15, 75-17-17, 75-17-19, 75-17-21, 75-17-23, 75-17-27, 75-17-29, 75-17-33, 63-19-43, 75-67-127 and 75-67-217, the finance charge may be calculated on the assumption that the indebtedness will be discharged as it becomes due, and prepayment penalties and statutory default charges shall not be included in the finance charge. Nothing in Section 75-17-1 or Sections 75-17-19, 75-17-21, 75-17-23, 75-17-27, 75-17-29, or 75-17-33 shall limit or restrict the manner of contracting for such finance charge, whether by way of add-on, discount or otherwise, so long as the annual percentage rate does not exceed that permitted by law. If a greater finance charge than that authorized by applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit.

The provisions of this section, Section 75-17-1 and Sections 75-17-19, 75-17-21, 75-17-23, 75-17-27, 75-17-29 and 75-17-33 shall not restrict the extension of credit pursuant to any other applicable law. A licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243), may
contract for and receive finance charges as authorized by Section 75-17-21, and the late payment charge as authorized by Section 75-17-27, regardless of the purpose for which the loan or other extension of credit is made.

(3) (a) If in connection with a consumer loan any person contracts for or receives, or participates in contracting for or receiving, other charges in violation of any applicable statutory or common law duty, or which are otherwise unlawful for any reason:

(i) All those other charges plus interest accrued on those charges at the rate of eight percent (8%) per annum shall be forfeited and may be recovered, whether the contract is executed or executory;

(ii) If the other charges subject to forfeiture under this section exceed Five Hundred Dollars ($500.00), all finance charges additionally shall be forfeited and may be recovered;

(iii) If the other charges subject to forfeiture under this section exceed One Thousand Five Hundred Dollars ($1,500.00), all principal additionally shall be forfeited and may be recovered.

(b) If the other charges subject to forfeiture under this section are found by the trier of fact and the court to have been contracted for or received as a result of fraud, then an award of three (3) times the other charges subject to forfeiture or One Thousand Dollars ($1,000.00), whichever is greater, plus reasonable attorney’s fees may be made in addition to the penalties provided in this subsection (3).

(c) The right to recover the penalties provided in paragraph (a)(ii) and (iii) of this subsection shall accrue only after:

(i) Written notice of the violation is given to the lender by certified mail addressed to the lender’s place of
business as shown in the credit transaction documents, or that
notice is given by certified mail to the lender’s agent for
service of process; and

(ii) Thirty (30) days have elapsed since receipt
of that notice by the lender and the violation has not been
corrected by refund or by credit to the consumer’s remaining
obligation of the amount required by paragraph (a)(i) of this
subsection.

In the case of multiple violations involving a common
violation affecting more than one hundred (100) consumers, the
lender must notify the Commissioner of Banking and Consumer
Finance and correct the violation as to each affected consumer
within thirty (30) days after receipt of a consumer notice, but
the commissioner may extend the time for correction for good
reason.

The penalties provided for in paragraph (a)(ii) and (iii) of
this subsection shall not apply if it is proven by a preponderance
of the evidence that the violation was not intentional and
resulted from a bona fide error notwithstanding the maintenance of
procedures reasonably adapted to avoid any such error, except that
the lender may be required to correct the error by refund or
credit to the consumer’s remaining obligation in the amount
required by paragraph (a)(i) of this subsection. Failure to
refund or give credit for an unlawful other charge within thirty
(30) days after receipt of a consumer notice or, in the case of
multiple violations, failure to give the commissioner the required
notice within the specified time, shall give rise to a rebuttable
presumption that the violation was not the result of a bona fide
error for purposes of this subsection (3).

The penalties provided for in paragraph (a)(ii) and (iii) of
this subsection shall not apply if the lender discovers the
problem itself or is notified of the problem by the commissioner
and within sixty (60) days after discovering the violation, and
before the receipt of written notice of the violation from the consumer as provided in this subsection, the lender notifies the affected consumer of the violation and either refunds or gives credit in the amount required by paragraph (a)(i) of this subsection.

(d) As used in this subsection (3):

(i) "Consumer loan" means any loan or extension of credit offered or extended primarily for personal, family or household purposes.

(ii) "Other charges" means any amounts contracted for or received by any person in connection with a consumer loan, other than finance charges as defined in this section.

(4) The remedies and penalties provided in this section shall be the exclusive remedies and penalties for contracting for or receiving any finance charge in excess of that permitted by applicable law or for contracting for or receiving, or participating in contracting for or receiving, other charges in violation of any applicable statutory or common law duty, or which are otherwise unlawful.

SECTION 4. This act shall take effect and be in force from and after its passage.