

By: Senator(s) Frazier

To: Business and Financial
Institutions; Judiciary,
Division B

SENATE BILL NO. 2756

1 AN ACT ENTITLED THE "MISSISSIPPI HOME LOAN PROTECTION ACT";
2 TO PROVIDE DEFINITIONS; TO PRESCRIBE CERTAIN PROHIBITED ACTS AND
3 PRACTICES REGARDING HOME LOANS; TO PROVIDE LIMITATIONS AND
4 PROHIBITED PRACTICES FOR HIGH-COST HOME LOANS; TO DEFINE
5 PROCEDURES FOR CURING ANY DEFAULT AND REINSTATEMENT OF THE HOME
6 LOAN PRIOR TO FORECLOSURE; TO PROVIDE CIVIL AND CRIMINAL
7 PENALTIES FOR VIOLATIONS OF THIS ACT; TO AUTHORIZE THE ATTORNEY
8 GENERAL TO ENFORCE THE PROVISIONS OF THIS ACT; AND FOR RELATED
9 PURPOSES.

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

11 **SECTION 1. Title, purposes.** (1) This act shall be known as
12 the "Mississippi Home Loan Protection Act."

13 (2) The Legislature finds that predatory lending has become
14 a problem in this state, exacerbating the loss of equity in homes
15 and causing foreclosures to increase. One of the most common
16 forms of predatory lending is the making of loans that are
17 equity-based, rather than income-based. A hallmark of such loans
18 is the financing of excessive points and fees which provides
19 immediate income to the originator of the loan, encourages
20 creditors to refinance, and reduces the creditor's incentive to
21 ensure that the homeowner can afford the subsequent monthly
22 payments. As long as there is sufficient equity in the home, a
23 creditor benefits if the consumer is unable to make the payments
24 and is forced to refinance. The repeated financing of points and
25 fees primarily for the benefit of the creditor in refinance
26 transactions is called flipping. Flipping is not in the best
27 interest of borrowers because each repeated refinancing
28 transaction strips precious equity, creating a path that can lead
29 to foreclosure.

30 Predatory lending has threatened the viability of many
31 communities and caused decreases in homeownership. While the
32 marketplace appears to operate effectively for most home loans,
33 too many homeowners are victims of overreaching creditors who
34 provide loans at exorbitant costs and include terms which are
35 unnecessary to secure repayment of the loan. The Legislature
36 finds that as competition and self-regulation have not eliminated
37 the predatory terms from home-secured loans, the consumer
38 protection provisions of this act are necessary to encourage
39 responsible lending.

40 (3) This act shall be liberally construed to effectuate its
41 purpose of protecting the homes and the equity of individual
42 borrowers. This act is to be construed as a consumer protection
43 statute for all purposes.

44 **SECTION 2. Definitions.** The following definitions apply for
45 the purposes of this act:

46 (a) "Affiliate" means any company that controls, is
47 controlled by, or is under common control with another company, as
48 set forth in 12 USC Section 1841 et seq.

49 (b) "Annual percentage rate" means the annual
50 percentage rate for the loan calculated according to the
51 provisions of 12 CFR part 226.

52 (c) "Bona fide discount points" means an amount
53 knowingly paid by the borrower for the express purpose of
54 reducing, and which in fact does result in a bona fide reduction
55 of, the interest rate applicable to the home loan; provided the
56 undiscounted interest rate for the home loan does not exceed the
57 conventional mortgage rate by two (2) percentage points for a home
58 loan secured by a first lien, or by three and one-half (3-1/2)
59 percentage points for a home loan secured by a subordinated lien.

60 (d) "Borrower" means any natural person obligated to
61 repay the loan, including a co-borrower, co-signer, or guarantor.

62 (e) "Brokering" means to act as a mortgage broker in
63 connection with a home loan.

64 (f) "Conventional mortgage rate" means the most
65 recently published annual yield on conventional mortgages
66 published by the Board of Governors of the Federal Reserve System,
67 as published in statistical release H.15 or any publication that
68 may supersede it, as of the applicable time set forth in 12 CFR
69 226.32(a)(1)(i).

70 (g) "Conventional prepayment penalty" means any
71 prepayment penalty or fee that may be collected or charged in a
72 home loan, and that is authorized by law other than this act,
73 provided the home loan (i) does not have an annual percentage rate
74 that exceeds the conventional mortgage rate by more than two (2)
75 percentage points; and (ii) does not permit any prepayment fees or
76 penalties that exceed two percent (2%) of the amount prepaid.

77 (h) "Creditor" means the same as "lender" as set forth
78 in 24 CFR 3500.2 and shall also mean a mortgage broker.

79 (i) "Excluded points and fees" means, in connection
80 with a home loan, up to and including one percent (1%) of the
81 total loan amount attributable to bona fide fees paid to a federal
82 or state government agency that insures payment of some portion of
83 a home loan plus an amount not to exceed two percent (2%) of the
84 total loan amount attributable to bona fide discount points or a
85 conventional prepayment penalty. In no case shall the total
86 excluded points and fees in connection with a home loan exceed
87 three percent (3%) of the total loan amount.

88 (j) "High-cost home loan" means a home loan in which
89 the terms of the loan meet or exceed one or more of the thresholds
90 as defined in subsection (o) of this section.

91 (k) "Home loan" means an extension of credit, including
92 an open-end credit plan, in which:

93 (i) The loan is such that it does not exceed the
94 maximum original principal obligation as set forth in and from

95 time to time adjusted according to the provisions of 12 USC
96 1454(a)(2);

97 (ii) The loan is such that it is considered a
98 federally related mortgage loan as set forth in 24 CFR 3500.2; and

99 (iii) The loan is neither a reverse mortgage
100 transaction nor a loan primarily for business, agricultural or
101 commercial purposes.

102 (l) "Manufactured home" means the same as set forth in
103 24 CFR 3280.2.

104 (m) "Mortgage broker" means the same as set forth in 24
105 CFR 3500.2.

106 (n) "Points and fees" means:

107 (i) All items included in the definition of
108 finance charge in 12 CFR 226.4(a) and 12 CFR 226.4(b) except
109 interest or the time price differential;

110 (ii) All items described in 12 CFR
111 226.32(b)(1)(iii);

112 (iii) All compensation paid directly or indirectly
113 to a mortgage broker from any source, including a mortgage broker
114 that originates a loan in its own name in a table-funded
115 transaction;

116 (iv) The cost of all premiums financed by the
117 creditor, directly or indirectly for any credit life, credit
118 disability, credit unemployment or credit property insurance, or
119 any other life or health insurance, or any payments financed by
120 the creditor directly or indirectly for any debt cancellation or
121 suspension agreement or contract, except that insurance premiums
122 or debt cancellation or suspension fees calculated and paid in
123 full on a monthly basis shall not be considered financed by the
124 creditor;

125 (v) The maximum prepayment fees and penalties that
126 may be charged or collected under the terms of the loan documents;

127 (vi) All prepayment fees or penalties that are
128 incurred by the borrower if the loan refinances a previous loan
129 originated or currently held by the same creditor or an affiliate
130 of the creditor;

131 (vii) For open-end loans, the points and fees are
132 calculated by adding the total points and fees known at or before
133 closing, including the maximum prepayment penalties which may be
134 charged or collected under the terms of the loan documents, plus
135 the minimum additional fees the borrower would be required to pay
136 to draw down an amount equal to the total credit line;

137 (viii) Points and fees shall not include:

138 1. Taxes, filing fees, recording, and other
139 charges and fees paid or to be paid to public officials for
140 determining the existence of or for perfecting, releasing or
141 satisfying a security interest; or

142 2. Bona fide and reasonable fees paid to a
143 person other than the creditor or an affiliate of the creditor for
144 the following: fees for tax payment services; fees for flood
145 certification; fees for pest infestation and flood determination;
146 appraisal fees; fees for inspections performed prior to closing;
147 credit reports; surveys; attorneys' fees, if the borrower has the
148 right to select the attorney from an approved list or otherwise;
149 notary fees; escrow charges, so long as not otherwise included
150 under subparagraph (i) of this paragraph; title insurance
151 premiums; and fire and hazard insurance and flood insurance
152 premiums, provided that the conditions in 12 CFR 226.4(d)(2) are
153 met.

154 (o) "Threshold" means any one (1) of the following
155 three (3) items, as defined:

156 (i) "Rate threshold" means for a home loan, the
157 annual percentage rate equals or exceeds the rate set forth in 12
158 CFR 226.32(a)(1)(i), without regard to whether the home loan may

159 be considered a "residential mortgage transaction" or an extension
160 of "open-end credit" as those terms are set forth in 12 CFR 226.2;

161 (ii) "Total points and fees threshold" means:

162 1. For loans in which the total loan amount
163 is Twenty Thousand Dollars (\$20,000.00) or more, the total points
164 and fees payable in connection with the home loan less any
165 excluded points and fees exceed five percent (5%) of the total
166 loan amount; and

167 2. For loans in which the total loan amount
168 is less than Twenty Thousand Dollars (\$20,000.00), the total
169 points and fees payable in connection with the home loan less any
170 excluded points and fees exceed the lesser of One Thousand Dollars
171 (\$1,000.00) or eight percent (8%) of the total loan amount.

172 (p) "Total loan amount" means the principal of the loan
173 minus those points and fees as defined in paragraph (h) of this
174 section that are included in the principal amount of the loan.
175 For open-end loans, the total loan amount shall be calculated
176 using the total line of credit allowed under the home loan at
177 closing.

178 **SECTION 3. Prohibited acts and practices regarding home**

179 **loans.** (1) No creditor making a home loan shall finance,
180 directly or indirectly, any credit life, credit disability, credit
181 unemployment or credit property insurance, or any other life or
182 health insurance, or any payments directly or indirectly for any
183 debt cancellation or suspension agreement or contract, except that
184 insurance premiums or debt cancellation or suspension fees
185 calculated and paid in full on a monthly basis shall not be
186 considered financed by the creditor.

187 (2) No creditor shall knowingly or intentionally engage in
188 the unfair act or practice of flipping a home loan. Flipping a
189 home loan is the making of a home loan to a borrower that
190 refinances an existing home loan when the new loan does not have
191 reasonable, tangible net benefit to the borrower considering all

192 of the circumstances, including, but not limited to, the terms of
193 both the new and refinanced loans, the cost of the new loan, and
194 the borrower's circumstances.

195 (3) No creditor shall recommend or encourage default on an
196 existing loan or other debt prior to and in connection with the
197 closing or planned closing of a home loan that refinances all or
198 any portion of such existing loan or debt.

199 (4) No borrower may incur a late payment charge unless the
200 loan documents specifically authorize the charge, the charge is
201 not imposed unless the payment is past due for ten (10) days or
202 more, and the charge does not exceed five percent (5%) of the
203 amount of the late payment. A late payment charge may not be
204 imposed more than once with respect to a particular late payment.
205 If a late payment charge is deducted from a payment made on the
206 home loan and such deduction results in a subsequent default on a
207 subsequent payment, no late payment charge may be imposed for such
208 default. A lender may apply any payment made in the order of
209 maturity to a prior period's payment due even if the result is
210 late payment charges accruing on subsequent payments due.

211 (5) No home loan may contain a provision that permits the
212 creditor, in its sole discretion, to accelerate the indebtedness.
213 This provision does not prohibit acceleration of the loan in good
214 faith due to the borrower's failure to abide by the material terms
215 of the loan.

216 (6) No borrower may be charged a fee for being informed or
217 receiving a statement of the balance due to pay off a home loan or
218 to be provided a release upon prepayment. Payoff balances shall
219 be provided within a reasonable time, but in any event no more
220 than seven (7) business days after the request.

221 **SECTION 4. Limitations and prohibited practices for**
222 **high-cost home loans.** A high-cost home loan shall be subject to
223 the following additional limitations and prohibited practices:

224 (a) In connection with a high-cost home loan, no
225 creditor shall directly or indirectly finance any points or fees.

226 (b) No prepayment fees or penalties shall be included
227 in the loan documents for a high-cost home loan.

228 (c) No high-cost home loan may contain a scheduled
229 payment that is more than twice as large as the average of earlier
230 scheduled payments. This provision does not apply when the
231 payment schedule is adjusted to the seasonal or irregular income
232 of the borrower.

233 (d) No high-cost home loan may include payment terms
234 under which the outstanding principal balance or accrued interest
235 will increase at any time over the course of the loan because the
236 regularly scheduled periodic payments do not cover the full amount
237 of interest due.

238 (e) No high-cost home loan may contain a provision that
239 increases the interest rate after default. This provision does
240 not apply to interest rate changes in a variable rate loan
241 otherwise consistent with the provisions of the loan documents,
242 provided the change in the interest rate is not triggered by the
243 event of default or the acceleration of the indebtedness.

244 (f) No high-cost home loan may include terms under
245 which more than two (2) periodic payments required under the loan
246 are consolidated and paid in advance from the loan proceeds
247 provided to the borrower.

248 (g) A creditor may not make a high-cost home loan
249 without first receiving certification from a counselor with a
250 third-party nonprofit organization approved by the United States
251 Department of Housing and Urban Development, a housing financing
252 agency of this state, or the regulatory agency which has
253 jurisdiction over the creditor, that the borrower has received
254 counseling on the advisability of the loan transaction.

255 (h) A high-cost home loan shall not be extended to a
256 borrower unless a reasonable creditor would believe at the time

257 the loan is closed that the borrower residing in the home will be
258 able to make the scheduled payments associated with the loan based
259 upon a consideration of his or her current and expected income,
260 current obligations, employment status, and other financial
261 resources, other than the borrower's equity in the collateral that
262 secures the repayment of the loan. There is a rebuttable
263 presumption that the borrower residing in the home is able to make
264 the scheduled payments to repay the obligation if, at the time the
265 loan is consummated, said borrower's total monthly debts,
266 including amounts under the loan, do not exceed fifty percent
267 (50%) of said borrower's monthly gross income as verified by tax
268 returns, payroll receipts and other third-party income
269 verification.

270 (i) A creditor may not pay a contractor under a
271 home-improvement contract from the proceeds of a high-cost home
272 loan, unless:

273 1. The creditor is presented with a signed and
274 dated completion certificate showing that the home improvements
275 have been completed; and

276 2. The instrument is payable to the borrower or
277 jointly to the borrower and the contractor, or, at the election of
278 the borrower, through a third-party escrow agent in accordance
279 with terms established in a written agreement signed by the
280 borrower, the creditor and the contractor prior to the
281 disbursement.

282 (j) A creditor may not charge a borrower any fees or
283 other charges to modify, renew, extend, or amend a high-cost home
284 loan or to defer any payment due under the terms of a high-cost
285 home loan.

286 (k) All high-cost home loan documents that create a
287 debt or pledge property as collateral shall contain the following
288 notice on the first page in a conspicuous manner: Notice: This
289 is a high-cost home loan subject to special rules under state law.

290 Purchasers or assignees of this high-cost home loan may be liable
291 for all claims and defenses by the borrower with respect to the
292 home loan.

293 **SECTION 5. Right To Cure.** (1) If a creditor asserts that
294 grounds for acceleration exist and requires the payment in full of
295 all sums secured by the security instrument, the borrower, or
296 anyone authorized to act on the borrower's behalf, shall have the
297 right at any time, up to the time title is transferred by means of
298 foreclosure by judicial proceeding and sale or otherwise, to cure
299 the default and reinstate the home loan by tendering the amount or
300 performance as specified in this section. Cure of default as
301 provided herein shall reinstate the borrower to the same position
302 as if the default had not occurred and shall nullify, as of the
303 date of the cure, any acceleration of any obligation under the
304 security instrument or note arising from the default.

305 (2) Before any action filed to foreclose upon the home or
306 other action is taken to seize or transfer ownership of the home,
307 a notice of the right to cure the default must be delivered to the
308 borrower informing the borrower of the following:

309 (a) The nature of default claimed on the home loan, and
310 of the borrower's right to cure the default by paying the sum of
311 money required to cure the default, provided that a partial
312 payment made or tendered in response to said notice must be
313 accepted. If the amount necessary to cure the default will change
314 during the thirty-day period after the effective date of the
315 notice, due to the application of a daily interest rate or the
316 addition of late fees, the notice shall give sufficient
317 information to enable the borrower to calculate the amount at any
318 point during the thirty-day period;

319 (b) The date by which the borrower shall cure the
320 default to avoid acceleration and initiation of foreclosure, or
321 other action to seize the home, which date shall not be less than
322 thirty (30) days after the date the notice is effective, and the

323 name and address and phone number of a person to whom the payment
324 or tender shall be made;

325 (c) That if the borrower does not cure the default by
326 the date specified, the creditor may take steps to terminate the
327 borrower's ownership in the property by requiring payment in full
328 of the home loan and commencing a foreclosure proceeding or other
329 action to seize the home; and

330 (d) The name and address of the creditor and the
331 telephone number of a representative of the creditor whom the
332 borrower may contact if the borrower disagrees with the creditor's
333 assertion that a default has occurred or the correctness of the
334 creditor's calculation of the amount required to cure the default.

335 (3) To cure a default under this subsection, a borrower
336 shall not be required to pay any charge, fee or penalty
337 attributable to the exercise of the right to cure a default as
338 provided for in this section, other than the fees specifically
339 allowed by this section. The borrower shall not be liable for any
340 attorney fees relating to the borrower's default that are incurred
341 by the creditor prior to or during the thirty-day period set forth
342 in subsection (2)(b) of this section. After the creditor files a
343 foreclosure action or takes other action to seize or transfer
344 ownership of the home, the borrower shall only be liable for
345 attorney fees that are reasonable and actually incurred by the
346 creditor, based on a reasonable hourly rate and a reasonable
347 number of hours.

348 (4) If a default is cured after the initiation of any action
349 to foreclose, the creditor shall take such steps as are necessary
350 to terminate the foreclosure proceeding or other action.

351 **SECTION 6. Civil action.** (1) Any person who purchases or
352 is otherwise assigned a high-cost home loan shall be subject to
353 all affirmative claims and any defenses with respect to the loan
354 that the borrower could assert against the original creditor of
355 the loan; provided that this subsection (1) shall not apply if the

356 purchaser or assignee demonstrates by a preponderance of the
357 evidence that it:

358 (a) Has in place at the time of the purchase or
359 assignment of the subject loans, policies that expressly prohibit
360 its purchase or acceptance of assignment of any high-cost home
361 loans;

362 (b) Requires by contract that a seller or assignor of
363 home loans to the purchaser or assignee represents and warrants to
364 the purchaser or assignee that either (i) the seller or assignor
365 will not sell or assign any high-cost home loans to the purchaser
366 or assignee, or (ii) that such seller or assignor is a beneficiary
367 of a representation and warranty from a previous seller or
368 assignor to that effect; and

369 (c) Exercises reasonable due diligence at the time of
370 purchase or assignment of home loans or within a reasonable period
371 of time after the purchase or assignment of such home loans,
372 intended by the purchaser or assignee to prevent the purchaser or
373 assignee from purchasing or taking assignment of any high-cost
374 home loans; provided further that reasonable due diligence shall
375 provide for sampling and shall not require loan-by-loan review.

376 (2) Limited to amounts required to reduce or extinguish the
377 borrower's liability under the home loan plus amounts required to
378 recover costs, including reasonable attorneys' fees, a borrower
379 acting only in an individual capacity may assert claims that the
380 borrower could assert against a creditor of the home loan against
381 any subsequent holder or assignee of the home loan as follows:

382 (a) Within five (5) years of the closing of a high-cost
383 home loan, a violation of this act in connection with the loan as
384 an original action; and

385 (b) At any time during the term of a high-cost home
386 loan, after an action to collect on the home loan or foreclose on
387 the collateral securing the home loan has been initiated or the
388 debt arising from the home loan has been accelerated or the home

389 loan has become sixty (60) days in default, any defense, claim or
390 counterclaim, or action to enjoin foreclosure or preserve or
391 obtain possession of the home that secures the loan.

392 (3) The provisions of this section shall be effective
393 notwithstanding any other provision of law, provided that nothing
394 in this section shall be construed to limit the substantive
395 rights, remedies or procedural rights available to a borrower
396 against any creditor, assignee or holder under any other law. The
397 rights conferred on borrowers by subsections (1) and (2) of this
398 section are independent of each other and do not limit each other.

399 **SECTION 7. Enforcement, good faith errors, no subterfuge.**

400 (1) The originating or brokering of a home loan that violates a
401 provision of this act shall constitute a violation of the act.

402 (2) Any person found by a preponderance of the evidence to
403 have violated this act shall be liable to the borrower for the
404 following:

405 (a) Actual damages, including consequential and
406 incidental damages; the borrower shall not be required to
407 demonstrate reliance in order to receive actual damages;

408 (b) For violations of Section 3 or Section 4 of this
409 act, statutory damages equal to two (2) times the finance charge
410 paid under the loan and forfeiture of the remaining interest under
411 the loan;

412 (c) Punitive damages, when the violation was malicious
413 or reckless; and

414 (d) Costs including reasonable attorneys' fees.

415 (3) A borrower may be granted injunctive, declaratory and
416 such other equitable relief as the court deems appropriate in an
417 action to enforce compliance with this act.

418 (4) The right of rescission granted under 15 USC 1601 et
419 seq. for a violation of that law shall be available to a borrower
420 by way of recoupment against a party foreclosing on the home loan
421 or collecting on the loan, at any time during the term of the

422 loan. Nothing in this act shall be construed to limit recoupment
423 rights available to the borrower under any other law.

424 (5) The remedies provided in this section are not intended
425 to be the exclusive remedies available to a borrower nor must the
426 borrower exhaust any administrative remedies provided under this
427 act or any other applicable law before proceeding under this
428 section.

429 (6) Any person, including members, officers, and directors of
430 the creditor, who knowingly violates this act is guilty of a
431 misdemeanor and, on conviction, is subject to a fine not exceeding
432 One Thousand Dollars (\$1,000.00) or to imprisonment not exceeding
433 six (6) months, or both.

434 (7) A creditor in a home loan who, when acting in good
435 faith, fails to comply with the provisions of this act, will not
436 be deemed to have violated this section if the creditor
437 establishes that either:

438 (a) Within thirty (30) days of the loan closing, and
439 prior to receiving any notice of the compliance failure, the
440 creditor has made appropriate restitution to the borrower, and
441 appropriate adjustments are made to the loan; or

442 (b) Within sixty (60) days of the loan closing and
443 prior to receiving any notice of the compliance failure, and the
444 compliance failure was not intentional and resulted from a bona
445 fide error notwithstanding the maintenance of procedures
446 reasonably adapted to avoid such errors, the borrower is notified
447 of the compliance failure, appropriate restitution is made to the
448 borrower, and appropriate adjustments are made to the loan.
449 Examples of a bona fide error include clerical, calculation,
450 computer malfunction and programming, and printing errors. An
451 error of legal judgment with respect to a person's obligations
452 under this section is not a bona fide error.

453 (8) The remedies provided herein are cumulative.

454 (9) Without regard to whether a borrower is acting
455 individually or on behalf of others similarly situated, any
456 provision of a home loan agreement that allows a party to require
457 a borrower to assert any claim or defense in a forum that is less
458 convenient, more costly or more dilatory for the resolution of a
459 dispute than a judicial forum established in this state where the
460 borrower may otherwise properly bring a claim or defense or limits
461 in any way any claim or defense the borrower may have is
462 unconscionable and void.

463 (10) It shall be a violation of this act for any person to
464 attempt in bad faith to avoid the application of this act by
465 dividing any loan transaction into separate parts or structuring a
466 home loan transaction as an open-end loan for the purpose of
467 evading the provisions of this act when the loan would have been a
468 high-cost home loan if the loan had been structured as a
469 closed-end loan or engaging in any other subterfuge with the
470 intent of evading any provision of this act.

471 **SECTION 8. Public enforcement.** The Attorney General and the
472 district attorneys of this state shall have jurisdiction to
473 enforce this act through their general regulatory powers and
474 through civil process.

475 **SECTION 9. Rights in addition to other law.** The rights
476 conferred by this section are independent of and in addition to
477 any other rights under other laws.

478 **SECTION 10. Severability.** The provisions of this act shall
479 be severable, and if any phrase, clause, sentence or provision is
480 declared to be invalid or is preempted by federal law or
481 regulation, the validity of the remainder of this act shall not be
482 affected thereby. If any provision of this act is declared to be
483 inapplicable to any specific category, type, or kind of loan or
484 points and fees, the provisions of this act shall nonetheless
485 continue to apply with respect to all other loans and points and
486 fees.

487 **SECTION 11.** **Applicability.** The law of the state in which
488 the property is located shall be applied to all transactions
489 governed by this act. This act shall apply to all loans
490 originated or entered into after the effective date of this act.

491 **SECTION 12.** This act shall take effect and be in force from
492 and after July 1, 2006.