To: Business and Financial Institutions

MISSISSIPPI LEGISLATURE
REGULAR SESSION 2011
By: Senator(s) Dawkins

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SENATE BILL NO. 2666

AN ACT TO DECLARE LEGISLATIVE INTENT TO PROHIBIT ACTIVITIES COMMONLY REFERRED TO AS PAYDAY LENDING, DEFERRED PRESENTMENT SERVICES, ADVANCE CASH SERVICES AND OTHER SIMILAR ACTIVITIES; TO PROVIDE THAT IT SHALL BE UNLAWFUL TO ENGAGE IN THE BUSINESS OF MAKING CERTAIN SMALL LOANS; TO PROVIDE CRIMINAL PENALTIES THEREFOR; TO PROVIDE FOR COLLECTION OF CIVIL PENALTIES IN ACTIONS BY THE STATE OR BY PRIVATE PARTIES ON BEHALF OF THE STATE; TO DECLARE THE SITE OR LOCATION OF A PLACE OF BUSINESS WHERE PAYDAY LENDING TAKES PLACE IN THE STATE OF MISSISSIPPI AS A PUBLIC NUISANCE; TO REPEAL SECTIONS 75-67-401 THROUGH 75-67-449, MISSISSIPPI CODE OF 1972, WHICH CREATE THE MISSISSIPPI TITLE PLEDGE ACT; TO REPEAL SECTIONS 75-67-501 THROUGH 75-67-539, MISSISSIPPI CODE OF 1972, WHICH CREATE THE MISSISSIPPI CHECK CASHERS ACT; AND FOR RELATED PURPOSES.

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

SECTION 1. (1) Without limiting in any manner the scope of this chapter, the Legislature declares that it is the general intent of this act to reiterate that in the State of Mississippi the practice of engaging in activities commonly referred to as payday lending, deferred presentment services or advance cash services and other similar activities are currently illegal and to strengthen the penalties for those engaging in such activities.

(2) This act in no way impairs or restricts the authority granted to the Commissioner of Banking and Finance or any other regulatory authority with concurrent jurisdiction over the matters stated in this act.

SECTION 2. (1) It shall be unlawful for any person to engage in any business, in whatever form transacted, including, but not limited to, by mail, electronic means, the Internet or telephonic means, which consists in whole or in part of making, offering, arranging or acting as an agent in the making of loans of Three Thousand Dollars ($3,000.00) or less unless:
(a) Such person is engaging in financial transactions permitted pursuant to:

(i) Title 81, Mississippi Code of 1972;

(ii) The laws regulating the sale of checks, Section 75-15-1 et seq.;

(iii) Chapter 17 of Title 75, relating to interest and usury, and revolving charge agreements;

(b) Such loans are lawful under the terms of:

(i) Chapter 19 of Title 63, the "Motor Vehicle Sales Finance Law";

(ii) Articles 3 and 5 of Chapter 67 of Title 75, relating to small loan companies; or

(iii) Article 7 of Chapter 67 of Title 75, relating to pawnbrokers;

(c) Such person is a bank or thrift chartered under the laws of the United States, a bank chartered under the laws of another state and insured by the Federal Deposit Insurance Corporation, or a credit card bank and is not operating in violation of the federal and state laws applicable to its charter; or

(d) Such loan is made as a tax refund anticipation loan. In order to be exempt under this paragraph the tax refund anticipation loan must be issued using a borrower's filed tax return and the loan cannot be for more than the amount of the borrower's anticipated tax refund. Tax returns that are prepared but not filed with the proper government agency will not qualify for a loan exemption under this paragraph.

(2) Subject to the exceptions in subsection (1), this section shall apply with respect to all transactions in which funds are advanced to be repaid at a later date, notwithstanding the fact that the transaction contains one or more other elements. Without limiting the generality of the foregoing, the advance of funds to be repaid at a later date shall be subject to this
section, notwithstanding the fact that the transaction also involves:

(a) The cashing or deferred presentment of a check or other instrument;

(b) The selling or providing of an item, service, or commodity incidental to the advance of funds;

(c) Any other element introduced to disguise the true nature of the transaction as an extension of credit; or

(d) Any arrangement by which a de facto lender purports to act as the agent for an exempt entity. A purported agent shall be considered a de facto lender if the entire circumstances of the transaction show that the purported agent holds, acquires or maintains a predominant economic interest in the revenues generated by the loan.

(3) (a) A payday lender shall not include in any loan contract made with a resident of this state any provision by which the laws of a state other than Mississippi shall govern the terms and enforcement of the contract, nor shall the loan contract designate a court for the resolution of disputes concerning the contract other than a court of competent jurisdiction in and for the county in which the borrower resides or the loan office is located.

(b) An arbitration clause in a payday loan contract shall not be enforceable if the contract is unconscionable. In determining whether the contract is unconscionable, the court shall consider the circumstances of the transaction as a whole, including, but not limited to:

(i) The relative bargaining power of the parties;

(ii) Whether arbitration would be prohibitively expensive to the borrower in view of the amounts in controversy;

(iii) Whether the contract restricts or excludes damages or remedies that would be available to the borrower in court, including the right to participate in a class action;
(iv) Whether the arbitration would take place outside the county in which the loan office is located or any other place that would be unduly inconvenient or expensive in view of the amounts in controversy; and

(v) Any other circumstance that might render the contract oppressive.

(4) Any person who violates subsection (1) or (2) of this section shall be guilty of a misdemeanor of a high and aggravated nature and upon conviction thereof shall be punished by imprisonment for not more than one (1) year or by a fine not to exceed Five Thousand Dollars ($5,000.00), or both fine and imprisonment. Each loan transaction shall be deemed a separate violation of this section. Any person who aids or abets such a violation, including any arbiter or arbitration company, shall likewise be guilty of a misdemeanor of a high and aggravated nature and shall be punished as set forth in this subsection. If a person has been convicted of violations of subsection (1) or (2) of this section on three (3) prior occasions, then all subsequent convictions shall be considered felonies punishable by a fine of Ten Thousand Dollars ($10,000.00) or five (5) years' imprisonment, or both.

SECTION 3. Any person who violates subsection (1) or (2) of Section 2 of this act shall be barred from the collection of any indebtedness created by said loan transaction and said transaction shall be void ab initio, and any person violating the provisions of subsection (1) or (2) of Section 2 of this act shall in addition be liable to the borrower in each unlawful transaction for three (3) times the amount of any interest or other charges to the borrower. A civil action under Section 2 of this act may be brought on behalf of an individual borrower or on behalf of an ascertainable class of borrowers. In a successful action to enforce the provisions of this chapter, a court shall award a
borrower, or class of borrowers, costs including reasonable attorneys' fees.

SECTION 4. (1) Any person who violates subsection (1) or (2) of Section 2 of this act shall be liable to the state for a civil penalty equal to three (3) times the amount of any interest or charges to the borrowers in the unlawful transactions.

(2) A civil action under this section may be brought by the Attorney General, any district attorney, or a private party. Where a successful civil action is brought by a district attorney, one-half (1/2) of the damages recovered on behalf of the state shall be distributed to the counties comprising the judicial district of such district attorney, pro rata according to the population of the counties.

SECTION 5. In regard to any loan transaction that is alleged to be in violation of subsection (1) of Section 2 of this act, the trial court shall be authorized to review the terms of the transaction in their entirety in order to determine if there has been any contrivance, device or scheme used by the lender in order to avoid the provisions of subsection (1) of Section 2 of this act. The trial court shall not be bound in making such determination by the parole evidence rule or by any written contract but shall be authorized to determine exactly whether the loan transaction includes the use of a scheme, device or contrivance and whether in reality the loan is in violation of the provisions of subsection (1) of Section 2 of this act based upon the facts and evidence relating to that transaction and similar transactions being made in the State of Mississippi. If any entity involved in soliciting or facilitating the making of payday loans purports to be acting as an agent of a bank or thrift, then the court shall be authorized to determine whether the entity claiming to act as agent is in fact the lender. Such entity shall be presumed to be the lender if, under the totality of the circumstances, it holds, acquires or maintains a predominant
economic interest in the revenues generated by the loan.

Furthermore, the trial court shall further be authorized to investigate all transactions involving gift cards, telephone cards, the sale of goods or services, computer services or the like which may be tied to such loan transactions and are an integral part thereof in order to determine whether any such transaction is in fact a contrivance, scheme or device used by the payday lender in order to evade the provisions of subsection (1) of Section 2 of this act.

SECTION 6. The site or location of a place of business where payday lending takes place in the State of Mississippi is declared a public nuisance.


SECTION 9. This act shall take effect and be in force from and after July 1, 2011.