

By: Senator(s) Dawkins

To: Business and Financial
Institutions

SENATE BILL NO. 2666

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

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

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

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

27 **SECTION 2.** (1) It shall be unlawful for any person to
 28 engage in any business, in whatever form transacted, including,
 29 but not limited to, by mail, electronic means, the Internet or
 30 telephonic means, which consists in whole or in part of making,
 31 offering, arranging or acting as an agent in the making of loans
 32 of Three Thousand Dollars (\$3,000.00) or less unless:



33 (a) Such person is engaging in financial transactions
34 permitted pursuant to:

35 (i) Title 81, Mississippi Code of 1972;

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

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

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

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

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

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

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

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

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



66 section, notwithstanding the fact that the transaction also
67 involves:

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

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

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

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

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

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

93 (i) The relative bargaining power of the parties;

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

96 (iii) Whether the contract restricts or excludes
97 damages or remedies that would be available to the borrower in
98 court, including the right to participate in a class action;



99 (iv) Whether the arbitration would take place
100 outside the county in which the loan office is located or any
101 other place that would be unduly inconvenient or expensive in view
102 of the amounts in controversy; and

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

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

120 **SECTION 3.** Any person who violates subsection (1) or (2) of
121 Section 2 of this act shall be barred from the collection of any
122 indebtedness created by said loan transaction and said transaction
123 shall be void ab initio, and any person violating the provisions
124 of subsection (1) or (2) of Section 2 of this act shall in
125 addition be liable to the borrower in each unlawful transaction
126 for three (3) times the amount of any interest or other charges to
127 the borrower. A civil action under Section 2 of this act may be
128 brought on behalf of an individual borrower or on behalf of an
129 ascertainable class of borrowers. In a successful action to
130 enforce the provisions of this chapter, a court shall award a



131 borrower, or class of borrowers, costs including reasonable
132 attorneys' fees.

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

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

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



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

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

176 **SECTION 7.** Sections 75-67-401, 75-67-403, 75-67-405,
177 75-67-407, 75-67-409, 75-67-411, 75-67-413, 75-67-415, 75-67-417,
178 75-67-419, 75-67-421, 75-67-423, 75-67-425, 75-67-427, 75-67-429,
179 75-67-431, 75-67-433, 75-67-435, 75-67-437, 75-67-439, 75-67-441,
180 75-67-443, 75-67-445, 75-67-447 and 75-67-449, Mississippi Code of
181 1972, which create the Mississippi Title Pledge Act, are hereby
182 repealed.

183 **SECTION 8.** Sections 75-67-501, 75-67-503, 75-67-505,
184 75-67-507, 75-67-509, 75-67-511, 75-67-513, 75-67-515, 75-67-516,
185 75-67-517, 75-67-519, 75-67-521, 75-67-523, 75-67-525, 75-67-527,
186 75-67-529, 75-67-531, 75-67-533, 75-67-535, 75-67-537 and
187 75-67-539, Mississippi Code of 1972, which create the Mississippi
188 Check Cashers Act, are hereby repealed.

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

