By: Representative Blackmon

To: Select Committee on Civil Justice Reform

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 14

AN ACT TO AMEND SECTION 75-67-103, MISSISSIPPI CODE OF 1972, TO REVISE DEFINITIONS UNDER THE SMALL LOAN REGULATORY LAW TO INCLUDE DEFINITIONS FOR THE TERMS "OTHER CHARGES," "CONSUMER LOAN," AND "CONSUMER"; TO AMEND SECTIONS 75-67-119 AND 75-17-25, MISSISSIPPI CODE OF 1972, TO PROVIDE FOR REMEDIES, PENALTIES AND DAMAGES FOR CONTRACTING FOR AND RECEIVING UNLAWFUL OTHER CHARGES IN CONNECTION WITH CONSUMER LOANS; TO PROVIDE FOR DOUBLE PENALTY AMOUNTS IF OTHER CHARGES ARE CONTRACTED FOR OR RECEIVED BY ACTUAL FRAUD; TO PROVIDE FOR THE RECOVERY OF ATTORNEY'S FEES IF PENALTIES ARE RECOVERED; TO PROVIDE THAT THE REMEDIES, PENALTIES AND DAMAGES PROVIDED FOR UNDER THIS ACT ARE EXCLUSIVE; TO PROVIDE FOR A ONE-YEAR STATUTE OF LIMITATIONS ON FILING ACTIONS FOR RECOVERY OF PENALTIES OR DAMAGES UNDER THIS ACT; TO PROVIDE THAT THE PROVISIONS OF THIS ACT SHALL STAND REPEALED ON JULY 1, 2004; AND FOR RELATED PURPOSES.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. (1) 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.

(h) "Consumer loan" means any loan or extension of credit in the principal amount of Twenty Thousand Dollars ($20,000.00) or less offered or extended primarily for personal, family or household purposes.

(i) "Consumer" means any natural person who is obligated on any consumer loan.

(2) Paragraphs (g) through (i) of subsection (1) of this section shall stand repealed on July 1, 2004; however, the provisions of paragraphs (g) through (i) of subsection (1) of this section shall remain in full force and effect with respect to any loan agreement that is entered into before July 1, 2004.

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) If, in connection with a consumer loan, any licensee or other 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, then all those unlawful other charges, all finance charges and all principal shall be forfeited and may be recovered by the consumer, by suit or other proceeding, whether the contract is executed or executory. However, no person who contracts for or receives other charges in violation of any applicable statutory or common law duty, or otherwise unlawfully, shall be subject to forfeiture of principal if the person shows by a preponderance of the evidence that those other charges were contracted for or received unintentionally and as a result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted

to avoid any such violation. Examples of bona fide errors include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to applicable statutory or common law duty is not a bona fide error.

(3) If the other charges subject to forfeiture under this section are found to have been contracted for or received by actual fraud, any penalty recovered under subsection (2) of this section shall be doubled.

(4) If a consumer recovers any penalty provided for under subsection (2) of this section, the consumer also may recover damages, to the extent proven by competent evidence, subject to the following limitations:

(a) If the amount of the unlawful other charges is One Hundred Dollars ($100.00) or less, the maximum amount of damages that may be recovered by the consumer as to each individual loan is Three Thousand Dollars ($3,000.00).

(b) If the amount of the unlawful other charges is more than One Hundred Dollars ($100.00) but less than One Thousand Dollars ($1,000.00), the maximum amount of damages that may be recovered by the consumer as to each individual loan is Fifteen Thousand Dollars ($15,000.00).

(c) If the amount of the unlawful other charges is not less than One Thousand Dollars ($1,000.00) but less than Two Thousand Dollars ($2,000.00), the maximum amount of damages that may be recovered by the consumer as to each individual loan is Thirty Thousand Dollars ($30,000.00).

(d) If the amount of the unlawful other charges is not less than Two Thousand Dollars ($2,000.00) but less than Five Thousand Dollars ($5,000.00), the maximum amount of damages that may be recovered by the consumer as to each individual loan is Forty-five Thousand Dollars ($45,000.00).

(e) If the amount of the unlawful other charges is not less than Five Thousand Dollars ($5,000.00), the maximum amount of damages that may be recovered by the consumer as to each individual loan is Sixty Thousand Dollars ($60,000.00).

(5) If any penalty is recovered under subsection (2) of this section, a reasonable attorney's fee also shall be recovered from the offending party by the consumer.

(6) Except as provided in subsection (7) of this section, the remedies, penalties and damages provided for in this section shall be the exclusive remedies, penalties and damages for contracting for or receiving any finance charge in excess of that expressly permitted by Section 75-17-21, 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.

(7) The remedies, penalties and damages provided for in this section are supplemental to the defense provided in Section 75-67-127(3) and to the enforcement powers conferred upon the Commissioner of Banking and Consumer Finance.

(8) No action for recovery of any penalty or damages provided for under this section may be brought unless it is filed within one (1) year after the date of the act or event that created the cause of action. However, if the act or event that created the cause of action occurred before the effective date of House Bill No. 14, Third Extraordinary Session 2002, no action for recovery of any penalty or damages provided for under this section based on that cause of action may be brought unless it is filed within one (1) year after the effective date of House Bill No. 14, Third Extraordinary Session 2002.

(9) Subsections (2) through (8) of this section shall stand repealed on July 1, 2004; however, the provisions of subsections (2) through (8) of this section shall remain in full force and

<u>effect with respect to any loan agreement that is entered into before July 1, 2004.</u>

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

75-17-25. <u>(1)</u> 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.

<u>(2)</u> 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) 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, then all those unlawful other charges, all finance charges and all principal shall be forfeited and may be recovered by the consumer, by suit or other proceeding, whether the contract is executed or executory. However, no person who contracts for or receives other charges in violation of any applicable statutory or common law duty, or otherwise unlawfully, shall be subject to forfeiture of principal if the person shows by a preponderance of the evidence that those other charges were contracted for or received

unintentionally and as a result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation. Examples of bona fide errors include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to applicable statutory or common law duty is not a bona fide error.

(4) If the other charges subject to forfeiture under this section are found to have been contracted for or received by actual fraud, any penalty recovered under subsection (3) of this section shall be doubled.

(5) If a consumer recovers any penalty provided for under subsection (3) of this section, the consumer also may recover damages, to the extent proven by competent evidence, subject to the following limitations:

(a) If the amount of the unlawful other charges is One Hundred Dollars ($100.00) or less, the maximum amount of damages that may be recovered by the consumer as to each individual loan is Three Thousand Dollars ($3,000.00).

(b) If the amount of the unlawful other charges is more than One Hundred Dollars ($100.00) but less than One Thousand Dollars ($1,000.00), the maximum amount of damages that may be recovered by the consumer as to each individual loan is Fifteen Thousand Dollars ($15,000.00).

(c) If the amount of the unlawful other charges is not less than One Thousand Dollars ($1,000.00) but less than Two Thousand Dollars ($2,000.00), the maximum amount of damages that may be recovered by the consumer as to each individual loan is Thirty Thousand Dollars ($30,000.00).

(d) If the amount of the unlawful other charges is not less than Two Thousand Dollars ($2,000.00) but less than Five Thousand Dollars ($5,000.00), the maximum amount of damages that may be recovered by the consumer as to each individual loan is Forty-five Thousand Dollars ($45,000.00).

(e) If the amount of the unlawful other charges is not less than Five Thousand Dollars ($5,000.00), the maximum amount of damages that may be recovered by the consumer as to each individual loan is Sixty Thousand Dollars ($60,000.00).

(6) If any penalty is recovered under subsection (3) of this section, a reasonable attorney's fee also shall be recovered from the offending party by the consumer.

(7) The remedies, penalties and damages provided for in this section shall be the exclusive remedies, penalties and damages 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.

(8) As used in this section:

(a) "Consumer loan" means any loan or extension of credit offered or extended in the principal amount of Twenty Thousand Dollars ($20,000.00) or less primarily for personal, family or household purposes.

(b) "Consumer" means any natural person obligated on any consumer loan.

(c) "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.

(9) No action for recovery of any penalty or damages provided for under this section may be brought unless it is filed within one (1) year after the date of the act or event that created the cause of action. However, if the act or event that created the cause of action occurred before the effective date of House Bill No. 14, Third Extraordinary Session 2002, no action for recovery of any penalty or damages provided for under this section

based on that cause of action may be brought unless it is filed within one (1) year after the effective date of House Bill No. 14, Third Extraordinary Session 2002.

(10) Subsections (3) through (9) of this section shall stand repealed on July 1, 2004; however, the provisions of subsections (3) through (9) of this section shall remain in full force and effect with respect to any loan agreement that is entered into before July 1, 2004.

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