SB273
By Senator Smitherman
RFD Banking and Insurance
Rd 1 17-JAN-2002

Under existing law, there is not a specific criminal or civil offense of predatory lending. This bill would prohibit the making of loans that include the financing of high points and financial fees in equity based loans. This bill would also provide for criminal penalties and civil sanctions for violations. Amendment 621 of the Constitution of Alabama of 1901 prohibits a general law whose purpose or effect would be to require a new or increased expenditure of local funds from becoming effective with regard to a local governmental entity without enactment by a 2/3 vote unless: It comes within one of a number of specified exceptions; it is approved by the affected entity; or the Legislature appropriates funds, or provides a local source of revenue, to the entity for the purpose. The purpose or effect of this bill would be to require a new or increased expenditure of local funds within the meaning of Amendment 621. However, the bill does not require approval of a local governmental entity or enactment by a 2/3 vote to become effective because it comes within one of the specified exceptions contained in Amendment 621.

A BILL
TO BE ENTITLED
AN ACT

To establish the Alabama Home Loan Protection Act; to define certain terms; to prohibit certain acts and practices regarding home loans based on the amount of equity; to limit certain practices for high-cost home loans; to provide for the enforcement of provisions; to provide for penalties for violations; and in connection therewith would have as its purpose or effect the requirement of a new or increased expenditure of local funds within the meaning of Amendment 621 of the Constitution of Alabama of 1901.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. (a) This act shall be known and may be cited as the Alabama Home Loan Protection Act.

(b) The Legislature of Alabama finds that predatory lending has become an increasing problem in this state, exacerbating the loss of equity in homes and causing foreclosures to increase. One of the most common forms of abusive lending is the making of loans that are equity based, rather than income based. One of the hallmarks of such loans is the financing of points and fees which provides immediate income to the originator of the loan, encourages lenders to refinance, and reduces the lender's incentive to ensure that the homeowner can afford the monthly payments. As long as there is sufficient equity in the home, a lender benefits if the consumer is unable to make the payments and is forced to refinance. The financing of high points and fees causes the loss of precious equity at the time of each refinancing and can eventually lead to foreclosure. These loans are most clearly exemplified by the financing of high points and fees financed. This financing of points and fees provides immediate income to the originator of the loan, encourages lenders to refinance home loans often, and reduces the lender's incentive to ensure that the homeowner can afford the payments of the loan. This predatory lending has
threatened the viability of many communities and caused decreases in home ownership. While the marketplace appears to operate effectively for conventional mortgages, too many homeowners are finding themselves victims of overreaching lenders who provide loans at unnecessary costs and include terms which are unnecessary to secure repayment of the loan. The Legislature finds that as competition and self-regulation have not eliminated the predatory loans from home-secured loans, the consumer protection provisions of this act are necessary to encourage lending at reasonable rates with reasonable terms.

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

Section 2. As used in this act, the following terms shall have the following meanings:

(1) BENCHMARK RATE. The interest rate which the borrower can reduce by paying bona fide discount points; this rate shall not exceed the weekly average yield of U.S. Treasury securities having a maturity of five years, on the fifteenth day of the month immediately preceding the month in which the loan is made, plus four percentage points.

(2) BONA FIDE DISCOUNT POINTS. Loan discount points which are knowingly paid by the borrower, are paid for the express purpose of lowering the benchmark rate, in fact reduce the interest rate or time price differential applicable to the loan, from an interest rate which does not exceed the benchmark rate, and are recouped within the first four years of the scheduled loan payments. For purposes of assessing compliance with this subdivision, loan discount points will be considered to be recouped within the first four years of the scheduled loan payments if the reduction in the interest rate that is achieved by the payment of the loan discount points, reduces the interest charged on the scheduled payments such that the borrower's dollar amount of savings in interest over the first four years is equal to or exceeds the dollar amount of loan discount points paid by the borrower.

(3) BORROWER. Any natural person obligated to repay the loan, including a coborrower, cosigner, or guarantor.

(4) CREDITOR. A person who extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments, and to whom the obligation is payable at any time.

(5) HIGH-COST HOME LOAN. A home loan in which the terms of the loan meet or exceed one or more of thresholds as defined herein.

(6) HOME LOAN. A loan, including an open-end credit plan, other than a reverse mortgage transaction, where the loan is secured by any of the following:

a. A mortgage or deed of trust on real estate in this state upon which there is located or there is to be located a structure or structures designed principally for occupancy of from one to four families which is or will be occupied by a borrower as the borrower's principal dwelling.

b. A security interest on a manufactured home which is or will be occupied by a borrower as the borrower's principal dwelling.

(7) POINTS AND FEES. Any of the following:
a. All items listed in 15 U.S.C. §1605(a)(1) through (4), except interest or the time-price differential.


c. All compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table-funded transaction.

d. The cost of all premiums financed by the creditor, directly or indirectly for any credit life, credit disability, credit unemployment, or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except insurance premiums calculated and paid on a monthly basis shall not be considered financed by the creditor.

e. The maximum prepayment fees or penalties that may be charged or collected under the terms of the loan documents.

f. All prepayment fees or penalties that are charged the borrower if the loan refinances a previous loan made by the same creditor or an affiliate of the creditor.

g. For open-end loans, the points and fees are calculated by adding the total fees charged at closing plus the maximum additional fees which can be charged pursuant to the loan documents during the term of the loan.

(8) RATE. The interest rate charged on a home loan, based on an annual simple interest yield.

(9) THRESHOLD. Any one of the following items, as defined:

a. Rate threshold means:

1. For a first lien mortgage loan the trigger rate equals or exceeds six percentage points over the weekly average yield on five-year United States securities.

2. For a subordinate mortgage lien or a mortgage secured solely by a security interest in a manufactured home, the trigger rate equals or exceeds eight percentage points over the weekly average yield on five-year United States securities.

3. The trigger rate is calculated as follows:

   (i) For fixed rate loans in which the interest rate will not vary during the term of the loan, the trigger rate is the rate as of the date of closing.

   (ii) For loans in which the interest varies according to an index, the trigger rate is the sum of the index rate as of the date of loan closing plus the maximum margin permitted at any time under the loan agreement.

   (iii) For all other loans in which the rate may vary at any time during the term of the loan, the trigger rate is the maximum rate that may be charged during the term of the loan.

b. Total points and fees threshold for closed-end loans means the following, excluding bona fide discount points:

1. For loans in which the total loan amount is thirty thousand dollars ($30,000) or more, the total points and fees
on the loan, paid by the borrower at or before closing, which exceed three percent of the total loan amount.

2. For loans in which the total loan amount is less than thirty thousand dollars ($30,000), the total points and fees on the loan, paid by the borrower at or before closing, which exceed the lesser of nine hundred dollars ($900) or six percent of the total loan amount.

(10) TOTAL LOAN AMOUNT. The principal of the loan minus those points and fees that are included in the principal amount of the loan. For open-end loans, the total loan amount shall be calculated using the total line of credit allowed under the home plan.

Section 3. (a) A creditor making a home loan may not finance, directly or indirectly, any credit life, credit disability, credit unemployment, or credit property insurance, or any other life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly basis shall not be considered financed by the creditor.

(b) A creditor may not engage in the unfair act or practice of "flipping" a home loan. Flipping a loan is the making of a home loan to a borrower that refinances an existing loan when the new loan does not have reasonable, tangible net benefit to the borrower considering all of the circumstances, including the terms of both the new and refinanced loans, the cost of the new loan, and the borrower's circumstances. In addition, the following home loan refinancings shall be presumed to be flippings:

(1) The primary tangible benefit to the borrower is an interest rate lower than the interest rate on debts satisfied or refinanced in connection with the home loan, and it will take more than four years for the borrower to recoup the costs of the points and fees and other closing costs through savings resulting from the lower interest.

(2) The new loan refinances an existing home loan that is a special mortgage originated, subsidized, or guaranteed by or through a state, tribal, or local government, or nonprofit organization, which either bears a below-market interest rate at the time the loan was originated, or has nonstandard payment terms beneficial to the borrower, such as payments that vary with income, are limited to a percentage of income, or where no payments are required under specified conditions, and where, as a result of the refinancing, the borrower will lose one or more of the benefits of the special mortgage.

(c) A creditor may not recommend or encourage default on an exiting loan or other debt prior to and in connection with the closing or planned closing of a home loan that refinances all or any portion of such exiting loan or debt.

(d) A creditor may not charge a late payment charge except according to the following rules:

(1) The late payment fee may not be in excess of four percent of the amount of the payment past due.

(2) The fee may only be assessed for a payment past due 15 days or more.

(3) The fee may not be charged more than once with respect to a single late payment. If a late payment charge is deducted from a payment made on the loan and such deduction results in a subsequent default on a subsequent payment, no late payment charge may be imposed for such default. If a late payment charge has been once imposed with respect to a particular late payment, no such charge shall be imposed with respect to any future payment which would have been timely and sufficient but for the previous default.
(4) No fee may be charged unless the creditor notifies the borrower within 45 days following the date the payment was due that a late payment charge has been imposed for a particular late payment. No late payment charge may be collected from any borrower if the borrower informs the creditor that nonpayment of an installment is in dispute and presents proof of payment within 45 days of receipt of the creditor's notice of the late charge.

(5) The creditor shall treat each payment as posted on the same date as it was received by the creditor, servicer, creditor's agent, or at the address provided to the borrower by the creditor, servicer, creditor's agent for making payments.

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

(f) No creditor may charge a fee for informing or transmitting to any person the balance due to pay off a home loan or provide a release upon prepayment. Payoff balances shall be provided within a reasonable time, but in any event no more than seven business days after the request.

Section 4. (1) No creditor making a high-cost home loan may directly or indirectly finance any points or fees.

(2) No prepayment fees or penalties may be included in the loan documents for a high-cost home loan or charged the borrower which exceed in the aggregate in the first 12 months after the loan closing more than two percent of the loan amount prepaid or in the second 12 months after the loan closing, more than one percent of the amount prepaid. No prepayment penalty shall be contracted for after the second year following the loan closing.

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

(4) No high-cost home loan may include payment terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.

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

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

(7) No high-cost home loan may be subject to a mandatory arbitration clause that limits in any way the right of the borrower to seek relief through the judicial process for any and all claims and defenses the borrower may have against the creditor, broker, or other party involved in the loan transaction.

(8) A creditor may not make a high-cost home loan without first receiving certification from a counselor approved by the United States Department of Housing and Urban Development, a state housing financing agency, or the
regulatory agency that has jurisdiction over the creditor, that the borrower has received counseling on the advisability of the loan transaction.

(9) A creditor may not make a high-cost home loan without due regard to repayment ability. A creditor who follows the debt-to-income ratio listed in 38 C.F.R. §36.4337(c)(1) and as defined in 38 C.F.R. §36.4337(d) and follows the residual income guidelines established in 38 C.F.R. §36.4337(e) and VA Form 26-6393 shall benefit from a rebuttable presumption that the creditor made the loan with due regard to repayment ability.

(10) A creditor may not pay a contractor under a home improvement contract from the proceeds of a high-cost home loan, unless the following occur:

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

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

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

(12) Any creditor making a high-cost home loan who has the legal right to foreclose must use the judicial foreclosure procedures of the state wherein the property securing the loan is located. The borrower may assert in such proceeding the nonexistence of a default and any other claim or defense to acceleration and foreclosure, including any based on violations of this act, though no such claim or defense shall be deemed a compulsory counterclaim.

Section 5. (a) If a creditor asserts that grounds for acceleration exist and requires the payment in full of all sums secured by the security instrument, the borrower, or anyone authorized to act on the borrower's behalf, may at any time, up to the time title is transferred by means of foreclosure by judicial proceeding and sale or otherwise, cure the default, and reinstate the home loan by tendering the amount or performance as specified herein. Cure of default as provided herein shall reinstate the borrower to the same position as if the default had not occurred and shall nullify, as of the date of the cure, any acceleration of any obligation under the security instrument or note arising from the default.

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

(1) The nature of the default claimed on the home loan, and of the borrower's right to cure the default by paying the sum of money required to cure the default, provided that a creditor or servicer may not refuse to accept any partial payment made or tendered in response to the notice. If the amount necessary to cure the default will change during the 30-day period after the effective date of the notice, due to the application of a daily interest rate or the addition of late fees, as allowed by this act, the notice shall give sufficient information to enable the borrower to calculate the amount at any point during the 30-day period.

(2) The date by which the borrower shall cure the default to avoid acceleration and initiation of foreclosure, or other action to seize the home, which date shall not be less than 30 days after the date the notice is effective, and
the name and address and phone number of a person to whom the payment or tender shall be made.

(3) That if the borrower does not cure the default by the date specified, the creditor may take steps to terminate the borrower's ownership in the property by requiring payment in full of the home loan and commencing a foreclosure proceedings or other action to seize the home.

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

(c) To cure a default under this section, a borrower shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default as provided in this section, other than the fees specifically allowed by this section. The borrower shall not be liable for any attorney fees relating to the borrower's default that are incurred by the lender prior to or during the 30-day period set forth in subsection (b)(2), nor for any such fees in excess of one hundred dollars ($100) that are incurred by the lender after the expiration of the 30-day period but prior to the time the lender files a foreclosure action or takes other action to seize or transfer ownership of the home. After the lender files a foreclosure action or takes other action to seize or transfer ownership of the home, the borrower shall only be liable for attorney fees that are reasonable and actually incurred by the lender, based on a reasonable hourly rate and a reasonable number of hours.

(d) If a default is cured prior to the initiation of any action to foreclose or to seize the home, the creditor may not institute the foreclosure proceeding or other action for that default. If a default is cured after initiation of any action to foreclose, the creditor may take such steps as are necessary to terminate the foreclosure proceeding or other action. Any creditor making a home loan who has the legal right to foreclose must use the judicial foreclosure procedures of the state wherein the property securing the loan is located. The borrower may assert in a judicial foreclosure proceeding or other action the nonexistence of a default and any other claim or defense to acceleration and foreclosure, including any based on violations of this act, though no such claim or defense shall be deemed a compulsory counterclaim.

Section 6. (a) Notwithstanding any other law to the contrary, where a home loan was made, arranged, or assigned by a person selling either a manufactured home, or home improvements to the dwelling of the borrower, the borrower may assert all affirmative claims and defenses that the borrower may have against the seller or home improvement contractor against the lender, any assignee, holder, or servicer, in any capacity.

(b) Notwithstanding any other law to the contrary, the remedies provided herein apply to the creditor, any director, officer, employee, or controlling stockholder of, or agent for a creditor who personally participated in the making or approving of a high-cost home loan, and any other persons to whom this act applies and who violated any requirement of this act. Any person who purchases or is otherwise assigned a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original creditor or broker of the loan.

(c) Notwithstanding any other provision of law to the contrary, a borrower in default more than 60 days or in foreclosure may assert a violation of this act by way of offset as an original action or as a defense or counterclaim to an action to collect amounts owed or to obtain possession of the home secured by the home loan.

(d) It is a violation of this act for any person, in bad faith to attempt to avoid the application of this act by dividing any loan transaction into separate parts for the purpose or any other such subterfuge, with the intent of evading the provisions of this act.
Section 7. (1) Any violation of this act constitutes a violation of the state law prohibiting unfair or deceptive trade practices.

(b) Any person found by the preponderance of the evidence to have violated this act shall be liable to the borrower for all of the following:

a. Actual damages, including consequential and incidental damages and the borrower shall not be required to demonstrate reliance in order to receive actual damages.

b. Statutory damages equal to the finance charges agreed to in the home loan agreement, plus 10 percent of the amount financed.

c. Punitive damages when the violation was malicious or reckless.

d. Costs and reasonable attorney fees.

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

(4) An intentional violation of this act renders the home loan agreement void and the creditor shall have no right to collect, receive, or retain any principal, interest, or other charges whatsoever with respect to the loan and the borrower may recover any payments made under the agreement.

(5) The remedies provided in this section are not intended to be the exclusive remedies available to a borrower, and the borrower shall exhaust any administrative remedies provided under this act or any other applicable law before proceeding under this section.

(b) Any person, including members, officers, and directors of the creditor, who knowingly violates this act shall, upon conviction, be guilty of a Class B misdemeanor and be subject to incarceration or a fine, or both.

(c) A creditor in a home loan who, when acting in good faith, fails to comply with the provisions of this act shall not be deemed to have violated this act if the creditor establishes either of the following:

(1) Within 30 days of the loan closing and prior to receiving any notice from the borrower of the compliance failure, the creditor has made appropriate restitution to the borrower and appropriate adjustments are made to the loan.

(2) Within 60 days of the loan closing and prior to receiving any notice from the borrower of the compliance failure, and the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, the borrower is notified of the compliance failure, appropriate restitution is made to the borrower and appropriate adjustments are made to the loan.

Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this section is not a bona fide error.

(d) The remedies provided herein are cumulative.
(e) Notwithstanding any other provision of law to the contrary, no home loan agreement may include any provision that waives any federal or state constitutional right of customers or limits their remedies available in law or equity, whether acting individually or on behalf of others similarly situated, or their rights to civil discovery or appeal. In addition to the foregoing, no home loan agreement may require a party to assert any claim against the party who prepared the agreement in a forum that is less convenient, more costly, or more dilatory for the resolution of the dispute than a judicial forum established in this state.

Section 8. The rights conferred by this act are independent of and in addition to any other rights under state law.

Section 9. Although this bill would have as its purpose or effect the requirement of a new or increased expenditure of local funds, the bill is excluded from further requirements and application under Amendment 621 because the bill defines a new crime or amends the definition of an existing crime.

Section 10. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.

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