

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas  
2 83rd General Assembly  
3 Regular Session, 2001  
4

*As Engrossed: H3/15/01*

## A Bill

HOUSE BILL 1545

5 By: Representatives C. Johnson, Borhauer, Clemons, J. Elliott, Jones, Ledbetter, Lewellen, Seawel, T.  
6 Steele, Thomas, White  
7

### For An Act To Be Entitled

10 AN ACT TO PROHIBIT PREDATORY LENDING IN THE HOME  
11 MORTGAGE MARKET; AND FOR OTHER PURPOSES.  
12

### Subtitle

14 AN ACT TO PROHIBIT PREDATORY LENDING IN  
15 THE HOME MORTGAGE MARKET.  
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18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
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20 SECTION 1. Definitions. The following definitions apply for the  
21 purposes of this section:

22 (1) "Affiliate" means any company that controls, is controlled by, or  
23 is under common control with another company, as set forth in the Bank Holding  
24 Company Act of 1956 (12 U.S.C. 1841);

25 (2) "Annual percentage rate" means the annual percentage rate for the  
26 loan calculated according to the provisions of the federal Truth in Lending  
27 Act (15 U.S.C. 1601), and the regulations promulgated thereunder by the  
28 Federal Reserve Board;

29 (3) "Bona fide loan discount points" means loan discount points  
30 knowingly paid by the borrower for the purpose of reducing, and which in fact  
31 result in a bona fide reduction of, the interest rate or time price  
32 differential applicable to the loan, provided the amount of the interest rate  
33 reduction purchased by the discount points is reasonably consistent with  
34 established industry norms and practices for secondary mortgage market  
35 transactions;

36 (4) "Flipping" means the making of a home loan to a borrower that

1 refinances an existing home loan when the new loan does not have a reasonable,  
2 tangible net benefit to the borrower when all the circumstances are  
3 considered, including the terms of both the new and refinanced loans, the cost  
4 of the new loan, and the borrower's circumstances;

5 (5) A "high cost home loan" means a home loan in which the terms of the  
6 loan meet one or more of the following thresholds:

7 (A) The annual percentage rate of the home loan at consummation  
8 equals or exceeds six (6) percentage points for a first lien mortgage loan or  
9 eight (8) percentage points for subordinate mortgage liens over the weekly  
10 average yield on ten-year United States Treasury securities, as made available  
11 by the Federal Reserve Board, as of the week immediately preceding the week in  
12 which the interest rate for the loan is established, provided that if the  
13 terms of the home loan offers any initial or introductory period, and the  
14 annual percentage rate that is taken is less than that which will apply after  
15 the end of the initial or introductory period, then the annual percentage rate  
16 that shall be taken into account for the purposes of this subsection shall be  
17 the rate which applies after the initial or introductory period;

18 (B) The home loan is a variable rate loan in which the annual  
19 percentage rate can reasonably be expected to increase beyond the threshold  
20 established in subdivision (5)(A) of this section and the potential or  
21 scheduled increases in the annual percentage rate of the home loan are not  
22 directly tied to future increases in a widely used federal or private market  
23 measurement that reflects the cost of borrowing money, such as the interest  
24 rate yield on United States Treasury securities, the federal funds rate, or  
25 the prime interest rate; or

26 (C) The total points and fees on the loan exceed five percent  
27 (5%) of the total loan amount where the total loan amount is more than twenty  
28 thousand dollars (\$20,000) or the total points and fees on the loan exceed the  
29 lesser of eight percent (8%) of the total loan amount or one thousand  
30 dollars(\$1,000) if the total loan amount is less than twenty thousand dollars  
31 (\$20,000). The following discount points shall be excluded from the  
32 calculation of the total points and fees:

33 (i) Up to and including two bona fide loan discount  
34 points payable by the borrower in connection with the loan transaction, but  
35 only if the interest rate from which the loan's interest rate will be  
36 discounted does not exceed by more than one percentage point the required net

1 yield for a ninety day standard mandatory delivery commitment for a reasonably  
2 comparable loan from either the Federal National Mortgage Association or the  
3 Federal Home Loan Mortgage Corporation, whichever is greater; and

4 (ii) Up to and including one bona fide loan discount  
5 point payable by the borrower in connection with the loan transaction, but  
6 only if the interest rate from which the loan's interest rate will be  
7 discounted does not exceed by more than two percentage points the required net  
8 yield for a ninety day standard mandatory delivery commitment for a reasonably  
9 comparable loan from either the Federal National Mortgage Association or the  
10 Federal Home Loan Mortgage Corporation, whichever is greater; or

11 (D) The home loan contains a pre-payment penalty of more than three  
12 percent (3%) in the first year or more than two percent (2%) in the second  
13 year or more than one percent (1%) in the third year, or any pre-payment  
14 penalty beyond the third year;

15 (6)(A) "Home loan" means a loan, including an open end credit plan or a  
16 reverse mortgage transaction, where:

17 (i) the principal amount of the loan does not exceed the  
18 conforming loan size limit for a single family dwelling as established by the  
19 Federal National Mortgage Association;

20 (ii) the borrower is a natural person;

21 (iii) the debt is incurred by the borrower primarily for  
22 personal, family, or household purposes; and

23 (iv) the loan is secured by a mortgage or deed of trust on real  
24 estate upon which there is located, or there is to be located a structure or  
25 structures designed principally for occupancy of from one to four families  
26 which is or will be occupied by the borrower as the borrower's principal  
27 dwelling;

28 (B) "Home loan" does not include any loan for the purpose of the  
29 construction of a one-to-four family residential structure if the term of the  
30 loan is three (3) years or less;

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32 (7) "Lender" means any entity which originated more than five (5) high  
33 cost home loans within the past twelve month period or acted as an  
34 intermediary between originators and borrowers on more than five (5) high cost  
35 home loans within the past twelve month period;

36 (8) "Obligor" means each borrower, co-borrower, cosigner, or guarantor

1 obligated to repay a loan;

2 (9) "Points and fees" means:

3 (A) All items required to be disclosed under sections 226.4(a)  
4 and 226.4(b) of Title 12 of the Code of Federal Regulations, except interest  
5 or the time price differential;

6 (B) All charges for items listed under section 226.4(c)(7) of  
7 Title 12 of the Code of Federal Regulations, but only if the lender receives  
8 direct or indirect compensation in connection with the charge or the charge is  
9 paid to an affiliate of the lender; otherwise, the charges are not included  
10 within the meaning of the phrase "points and fees";

11 (C) All compensation paid directly or indirectly to a mortgage  
12 broker, including a broker that originates a loan in its own name in a table  
13 funded transaction, not otherwise included in subdivision (9)(A) or (B) of  
14 this section;

15 (D) "Points and fees" shall not include:

16 (i) taxes, filing fees, recording and other charges  
17 and fees paid or to be paid to public officials for determining the existence  
18 of or for perfecting, releasing, or satisfying a security interest; and

19 (ii) fees paid to any person, not in excess of the  
20 customary charge for similar products and services in the local market, for  
21 the following: appraisal fees; fees for inspections infestation and flood  
22 determinations; appraisal fees; fees for inspections performed prior to  
23 closing; credit reports; surveys; attorneys' fees, provided the borrower has  
24 the right to select the attorney from an approved list; notary fees; escrow  
25 charges, so long as not otherwise included under subdivision (9)(A) of this  
26 section; title insurance premiums; and fire insurance and flood insurance  
27 premiums, provided that the conditions in section 226.4(d)(2) of Title 12 of  
28 the Code of Federal Regulations are met; and

29 (10) "Total loan amount" means the same as the term "total loan amount"  
30 as used in section 226.32 of Title 12 of the Code of Federal Regulations, and  
31 the same shall be calculated in accordance with the Federal Reserve Board's  
32 Official Staff Commentary.

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34 SECTION 2. Limitations and Prohibited Acts and Practices for High Cost  
35 Home Loans.

36 (a) Lenders may not charge a late payment charge:

1 (1) In excess of five percent (5%) of the amount of the payment  
2 past due; or

3 (2) For any payment which is less than fifteen (15) days past  
4 due; or

5 (3) More than once with respect to any single late payment. If a  
6 late payment charge is deducted from a payment made on the mortgage and such  
7 deduction results in a subsequent default on a subsequent payment, no late  
8 charge may be imposed. If a late payment charge has been imposed on a  
9 particular late payment, no late charge may be imposed on any future payment  
10 which would have been timely but for the previous default; or

11 (4) Unless the lender treats each and every payment as posted on  
12 the same date as it is received by the lender, servicer, lender's agent, or at  
13 the address provided to the borrower by the lender, servicer, or lender's  
14 agent for making payments.

15 (b) Lenders may not recommend or encourage default on an existing loan  
16 or other debt prior to and in connection with the closing or planned closing  
17 of a consumer high cost home loan that refinances all or any portion of such  
18 existing loan or debt.

19 (c) Lenders may not charge a fee for a product or service where the  
20 product or service is not actually provided, or misrepresent the amount  
21 charged by or paid to a third party for a product or service.

22 (d) Lenders may not make or cause to be made, directly or indirectly,  
23 any false, deceptive, or misleading statement or representation in connection  
24 with a high cost residential loan transaction including false, deceptive, or  
25 misleading statements or representations regarding the borrower's ability to  
26 qualify for any mortgage product. A statement or representation is deceptive  
27 or misleading if it has the capacity or tendency to deceive or mislead a  
28 borrower or potential borrower. A court shall consider the following factors  
29 in deciding whether a statement or representation is deceptive or misleading:

30 (1) The overall impression that the statement or representation  
31 reasonably creates;

32 (2) The particular type of audience to which it is directed; and

33 (3) Whether the statement or representation may be reasonably  
34 comprehended by the segment of the public to which it is directed.

35 (e) Lenders may not compensate, whether directly or indirectly, coerce  
36 or intimidate an appraiser for the purpose of influencing the independent

1 judgment of the appraiser with respect to the value of real estate that is to  
2 be covered by a residential mortgage or is being offered as security according  
3 to an application for a high cost residential loan.

4 (f) Lenders may not finance, directly or indirectly, any credit life,  
5 credit disability, or credit unemployment insurance, or any other life or  
6 health insurance premiums through a high cost home loan. Insurance premiums  
7 calculated and paid on a monthly basis shall not be considered financed by the  
8 lender.

9 (g) High cost home loan contracts in which blanks are left to be filled  
10 in after the contract is signed shall not be enforceable under law.

11 (h) High cost home loans may not contain a scheduled payment that is  
12 more than twice as large as the average of earlier scheduled payments. This  
13 provision does not apply when the payment schedule is adjusted to the seasonal  
14 or irregular income of the borrower.

15 (i) High cost home loans may not include terms under which more than  
16 two (2) periodic payments required under the loan are consolidated and paid in  
17 advance from the loan proceeds provided to the borrower.

18 (j) High cost home loans may not contain a provision that increases the  
19 interest rate after default. This provision does not apply to interest rate  
20 changes in a variable rate loan otherwise consistent with the provisions of  
21 the loan documents, provided the change in the interest rate is not triggered  
22 by the event of default or the acceleration of the indebtedness.

23 (k) High cost home loans may not contain a provision which permits the  
24 lender, in its sole discretion, to accelerate the indebtedness. This  
25 provision does not apply when repayment of the loan has been accelerated by  
26 default, pursuant to a due-on-sale provision, or pursuant to some other  
27 provision of the loan documents unrelated to the payment schedule.

28 (l) A lender may not charge a borrower any fees or other charges to  
29 modify, renew, extend, or amend a high cost home loan or to defer any payment  
30 due under the terms of a high cost home loan.

31 (m) A lender may not make a high cost home loan without first receiving  
32 certification from a counselor approved by the U.S. Department of Housing and  
33 Urban Development that the borrower has received counseling on the  
34 advisability of the loan transaction and the appropriate loan for the  
35 borrower.

36 (n) High cost home loans may not be subject to a mandatory arbitration

1 clause that limits in any way the right of the borrower to seek relief through  
2 the judicial process.

3 (o) Lenders may not pay a contractor under a home improvement contract  
4 from the proceeds of a high cost home loan other than:

5 (1) By an instrument payable to the borrower or jointly to the  
6 borrower and the contractor; or

7 (2) at the election of the borrower through a third party escrow  
8 agent in accordance with terms established in a written agreement signed by  
9 the borrower, the lender, and the contractor prior to the disbursement.

10 (p) High cost home loans may not contain a payment schedule with  
11 regular periodic payments that result in an increase in the principal balance,  
12 a practice known as negative amortization.

13 (q) Lenders may not knowingly or intentionally engage in the practice  
14 of "flipping" a home loan.

15 (r) Lenders may not make a high cost home loan unless the lender  
16 reasonably believes at the time the loan is consummated that one or more of  
17 the obligors, when considered individually or collectively, will be able to  
18 make the scheduled payments to repay the obligation based upon a consideration  
19 of their current and expected income, current obligations, employment status,  
20 and other financial resources other than the borrower's equity in the dwelling  
21 which secures repayment of the loan.

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23 SECTION 3. Attempted Evasion of Coverage and Unintentional Violations.

24 (a) The provisions of section 2 of this act shall apply to any person  
25 who in bad faith attempts to avoid its application by:

26 (1) Dividing any loan transaction into separate parts for the  
27 purpose and with the intent of evading the provisions of this section; or

28 (2) Any other such subterfuge.

29 (b) A lender in a high cost home loan who, when acting in good faith,  
30 fails to comply with section 2 of this act, will not be deemed to have  
31 violated this section if the lender establishes that either:

32 (1) Within thirty (30) days of the loan closing and prior to the  
33 institution of any action under this section, the borrower is notified of the  
34 compliance failure, appropriate restitution is made, and whatever adjustments  
35 are necessary are made to the loan to either, at the choice of the borrower:

36 (A) Make the high cost home loan satisfy the requirements

1 of section 2 of this act; or

2 (B) Change the terms of the loan in a manner beneficial to  
3 the borrower so that the loan will no longer be considered a high cost home  
4 loan subject to the provisions of this section; or

5 (2) The compliance failure was not intentional and resulted from  
6 a bona fide error notwithstanding the maintenance of procedures reasonably  
7 adapted to avoid such errors, and within sixty (60) days after the discovery  
8 of the compliance failure and prior to the institution of any action under  
9 this section or the receipt of written notice of the compliance failure, the  
10 borrower is notified of the compliance failure, appropriate restitution is  
11 made, and whatever adjustments are necessary are made to the loan to either,  
12 at the choice of the borrower:

13 (A) make the high cost home loan satisfy the requirements  
14 of section 2 of this act; or

15 (B) change the terms of the loan in a manner beneficial to  
16 the borrower so that the loan will no longer be considered a high cost home  
17 loan subject to the provisions of section 2 of this act. Examples of a bona  
18 fide error include clerical, calculation, or computer malfunctions, and  
19 programming and printing errors. An error of legal judgment with respect to a  
20 person's obligations under this section is not a bona fide error.

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22 SECTION 4. Penalties.

23 (a) Lenders found in violation of this act may be liable to the  
24 borrower for the following:

25 (1) Actual damages;

26 (2) Exemplary damages equal to the finance charges agreed to in  
27 the home loan agreement plus ten percent (10%) of the amount financed;

28 (3) Punitive damages; and

29 (4) Costs of court and reasonable attorney's fees.

30 (b) Borrowers may be granted injunctive, declaratory and other  
31 equitable relief as the court deems appropriate in an action to enforce  
32 compliance with this act.

33 (c) Lenders found to have intentionally violated this act shall have no  
34 right to collect, receive or retain any principal, interest, or other charges  
35 with respect to the loan.

36 (d) Violations of this act shall be deemed to be deceptive trade

1 practices under Arkansas Code Title 4, Chapter 88, and the Attorney General is  
2 entitled to pursue all remedies available to him under that chapter.

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SECTION 5. Investments.

The lender shall not make investments that the lender knows are backed  
by high cost home loans that violate section 2 of this act.

/s/ C. Johnson, et al.