

## HOUSE SUBSTITUTE TO SENATE BILL 157

A BILL TO BE ENTITLED  
AN ACT

1 To amend Code Section 7-3-29 of the Official Code of Georgia Annotated, relating to  
2 penalties for violations of the "Georgia Industrial Loan Act," so as to allow class actions to  
3 be brought against unlicensed lenders; to amend Title 16 of the Official Code of Georgia  
4 Annotated, relating to crimes and offenses, so as to include payday lending in the definition  
5 of racketeering activity; to declare a legislative intent to prohibit activities commonly  
6 referred to as payday lending, deferred presentment services, or advance cash services and  
7 other similar activities; to strengthen and increase the criminal and civil penalties therefor;  
8 to void payday lending loans; to declare that forum selection clauses in payday lending  
9 contracts are unenforceable in Georgia; to provide that it shall be unlawful to engage in the  
10 business of making certain small loans; to provide for exemptions for licensed and regulated  
11 activities; to provide for an oversight committee; to define crimes and declare penalties; to  
12 provide for civil remedies of borrowers; to provide for civil penalties; to provide for  
13 collection of civil penalties in actions by the state or by private parties; to declare a tax on  
14 profits from payday loans; to declare sites or locations on which payday lending is taking  
15 place to be public nuisances; to provide disclosure and notice requirements regarding loans  
16 made to members of the military; to provide for related matters; to provide an effective date;  
17 to repeal conflicting laws; and for other purposes.

18 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:**

19 **SECTION 1.**

20 Code Section 7-3-29 of the Official Code of Georgia Annotated, relating to penalties for  
21 violations of the "Georgia Industrial Loan Act," is amended by striking subsection (e) and  
22 inserting in its place the following:

23 "(e) A claim of violation of this chapter may be asserted in a class action under Code  
24 Section 9-11-23 or any other provision of law."

25 **SECTION 2.**

S. B. 157 (SUB)

1 Title 16 of the Official Code of Georgia Annotated, relating to crimes and offenses, is  
 2 amended in Code Section 16-14-3, relating to definitions concerning racketeer influenced  
 3 organizations, by striking divisions (9)(A)(xxxvi) and (9)(A)(xxxvii) and inserting in lieu  
 4 thereof the following:

5 "(xxxvi) Article 8 of Chapter 9 of this title, relating to identity fraud, and Section  
 6 1028 of Title 18 of the United States Code, relating to fraudulent identification  
 7 documents and information; ~~or~~  
 8 (xxxvii) Code Section 33-1-9, relating to insurance fraud; or  
 9 (xxxviii) Code Section 16-17-2, relating to payday loans."

### 10 SECTION 3.

11 Said title is further amended by adding a new Chapter 17 to read as follows:

#### 12 "CHAPTER 17

13 16-17-1.

14 (a) Without limiting in any manner the scope of this chapter, 'payday lending' as used in  
 15 this chapter encompasses all transactions in which funds are advanced to be repaid at a  
 16 later date, notwithstanding the fact that the transaction contains one or more other elements  
 17 and a 'payday lender' shall be one who engages in such transactions. This definition of  
 18 'payday lending' expressly incorporates the exceptions and examples contained in  
 19 subsections (a) and (b) of Code Section 16-17-2.

20 (b) Despite the fact that the Attorney General of the State of Georgia has opined in  
 21 Official Opinion 2002-3 entered on June 27, 2002, that payday lending is in violation of  
 22 Georgia law and despite the fact that the Industrial Loan Commissioner has issued cease  
 23 and desist orders against various payday lenders in the State of Georgia, the General  
 24 Assembly has determined that payday lending continues in the State of Georgia and that  
 25 there are not sufficient deterrents in the State of Georgia to cause this illegal activity to  
 26 cease.

27 (c) The General Assembly has determined that various payday lenders have created certain  
 28 schemes and methods in order to attempt to disguise these transactions or to cause these  
 29 transactions to appear to be 'loans' made by a national or state bank chartered in another  
 30 state in which this type of lending is unregulated, even though the majority of the revenues  
 31 in this lending method are paid to the payday lender. The General Assembly has further  
 32 determined that payday lending, despite the illegality of such activity, continues to grow  
 33 in the State of Georgia and is having an adverse effect upon military personnel, the elderly,  
 34 the economically disadvantaged, and other citizens of the State of Georgia. The General

1 Assembly has further determined that substantial criminal and civil penalties over and  
2 above those currently existing under state law are necessary in order to prohibit this  
3 activity in the State of Georgia and to cause the cessation of this activity once and for all.  
4 The General Assembly further declares that these types of loans are currently illegal and  
5 are in violation of Code Section 7-4-2. The General Assembly declares that the use of  
6 agency or partnership agreements between in-state entities and out-of-state banks, whereby  
7 the in-state agent holds a predominant economic interest in the revenues generated by  
8 payday loans made to Georgia residents, is a scheme or contrivance by which the agent  
9 seeks to circumvent Chapter 3 of Title 7, the 'Georgia Industrial Loan Act,' and the usury  
10 statutes of this state.

11 (d) Payday lending involves relatively small loans and does not encompass loans that  
12 involve interstate commerce and certain payday lenders have attempted to use forum  
13 selection clauses contained in payday loan documents in order to avoid the courts of the  
14 State of Georgia, and the General Assembly has determined that such practices are  
15 unconscionable and should be prohibited.

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

21 (f) This chapter in no way impairs or restricts the authority granted to the commissioner  
22 of banking and finance, the Industrial Loan Commissioner, or any other regulatory  
23 authority with concurrent jurisdiction over the matters stated in this chapter.

24 16-17-2.

25 (a) It shall be unlawful for any person to engage in any business, in whatever form  
26 transacted, including, but not limited to, by mail, electronic, the Internet, or telephonic  
27 means, which consists in whole or in part of making, offering, arranging, or acting as an  
28 agent in the making of loans of \$3,000.00 or less unless:

29 (1) Such person is engaging in financial transactions permitted pursuant to:

30 (A) The laws regulating financial institutions as defined under Chapter 1 of Title 7, the  
31 'Financial Institutions Code of Georgia';

32 (B) The laws regulating state and federally chartered credit unions;

33 (C) Article 13 of Chapter 1 of Title 7, relating to Georgia residential mortgages;

34 (D) Chapter 3 of Title 7, the 'Georgia Industrial Loan Act';

35 (E) Chapter 4 of Title 7, relating to interest and usury;

- 1 (F) Chapter 5 of Title 7, 'The Credit Card and Credit Card Bank Act,' including  
2 financial institutions and their assignees who are not operating in violation of said  
3 chapter;
- 4 (G) Paragraph (2) of subsection (a) of Code Section 7-4-2 in which the simple interest  
5 rate is not greater than 16 percent per annum; or
- 6 (2) Such loans are lawful under the terms of:
- 7 (A) Article 1 of Chapter 1 of Title 10, 'The Retail Installment and Home Solicitation  
8 Sales Act';
- 9 (B) Article 2 of Chapter 1 of Title 10, the 'Motor Vehicle Sales Finance Act'; or
- 10 (C) Part 5 of Article 3 of Chapter 12 of Title 44, relating to pawnbrokers;
- 11 (3) Such loan is a part of a sale and lease back transaction offered by a company doing  
12 business in Georgia on January 1, 2004, that had a valid Georgia sales and use tax permit  
13 on that date. The company must show a history of paying sales tax to the Department of  
14 Revenue for at least one full tax year in order to be entitled to this exemption. To qualify  
15 for this exemption a company shall contact the Department of Revenue notifying the  
16 department that the company is entitled to this exemption. The department shall group  
17 these companies in a special classification and reissue a new Georgia sales and use tax  
18 permit showing the exempt classification. Nothing in this paragraph shall be applied to  
19 lease-purchase agreements under Article 23 of Chapter 1 of Title 10 or leases governed  
20 by Article 2A of Title 11; or
- 21 (4) Such loan is made as a tax refund anticipation loan. In order to be exempt under this  
22 paragraph the tax refund anticipation loan must be issued using a borrower's filed tax  
23 return and the loan cannot be for more than the amount of the borrower's anticipated tax  
24 refund. Tax returns that are prepared but not filed with the proper government agency  
25 will not qualify for a loan exemption under this paragraph.
- 26 (b) Subject to the exceptions in subsection (a) of this Code section, this Code section shall  
27 apply with respect to all transactions in which funds are advanced to be repaid at a later  
28 date, notwithstanding the fact that the transaction contains one or more other elements.  
29 Without limiting the generality of the foregoing, the advance of funds to be repaid at a later  
30 date shall be subject to this Code section, notwithstanding the fact that the transaction also  
31 involves:
- 32 (1) The cashing or deferred presentment of a check or other instrument;
- 33 (2) The selling or providing of an item, service, or commodity incidental to the advance  
34 of funds;
- 35 (3) Any other element introduced to disguise the true nature of the transaction as an  
36 extension of credit; or

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

5 (c)(1) A payday lender shall not include in any loan contract made with a resident of this  
 6 state any provision by which the laws of a state other than Georgia shall govern the terms  
 7 and enforcement of the contract, nor shall the loan contract designate a court for the  
 8 resolution of disputes concerning the contract other than a court of competent jurisdiction  
 9 in and for the county in which the borrower resides or the loan office is located.

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

13 (A) The relative bargaining power of the parties;

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

16 (C) Whether the contract restricts or excludes damages or remedies that would be  
 17 available to the borrower in court, including the right to participate in a class action;

18 (D) Whether the arbitration would take place outside the county in which the loan  
 19 office is located or any other place that would be unduly inconvenient or expensive in  
 20 view of the amounts in controversy; and

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

22 (d) Any person who violates subsection (a) or (b) of this Code section shall be guilty of  
 23 a misdemeanor of a high and aggravated nature and upon conviction thereof shall be  
 24 punished by imprisonment for not more than one year or by a fine not to exceed \$5,000.00  
 25 or both. Each loan transaction shall be deemed a separate violation of this Code section.  
 26 Any person who aids or abets such a violation, including any arbiter or arbitration  
 27 company, shall likewise be guilty of a misdemeanor of a high and aggravated nature and  
 28 shall be punished as set forth in this subsection. If a person has been convicted of  
 29 violations of subsection (a) or (b) of this Code section on three prior occasions, then all  
 30 subsequent convictions shall be considered felonies punishable by a fine of \$10,000.00 or  
 31 five years imprisonment or both.

32 (e) An oversight committee is established to monitor and report on the issuance of licenses  
 33 under the provisions of Chapter 3 of Title 7, the 'Georgia Industrial Loan Act.' The  
 34 committee shall consist of one member appointed by the Speaker of the House of  
 35 Representatives, one member appointed by the President of the Senate, two members  
 36 appointed by the Governor, and one member appointed by the Insurance Commissioner.  
 37 The Insurance Commissioner shall also serve on the committee in an advisory capacity.

1 16-17-3.

2 Any person who violates subsection (a) or (b) of Code Section 16-17-2 shall be barred  
3 from the collection of any indebtedness created by said loan transaction and said  
4 transaction shall be void ab initio, and any person violating the provisions of subsection  
5 (a) or (b) of Code Section 16-17-2 shall in addition be liable to the borrower in each  
6 unlawful transaction for three times the amount of any interest or other charges to the  
7 borrower. A civil action under Code Section 16-17-2 may be brought on behalf of an  
8 individual borrower or on behalf of an ascertainable class of borrowers. In a successful  
9 action to enforce the provisions of this chapter, a court shall award a borrower, or class of  
10 borrowers, costs including reasonable attorneys' fees.

11 16-17-4.

12 (a) Any person who violates subsection (a) or (b) of Code Section 16-17-2 shall be liable  
13 to the state for a civil penalty equal to three times the amount of any interest or charges to  
14 the borrowers in the unlawful transactions.

15 (b) A civil action under Code Section 16-17-2 may be brought by the Attorney General,  
16 any district attorney, or a private party. Where a successful civil action is brought by a  
17 district attorney one-half of the damages recovered on behalf of the state shall be  
18 distributed to the office of the district attorney of the judicial circuit of such district  
19 attorney to be used by the district attorney in order to fund the budget of that office.

20 16-17-5.

21 (a) There is imposed a state tax on all loans made in violation of this chapter. Such tax  
22 shall be administered and collected in connection with the Georgia income taxation of the  
23 person making such loans and shall be in addition to any other tax liability of such person.

24 (b) The tax imposed by this Code section shall be at the rate of 50 percent of all proceeds  
25 received by a person from loans made in violation of this chapter.

26 (c) A person making loans in violation of this chapter shall declare and return the proceeds  
27 subject to taxation under this Code section as a part of such person's Georgia income tax  
28 return.

29 (d) The state revenue commissioner shall retain returns under this Code section apart from  
30 all other returns and shall not disclose any part of such a return for any purpose other than  
31 the collection of tax owed or a criminal prosecution involving tax matters. In a criminal  
32 proceeding under this chapter, a person's return of proceeds under this Code section and  
33 any evidence derived as a result of such return shall not be admissible.

1 16-17-6.

2 In regard to any loan transaction that is alleged to be in violation of subsection (a) of Code  
3 Section 16-17-2, the trial court shall be authorized to review the terms of the transaction  
4 in their entirety in order to determine if there has been any contrivance, device, or scheme  
5 used by the lender in order to avoid the provisions of subsection (a) of Code Section  
6 16-17-2. The trial court shall not be bound in making such determination by the parol  
7 evidence rule or by any written contract but shall be authorized to determine exactly  
8 whether the loan transaction includes the use of a scheme, device, or contrivance and  
9 whether in reality the loan is in violation of the provisions of subsection (a) of Code  
10 Section 16-17-2 based upon the facts and evidence relating to that transaction and similar  
11 transactions being made in the State of Georgia. If any entity involved in soliciting or  
12 facilitating the making of payday loans purports to be acting as an agent of a bank or thrift,  
13 then the court shall be authorized to determine whether the entity claiming to act as agent  
14 is in fact the lender. Such entity shall be presumed to be the lender if, under the totality  
15 of the circumstances, it holds, acquires, or maintains a predominant economic interest in  
16 the revenues generated by the loan. Furthermore, the trial court shall further be authorized  
17 to investigate all transactions involving gift cards, telephone cards, the sale of goods or  
18 services, computer services, or the like which may be tied to such loan transactions and are  
19 an integral part thereof in order to determine whether any such transaction is in fact a  
20 contrivance, scheme, or device used by the payday lender in order to evade the provisions  
21 of subsection (a) of Code Section 16-17-2.

22 16-17-7.

23 All corporations, limited liability companies, or other business entities which are engaged  
24 in payday lending in the State of Georgia are prohibited from obtaining any certificate of  
25 authority from the Secretary of State or from the Department of Banking and Finance and  
26 engaging in such payday lending activity in the State of Georgia shall result in the  
27 revocation of any existing certificate of authority.

28 16-17-8.

29 The site or location of a place of business where payday lending takes place in the State  
30 of Georgia is declared a public nuisance.

31 16-17-9.

32 (a) In addition to the other obligations and duties required under this chapter, if the  
33 customer is a member of the military services of the United States or a spouse of a member

1 of the military services of the United States, the following duties and obligations apply to  
2 any payday lender:

3 (1) The lender is prohibited from garnishment of any military wages or salaries;

4 (2) The lender is prohibited from conducting any collection activity against a military  
5 customer or his or her spouse when the military member has been deployed to a combat  
6 or combat support posting for the duration of the deployment;

7 (3) The lender is prohibited from contacting the commanding officer of a military  
8 customer in an effort to collect on a loan to the military member or his or her spouse;

9 (4) The lender agrees to be bound by the terms of any repayment agreement that it  
10 negotiates through military counselors or third-party credit counselors; and

11 (5) The lender agrees to honor any statement or proclamation by a military base  
12 commander that a specific payday lender branch location has been declared off limits to  
13 military personnel and their spouses.

14 (b) If the customer is a member of the military services of the United States or a spouse  
15 of a member of the military services of the United States, the following disclosures shall  
16 be made in writing by the payday lender:

17 (1) A notice that the lender is prohibited from garnishment of any military wages or  
18 salaries;

19 (2) A notice that the lender is prohibited from conducting any collection activity against  
20 a military customer or his or her spouse when the military member has been deployed to  
21 a combat or combat support posting for the duration of the deployment;

22 (3) A notice that the lender is prohibited from contacting the commanding officer of a  
23 military customer in an effort to collect on a loan to the military member or his or her  
24 spouse;

25 (4) A notice that the lender agrees to be bound by the terms of any repayment agreement  
26 that it negotiates through military counselors or third-party credit counselors; and

27 (5) A notice that the lender agrees to honor any statement or proclamation by a military  
28 base commander that a specific payday lending branch location has been declared off  
29 limits to military personnel and their spouses."

#### 30 **SECTION 4.**

31 This Act shall become effective upon its approval by the Governor or upon its becoming law  
32 without such approval.

#### 33 **SECTION 5.**

34 All laws and parts of laws in conflict with this Act are repealed.