



Summary of S. 2452, the Home Ownership Preservation and Protection Act of 2007, as Introduced in the Senate

Status – On December 12, 2007, Senate Banking Committee Chairman Chris Dodd (D-Conn.) introduced S. 2452, the Home Ownership Preservation and Protection Act of 2007. The bill has been described as a starting point for discussions and differs considerably from the bill passed by the House of Representatives, H.R. 3915. No hearings have yet been scheduled on the bill and none are anticipated immediately.

Scope – S. 2452 would amend the Truth in Lending Act (TILA) to establish new requirements for: (1) all loans with a specific emphasis on: (a) increased coverage and restrictions for “high-cost” or Home Ownership and Equity Protection Act (HOEPA) mortgage loans; and (b) subprime and nontraditional mortgages; (2) appraisals; (3) servicing; (4) foreclosure prevention counseling; (5) establish new remedies and bases for enforcement actions against lenders as well as assignee liability provisions; (6) empower the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) to prohibit unfair and deceptive acts or practices; and (7) authorize appropriations for mortgage fraud enforcement. The bill does not include licensing and registration requirements, nor does it establish a uniform national standard for mortgage lending because it does not provide any federal preemption of state and local laws and regulations whatsoever. Unlike H.R. 3915, the bill does not include safe harbors.

Short Summary – S. 2452 would enact a number of new requirements as detailed more fully below:

- **HOEPA -High Cost Mortgages** - Expand the coverage of HOEPA by lowering and including new items in the HOEPA points/fee triggers and adding new restrictions to prohibit prepayment penalties, YSPs and other practices (below).
- **Subprime and Nontraditional Loans** -
 - Require assessment of borrower’s reasonable ability to pay principal, interest, taxes and insurance (PITI), and the fully indexed rate for variable rate loans;
 - Establish rebuttable presumption of inability of repay if less than 45 percent DTI;
 - Prohibit prepayment penalties;
 - Prohibit yield spread premiums;
 - Mandate escrow accounts for taxes and insurance; and
 - In accordance with FRB regulations, require net tangible benefit for refinances.
- **All mortgage Loans** -
 - Impose a “good faith and fair dealing standard” on all mortgage originators, including mortgage brokers;
 - Impose a fiduciary duty on mortgage brokers to act in the borrower’s best interest and clearly disclose material information including total compensation;
 - Prohibit steering a consumer to a loan with rates, charges or other terms that are more costly than the consumer otherwise qualifies for;
 - Require that ability to repay be based on documentation; and

- Restrict YSPs to loans where broker collects no other fees.
- **Appraisals -**
 - Impose a “reasonable skill” and a “good faith and fair dealing” standard and other requirements on appraisers, and creates remedies against the appraiser for violations, and permit such violations to be used as defense to foreclosure.
- **Servicing -**
 - Impose a “reasonable skill” and a “good faith and fair dealing” standard on and other requirements on servicers regarding their fees, monthly statements, crediting of payments and requiring loss mitigation.
- **Foreclosure Prevention Counseling -**
 - Requires notice of counseling upon delinquency at settlement and after 60 day delinquency, and require lenders to reimburse the costs of counseling.
- **Remedies and Enforcement -**
 - Permit state attorneys general to enforce law, and extend the right to rescission.
- **Assignee liability -**
 - Permit action against the holder of a mortgage whether the holder is the original lender or a subsequent investment trust.
- **Additional provisions -**
 - Authorize OCC and FDIC to prohibit unfair and deceptive acts or practices in mortgage lending.
- **Mortgage Fraud -**
 - Authorize funds for the FBI and US Attorney anti-mortgage fraud efforts.

SPECIFIC PROVISIONS

Definitions - The bill defines:

“Mortgage originator” as a creditor or other person including a mortgage broker that engages directly or indirectly in the acceptance of applications for mortgage loans, solicits loans on behalf of consumers, negotiates the terms of the mortgage loan on behalf of consumers or lenders, or negotiates the sale of the loans to loan purchasers. Employees and agents of “originators” are also included in this definition.

“Mortgage broker” as a person that arranges or negotiates mortgage loans or loan commitments refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit can be made, in exchange for compensation.

“Nontraditional mortgage loan” as a loan that allows borrowers to defer principal or interest.

“Subprime mortgage loan” by using the trigger levels established under the Home Mortgage Disclosure Act (HMDA) or the “conventional mortgage rate,” published regularly by the Federal Reserve as the H. 15 rate. A first lien mortgage is a “subprime mortgage loan,” if, at the time of origination, it has an APR equal to or greater than three percentage points over a U.S. Treasury obligation with a comparable maturity or has an APR that is equal or greater than the most recent “conventional mortgage rate” by more than 175 basis points. A mortgage that is “not a first lien mortgage” is a “subprime mortgage loan” if it has an APR equal to or greater than five percentage points over a Treasury security of comparable maturity, or has an APR that is equal to or greater than the most recent conventional mortgage rate. FHA and VA loans are not an exception to the definition of “subprime mortgage.”

HOEPA - High-Cost Mortgages The bill would:

Definition/Triggers – Change the statutory provision of the APR trigger to match the Federal Reserve Board’s present benchmark at eight percent above Treasury securities for first lien loans (10 for junior liens). Additionally, it lowers the point and fee trigger from eight percent of the total loan amount to five percent (except for loans under \$20,000). The definition of points and fees would be expanded to include all compensation paid directly or indirectly to a mortgage broker, premiums for credit, life and other insurance not paid on a monthly basis, and maximum prepayment penalties. The bill permits the exclusion of 2 bona fide discount points.

HOEPA Restrictions – Amend HOEPA to prohibit prepayment penalties; balloon payments (except to accommodate “seasonal or irregular income” of consumers); YSPs; acceleration of indebtedness provisions; financing points and fees; credit life and other insurance; and evasions, modification and deferral fees. Prohibit any HOEPA refinance unless it provides a net tangible benefit to consumer.

Subprime and Nontraditional Mortgage Loans The bill would:

Ability to Pay – Require all mortgage originators to verify the “reasonable ability” of the borrower to pay principal, interest, taxes and insurance considering borrower income, credit history, DTI, residual income, and other available financial resources (other than equity on the dwelling). For variable rate mortgages, the calculation must be based on the fully indexed rate. Impose “Rebuttable Presumption” that a mortgage was made without regard to the borrower’s ability to repay if DTI exceeds 45 percent of the gross monthly income of the borrower. There is no presumption of ability to make the payments if DTI does not exceed 45 percent.

Net Tangible Benefit for Refinance Loans – Prohibit an originator from making a subprime or nontraditional mortgage that involves a refinancing or an existing loan, unless the new loan will provide a net tangible benefit to the consumer, under regulations prescribed by the Federal Reserve Board. No net tangible benefit exists if the refinanced loan’s points, fees and other charges exceed the amount of any newly advanced principal, less the points, fees and other charges, without corresponding changes in the terms of the refinanced loan that are advantageous to the borrower.

Prepayment Penalties and YSPs – Prohibit prepayment fees and yield spread premiums.

Escrow for Taxes and Insurance – Require establishment of escrow for subprime and nontraditional mortgages calculated in accordance with Section 10 of RESPA.

All Mortgage Loans The bill would:

Duty of Care – Establish good faith and fair dealing standard for all mortgage originators including mortgage brokers. Additionally requires originator to safeguard and account for all consumer monies; follow reasonable and lawful consumer instructions; act with reasonable skill, care and diligence; act in “good faith and fair dealing;” and make reasonable efforts to secure loans that are “appropriately advantageous” to borrowers, “considering all circumstances.” In addition, it establishes fiduciary standard requiring broker to act in the borrowers’ best interest and clearly disclose material information including total compensation.

Ability to Repay – Require mortgage originators to determine a consumer’s ability to repay based on verified documentation (i.e. tax returns, payroll receipts, bank records, or the best and most appropriate form of documentation available), the debt-to-income ratio and the residual income of the consumer. This is distinct from the ability to repay standard for subprime and nontraditional mortgages in that there is fewer criteria for originators to consider.

Anti- Steering – Require loan originators to: (1) disclose to consumer that the creditor does not offer a loan that is not more expensive than the consumer qualifies for but other creditors may offer such a loan, or provide the reasons the products or services are not available or reasonably advantageous for the consumer, if the lender is unable to suggest, offer, or recommend a loan that is not more expensive than one consumer qualifies for; (2) not recommend or encourage a borrower to default on a loan with the purpose of refinancing the borrower; (3) maintain the following best practices: (a) obey applicable mortgage provisions of Federal or State Law; (b) safeguard and account for any money handled for the borrower; (c) follow reasonable and lawful instructions from the borrower; (d) act with reasonable skill, care, and diligence; (e) act in good faith and with fair dealing in any transaction, practice, or course of business.

Yield Spread Premiums – Prohibit yield spread premiums except in “no-cost loans” where the broker (a) receives no other compensation from the consumer or the creditor; (b) there are no points; (c) there is no prepayment penalty; and (d) there are no other closing costs, except for fees to government officials or money for escrow. This exception to the general prohibition on YSPs does not apply to high cost, subprime or nontraditional mortgages.

Remedies – Provide borrowers and state attorneys general with the right to bring actions in court within three years from the occurrence of the violation. Borrowers may choose to rescind or claim damages for violations. Increase potential liability in individual actions from between \$200 to \$2,000 to \$500 to \$5,000, and permit adjustment of amounts annually based on the consumer price index. Extend the statute of limitations for rescission from three years from closing to six years. Give consumer – who has the right to rescind – the ability to assert the right as a defense to foreclosure, even if the new six-year statute of limitations expires, but no more than a total of ten years from consummation. Change the cap for class actions from the lesser of \$500,000 or one percent of the net worth of the creditor to the lesser of \$5 million or one percent of the net worth of the creditor or mortgage broker.

Originator Liability – Make mortgage brokers liable for TILA violations, and make creditors liable for the acts, omission, and representations made by mortgage brokers in connection with a subprime or nontraditional mortgage or any loan where mortgage brokers received a yield spread premium or other compensation from creditors.

Assignee Liability – Permit individual action to be brought against any person who purchases, holds, or is otherwise assigned a mortgage or similar security interest in connection with a subprime or nontraditional home mortgage, other than a HOEPA loan. Permits, class action liability against a person holder or assignee for violation of the bill’s new provisions protecting subprime and nontraditional loans unless it is demonstrated through evidence that a reasonable person exercising ordinary and independent due diligence could not determine that the home mortgage was not compliant. For loans other than subprime, nontraditional and HOEPA mortgages, the holder of the note is liable only in an individual action for violations of the bill’s protections for all loans, with liability limited to the remaining indebtedness and the total amount paid in connection with the transaction plus amounts required to recover costs, including reasonable attorneys’ fees.

Servicing – Impose a “reasonable skill” and a “good faith and fair dealing” standard on servicers; require fees be reasonable, for services, specifically authorized by contract and state law and explained to the consumer; require new monthly statements of monthly payment application to principal, interest, escrow and fees; limit late fees and collateral protection insurance; require prompt crediting of payments and timely escrow payments; require response to borrower’s requests for information on their accounts within 10 days of receipt; require mandatory loss mitigation before filing for foreclosure; require quarterly reports from servicers on loss mitigation activities. Also, appears to require a successor to a foreclosed property to (1)

take the property subject to the rights of a bona fide tenant (not the mortgagor) under a lease entered into before the notice of foreclosure, for the remaining term of the lease, or (2) without a lease or with a lease terminable at will, subject to a notice 90 days before the effective date of the notice to vacate. Amend RESPA notice of transfer of servicing disclosure to include a statement regarding the borrower's account status, the balance due on the loan and the escrow balance, and a full payment history.

Appraisers – Establish new requirements for mortgage appraisals that would: impose a “reasonable skill” and a “good faith and fair dealing” standard on appraisers; require state certification or licensing, conformity with Uniform Standards of Professional Appraisal Practice (USPAP) and other regulations; require objectivity and bonding of appraisers; assure a copy of appraisal report to consumer; prohibit lender or loan servicer from influencing an appraiser to achieve a targeted value to facilitate a home mortgage or selecting an appraiser based on an expectation that appraiser would provide a targeted value; require the holder of the loan to modify the loan, based on retrospective appraisal, of an appraisal on which a loan was based that exceeded the “true value” by 10 percent or more; and establishes enforcement and civil liability of appraiser. Provide appraiser liability for failure to comply with provisions including actual damages, an amount not less than \$5,000, costs and attorneys fees. Notably, violation of appraisal provisions may be used to stop a foreclosure.

Counseling – Require new disclosure at settlement about the availability of counseling and after 60 days delinquency; prohibit a lender or a servicer from initiating or continuing a foreclosure for a 45-day period upon notice the borrower has engaged an approved housing counseling agency; require the lender or servicer to reimburse the housing counseling agency for their services.

For further information concerning this legislation please contact:

Ken Markison, Senior Director and Regulatory Counsel
(202) 557-2930 or kmarkison@mortgagebankers.org

Andrew Szalay, Senior Specialist, Government Affairs
(202) 557-2941 or aszalay@mortgagebankers.org