# S. 1299

To establish on behalf of consumers a fiduciary duty and other standards of care for mortgage brokers and originators, and to establish standards to assess a consumer's ability to repay, and for other purposes.

#### IN THE SENATE OF THE UNITED STATES

May 3, 2007

Mr. Schumer (for himself, Mr. Brown, and Mr. Casey) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

# A BILL

- To establish on behalf of consumers a fiduciary duty and other standards of care for mortgage brokers and originators, and to establish standards to assess a consumer's ability to repay, and for other purposes.
  - 1 Be it enacted by the Senate and House of Representa-
  - 2 tives of the United States of America in Congress assembled,
  - 3 SECTION 1. SHORT TITLE.
  - 4 This Act may be cited as the "Borrower's Protection
  - 5 Act of 2007".

# 1 SEC. 2. MORTGAGE ORIGINATOR REQUIREMENTS.

- The Truth in Lending Act (15 U.S.C. 1601 et seq.)
- 3 is amended by inserting after section 129 the following
- 4 new section:

#### 5 "SEC. 129A. DUTIES OF MORTGAGE ORIGINATORS.

- 6 "(a) DEFINITIONS.—As used in this section—
- 7 "(1) the term 'home mortgage loan' means an 8 extension of credit secured by or to be secured by a 9 security interest in the principal dwelling of the obli-

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- "(2) the term 'mortgage broker' means a person who, for compensation or in anticipation of compensation, arranges or negotiates, or attempts to arrange or negotiate, home mortgage loans or commitments for such loans, or refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made;
  - "(3) the term 'mortgage originator' means—
  - "(A) any creditor or other person, including a mortgage broker, who, for compensation or in anticipation of compensation, engages either directly or indirectly in the acceptance of applications for home mortgage loans, solicitation of home mortgage loans on behalf of borrowers, negotiation of terms or conditions of

1	home mortgage loans on behalf of borrowers or
2	lenders, or negotiation of sales of existing home
3	mortgage loans to institutional or non-institu-
4	tional lenders; and
5	"(B) any employee or agent of a creditor
6	or person described in subparagraph (A);
7	"(4) the term 'qualifying bond' means a bond
8	equal to not less than 1 percent of the aggregate
9	value of all homes appraised by an appraiser of real
10	property in connection with a home mortgage loan
11	in the calendar year preceding the date of the trans-
12	action, with respect to which—
13	"(A) the bond shall inure first to the ben-
14	efit of the homeowners who have claims against
15	the appraiser under this title or any other ap-
16	plicable provision of law, and second to the ben-
17	efit of originating creditors that complied with
18	their duty of good faith and fair dealing in ac-
19	cordance with this title; and
20	"(B) any assignee or subsequent transferee
21	or trustee shall be a beneficiary of the bond,
22	only if the originating creditor qualified for
23	such treatment; and
24	"(5) the term 'rate spread mortgage trans-
25	action' means a home mortgage loan that has an an-

1	nual percentage rate of interest that equals or ex-
2	ceeds the rate that would require reporting under
3	the Home Mortgage Disclosure Act (12 U.S.C. 2801
4	et seq.) as a rate spread loan, without regard to
5	whether such loan is otherwise subject to the Home
6	Mortgage Disclosure Act.
7	"(b) Standard of Care.—
8	"(1) FIDUCIARY RELATIONSHIP.—In the case
9	of a home mortgage loan, the mortgage broker shall
10	be deemed to have a fiduciary relationship with the
11	consumer, and each such mortgage broker shall be
12	subject to all requirements for fiduciaries otherwise
13	applicable under State or Federal law.
14	"(2) Fair dealing.—Each mortgage origi-
15	nator shall, in addition to the duties imposed by oth-
16	erwise applicable provisions of State or Federal law,
17	with respect to each home mortgage loan in which
18	the mortgage originator is involved—
19	"(A) act with reasonable skill, care, and
20	diligence; and
21	"(B) act in good faith and with fair deal-
22	ing in any transaction, practice, or course of
23	business associated with the transaction.

"(e) Assessment of Ability to Repay.—

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1	"(1) In general.—Each mortgage originator
2	shall, before entering into or otherwise facilitating
3	any home mortgage loan, verify the reasonable abil-
4	ity of the borrower to pay the principal and interest
5	on the loan, and any real estate taxes and home-
6	owners insurance fees and premiums.
7	"(2) Variable mortgage rates.—In the case
8	of a home mortgage loan with respect to which the
9	applicable rate of interest may vary, for purposes of
10	paragraph (1), the ability to pay shall be determined
11	based on the maximum possible monthly payment
12	that could be due from the borrower during the first
13	7 years of the loan term, which amount shall be cal-
14	culated by—
15	"(A) using the maximum interest rate al-
16	lowable under the loan; and
17	"(B) assuming no default by the borrower,
18	a repayment schedule which achieves full amor-
19	tization over the life of the loan.
20	"(3) Required verification documents.—
21	"(A) In general.—For purposes of para-
22	graph (1), a mortgage originator shall base a
23	determination of the ability to pay on—
24	"(i) documentation of the income and
25	financial resources of the borrower, includ-

ing tax returns, payroll receipts, bank records, or other similarly reliable documents; and

- "(ii) the debt-to-income ratio and residual income of the borrower, as determined under section 36.4337 of title 38 of the Code of Federal Regulations, or any successor thereto.
- "(B) LIMITATION.—A statement provided by the borrower of the income and financial resources of the borrower, without other documentation referred to in this paragraph, is not sufficient verification for purposes of assessing the ability of the consumer to pay.

# "(d) RATE SPREAD MORTGAGES.—

- "(1) ESCROW ACCOUNT REQUIRED.—In the case of a rate spread mortgage transaction, the obligor shall be required to make monthly payments into an escrow account established by the mortgage originator for the purpose of paying taxes, hazard insurance premiums, and, if applicable, flood insurance premiums.
- "(2) EXCEPTION.—This paragraph does not apply in any case in which the mortgage originator reasonably believes that, following the loan closing,

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the obligor will be required, or will continue to be required, to make escrow payments described in paragraph (1) on the property securing the loan in connection with another loan secured by the same property.

"(3) Lender and broker liability.—In any case in which a mortgage broker sells or delivers a rate spread mortgage loan to a lender, the lender shall be liable for the acts, omissions, and representations made by the mortgage broker in connection with that mortgage loan.

### "(e) Steering Prohibited.—

- "(1) In GENERAL.—In connection with a home mortgage loan, a mortgage originator may not steer, counsel, or direct a consumer to rates, charges, principal amount, or prepayment terms that are not reasonably advantageous to the consumer, in light of all of the circumstances associated with the transaction, including the characteristics of the property that secures or will secure the extension of credit and the loan terms for which the consumer qualifies.
- "(2) Duties to consumers.—If unable to suggest, offer, or recommend to a consumer a reasonably advantageous home loan, a mortgage originator shall—

1	"(A) based on the information reasonably
2	available and using the skill, care, and diligence
3	reasonably expected for a mortgage originator,
4	originate or otherwise facilitate a reasonably
5	advantageous home mortgage loan by another
6	creditor to a consumer, if permitted by and in
7	accordance with all otherwise applicable law; or
8	"(B) disclose to a consumer—
9	"(i) that the creditor does not offer a
10	home mortgage loan that would be reason-
11	ably advantageous to a consumer, but that
12	other creditors may offer such a loan; and
13	"(ii) the reasons that the products
14	and services offered by the mortgage origi-
15	nator are not available to or reasonably ad-
16	vantageous for the consumer.
17	"(3) Prohibited Conduct.—In connection
18	with a home mortgage loan, a mortgage originator
19	may not—
20	"(A) mischaracterize the credit history of a
21	consumer or the home loans available to a con-
22	sumer;
23	"(B) mischaracterize or suborn
24	mischaracterization of the appraised value of
25	the property securing the extension of credit; or

1	"(C) if unable to suggest, offer, or rec-
2	ommend to a consumer a reasonably advan-
3	tageous home mortgage loan, discourage a con-
4	sumer from seeking a home mortgage loan from
5	another creditor or with another mortgage
6	originator.
7	"(4) Rule of Construction.—Nothing in
8	this subsection shall be deemed to prohibit a mort-
9	gage originator from providing a consumer with ac-
10	curate, unbiased, general information about home
11	mortgage loans, underwriting standards, ways to im-
12	prove credit history, or any other matter relevant to
13	a consumer.
14	"(f) Good Faith and Fair Dealing in Appraisal
15	Process.—
16	"(1) In General.—No mortgage originator
17	may enter into a home mortgage loan with respect
18	to which the mortgage originator has reason to be-
19	lieve that, with respect to the appraisal of the value
20	of the property securing the loan—
21	"(A) the appraiser failed to act in good
22	faith and fair dealing with respect to the con-
23	sumer in connection with the appraisal;
24	"(B) the appraisal was conducted other
25	than in accordance with all applicable State and

1	Federal standards required of certified apprais-
2	ers, or was otherwise not accurate and reason-
3	able;
4	"(C) the appraiser had a direct or indirect
5	interest in the property or the transaction;
6	"(D) the appraiser charged, sought, or re-
7	ceived compensation for the appraisal, and the
8	appraisal was not covered by a qualifying bond;
9	or
10	"(E) the appraisal order or any other com-
11	munication in any form includes the requested
12	loan amount or any estimate of value for the
13	property to serve as collateral, either express or
14	implied.
15	"(2) Prohibited influence.—No mortgage
16	originator may, with respect to a home mortgage
17	loan, in any way—
18	"(A) seek to influence an appraiser or oth-
19	erwise to encourage a targeted value in order to
20	facilitate the making or pricing of the home
21	mortgage loan; or
22	"(B) select an appraiser on the basis of an
23	expectation that such appraiser would provide a
24	targeted value in order to facilitate the making
25	or pricing of the home mortgage loan.

1	"(3) Limitation on defenses.—It shall not
2	be a defense to enforcement of the requirements of
3	this subsection that the mortgage originator used
4	another person in the appraisal process or to review
5	the appraisal process.
6	"(4) Notice of Appraisal.—In any case in
7	which an appraisal is performed in connection with
8	a home mortgage loan, the mortgage originator shall
9	provide a copy of the appraisal report to an appli-
10	cant for a home mortgage loan, whether credit is
11	granted, denied, or the application was withdrawn."
12	SEC. 3. CONFORMING AND CLERICAL AMENDMENTS.
13	The Truth in Lending Act (15 U.S.C. 1601 et seq.)
14	is amended—
15	(1) in section 103(u) (15 U.S.C. 1602(u)), by
16	striking "disclosures required by section 129(a)"
17	and inserting "provisions of section 129 and 129A"
18	(2) in section 130 (15 U.S.C. 1640) by insert-
19	ing "or 129A" after "section 129" each place that
20	term appears; and
21	(3) in the table of sections for chapter 2 (15
22	U.S.C. 1631 et seq.), by inserting after the item re-
23	lating to section 129 the following:

"129A. Duties of mortgage originators.".