

110TH CONGRESS  
2D SESSION

# S. 2888

To protect the property and security of homeowners who are subject to foreclosure proceedings, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

APRIL 17, 2008

Mr. KOHL (for himself, Ms. COLLINS, and Mrs. LINCOLN) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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## A BILL

To protect the property and security of homeowners who are subject to foreclosure proceedings, 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 “Foreclosure Rescue  
5       Fraud Act of 2008”.

6       **SEC. 2. DEFINITIONS.**

7       In this title:

8               (1) COMMISSION.—The term “Commission”  
9       means the Federal Trade Commission.

1           (2) FORECLOSURE CONSULTANT.—The term  
2           “foreclosure consultant”—

3                   (A) means a person who directly or indi-  
4                   rectly makes any solicitation, representation, or  
5                   offer to a homeowner facing foreclosure on resi-  
6                   dential real property to perform, with or with-  
7                   out compensation, or who performs, with or  
8                   without compensation, any service that such  
9                   person represents will prevent, postpone, or re-  
10                  verse the effect of such foreclosure; and

11                  (B) does not include—

12                   (i) an attorney licensed to practice law  
13                   in the State in which the property is lo-  
14                   cated who has established an attorney-cli-  
15                   ent relationship with the homeowner;

16                   (ii) a person licensed as a real estate  
17                   broker or salesperson in the State where  
18                   the property is located, and such person  
19                   engages in acts permitted under the licen-  
20                   sure laws of such State;

21                   (iii) a housing counseling agency ap-  
22                   proved by the Secretary;

23                   (iv) a depository institution (as de-  
24                   fined in section 3 of the Federal Deposit  
25                   Insurance Act (12 U.S.C. 1813));

1 (v) a Federal credit union or a State  
 2 credit union (as defined in section 101 of  
 3 the Federal Credit Union Act (12 U.S.C.  
 4 1752)); or

5 (vi) an insurance company organized  
 6 under the laws of any State.

7 (3) HOMEOWNER.—The term “homeowner”,  
 8 with respect to residential real property for which an  
 9 action to foreclose on the mortgage or deed of trust  
 10 on such real property is filed, means the person  
 11 holding record title to such property as of the date  
 12 on which such action is filed.

13 (4) LOAN SERVICER.—The term “loan servicer”  
 14 has the same meaning as the term “servicer” in sec-  
 15 tion 6(i)(2) of the Real Estate Settlement Proce-  
 16 dures Act of 1974 (12 U.S.C. 2605(i)(2)).

17 (5) RESIDENTIAL MORTGAGE LOAN.—The term  
 18 “residential mortgage loan” means any loan pri-  
 19 marily for personal, family, or household use that is  
 20 secured by a mortgage, deed of trust, or other equiv-  
 21 alent consensual security interest on a dwelling (as  
 22 defined in section 103(v) of the Truth in Lending  
 23 Act (15 U.S.C. 1602)(v)) or residential real estate  
 24 upon which is constructed or intended to be con-  
 25 structed a dwelling (as so defined).

1           (6) RESIDENTIAL REAL PROPERTY.—The term  
 2           “residential real property” has the meaning given  
 3           the term “dwelling” in section 103 of the Consumer  
 4           Credit Protection Act (15 U.S.C. 1602).

5           (7) SECRETARY.—The term “Secretary” means  
 6           the Secretary of Housing and Urban Development.

7   **SEC. 3. MORTGAGE RESCUE FRAUD PROTECTION.**

8           (a) LIMITS ON FORECLOSURE CONSULTANTS.—A  
 9           foreclosure consultant may not—

10           (1) claim, demand, charge, collect, or receive  
 11           any compensation from a homeowner for services  
 12           performed by such foreclosure consultant with re-  
 13           spect to residential real property until such fore-  
 14           closure consultant has fully performed each service  
 15           that such foreclosure consultant contracted to per-  
 16           form or represented would be performed with respect  
 17           to such residential real property;

18           (2) hold any power of attorney from any home-  
 19           owner, except to inspect documents, as provided by  
 20           applicable law;

21           (3) receive any consideration from a third party  
 22           in connection with services rendered to a homeowner  
 23           by such third party with respect to the foreclosure  
 24           of residential real property, unless such consider-

1       ation is fully disclosed to such homeowner in writing  
 2       before such services are rendered;

3           (4) accept any wage assignment, any lien of any  
 4       type on real or personal property, or other security  
 5       to secure the payment of compensation with respect  
 6       to services provided by such foreclosure consultant  
 7       in connection with the foreclosure of residential real  
 8       property; or

9           (5) acquire any interest, directly or indirectly,  
 10      in the residence of a homeowner with whom the fore-  
 11      closure consultant has contracted.

12      (b) CONTRACT REQUIREMENTS.—

13           (1) WRITTEN CONTRACT REQUIRED.—Notwith-  
 14      standing any other provision of law, a foreclosure  
 15      consultant may not provide to a homeowner a service  
 16      related to the foreclosure of residential real prop-  
 17      erty—

18           (A) unless—

19                   (i) a written contract for the purchase  
 20                   of such service has been signed and dated  
 21                   by the homeowner; and

22                   (ii) such contract complies with the  
 23                   requirements described in paragraph (2);  
 24                   and

1 (B) before the end of the 3-business-day  
2 period beginning on the date on which the con-  
3 tract is signed.

4 (2) TERMS AND CONDITIONS OF CONTRACT.—  
5 The requirements described in this paragraph, with  
6 respect to a contract, are as follows:

7 (A) The contract includes, in writing—

8 (i) a full and detailed description of  
9 the exact nature of the contract and the  
10 total amount and terms of compensation;

11 (ii) the name, physical address, phone  
12 number, email address, and facsimile num-  
13 ber, if any, of the foreclosure consultant to  
14 whom a notice of cancellation can be  
15 mailed or sent under subsection (d); and

16 (iii) a conspicuous statement in at  
17 least 12 point bold face type in immediate  
18 proximity to the space reserved for the  
19 homeowner's signature on the contract  
20 that reads as follows: "You may cancel this  
21 contract without penalty or obligation at  
22 any time before midnight of the 3rd busi-  
23 ness day after the date on which you sign  
24 the contract. See the attached notice of

1 cancellation form for an explanation of this  
 2 right.”.

3 (B) The contract is written in the principal  
 4 language used by the homeowner.

5 (C) The contract is accompanied by the  
 6 form required by subsection (c)(2).

7 (c) RIGHT TO CANCEL CONTRACT.—

8 (1) IN GENERAL.—With respect to a contract  
 9 between a homeowner and a foreclosure consultant  
 10 regarding the foreclosure on the residential real  
 11 property of such homeowner, such homeowner may  
 12 cancel such contract without penalty or obligation by  
 13 mailing a notice of cancellation not later than mid-  
 14 night of the 3rd business day after the date on  
 15 which such contract is executed or would become en-  
 16 forceable against the parties to such contract.

17 (2) CANCELLATION FORM AND OTHER INFOR-  
 18 MATION.—Each contract described in paragraph (1)  
 19 shall be accompanied by a form, in duplicate, that—

20 (A) has the heading “Notice of Cancell-  
 21 ation” in boldface type; and

22 (B) contains in boldface type the following  
 23 statement:

24 “You may cancel this contract, without any  
 25 penalty or obligation, at any time before midnight of

1 the 3rd day after the date on which the contract is  
 2 signed by you.

3 “To cancel this contract, mail or deliver a  
 4 signed and dated copy of this cancellation notice or  
 5 any other equivalent written notice to [insert name  
 6 of foreclosure consultant] at [insert address of fore-  
 7 closure consultant] before midnight on [insert date].

8 “I hereby cancel this transaction on [insert  
 9 date] [insert homeowner signature].”.

10 (d) WAIVER OF RIGHTS AND PROTECTIONS PROHIB-  
 11 ITED.—

12 (1) IN GENERAL.—A waiver by a homeowner of  
 13 any protection provided by this section or any right  
 14 of a homeowner under this section—

15 (A) shall be treated as void; and

16 (B) may not be enforced by any Federal or  
 17 State court or by any person.

18 (2) ATTEMPT TO OBTAIN A WAIVER.—Any at-  
 19 tempt by any person to obtain a waiver from any  
 20 homeowner of any protection provided by this sec-  
 21 tion or any right of the homeowner under this sec-  
 22 tion shall be treated as a violation of this section.

23 (3) CONTRACTS NOT IN COMPLIANCE.—Any  
 24 contract that does not comply with the applicable



1 provisions of this title shall be void and may not be  
2 enforceable by any party.

3 **SEC. 4. WARNINGS TO HOMEOWNERS OF FORECLOSURE**  
4 **RESCUE SCAMS.**

5 (a) IN GENERAL.—If a loan servicer finds that a  
6 homeowner has failed to make 2 consecutive payments on  
7 a residential mortgage loan and such loan is at risk of  
8 being foreclosed upon, the loan servicer shall notify such  
9 homeowner of the dangers of fraudulent activities associ-  
10 ated with foreclosure.

11 (b) NOTICE REQUIREMENTS.—Each notice provided  
12 under subsection (a) shall—

13 (1) be in writing;

14 (2) be included with a mailing of account infor-  
15 mation;

16 (3) have the heading “Notice Required by Fed-  
17 eral Law” in a 14-point boldface type in English  
18 and Spanish at the top of such notice; and

19 (4) contain the following statement in English  
20 and Spanish: “Mortgage foreclosure is a complex  
21 process. Some people may approach you about sav-  
22 ing your home. You should be careful about any  
23 such promises. There are government and nonprofit  
24 agencies you may contact for helpful information  
25 about the foreclosure process. Contact your lender

1 immediately at [\_\_\_\_], call the Department of  
 2 Housing and Urban Development Housing Coun-  
 3 seling Line at (800) 569-4287 to find a housing  
 4 counseling agency certified by the Department to as-  
 5 sist you in avoiding foreclosure, or visit the Depart-  
 6 ment's Tips for Avoiding Foreclosure website at  
 7 <http://www.hud.gov/foreclosure> for additional assist-  
 8 ance." (the blank space to be filled in by the loan  
 9 servicer).

10 **SEC. 5. CIVIL LIABILITY.**

11 (a) LIABILITY ESTABLISHED.—Any foreclosure con-  
 12 sultant who fails to comply with any provision of section  
 13 3 or 4 with respect to any other person shall be liable  
 14 to such person in an amount equal to the sum of the  
 15 amounts determined under each of the following para-  
 16 graphs:

17 (1) ACTUAL DAMAGES.—The greater of—

18 (A) the amount of any actual damage sus-  
 19 tained by such person as a result of such fail-  
 20 ure; or

21 (B) any amount paid by the person to the  
 22 foreclosure consultant.

23 (2) PUNITIVE DAMAGES.—In the case of any  
 24 action by an individual, such amount (in addition to

1 damages described in paragraph (1)) as the court  
2 may allow.

3 (3) ATTORNEYS' FEES.—In the case of any suc-  
4 cessful action to enforce any liability under para-  
5 graph (1) or (2), the costs of the action, together  
6 with reasonable attorneys' fees.

7 (b) FACTORS TO BE CONSIDERED IN AWARDING PU-  
8 NITIVE DAMAGES.—In determining the amount of any li-  
9 ability of any foreclosure consultant under subsection  
10 (a)(2), the court shall consider, among other relevant fac-  
11 tors—

12 (1) the frequency and persistence of noncompli-  
13 ance by the foreclosure consultant;

14 (2) the nature of the noncompliance; and

15 (3) the extent to which such noncompliance was  
16 intentional.

17 **SEC. 6. ADMINISTRATIVE ENFORCEMENT.**

18 (a) ENFORCEMENT BY FEDERAL TRADE COMMIS-  
19 SION.—

20 (1) UNFAIR OR DECEPTIVE ACT OR PRAC-  
21 TICE.—A violation of a prohibition described in sec-  
22 tion 3 or a failure to comply with any provision of  
23 section 3 or 4 shall be treated as a violation of a  
24 rule defining an unfair or deceptive act or practice

1 described under section 18(a)(1)(B) of the Federal  
2 Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

3 (2) ACTIONS BY THE FEDERAL TRADE COMMIS-  
4 SION.—The Federal Trade Commission shall enforce  
5 the provisions of sections 3 and 4 in the same man-  
6 ner, by the same means, and with the same jurisdic-  
7 tion, powers, and duties as though all applicable  
8 terms and provisions of the Federal Trade Commis-  
9 sion Act (15 U.S.C. 41 et seq.) were incorporated  
10 into and made part of this title.

11 (b) STATE ACTION FOR VIOLATIONS.—

12 (1) AUTHORITY OF STATES.—In addition to  
13 such other remedies as are provided under State  
14 law, whenever the chief law enforcement officer of a  
15 State, or an official or agency designated by a State,  
16 has reason to believe that any person has violated or  
17 is violating the provisions of section 3 or 4, the  
18 State—

19 (A) may bring an action to enjoin such vio-  
20 lation;

21 (B) may bring an action on behalf of its  
22 residents to recover damages for which the per-  
23 son is liable to such residents under section 5  
24 as a result of the violation; and

1 (C) in the case of any successful action  
2 under subparagraph (A) or (B), shall be award-  
3 ed the costs of the action and reasonable attor-  
4 ney fees, as determined by the court.

5 (2) RIGHTS OF FEDERAL TRADE COMMIS-  
6 SION.—

7 (A) NOTICE TO COMMISSION.—The State  
8 shall serve prior written notice of any civil ac-  
9 tion under paragraph (1) upon the Commission  
10 and provide the Commission with a copy of its  
11 complaint, except in any case in which such  
12 prior notice is not feasible, in which case the  
13 State shall serve such notice immediately upon  
14 instituting such action.

15 (B) INTERVENTION.—The Commission  
16 shall have the right—

17 (i) to intervene in any action referred  
18 to in subparagraph (A);

19 (ii) upon so intervening, to be heard  
20 on all matters arising in the action; and

21 (iii) to file petitions for appeal in such  
22 actions.

23 (3) INVESTIGATORY POWERS.—For purposes of  
24 bringing any action under this subsection, nothing in  
25 this subsection shall prevent the chief law enforce-

1       ment officer, or an official or agency designated by  
 2       a State, from exercising the powers conferred on the  
 3       chief law enforcement officer or such official by the  
 4       laws of such State to conduct investigations or to  
 5       administer oaths or affirmations, or to compel the  
 6       attendance of witnesses or the production of docu-  
 7       mentary and other evidence.

8               (4) LIMITATION.—Whenever the Federal Trade  
 9       Commission has instituted a civil action for a viola-  
 10      tion of section 3 or 4, no State may, during the  
 11      pendency of such action, bring an action under this  
 12      section against any defendant named in the com-  
 13      plaint of the Commission for any violation of section  
 14      3 or 4 that is alleged in that complaint.

15   **SEC. 7. PREEMPTION.**

16       Nothing in this title affects any provision of State  
 17      or local law respecting any foreclosure consultant, residen-  
 18      tial mortgage loan, or residential real property that pro-  
 19      vides equal or greater protection to homeowners than what  
 20      is provided under this title.

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