2009

National Affordable Housing Trust Fund Legislation: The Subprime Mortgage Crisis Also Hits Renters

Peter W. Salsich

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Legal Studies Research Paper Series

No. 2009 - 08

National Affordable Housing Trust Fund Legislation: The Subprime Mortgage Crisis Also Hits Renters

Peter W. Salsich
Saint Louis University School of Law

[redacted]

Georgetown Journal on Poverty Law & Policy
Volume XVI, Number 1, Winter 2009

ARTICLES

National Affordable Housing Trust Fund Legislation: The Subprime Mortgage Crisis Also Hits Renters

Peter W. Salsich*

Introduction

Compromise legislation, the Housing and Economic Recovery Act of 2008[1], enacted in response to the subprime mortgage-induced foreclosure crisis,[2] includes a new program of direct federal financial support for production and preservation of housing for extremely low-income families.[3] Included, some

* McDonnell Professor of Justice in American Society, Saint Louis University School of Law. I appreciate the comments and suggestions given to me by John Ammann, Elizabeth Bolen, Kelly Dineen, Teri Dobbins, Brad Fogel, Roger Goldman, Sandra Johnson, Eric Miller, Nicholas Terry, Sidney Watson and other participants in a summer faculty workshop at Saint Louis University School of Law. Research Librarians Lynn Hartke, David Kullman and Peggy McDermott were indispensable. Rex Gradeless and Jessica Tietjen provided excellent research assistance. Thanks also to Phil Dupre, Articles Editor of the Georgetown Journal on Poverty Law and Policy, whose invitation letter provided the motivation for me to write this piece.

1. Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (effective July 30, 2008, to be codified in scattered sections of 12 U.S.C. §§ 4501-4520).

2. David M. Herszenhorn, *Senate Gives Final Approval to Sweeping Housing Bill,* N.Y. Times, July 27, 2008, *available at* www.nytimes.com/2008/07/270washington/26cnd-housing.html (last visited July 26, 2008). HERA did not end the crisis, and a massive additional rescue program authorizing up to $700 billion for government acquisition of troubled mortgages and mortgage-backed securities, as well as government investment in troubled financial institutions, was enacted a few weeks later, Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th Cong. (2008), as Pub. L. 110-343; Steve Lohr, *U.S. Investing $250 Billion to Bolster Bank Industry,* N.Y. Times (Oct. 14, 2008), at p. A1. The Housing Trust Fund legislation, while it continued to be challenged, was not changed or eliminated by this new legislative initiative. National Low Income Housing Colation ("NLIHC"), *National Housing Trust Fund: National Housing Trust Fund Attacked Again By House Minority Leader*, 13 MEMO TO MEMBERS No. 40, Oct. 10, 2008, at 1, and *Sen. Bennett Optimistic About National Housing Trust Fund* , 13 MEMO TO MEMBERS No. 40, Oct. 10, 2008, at 1.

3. The last major piece of housing legislation authorizing new programs was the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2594 (codified at 42 U.S.C. § 1437z (2003)), which made major changes in the public housing program including creation of the Hope VI program which enabled local public housing authorities to recast urban high-rise public housing units into mixed-income, mixed-use neighborhoods.

might say buried,[4] in this massive Act is a mechanism, the Housing Trust Fund, to provide a dedicated source of funds[5] for affordable housing production and preservation.[6] For the first time in a generation,[7] the federal government returns as a serious player in its efforts to improve the housing lot of the nation's lowest-income families.

The main thrusts of the Act respond to the subprime mortgage crisis with foreclosure relief programs,[8] greater oversight of the mortgage purchase activities of the government-sponsored enterprises ("GSEs"), the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"),[9] and authorization for the Treasury Department to intervene to prevent the two agencies from collapsing.[10] The Housing Trust Fund is the part of the compromise legislation crafted by Representative Barney Frank (D-Mass,), chair of the House Committee on Financial Services, and Senators Christopher J. Dodd (D-Conn.), chair of the Senate Banking Committee, and Richard C. Shelby (R-Ala.), senior Republican on the committee, that the Democratic Party co-sponsors believe is most

---

4. Herszenhorn, *supra* note 2. This article announcing final passage of the bill, was posted on the *New York Times* website shortly after the Senate vote but made no mention of the new program. Likewise, the Wall Street Journal and USA Today made no mention of the Housing Trust Fund in their Monday, July 28 reports of the Senate's weekend vote. Damien Paletta, *Housing Bill Relies On Banks to Take Loan Losses,* WALL ST. J., July 28, 2008, at A3; Anna Bahney, *Housing Rescue Bill May Fall Short; Who Benefits?* USA TODAY, July 28, 2008, *available at* http://www.usatoday.com/money/economy/housing/2008-07-26-housing-bailout-bill_N.htm (discussing six groups intended to benefit from the bill, but not mentioning extremely low-income households).

5. Advocates have sought a dedicated revenue source for affordable housing production and preservation since the early 1990s. See *infra* note 164 and accompanying text.

6. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, at § 1131, adding new § 1338 to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. §§ 4501 (1992). See *infra* Part IV.

7. In the 1980s, the federal government shifted its emphasis from direct support to indirect support of housing production with the enactment of the Low Income Housing Tax Credit ("LIHTC"), Pub. L. No. 99-514, § 252 (codified at 26 U.S.C. § 42 (2008)), and from supply-side (production) programs to demand-side (rental support) programs such as the Section 8 housing certificate and voucher programs, 42 U.S.C. §§ 1437f(r) & (o) (1999), merged in 1998 into a single tenant-based rental assistance program, Pub. L. No. 105-276, § 545, 112 Stat. 2596, amending 42 U.S.C. § 1437f(o).

8. Housing and Economic Recovery Act of 2008, *supra* note 1, at §§ 1401-1404, adding new § 257 to title II of the National Housing Act, 12 U.S.C. § 1707 et seq. (2008), creating the HOPE for Homeowners Program to enable homeowners to avoid threatened foreclosures by authorizing FHA to insure up to $300 billion in "refinanced eligible mortgages" and by authorizing the Government National Mortgage Association ("GNMA" or "Ginnie Mae") to guarantee securities backed by such mortgages. *Id.* at § 257(e) & (m).

9. The legislation creates a new agency, the Federal Housing Finance Agency, to oversee the government-sponsored enterprises, Federal National Mortgage Association and Federal Home Loan Mortgage Corporation. *Id.* at § 1101, adding a new § 1311 to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. § 4501 (1992). Less than 60 days after the legislation was signed into law, the new agency assumed control of the GSEs. See *infra* Part IV.

10. The Treasury Department's temporary investment authority, which expires December 31, 2009, *Id.* § 1117, is limited only by the federal debt limit, which was raised in the bill from $9.8 trillion to $10.615 trillion. *Id.* § 3083, amending 31 U.S.C. § 3101(b).

important.[11]

A key feature of the Housing Trust Fund provision is the requirement that all monies distributed to grantees of the Housing Trust Fund must be used to benefit people in the lower quartile of income for the area in which they live: Seventy-five percent of the monies are earmarked for extremely low-income households,[12] defined as those whose income "is not in excess of 30 per centum of the area median income," and the remaining 25% are for very low-income households (50% of area media income).[13] National median income averages can give real meaning to these definitions, although the actual median incomes will vary from area to area. Based on the Department of Housing and Urban Development's calculation of an average area median income of $59,400 for fiscal year 2008, extremely low-income households, on average, make no more than $17,820.[14] This is almost $3,400 below the poverty level established as income of $21,201 for a family of four.[15] Very low-income households, on average, make $29,700 or less,[16] which is almost $8,500 more than the established poverty level income for a family of four.[17]

The Housing Trust Fund targeting provision is a reminder of the special housing plight of people living in poverty. While people in the middle and upper income ranges may have choices concerning homeownership, people in the lower quartile income range have little choice but to rent,[18] and few communities willingly accept rental housing. The National Low Income Housing Coalition ("NLIHC"), a major advocate for the Housing Trust Fund, states flatly that its research leads to "one unmistakable conclusion: *no rental market in America can*

---

11. Senator Dodd stated that the Housing Trust Fund "is the part of the bill that will have the greatest long-term impact," and Representative Frank stated that it is "what I'm most proud of." David S. Broder, *When Congress Works,* WASH. POST, July 31, 2008, at A19.

12. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289. § 1338(c)(7)(A) (beginning in the second year of operation).

13. *Id*. § 1338 (f)(1) & (6), defining "Extremely Low-Income Renter Household" and "Very Low-Income Renter Household."

14. NATIONAL LOW INCOME HOUSING COAL., OUT OF REACH 2007-2008, Online Guide to Data Usage and Sources 1 (2008), *available at* http://www.nlihc.org/oor/oor2008/onlineguide.pdf. OUT OF REACH 2009 was published in April, 2009, http://www.nlihc.org/oor/oor2009 (last visited Apr. 20, 2009). That release came at the end of the final editing process, and the 2007-2008 figures were retained in this article.

15. U.S. CENSUS BUREAU, PRELIMINARY ESTIMATES OF WEIGHTED AVERAGE POVERTY THRESHOLDS FOR 2007 (Jan. 18, 2008), *available at* http://www.census.gov/hhes/www/poverty/threshld/07prelim.html.

16. Fifty percent of the national median income of $59,400. *Id.*

17. U.S. CENSUS BUREAU, *supra* note 15.

18. *See, e.g.,* Anne B. Shlay, *Low-income Homeownership: American Dream or Delusion?* 43 URBAN STUD., n. 3, Mar. 2006, 511, 526-527 ("On the demand side, the vast majority of renters cannot be served by the most lenient available underwriting standards because of economic problems. On the supply side, the affordable housing stock for the low-income homeownership market is not readily available"). Even the Habitat for Humanity program, which provides homeownership opportunities to low-income households primarily by recruiting volunteers to donate building materials and to help with construction and by utilizing the "sweat equity" of its prospective homeowners, requires regular incomes in the 25-50% of median income range. *See, e.g.,* HABITAT FOR HUMANITY-ST. LOUIS, OWNING A HABITAT HOME, *available at* http://www.habitatstl.org/homeownership (last visited July 11, 2008).

offer low income Americans safe harbor from unaffordable housing."[19]

Approximately 18.5 million households made, on average, $29,700 or less in 2005, which qualifies them as very low-income under the Housing Trust Fund targeting provisions, with about nine million of those households making, on average, $17,800 or less per year, qualifying them as extremely low-income under those targeting provisions.[20] Given the sheer size of the extremely low and very low-income cohorts, the answer to the question of whether the federal government has a role to play in responding to this group's housing needs appears self evident. In an earlier article,[21] I argued that the federal government should be willing to preempt local land use regulations when such regulations interfere with the implementation of federally supported affordable housing initiatives. In this article, I conclude that creation of the national Housing Trust Fund is both a reasonable and an appropriate component of a comprehensive response to the mortgage crisis.

Part II examines the housing affordability concerns of extremely low-income households, as described by the NLIHC in its annual publication, *Out of Reach* 2007-2008,[22] and reflected in the *basic family budget* calculations of the Economic Policy Institute.[23] Part III examines the impact of the subprime mortgage foreclosure crisis, particularly on households in the lower income cohorts. Part IV summarizes the Act's regulatory reform and foreclosure relief provisions and reviews the Housing Trust Fund provisions.

Part V analyzes the Housing Trust Fund debate and concludes that the Act's emphasis on the extremely low-income cohort is the appropriate focus of this new federal housing development policy. The Housing Trust Fund responds to the housing concerns of persons who have the least ability to compete for affordable and decent housing in the private market and for whom homeownership may be an unrealistic dream. The creation of a dedicated source of funds, while modest in amount at the outset, acknowledges the great difficulty that supporters of housing programs for extremely low-income persons have had in the give-and-take of the legislative process, and it makes a strong policy statement—that the federal government has an important role to play in improving the housing conditions of this segment of the populace. A compromise provision that was included in the legislation, which postpones full implementation of the Housing Trust Fund for three years and uses the first year's allocation entirely for foreclosure relief, is justified by the impact of the subprime mortgage

19. OUT OF REACH 2007-2008, *supra* note 14, at 3.

20. DANILO PELLETIERE, HOUSING AT THE HALF: A MID-DECADE PROGRESS REPORT FROM THE 2005 AMERICAN COMMUNITY SURVEY 6 (2008) (reporting nine million extremely low-income renter households but only 6.2 affordable rental units); OUT OF REACH 2007-2008., *supra* note 14, at 6-7.

21. Peter W. Salsich, *Toward a Policy of Heterogeneity: Overcoming A Long History of Socioeconomic Segregation in Housing,* 42 WAKE FOREST L. REV. 459 (2007)

22. OUT OF REACH 2007-2008, *supra* note 14.

23. *See, e.g.,* SYLVIA ALLEGRETTO, BASIC FAMILY BUDGETS (Economic Policy Institute briefing paper #165, Sept. 1, 2005), *available at* http://www.epi.org/content.cfm/bp165.

industry's collapse. Some members of the extremely low-income cohort still will benefit from this allocation because of the increasing numbers of renters affected by foreclosures against their landlords.

I. Housing Affordability Concerns of Extremely Low-Income Households

While the plight of homeowners facing the sticker shock of adjustable-rate mortgage interest rate resets has captured the attention of the country,[24] far less attention has been paid to the increasing difficulty of extremely low-income renters—whether they are working full time at lower-paying jobs or they are elderly or disabled—to be able to afford their housing costs. Two ways to measure this difficulty are the Housing Wage concept of the NLIHC and the Basic Family Budget concept of the Economic Policy Institute ("EPI").

A. NLIHC Housing Wage—"Out of Reach"?

Since 1998 the NLIHC has annually measured[25] what it describes as the "long standing and steadily growing gap between wages and the cost of rental housing."[26] Using what it calls a "Housing Wage," the NLIHC measures the affordability of rental housing in "every county, metropolitan area, and state in the country."[27] The NLIHC defines its "Housing Wage" as:

> the full-time (40 hours/week for 52 weeks) hourly wage one would need to earn in order to pay what the Department of Housing and Urban Development ("HUD") estimates to be the Fair Market Rent ("FMR") for an apartment where you live, spending no more that 30% of your income on housing costs.[28]

Applying this formula on a national-average basis, the NLIHC concludes that in 2008 a full-time worker must make slightly over $36,000 (i.e. $17.32, the

---

24. *See, e.g.,* Steven Seidenberg, *Homing in on Foreclosure,* ABA J. 54 (July 2008); M.P. Dunleavey, *Sleepless and Worried in My House,* N.Y. Times, July 12, 2008, *available at* http://www.nytimes.com/2008/07/12/business/12cost.html?ref=business&pagewanted=print; Patrik Jonsson, *Vacant Homes Spread Blight in Suburb and City Alike,* Cristian Science Monitor, July 1, 2008, *available at* http://www.csmonitor.com/2008/0702/p01s01-usgn.html; Lara Farrar, *Is America's Suburban Dream Collapsing into a Nightmare?* CNN, June 16, 2008, *available at* http://edition.cnn.com/2008/TECH/06/16/suburb.city/?imw=Y&iref=mpstoryemail.

25. National Low Income Housing Coal., Out of Reach 1998: Rental Housing at What Cost?, *available at* http://www.nlihc.org/oor/oor1998.

26. Out of Reach 2007-2008, *supra* note 14, at 2.

27. *Id.*

28. *Id.* at 3. Since enactment of the Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-101, § 206(d)(6), 97 Stat. 1180-1181 (codified at 42 U.S.C. § 1437f(2)(A)(i) (1999)), all federal rental housing assistance programs use the 30% of income standard. For a review of housing affordability standards in federal housing policy, *see* Danilo Pelletiere, Getting to the Heart of Housing's Fundamental Question: How Much Can a Family Afford? (2008), *available at* www.nlihc.org.

national Housing Wage for that year, *x* 40 hours/week *x* 52 weeks) "in order to afford" a two-bedroom rental unit at the $900/month national average FMR.[29] At $17,800, the average extremely low-income household earns less than half of what is necessary to afford the national average FMR, thereby creating an average affordability gap of just under 51%.[30]

As a result, according to an NLIHC analysis of data from the 2003 American Housing Survey, "an absolute shortage of just fewer than 1.7 million affordable rental units" existed for the 7.7 million extremely low-income households in 2003.[31] By 2005, this shortage had grown to 2.8 million units for approximately nine million households.[32] Nothing of significance has happened to reduce this gap in the intervening years.

Of course, a national average is just that—an average. The situation in individual states and cities is different, but a pattern emerges. As the Housing Wage goes up or down in particular localities, the housing affordability gap for extremely low-income households also widens or narrows.[33] States and metropolitan areas located in the coastal areas generally have larger affordability gaps than do states in the country's mid-section.[34] But even the relatively more affordable areas have affordability gaps above 30 percent,[35] meaning that households at the top of the extremely low-income range (in the neighborhood of $17,000/year) can afford no more than 70 cents per rental dollar when one or more of its members are working full time. Someone working full time at minimum wage levels (earning in the neighborhood of $13,000/year at $6.55/hr., as of July 2008) can afford even less.

For example, the FMR for Arizona is $827 for a two-bedroom apartment. The Arizona Housing Wage is $33,074 per annum ($15.90/hr. *x* 40 hours/week *x* 52 weeks) for a two-bedroom unit, whereas the extremely low-income maximum is $17,713 per annum (i.e. 30% of the area [state] median income ("AMI") of $59,043), which is 53.5% of Arizona's Housing Wage, thereby creating an affordability gap of 46.5%.[36] The FMR for the Phoenix metropolitan area ($862) is higher that the state FMR ($827), as is the Phoenix area AMI ($64,200). The Phoenix area Housing Wage is $34,480 per annum and the extremely low-income maximum is $19,260 per annum (55.8% of the Phoenix area Housing Wage—or

---

29. OUT OF REACH 2007-2008, *supra* note 14, at 4. The FMR is "HUD's best estimate of what a household seeking a modest rental unit in a short amount of time can expect to pay for **rent and utilities** in the current market." *Id.* at 9. (Emphasis in original.)

30. OUT OF REACH 2007-2008 *supra* note 14 and accompanying text.

31. DANILO PELLETIERE, THE RENTAL HOUSING AFFORDABILITY GAP: COMPARISON OF 2001 AND 2003 AMERICAN HOUSING SURVEYS 4 (2006).

32. DANILO PELLETIERE, *supra* note 20.

33. OUT OF REACH 2007-2008, *supra* note 14, at 6-7.

34. *Id.*

35. *Id.*

36. OUT OF REACH 2007-2008 *supra* note 14, at AZ, *available at* http://www.nlihc.org/oor/oor2008/data.cfm?getstate=on&state=AZ.

an affordability gap of 44.2%).[37]

In Connecticut, the statistics are similar, but even higher. Connecticut reports a $84,259 per annum state AMI, a $43,911 per annum state Housing Wage for two-bedroom units, and a $25,278 per annum extremely low-income maximum (57.5% of Connecticut's Housing Wage—or an affordability gap of 42.5%); for the Stamford-Norwalk metropolitan area: a $117,800 per annum AMI (the highest in the nation), a $65,680 per annum area Housing Wage, and a $35,340 per annum extremely low-income maximum (53.8% of the area's Housing Wage—or an affordability gap of 46.2%).[38]

Georgia has an extremely low-income affordability gap (39%). It has a $59,373 per annum state AMI, $29,084 state Housing Wage for two-bedroom units, and a $17,812 per annum extremely low-income maximum (61% of area Housing Wage); the Atlanta metropolitan area has a $69,200 per annum AMI, a $32,960 per annum area Housing Wage, and a $20,760 per annum extremely low-income maximum (63% of the area's Housing Wage—or an affordability gap of 37%).[39]

Missouri has an extremely low-income affordability gap (33.5%). It has a $57,300 per annum state AMI, a $25,846 state Housing Wage for two-bedroom units, and a $17,190 extremely low-income maximum (66.5% of the state's Housing Wage); St. Louis metropolitan area has a $65,000 per annum AMI, a $28,440 area Housing Wage for two-bedroom units, and a $19,500 extremely low-income maximum (68.6% of area Housing Wage—or an affordability gap of 31.4%).[40]

Ohio has an affordability gap of 34.6%. It has a $59,362 per annum state AMI, a $27,191 state Housing Wage for two-bedroom units, and a $17,809 extremely low-income maximum (65.4% of state Housing Wage); Cincinnati metropolitan area has a $66,200 per annum AMI, a $29,040 area Housing Wage for two-bedroom units, and a $19,860 extremely low-income maximum (68.3% of area Housing Wage—or an affordability gap of 31.7%).[41]

The affordability gap problem affects millions of people. According to the NLIHC, more than half of the 36.5 million renter households (approximately 18.5 million) "do not earn enough to afford the average FMR for an appropriately-sized unit in their state."[42] Complicating the picture is the fact that such renters face increasing competition for affordable units from former homeowners who have lost their homes through foreclosure,[43] as well as from developers seeking

---

37. *Id.*
38. *Id*. at CT.
39. *Id*. at GA.
40. *Id*. at MO.
41. *Id*. at OH.
42. OUT OF REACH 2007-2008, *supra* note 14, at 6-7.
43. *See, e.g.,* Rachel L. Swarns, *Rise in Renters Erasing Gains for Ownership,* N.Y. TIMES, June 21, 2008, *available at* http://www.nytimes.com/2008/06/21/us/21renters.html?th=&emc=th&pagewanted=print (discussing competition for rental units).

to convert such units to condominiums.[44]

B. EPI's Basic Family Budgets

The Economic Policy Institute's "basic family budget" calculation provides another way of thinking about the housing needs of families in the extremely low-income cohort.[45] Basic family budgets are "relative measures of what incomes are necessary to attain a specific standard of living" for different family sizes living in specific communities.[46] Seven items are included in basic family budget calculations: housing (based on FMR calculations), food (based on the Department of Agriculture's "low-cost plan"), transportation (National Travel Household Survey calculations for owning and operating a car),[47] child care (Children's Defense Fund figures for child care centers for four and eight year olds), health care (a "weighted average" of group and non-group health insurance premiums, along with out-of-pocket expenses), other necessities (e.g., clothing, personal care expenses, household supplies, etc.), and taxes (federal Social Security, Medicare payroll taxes, and federal, state and local income taxes).[48]

Similar to the NILHC's Housing Wage, the EPI's basic family budget is a relative measure of the costs of a "relatively safe, modest standard of living."[49] Advocates of the basic family budget approach stress that the dynamic nature of the basic family budget analysis is superior to the absolute income levels of poverty thresholds because the basic family budget recognizes the "importance of accounting for cost-of-living variations" in the budgetary calculations.[50]

An EPI comparison of basic family budgets for a four-person family (two adults and two children) in eight metropolitan areas illustrates the point about cost of living variations, particularly with respect to housing and child care costs. In the EPI analysis, Casper, Wyoming is at the low end with monthly housing costs of $470 and monthly child care costs of $595, while Boston, Massachusetts and Oakland, California have the highest housing costs with FMRs of $1,266 and $1,342 and Minneapolis-St. Paul, Minnesota and Washington, D.C. lead the child care category with costs of $1,364 and $1,316.[51]

---

44. *See, e.g.,* Kirstin Downey, *Low-Cost Housing Eliminated, But Nothing Built In Its Place,* WASH. POST, Nov. 5, 2007, at p. B1 (describing failed condominium conversion projects in the Washington, D.C. suburbs).

45. SYLVIA ALLEGRETTO, *supra* note 23, at 3.

46. *Id.*

47. *Id*. Ms. Allegretto's paper discusses family budgets for the year 2004. The sharp increases in transportation and food costs triggered by the spike in oil prices in 2007-2008 obviously affect budget calculations.

48. *Id. See* MICHAEL E. STONE, SHELTER POVERTY (1993) (discussing earlier measure of housing affordability that took a similar approach).

49. ALLEGRETTO, *supra* note 23, at 4.

50. *Id*. at 5.

51. *Id*, at 6. In 2007, the poverty threshold for a family of four was $21,201. U. S. CENSUS BUREAU, *supra* note 15.

A major feature of the basic family budget calculation is its relationship to the poverty threshold calculation. Basic family budget calculations produce cost estimates well in excess of traditional poverty threshold calculations. The basic family budget for Boston, Massachusetts, $64,656, was over three times the poverty threshold of $19,157 in 2004[52] for a four person family, and mid-cost cities such as Charlotte, North Carolina and Denver, Colorado have basic family budgets, $42,732 and $47,520 respectively, well over twice the poverty threshold. The FMR method of calculating housing costs becomes the second largest item in the basic family budget, with only child care consuming a greater portion of the budget. Almost 30 percent of working families "have incomes below basic family budget levels," which is three times the number of such families with incomes "below the official poverty thresholds" and approximately the same as the "percentage of families living below twice poverty, 28 percent."[53]

Both methods of analyzing housing costs for low income families, the Housing Wage and the basic family budget, lead to the same conclusion—a far greater number of American families have serious housing affordability concerns than more conventional methods of analysis would suggest. This fact adds considerable weight to the argument for a new federal affordable housing policy.[54] Furthermore, the subprime mortgage foreclosure crisis, discussed in Part III, offers additional evidence of the housing plight of the extremely low-income cohort.

II. Impact and Causes of the Subprime Mortgage Crisis

A. Impact

As the subprime[55] mortgage-induced foreclosure crisis deepened over the spring and summer of 2008,[56] reports surfaced calling attention to the fact that

52. Allegretto, *supra* note 23, at 5.

53. *Id*. at 6.

54. *See, e.g.,* Harv. Joint Ctr for Housing Studies, The State of the Nation's Housing 2008 at 4 *available at* http://www.jchs.harvard.edu/scn/index.htm ("new directions for policy"); Out of Reach 2007-2008, *supra* note 14, at 8 ("working to lower the cost of housing and to raise the incomes of low-income people are two ways to help bring America's affordable housing crisis to an end").

55. Subprime loans are loans that are "offered to people who have problems with their credit." Interest rates generally are higher than prevailing rates to account for the "additional risks involved in lending to someone with poor credit or without a financial track record." Freddie Mac, Subprime Lending (2008), *available at* http://www.freddiemac.com/corporate/citizenship/protecting_consumers/subprime.html. Credit problems may be based on "sketchy credit or stretched finances." Rich Brooks and Constance Mitchell Ford, *The United States of Subprime; Data Show Bad Loans Permeate the Nation; Pain Could Last Years,* Wall St. Journal, Oct. 11, 2007, at p. A1 (reporting that between 2004 and 2006 "more than 2,500 banks, thrifts, credit unions and mortgage companies made a combined $1.5 trillion in high-interest-rate loans," and that such loans were made, not only in "poorer communities," but also in "middle-class and wealthier communities").

56. The Mortgage Bankers Association reported that foreclosures and late payments in the first quarter of 2008 were at record levels. Mortgage Bankers Assn., Delinquencies and Foreclosures Increase

many renters—a segment of the housing market not generally included in discussions of residential foreclosures—were directly affected by the crisis.[57] Suddenly,[58] renters were faced with losing their homes because the people involved in the foreclosure process—defaulting owner-landlords, lenders and foreclosure-sale purchasers—usually were not interested in the plight of affected tenants.[59] In some cases, particularly early in the foreclosure process, defaulting landlords abandoned their building and stopped paying for utilities and other services.[60] In other cases, once the foreclosure process was completed,[61] renters

---

IN LATEST MBA NATIONAL DELINQUENCY SURVEY, June 5, 2008, at p. 1, *available at* http://www.mortgagebankers.org/NewsandMedia/PressCenter/62936.htm. Subprime adjustable rate mortgages ("ARMs") accounted for 39 percent of new foreclosures, even though they made up only 6 percent of outstanding loans. *Id.* Increases in mortgage payments ("resets") of subprime ARMs peaked nationally in June, 2008 at 7.61 percent of outstanding loans. Renae Merle, *Resets Peaking on Subprime Loans,* WASH. POST, July 1, 2008, at p. D1. RealtyTrac®, a self-styled California "online foreclosure marketplace," reported in July 2008 that foreclosure filings on 739,714 properties during the second quarter in 2008 represented an increase of over 120 percent from the second quarter in 2007, and that "one in every 171 U.S. households received a foreclosure filing during the quarter," with Nevada, California, Florida, Ohio, Arizona, and Michigan leading the way. REALTYTRAC®, FORECLOSURE ACTIVITY UP 14 PERCENT IN SECOND QUARTER (July 25, 2008), *available at* http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID. Some estimate the total foreclosures in 2008 could be as high as 2.5 million. Gretchen Morgenson, *Big Rescues Can Work, Just Ask New York,* N.Y. TIMES, May 11, 2008, at BU 1; Zachary Gorchow, *Foreclosure Crisis to Pinch Everyone, Mayors' Report Says,* DETROIT FREE PRESS, Nov. 27, 2007, *available at* http://www.freep.com.

57. *See, e.g.,* CHRISTOPHER L. FOOTE, KRISTOPHER GERARDI, LORENZO GOETTE AND PAUL S. WILLEN, SUBPRIME FACTS: WHAT (WE THINK) WE KNOW ABOUT THE SUBPRIME CRISIS AND WHAT WE DON'T 35 (May 30, 2008) ("An additional externality that often accompanies a multi-family foreclosure is the eviction of tenants who rent apartments there"), *available at* http://www.bos.frb.org/economic/ppdp/2008/ppdp0802.htm (last visited June 10, 2008); Rachel L. Swarns, *supra* note 43; *New England Foreclosure Study Estimates 45 Percent of Units in Four States are Renter-Occupied,* HOUS. & DEV. RPTR, Vol. 36, No. CD-10 [Current Dev.], May 19, 2008, at p. 297, reporting on study by the National Low Income Housing Coalition (NLIHC); Jeni Senter, *Renters Now Feel the Pinch of Foreclosure Pinch,* SANTA ROSA PRESS GAZETTE (Florida), May 23, 2008, *available at* http://www.srpressgazette.com; Hubble Smith, *Housing Slump: No Notice, No Home: More Renters Left Suddenly Homeless when Homeowners Don't Pay Mortgage,* LAS VEGAS REVIEW-J., Mar. 16, 2008, *available at* http://www.reviewjournal.com; Cynthia Osterman, *Evicted US Tenants Go from Renter to Homeless Shelter*, BRUNEI TIMES, Feb. 15, 2008, *available at* http://www.bt.com.bn/en/en/focus/2008/02/15evicted_us_tenants_go_from_renter_to_homeless_shelter; Tamara E. Holmes, *Foreclosure Can Leave Renters Homeless,* BANKRATE.COM, Nov. 9, 2007, *available at* http://www.bankrate.com; Steve Brandt and Warren Wolfe, *Oct. 29: Wave of Foreclosures Hits Renters*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, Nov. 5, 2007; Thelma Gutierrez and Wayne Drash, *Man Pays $30K in Rent, Faces Eviction*, CNN, May 28, 2008, *available at* http://www.cnn.com/2008/LIVING/wayoflife/05/28/renters.booted/index.html.

58. *See, e.g.,* Tim Logan, *Renters Often Become the Forgotten Victims*, ST. LOUIS POST-DISPATCH, June 20, 2008, at p. B1 (reporting that lawyers with Legal Services of Eastern Missouri have clients who first learn of the foreclosure process by receiving a notice of eviction following the foreclosure proceedings).

59. Because mortgage loans usually will have priority over residential leases, the foreclosure process, governed by state law, generally is not protective of residential renters, who tend to have short-term leases.

60. Elizabeth A. Harris, *Even Renters Aren't Safe,* N.Y. TIMES, Apr. 13, 2008, *available at* http://www.nytimes.com/2008/04/13/realestate/13cover.html (reporting renters being forced to leave because of utility cut-offs); Osterman, *supra* note 57 (reporting that one tenant, a teacher, "endured months with no lights or working toilets" after foreclosure against his landlord's property).

faced eviction because banks and/or foreclosure sale purchasers desired to start fresh.[62] While the foreclosure process affects homeowners and renters with all levels of income,[63] low-income renters "in many ways . . . are the most vulnerable—and the least to blame when they get tossed out."[64]

To make matters worse, the rise in foreclosures of owner-occupied properties forced an increasing number of defaulting homeowners to seek rental housing in a market with a "limited supply of affordable housing."[65] Many of these homeowners, particularly in the minority and immigrant communities, previously had been "renter households with limited resources" who had been "encouraged . . . to make the switch to home owning."[66] The losers in this competition for rental housing, either the renters whose landlord-owners lost control of their units through foreclosure, or the homeowners who could not afford their mortgage payments, could well become homeless.[67]

A multi-year housing boom, driven by low interest rates and constantly

---

61. Foreclosure is governed by state law, which establishes a procedure to enable lenders to recover property from defaulting borrowers through a public sale process. States authorize two different methods, judicial foreclosure, *see, e.g*., 735 ILCS § 5/15-1501 et seq, in which the foreclosure process requires a judicial hearing and power of sale foreclosure, *see, e.g*., RSMo §§ 443.290–443.410, in which a trustee can offer mortgaged property to the highest bidder at a public sale after giving 20 days public notice. RealtyTrac® organizes its reports of documents filed in foreclosure actions into three categories: "Default – Notice of Default (NOD) and Lis Pendens (LIS); Auction – Notice of Trustee Sale and Notice of Foreclosure Sale (NTS and NFS); and Real Estate Owned, or REO properties (that have been foreclosed upon and repurchased by a bank)." RealtyTrac®, *supra* note 56, at 2.

62. Senter, *supra* note 57 (quoting commercial real estate attorney in Seattle that residential leases "rarely" contain agreements with lenders giving tenants priority rights enabling them to remain in possession after foreclosure).

63. Retired television personality Ed McMahon, 85, faced foreclosure on his multi-million dollar Beverly Hills estate. Mireya Navarro, *Ed McMahon's 90210 Mortgage Crisis,* N.Y. TIMES, June 15, 2008, at ST 2; James R. Hagerty and Glenn R. Simpson**,** *Ed McMahon May Lose Beverly Hills Home,* WALL ST. J., June 4, 2008, at A3. *See also* Gutierrez and Drash, *supra* note 57 (reporting that an owner of an auto sales company paying over $4000/month rent in an upper-middle class "enclave" and a single mother on fixed income both were threatened with loss of their homes through foreclosures against their landlords).

64. Comments of Rev. John Estrem, CEO of Catholic Charities, Minneapolis-St. Paul, as reported by Brandt and Wolfe, *supra* note 57.

65. HARV. JOINT CTR. FOR HOUS. STUDIES, AMERICA'S RENTAL HOUSING: THE KEY TO A BALANCED NATIONAL POLICY 2 (2008).

66. *Id*. at 5-6. In 2002, President George W. Bush announced an ambitious goal of increasing homeownership opportunities for low-income households. PRES. GEORGE W. BUSH, A HOME OF YOUR OWN: EXPANDING OPPORTUNITIES FOR ALL AMERICANS (2002), *available at* http://www.whitehouse.gov/infocus/homeownership/homeownership-policy-bookwhole.pdf. *See also* U.S. DEP'T OF HOUS. & URB. DEV., BLUEPRINT FOR THE AMERICAN DREAM (2002), *available at* http://www.hud.gov/news/releasedocs/blueprint.pdf. See Paulette Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions,* FORDHAM URB. L. J. 413 (2004) for a generally supportive analysis of homeownership initiatives.

67. BOB ERLENBUSCH, KELLY O'CONNOR, SHERRIE DOWNING & SUE WATLOV PHILLIPS, FORECLOSURE TO HOMELESSNESS: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS 4 (2008) ("Nearly forgotten in this crisis are the thousands of homeowners and renters who have become homeless once their equity is exhausted"); Manny Fernandez, *The Neediest Cases: Helping to Keep Homelessness at Bay as Foreclosures Hit More Families,* N.Y. TIMES, Feb. 4, 2008, *available at* http://www.nytimes.com/2008/02/04/nyregion/04neediest.html.

increasing housing prices, peaked in 2005.[68] Many of the loans fueling this boom were secured by non-traditional means such as subprime adjustable rate mortgages ("ARM"), which begin with low "teaser" rates for a year or two, but then adjust upwards by one or more points on a regular basis, until reaching a peak several points above the initial rate.[69] Defaults leading to foreclosures began occurring in significant numbers when borrowers could not afford the new monthly payments triggered by the higher interest rates.[70] The problem, serious in late 2006 and early 2007,[71] then ballooned into a crisis in 2008, causing the Treasury Department and the Federal Reserve to take emergency steps[72] to protect Fannie Mae[73] and Freddie Mac,[74] also known as Government-Sponsored Enterprises ("GSEs"),[75] who between them "own or guarantee about half of the country's $12 trillion in mortgage debt."[76]

During that time, Congress and the Bush Administration struggled to reach

---

68. HARV. JOINT CTR. FOR HOUSING STUDIES, THE STATE OF THE NATION'S HOUSING 2008, *supra* note 54, at 6, 17 ("price appreciation showed signs of weakening in 2005," "the homeownership rate began to retreat in 2005 and 2006 and then dropped more steeply in 2007"); Alec Klein and Zachary A. Goldfarb, *The Bubble: How Homeowners, Speculators and Wall Street Dealmakers Rode a Wave of Easy Money with Crippling Consequences,* WASH. POST, June 15, 2008, at p. A1 (quoting a loan officer about a lavish party hosted by a mortgage company in December, 2005: "It was the peak. It was the embodiment of business success.").

69. A mortgage loan is said to be non-traditional if it is underwritten less carefully than the norm, e.g., incomplete verification of income or employment status, or if it has features different from a standard fixed-rate, self-amortizing loan, a "fixed-rate, short-term mortgage with a balloon payment, or a "simple" ARM, defined as one "having a set of rules that determine the interest rate used to calculate *every* payment based on an index, a margin, an agreed-upon frequency of adjustment, a per-period cap, and a lifetime cap." FREDERICK J. EGGERS AND DONALD BRADLEY, THE AMERICAN HOUSING SURVEY AND NON-TRADITIONAL MORTGAGE PRODUCTS 10-11 (2007).

70. See *infra* notes 131-145 and accompanying text.

71. ELLEN SCHLOEMER, WEI LI, KEITH ERNST & KATHLEEN KEEST, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 11-22 (Center for Responsible Lending, Dec. 2006 (estimating that "2.2 million U.S. households [who entered into subprime mortgage loan transactions between 1998 and 2006] will lose their home to foreclosure" and that "one in five" subprime loans originating in 2005 and 2006 will foreclose)); Brooks and Ford, *supra* note 55 ("As America's mortgage markets began unraveling this year [2007]").

72. Stephen Labaton, *Treasury Unveils Vast Plan to Save Mortgage Giants,* N.Y. TIMES, July 14, 2008, at p. A1; Neil Irwin and Jeffrey H. Birnbaum, *U.S. Unveils Plan to Aid Mortgage Giants,* WASH. POST, July 14, 2008, at p. A1.

73. Fannie Mae was authorized to purchase qualified residential mortgage loans from originating lending institutions by the National Housing Act Amendments of 1938, Pub. L. No. 424, 52 Stat. 8, 23, 24 (codified as amended at 12 U.S.C. § 1716 et seq. (2006)).

74. Freddie Mac received similar authorization by the Federal Home Loan Mortgage Corporation Act of 1970, Title III, Pub. L. No. 91-351, 84 Stat. 451 (codified as amended at 12 U.S.C. §§ 1421-1449 (2006)).

75. The term, Government-Sponsored Enterprise, was coined to denote the fact that the two agencies are corporations chartered by the federal government but owned by private investors who hold stock in the entities.

76. Julie Creswell, *Long Protected by Washington, Fannie and Freddie Ballooned,* N.Y. TIMES, July 12, 2008, at p. A1.

agreement on an appropriate response. Numerous bills were filed and debated[77] and several program initiatives were announced by Federal agencies.[78] But achieving consensus on a program that would "rescue the needy but not the reckless or greedy" proved to be very difficult.[79]

Not surprisingly, most of the attention of policy makers and analysts has been on the impact the subprime mortgage crisis has had on millions of American homeowners and their communities, as well as its effect on financial markets and the overall economy.[80] But it also has exacerbated the housing problems of low-income renters. One side effect of the sharp increase in residential mortgage foreclosures is additional pressure on residential rental markets, with low-income households facing both increased competition for rental units from previous homeowners who have lost their homes through foreclosure[81] and eviction from current rental units (or loss of services such as heat and water) because of

---

77. *See e.g.,* H.R. 3221 (comprehensive mortgage foreclosure relief authorizing $300 billion in refinancing loans by FHA), passed by the House on May 8, 2008, and incorporating H.R. 1427 (government sponsored enterprise ("GSE") reform), H.R. 1852 (FHA modernization), portions of H.R. 5720 relating to the low-income housing tax credit and tax-exempt housing bonds, as well as H.R. 5579 (encouraging workout plans or loan modifications in certain circumstances) and H.R. 5830 (FHA refinancing); H.R. 5818, also passed by the House on May 8 ($15 billion in loans and grants to states and localities for acquisition and renovation of vacant homes whose mortgages have been foreclosed); S. 2523 (National Affordable Housing Trust Fund Act). The House-passed legislation is discussed in Barry G. Jacobs, *House Passes Comprehensive Mortgage Foreclosure Relief Bill,* Hous. & Dev. Rptr, *supra* note 57, at 290.

78. *See, e.g.,* Lori Montgomery & David Cho, *Bush Readies Mortgage Aid Plan,* Wash. Post, Mar. 29, 2008, at p. A1. *See also, Fannie Mae Launches Initiatives To Address Mortgage Problems,* Hous. & Dev. Rptr, *supra* note 57, at 309; *HOPE NOW Alliance Reports Progress in Helping Homeowners Struggling with Mortgage Problems, Id.* Feb. 4, 2008, at 81. Two pieces of legislation were enacted in late 2007 and early 2008: the Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. 110-142, 121 Stat. 1803, codified at 26 U.S.C. § 108, eliminating tax liability for people who sell their homes for less than they owe ("short sales") and temporary increase of loan limits for mortgages eligible to be purchased by Fannie Mae and Freddie Mac from $417,000 to $730,000 contained in the economic stimulus package, Section 201, Economic Stimulus Act of 2008, Pub. L. 110-185, 122 Stat 613, 619-621 (for mortgages originated between July 1, 2007 and December 31, 2008).

79. David M. Herszenhorn and Vikas Bajaj, *The Tricky Task Of Offering Aid To Homeowners*, N.Y. Times, Apr. 6, 2008, at pp. A1, A17. One study concluded that "[a]s much as 70 percent of recent early payment defaults had fraudulent misrepresentations on their original loan applications." Tyler Cowen, *So We Thought, But Then Again . . . ,* N.Y. Times, Jan. 13, 2008, at BU 6 (discussing a study of more than three million loans between 1997 and 2006, Occupancy Fraud and the Impact to the Mortgage Industry (2008) by BasePoint Analytics, a lender consulting firm). The opening of Senate debate on a Banking Committee compromise bill, discussed *infra,* was met with the threat of a Presidential veto. Lori Montgomery, *Veto Threatened for Housing Bill: White House Objects to Funding Plan for FHA Program,* Wash. Post, June 20, 2008, at p. D2.

80. The foreclosure crisis has been called "[t]he collapse of the bubble in the U. S. housing market," Dean Baker, Danilo Pelletiere and Hye Jin Rho, The Cost of Maintaining Ownership in the Current Crisis 2 (2008), a "financial time bomb," Nelson D. Schwartz and Vikas Bajaj, *Credit Time Bomb Ticked, But Few Heard,* N. Y. Times, Aug. 19, 2007, at A1, and a "tsunami of predatory lenders preying on the unsuspecting, the misinformed and the overeager," Tim McKenzie, *The Case for Plan B*, Shelterforce, Fall 2007, at 36, 37.

81. Harvard Joint Ctr. for Hous. Studies, *supra* note 65.

foreclosure actions taken against their landlords.[82]

Massive foreclosures of mortgages on both single-family and multi-family residences in turn threaten many neighborhoods, particularly those with high concentrations of low-income and/or minority households.[83] As a Brookings Institute report noted, local real estate markets, particularly in middle- and upper-income neighborhoods, usually can absorb an occasional foreclosure. But "market demand is insufficient to absorb" large scale foreclosures in lower-income neighborhoods, often resulting in abandonment or purchase and "flipping" by a speculator.[84] Abandoned houses and apartments can have a deleterious effect on property values of neighboring units, and can become fire hazards and sources for criminal activity.[85]

B. Effect of Changes in Traditional Residential Mortgage Practice

The subprime mortgage/foreclosure crisis is the product of a number of factors, including a breakdown in the loan/investment analysis process[86] and sharp increases in the cost of housing.[87] But three changes in traditional

---

82. For reports of this phenomenon, *see* Harris, *supra* note 60; Jeni Senter, *Renters Now Feel the Pinch of Foreclosure Pinch,* SANTA ROSA PRESS GAZETTE (Florida), May 23, 2008, *available at* http://www.srpressgazette.com; Tamara E. Holmes, *Foreclosure Can Leave Renters Homeless,* BANKRATE.COM, Nov. 9, 2007, *available at* http://www.bankrate.com; Steve Brandt and Warren Wolfe, *Oct. 29: Wave of Foreclosures Hits Renters*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, Nov. 5, 2007, *available at* http://www.startribune.com/business/11245186.html; Thelma Gutierrex and Wayne Drash, *Man Pays $30K in Rent, Faces Eviction*, CNN, May 28, 2008, *available at* http://www.cnn.com/2008/LIVING/wayoflife/05/28/renters.booted/index.html. *See also* ERLENBUSCH ET AL., *supra* note 67 (expressing concern that large numbers of homeowners and renters face danger of becoming homeless because of foreclosure).

83. *See, e.g.,* Keith E. Wardrip & Danilo Pelletiere, *Neighborhood Poverty and Tenure Characteristics and the Incidence of Foreclosures in New England* 3 (June 17, 2008) (Nat'l Low Income Hous. Coal., Research Note #08-02, June 17, 2008), *available at* www.nlihc.org/doc/RN-08-02-Final.pdf ("The real foreclosure 'hot spots' are neighborhoods with high levels of poverty and average-to-high levels of renter-occupied housing"); REBUILD OHIO AND COMMUNITY RESEARCH PARTNERS, $60 MILLION AND COUNTING: THE COST OF VACANT AND ABANDONED PROPERTIES TO EIGHT OHIO CITIES (2008), *available at* www.greaterohio.org/rebuildohio/ROPolicyrecsfinal_nonembargoed.pdf; *Neighborhoods Bear the Brunt,* WASH. POST, June 30, 2008, at A2 (reporting that a study of subprime mortgages in New York City by the NYU Center for Real Estate and Urban Policy found that the 10 neighborhoods with the highest incidence of subprime mortgages – nearly half of the mortgages issued in those neighborhoods – were predominantly minority neighborhoods).

84. ALAN MALLACH, TACKLING THE MORTGAGE CRISIS: 10 ACTION STEPS FOR STATE GOVERNMENT 6 (2008).

85. *Id.* (citing studies from Philadelphia and cities in Ohio). *See also* WILLIAM C. APGAR and MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM (2005), prepared for the Homeownership Preservation Foundation, www.hpfonline.org (documenting costs to municipalities from foreclosures, using Chicago as an example, that can exceed $30,000 per property).

86. Schwartz & Bajaj, *supra* note 80.

87. In a comparison of the costs of owning and renting in 20 metropolitan areas, researchers for the Center for Economic and Policy Research (CEPR) and NLIHC found that, while ownership and rental costs were roughly in balance in several cities such as Atlanta, Cleveland, Detroit and Houston, coastal

residential mortgage practice stand out as influencing, if not causing, the crisis: 1) greater use of alternative mortgage instruments such as adjustable rate mortgages,[88] 2) the securitization of mortgages[89] and 3) a willingness to lend to persons with poor credit (the "subprime" market).[90]

1. Alternative Mortgage Instruments

The ability of the majority of American families to become homeowners was made possible in great part by the development of a "standard" residential note and mortgage in which the essential terms (interest rate, down payment amount, monthly payment, length of the note and mortgage) were fixed at the beginning of the relationship between borrower and lender and remained so for the duration of the loan.[91] This relationship, called a "level payment, self-amortizing" loan,[92] was made possible by the Depression-era creation of the federal mortgage insurance program administered by the Federal Housing Administration ("FHA") in 1934[93] and the establishment of a secondary mortgage market by Fannie Mae in 1938,[94] the Government National Mortgage Association (Ginnie Mae) in 1968[95] and Freddie Mac in 1970.[96] These federal initiatives had major influences

---

cities such as Boston, Los Angeles, New York, San Diego, San Francisco, Seattle and Washington, D.C., ownership costs were double or close to triple rental costs. BAKER ET AL., *supra* note 80, at 4.

88. For a discussion of the development of alternative mortgage instruments, see Helen Jean Walleser, *Balancing the Interest: The Changing Complexion of Home Mortgage Financing in America*, 31 DRAKE. L. REV. 1 (1981); Stanley L. Iezman, *Alternative Mortgage Instruments: Their Effect on Residential Financing*, 10 REAL EST. L. J. 3 (1981); Douglas W. Kmiec, *Shared Appreciation Mortgages: A Step Toward Making Housing a Bad Investment,* 10 REAL EST. L. J. 302 (1982); Stephen Cowen & Susan E. Foley, *New Trends in Residential Mortgage Finance*, 13 REAL PROP. PROB. & TR. J. 1075 (1978).

89. Mortgage securitization is discussed in Michael Schill, *The Impact of the Capital Markets on Real Estate Law and Practice,* 32 J. MARSHALL L. REV. 269, 269-79 (1999), and Robin Malloy, *The Secondary Mortgage Market – A Catalyst for Change in Real Estate Transactions*, 39 SOUTHWESTERN L. J. 991, 1003-1010 (1986).

90. *See generally* Allen Fishbein & Harold Bunce, *Subprime Market Growth and Predatory Lending: Housing Policy in the New Millennium*, *in* HOUSING POLICY IN THE NEW MILLENNIUM 273 (Susan M. Watcher & R. Leo Penne eds., 2001), *available at* http://www.huduser.org/Publications/pdf/brd/13Fishbein.pdf.

91. For a discussion of this "credit quartet," *see* CURTIS J. BERGER and QUINTIN JOHNSTONE, LAND TRANSFER AND FINANCE 177-228 (4th ed. 1993).

92. *Id*. at 226-27.

93. FHA was created by and received its authority from the National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. § 1701-50 (2003)).

94. Fannie Mae was authorized to purchase federally-insured residential mortgages from banks and savings and loan associations and to resell them to other investors by the National Housing Act Amendments of 1938, Pub. L. No. 75-424, 52 Stat. 8 (codified as amended at 12 U.S.C. § 1716 (2003)). The Reconstruction Finance Corporation ("RFC"), established by Congress in 1935 to help the country work itself out of the Depression, developed a successful program to purchase FHA-insured, and later VA-guaranteed, mortgages. This program demonstrated that a secondary market for residential mortgages was feasible. Malloy, *supra* note 89, at 992-93.

95. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, Title VIII, § 801, 82 Stat. 536 (codified at 12 U.S.C. § 1716b (2003)). Ginnie Mae was organized as a government agency, rather than a

on homeownership and the growth of suburbia after World War II.[97]

The standard or "traditional" mortgage instrument "is a long-term asset with both a fixed principal and interest rate."[98] It "was designed to function in a non-inflationary economy"[99] and did so quite well until the inflationary decade of the 1970s. During the 1970s and 1980s, double digit inflation caused serious problems for residential mortgage lenders as well as borrowers.[100] Because the standard mortgage instrument featured a fixed interest rate and a lengthy term (20 to 30 years), mortgage lenders found themselves locked into mortgages with relatively low, single digit interest rates at a time when they had to pay double digit rates to obtain additional funds for making additional loans.[101] Lenders responded by charging much higher interest rates for new or refinanced loans.[102]

Many potential home buyers, particularly first-time buyers, were put off by the resulting high interest rates. Young professionals and other upwardly mobile persons could look forward to increases in income as they acquired experience and skills, but had increasing difficulty affording the high monthly payments demanded by double digit interest rates in the early stages of their careers.[103]

In response to these pressures, a number of "convenience-related" and "inflation-related" alternative mortgage instruments were developed.[104] "Convenience-related" mortgage products, such as the graduated payment mortgage

---

government-sponsored enterprise like Fannie Mae and Freddie Mac, to buy federally-subsidized loans such as those authorized by the 235 and 236 programs. *Id*. at §§ 1720-21.

96. Freddie Mac was created and given similar authority to purchase and sell conventional loans by the Federal Home Loan Mortgage Corporation Act of 1970, Pub. L. No. 91-351, Title III, 84 Stat. 451 (codified as amended at 12 U.S.C. §§ 1421-49 (2003)).

97. Christopher Leinberger argues that the "suburban dream began . . . at the New York World's Fair of 1939 and '40," where "perhaps 10 percent of the American population" saw the exhibit, "'Highways and Horizons,' better known as 'Futurama'" that featured "a scale model, covering an area about the size of a football field, that showed what American cities and towns might look like in 1960." Christopher B. Leinberger, *The Next Slum?* THE ATLANTIC, Mar. 2008, at 70, 71.

98. Walleser, *supra* note 88, at 3.

99. *Id*. (citing Donald M. Kaplan, *The Alternative Mortgage Instruments Research Study: A Progress Report,* 9 FED. HOME LOAN BANK BD. J. 6, 8 (Oct. 1976)).

100. Iezman, *supra* note 88, at 3 (reporting mortgage interest rates in 1981 in the 14-15% range).

101. A bank president explained the lender's dilemma to a law school real estate development class by likening the lender to a seller of shoes, the only difference being the product the lender was selling (money). The shoe vendor has to buy the shoes she sells from a shoe manufacturer, and the lender has to buy the money she lends from other financial institutions and investors. If she has to pay more for new money than she is receiving from outstanding loans, she will not be able to continue lending for very long. Because it is very difficult to forecast what the cost of money will be in five years, let alone 20 or 30 years, lenders have strong incentives to move away from long-term fixed interest rate loans. Comments of John Dubinsky, Saint Louis University School of Law, Feb. 1976.

102. The author recalls accepting a second mortgage loan in 1981 with an interest rate of 20% to pay for education and home improvement expenses rather than refinancing his first mortgage at 15-16% in the hopes that rates would drop soon. Fortunately they did the following year and refinancing became feasible.

103. *See, e.g.*, Glenn H. Miller, *The Affordability of Home Ownership in the 1970s,* ECONOMIC REVIEW, Sept.-Oct. 1980, at 17, *available at* http://www.kansascityfed.org/PUBLICATE/ECONREV/EconRevArchive/1980/3-4q80mill.pdf.

104. Walleser, *supra* note 88, at 7.

(GPM), featuring lower monthly payments initially and increases later, and the combination GPM/variable rate mortgage (VRM), in which both monthly payments and interest rates are lower initially but increase later, were designed for the "convenience" of the borrower who could anticipate regular increases in income. "Inflation-related" products, such as the adjustable rate mortgage (ARM), in which the interest rate will "adjust" periodically as an index to which it is linked, were designed to shift to the buyer the risk that interest rates will increase.[105] After several years of product testing and resolving a number of regulatory issues, including questions of authority to make such loans[106] and whether interest rate increases would violate state usury laws,[107] ARMs became popular means of financing residential transactions, particularly for families buying their first home.[108] They became a fixture in the subprime mortgage market, making up a large share of the so-called "nontraditional mortgage market."[109]

2. Mortgage Securitization

A second change in the traditional residential mortgage market that had a profound influence on the subprime mortgage/foreclosure crisis was the growth of the concept of mortgage securitization. The growth of the secondary mortgage market in the 1970s prompted interest in mortgage securitization, defined by David Richards, former chair of the American Bar Association's Section of Real Property, Probate and Trust Law, as

> the financing of real estate through the nontraditional methods of stocks and bonds—known collectively as "mortgage-backed securities" ("MBS")—in order to expand the available lending community and to use more efficient (cheaper) primary and secondary capital sources.[110]

---

105. *Id*. at 7-8.

106. Cowan and Foley, *supra* note 88, at 1077 (citing KAPLAN, ed., THE ALTERNATIVE MORTGAGE INSTRUMENTS RESEARCH STUDY (AMIRS), FEDERAL HOME LOAN BANK BOARD (1977)).

107. *Id*. at 1082.

108. Walleser, *supra* note 88, at 18, describes the potential ARM market as follows:

> The hypothetical family an ARM would most attract . . . would have a present income disproportionately lower than their anticipated future income. For example, one family wage earner might be outside the labor force for educational reasons or because he had chosen to remain home with young children. Such a family could expect a rise in earning capacity that would offset future interest increases.

109. "Traditional" mortgages, also known as "level payment" mortgages, are structured so that the monthly payment remains the same for the life of the loan. But in a nontraditional mortgage, "the borrower faces two payment regimes: an initial regime with low payments and a second regime where payments increase to fully amortize the loan and to compensate the lender for the cost of capital and riskiness of the loan." *Subprime Mortgage Woes May Spur Changes in AHS Data,* RESEARCH WORKS, Mar. 2008, at 4 (quoting *Inside Mortgage Finance*).

110. David Alan Richards, *"Gradable and Tradable": The Securitization of Commercial Real Estate Mortgages*, 16 REAL EST. L.J. 99, 99 (1987).

Once Fannie Mae and Freddie Mac received authorization to purchase conventional loans, Fannie in 1968[111] and Freddie in 1970,[112] the secondary mortgage market business picked up considerably.[113] As volume increased, a "let me have a piece of the Rock"[114] mentality took hold and mortgage securitization was born.[115]

Mortgage securitization was a logical extension of legendary land developer William Zeckendorf's "Hawaiian Technique,"[116] by which he created a variety of opportunities for investment in real estate through the sale of fractional interests in real estate ventures such as leases, sub-leases and sub-sub-leases, to which he attached mortgages. In this way, he could offer investment opportunities to multiple parties who would obtain property interests, such as a ground lease, a mortgage on the ground lease, a building sub-lease, a mortgage on that interest, a space sub-sub-lease and a mortgage on that interest. The resulting investment risks approximated the investment risks of debentures, preferred stock and common stock, depending on where purchasers' interests put them in line to receive fruits of the venture.[117]

Residential mortgage securitization applies the same concept of fractional property interests to residential mortgages which have been accumulated by an intermediary into packages or pools of 100, 1000, or 10,000 mortgages from all over the country. The mortgage pools are sold to investment entities or GSEs, who finance the purchase of these pools by selling "mortgage-backed securities," which are "slices" (fractional shares) of a pool that are backed by mortgages in the pool.[118] Michael Schill summarizes the development of mortgage-backed securities:

> The first generation of mortgage-backed securities were pass-through certificates that entitled the holders to a proportionate share of interest and principal as these amounts were paid by mortgagors. Recognizing that investors have

---

111. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, Title VIII, § 801, 82 Stat. 536 (codified at 12 U.S.C. § 1716b (2003)).

112. Federal Home Loan Mortgage Corporation Act of 1970, Pub. L. No. 91-351, Title III, 84 Stat. 451 (codified as amended at 12 U.S.C. §§ 1421-49 (2003)).

113. *See generally* Malloy, *supra* note 89.

114. A legendary television commercial by Prudential Insurance Company used the Rock of Gibraulter as a symbol of the company's stability and value and offered prospective customers a "piece of the Rock." A Google search produced over 8000 references to the phrase, including a comment by U.S. Rep. Thomas Reynolds (R-N.Y.) that homeownership "gives people an opportunity to build equity – to own a piece of the rock." Ben Rand, *HUD Secretary Visits Greece Homeowner,* ROCHESTER DEMOCRAT AND CHRONICLE, June 13, 2006, *available at* www.housingchoice.org/news%20stories/2006/06132006.htm (last visited July 31, 2008).

115. Richards, *supra* note 110, at 102 (mortgage securitization was "invented in 1970").

116. William Zeckendorf named his idea the Hawaiian Technique because it came to him while he was surf fishing during a vacation in Hawaii. WILLIAM ZECKENDORF with EDWARD MCCREARY, ZECKENDORF 144-148 (1970).

117. *Id.*

118. Richards, *supra* note 110, at 102.

> varying time horizons and tolerances for risk, issuers of mortgage-backed securities subsequently divided the flow of mortgage interest and principal from the pool to create debt instruments of varying maturities and levels of risk. These mortgage-backed securities were initially structured as collateralized mortgage obligations and then, after the Tax Reform Act of 1968, as Real Estate Mortgage Investment Conduits or REMICS.[119]

Once the idea of securitization caught on, residential mortgage-backed securities enjoyed "phenomenal" growth.[120] Schill reports that by 1984, "the three secondary mortgage market agencies together issued $58.6 billion in pass-through securities backed by one-to-four family home conventional mortgages."[121] Less than ten years later, in 1993, the figure had climbed to a $550 billion peak and by 1997, the agencies' origination of $358.3 billion "constitute[ed] more than a 500% increase over the thirteen year period."[122] The Center for Responsible Lending reported that by June 30, 2006, "mortgage-backed securities were the largest segment of the United States bond market, accounting for 23 percent of all bond market debt outstanding."[123] By 2007, "mortgage-related debt" was the "largest segment of the U.S. bond market."[124]

As securitization grew in size and complexity, and more actors got involved, the traditional protections—solid appraisals of property, close analysis of borrowers' income and ability to pay back the amount of principle and interest to which they were committing, and extent of borrowers' commitment to the transaction, as measured by the amount of their investment in the property—tended to be forgotten. A mentality developed that "someone else"—the appraiser, the lender, the government—was minding the store, when in fact no one was in many cases, particularly in the subprime field.[125]

---

119. Schill, *supra* note 89, at 271.

120. *Id*.

121. *Id.*

122. *Id.*

123. Corporate bonds accounted for 20 percent and Treasury debt 16 percent of the market. SCHLOEMER ET AL., *supra* note 71, at 29 (citing U.S. Bond Market Debt, Bond Market Association (June 30, 2006)), *available at* http://www.bondmarkets.com/assets/files/Outstanding%20Level.pdf.

124. PIMCO, Bond Basics: Mortgage-Backed Securities 3 (October 2007), http://www.pimco.com/LeftNav/BondResources/Default.htm (last visited July 31, 2008).

125. Michael M. Grynbaum, *Study Finds Flawed Practices at Ratings Firms*, N.Y. TIMES, July 9, 2008, at C1 (reporting that the Securities and Exchange Commission had concluded that major ratings firms "flouted conflict of interest guidelines and considered their own profits when rating securities"); Charlie Savage, *Government Crackdown on Mortgage Fraud,* N.Y. TIMES, June 20, 2008, *available at* http://www.nytimes.com/2008/06/20/business/20mortgage.html (reporting that a Justice Department sweep, Operation Malicious Mortgage, had resulted in the indictment of over 400 people on charges of mortgage fraud); Aaron Luchetti, *Bond-Rating Shifts Loom in Settlement: N.Y.'s Cuomo Plans Overhaul of How Firms Get Paid*, WALL ST. J., June 4, 2008, at C1(reporting tentative settlement of concerns about ratings of mortgage-related securities); Ruth Simon, *Investors Press Lenders on Bad Loans,* WALL ST. J., May 28, 2008, at C1; Vikas Bajaj, *Inquiry Assails Accounting Firm in Lender's Fall,* N.Y. TIMES, Mar. 27, 2008, at A1; Vikas Bajaj, *In Deal With Cuomo, Mortgage Giants Accept Appraisal Standards,* N.Y. TIMES, Mar. 4, 2008, *available at* http://www.nytimes.com/2008/03/04/business/04loans.html?ref=us.;

One response to the collapse of the subprime mortgage-backed securities market is a European-favored alternative financing mechanism called a "covered bond."[126] The Federal Deposit Insurance Corporation ("FDIC") defines a covered bond as "a recourse debt obligation of an insured depository institution ("IDI") with a (one- to ten-year) term that is secured directly or indirectly by a pool of mortgage loans or AAA-rated mortgage bonds."[127] The European Covered Bond Council ("ECBC") traces covered bonds to the Greek mortgage and Italian and Dutch bonds, with major developments occurring in the 18th and 19th centuries; by 2007 twenty-seven countries had legislation or contracts authorizing issuance of covered bonds.[128]

Common characteristics of covered bonds include 1) issuance by financial institutions "subject to public supervision and regulation," 2) a "cover pool of financial assets" to which bondholders have a priority claim, 3) a continuing obligation of issuers to "maintain sufficient assets in the cover pool," and 4) public or independent body supervision of issuer obligations.[129] Although similar to mortgage-backed securities, covered bonds are believed to provide greater protection because "they stay on a bank's balance sheet and the buyer of the bonds gets double protection:" 1) a "'cover pool'" of mortgages meeting stricter standards, and 2) a commitment by the issuing bank to "step in to ensure bond holders get their interest" if mortgages default.[130]

3. The Subprime Market

The subprime mortgage market consists of borrowers who are perceived to have a higher-risk of default or difficulty in making payments than borrowers in the "lowest-risk or prime" category.[131] A Wall Street Journal analysis of over 130 million home loans made during the 1996-2006 period "reveal[ed] that risky mortgages were made in nearly every corner of the nation, from small towns in the middle of nowhere to inner cities to affluent suburbs."[132] The article identified three groups of subprime borrowers: 1) "investors hoping to strike it rich by

---

Christopher Maag, *Cleveland Sues 21 Lenders Over Subprime Mortgages*, N.Y. TIMES, Jan. 12, 2008, *available at* http:www/nytimes.com/2008/01/12/us/12cleveland.html? (alleging that public nuisances resulted from widespread abandonment of homes facing foreclosure).

126. Deborah Solomon, *U.S. Pushes a European Method to Help Banks Make Home Loans,* WALL ST. J., June 17, 2008, at p. A3.

127. FDIC, FINANCIAL INSTITUTION LETTER, FIL-34-2008, Apr. 30, 2008, *available at* http://www.fdic.gov/news/news/financial/2008/fil08034.pdf.

128. EUROPEAN COVERED BOND COUNCIL, EUROPEAN COVERED BOND FACTBOOK 67-70 (2007).

129. *Id*. at 73.

130. Solomon, *supra* note 126. On July 28, 2008, the Treasury Department released what it termed "best practices" for banks to invest in covered bonds. DEPARTMENT OF THE TREASURY, BEST PRACTICES FOR RESIDENTIAL COVERED BONDS (July 2008), *available at* http://www.treas.gov/offices/domestic-finance/covered-bonds/.

131. AMY CREW CUTTS AND ROBERT VAN ORDER, *On The Economics of Subprime Lending* 10 (Freddie Mac Working Paper #04-01, Jan. 2004).

132. Brooks & Ford, *supra* note 55.

speculating on condominiums," 2) "six-figure income" home buyers responding to "sky-high housing costs" and 3) "lower-income consumers with spotty credit."[133] All were accommodated by "an aggressive home-mortgage industry trying to get people into homes they couldn't afford at a time when home prices were very high."[134]

A study of the economics of subprime lending by Freddie Mac in 2004, before the subprime crisis began, identified six main "stylized facts" of the subprime market:

1. High interest rates.
2. High points and fees.
3. Prevalence of prepayment penalties.
4. Lending based largely on asset value, rather than borrower characteristics, with low loan-to-value (LTV) ratios and high rejection rates.
5. Specialized subprime lenders who cater only to subprime borrowers and who have limited access to secondary mortgage markets.
6. Large rate differences between marginally prime and marginally subprime borrowers.[135]

A HUD-sponsored study of the mortgage finance component[136] of the American Housing Survey ("AHS")[137] distinguished subprime mortgages from non-traditional mortgages, arguing that "subprime" is best reserved for mortgages that present higher risk either because of reduced underwriting, unusual features, or the lower credit worthiness of the borrowers."[138]

Popular non-traditional mortgages, that may or may not also be subprime mortgages, include *interest-only mortgages,* with lower payments for a few years and higher payments for the balance of the loan term, *hybrid ARMs,* featuring a fixed, below-market interest for the first period, then an ARM with higher rates to compensate for the original below-market interest rate, and *option ARMs,* containing "three distinguishing features":

> an initial, below-market interest rate (a buydown); a provision that allows the borrower to determine what payment to make each month (the option); and the ability to add to the outstanding balance by making a payment less than the

133. *Id.*
134. *Id.* (quoting Karl Case, an economics professor at Wellesley College).
135. Cutts and Order, *supra* note 131, at 1-2.
136. Eggers and Bradley, *supra* note 69.
137. The AHS is a "biennial record of the physical characteristics, quality, and condition of the nation's housing stock and of the characteristics of the households in occupied housing units," paid for by HUD and conducted by the Census Bureau. *Id.* at 1.
138. *Id.* at 11.

> amount of the accrued interest (negative amortization). After some initial period, the loan becomes a fully amortizing ARM.[139]

The "distinguishing feature" of these types of loans is the fact that borrowers "face two payment regimes: an initial regime with low payments and a second regime where payments increase," often quite sharply.[140] For example, a 30-year, $100,000 loan with an initial interest rate of 6% for two years and a second interest rate of 8% would have initial monthly payments of approximately $600 per month. A first-time home buyer who qualified for that loan under the conventional standard of 25-30% of income would have an income in the range of $24,000 to $30,000 per year. When the interest rate reset (changed) to 8% two years later, the monthly payment would increase to approximately $730 per month, requiring an income range between $29,000 and $35,000 per year for the loan to remain affordable. The resulting "sticker shock" was too much for many borrowers, and helped fuel the subprime mortgage foreclosure crisis.[141]

Very few borrowers could expect their income to rise by 20% in two years, but HUD and the GSEs looked the other way. In the interest of expanding home ownership to lower income and minority households, HUD continued a practice mandated by Congress in 1992[142] of establishing annual affordable housing goals for Fannie Mae and Freddie Mac to include in their portfolios a percentage of "affordable" mortgage loans to "meet the then-existing unaddressed needs" of low-income and very low-income families.[143] As the subprime market expanded, the GSEs increased their purchases of subprime mortgage-backed securities to a total of $434 billion in the three-year period, 2004 to 2006.[144] Former HUD officials have concluded that the policy of counting subprime loans as "affordable" in order to foster homeownership goals was "a mistake."[145]

---

139. *Id.* at 11-12.

140. *Id.* at 12.

141. In some particularly hard-hit areas, the sharp rise in foreclosures spawned new businesses, such as You Walk Away Services of San Diego, which opened in January 2008 and in less than two months had more than 200 clients in six states. "For $995, [You Walk Away Services] helps people walk away from their homes, ceding them to the banks in foreclosure." John Leland, *Facing Default, Some Walk Out on New Homes,* N.Y. TIMES, Feb. 29, 2008, *available at* http://www.nytimes.com/2008/02/29us/29walks.html.

142. The Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Subpart B, Pub. L. 102-550, §§ 1331-1338, 106 Stat. 3956-3964, codified at 12 U.S.C. §§ 4561-67, established the goal requirements and directed the Secretary of HUD to promulgate them, along with annual reporting requirements.

143. 12 U.S.C. § 4563. Goals for 2005-2008 increasing the percentage of affordable unit mortgages in the GSEs' portfolios from 52% to 56% of their total portfolios were published in 24 CFR Subtitle B, §§ 81.12–81.22 (Apr. 1, 2005 Ed.). FANNIE MAE'S 2007 ANNUAL HOUSING ACTIVITIES REPORT (Mar. 17, 2008), *available at* http://www.hud.gov/offices/hsg/gse/gse.cfm.

144. Carol D. Leonnig, *How HUD Mortgage Policy Fed The Crisis,* WASH. POST, June 10, 2008, at p. A1.

145. *Id.* (quoting William C. Apgar, Jr., a HUD assistant secretary in the Clinton Administration, and Allen Fishbein, his advisor during that period).

III. Housing Finance Regulatory Reform and the New Afordable Housing Trust Fund

As noted earlier,[146] Congress and the Bush Administration struggled throughout 2007 and much of 2008 to determine an appropriate Federal response to the foreclosure crisis. Economists and other commentators warned against too much government intervention,[147] while legislators and advocates debated alternative proposals.[148] The failure of IndyMac Bancorp, one of the largest such failures in U.S. history,[149] and the sharp erosion of confidence in Fannie Mae and Freddie Mac[150] that occurred in July 2008 gave a final push to Congressional and Administration efforts to craft a suitable response**.** The new Housing Trust Fund program was included in that response.

A. Regulatory Reform and Foreclosure Prevention

1. A New Regulatory Agency

The main thrust of regulatory reform efforts is the replacement of HUD's supervisory authority over the GSEs with that of a new independent agency, the Federal Housing Finance Agency (FHFA), with supervisory authority over Fannie Mae, Freddie Mac, the Federal Home Loan Banks and the Office of Finance.[151] The Director of FHFA's

---

146. *See supra* notes 77-85 and accompanying text.

147. *See e.g.,* David Nicklaus, *Congressional Help Could Be Ruin of Fannie and Freddie,* St. Louis Post-Dispatch, Feb. 13, 2008, at B1 (echoing concern of some economists that Congressional expansion of mortgage loan purchase limits for Freddie Mae and Freddie Mac from $417,000 to $730,000 "went too far"). *See supra* note 79.

148. *See e.g.,* Edmund Andrews, *In Washington, Aid to Homeowners Debated,* N.Y. Times, Aug. 28, 2007, *available at* http://www.nytimes.com/2007/08/28/business/28workout.html (reporting that the Bush administration was "reluctant to bail out" undeserving borrowers and Democrats sought to "help lower-income people renegotiate their loans and stay in their homes"); *Foreclosure Crisis May Create Opportunity to Boost Funding for HUD Programs, Ramirez Says,* Hous. & Dev. Rptr CD-8, Apr. 21, 2008, at 230; *Response to Housing Crisis Must Consider Relationship of Local Ownership, Rental Costs, Study Says,* Hous. & Dev. Rptr No. CD-8, Apr. 21, 2008, at 233.

149. Louise Story, *Regulators Seize Mortgage Lender,* N.Y. Times, July 12, 2008, *available at* http://www.nytimes.com/2008/07/12/business/12indymac.html?ref=business&pagewanted=print.

150. Stephen Labaton, *Scramble Led to Rescue Plan on Mortgages,* N.Y. Times, July 15, 2008, *available at* http://www.nytimes.com/2008/07/15/washington/15fannie.html?pagewanted=print.

151. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654, at § 1101 et seq. Less than six weeks after the legislation creating FHFA was enacted, its director, James Lockhart, announced that FHFA had placed Fannie and Freddie into conservatorship, which he described as "a statutory process [12 U.S.C. § 4619] designed to stabilize a troubled institution with the objective of returning the entities to normal business operation." FHFA, as conservator, will operate Fannie and Freddie "until they are stabilized." Federal Housing Finance Agency, Statement of FHFA Director James B. Lockhart, Sept. 7, 2008, *available at* www.ofheo.gov/media/statements/FHFAStatement9708.pdf. In response, the NLHIC noted that, while the statute gave FHFA the authority to "temporarily suspend" Fannie and Freddie's contributions to the new trust funds, *infra* note 187, such an action would not be necessary for some time because contributions were not scheduled to begin until 2010. Nat'l Low

> "principal duties [include ensuring] that the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets (including activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities)."[152]

The Federal Housing Finance Oversight Board (FHFOB) is an advisory board consisting of the secretaries of the Treasury and HUD, the chair of the Securities and Exchange Commission, and the FHFA Director, who serves as chair.[153] The director's responsibilities include establishing "prudential management and operations standards" for the regulated entities,[154] as well as standards for portfolio holdings,[155] risk-based capital requirements,[156] and increasing minimum capital levels when warranted.[157]

2. FHA Mortgage Refinance Insurance

The centerpiece of the foreclosure relief effort is a new FHA program to insure mortgages issued to refinance existing single-family (1- to 4-family residences) mortgages of owner-occupiers in danger of losing their homes.[158] Loans to be eligible for refinancing must have been made on or before December 31, 2007, by borrowers who, as of March 1, 2008, have a mortgage debt to income ratio greater than 35 percent and who certify that they own no other residence and have not intentionally defaulted on the existing mortgage nor falsified information to obtain the mortgage.[159] Refinancing loans may not exceed 90% of the "current appraised value" of the property[160] and must have a single rate of interest "that is fixed for the entire term of the mortgage, [which must] have a maturity of not less than 30 years" from the date of refinancing.[161]

3. Homeowner Counseling

Counseling for homeowners and renters would be emphasized, with grants to

---

INCOME HOUS. COAL., MEMO TO MEMBERS, *The Fannie/Freddie Takeover and the National Housing Trust Fund*, Vol. 13, No. 36, Sept. 12, 2008, at 1.

152. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 112 Stat. 2654, at § 1102 (amending § 1313 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (codified at 12 U.S.C. § 4513)).

153. *Id*. at § 1103.

154. *Id*. at § 1108 (adding new § 1313B).

155. *Id*. at § 1109 (adding new § 1369E).

156. *Id*. at § 1110.

157. *Id*. at § 1111.

158. *Id*. at §§ 1401-1404 (HOPE for Homeowners Act of 2008, adding new section 257 to Title II of the National Housing Act, 12 U.S.C. § 1707 *et seq*.).

159. *Id*. at § 1402(a).

160. *Id*.

161. *Id*.

states and local governments authorized.[162] In addition, state housing finance agencies would receive a temporary increase in housing bond issue authority to enable them to refinance "qualified subprime" loans, defined as "adjustable rate single-family residential mortgage loan[s] made after December 31, 2001, and before January 1, 2008, that the bond issuer determines would be reasonably likely to cause financial hardship to the borrower if not refinanced."[163]

B. Affordable Housing Trust Fund

1. State and Local Housing Trust Funds

For more than 20 years affordable housing advocates, assisted by the Housing Trust Fund Project of the Center for Community Change, have worked to establish dedicated sources of public funds to support affordable housing efforts.[164] Housing Trust Fund Project publications describe housing trust funds as "distinct funds established by city, county or state governments to receive ongoing dedicated sources of public funding."[165] They represent a "change [from] reliance on annual budget allocations" to regular allocations of other public funds such as land recording fees[166] and real estate transfer taxes.[167] According to the Housing Trust Fund Project, 38 states and the District of Columbia, more than 550 cities and counties now operate housing trust funds that annually make available more than $1.6 billion for affordable housing.[168]

2. Initial Efforts to Establish a National Housing Trust Fund

Beginning in the early 1990s, the Housing Trust Fund movement focused on national legislation.[169] Legislative leaders such as Senator John Kerry (D-Mass.) and Rep. Barney Frank (D-Mass.) led unsuccessful efforts to enact National

---

162. *Id.* at §§ 2401-02.

163. *Id.* at § 3021 (amending § 143(k) of the Internal Revenue Code of 1986 by adding new paragraph (12)).

164. The Center for Community Change launched its Housing Trust Fund Project in 1986 to provide information and technical assistance. Center for Community Change, Housing Trust Fund Project, http://www.communitychange.org/our-projects/htf (last visited June 9, 2008).

165. *Id.*

166. *See, e.g.,* MO. REV. STAT. § 59.319.2-3 (2008) ($3.00 of real estate-related documents recording fees devoted to the Missouri housing trust fund).

167. *See, e.g.,* 35 ILL. COMP. STAT. 200/31-10 (2006) (one half of the proceeds from a real estate transfer tax of 50 cents per $500 value on the "privilege of transferring title" devoted to a state housing trust fund).

168. Center for Community Change, *supra* note 164.

169. Laura Schwarz, Comment, *The 2007 National Affordable Housing Trust Fund Act: A National Fund for a National Need,* 17 J. AFF. HOUS. & COMM. DEV. L. 393, 398-399 (forthcoming 2008) (citing Beth Parr, Note, *Almost Home: Policy and Politics in the Campaign for a National Housing Trust Fund*, 11 GEO. J. ON POVERTY L. & POL'Y 321, 331-358 (2004) (summarizing earlier legislative efforts).

Affordable Housing Trust Fund legislation.[170] Despite the efforts of a strong grass roots organization,[171] the bills foundered over concerns about the principle of creating a dedicated fund for affordable housing programs rather than subjecting them to the regular appropriation process and questions about the appropriate sources of funding.[172]

In late 2007, housing trust fund fortunes changed as the House of Representatives approved, by a vote of 264-148, Rep. Frank's bill, the National Affordable Housing Trust Fund Act of 2007 (H.R. 2895).[173] This was the first time that housing trust fund legislation had been approved by one of the two branches of Congress. Funding under the Frank bill was to come from profits generated by FHA insurance premiums as well as a percentage (4.2 basis points/dollar) of the unpaid principal balance of new business purchases by Fannie Mae and Freddie Mac.[174] These sources were expected to provide between $800 million and $1 billion per year for the Housing Trust Fund,[175] which would allocate the funds in working toward the legislative goal of "produc[ing] 1,500,000 units of affordable housing over the next decade."[176] The anticipated annual amounts are quite small in relation to the need and the articulated goal,[177] but sponsors and supporters focused on the principle of a permanent fund dedicated to housing for extremely low- and very low-income households rather than the amount the dedicated source would generate.[178] Once the principle was established, efforts to identify additional sources would commence.

---

170. *See, e.g.,* National Affordable Housing Trust Fund Act of 2007, S. 2523, 110th Cong. (2007); Federal Housing Finance Reform Act of 2007, H.R. 1427, 110th Cong. (2007).

171. The National Housing Trust Fund Campaign is a nationwide coalition of organizations and individuals led by the NLIHC that has supported the idea of a National Affordable Housing Trust Fund since 1991. The coalition claims over 5600 endorsers of the Housing Trust Fund. NLIHC, National Housing Trust Fund, *available at* http://www.nlihc.org/template/page.cfm?id=40 (last visited June 13, 2008).

172. Laura Schwarz, *supra* note 169, at 395, n. 22 (citing Frank Alexander, *Financing Affordable Housing in Georgia: The Possibility of a Dedicated Revenue Source*, 13 GA. ST. U. L. REV. 363, 382 (1997)) (reviewing opposition to dedicated funds for housing).

173. *National Housing Trust Fund: Victory: House Passes National Affordable Housing Trust Fund Act,* MEMO TO MEMBERS, Vol. 12, No. 40 (Nat'l Low Income Housing Coalition, Washington, D.C.), Oct. 12, 2007, at 1.

174. H. R. 2895, 110th Cong. § 2 (2007) (adding new §§ 291 & 292 to Title II of the Cranston-Gonzalex National Affordable Housing Act, 42 U.S.C. § 12721 et seq.); *Id.*

175. *National Housing Trust Fund: Victory: House Passes National Affordable Housing Trust Fund Act*, *supra* note 173, at 3.

176. H.R. REP. NO. 110-362 at p. 15 (2007).

177. *See* Anuradha Kher, *Housing Trust Fund Not Expected to Help Low-Income Housing Until 2010,* MULTI-HOUSING NEWS, Sept. 2, 2008, *available at* http://www.multihousingnews.com/multihousing/content_display/industry-news/e3i9e7f602573f2a54401a2bc79a6b6cf95. Assuming a cost of $150,000 per unit, a fund of $800 million to $1 billion would enable between 5300 and 6500 housing units to be added per year, less that 10% of the articulated annual goal.

178. *See, e.g.*, NAT'L LOW INCOME HOUS. COAL., *Details About the National Housing Trust Fund Campaign, available at* http://www.nhtf.org/detail/article.cfm?article_id=3834#leg. ("The establishment of a National Housing Trust Fund is intended to generate, new, additional dollars for housing . . . .")

3. The 2008 Legislation

Prospects for the trust fund really picked up when the Senate Banking Committee overwhelmingly approved a massive regulatory reform bill with a housing trust fund provision similar to the one approved by the House.[179] Section 131 of the Federal Housing Finance Regulatory Reform Act of 2008, later renumbered as § 1131 of the Housing and Economic Recovery Act, establishes two trust funds, a HUD-managed Housing Trust Fund to support "production, preservation, and rehabilitation" of rental housing and housing for homeownership[180] and a Treasury Secretary-managed Capital Magnet Fund to support a "competitive grant program to attract private capital" for affordable housing and related economic development and community service activities.[181]

The main source of capital for the two trust funds will come from the House formula for Fannie Mae and Freddie Mac, as each agency is required to "set aside an amount equal to 4.2 basis points (0.042%) for each dollar of the unpaid principal balance of its total new business purchases," and allocate 65% of that amount to the Housing Trust fund and 35% to the Capital Magnet Fund,[182] with 25% of the aggregate amount to be deposited in a reserve fund to support FHA mortgage foreclosure relief efforts.[183] While the FHA contribution provision in the House bill[184] was dropped from the final version, both funds also can receive additional monies by appropriation, transfer or credit "under any other provision of law."[185] Although HUD and Treasury have day-to-day fund management responsibilities, the Director of the new oversight agency, FHFA,[186] has supervisory responsibilities to ensure that fund allocations do not cause financial instability, undercapitalization or other interference with the enterprises, and to prohibit the enterprises from passing their costs onto mortgage originators.[187] While Housing Trust Fund and Capital Magnet Fund monies may be used only for production and preservation of housing for low-income households, such

---

179. *Senate Panel Okays Foreclosure Relief Bill with Amendment to Create Housing Trust Fund,* HOUS. & DEV. RPTR, June 2, 2008, at 323; James R. Hagerty & Damian Paletta, *Oversight Compromise Reached on Fannie, Freddie,* WALL ST. J., May 21, 2008, at A3.

180. Housing and Economic Recovery Act of 2008, *supra* note 1, at § 1131 (adding § 1338 to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. § 1301 *et seq.*). Section 131 "builds on the basic tenets of S. 2523," the National Affordable Housing Trust Fund Act of 2007, introduced by Senator John Kerry, D-Mass. Letter from Sheila Crowley, President and CEO, NLIHC, to Sen. Kerry (June 5, 2008).

181. Housing and Economic Recovery Act of 2008, *supra* note 1, at § 1131 (adding § 1339).

182. *Id.*, adding § 1337(a)(1)(A)-(B), (a)(2)(A)-(B). A basis point is 1/100$^{\text{th}}$ of a percent. "The relationship between percentage changes and basis points can be summarized as follows: 1% change = 100 basis points, and 0.01% = 1 basis point." Investopedia, http://www.investopedia.com/terms/b/basispoint.asp.

183. *Id.* at § 1337(e).

184. H. R. 2895, *supra* note 1, at §§ 1338(a)(1), 1339(b).

185. Housing and Economic Recovery Act of 2008, *supra* note 1, at §§ 1338(a)(1) and 1339(b).

186. Housing and Economic Recovery Act of 2008, *supra* note 1.

187. *Id.* at § 1337(b), (c).

funds may not be used to support economic development projects in which eminent domain is used to acquire private property that will be transferred to another private entity.[188]

4. Three Year Phase-In for Full Implementation

Full implementation of the Housing Trust Fund's basic purpose, making grants to states for production and preservation of rental units and increased homeownership opportunities for ELI and VLI households, has been postponed for three years.[189] Funds will be allocated during the first three years of operation in declining percentages to reimburse FHA for costs associated with proposed refinancings to prevent foreclosures.[190] Beginning in 2010, funds not allocated to foreclosure relief efforts will be distributed as grants to states or state-designated agencies such as state housing finance agencies, state housing and community development entities, tribally designated housing entities, "or other qualified instrumentalit[ies]."[191] Distributions will be made in accordance with a needs-based formula to be developed by HUD that includes the sum of four ratios: (i) the ratio of the shortage of standard rental units that are "affordable and available to extremely low-income renter households" in the state to the national shortage of such units, (ii) the ratio of the shortage of similar units for very low-income renter households, (iii) the ratio of extremely low-income renter households living with incomplete kitchen or plumbing facilities, or more than one person per room, or paying more than 50% of income for housing costs, and (iv) the ratio of very low-income renter households living with the same housing concerns, multiplied by the relative cost of construction in the state measured against national costs.[192]

5. State Allocation Plans

States or state-designated entities and grantees will be required to prepare allocation plans that are based on "priority housing needs" and are consistent with established comprehensive housing affordability strategies ("CHAS").[193] Allocation plans must provide that funding priority will be based on "geographic diversity," ability to undertake activities in a "timely manner," extent and

188. *Id*. at § 1337(f).
189. *Id*. at § 1338(a).
190. *Id*. at § 1338(b)(1) (100% in calendar year 2009, 50% in 2010 and 25% in 2011).
191. *Id*. at § 1338(c).
192. *Id*. at § 1338(c)(3)(B).
193. 42 U.S.C § 12705 (2006). "Priority housing needs" are to be identified by state agencies based on statutory and regulatory criteria that emphasize geographic diversity, ability to undertake activities in a timely manner, affordability for extremely low-income families, use of other funding sources, and the merits of a particular proposal. Housing and Economic Recovery Act of 2008, *supra* note 1, §§ 1338(c) (5) (A)(ii), 1338 (g) (2) (D).

duration of affordable rents for ELI families, extent to which other funds will be used and the merits of a particular proposal.[194] "Geographic diversity" is not defined in this section, but in the Capital Magnet Fund section it is defined as including "those areas that meet objective criteria of economic distress as developed by the Secretary of the Treasury, which may include –

> (i) the percentage of low-income families or the extent of poverty;
>
> (ii) the rate of unemployment or underemployment;
>
> (iii) extent of blight and disinvestment;
>
> (iv) projects that target extremely low, very low, and low-income families in or outside a designated economic distress area; or
>
> (v) any other criteria designated by the Secretary of the Treasury."[195]

Presumably the Secretary of Housing and Urban Development will use the same or similar approach in defining "geographic diversity" for the Housing Trust Fund.

Eligible activities include "production, preservation, and rehabilitation," as well as operating costs, of rental housing, with at least 75% of the funds required to benefit ELI families and 25% VLI families, and homeownership opportunities for ELI and VLI first-time homebuyers who have completed a financial education and counseling program from an approved counseling agency,[196] but only 10% of trust fund monies can be used for homeownership support.[197] Eligible grant recipients include both for-profit and nonprofit organizations which demonstrate experience, financial and organizational capacity, ability, familiarity with the requirements of other housing programs, and provide assurances of compliance with program and statutory standards.[198]

C. Capital Magnet Fund

The Capital Magnet Fund established by the Act will utilize its 35% share of the GSE fund allocation[199] for a "competitive grant program to attract private capital for and increase investment in" affordable housing for ELI, VLI and LI families, as well as economic development activities or community service facilities, "which in conjunction with affordable housing activities implement a concerted strategy to stabilize or revitalize a low-income area or underserved

---

194. Housing and Economic Recovery Act of 2008, *supra* note 1, §§ 1338(c)(5)(A), 1338(g)(2)(D).
195. *Id*. at § 1339(h)(2)(B).
196. *Id*. at § 1338(c)(7)(A)-(B) (Section 132 of the Act creates a new financial education and counseling grant program in the Treasury Department).
197. *Id*. at § 1338(c)(10)(A).
198. *Id*. at § 1338(c)(9).
199. Housing and Economic Recovery Act of 2008, *supra* note 1, at § 1337(a)(1)(B)(i).

rural area."[200] Eligible grantees include Treasury certified community development financial institutions and nonprofit affordable housing development or management organizations.[201]

Grants from the fund may be used to provide loan loss reserves, to capitalize revolving loan, affordable housing or economic development loan funds, or to make risk-sharing loans,[202] all of which "shall be reasonably expected" to result in developments that leverage the grant funds by at least a ratio of 10 to 1.[203] As is the case for the Housing Trust Fund, monies from the Capital Magnet Fund are to be distributed under the principle of "geographic diversity."[204]

IV. The Potential of and Challenges to a National Housing Trust Fund

The devastating effect of the subprime mortgage foreclosure crisis on low-income homeowners, renters and their neighborhoods[205] has exposed the weakness of a housing policy centered on homeownership. While homeownership has been at the heart of U.S. housing policy since the creation of FHA and the GSEs in the 1930s, support for low and moderate income renters also was expressed through the public housing,[206] section 221,[207] section 236[208] and section 8[209] programs, as well as the low-income housing tax credit ("LIHTC").[210] But over the years, local controversies, program weaknesses and an increasing tilt toward encouraging homeownership have caused public and financial support for these programs to be sharply reduced. Even in the midst of arguably the most severe housing emergency since the Great Depression,[211] little public concern has been noted for the housing needs of low-income households:

> Thus far, there has been little national outcry about the fact that growing numbers of low-and middle-income families are spending half or more of their incomes on housing, and that so many children are living in unhealthy, unsafe conditions—or, worse yet, forced to make their way on the streets. The grim

---

200. *Id*. at § 1339(c) (citing day care centers, workforce development centers, and health care centers as examples of community service facilities).

201. *Id*. at § 1339(e).

202. *Id*. at § 1339(f).

203. *Id*. at § 1339(h)(3).

204. *Id*. at § 1339(h)(2). *See supra* note 195.

205. *See supra* Part III.

206. *See* United States Housing Act of 1937, 42 U.S.C. § 1437.

207. Pub. L. 560, § 221, tit. I, § 123, 68 Stat. 599 (1954) (codified at 12 U.S.C. § 1715*l* (2000)).

208. Pub. L. 90-448, tit. I, § 236, 82 Stat. 476 (codified at 12 U.S.C. § 1715z-1 (2000)).

209. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 8, 88 Stat. 633, 748 (codified at 42 U.S.C. § 1437f (2000)).

210. Tax Reform Act of 1986, I.R.C. § 42 (2000).

211. Patrick Fitzgibbons, *Bernake Offers Bleak Outlook,* Boston Globe (Sept. 24, 2008) *available at* http://www.boston.com.business/articles/2008/09/24/bernake_offers_bleak_outlook_1222273058/ ("The most severe U.S. housing slump since the Great Depression has sent foreclosures soaring, saddling the global financial system with a mountain of bad debt that has threatened to choke off the supply of credit").

> plight of many veterans has also failed to rally a groundswell of support to tackle these urgent issues.[212]

The long journey of the national Housing Trust Fund legislation attests to the general absence of affordable housing issues on the nation's recent public agenda.

A. *Trust Fund Potential: Restoring a Balanced Housing Policy*

Establishment of a national Housing Trust Fund with a dedicated source of funding pledged by law to support housing for the extremely low-income and very low-income cohorts accomplishes several things. The Federal Government becomes committed to providing predictable and regular financial support for additional housing production, primarily rental and affordable, to the ELI and VLI cohorts. States and local entities that have gained valuable experience through the administration of their own housing programs over the last several decades receive a substantial infusion of new monies. These funds enable qualified state and local entities, both public and private, to respond to the increasingly severe housing needs of families least able to compete effectively for such housing in the private market.

Inclusion of the national Housing Trust Fund in the foreclosure relief legislation acknowledges the important point that renters as well as homeowners are affected by the foreclosure crisis. And while the focus of the Housing Trust Fund should remain on the housing needs of extremely low-income and very low-income renters, the allocation of Housing Trust Fund monies in the first years of operation to foreclosure relief programs represents a reasonable compromise and a recognition that enabling as many homeowners as possible to save their homes is a critical step toward stabilizing the overall housing market.

The subprime mortgage-foreclosure crisis[213] is a wake-up call to policy makers and the public. Homeownership status is justifiably valued, both by individuals and their communities, and merits public support. But the subprime mortgage-foreclosure crisis also is a sobering reminder that homeownership "can be a very risky venture"[214] and is not for everyone.[215] Millions of Americans rent their housing, either because they cannot afford to purchase a house or because

212. HARV. JOINT CTR., *supra* note 65, at 31.

213. See *supra* notes 55-145 and accompanying text. The availability of adjustable rate mortgages, which offered very low introductory interest rates, enabled millions of lower-income households to become homeowners during the housing boom of the 1990s and early 2000s. When those rates began to reset a few years later, mortgage payments increased sharply, in many cases to a level that was unaffordable, leading to default and foreclosure.

214. Rachel Swarns, *supra* note 43, quoting William C. Apgar, a senior scholar at the Joint Center for Housing Studies at Harvard University and a former FHA Commissioner. *See also,* Anne B. Shlay, *supra* note 18, at pp. 516, 527 (arguing that "research on the demand side suggests that the market for low-income homeownership has a limit" and noting that "elevation of low-income homeownership to its current status has deflected political attention away from other policies for affordable housing"). The

they prefer to rent.[216] Most households in the extremely low-income cohort have no choice but to rent,[217] and increasing numbers of them are threatened with the loss of their rental units because of foreclosure actions against their landlords. National housing policy that does not recognize these realities is seriously deficient.

As policy analysts at the Joint Center for Housing Studies at Harvard University have pointed out, the foreclosure crisis provides an opportunity to restore balance in housing policy by refocusing on the potential of rental housing.[218] The Housing Trust Fund could become the vehicle for establishing that balance by providing necessary financial support for state and local affordable housing initiatives, and through that process, helping to regain public confidence in government-sponsored housing efforts. After the initial emphasis on reimbursing FHA for costs associated with refinancings to prevent foreclosure,[219] Housing Trust Fund allocations could be used in a number of creative ways to support rental housing.

For example, financial support could be provided to local not-for-profit "community preservation funds" to enable them to acquire properties that have

---

Center for Responsible Lending report, *supra,* note 71, at pp. 22-29, discusses the "costs and causes of *unsustainable* homeownership" (emphasis added).

215. In some respects, the subprime mortgage foreclosure crisis resembles a home ownership-driven crisis in the early 1970s. The Housing and Urban Development Act of 1968, Act of Aug. 1, 1968, Pub. L. 90-448, 82 Stat. 476, introduced a new program of interest subsidies to banks, Section 235, 12 U.S.C. § 1715z (2000), that enabled qualifying home buyers to be charged only 1% interest on their home loans. This program piggy-backed onto a 1960s extension of FHA mortgage insurance to persons of moderate income, Section 221(d)(2), 12 U.S.C. 1715*l* (d)(2) (2000), which permitted down payments as low as $200. For a variety of reasons, 235/221(d) (2) home loans were made to numerous low-income households. While technically they may have "qualified" for such loans, many did not have the financial resources to handle the costs associated with homeownership such as utilities, insurance, maintenance and taxes. When this income/expense gap became apparent, many homeowners abandoned their houses or lost them to foreclosure, leaving whole neighborhoods vacant. The 235 program and its rental counterpart, Section 236, 12 U.S.C. § 1715z (1) (2000), were suspended by President Nixon in January, 1973 and, while the programs are still on the statute books, they have not played a serious role in housing since then. For a case study focusing on St. Louis, Missouri, see Harry B. Wilson, Jr., Comment, *Exploiting the Home-Buying Poor: A Case Study of Abuse of the National Housing Act,* 17 ST. LOUIS U. L.J. 525 (1973) (citing *inter alia Hearings on Defaults on FHA-Insured Mortgages Before the Legal and Monetary Affairs Subcomm. of the House Comm. on Government Operations,* 92nd Cong., 2d Sess., pt. 2, at 290 (testimony of George Romney, Secretary of Housing and Urban Development, May 3, 1972); *President's Message on the Quality of Life in the Cities*, 119 CONG. REC. H1517 (daily ed. Mar. 8, 1973)).

216. Joint Center, *supra* note 65, at 6 (noting that nearly 37 million households rented in 2005).

217. Shlay, *supra* note 18, at 516-517 (discussing research findings that "homeownership remained unaffordable for about 80 percent of renters, [which] represents 21 million renter families," because they lacked sufficient income and assets).

218. HARV. JOINT CTR., *supra* note 65, at 19 ("now is a good time to develop initiatives that would transform the large inventory of foreclosed properties into the next generation of affordable rental housing").

219. Housing and Economic Recovery Act of 2008, *supra* note 1, at § 1401-1404.

been foreclosed and restore them to local rental markets.[220] Support for such funds could help solidify the momentum expected to be provided by an emergency, one-time $4 billion infusion of Community Development Block Grant ("CDBG") funds earmarked for "the redevelopment of abandoned and foreclosed upon homes and residential properties."[221] Community land trusts ("CLTs") could be assisted in their efforts to acquire land on which affordable rental as well as ownership housing would be constructed and operated.[222] New affordable rental units could become part of transit-oriented development in suburban locations where service-oriented jobs tend to cluster.[223]

Initial funding of the Housing Trust Fund will be modest.[224] The $800 million to $1 billion per year that the Fannie Mae/Freddie Mac fees are expected to provide[225] doesn't even match the $1.6 billion generated annually by the over 600 state and local housing trust funds in existence,[226] nor would it provide more than seed money in support of the announced goal of producing "1,500,000 units of affordable housing over the next decade."[227] The significance of the legislation lies primarily in the facts that it manifests recognition of the severe housing burdens of extremely low- and very low-income households and establishes a mechanism for the allocation of "dedicated funding sources of revenue" to support housing production, preservation and rehabilitation programs "for the nation's lowest income households"[228] and undertakes to implement state and

---

220. Joint Center, *supra* note 65, at 23. This recommendation anticipates the reality that not all homeowners in default will be able to be saved through the new FHA refinancing program, *supra* note 158.

221. Housing and Economic Recovery Act of 2008, *supra* note 1, at § 2301. A small portion of the $4 billion appropriation, $180,000,000, is set aside for home ownership counseling. *Id.* at § 2305.

222. For a discussion of the potential for community land trusts, see JOHN EMMEUS DAVIS AND RICK JACOBUS, THE CITY—CLT PARTNERSHIP: MUNICIPAL SUPPORT FOR COMMUNITY LAND TRUSTS (2008) (focusing on the home ownership potential of CLTs and emphasizing their roles as stewards of both the land and housing built on that land, and as trustees of the subsidies provided for that housing).

223. Transit-oriented development emphasizes the desirability of, and need for, relatively high density, mixed-use and pedestrian-friendly development located in the vicinity of public transit stops and stations. *See, e.g.,* HANK DITTMAR AND GLORIA OHLAND, THE NEW TRANSIT TOWN: BEST PRACTICES IN TRANSIT-ORIENTED DEVELOPMENT (2004); JAMES A. KUSHNER, THE POST-AUTOMOBILE CITY: LEGAL MECHANISMS TO ESTABLISH THE PEDESTRIAN-FRIENDLY CITY (2004).

224. And while the Housing Trust Fund has a dedicated source of revenue, dedicated sources do not remove all uncertainties regarding availability of funds. As users of the Highway Trust Fund are discovering, the spike in gasoline prices to the $4.00 range during the summer of 2008 caused a severe reduction in gasoline purchase and a corresponding reduction in Highway Trust Fund receipts. Christopher Conkey, *Funds for Highways Plummet As Drivers Cut Gasoline Use*, WALL ST. J., July 28, 2008, at A1.

225. H.R. REP. NO. 110-362 (2007).

226. *Id*. at 16.

227. *Id*. at 15. An annual fund of $1 billion dollars spread evenly over 150,000 units would make available only $6667 per unit.

228. NAT'L LOW INCOME HOUS. COAL., NAT'L HOUS. TRUST FUND 1 (June 9, 2008), *available at* http://www.nlihc.org/template/page.cfm?id=40 (last visited July 11, 2008).

local affordable housing plans.[229]

B. Housing Trust Fund Challenges

Despite the overwhelming votes of support in both the House and the Senate, which admittedly may have been for the overall foreclosure response of the final legislative package, the idea of a national Housing Trust Fund has been and remains controversial. The report of the House Committee on Financial Services accompanying Rep. Frank's trust fund bill, H.R. 2895,[230] contained a sharply-worded dissent signed by 13 members of the Committee when it was sent to the House floor.

The dissenters raised four main objections: 1) "[s]iphoning money" from the GSEs and the FHA programs for the Trust Fund would amount to a "tax on middle-income homeowners seeking to purchase a home or refinance an existing mortgage through FHA," 2) decisions regarding affordable housing production "are best managed through state and local housing trust funds rather than through a new federal bureaucracy" which could take "months and even years" to become fully operational, 3) making the trust fund a "set-aside" within the existing HOME Investment Partnership Program[231] is preferable to creating a new program that is "essentially the same program," and 4) "political considerations will inevitably enter into the grant process administered by state and local government agencies," despite provisions in the bill to prevent misuse of funds.[232]

1. A "Middle-Class Mortgage Tax"?

A major source of contention over the years has been the proper source or sources of monies for a national housing trust fund.[233] The search has been for

229. The last Federal program directly supporting the production of affordable rental housing for very low-income households was the Section 8 New Construction and Substantial Rehabilitation program, established in 1974, 42 U.S.C. § 1437(f), and terminated in 1983, Pub. L. 98-181, § 209(a)(1) (substituting "existing housing" for "existing, newly constructed, and substantially rehabilitated housing) in a shift from supply-side to demand-side emphasis in the Section 8 program. The last new housing program was the HOME Investment Partnership program, established in 1990, which focuses on households in the 60-80% of median income range. HOME Investment Partnerships, Pub. L. 101-625, 104 Stat. 4096 (1990) (codified as 42 U.S.C. §§ 12741- 12756 (2000)). The only Federal housing program that has served the extremely low-income cohort is the public housing program, United States Housing Act of 1937, ch. 896 (codified as amended at 42 U.S.C. § 1437 (2000)), which helped finance the construction of approximately 1.5 million units, primarily in the 1950s through 1970s, but ceased supporting production of new public housing units in the 1980s to concentrate on management of units already in the public housing inventory.

230. H.R. REP. NO. 110-362, at 57-59.

231. The HOME program authorization is codified at 42 U.S.C. § 12741 ff (2000).

232. H.R. REP. NO. 110-362, at 57-59.

233. The original proposal called for modifications to three tax benefits enjoyed by homeowners, the mortgage interest tax deduction, 26 U.S.C. § 163, the property tax deduction, 26 U.S.C. § 164, and

"dedicated sources of revenue . . . that would support additional housing activities [and not] supplant existing federal, state or local appropriations or other existing funding sources for affordable housing activities."[234] Earlier unsuccessful efforts focused on homeownership tax deductions[235] and surplus funds in the FHA Mutual Mortgage Insurance Fund.[236] From 2002 to 2007, housing trust fund bills were introduced on a regular basis. But despite strong grass roots support, no final action was taken until enactment of the Housing and Economic Recovery Act of 2008 in July of that year.

The shift to a focus on the GSEs' portfolios recognizes the importance of the GSEs to housing finance and of the resources available to them. That focus also recognizes the public-private partnership aspect of Fannie Mae and Freddie Mac. As government sponsored enterprises they have both public and private characteristics. The public aspect is evidenced by "a $2.25 billion line of credit with the U.S. Treasury" which enables them to borrow more cheaply than private entities, plus the fact that they are not subject to regulation by the Securities and Exchange Commission and are exempt from state and local income taxes as well as state securities laws.[237] The private aspect is the fact that they are owned by shareholders who seek a profit from their investments.[238]

Reasons for tapping GSE resources for the Trust Fund include (1) the "special charters from Congress that give [GSEs] special treatment" noted above and (2) the fact that "their charters limit their business activities to purchasing home mortgages and supporting affordable housing."[239] Supporters view GSE participation in Housing Trust Fund funding as consistent with the GSEs' affordable

---

special capital gains rules for the sale of a home upon the death of the homeowner, 26 U.S.C. § 1014, Parr, *supra* note 169, at 331, citing NAT'L LOW INCOME HOUS. COAL., PROPOSED FED. HOUS. TRUST FUND 10-12 (1995). *See, also,* Nancy Bernstine and Irene Basloe Saraf, *New Rental Production and the National Housing Trust Fund Campaign,* 12 J. AFFORD. HOUS. & COMTY. DEV. L. 389, 390-395 (2003) (discussing proposals to allocate surplus funds from the FHA's Mutual Mortgage Insurance Fund, 12 U.S.C. § 1708 (2003)); see sources cited *supra* note 172; Schwarz, Comment, *supra* note 169.

234. *Id*. at 16.

235. Parr, *supra* note 169, at 331.

236. House Report 362 at 17-18 (citing H.R. 3995, the "Housing Affordability for America Act of 2002" (matching grants to state and local housing trust funds)); H.R. 2349; H.R. 1102 (2004). *See also* H.R. 4347, 109th Cong. (2005) and the "Bringing America Home Act of 2006" (H.R. 2897).

237. RICHARD WILLIAMS, ALTERNATIVE ASSESSMENTS OF GSE PERFORMANCE, INFLUENCE, AND IMPACT 1993-2003 (2006), at 3, *available at* www.huduser.org (citing HUD's Proposed Housing Goal Rule – 2004, *available at* http://www.hud.gov/offices/hsg/gse/summary.doc. The new legislation makes explicit an implicit commitment by the federal government to honor commitments of Fannie Mae and Freddie Mac. The Secretary of the Treasury is authorized to expand the line of credit and, in necessary, to buy equity shares in the two agencies. Housing and Economic Recovery Act of 2008, *supra* note 1, at § 1117.

238. One study estimated that the GSEs retained $3.9 billion in 2000 from $13.6 billion in benefits from their special status. Williams, *supra* note 226, citing Dan L. Crippen, Federal Subsidies for the Housing GSEs, Statement to the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, U.S. House of Representatives, May 23, 2001.

239. OPEN CRS, CREATING GSE AFFORDABLE HOUSING FUNDS: PROPOSED LEGISLATION IN THE 110TH CONGRESS, RL34158 (Sept. 5, 2007), *available at* http://opencrs.cdt.org/documents/RL34158 (last visited June 17, 2008).

housing support mandate,[240] even though 90% of the funds would be earmarked for support of rental housing, because the GSE emphasis on encouraging homeownership may well have contributed to the subprime foreclosure crisis by encouraging a relaxation of prudent lending standards.[241]

The dissenters on the House Financial Services Committee questioned the use of GSE assessments and FHA surpluses to fund a new housing program for low-income households. "When it comes to meeting the affordable housing needs of our very low-income citizens, there simply has to be a better way than imposing what amounts to a middle-class mortgage tax on the millions of Americans whose mortgages are financed by the GSEs. . . ."[242]

The dissenters have a point. The primary mission of the GSEs has been and continues to be the support of homeownership. Diverting funds from that essential mission appears to compromise that mission. But homeownership is not for everyone, and the evidence is mounting that preoccupation with increasing the number of lower income homeowners was counterproductive.[243] Households that have benefited from GSE purchases of their mortgages clearly have received support, perhaps even a subsidy,[244] from an entity with close ties to the Federal Government. Given the importance of affordable housing for all segments of American society,[245] the evidence from the recent housing bust that homeownership is not for everyone in all stages of their lives, and the huge role the GSEs play in the American housing market,[246] diverting a small percentage of their resources to an affordable rental housing program for ELI and VLI households,

---

240. See *supra* notes 142-145 and accompanying text.

241. Leonnig, *supra* note 144.

242. *Id*. at 58.

243. The authors of a Washington Post article in an investigative report series retracing the housing boom and bust cycle commented that "[t]here was something very new about this particular housing boom. Much of it was driven by loans made to a new category of borrowers – those with little savings, modest income or checkered credit histories." Alec Klein and Zachary A. Goldfarb, *The Bubble: How Homeowners, Speculators and Wall Street Dealmakers Rode a Wave of Easy Money with Crippling Consequences,* WASH. POST, June 15, 2008, at p. A1.

244. Of course, the recipients of that support may not see it as support or even a subsidy. Many people, for example, believe that the mortgage interest deduction, which is so important to the home ownership psyche, is nothing short of an entitlement.

245. The report accompanying H.R. 2895 cites the following findings of the Joint Center for Housing Studies of Harvard University State of the Nation's Housing Report 2007.

> [I]n just one year, the number of households with housing cost burdens in excess of 30 percent of income climbed by 2.3 million, hitting a record 37.3 million in 2005. The number of American households paying more than half their incomes on housing increased to 17 million in 2005, with one in seven U.S. households being "severely housing cost burdened" in that year. Nearly one-half of low-income households, a total of 8.2 million renters and 5 million homeowners, have severe cost burdens. The study indicates that about 750,000 persons are homeless on any given night . . . .

Supra note 176, at 16.

246. In May, 2008 Fannie Mae and Freddie Mac held $1.5 trillion worth of mortgages and had guaranteed another $3.9 trillion worth of mortgages, together amounting to about half the stated value of outstanding residential mortgages. Charles Duhigg, *Putting Their Houses in Order,* N.Y. TIMES, July 12,

for whom homeownership may be an unrealistic dream, appears more consistent, rather than less consistent, with their affordable housing-support mandate.[247]

2. A New Federal Bureaucracy?

The Housing Trust Fund is to be lodged in HUD, causing the dissenters to complain that the resulting "new federal bureaucracy" could take years to make the program operational. In their opinion, state and local housing trust funds should manage housing production programs.[248] But that is essentially what the Housing Trust Fund legislation provides. HUD's job is to "establish and manage" the Fund, develop a statutorily-prescribed formula for distributions of Housing Trust Fund monies to each state,[249] approve statutorily-required state allocation plans,[250] and implement an accountability program of funds distributed by state recipients.[251] Distribution of funds for specific programs and activities will be administered by the recipient states, localities and Indian Tribes.

3. A "Set Aside" Under HOME?

Objectors to the Trust Fund legislation also argue that, if there is to be a new housing program, a more efficient approach would be to fold the program into the existing HOME program,[252] a targeted housing block grant program conceptually similar to the Community Development Block Grant ("CDBG") program.[253] While the HOME program has a philosophy that is similar to the Trust Fund program in that decisions on how the money is to be spent are made at the local and state levels rather than the national level, HOME has a separate set of requirements that may limit its flexibility and is targeted to a different income cohort, households in the 60-80% of median income range.[254] HOME also requires annual appropriations of general revenue and thus is subject to the

---

2008, *available at* http://www.nytimes.com/2008/07/12/business/12expense.html?th=&emc=th&pagewanted=print.

247. A possible alternative source of funding for a national HTF, discussed in the early years of the HTF debate and as a mechanism for reducing high deficits in the early 1990s, could be derived from a cap on the amount of federal tax revenue foregone as a result of the mortgage interest tax deduction available to homeowners who itemize deductions on their federal income tax returns, I.R.C § 163(a) & (h) (2002). *See, e.g.,* Peter Salsich, *A Decent Home for Every American: Can the 1949 Goal Be Met?* 71 N. C. L. REV. 1619, 1634-1637 (1993).

248. Center for Community Change, *supra* note 168.

249. 12 U.S.C. § 4562.

250. 42 U.S.C. § 4562.

251. 12 U.S.C. § 4562.

252. 42 U.S.C. § 12741. Laura Schwarz, while supporting the final bill, also had strong arguments for the HOME set aside approach. *See* Schwarz, *supra* note 169 at 410.

253. The CDBG program authorization is codified at 42 U.S.C. § 5301 et seq.

254. For example, HOME funds may not be used to provide tenant-based rental assistance that replicates Section 8 assistance, or to provide support for public housing capital investment. 42 U.S.C. § 12742.

vagaries of the federal budget process, making it difficult for fund recipients to make long-term funding commitments.[255]

Supporters of the Housing Trust Fund concept also feared that folding the Housing Trust Fund into HOME would inevitably result in competition for current levels of HOME appropriations rather than an infusion of new monies. The Housing Trust Fund concept is designed to emphasize the importance of securing additional funding sources to make possible the realization of an ambitious goal of producing 1,500,000 new or substantially rehabilitated housing units over a 10-year period, rather than simply reallocating funds from one program to another.[256] While many factors will influence affordable housing production during that decade, the establishment of a dedicated, regular and predictable source of revenue for the Housing Trust Fund provides a structure to make possible the realization of that goal.[257]

4. Will Political Considerations Affect Local Decisions?

Despite many safeguards against misuse of funds in the legislation, including prohibitions against use of funds for recipient administrative costs and political activities, grantee limits on administrative costs, required program regulations, HUD audit responsibility and authority to impose penalties for failure to comply with HUD regulations, opponents worry that "political considerations will inevitably enter into the grant process administered by state and local government agencies."[258] Again, they have a point. Any program that dispenses large sums of money has the "potential . . . to be used to benefit elected officials and reward their political supporters."[259]

But states and localities have gained valuable experience in the administration of housing production programs in the 30 plus years since the Federal Government withdrew from direct housing production support with the cancellation of the Section 8 new construction and substantial rehabilitation programs,[260] and the shift to indirect support of housing production through the Low Income Housing Tax Credit ("LIHTC") program.[261] The experience gained by state housing finance agencies in the administration of tax exempt housing bond

255. 42 U.S.C. § 12744.

256. H.R. REP. NO. 110-362, at 27 (2007).

257. Of course, setting a goal doesn't guarantee realization of that goal. For a look back at ambitious housing goals set in 1968 that fell far short of their marks, see John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect – An Introduction,* 71 N.C L. REV. 1289 (1993).

258. H.R. REP. NO. 110-362, at 58-59.

259. *Id,* at 59. *See also,* Peter Salsich, et al., *Affordable Workforce Housing—An Agenda for the Show Me State: A Report from an Interactive Forum on Housing Issues in Missouri,* 27 ST. LOUIS U. PUB. L. REV. 45, 53, n. 62 (citing Nancy Cambria, *Nixon Alleges 'Secret Bailout' for O'Fallon Project: He Assails Members of Housing Panel,* ST. LOUIS POST-DISPATCH, Oct. 4, 2007, at B2 (reporting on controversial project support by Missouri Housing Development Commission)).

260. 42 U.S.C. § 1437 (2000).

261. I.R.C. § 42 (2008) (enacted in 1986).

programs, LIHTC allocations and state housing trust funds,[262] coupled with lessons derived[263] from the local planning process built into the CDBG program through the Comprehensive Housing Affordability Strategy ("CHAS") program,[264] belies the notion that states and localities do not have the wherewithal to administer an effective national Housing Trust Fund program.

5. Exclusionary Pressure at the Local Level

Perhaps the most serious threat to the success of any new rental housing production program is the prevalence of local land use regulations, and public attitudes favoring single family ownership and severely restricting or prohibiting multifamily rental units within residential areas. The legacy of the Supreme Court's approval of single-family zoning in *Village of Euclid v. Ambler Realty Co.*[265] and the FHA's insistence on the imposition of restrictive land use regulations in new FHA-insured suburban developments in the 1940s and 1950s[266] is a predominance of residential neighborhoods dominated by single family housing.[267] Land use regulatory policies favoring, or even requiring, 1800 square-foot single-family detached houses on relatively large lots (e.g., one-sixth of an acre or larger)[268] and rejecting multi-family developments are by definition hostile to the ELI and VLI cohorts because of the higher costs of such housing. In the words of analysts at the Joint Center for Housing Studies of Harvard University:

> In many markets, zoning restrictions, minimum lot sizes, lengthy permitting and approval processes, and voter opposition to specific kinds of developments make the construction of affordable rental housing more difficult and therefore more expensive.[269]

---

262. *See, e.g.,* NATIONAL COUNCIL OF STATE HOUSING AGENCIES, STATE HFA FACT BOOK (2005).

263. For a review of housing planning policies, see MARGERY AUSTIN TURNER ET AL., THE URBAN INST., PLANNING TO MEET LOCAL HOUSING NEEDS: THE ROLE OF HUD'S CONSOLIDATED PLANNING REQUIREMENTS IN THE 1990S (2002).

264. CHAS regulations are found at 24 C.F.R. pt. 91.

265. 272 U.S. 365 (1926).

266. For a discussion of FHA policies during the post-war era, see Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks,* 115 YALE L.J. 186 (2005).

267. *See generally* ROLF PENDALL ET AL., BROOKINGS INST., FROM TRADITIONAL TO REFORMED: A REVIEW OF THE LAND USE REGULATIONS IN THE NATION'S 50 LARGEST METROPOLITAN AREAS (2006), *available at* http://media.brookings.edu/mediaarchive/pubs/metro/pubs/20060810_LandUse.pdf.

268. Median house and lot sizes in 2007 were reported to be 1769 square feet (house size) and 0.35/acre (lot size). U.S. DEP'T. OF HOUS. AND URBAN DEV. & U.S. CENSUS BUREAU, AMN. HOUS. SURVEY FOR THE UNITED STATES: 2007 (Sept. 2008).

269. HARV. JOINT CTR. FOR HOUS. STUDIES, *supra* note 65, at 20.

That issue requires "head on" confrontation[270] because of the adverse impact such policies could have on the cost and availability of housing located near job opportunities,[271] as well as on the ability of organizations using the Housing Trust Fund programs to provide ELI-and VLI-affordable housing near such job opportunities.

The House-passed version of Housing Trust Fund legislation contained a creative, but limited, approach to restrictive land use regulations. H.R. 2895 required grantees to provide matching funds at the rate of 25 percent if federal funds are used for the match and 12.5 percent if the match comes from state, local or private funds.[272] However, the match is reduced or waived in cases where "any variance from zoning laws or other waiver of regulatory requirements was approved by the local jurisdiction" in order to permit the activity which is to be assisted by Trust Fund monies.[273]

CONCLUSION

Enactment of the Housing Trust Fund legislation marks the return of the Federal Government as a direct participant in the production and preservation of housing, primarily rental, that will be affordable to ELI and VLI households. Motivated by arguably the most severe housing crisis in several generations,[274] and spurred on by a dedicated coalition of advocates spanning the 50 states,[275] Congressional approval of the Housing Trust Fund marks the beginning of what could be a turn toward a more balanced housing policy that gives due regard to the fact that not everyone can afford to own a home. The permanent nature of the funding mechanism gives states and local governments, as well as other interested parties, a greater opportunity to plan and implement effective housing production and preservation programs, confident of direct Federal support without a stultifying "one size fits all" national mandate.[276]

No program is perfect, and the new Housing Trust Fund program has its

---

270. *Id*. at 22. *See also*, GERRIT KNAAP, STUART MECK, TERRY MOORE, AND ROBERT PARKER, ZONING AS A BARRIER TO MULTIFAMILY HOUSING, APA PAS REPORT 548 (2007); NAHB RESEARCH CENTER, STUDY OF SUBDIVISION REQUIREMENTS AS A REGULATORY BARRIER (2007), *available at* http://www.huduser.org/publications/commdevl/subdiv_report.html.

271. Reconnecting America, a national non-profit organization that supports integration of transportation systems with the communities they serve, has published two recent reports on the jobs-housing-transportation connection, REALIZING THE POTENTIAL: EXPANDING HOUSING OPPORTUNITIES NEAR TRANSIT (May 2007) and PRESERVING OPPORTUNITIES SAVING AFFORDABLE HOMES NEAR TRANSIT (undated), *available at http://www.reconnectingamerica.org/public/reports.*

272. National Affordable Housing Trust Fund Act of 2007, H.R. 2895, 110th Cong. § 294(f)(1)(A) & (B) (2007).

273. *Id*. at § 294(f)(4).

274. *See e.g.,* HARV. JOINT CTR., *supra* note 65, at 4 ("most industry experts predict loans originated in 2006 and 2007 will be the most foreclosure-prone in history").

275. *See supra* notes 164-168 and accompanying text.

276. This is not meant to suggest that the Housing Trust Fund program should be devoid of regulation. Rather, the quest will be for the "right" regulation. NPR Marketplace, *Crisis Calls for the Right*

limitations, particularly in the amount of funds to be available relative to the housing goal supporters have advanced. It will take time for regulations to be adopted and plans to be developed. No one can guarantee that the goal of 1,500,000 new, preserved or rehabilitated housing units for the ELI and VLI cohorts will be reached anytime soon. Previous experience with affordable housing goals does not provide grounds for optimism.[277] However, the presence of a dedicated national housing fund with a permanent source of revenue and a legislative invitation to pursue additional sources of funding,[278] along with a far more sophisticated infrastructure of state and local housing organizations than existed during the housing initiatives in the 1960s and 1970s offers hope that substantial progress can be made in responding to the very serious housing needs of extremely-low and very-low income households. Reliance on a private sector-driven, homeownership-oriented approach did not succeed, as the current foreclosure crisis makes clear.

Homeownership has long been the American dream—one that has been strongly supported by public policy.[279] The loss of that dream for so many American households because of the subprime mortgage melt-down is tragic. But lessons can and should be taken from that tragedy. One clear lesson is the risk associated with home ownership and the need for that risk to be tempered by greater acceptance of rental housing and a corresponding relaxation of pressures on agencies and individuals to push homeownership on people who do not have the resources to succeed with homeownership. The new Housing Trust Fund legislation is a strong step in that direction.

Regulation, October 9, 2008 (comments of Will Wilkinson, research fellow at the Cato Institute, on the current financial crisis).

277. The Housing and Community Development Act of 1968, Pub. L. No 90-448, 82 Stat. 476, established a goal of six million affordable housing units over a ten year period, but implementation never exceeded 10 percent of the annual goals. Boger, *supra* note 257, at 1332, n. 188.

278. Additional monies can come by appropriation, transfer or credit "under any other provision of law." *See supra*, note 185 and accompanying text. The Obama Administration's 2010 budget and both the House and Senate 2010 budget resolutions propose allocating $1 billion to the National Housing Trust Fund. A source for the funds was not identified in the early drafts of the budget resolutions. NLIHC, *Advocates Hope Spring Showers Will Bring Legislative Flowers,* 14 MEMO TO MEMBERS No. 15, April 17, 2009, at 2. The NLIHC is proposing "an annual distribution of $5 billion" as a "short term goal." NLIHC, *The New National Housing Trust Fund Frequently Asked Questions*, at 3, *available at* www.nhtf.org (last visited Apr. 17, 2009).

279. The mortgage interest tax deduction, I.R.C. § 163(a), (h) (1)-(3) (2002), and related tax provisions favoring home ownership comprise the second largest tax expenditure (revenue foregone) in the federal budget. The first Housing Trust Fund bills in the early 1990s would have generated over $20 billion annually by reducing progressively the size of homeownership tax preferences. Parr, *supra* note 169, at 331.