

# Housing Law Bulletin

Volume 38 • August 2008

Published by the National Housing Law Project  
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**Cover:** Adel Court, a 30-unit senior public housing development operated by the Oakland Housing Authority, California.

The *Housing Law Bulletin* is published 10 times per year by the National Housing Law Project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source.

A one-year subscription to the *Bulletin* is \$175.

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## Foreclosure Relief Legislation Includes GSE Regulation and National Housing Trust Fund\*

On July 30, President Bush signed into law the most sweeping housing legislation to be passed in years, the Housing and Economic Recovery Act of 2008 (H.R. 3221).<sup>1</sup> The Act provides mortgage foreclosure relief, enables a possible government rescue of Fannie Mae and Freddie Mac and reforms their regulatory oversight, establishes an affordable housing trust fund, and enacts changes to the HUD housing programs.

In spite of his opposition to some of the bill's provisions, President Bush dropped his veto threat after Treasury Secretary Henry M. Paulson stated that legislation was necessary to bolster confidence in Fannie Mae and Freddie Mac.<sup>2</sup> Recent concerns about the future of Fannie and Freddie, which together hold almost half the nation's \$12 trillion in mortgages, created great instability in the housing and credit markets.<sup>3</sup> To address these concerns, the Act gives the Treasury Department broad authority to maintain the solvency of Fannie Mae and Freddie Mac.<sup>4</sup>

The act's primary foreclosure relief measure creates an FHA-insured mortgage refinancing program, which is expected to help roughly 400,000 people stay in their homes.<sup>5</sup> It also earmarks \$3.92 billion for states and local governments to purchase and rehabilitate vacant homes abandoned after foreclosure. In a major victory for affordable housing advocates, the bill also establishes an Affordable Housing Trust Fund and Capital Magnet Fund, which will provide states with dedicated funding

\*Katherine Lehe is the author of this article. She is a J.D. Candidate at the University of California, Berkeley School of Law (Boalt Hall) and was a summer intern at the National Housing Law Project.

<sup>1</sup>The law is Pub. L. No. 110-289, \_\_\_ Stat. \_\_\_ (July 30, 2008). Because the official Public Law version is not yet available, this article cites to sections of the enrolled version of H.R. 3221, which will be identical to the eventual Public Law. For general overview, see also Memo to Members, National Low Income Housing Coalition, H.R. 3221 Will Address Reform of GSEs, Foreclosure Crisis, More (July 25, 2008), Vol. 13, No. 30, at [http://www.nlihc.org/detail/article.cfm?article\\_id=5394](http://www.nlihc.org/detail/article.cfm?article_id=5394) [hereinafter NLIHC Memo to Members].

<sup>2</sup>Sheryl Gay Stolberg and David M. Herszenhorn, *House Passes Housing Bill After Bush Says He Will Sign It*, N.Y. TIMES, July 24, 2008, <http://www.nytimes.com/2008/07/24/business/24housing.html?scp=1&sq=House%20Passes%20Housing%20Bill%20After%20Bush%20Says%20He%20Will%20Sign%20It&st=cse>.

<sup>3</sup>*Id.*

<sup>4</sup>David M. Herszenhorn, *Bush Signs Sweeping Housing Bill*, N.Y. TIMES, July 31, 2008, [http://www.nytimes.com/2008/07/31/business/31housing.html?\\_r=1&hp=&oref=slogin&pagewanted=print](http://www.nytimes.com/2008/07/31/business/31housing.html?_r=1&hp=&oref=slogin&pagewanted=print).

<sup>5</sup>Cost Estimate, Congressional Budget Office, CBO's Estimate of Cost of the Administration's Proposal to Authorize Federal Financial Assistance for the Government-Sponsored Enterprises for Housing 3 (July 22, 2008), <http://www.cbo.gov/ftpdocs/95xx/doc9574/07-22-GSEs.pdf> [hereinafter CBO Cost Estimate July 22, 2008].

for the development of affordable housing,<sup>6</sup> generated from a percentage of the annual new business conducted by Fannie Mae and Freddie Mac,<sup>7</sup> outside of the annual Congressional appropriations process. Although during the first two years of the program these contributions will be diverted on a stepped-down basis to offset the costs of the bill's mortgage refinance program, the trust fund alone is expected to generate \$300 million annually beginning in 2012.<sup>8</sup> The Act also establishes roughly \$15 billion in housing tax breaks,<sup>9</sup> including a \$7,500 tax credit for first-time homebuyers.<sup>10</sup>

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The final version of the bill signed into law was the result of months of negotiations between the House and Senate, and is a re-working of the Federal Housing Finance Regulatory Reform Act of 2008, which had been approved by the Senate Committee on Banking, Finance, and Urban Affairs on May 20. A number of titles were added and changes made to the bill since then, which are discussed in more detail below. For a more in-depth discussion of the Act's foreclosure relief program, FHA modernization, Government-Sponsored Enterprise reforms, and the Affordable Housing Trust Fund, readers should refer to the discussion of the bill's earlier version, the "Federal Housing Finance Regulatory Reform Act of 2008," which appeared in NHLP's June 2008 *Bulletin*.<sup>11</sup>

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<sup>6</sup>H.R. 3221, at § 1131.

<sup>7</sup>Fannie Mae and Freddie Mac will contribute to the Funds an amount equal to 4.2 basis points for each dollar (or 4.2 cents per 100 dollars) of the unpaid principal balance of its total new business purchases. *Id.*

<sup>8</sup>Posting of Barbara Sard, Director of Housing Policy, Center on Budget and Policy Priorities, bsard@rcn.com, to members@lists.housingjustice.net (July 30, 2008) (copy on file with author) [hereinafter Posting of Barbara Sard].

<sup>9</sup>Richard Simon, *House Votes to Back Fannie Mae, Freddie Mac, Stem Foreclosures*, L.A. TIMES, July 23, 2008, <http://www.latimes.com/business/la-fi-housing24-2008jul24,0,548381.story>.

<sup>10</sup>H.R. 3221, at § 3011.

<sup>11</sup>NHLP, *Congress Tackles Foreclosure Relief and GSE Reform*, 38 Hous. L. BULL. 109 (June 2008). Although the NHLP June *Bulletin* article includes a section on H.R. 3221, the final version of the Act is actually a modification of the Senate Committee's "Federal Housing Finance Regulatory Reform Act of 2008." Readers should refer to the section of the June *Bulletin* article that is so entitled, rather than to its discussion of what was then the contents of H.R. 3221.

## Boosting Market Confidence in Fannie Mae and Freddie Mac and GSE Reform

In the bill's final week, provisions were added on the recommendation of Treasury Secretary Paulson to help restore market confidence in Fannie Mae and Freddie Mac, the nation's two largest mortgage finance companies.<sup>12</sup> These measures will grant the Federal Treasury temporary authority to increase its lending to the Government Sponsored Enterprises (GSEs), which include Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.<sup>13</sup> The Secretary will have standby authority to invest in Fannie, Freddie, and the Banks "in such amounts as the Secretary may determine."<sup>14</sup> This authority expires on December 31, 2009.

Several provisions were added to ensure that this increased authority does not pose undue risk to taxpayers. The bill requires that taxpayers be paid back before other shareholders; shareholder dividends will be restricted and executive compensation may be modified until taxpayers are paid back; and the Director of the Federal Housing Finance Agency, the new regulator of the GSEs, must consult with the Federal Reserve regarding the use of the Treasury's standby authority.<sup>15</sup> To accommodate the additional risk posed by this authority,<sup>16</sup> the bill will also increase the statutory limit on the national debt by \$800 billion to \$10.6 trillion.<sup>17</sup>

The Congressional Budget Office has estimated that although the GSEs stand a "better than 50 percent" chance of weathering the current housing crisis without this increased governmental assurance, these provisions will likely cost \$25 billion over fiscal years 2009 and 2010.<sup>18</sup> The Treasury Department has stated that it hopes never to exercise its increased authority, noting that Fannie Mae and Freddie Mac remain in sound financial condition.<sup>19</sup>

Aside from the provisions that ensure the solvency of the GSEs, H.R. 3221 includes a number of regulatory reforms to the GSEs themselves, including a new regulatory body<sup>20</sup> and new affordable housing goals, which are discussed at more length in NHLP's June *Bulletin* article.

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<sup>12</sup>Stolberg and Herszenhorn, *supra* note 2, at 1.

<sup>13</sup>This authority is subject to the Treasury Secretary's determination that it is necessary to provide stability to financial markets, prevent disruptions in the availability of mortgage finance, and to protect taxpayers. H.R. 3221, at § 1117. Currently, the Treasury has permanent authority to purchase debt securities issued by Fannie Mae and Freddie Mac in amounts up to \$2.25 billion for each. CBO Cost Estimate, *supra* note 5, at 3.

<sup>14</sup>H.R. 3221, at § 1117. See also NLIHC Memo to Members, *supra* note 1.

<sup>15</sup>*Id.*

<sup>16</sup>Stolberg and Herszenhorn, *supra* note 2, at 1.

<sup>17</sup>H.R. 3221, at § 3083.

<sup>18</sup>CBO Cost Estimate, *supra* note 5, at 3. See also Simon, *supra* note 9, at 1.

<sup>19</sup>Stolberg and Herszenhorn, *supra* note 2, at 1.

<sup>20</sup>A new Federal Housing Finance Agency (FHFA) will regulate the GSEs, and will be headed by a director appointed by the President and confirmed by the Senate for a five-year term. NLIHC Memo to Members, *supra* note 1.

In a new provision, the bill also raises the cost limits for single-family home loans that the GSEs can buy or guarantee to \$417,000, and to \$625,000 in high-cost housing areas.<sup>21</sup> The current high-cost loan limit is \$729,750, a temporary increase effective through 2008.<sup>22</sup>

### Mortgage Foreclosure Relief

The centerpiece of the bill's foreclosure relief provisions is the Hope for Homeowners Program, which gives the Federal Housing Administration (FHA) authority to refinance \$300 billion of mortgages for eligible borrowers at risk of foreclosure.<sup>23</sup> The program is voluntary on the part of lenders and borrowers, and is expected to help roughly 400,000 people stay in their homes.

In addition to the federal refinancing program, the bill enables states to refinance subprime loans with tax-exempt mortgage revenue bonds. For calendar year 2008 only, states have authority to offer an additional \$11 billion in mortgage revenue bonds for refinancing adjustable rate single-family residential mortgage loans made between December 31, 2001, and January 1, 2008, that are "likely to cause financial hardship to the borrower."<sup>24</sup> States may offer such bond refinancing at standard state levels until December 31, 2010.<sup>25</sup>

Significantly, the bill also bans seller-funded downpayments. In most of these controversial transactions, buyers who could not otherwise afford a downpayment contact a third-party intermediary, normally a tax-exempt charitable organization that advertises a downpayment program.<sup>26</sup> Sellers then make a contribution to the organization equal to the amount of the downpayment. The intermediary normally collects a fee, and then pays the balance of the seller's contribution toward the buyer's downpayment.

The FHA has long sought to prohibit such transactions, citing HUD data that shows that such programs result in excessive defaults, foreclosures, and losses at a rate of between two and three times that of loans for which buyers pay their own downpayments.<sup>27</sup> However, several prominent charitable organizations that offer such programs dispute the accuracy of HUD's data, and argue that the vast majority of the working families who have bought homes through these programs have not defaulted

<sup>21</sup>H.R. 3221, at § 1124.

<sup>22</sup>NLIHC Memo to Members, *supra* note 1.

<sup>23</sup>H.R. 3221, at § 1402.

<sup>24</sup>*Id.* at § 3021. See also Alison Vekshin, *U.S. Housing, Bank Regulators to Meet on Housing Bill (Update 1)*, BLOOMBERG NEWS SERVICE, July 27, 2008, at <http://www.bloomberg.com/apps/news?pid=20601087&refer=home&id=ad1iF8nRjzh4>.

<sup>25</sup>*Id.*

<sup>26</sup>Kenneth R. Harney, *FHA Calls For An End To Seller-Funded Down-Payment Charities*, WASHINGTON POST, June 21, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/20/AR2008062001242.html>.

<sup>27</sup>*Id.*

## JULIE LEVIN WINS ABA AWARD FOR OUTSTANDING PUBLIC SECTOR WORK

Julie Levin, the managing attorney for Western Missouri Legal Service's central office in Kansas City, was recently given the American Bar Association's Outstanding Public Sector Work Award. Julie, a member of the National Housing Law Project's Housing Justice Network and its Council of Advisors, was honored in New York City on August 8 for her groundbreaking work in challenging the Housing Authority of Kansas City (HAKC) for its failure to maintain the Theron B. Watkins public housing development.

In *Tinsley v. Kemp*, Julie argued that the housing authority's failure to maintain the development constituted *de facto* demolition of the units and violated the Fair Housing Act. After HAKC lost its motion to dismiss, Julie was successful in reaching a settlement agreement that ultimately resulted in \$143 million being devoted to the renovation of all of HAKC's public housing units. When rehabilitation of the units was not progressing and additional housing units were deteriorating, Julie was successful in putting HAKC into private judicial receivership. The receivership lasted for more than thirteen years and has transformed HAKC from a troubled housing authority to a model for other public housing authorities. Significantly, residents' interests have been protected as a result of the litigation: a resident organization was formed to monitor HAKC policies, procedures and operations, and the properties' renovation; demolished or sold units have been replaced on a one-to-one basis; displaced residents were given the right to return to new units; Section 3 job opportunities were created; minimum rents were abolished for most needy residents; and drug and criminal evictions were limited to cases where the resident knew or should have know of the activity. Julie and her husband, Murray S. Levin, have published articles on *Tinsley* in the *Stetson Law Review*, 36 STETSON L. REV. 77 (2006) and the *Housing Law Bulletin*, 37 HOUS. L. BULL. 31 (2007).

NHLP congratulates Julie for winning this prestigious award and recognizes her for thirty-one years of exceptional work in the legal services and housing communities. We also thank her for her generous support of the Housing Justice Network and of the National Housing Law Project.

or been foreclosed.<sup>28</sup> Transactions with seller-funded downpayments have accounted for more than one-third of the total FHA loan volume in recent years.<sup>29</sup>

The bill expressly prohibits seller-funded downpayments for mortgages approved on or after October 1, 2008,<sup>30</sup> and imposes a cash investment requirement on homebuyers with mortgages insured by the FHA.<sup>31</sup> The bill prohibits the cash investment from coming from a “seller or any other person or entity that financially benefits from the transaction,” or “any third party or entity that is reimbursed, directly or indirectly,” by the seller or benefiting entities.<sup>32</sup> Borrowers with FHA-insured mortgages will be required to pay at least 3.5% of the appraised value of the property in cash or its equivalent.<sup>33</sup>

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*To assist communities hardest hit by the foreclosure crisis, the act will provide a one-time \$3.92 billion allocation of Community Development Block Grant (CDBG) funds to states and local governments.*

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The bill also imposes a one-year moratorium on risk-based pricing of mortgage insurance premiums, beginning October 1, 2008.<sup>34</sup> Risk-based premiums are designed for mortgage lenders to offer borrowers an FHA-insured mortgage priced on the risk that the insurance contract represents. HUD Secretary Steve Preston has stated that failure to use risk-based pricing could result in increased premiums for all borrowers or decreased mortgage activity.<sup>35</sup>

The final bill also allocates funds for housing counseling and related services aimed at foreclosure prevention. The bill appropriates \$180 million for the Neighborhood Reinvestment Corporation for counseling services, at least \$27 million of which must be allocated to organizations that serve minority and low-income homeowners and neighborhoods.<sup>36</sup> An additional \$100 million will be “appropriated out of any money in the Treasury not otherwise appropriated for the fiscal year 2008” for certain

mortgage foreclosure mitigation activities, to remain available until December 31, 2008.<sup>37</sup> Of the total appropriation, \$30 million must be used for grants to counseling intermediaries or to hire attorneys to assist homeowners who have legal issues directly related to foreclosure, delinquency or short sale.<sup>38</sup>

Although the final bill does not establish minimum notice requirements for renters facing eviction due to foreclosure, several provisions offer protections for certain renters. The bill increases by \$30 million the funding level for McKinney-Vento homeless assistance programs, which provide emergency assistance to homeless youth and their families who become homeless due to foreclosure.<sup>39</sup> Funds may be used to benefit both homeowners and renters who lose their homes due to a foreclosure. In addition, the bill authorizes federal reimbursement of the moving expenses for military service members who lose their rental homes due to a foreclosure.<sup>40</sup>

In an effort to curb the abuse of senior citizens in mortgage sales, the bill establishes new regulations on reverse mortgages.<sup>41</sup> Reverse mortgages allow senior citizens<sup>42</sup> to receive a lump sum or monthly check from their home equity, to be repaid only when they move out or when their heirs sell the home.<sup>43</sup> To prevent the sales tactics that have pressured seniors into loans with high fees and unnecessary financial products, the bill caps origination fees at 2% for loans up to \$200,000, and at 1% for larger loans, up to a maximum of \$6,000. Borrowers cannot be required to purchase an annuity or other financial insurance product in order to qualify for a reverse mortgage.

## Neighborhood Stabilization Funds

To assist communities hardest hit by the foreclosure crisis, the Act will provide a one-time \$3.92 billion allocation of Community Development Block Grant (CDBG) funds<sup>44</sup> to states and local governments to purchase and redevelop abandoned and foreclosed homes and residential properties.<sup>45</sup> This provision, omitted from an earlier

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<sup>28</sup>*Id.* at § 2401.

<sup>29</sup>*Id.* at § 2305.

<sup>30</sup>H.R. 3221, at § 2113.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>HUD may require a cash investment larger than 3.5% of the property's appraised value. Amounts borrowed from family members shall be considered cash or its equivalent, subject to certain conditions. H.R. 3221, at § 2113.

<sup>34</sup>*Id.*

<sup>35</sup>Senate Panel Approves \$42.4 Billion in Fiscal 2009 HUD Funding Bill; Senate Moving Ahead on Housing Bill, 36 HOUSING AND DEV. REP. CURRENT DEV. 417, 446 (July 14, 2008).

<sup>36</sup>H.R. 3221, at § 2305.

<sup>37</sup>*Id.* at § 2401.

<sup>38</sup>*Id.* at § 2305.

<sup>39</sup>*Id.* at § 2901.

<sup>40</sup>NLIHC Memo to Members, *supra* note 1. The bill also extends current restrictions on the sale, foreclosure, or seizure of property owned by military service members from ninety days to nine months after completion of service. H.R. 3221, at § 2203.

<sup>41</sup>H.R. 3221, at § 2122.

<sup>42</sup>Reverse mortgages are typically available for persons at least sixty-two years old. Ron Lieber, *Housing Bill Has Something for Nearly Everyone*, N.Y. TIMES, July 25, 2008, <http://www.nytimes.com/2008/07/25/business/25money.html>.

<sup>43</sup>*Id.*

<sup>44</sup>HUD will have the authority to alter the CDBG program requirements placed on these funds to the extent necessary to expedite the use of such funds, except for those requirements related to fair housing, non-discrimination, labor standards, and the environment. H.R. 3221, at § 2301(f).

<sup>45</sup>H.R. 3221, at §§ 2301 and 2305.

version due to opposition from the Bush Administration, was included thanks in large part to the leadership of Rep. Maxine Waters (D-CA). After the President dropped his veto threat to get legislation to boost confidence in the GSEs, Waters insisted on the inclusion of the so-called neighborhood stabilization funds.<sup>46</sup>

The funds will be distributed to states and local governments through a needs-based formula<sup>47</sup> to be determined by HUD within sixty days of enactment. No state will receive less than 0.5% of the total funds,<sup>48</sup> or \$19.6 million, and states and local governments must use their allocation within eighteen months of receipt.<sup>49</sup>

All of these funds must be used to provide affordable housing for low- and moderate-income people whose incomes do not exceed 120% of Area Median Income (AMI), and at least 25% must be used to provide housing for those at or below 50% of AMI.<sup>50</sup> The bill also requires HUD to ensure, to the maximum extent possible, that these properties remain affordable to people in these income ranges for as long as feasible.<sup>51</sup>

Any homes acquired with these funds and sold to individuals as a primary residence shall be sold for no more than the public entity recipient's purchase and rehabilitation costs.<sup>52</sup> Recipients may reinvest profits from sale, rental, rehabilitation or redevelopment for five years, at which point any remaining profits will be deposited in the Treasury.<sup>53</sup>

Critics argue that the funds may prolong the housing crisis by providing banks with an incentive to foreclose.<sup>54</sup> While housing advocates acknowledge that the program will benefit some lenders, they emphasize that these funds will help stabilize neighborhoods in decline due to increasing foreclosure vacancies and the resulting drop in property values.<sup>55</sup> Some advocates have pointed out that help for homeowners and neighborhoods affected by foreclosures is especially warranted given the government's orchestration of the sale of Countrywide, which contributed significantly to the current foreclosure crisis, and federal bailout of Bear Sterns.<sup>56</sup>

<sup>46</sup>Gene Maddaus, *Waters Hails Housing Bill Passage*, THE DAILY BREEZE, July 26, 2008, [http://www.dailybreeze.com/ci\\_10010059](http://www.dailybreeze.com/ci_10010059).

<sup>47</sup>The formula must take into consideration the states' relative number and percentage of home foreclosures, homes financed by subprime mortgage related loans, homes in default or delinquency, and the likelihood that the area will face a significant rise in foreclosures. H.R. 3221, at § 2301.

<sup>48</sup>H.R. 3221, at § 2302.

<sup>49</sup>*Id.* at § 2301. The bill requires HUD to distribute the funds no more than thirty days after the formula is established. *Id.*

<sup>50</sup>H.R. 3221, at § 2301(f)(3).

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at § 2301(d)(3).

<sup>53</sup>H.R. 3221, at § 2301(d)(4).

<sup>54</sup>Maddaus, *supra* note 46, at 1.

<sup>55</sup>*Id.*

<sup>56</sup>*See id.* (quoting Kathleen Day, Spokesperson, Center for Responsible Lending).

## Provisions Affecting Other Housing Programs

The act includes numerous provisions affecting the HUD housing programs, as well as the Low-Income Housing Tax Credit program.<sup>57</sup>

### Changes to the Public Housing Program

The act also includes significant changes to the public housing program, including a provision that makes FEMA, rather than HUD, financially responsible for repairing public housing units damaged in disasters.<sup>58</sup> Significantly, the bill also exempts almost all small public housing agencies (PHAs) from the requirement to submit an annual plan to HUD.<sup>59</sup> The exemption applies to PHAs that administer no more than 550 vouchers and public housing units, which includes roughly 3000 PHAs and affects approximately 500,000 families.<sup>60</sup> These PHAs still must certify annually that they are complying with civil rights requirements, hold annual public meetings on proposed policy changes, and establish and consult with a Resident Advisory Board.<sup>61</sup> However, elimination of the annual planning process is likely to limit advocates' abilities to obtain important information on and influence PHA operations.

### Changes to the Low-Income Housing Tax Credit and Voucher Programs

A separate title of the bill enacts several changes to the Low-Income Housing Tax Credit (LIHTC) program, as well as provisions affecting the interaction between LIHTCs and other federal housing programs. Many of these provisions were taken from both the House and Senate versions of the Section 8 Voucher Reform Act (SEVRA).<sup>62</sup>

The bill temporarily increases the total amount of LIHTCs allocated to states for calendar years 2008 and 2009. States that receive LIHTCs on a per capita basis will receive a \$0.20 per capita increase, and the minimum allocation to small states will be increased by 10% in both years.<sup>63</sup> The bill also protects the rental income stream of LIHTC properties. Because LIHTC rents are capped at

<sup>57</sup>Apart from the changes discussed here, for all HUD housing programs, deferred veterans lump sum disability benefits may not be considered in determining program eligibility or income. H.R. 3221, 110<sup>th</sup> Cong. § 2608 (2008). *See also* Memo to Members, National Low Income Housing Coalition, H.R. 3221 Will Address Reform of GSEs, Foreclosure Crisis, More (July 25, 2008), Vol. 13, No. 30, at [http://www.nlihc.org/detail/article.cfm?article\\_id=5394](http://www.nlihc.org/detail/article.cfm?article_id=5394) [hereinafter NLIHC Memo to Members].

<sup>58</sup>H.R. 3221, at § 2804.

<sup>59</sup>The exemption does not apply to agencies designated as "troubled," or to those with a failing score under the Section 8 Management Assessment Program in the prior twelve months. H.R. 3221, at § 2702.

<sup>60</sup>Posting from Barbara Sard, *supra* note 8.

<sup>61</sup>H.R. 3221, at § 2702. *See also* Posting from Barbara Sard, *supra* note 8.

<sup>62</sup>The Senate Banking Committee may consider the remaining portions of its version of SEVRA (S. 2684) in September. Posting from Barbara Sard, *supra* note 8.

<sup>63</sup>H.R. 3221, at § 3001.

30% of 60% of AMI, rents in LIHTC properties can drop significantly if the HUD calculation of AMI decreases. To address this problem, the bill prohibits decreases in AMI calculations for LIHTC purposes.<sup>64</sup>

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*Although H.R. 3221 was drafted to bypass the normal rulemaking process, it is uncertain when HUD will be able to complete regulations to implement the bill's mortgage refinancing program.*

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Several provisions are designed to enable the LIHTC program to serve lower-income households. Projects can now combine federal rent and operating subsidies with LIHTCs without counting against the total tax credit amount, which could allow more low-income households to reside in LIHTC units.<sup>65</sup> The bill authorizes states to increase the amount of credits for certain projects by 30%,<sup>66</sup> and to further boost project allocations if necessary to keep projects financially feasible.<sup>67</sup> The bill also lifts the ban on using tax credits and tax-exempt housing bonds in projects receiving Section 8 Moderate Rehabilitation assistance,<sup>68</sup> and treats single room occupancy units as residential units for LIHTC purposes.<sup>69</sup>

Another provision repeals, for federally or state-assisted properties, the "10-year rule" prohibiting use of LIHTCs for existing properties that have been transferred during the previous ten years.<sup>70</sup> Also, the bill requires state LIHTC administrators annually to report data on the race, ethnicity, family composition, age, income, use of HUD or similar rental assistance, disability status, and monthly rent payments for all LIHTC households, and authorizes five-year funding for implementation.<sup>71</sup>

In addition to the changes in the LIHTC program itself, H.R. 3221 affects the interaction between LIHTCs and the Project-Based Section 8 Voucher (PBV) and tenant-based Voucher programs, and makes changes to the voucher programs themselves. Many of these changes are intended to make it easier to use project-based vouchers

to provide affordable housing in mixed-income projects.<sup>72</sup> The bill extends the maximum PBV contract term from ten years to fifteen years, and allows PHAs and owners to agree at any time to extend the contract for up to fifteen years, rather than permitting such agreements only in the last year of the contract term.<sup>73</sup> For project-based units with LIHTCs, PHAs may set reasonable rents up to 110% of HUD's Fair Market Rent, even if this amount exceeds maximum LIHTC rents.<sup>74</sup> Further, PHAs may guarantee owners that PBV rents will not be reduced below initial HAP contract rent levels.<sup>75</sup> The Act also allows PBVs in cooperatives and elevator buildings.<sup>76</sup>

In order to make it easier to use tenant-based vouchers in LIHTC and HOME-funded units, the bill makes several changes to rent reasonableness determinations in these units. In LIHTC or HOME-funded units with vouchers, an independent determination of rent reasonableness is not required if the rent does not exceed the rent of comparable project units without vouchers.<sup>77</sup> However, rents will be considered reasonable only if less than the greater of the rent charged to non-voucher holders in the project or the voucher payment standard. The practical effect will be to continue to allow LIHTC and HOME project owners to charge tenant-based voucher holders more than non-voucher holders, but only when any excess rent is covered by the voucher subsidy and does not force the tenant to pay more.

## What's Next

Although H.R. 3221 was drafted to bypass the normal rulemaking process, it is uncertain when HUD will be able to complete regulations to implement the bill's mortgage refinancing program. In a news conference on July 26<sup>th</sup>, Senator Dodd expressed disappointment with statements he attributed to HUD Secretary Preston that the agency would take as long as a year to promulgate the necessary regulations.<sup>78</sup> HUD spokesman Stephen O'Halloran denied that Preston made such comments, and stated that HUD is committed to implementing the program.<sup>79</sup> Senator Dodd has requested a meeting with HUD, the Federal Reserve, the Treasury Department, and the Federal Deposit Insurance Corporation to push for an immediate start to the process. Other provisions affecting other housing programs (e.g., the project-based voucher

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<sup>64</sup>NLIHC Memo to Members, *supra* note 1.

<sup>65</sup>H.R. 3221, at § 2835. *See also* Posting from Barbara Sard, *supra* note 8.

<sup>66</sup>H.R. 3221, at § 3003. This increase in the allowable tax credit amount applies to projects outside those areas where increases are currently allowed, Qualified Census Tracts and Difficult Development Areas, but excludes bond financed projects already receiving 4% credits. *Id.* *See also* Posting from Barbara Sard, *supra* note 8.

<sup>67</sup>H.R. 3221, at § 3003. *See also* NLIHC Memo to Members, *supra* note 1.

<sup>68</sup>H.R. 3221, at § 3004.

<sup>69</sup>*Id.* at § 3008.

<sup>70</sup>*Id.* at § 3003(f). *See also* NLIHC Memo to Members, *supra* note 1.

<sup>71</sup>H.R. 3221, at § 2835(d), adding a new Section 36 to the United States Housing Act.

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<sup>72</sup>Posting from Barbara Sard, *supra* note 8.

<sup>73</sup>H.R. 3221, at § 2835(a). *See also* Posting from Barbara Sard, *supra* note 8.

<sup>74</sup>H.R. 3221 at § 2835(a)(1)(D). *See also* Posting from Barbara Sard, *supra* note 8.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>H.R. 3221, at § 2835(a)(2).

<sup>78</sup>Alison Vekshin, *U.S. Housing, Bank Regulators to Meet on Housing Bill (Update 1)*, BLOOMBERG NEWS SERVICE, July 27, 2008, at <http://www.bloomberg.com/apps/news?pid=20601087&refer=home&sid=ad1iF8nRjzh4>.

<sup>79</sup>*Id.*

program) might be implemented by HUD's issuance of a notice suspending currently incompatible regulations.

While the Housing and Economic Recovery Act of 2008 includes significant reform and foreclosure relief provisions, it remains to be seen whether it will be sufficient to slow the decline in housing prices and enable an economic recovery.<sup>80</sup> Although the mortgage refinance provisions of the bill are expected to help roughly 400,000 families keep their homes, the Congressional Budget Office has estimated that 35% of the refinanced loans will end up in default again.<sup>81</sup>

Moreover, many affordable housing advocates point out that the most effective solutions to the foreclosure crisis were abandoned by Congress. Provisions that would have curbed predatory lending practices and severed the relationship between banks and appraisers were either omitted or are too weak to provide the scale of relief necessary, advocates say.<sup>82</sup> Making the mortgage refinance program voluntary for lenders was a major disappointment for advocates, some of whom argue that in order to make homeownership viable, lawmakers cannot rely on the same lending industry that triggered the foreclosure crisis in the first place.<sup>83</sup> Also omitted from the bill was a provision favored by advocates that would have empowered judges to rewrite loans during bankruptcy proceedings, as well as certain protections for tenants in occupancy. Although the prospects for further legislation are unclear, Senator Dodd and Representative Frank later hope to take up anti-predatory lending bills that would enact "forward-looking, preventative measures" to address some of the shortcomings of the Act's foreclosure relief programs.<sup>84</sup> ■

## California Expands Tenant Protections in Response to Foreclosure Crisis\*

California Governor Arnold Schwarzenegger recently signed a bill providing protections for tenants and homeowners affected by the foreclosure crisis.<sup>1</sup> The new law increases notice requirements for homeowners and tenants, and it also requires owners of foreclosed residential properties to keep those properties in good repair or risk fines. Additional legislation that would protect tenants living in foreclosed dwellings from having their utilities shut off is awaiting the governor's signature.

### The Foreclosure Crisis

Like many other states, California is in the midst of a foreclosure crisis prompted by the collapse of housing prices and widespread trouble with the subprime mortgage market. Foreclosures on residential mortgages in California increased sevenfold from 2006 to 2007.<sup>2</sup> In 2007, more than 84,000 California properties suffered foreclosures, and over 250,000 loans went into default.<sup>3</sup> This dramatic rise in the number of foreclosures has affected more than just those homeowners. It has negatively impacted neighborhood property values and living conditions, and it has forced many renters to hurriedly relocate after lenders foreclosed on their rental properties.

Unoccupied dwellings with unkempt yards are not only eyesores, they may also be public health hazards and crime magnets, according to supporters of the recent legislation.<sup>4</sup> In a number of reported cases, purchasers have ceased to maintain the foreclosed-upon properties.<sup>5</sup> Untended swimming pools have become breeding grounds for mosquitoes, and uninhabited homes have invited squatters and vandals.<sup>6</sup>

In addition to neighbors, renters have become casualties of foreclosures. In jurisdictions without adequate notice requirements for tenants living in foreclosed-upon properties, renters may find themselves suddenly homeless

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<sup>1</sup>Samantha Sondag, *Governor Signs Law to Help Homeowners Keep Their Properties*, S.F. CHRON., July 9, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/09/BA3411LL25.DTL>.

<sup>2</sup>S.B. 1137, 2008 Leg., Reg. Sess. (Cal. 2008).

<sup>3</sup>*Id.*

<sup>4</sup>See Assembly Floor, S.B. 1137 Analysis at 6-7 (June 30, 2008), [http://leginfo.ca.gov/pub/07-08/bill/sen/sb\\_1101-1150/sb\\_1137\\_cfa\\_20080630\\_145451\\_asm\\_floor.html](http://leginfo.ca.gov/pub/07-08/bill/sen/sb_1101-1150/sb_1137_cfa_20080630_145451_asm_floor.html).

<sup>5</sup>David Streitfeld, *Blight Moves in After Foreclosures*, L.A. TIMES, Aug. 28, 2007, <http://articles.latimes.com/2007/aug/28/business/fi-vacant28>.

<sup>6</sup>*Id.*

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<sup>80</sup>See Stolberg and Herszenhorn, *supra* note 2, at 1.

<sup>81</sup>Cost Estimate, Congressional Budget Office, Federal Housing Finance Regulatory Reform Act of 2008 10 (June 9, 2008), [http://www.cbo.gov/ftpdocs/93xx/doc9366/Senate\\_Housing.pdf](http://www.cbo.gov/ftpdocs/93xx/doc9366/Senate_Housing.pdf).

<sup>82</sup>Mike Lillis, *Moving Right or Dodging Bullets?*, WASHINGTON INDEPENDENT, June 27, 2008, <http://washingtonindependent.com/view/moving-right-or>.

<sup>83</sup>See *id.* (quoting Josh Nassar, Vice President of Federal Affairs, Center for Responsible Lending).

<sup>84</sup>*Id.*