

Housing Law Bulletin

Volume 38 • June 2008

Published by the National Housing Law Project
614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300

727 Fifteenth Street, N.W., 6th Fl. • Washington, D.C. 20005

www.nhlp.org • nhlp@nhlp.org

Table of Contents

	Page
Congress Tackles Foreclosure Relief and GSE Reform.....	109
As Impacts Spread, Congress Considers Additional Foreclosure Policies	118
Efforts to Erode Rent Control Continue	121
California Voters Reject Anti Rent-Control Measure	124
Tenants Can Sue for Violation of Public Housing Demolition Law	125
Recent Cases	128
Recent Housing-Related Regulations and Notices..	130
Announcements	
Publication List/Order Form	133



Cover: XXXXXX

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.

Inquiries or comments should be directed to Eva Guralnick, Editor, *Housing Law Bulletin*, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

Congress Tackles Foreclosure Relief and GSE Reform*

The current mortgage foreclosure crisis worsened significantly in May, when more than a quarter-million homes nationwide received foreclosure-related filings,¹ a 48% increase over filings in May 2007. Foreclosures during the first quarter of 2008 also rode a pronounced upward trend, with foreclosure activity up 23% over the previous quarter, and 112% over the first quarter of 2007.² Although predictions vary, some experts believe that foreclosures are not likely to peak until fall 2008, when interest rates on many adjustable-rate mortgages (ARMs) reset and payments become unaffordable for borrowers.³ The Congressional Budget Office (CBO) has estimated that 2.2 million homeowners with subprime and alt-A mortgages, the most abusive mortgage loans, will have foreclosure proceedings initiated against them between October 1, 2008, and September 30, 2011.⁴

With no end to the crisis in sight, Congress is grappling with legislation to curb the growing tide of foreclosures and help people stay in their homes. Of the numerous bills that have been introduced in the House and Senate, the American Housing Rescue and Foreclosure Prevention Act (H.R. 3221) passed the full House on May 8, and the Federal Housing Finance Regulatory Reform Act was approved by the Senate Committee on Banking, Finance, and Urban Affairs on May 20.

H.R. 3221

On May 8, the House passed the American Housing Rescue and Foreclosure Prevention Act of 2008, H.R. 3221, which provides foreclosure relief and Federal Housing Administration (FHA) refinancing loans for homeowners, modernizes the FHA, reforms the Government Sponsored Enterprises (GSEs) such as Fannie Mae and Freddie Mac, and establishes a housing trust fund. The bill was packaged as three amendments to a version of the

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

¹RealtyTrac, Foreclosure Activity Increase 7 Percent in May (June 13, 2008), available at <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4728&acct=64847>.

²RealtyTrac, U.S. Foreclosure Activity Increases 23 Percent in First Quarter (April 29, 2008), available at <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4566&acct=64847>.

³ASSOCIATED PRESS, *Foreclosure Filings Jump, and Fall is Forecast as Peak*, N.Y. TIMES, June 14, 2008, <http://www.nytimes.com/2008/06/14/business/14mortgage.html?sq=foreclosure&st=cse&scp=1&pagewanted=print>.

⁴Cost Estimate, Congressional Budget Office, Federal Housing Finance Regulatory Reform Act of 2008 8 (June 9, 2008), http://www.cbo.gov/ftpdocs/93xx/doc9366/Senate_Housing.pdf [hereinafter CBO Cost Estimate].

bill previously approved by the Senate, and was passed by the House in three separate votes.⁵

The Bush Administration has stated that the President will veto H.R. 3221 if presented in its current form.⁶ Two portions of the bill passed, but fell short of a veto-proof majority. The main housing amendment passed by a 266-154 vote, and an amendment providing that H.R. 3221 would not preempt state foreclosure laws passed by a 256-160 vote. Only the amendment containing the bill's tax provisions passed by a veto-proof margin of 322-94.⁷

Allowing homeowners facing foreclosure to refinance their mortgages with loans they can realistically afford, and reducing borrowers' loan principal, are important components of homeowner relief that have been sought by advocates.

An earlier version of H.R. 3221 would have authorized Community Development Block Grant Funds to create a Neighborhood Stabilization Fund. This fund would have allocated grant and loan funds to states to purchase vacant foreclosed properties in order to stabilize communities hardest hit by the foreclosure crisis. These provisions were omitted due to concern that they would undermine Republican support for the bill, and were packaged instead in the stand-alone Neighborhood Stabilization Act of 2008, discussed elsewhere in this *Bulletin*. Similarly, the bill did not include proposed protections for renters facing eviction from properties in foreclosure. Several renter protection bills have been introduced in Congress, and are also discussed elsewhere in this *Bulletin*. The bill does not include provisions allowing a write-down of mortgage principal in bankruptcy.

⁵Memo to Members, National Low Income Housing Coalition, House Passes Massive Housing Bill (May 9, 2008), Vol. 13, No. 19, at http://nlihc.org/detail/article.cfm?article_id=5115 [hereinafter NLIHC, House Passes Massive Housing Bill]. H.R. 3221 includes, as part of three amendments, the FHA Housing and Homeowner Retention Act of 2008 (H.R. 5830), the Federal Housing Finance Reform Act of 2007 (H.R. 1427), the Expanding American Homeownership Act of 2007 (H.R. 1852), the Emergency Mortgage Loan Modification Act of 2008 (H.R. 5579), the Housing Assistance Tax Act of 2008 (H.R. 5720), and an amendment providing that H.R. 3221 would not preempt state laws addressing foreclosure of residential properties.

⁶Statement of Administrative Policy, Executive Office of the President, Office of Management and Budget, House Amendments to Senate Amendment to H.R. 3221—Foreclosure Prevention Act of 2008 1 (May 6, 2008), <http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr3221-r.pdf> [hereinafter Statement of Administrative Policy].

⁷Barry G. Jacobs, *House Passes Comprehensive Mortgage Foreclosure Relief Bill*, 36 HOUSING AND DEV. REP. CURRENT DEV. 289, 316 (May 19, 2008).

FHA Refinancing and Foreclosure Relief

Allowing homeowners facing foreclosure to refinance their mortgages with loans they can realistically afford, and reducing borrowers' loan principal, are important components of homeowner relief that have been sought by advocates.⁸ H.R. 3221 includes mortgage refinancing provisions added to address criticism that a prior version of the bill passed by the Senate on April 10 did not do enough to assist distressed homeowners.⁹ These provisions would authorize up to \$300 billion in FHA-insured refinancing loans for homeowners facing foreclosure on owner-occupied principal residences.¹⁰ The refinancing loans would be securitized through an additional \$300 billion increase in Ginnie Mae commitment authority.¹¹ Participation in the refinance program is voluntary, by both borrowers and lenders, and would require lenders to accept the new loan as full satisfaction of the current mortgage.¹²

The refinancing provisions of the bill would require mortgage holders to accept a substantial write-down in the value of the existing mortgage. Refinance loans could not exceed 90% of the home's current appraised value.¹³ Further, the costs of the refinance loan would be subtracted from the new loan amount, resulting in the final refinance loan being no more than 85% of the home's current value.¹⁴ Mortgages on single-family homes could be refinanced with loans up to 125% of the median area home price or \$729,750, whichever is less.¹⁵ Mortgages insured under the program would have a fixed interest rate for the entire term,¹⁶ which would be extended to forty years.¹⁷ The Oversight Board would establish reasonable limits on origination fees, and would require interest rates to

⁸H.R. 3221 also includes heightened foreclosure protections for military service members. The bill would extend current restrictions on the sale, foreclosure, or seizure of property owned by service members from ninety days to one year after completion of military service. Further, bankruptcy could not be the basis for denying disabled veterans' participation in federal mortgage or subsidy programs. *Id.*

⁹NLIHC, House Passes Massive Housing Bill, *supra* note 5. Most of the bill's mortgage foreclosure provisions were originally part of H.R. 5830. *Id.*

¹⁰H.R. 3221, 110th Cong. § 112 (2008), adding §§ 257(c)(1), (h) to Title II of the National Housing Act.

¹¹H.R. 3221, at § 112, adding § 257(k)(2) to the National Housing Act. See also *Financial Services Committee Approves FHA Refinancing Bill for Homeowners Facing Foreclosure*, 36 HOUSING AND DEV. REP. CURRENT DEV. 257, 259 (May 5, 2008).

¹²H.R. 3221, at § 112, adding § 257(c)(6)(B) to the National Housing Act.

¹³H.R. 3221, at § 112, adding § 257(c)(4) to the National Housing Act. The bill would impose civil money penalties on lenders, mortgage brokers, realtors, and other interested parties in the program's refinancing transactions who attempt to improperly influence appraisals. H.R. 3221, at § 112, adding § 257(g) to the National Housing Act.

¹⁴STAFF OF HOUSE COMM. ON FIN. SERV., 110TH CONG., Economic and Housing Rescue Legislation Introduced in the House, FHA Housing Stabilization and Homeownership Retention Act (May 1, 2008), at <http://financialservices.house.gov/FHA.html>. See also Jacobs, *supra* note 7, at 316.

¹⁵Jacobs, *supra* note 7, at 316.

¹⁶H.R. 3221, at § 112, adding § 257(c)(10) to the National Housing Act.

¹⁷H.R. 3221, at § 204, amending § 203(b) of the National Housing Act.

be commensurate with market-rate interest rates on comparable loans.¹⁸ The bill would also require the mortgage holder to waive any prepayment penalties, as well as all fees related to default or delinquency, and would require reduction of the borrower's debt service payments.¹⁹

Provisions of the bill would also encourage servicers of pooled home loans to modify loans or develop plans to avoid foreclosure.²⁰ Although the final version of the bill omitted provisions authorizing the FHA to refinance loans on a bulk basis, the bill would require the Federal Reserve Board to study the potential need for auctions or bulk refinancing.²¹

In addition to the refinancing provisions, the bill would require HUD to establish new underwriting standards for high-risk borrowers. It would also authorize adjustments in mortgage insurance premiums based on risk associated with the borrower and mortgage products. The bill would establish a program Oversight Board consisting of the Secretary of the Treasury, the HUD Secretary, and the Chairman of the Board of Governors of the Federal Reserve System.²²

Eligibility for Refinance Loans

The FHA refinancing program would be available for mortgages originated on or before December 31, 2007.²³ Refinancing loans would be available for one- to four-unit owner-occupied residences.²⁴ The bill includes a number of provisions designed to prevent borrowers from intentionally defaulting on mortgage loans in order to utilize the program. To be eligible for refinancing, borrowers must have been paying at least 35% of their income toward their existing mortgages.²⁵ Borrowers would also be required to certify that they did not provide false information to secure the existing loan, they have not intentionally defaulted on the mortgage, they do not own any other homes, and that the home is their principal residence.²⁶ Homeowners convicted of fraud in the previous seven years are ineligible for the program.²⁷ The bill would also allow the government to retain a share of the future home-price appreciation as an exit premium to be paid upon refinance, sale, or other disposition of the mortgaged home.²⁸

H.R. 3221 includes several provisions to help ensure that borrowers will not default on the refinanced loans. The bill would require the Oversight Board to establish underwriting standards to ensure that borrowers have a reasonable expectation of repaying the mortgage, considering the borrower's income, assets, liabilities, payment history, and other applicable criteria.²⁹ This determination would not be made solely on the basis of the borrower's current credit scores or any delinquency or default on their current mortgage. H.R. 3221 would also require that post-refinancing debt payments not exceed 43% of a borrower's income. However, payments up to 50% of income could be approved based on the borrower's payment history.³⁰

In addition, participation in the program requires the release of all existing liens on the property, including any second mortgages.

In addition, participation in the program requires the release of all existing liens on the property, including any second mortgages.³¹ The bill would also prohibit borrowers from taking out any second mortgages within five years of refinancing, except as the Oversight Board determines to be necessary for the maintenance of the property.³² Because second mortgage holders might well choose to keep their existing loans because of the even slight possibility of future repayments, this restriction could effectively bar a significant portion of distressed homeowners from eligibility. However, H.R. 3221 includes provisions that could allow subordinate mortgage holders to receive compensation for the extinguishment of their liens, which may in turn encourage participation.³³ The Oversight Board would establish a voluntary program for senior mortgage holders to pay subordinate mortgage holders an amount determined by a Board-established formula in satisfaction of the subordinate mortgage. The Board may also establish a short period for senior and subordinate lien holders to negotiate extinguishment of the subordinate lien for a different payment amount. In addition, the Oversight Board may require the mortgagor

¹⁸H.R. 3221, at § 112, adding § 257(f) to the National Housing Act.

¹⁹H.R. 3221, at § 112, adding §§ 257(c)(5), (7) to the National Housing Act.

²⁰Jacobs, *supra* note 7, at 289.

²¹H.R. 3221, at § 113.

²²*Id.* § 112, adding § 257(a) to the National Housing Act.

²³*Id.* at § 112, adding § 257(c)(3) to the National Housing Act.

²⁴*Id.* at § 112, adding § 257(b)(1) to the National Housing Act.

²⁵*Id.* at § 112, adding § 257(c)(2)(B) to the National Housing Act.

²⁶*Id.* at § 112, adding §§ 257(c)(1), (2)(A) to the National Housing Act.

²⁷*Id.* at § 112, adding § 257(c)(12) to the National Housing Act.

²⁸The exit premium paid to the federal government would be secured through a lien on the property that is subordinate to the FHA-insured mortgage, but senior to all other mortgages. H.R. 3221, at § 112, adding § 257(8) of the National Housing Act.

²⁹H.R. 3221, at § 112, adding § 257(d) of the National Housing Act.

³⁰Borrowers may pay up to 50% of their income toward the refinanced mortgage if they have made at least six months of full, timely payments prior to the refinancing. H.R. 3221, at § 112, adding § 257 (d)(2) of the National Housing Act.

³¹H.R. 3221, at § 112, adding § 257(c)(6)(B) to the National Housing Act. See also *CBO Estimates About 500,000 Loans Would Be Refinanced Under House-Approved FHA Program*, 36 HOUSING AND DEV. REP. CURRENT DEV. 289, 306 (May 19, 2008) [hereinafter H.D.R., *CBO Estimates*].

³²H.R. 3221, at § 112, adding § 257(c)(8)(F) to the National Housing Act.

³³*Id.* at § 112, adding § 257(c)(6)(B) to the National Housing Act.

to share a portion of future home equity with the subordinate lien holder.

According to CBO estimates, second mortgages have been taken out on 40% of homes with sub-prime and alt-A first mortgages, the most abusive loans contributing to the current foreclosure crisis.³⁴ Although the CBO estimates that 2.8 million loans would be eligible for refinancing, this figure would be reduced significantly by the subsequent lienholder release requirement. The CBO estimates that about 500,000 home mortgages would be refinanced under the program.³⁵

Because many homeowners at risk of mortgage default and delinquency are not well-versed in home finance, mortgage counseling services are essential to foreclosure prevention.

Foreclosure Counseling and Legal Services

Because many homeowners at risk of mortgage default and delinquency are not well-versed in home finance, mortgage counseling services are essential to foreclosure prevention. To address this need, the bill would authorize the appropriation of \$230 million for services targeting mortgagors with one- to four-family residences during fiscal years 2008 and 2009.³⁶ Funds would be allocated to communities and states based on the 2007 and 2008 levels of delinquencies and foreclosures, and at least 15% of these funds would be provided to organizations targeting minority and low-income homeowners. Of the total appropriation, \$35 million in grants would be allocated to legal organizations to assist homeowners facing foreclosure and tenants who live in homes at risk of or in foreclosure. At least 60% of the legal assistance grants would be designated for legal services for low-income homeowners and tenants.

FHA Modernization

The bill also includes general FHA modernization provisions. The limit on FHA loans for one-family homes would be increased to 125% of the area median home price or 175% of the Fannie Mae-Freddie Mac conforming loan limit, whichever is less. The bill would provide that FHA-insured mortgage loans would have a term of up to forty years.³⁷ In addition, the modernization provisions simplify downpayment requirements and authorize no-downpayment loans.

³⁴H.D.R., *CBO Estimates*, *supra* note 31, at 307.

³⁵*Id.* at 306. Although the full budgetary impact of the bill will depend on the number of loans refinanced and the likelihood of borrower default, the CBO estimates that the program will cost \$1.7 billion. *Id.*

³⁶H.R. 3221, at § 112, *adding* § 257(o) to the National Housing Act.

³⁷*Id.* at § 204, *amending* § 203(b)(3) of the National Housing Act.

GSE Reform and Housing Trust Fund Provisions

H.R. 3221 would also enact regulatory reforms of the GSEs, many of which were previously approved by the House as the stand-alone bill H.R. 1427 in May 2007.³⁸ The bill would also add new provisions to finance an affordable housing trust fund with revenue from the GSEs.³⁹

In order to consolidate and improve oversight of the GSEs, the reform measures would abolish the Office of Federal Housing Enterprise Oversight and Federal Housing Finance Board as the current regulators of the GSEs, and would instead establish a new Federal Housing Finance Agency (FHFA) to regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.⁴⁰ Responsibility for housing goals and program approval would be transferred from HUD to the FHFA.⁴¹ The bill would establish goals for single-family and multi-family special affordable housing, replacing the enterprises' current affordable housing goals.⁴²

Mortgage portfolio limits for Fannie Mae and Freddie Mac would be set by the FHFA based in part on the potential risk to GSEs, but would not take into account the potential risk to the larger financial system, an additional provision sought by the Bush Administration.⁴³ Under the bill, the FHFA director would establish and maintain a housing price index used to annually adjust the conforming loan limit up or down for one- to four-unit properties. The limit would be set at either the basic loan limit or 125% of the area median price for the applicable residence size, and would not exceed 175% of the basic limit.⁴⁴ This change would take effect in 2009, and would not include the additional adjustments in loan limits for high-cost housing areas previously authorized by the House.⁴⁵

National Affordable Housing Trust Fund

Although advocates were disappointed that the National Affordable Housing Trust Fund Act of 2007 (S. 2523) was not adopted as an amendment to the final version of H.R. 3221, the bill does include provisions that would create a temporary National Affordable Housing Trust Fund from 2008 to 2012, funded by annual contributions from the GSEs.⁴⁶ The purpose of the fund is to provide grants to increase homeownership for extremely low- and very low-income households, to increase and preserve the supply of rental and owner-occupied housing

³⁸H.R. 1427, the Federal Housing Finance Reform Act of 2007, was included as an amendment to the version of H.R. 3221 passed by the House. See NHLP, *House of Representatives Passes Affordable Housing Fund*, 37 HOUS. L. BULL. 110 (June/July 2007); NLIHC, *House Passes Massive Housing Bill*, *supra* note 5.

³⁹*Id.*

⁴⁰Jacobs, *supra* note 7, at 316.

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.* See also Statement of Administrative Policy, *supra* note 6, at 3.

⁴⁴Jacobs, *supra* note 7, at 316.

⁴⁵*Id.*

⁴⁶H.R. 3221, at § 340, *replacing* §§ 1337, 1338 of the Housing and Community Development Act of 1992.

for extremely low- and very low-income households, and increase investment in housing in low-income areas and areas of chronic economic distress.⁴⁷ However, the bill stops short of creating a permanent, independent trust fund that could accept funding from multiple sources.⁴⁸ The bill also provides that if a comparable Affordable Housing Trust Fund is later created, funds from the H.R. 3221 fund will be diverted into the newly created fund.⁴⁹ Unlike S. 2523, the bill would not require grant recipients to match a specified percentage of the funds received from the trust fund, a provision sought by advocates. The program would sunset after five years.

Under H.R. 3221, Fannie Mae and Freddie Mac would be required to make contributions equal to 1.2 basis points for each dollar (or 1.2 cents for every 100 dollars) of the GSE's average total mortgage portfolio during the preceding year.⁵⁰ The FHFA Director would be empowered to temporarily suspend the allocation of GSE revenue to the fund upon a finding that the allocations are contributing or would contribute to the financial instability or undercapitalization of the enterprise, or would prevent the enterprise from successfully completing a capital restoration plan.⁵¹

For 2008 only, the bill would allocate 100% of grant funds to hurricane-affected areas of Louisiana and Mississippi. Seventy-five percent of these funds will be allocated to the Louisiana Housing Finance Agency, and the remaining 25% to the Mississippi Development Authority.⁵² After the fund's first year, grants would be allocated among the states and federally recognized Indian tribes based on a HUD-set formula, including factors such as proportions of national population, families that pay more than 50% of annual income for housing, extremely low- or very low-income families, families residing in substandard housing, extremely old housing stock, the cost of rehabilitating or developing housing, and any other factors HUD determines appropriate.⁵³

Grant funds could be used to produce, preserve and rehabilitate rental housing and homeownership housing for first-time homebuyers, as well as for the development

of related public infrastructure.⁵⁴ At least 10% of all funds must be used to support homeownership for first-time homebuyers, and up to 12.5% could be used for public infrastructure development.⁵⁵ All funded activities must benefit extremely low- and very low-income households. The bill would not impose affordability requirements on the housing units constructed or rehabilitated with housing trust funds.

Federal Housing Finance Regulatory Reform Act of 2008

On May 20, the Senate Committee on Banking, Finance, and Urban Affairs approved the Federal Housing Finance Regulatory Reform Act of 2008 (an unnumbered bill) by a bipartisan vote of 19-2.⁵⁶ The bill would provide foreclosure relief and FHA refinancing loans for homeowners, FHA modernization, GSE reforms, and a permanent Housing Trust Fund and Capital Magnet Fund. Although the bill would address many of the same issues as H.R. 3221, there are significant differences between the bills that are expected to be considered by the House and Senate in the coming weeks.

To gain support for the bill from Senator Shelby (R-AL), ranking member of the Committee, Senator Reed (D-RI) suggested a compromise that would divert GSE revenues designated for the Housing Trust Fund (HTF) and Capital Magnet Fund (CMF) to cover the potential costs of the bill's foreclosure relief program. The provisions of this compromise would divert 100% of GSE contributions to the HOPE for Homeowners foreclosure relief program in the first year.⁵⁷ Fifty percent of GSE contributions would go to the foreclosure program in the second year and 25% in the third year. The total amount of GSE contributions would then be allocated to the HTF and CMF every year thereafter. Although advocates opposed this provision, legislators believed it necessary to address Sen. Shelby's concerns that the mortgage refinancing program could prove costly to taxpayers, and ultimately to have the bill approved by the Committee.

However, a CBO Cost Estimate for the bill released on June 9 estimates that the Federal Housing Finance Regulatory Reform Act programs would increase net revenues by \$800 million over the next ten years.⁵⁸ This suggests

⁴⁷*Id.* at § 340, replacing §§ 1337(a)(1)-(3) of the Housing and Community Development Act of 1992.

⁴⁸Memo to Members, National Low Income Housing Coalition, Senate Passes Foreclosure Prevention Act of 2008; Dodd Vows To Do More (April 11, 2008), Vol. 13, No. 19, at http://www.nlihc.org/detail/article.cfm?article_id=5039 [hereinafter NLIHC, Senate Passes Foreclosure Prevention Act of 2008].

⁴⁹H.R. 3221, at § 340, replacing § 1337(o) of the Housing and Community Development Act of 1992.

⁵⁰*Id.*, replacing § 1337(b)(1) of the Housing and Community Development Act of 1992.

⁵¹*Id.*, replacing §§ 1337(b)(2)(A)-(C) of the Housing and Community Development Act of 1992.

⁵²*Id.*, replacing § 1337(c)(1) of the Housing and Community Development Act of 1992.

⁵³H.R. 3221, at § 340, replacing § 1337(c)(2) of the Housing and Community Development Act of 1992.

⁵⁴*Id.*, replacing § 1337(g) of the Housing and Community Development Act of 1992.

⁵⁵*Id.*, replacing § 1337 of the Housing and Community Development Act of 1992.

⁵⁶Memo to Members, National Low Income Housing Coalition, Action on Housing Trust Fund Expected Before July 4 Recess (June 6, 2008), Vol. 13, No. 23, at http://www.nlihc.org/detail/article.cfm?article_id=5261 [hereinafter NLIHC, Action on Housing Trust Fund Expected Before July 4 Recess]. The Act has not yet been assigned a bill number.

⁵⁷S. ____, 110th Cong. § 131 (2008), adding a new § 1338 to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (this amends the same statute as H.R. 3221, using a different name).

⁵⁸CBO Cost Estimate, *supra* note 4, at 1.

that the risk associated with the bill's mortgage refinancing program has been overstated, and that diversion of GSE revenues from the Housing Trust Fund is unnecessary. The bill is expected to be taken up by the full Senate prior to the July 4 Congressional recess.⁵⁹ In a June 9th speech to the National Press Club, Federal Housing Administration Commissioner Brian Montgomery argued that the Senate proposal would be too risky to taxpayers.⁶⁰ Although Montgomery did not explicitly state that President Bush would veto the bill, his comments indicate that the Administration does not support the bill.

*To address to need for mortgage
foreclosure relief for homeowners,
the bill incorporates the HOPE for
Homeowners Act as Title VI of the bill.*

FHA Refinancing and Foreclosure Relief

To address to need for mortgage foreclosure relief for homeowners, the bill incorporates the HOPE for Homeowners Act as Title VI of the bill. Like H.R. 3221, the bill would authorize up to \$300 billion in refinancing loans insured by the FHA for homeowners facing foreclosure. The refinancing loans would be securitized through an additional \$300 billion increase in Ginnie Mae commitment authority.⁶¹ Participation in the HOPE for Homeowners program would be voluntary on the part of lenders and borrowers, and would require lenders to accept the new loan as full satisfaction of the current mortgage.⁶² The bill would establish a Board of Directors for the program composed of the HUD Secretary, the Secretary of the Treasury, and the Chair of the Federal Deposit Insurance Corporation (FDIC).⁶³ Unlike H.R. 3221, the bill would also establish procedures for an auction to refinance mortgages on a bulk basis, if feasible.⁶⁴ The bill does not include any protections for renters facing eviction after their residences are foreclosed.

One purpose of the bill is to reduce mortgage loan principal obligations and interest rates to help distressed homeowners avoid foreclosure, thereby supporting long-term, sustainable homeownership.⁶⁵ Refinanced mort-

gages would have a fixed interest rate and a thirty-year term.⁶⁶ The bill would require the Board to ensure that interest rates on refinanced loans are commensurate with market-rate interest on comparable loans, and to reasonably limit loan origination fees.⁶⁷ The total amount of the loan principal that could be insured under the program would be the amount equal to the borrower's reasonable ability to pay, or the amount established at auction for bulk refinances, whichever is less. In either case, the amount of insured mortgage principal would not exceed 90% of the home's current value minus loan costs, meaning that the existing mortgage holder would receive no more than 87% of the property's current value.⁶⁸ The maximum dollar amount that could be insured is 132% of the 2007 conforming loan limit, which is currently \$550,440 for a single-family home.⁶⁹ The program would require the waiver of all loan prepayment penalties, as well as penalties and fees assessed for default or delinquency.⁷⁰

Borrowers would be required to share equity and any appreciation in value with the federal government.⁷¹ Any equity created from sale, disposition, or subsequent refinancing would be shared between the government and borrower based on a five-year phase-in schedule. Any appreciation in property value upon sale or disposition of the property would be shared equally between the borrower and government.

Like H.R. 3221, the HOPE for Homeowners program would require all subordinate liens to be extinguished, including any second mortgages,⁷² and would prohibit borrowers from taking out a second mortgage within five years of refinancing.⁷³ As discussed above, resistance on the part of second mortgage holders to release their liens could make many homeowners ineligible for the program. However, subordinate mortgage holders may be encouraged to participate by a provision that would allow them to receive a portion of the property's future appreciation that the homeowner would otherwise share with the federal government.⁷⁴

The CBO estimates that 400,000 borrowers would refinance troubled loans under the HOPE for Homeowners program from 2009 through 2011, taking into consideration the high number of subprime and alt-A mortgages with second mortgage liens.⁷⁵ The program would sunset

⁵⁹NLIHC, Action on Housing Trust Fund Expected Before July 4 Recess, *supra* note 56.

⁶⁰Alan Zibel, *FHA Chief Warns Against Broad Housing Intervention*, BUSINESS WEEK, June 9, 2008, <http://www.businessweek.com/ap/financialnews/D916PT080.htm>.

⁶¹S. ____, at § 402, adding § 257(q) to Title II of the National Housing Act.

⁶²S. ____, at § 402, adding § 257(s) to the National Housing Act.

⁶³S. ____, at § 402, adding § 257(r) to the National Housing Act.

⁶⁴S. ____, at § 402, adding § 257(e)(5) to the National Housing Act.

⁶⁵S. ____, at § 402, adding § 257(b) to the National Housing Act.

⁶⁶S. ____, at § 402, adding § 257(j) to the National Housing Act.

⁶⁷S. ____, at § 402, adding § 257(r) to the National Housing Act.

⁶⁸S. ____, at § 402, adding § 257(e)(2) to the National Housing Act. *See also* CBO Cost Estimate, *supra* note 4, at 7.

⁶⁹S. ____, at § 402, adding § 257(6) to the National Housing Act. *See also* Senate Panel Okays Foreclosure Relief Bill with Amendment To Create Housing Trust Fund, 36 HOUSING AND DEV. REP. CURRENT DEV. 321, 323 (June 2, 2008) [hereinafter H.D.R., Senate Panel].

⁷⁰S. ____, at § 402, adding § 257(e)(3) to the National Housing Act.

⁷¹S. ____, at § 402, adding § 257(k) to the National Housing Act.

⁷²S. ____, at § 402, adding § 257(e)(4)(B) to the National Housing Act.

⁷³S. ____, at § 402, adding § 257(e)(7) to the National Housing Act.

⁷⁴S. ____, at § 402, adding § 257(e)(4) to the National Housing Act.

⁷⁵CBO Cost Estimate, *supra* note 4, at 8.

after five years, and no new commitments to insure refinanced mortgages would be made after December 31, 2012.⁷⁶

Eligibility for Refinance Loans

FHA refinancing would be available for mortgages originated on or before January 1, 2008.⁷⁷ The bill includes certification requirements similar to those in H.R. 3221 to prevent borrowers from intentionally defaulting on mortgages to qualify for the program. To be eligible, borrowers must have been paying at least 31% of their income toward their total mortgage debt as of March 31, 2008.⁷⁸ Borrowers would also have to certify that they have not knowingly furnished false information to secure the mortgage, and that they have not intentionally defaulted on any debt, not just their current mortgage.⁷⁹ No homeowner who has been convicted of fraud would be eligible for the program, and the income of every applicant must be documented and verified by the IRS for the most recent two-year period.⁸⁰ Borrowers must occupy the home as their principal residence and be unable to afford their mortgage payments, and must not have a current ownership interest in any other home.⁸¹

Foreclosure Counseling Services

The bill would also authorize grants to provide financial education and counseling services to homeowners and prospective homebuyers.⁸² The initial version of the bill would have appropriated \$100 million for counseling services, but the version of the bill as approved by the Committee would simply authorize “sums as are necessary” to provide services.⁸³ The bill does not include provisions similar to those in H.R. 3221 that would allocate funds to states and tribes based on delinquency and foreclosure rates in prior years, and require a percentage of funds to be targeted toward minority and low-income homeowners. The bill would distribute grants to eligible organizations certified by HUD or the Office of Financial Education, and would require a report on the effectiveness of the program in improving the financial situation of participating households.⁸⁴ Unlike H.R. 3221, the Senate bill would *not* authorize funds for legal services for homeowners or renters facing foreclosure and displacement.

⁷⁶S. ____, at § 402, *adding* § 257(r) to the National Housing Act.

⁷⁷S. ____, at § 402, *adding* § 257(s)(3)(B) to the National Housing Act.

⁷⁸S. ____, at § 402, *adding* § 257(e)(1)(B) to the National Housing Act. The Board would be able to determine that an amount higher than 31% is appropriate. *Id.*

⁷⁹S. ____, at § 402, *adding* § 257(e) to the National Housing Act. The borrower would be liable to the FHA for any benefits received through reduction of the mortgage based on misrepresentations. *Id.*

⁸⁰S. ____, at § 402, *adding* § 257(e) to the National Housing Act.

⁸¹S. ____, at § 402, *adding* §§ 257(e), (s)(3) to the National Housing Act.

⁸²S. ____, at § 132.

⁸³S. ____, at § 132(e).

⁸⁴S. ____, at § 132(f).

Nationwide Mortgage Licensing System and Registry

In an effort to reduce mortgage fraud, enhance consumer protection, and increase responsibility in the subprime mortgage market, the bill would also establish a Nationwide Mortgage Licensing System and Registry (NMLSR).⁸⁵ The bill would require state-licensed loan originators to participate in the NMLSR, which would establish uniform reporting requirements and license applications.⁸⁶ The bill would encourage states to establish their own loan originator licensing systems, but would grant HUD authority to establish such systems in states that do not create their own.⁸⁷

The bill would impose on Fannie Mae and Freddie Mac a duty to undertake activities relating to mortgages on housing for very low-, low- and moderate-income families.

GSE Reform and Housing Trust Fund Provisions

Like H.R. 3221, the Senate bill would enact regulatory reforms of the GSEs. The bill would also require Fannie Mae and Freddie Mac to make annual contributions to a permanent housing trust fund, discussed in more detail below. To consolidate oversight of the GSEs, the bill would establish a new Federal Housing Finance Agency (FHFA) to regulate Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance.⁸⁸ The FHFA would have authority over housing goals, mortgage portfolio limits, and capital standards.⁸⁹ The Senate bill would require GSE holdings to be backed by sufficient capital for the safe and sound operation of the enterprises.⁹⁰

Significantly, the bill would impose on Fannie Mae and Freddie Mac a duty to undertake activities relating to mortgages on housing for very low-, low- and moderate-income families.⁹¹ Fannie Mae and Freddie Mac would also have a duty to serve underserved markets, including manufactured housing, subprime borrowers, rural markets, and to conduct activities that facilitate a secondary market in affordable housing preservation.⁹² Goals for single-family home purchase mortgages, including one- to four-family owner-occupied properties, single-family

⁸⁵S. ____, at § 602. *See also* H.D.R., *Senate Panel*, *supra* note 69, at 324.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸S. ____, at § 101, *amending* § 1311 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

⁸⁹H.D.R., *Senate Panel*, *supra* note 69, at 324.

⁹⁰S. ____, at § 109, *amending* § 1369E of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

⁹¹S. ____, at § 129.

⁹²S. ____, at § 129. The duty to serve underserved markets also includes providing assistance to depository institutions in meeting their obligations under the Community Reinvestment Act (CRA). *Id.*

mortgage refinancings, and multifamily special affordable housing would replace Fannie and Freddie's current affordable housing goals.⁹³

The Senate bill would establish a housing price index to annually adjust the conforming loan limit for GSEs. Rather than reducing loan limits if the index declines, as would H.R. 3221, the Senate bill would offset any loan limit reductions from future increases in the index.⁹⁴ Unlike H.R. 3221, the bill would provide adjustments in the conforming loan limit for areas with high housing costs.⁹⁵ However, the bill would prohibit Fannie Mae and Freddie Mac from holding loans in their portfolios that exceed the basic loan limit, except to the extent that such mortgages would be held for the purposes of securitization.⁹⁶ This restriction on Fannie and Freddie's portfolio holdings particularly will affect states with high housing costs, and has drawn concern from Senators Charles Schumer (D-NY) and Mel Martinez (R-FL).⁹⁷

National Housing Trust Fund

Advocates were pleased that most of the key provisions of the National Affordable Housing Trust Fund Act of 2007 (H.R. 2523) were included in the Senate bill. The bill would establish a permanent housing trust fund that could accept contributions from Fannie Mae and Freddie Mac, as well as other sources that could be dedicated by Congress. Fannie Mae and Freddie Mac would contribute annually an amount equal to 4.2 basis points for each dollar (or 4.2 cents per 100 dollars) of the enterprises' total new business purchases.⁹⁸ After the first three years of the program, 65% of these contributions would be allocated to the Housing Trust Fund, and the remaining 35% to a Capital Magnet Fund.⁹⁹ Unlike S. 2523, the bill would not require grant recipients to match a specified percentage of the funds received from the trust fund, a provision long sought by advocates to increase public investment in affordable housing.

Grants from the Housing Trust Fund would be allocated to states and tribes using a needs-based formula, and then distributed to qualified agencies and organizations with a demonstrated experience and capacity to conduct eligible activities.¹⁰⁰ Funds could be used for the production, preservation, and rehabilitation of rental housing and housing for ownership by first-time home-

buyers.¹⁰¹ In contrast to H.R. 3221, public infrastructure development would not be eligible for funding. No more than 10% of the funds could be used for homeownership activities, whereas H.R. 3221 requires a minimum 10% of funds be allocated to homeownership.¹⁰² Under the Senate bill, every state would receive a minimum of \$3 million in Fund grants.¹⁰³

Advocates were pleased that most of the key provisions of the National Affordable Housing Trust Fund Act of 2007 (H.R. 2523) were included in the Senate bill.

The allocation formula would take into consideration the following factors: the state's shortage of rental units affordable and available to extremely low-income households (those below 30% of area median income, or ELI) and very low-income households (those below 50% of area median income, or VLI) relative to other states, with priority consideration given to the shortage of housing for ELI households; the state's relative number of ELI households living with incomplete kitchen or plumbing facilities, more than one person per room, or paying more than 50% of their income towards rent; and the state's relative number of VLI households paying such rent burdens.¹⁰⁴ Like H.R. 3221, the bill would not impose affordability requirements on the housing units constructed or rehabilitated with HTF funds.

To ensure that the fund is used to help those households with the greatest housing needs, the bill would require that 75% of all HTF funds be used for activities benefiting ELI families, and 25% for activities benefiting VLI families.¹⁰⁵ This provision, central to the National Housing Trust Fund Campaign, was adopted by Senator Reed and Senator Dodd in the version of the bill as passed by the Committee. Significantly, there is no provision in the Senate bill that would prohibit the use of HTF funds for activities benefiting undocumented immigrants.

⁹³S. ____, at § 129. See also H.D.R., *Senate Panel*, *supra* note 69, at 324.

⁹⁴S. ____, at § 124. See also H.D.R., *Senate Panel*, *supra* note 69, at 324.

⁹⁵S. ____, at § 124. Loan limits in high cost housing areas would be equal to the median home price for the area, or 132% of the basic loan limit, whichever is less. *Id.*

⁹⁶S. ____, at § 124.

⁹⁷*Id.* See also H.D.R., *Senate Panel*, *supra* note 69, at 324.

⁹⁸S. ____, at § 131, replacing § 1337 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4567).

⁹⁹S. ____, at § 131, replacing § 1337 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

¹⁰⁰S. ____, at § 131, adding a new § 1338(c) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

¹⁰¹S. ____, at § 131, adding a new § 1338(c)(7) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

¹⁰²S. ____, at § 131, adding a new § 1338(c)(9) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

¹⁰³S. ____, at § 131, adding a new § 1338(c)(4) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

¹⁰⁴S. ____, at § 131, adding a new § 1338(c)(3) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992. The formula would take into consideration state construction costs relative to other states. *Id.*

¹⁰⁵S. ____, at § 131, adding a new § 1338(c)(7) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

The Capital Magnet Fund (CMF) created by the bill would be used to attract private capital through a competitive grant program.¹⁰⁶ Capital brought in by the CMF could be used for affordable housing as well as economic development or community service activities, and would be distributed to certified Community Development Financial Institutions. Advocates hope that when the bill is conferenced with the House, its provisions can be changed either to omit the CMF altogether to increase revenue for the Housing Trust Fund, or to require CMF funds to be used exclusively for affordable housing.

Administration's Position

In response to the mortgage foreclosure crisis, the Bush Administration launched the FHA Secure program in August of 2007, in combination with a risk-based pricing structure for FHA loans that took effect January 1, 2008.¹⁰⁷ Initially, the FHA Secure program provided FHA-insured refinancing loans for homeowners in non-FHA ARMs who only missed mortgage payments after their interest rate reset, and who had strong credit histories.¹⁰⁸ To qualify for FHA Secure, homeowners must have made all payments in the six months before the ARM teaser interest rate expired.¹⁰⁹ In addition, homeowners must have had an interest rate that reset or will reset between June 2005 and December 2008, 3% cash or equity in the home, a sustained employment history, and income sufficient to make the mortgage payments.¹¹⁰ Under the risk-based pricing structure for FHA-insured loans, borrowers with less favorable credit profiles pay higher loan premiums.¹¹¹

In an effort to allow more distressed homeowners to utilize the program, on April 9 Assistant Secretary for Housing and FHA Commissioner Brian Montgomery announced the expansion of FHA Secure to make some borrowers with a history of delinquent payments on ARMs prior to an interest rate reset eligible for refinancing. Under the expanded program, homeowners who were late on up to two thirty-day payments or one sixty-day payment in the previous twelve months qualify for FHA Secure loans to refinance up to 97% of their

mortgage.¹¹² Homeowners with ARMs who were late on up to three thirty-day payments or one ninety-day payment in the last twelve months qualify for FHA Secure loans to refinance up to 90% of their mortgage.¹¹³ Homeowners with fixed-rate mortgages are eligible for the program if they are current on mortgage payments.¹¹⁴

The Bush Administration expects the FHA Secure program to help up to 240,000 families avoid foreclosure,¹¹⁵ as compared to the 500,000 and 400,000 estimated to be helped by H.R. 3221 and the Senate's Federal Housing Finance Regulatory Reform Act, respectively.

What's Next

Because the housing provisions of H.R. 3221 did not pass the House with a super-majority vote sufficient to override the threatened Presidential veto, the bill is unlikely to be successful in its current form. Negotiations have been taking place between chairs of the Senate Banking Committee and the House Committee on Financial Services, Sen. Dodd (D-CT) and Rep. Barney Frank (D-MA), respectively, to establish a compromise between H.R. 3221 and the Senate bill.¹¹⁶ Representative Frank has sent a list of requested changes to the Senate Committee, which includes an increase in the conforming loan limit for high-cost areas, a provision opposed by Senator Shelby.¹¹⁷ The full Senate could consider the bill in late June.¹¹⁸ Although the Administration has signaled opposition to the bill, Rep. Frank predicts that President Bush will ultimately sign the bill because the Administration supports its provisions on stronger GSE regulation and FHA modernization.¹¹⁹ The National Housing Trust Fund Campaign supports the Senate bill in its current form.¹²⁰ Resolution of the many policy differences appears likely before the election recess. ■

¹⁰⁶H.D.R., *Senate Panel*, *supra* note 69, at 323.

¹⁰⁷Jacobs, *supra* note 7, at 253; Press Release, United States Department of Housing and Urban Development, No. 07-123, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, Keep Their Homes, FHA to Implement New "FHA Secure" Refinancing Product (August 31, 2007), available at <http://www.hud.gov/news/release.cfm?content=pr07-123.cfm> [hereinafter Press Release, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance].

¹⁰⁸Jacobs, *supra* note 7, at 253.

¹⁰⁹*Id.*

¹¹⁰Press Release, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, *supra* note 107.

¹¹¹*Id.*

¹¹²Memo to Members, National Low Income Housing Coalition, Senate Appropriations Holds Hearing on FHA's Role in Crisis (April 11, 2008), Vol. 13, No. 15, at http://nlihc.org/detail/article.cfm?article_id=5040; *Guidance Issued for Expanded FHA Secure Program; Risk-Based MIP Structure to Be Implemented*, 36 HOUSING AND DEV. REP. CURRENT DEV. 289, 292 (May 19, 2008) [hereinafter H.D.R., *Guidance Issued*].

¹¹³H.D.R., *Guidance Issued*, *supra* note 112, at 292.

¹¹⁴*Id.*

¹¹⁵Press Release, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, *supra* note 107.

¹¹⁶Memo to Members, National Low Income Housing Coalition, Senate Action on GSE Bill is Imminent (June 13, 2008), Vol. 13, No. 24, at http://www.nlihc.org/detail/article.cfm?article_id=5275 [hereinafter NLIHC, Senate Action on GSE Bill is Imminent].

¹¹⁷Steve Sloan, *Frank Offers GSE Changes Ahead of Senate Vote*, AMERICAN BANKER, June 16, 2008, <http://www.americanbanker.com/errornocookies.html?url=%2F%24nocookies%24%2Farticle.html%3Fid%3D20080613LD-EZC8D1>.

¹¹⁸*Id.*

¹¹⁹Frank Predicts President Will Sign Mortgage Foreclosure Relief Bill, 36 HOUSING AND DEV. REP. CURRENT DEV. 321, 324 (June 2, 2008).

¹²⁰NLIHC, Senate Action on GSE Bill is Imminent, *supra* note 116.