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Cover: Plaza East, a 193-unit public housing development in San Francisco, California.

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Lenders, Government Entities Ramp Up Foreclosure Prevention Efforts

In the past several months, the public and private sectors have launched a variety of initiatives to keep homeowners out of foreclosure, to temporarily suspend foreclosure sales, and to protect tenants living in foreclosed properties. This article provides updates on the foreclosure prevention and tenant protection measures included in the Housing and Economic Recovery Act,[1] the Emergency Economic Stabilization Act,[2] and the proposed Second Stimulus Package,[3] as well as foreclosure prevention activities initiated by the private sector.

Housing and Economic Recovery Act

On July 30, 2008, President Bush signed into law the Housing and Economic Recovery Act of 2008 (H.R. 3221).[4] This article examines the status of three of the act's provisions. First, the act's Hope for Homeowners Program authorized the Federal Housing Administration to refinance $300 billion of mortgages for eligible borrowers at risk of foreclosure. Second, the act allocated $3.92 billion in Neighborhood Stabilization funds to states and local governments to purchase and redevelop abandoned and foreclosed homes. Third, the act established an Affordable Housing Trust Fund to provide states with dedicated funding for the development of affordable housing.

Hope for Homeowners

Title IV of the Housing and Economic Recovery Act created the Hope for Homeowners program, which became effective on October 1, 2008.[5] The program allows borrowers at risk of default to qualify for new, thirty-year, fixed-rate mortgages insured by the Federal Housing Administration. As launched, borrowers could only participate in Hope for Homeowners if their current lender voluntarily agreed to write down the size of the mortgage to a maximum of 90% of the home's new appraised value.[6] The program's early results were discouraging, with HUD receiving only seventy applications during the program's first month.[7]

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[1]Pub. L. 110-289, 122 Stat. 2654 (July 30, 2008).
[2]Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008).
[3]S.3689, 110th Cong. (2008).
[4]Pub. L. 110-289, 122 Stat. 2654 (July 30, 2008). For a comprehensive overview of the act, see Katherine Lehe, *Foreclosure Relief Legislation Includes GSE Regulation and National Housing Trust Fund*, 38 Hous. L. Bull. 161 (Aug. 2008).
[5]Pub. L. No. 110-289, § 1401-1404, 122 Stat. 2654, 2800-08 (2008).
[6]Press Release, HUD, Bush Administration Launches "Hope For Homeowners" Program to Help More Struggling Families Keep Their Homes (Oct. 1, 2008), http://portal.hud.gov/portal/page?_pageid=73,7605828&_dad=portal&_schema=PORTAL.
[7]Alison Vekshin, *HUD Said to Entice Banks to Enter Foreclosure Program*,

In response, on November 19, 2008, HUD modified the program to increase the incentive for lenders to participate. Specifically, HUD increased the loan-to-value ratio from 90% to 96.5% for some Hope for Homeowners loans, and authorized lenders to extend mortgage terms from thirty to forty years.[8] These changes are intended to apply only to borrowers whose mortgage payments do not exceed 31% of their monthly gross income.[9] Further, borrowers cannot have household debt of more than 43% of their monthly income.[10] Many of the original Hope for Homeowners rules remain in place. For example, the mortgage must have originated before January 1, 2008, the borrower must have made at least six payments on the first mortgage, and the loan amount cannot exceed $550,440.[11] All Hope for Homeowners loans will remain fixed-rate mortgages.[12]

Contributions that the government sponsored entity's will make to the Housing Trust Fund are based on their volume of new business, not their profits.

Neighborhood Stabilization Program

Title III of the Housing and Economic Recovery Act created the Neighborhood Stabilization Program (NSP) and granted $3.92 billion for emergency assistance to states and localities to redevelop abandoned and foreclosed homes and residential properties.[13] States and localities receiving NSP funds were required to submit plans to HUD by December 1, 2008, detailing their need, anticipated use, and allocation plan for use of the funds. Advocates throughout the country submitted comments on their jurisdictions' plans, addressing issues such as preventing displacement of families in foreclosed properties, ensuring long-term affordability, complying with fair housing obligations, and increasing the amount of funds targeted to serve very low-income and extremely low-income families.[14] HUD is expected to approve NSP plans by early January. Any revisions to the plans or resubmissions of disapproved plans must be completed by February 13, 2009. NSP grantees are then required to submit quarterly reports on use of the funds for fifteen months.[15]

National Housing Trust Fund

Title I of the Housing and Economic Recovery Act created the national Housing Trust Fund (HTF).[16] Funds for the HTF will come from annual contributions made by Fannie Mae and Freddie Mac, with the amount based on a percentage of each government-sponsored entity's (GSE) annual new business. However, on September 7, 2008, Fannie Mae and Freddie Mac were placed into conservatorship by the U.S. Treasury, raising concerns about the HTF's future. According to the National Low Income Housing Coalition, contributions that the GSEs will make to the HTF are based on their volume of new business, not their profits, and their new business is increasing and will continue to do so.[17] Further, the HTF is not scheduled to receive any funding until fiscal year 2010, by which time the GSEs' fiscal conditions are expected to improve.[18]

Protections for Tenants in Foreclosed Properties

The Emergency Economic Stabilization Act (EESA),[19] enacted October 3, 2008, provides $700 billion to the Treasury Secretary to purchase troubled assets, especially mortgage-backed securities, from the nation's banks. As the federal government purchases distressed mortgage-related assets, it will become the owner of rental properties throughout the country. EESA requires that the Treasury Secretary coordinate with the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Board, the Federal Housing Finance Agency, the Secretary of HUD, and other federal entities, "to permit bona fide tenants who are current on their rent to remain in their homes under the terms of the lease."[20] EESA also requires the Treasury Secretary, in modifying any mortgage, to ensure (1) the continuation of any federal, state and local rent subsidies and protections for tenants; and (2) that any modification take into account the need for funds to maintain safe and decent conditions at rental properties.[21]

Bloomberg.com, Nov. 19, 2008, http://www.bloomberg.com/apps/news?pid=20601103&sid=ahcR.ajXp4Fc&refer=us.

[8] Press Release, HUD, Bush Administration Announces Flexibility for "HopeForHomeowners" Program (Nov. 19, 2008), http://portal.hud.gov/portal/page?_pageid=73,7699757&_dad=portal&_schema=PORTAL.

[9] The program currently does not address what will happen if a homeowner's monthly income decreases, causing mortgage payments to exceed 31% of the homeowner's monthly gross income.

[10] *Id.* The program will continue to offer borrowers with higher debt loads a 90% loan-to-value ratio on their Hope for Homeowners loans.

[11] *Id.*

[12] *Id.*

[13] Pub. L. No. 110-289, §§ 2301-2305, 122 Stat. 2654, 2850-4 (July 30, 2008). For a detailed review of the NSP, see *HUD Issues Regulations Implementing the Neighborhood Stabilization Program,* 30 Hous. L Bull. 215 (Oct. 2008). To obtain a checklist of activities that advocates can undertake to ensure that their jurisdictions are appropriately using NSP funds, contact David Rammler of NHLP at drammler@nhlp.org.

[14] *See, e.g.*, Letter from Evan Lewis, Legal Aid of North Carolina Inc., to Vickie Miller, North Carolina Department of Commerce, Comments on Draft Neighborhood Stabilization Program Substantial Amendment (Nov. 25, 2008) (on file with NHLP).

[15] HUD Notice Implementing Neighborhood Stabilization Program Under the Housing and Economic Recovery Act, 73 Fed. Reg. 58,330, 58,341 (Oct. 6, 2008).

[16] Pub. L. No. 110-289, § 1331, 122 Stat. 2654, 2711-22 (July 30, 2008).

[17] National Low Income Housing Coalition, *What Fannie and Freddie Crisis Means for NHTF*, 13 Memo to Members (Sept. 5, 2008), https://www2398.ssldomain.com/nlihc/detail/article.cfm?article_id=5481.

[18] *Id.*

[19] Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008).

[20] *Id.* § 109, 122 Stat. 3774-75.

[21] *Id.*

Despite EESA's tenant protections, Fannie Mae initiated eviction proceedings against tenants in Hartford, Connecticut, who were living in recently foreclosed properties.[22] Greater Hartford Legal Aid, Inc., citing EESA, moved to dismiss the eviction proceedings and entered into negotiations with Fannie Mae.[23] On December 14, 2008, Fannie Mae announced that it is creating a program to assist tenants in foreclosed properties, and that it will stay all eviction proceedings nationwide until the new program is implemented.[24] The program, which will offer tenants the opportunity to enter into leases while foreclosed properties are marketed, will be available on or before January 9, 2009.[25] Fannie Mae is also in the process of reviewing the eviction cases identified by Greater Hartford Legal Aid, Inc. and intends to work with these tenants to establish leases.[26]

Advocacy on behalf of tenants in foreclosed properties may receive a boost from S. 3689, commonly known as the Second Stimulus Package.[27] The bill would appropriate $100.3 billion, including $575 million for relocation and temporary housing assistance, to tenants living in foreclosed properties or properties where foreclosure is imminent.[28] The bill would also allocate $37.5 million to the Legal Services Corporation to provide legal assistance related to "tenancy associated foreclosure," as well as legal assistance related to home ownership preservation and foreclosure prevention.[29] The bill was introduced in the Senate on November 17, but Congressional leaders and the White House failed to reach an agreement on a stimulus package.[30] The bill likely will be reintroduced in January 2009.[31]

Loan Modifications

On November 11, 2008, the Federal Housing Finance Agency (FHFA), the entity that seized control of Fannie Mae and Freddie Mac in September, announced the creation of a streamlined loan modification program.[32] The FHFA's announcement came shortly after several major lenders, including Bank of America, Citigroup, and JP Morgan Chase & Co., initiated loan modification programs of their own.

The FHFA's program became effective December 15 and applies only to mortgages owned or guaranteed by the GSEs.[33] To qualify, a borrower must be at least three months behind on loan payments, own and occupy the

[22]Kenneth R. Gosselin, *Hartford Tenant Fights to Stay in Home After Foreclosure*, Hartford Courant, Oct. 24, 2008.
[23]Mot. to Dismiss, Fed. Nat'l Mortgage Assoc. v. Doe, No. HDSP 149558 (Conn. Super. Ct. Oct. 21, 2008).
[24]Letter from Curtis P. Lu, Senior Vice President and Principal Deputy General Counsel, Fannie Mae Legal Department, to Amy Marx, Amy Eppler-Epstein, and Shelley White, New Haven Legal Assistance Association, Inc. (Dec. 14, 2008) (on file with NHLP); Kelly Evans, *Fannie Mae to End Tenant Evictions in Foreclosures*, Wall St. J., Dec. 15, 2008.
[25]*Id.*
[26]*Id.*
[27]S. 3689, 110th Cong. (2008).
[28]*Id.* Ch. 9.
[29]*Id.* Ch. 2.
[30]National Low Income Housing Coalition, Congress Leaves without Passing Stimulus Legislation; Funds for Renters Included in Senate Proposal, 13 Memo to Members (Nov. 21, 2008), http://nlihc.org/detail/article.cfm?article_id=5661.
[31]*Id.*

[32]Federal Housing Finance Agency, Statement of FHFA Director James Lockhart (Nov. 11, 2008), http://www.fhfa.gov/GetFile.aspx?FileID=169.
[33]*Id.*

property as a primary residence, and not have filed for bankruptcy.[34] The program creates a fast-track method of getting borrowers to an affordable monthly payment of no more than 38% of the household's monthly gross income.[35] This will be achieved via a combination of reducing the mortgage interest rate, extending the term of the loan, or deferring payment on part of the principal.[36] The program is modeled on the loan modification procedures the FDIC instituted at failed lender IndyMac.[37] However, FDIC chair Sheila Bair has stated that the FHFA's modification program fails to adequately address mortgages held in private securities, and that the government should use $24 billion in EESA funds to directly guarantee modified loans.[38] The program has also been criticized for failing to assist homeowners who are struggling to make payments but are not yet in default.

The governors of California, Connecticut and Florida have called for temporary moratoriums on all residential foreclosures in their respective states, but these moratoriums have yet to be enacted.

Foreclosure Moratoriums

On November 20, 2008, Fannie Mae and Freddie Mac issued notices to loan servicing organizations and foreclosure attorneys directing them to suspend foreclosure sales and evictions from occupied single-family and two- to four-unit properties from November 26, 2008, until January 9, 2009.[39] The moratorium is intended to enable borrowers to retain their homes while the GSEs work with mortgage servicers to implement the streamlined loan modification program. The foreclosure moratorium applies only to loans owned or securitized by Fannie Mae and Freddie Mac, and therefore falls far short of the ninety-day national foreclosure moratorium proposed by President-Elect Barack Obama.[40] It does not apply to vacant properties.[41] The GSEs have directed servicers and foreclosure attorneys to contact the estimated 16,000 borrowers with foreclosure sales scheduled between November 26, 2008, and January 9, 2009.[42]

The governors of California,[43] Connecticut[44] and Florida[45] have called for temporary moratoriums on all residential foreclosures in their respective states, but these moratoriums have yet to be enacted. In the private sector, Citigroup announced in early November that it will not initiate a foreclosure or complete a foreclosure sale on any eligible borrower "where Citi owns the mortgage, the borrower is seeking to stay in the home which is his/her principal residence, is working in good faith with Citi, and has sufficient income for affordable mortgage payments."[46]

Conclusion

Recent efforts by the public and private sectors to keep homeowners out of foreclosure appear promising. However, a recent survey of California mortgage counselors found that lenders are not modifying home loans at scale; lenders are not conducting sufficient outreach to borrowers facing growing payments; foreclosure is still lenders' most common response to borrowers in distress; and federal, state and industry initiatives that rely on voluntary industry compliance are not working.[47] In light of these findings, the California Reinvestment Coalition recommends a 180-day moratorium on foreclosures to allow time for loan workouts and a mandate that all loan servicers adopt FDIC-like loan modification programs that include principal reduction.[48] As these results and recommendations indicate, much work remains to be done to ensure that foreclosure prevention efforts have a systemic impact. ■

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Eileen Ambrose, *FDIC Chair Urges Focus on Foreclosures*, Baltimore Sun, Nov. 21, 2008.
[39] Press Release, Fannie Mae To Suspend Foreclosures Until January 2009 While Streamlined Modification Program is Implemented (Nov. 20, 2008), http://www.fanniemae.com/newsreleases/2008/4531.jhtml?p=Media&s=News+Releases; Press Release, Freddie Mac Suspends All Foreclosure Sales of Occupied Homes from Day Before Thanksgiving Until January 9, 2009 (Nov. 20, 2008), http://www.freddiemac.com/news/archives/servicing/2008/20081120_foreclosure-suspend.html. Neither Fannie Mae nor Freddie Mac has specified how it will determine whether properties are "occupied."
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Jim Wasserman, *Assembly's Foreclosure Moratorium on Slow Track*, Sacramento Bee, Nov. 18, 2008.
[44] Kenneth Gosselin, *Rell Proposes Moratorium on Residential Foreclosures*, Hartford Courant, Nov. 21, 2008.
[45] Aaron Deslatte, *Crist Says Banks Being Asked to Temporarily Stop Foreclosures*, Sun-Sentinel, Dec. 1, 2008. In response to pressure from Florida Governor Charlie Crist, members of the lending industry have voluntarily agreed to stop filing new foreclosure petitions until January 15, 2009.
[46] Press Release, Citigroup, Citi Announces New Preemptive Initiatives to Help Homeowners Remain in Their Homes (Nov. 11, 2008), http://www.citigroup.com/citi/press/2008/081111a.htm. This is a step in the right direction, but Citi has retained significant discretion to define terms such as "working in good faith" and "sufficient income for affordable mortgage payments."
[47] California Reinvestment Coalition, *The Widening Chasm Between Words and Deeds IV*, Nov. 25, 2008, http://www.calreinvest.org/system/assets/177.pdf.
[48] *Id.*