



## **ANNOTATED SUMMARY OF THE IMPACT ON NYC OF THE HOUSING AND ECONOMIC RECOVERY ACT OF 2008**

On July 23<sup>rd</sup> Congress passed and seven days later the President signed, the most sweeping housing legislation since the 1947 Housing Act. The Housing and Economic Recovery Act of 2008, weighing in at over 600 pages, addresses issues from technical changes to the Low Income Housing Tax Credit Program, a mainstay of low income housing development for more than two decades, to the creation of a new program, funded with nearly \$4 billion in a special allocation of Community Development Block Grant funds, to give states and localities new tools to address concentrations of foreclosed and abandoned residential properties. Few existing housing programs have been untouched by the new act, and many new programs will result from it as well.

The Citizens Housing & Planning Council (CHPC) and the New York Housing Conference (NYHC) have worked together to provide an annotated summary of the key provisions of the act, particularly in relation to New York City. The project consultant, Evelyn Wolff, carried out the primary research, interviewed a variety of housing professionals, and completed this annotated summary by working closely with CHPC and NYHC board members. This work was made possible by funding from the NYHC, the Community Preservation Corporation, Forsyth Street Advisors, and in-kind services from CHPC.

This annotated summary makes use of the many summaries and analyses already undertaken by professionals in the field of affordable housing and community development. It is intended to provide some interpretation of the act but does not substitute for any legal analysis or advice. We recommend reading the act directly for specific information. The act can be accessed at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ289.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ289.110.pdf)

A list of informational resources related to the act can be found in Appendix A.

The Housing and Economic Recovery Act of 2008, addresses virtually every federal housing program currently in existence, including:

- Low Income Housing Tax Credits
- Tax-exempt Housing Bonds – both single family and multifamily
- FHA mortgage insurance
- Rural Development
- Historic Tax Credits
- HUD subsidized rental assistance

It also creates several new programs and/or sources of funding to implement them:

- Redevelopment Program for Abandoned and Foreclosed Homes, also known as Neighborhood Stabilization Program
- Affordable Housing Trust Fund
- Capital Magnet Fund

Finally, it contains enhanced protections for stakeholders in various housing programs, new oversight requirements, and technical clarifications for a number of existing programs.

Many of these provisions directly impact New York City, both from a programmatic and a funding perspective: this annotated summary focuses on the most important of these provisions, comments on their impact on the City, and makes recommendations for improvements and/or changes. It is not intended to be a complete summation of the Act but rather a guide to where to find, and a brief explanation of, the key provisions as they affect New York City. Events and Federal actions taken since the passage of HERA, most particularly the federalization of Fannie Mae and Freddie Mac, have further shaped the available resources for affordable housing in New York.

**This annotated summary does not attempt to evaluate the impact of those changes. Nor does it cover every provision in the Bill. Only provisions affecting the affordable housing arena in New York City are summarized here.**

## I. Organization of the Housing and Economic Recovery Act of 2008

The Act is divided into three parts.

**Division A: “Housing Finance Reform”** - covers the primary GSEs - Fannie Mae and Freddie Mac - and the Federal Home Loan Banks. It provides protection for homeowners, discusses mortgage insurance requirements and encourages the creation of a Nationwide Mortgage Licensing System and Registry. It also establishes within FHA a revolving fund called the Home Ownership Preservation Entity (HOPE) Fund to be used for mortgage insurance obligations. Finally, it contains legislation to assure continued affordability for Starrett City by authorizing the conversion of existing Section 8 assistance to project based contracts. Within this Division are six Titles:

Title I:	Reform of Regulation of Government Sponsored Enterprises
Title II:	Federal Home Loan Banks
Title III:	Transfer of Functions, Personnel, and Property of OFHEO and the Federal Housing Finance Board to the Federal Housing Finance Authority
Title IV:	Hope for Homeowners
Title V:	S.A.F.E. Mortgage Licensing Act
Title VI:	Miscellaneous

**Division B: “Foreclosure Prevention”** - seeks to assure that the housing crisis currently being experienced is not repeated at some future time. To that end, it expands and modifies some existing FHA single family insurance provisions, creates a homeownership counseling program, makes changes to the manufactured housing program, and provides safeguards for service members and their families. It also establishes a \$4 billion fund to provide assistance to communities dealing with abandoned and foreclosed homes. Title VIII is of key importance because it addresses the ways in which federal housing programs and tax credits are to be used together and provides significant changes to other HUD programs. The Division has nine Titles:

Title I:	FHA Modernization Act of 2008
Title II:	Mortgage Foreclosure Protections for Servicemembers
Title III:	Emergency Assistance for the Redevelopment of Abandoned and Foreclosed Homes
Title IV:	Housing Counseling Resources
Title V:	Mortgage Disclosure Improvement Act
Title VI:	Veterans Housing Matters
Title VII:	Small Public Housing Authorities Paperwork Reduction Act
Title VIII:	Housing Preservation
Title IX:	Miscellaneous

**Division C: “Tax-Related Provisions”** – contains significant beneficial changes to the low income housing tax credit program, including additional volume cap and increased credit rates as well as other programmatic reforms. It has comparable benefits for tax-exempt housing bonds and how they can work in a more coordinated way with low income housing tax credits (LIHTCs). Of the three Titles in this Division, Title I has the most significance for NYC and its affordable housing constituents.

Title I:	Housing Tax Incentives
Title II:	Reforms Related To Real Estate Investment Trusts
Title III:	Revenue Provisions

## II. Summary of Key Provisions Important to New York City

### Affordable Housing Programs

- (a) Fannie Mae and Freddie Mac are to set aside 4.2 basis points of new business dollars earned in fees from loans originated each year: 65% goes to a Housing Trust Fund; 35% to a Capital Magnet Fund (see below).
- (b) The Director of the newly authorized regulating agency, the Federal Housing Finance Authority (FHFA) can set aside allocation requirements if allocations would contribute to the financial instability of either GSE.
- (c) Entities cannot pass on costs of mortgages purchased/securitized by GSEs to the mortgage originators.
- (d) 25% of the amounts allocated are set aside go to the Treasury's reserve for the HOPE for Homeowners Program (see below).
- (e) Funds cannot be used in conjunction with property taken by eminent domain.

#### **Comments:**

- Given the current turmoil in the mortgage and capital markets, there is general concern about how much money will actually be made available to the Housing Trust and Capital Magnet Funds. No moneys are projected for these funds before 2010 and even then, the amounts are subject to reduction (see below). However, since the source of funds will be from "new business" generated by Fannie and Freddie, rather than from profits, it is more than likely that in the long term the Funds will become a steady source of funding for affordable housing and economic development.
- In New York, there is a real need for a program for 2-4 family structures. None of the programs are geared to this need.

#### **Recommendation:**

- *The GSEs should be playing a much bigger role in financing 2-4 family structures and a program for this sub-group of owners should be developed.*

### Housing Trust Fund (HTF)

- (a) The Housing Trust Fund (HTF) is to be funded by GSE allocations noted above and other monies as may be appropriated to increase/preserve supply of rental housing for extremely low- and very low-income families and increase homeownership in these same income groups. Money from this fund is considered federal financial assistance.

- (b) For the first three years, money for the HTF is to be diverted to cover potential losses from FHA-backed troubled mortgages. The stipulated diversion in FY2009 is 100%; in FY 2010, 50%; and in FY 2011, 25%. If there is money left over at the end of the HOPE program, it goes back into the HTF.
- (c) Contributions will be suspended if allocations threaten the stability or capitalization of Fannie and Freddie or if they are needed to carry out either GSE's recapitalization plan.
- (d) The Act establishes the following allocation rules:
  - Money goes to states according to a formula to be developed by HUD which must also develop a plan to distribute funds.
  - Eligible activities include: production, preservation, and rehabilitation of rental housing (at least 75% of the grant must benefit extremely low income-families or families at/below poverty line); limited homeownership help (no more than 10% of amounts allocated to a state can go for homeownership activities).
  - Eligible recipients are entities which have experience, capacity, and knowledge to undertake appropriate activities.
  - States must use money within two years or return the money to HUD.
  - Certain activities, such as travel or lobbying, are not eligible for funding.

**Comments:**

- The big unknown at this point is how HUD will allocate these funds and whether it will follow CDBG rules in doing so. Since moneys won't be available until the earliest 2010, it is reasonable to assume that promulgating these rules is not a high priority.
- Diversion of funds to maintain either Freddie's or Fannie's financial viability is a threat to the build-up of monies in this Fund.
- On November 13, FHFA required GSEs to stop setting aside or allocating funds for the HTF until further notice. No explanation or reason is known for this action at this time.

***Recommendation:***

- *Given the emphasis on the use of these funds rental housing for which is the core of NYC's affordable stock, stakeholders must make sure that they have a say with the new administration in how the funding decisions will be made by HUD.*

**Capital Magnet Fund (CMF)**

- (a) The Fund will be housed in the Community Development Financial Institutions Fund
- (b) Expenditures are to create a national competitive grant program for:
  - development, preservation, rehabilitation, or purchase of affordable housing for extremely low-, very low-, or low-income families; and
  - economic development that would stabilize or revitalize low-income or underserved rural areas.
- (c) This money is considered federal financial assistance.

- (d) Eligible grantees include Treasury-certified community development financial institutions or nonprofits with at least one of their principal purposes being the development/management of affordable housing.
- (e) Eligible uses include capitalizing loan loss reserves, revolving loan funds, affordable housing funds, economic development funds, and risk-sharing loans.
- (f) No one eligible grantee may be awarded more than 15% of the aggregate funds during any year, and the Secretary shall seek geographic diversity in distributing funds.
- (g) Activities such as political activities, advocacy, counseling services, or travel are prohibited.

**Comments:**

- As with the HTF, the unknown is how CDFI will allocate these funds and what rules will be followed. Since moneys won't be available until the earliest 2010, it is reasonable to assume that promulgating these rules is not a high priority.
- Diversion of funds to maintain either Freddie's or Fannie's financial viability is a threat to the build-up of monies in this Fund.
- On November 13, FHFA required GSEs to stop setting aside or allocating funds for the CMF until further notice. No explanation or reason is known for this action at this time.

**Neighborhood Stabilization Program**

- (a) \$4 billion<sup>1</sup> in CDBG funds, to remain available until expended, will go to communities for "redevelopment of abandoned and foreclosed homes and residential properties".
- (b) HUD developed a distribution formula and allocated funds by October 1 as required by the statute, based on need as determined by number and percentage of homes: in foreclosure; financed by subprime debt; and in default or delinquency.<sup>2</sup>
- (c) Once received, recipients must use funds within 18 months to purchase and redevelop abandoned and foreclosed homes and residential properties.
- (d) Eligible uses of funds include:
  - Financing mechanisms, e.g., soft seconds, loan loss reserves, shared-equity loans
  - Purchase and rehabilitation of properties for resale, rent or redevelopment
  - Establishment of land banks
  - Demolition of blighted properties and redevelopment of demolished or vacant structures
- (e) Purchases must be made at below market value; sales must be equal to or less than the cost to acquire or rehabilitate such a home to a decent, safe and habitable condition.
- (f) Profits can be recycled (reinvested for the same purposes) for 5 years from July 30, 2008.

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<sup>1</sup> \$3.920 billion goes to state and local governments; \$180 million to housing counseling resources

<sup>2</sup> HUD issued its "Guide to Neighborhood Stabilization Program Eligible Uses" on September 26, 2008 along with its state by state allocations. The Guide and information are available on HUD's website at [www.hud.gov/nsp](http://www.hud.gov/nsp). New York City is to receive \$24,257,740 directly from HUD and another estimated \$5,301,213 from the State's allocation.

- (g) Use of funds is restricted to assist those whose income does not exceed 120% of AMI; not less than 25% of the funds must be used for recipients with incomes at or below 50% of median.
- (h) There are also restrictions on the use of eminent domain which is limited to public uses which do not primarily benefit private entities.

The HUD Guide describes the activities eligible to be assisted and defines a number of key terms:

- (a) Abandoned units are defined as homes that have been vacant for at least 90 days, where no tax or mortgage payments have been made, and where mortgage or tax proceedings have begun.
- (b) Foreclosed properties are those where title has passed from the former homeowner.
- (c) Funds must be used (obligated), by recipients within 18 months of receipt.
- (d) Purchases of foreclosed properties must be at a 5% discount from current market appraised value, based on an appraisal made within 60 days of offer. For aggregate purchases, the discount must be at least 15%.
- (e) Eligible entitlement communities may make joint applications with the state; however the state must then administer the program.
- (f) Sub-agreements can be entered into between a grantee and a nonprofit entity.
- (g) States can distribute funds to any jurisdiction defined as having the “greatest need” including those receiving NSP funds directly. States can also use funds directly for projects.
- (h) No public participation in program design and implementation is required, only distribution of program information.
- (i) Long term affordability requirements, including affordable rents, must be developed with HOME program standards as the minimum acceptable.
- (j) 10% limitation for administrative and planning costs applies to the grant as a whole, not each individual program.
- (k) Reasonable developer fees will be permitted for both new construction and rehabilitation activities.
- (l) Funds may be used for non-residential uses including public parks, commercial uses and mixed developments. Activities are the same as those eligible under the regular CDBG program.
- (m) One-for-one replacement requirements are waived in conjunction with demolition and conversion activities.
- (n) Funds may be used to acquire and redevelop FHA foreclosed properties.

HUD’s website contains further guidance on the use of NSP monies which are of particular interest to New York City, as well as a resource page on acquisition and relocation issues. It encourages recipients to:

- (a) Purchase several single-family homes in a neighborhood and create a permanent supportive housing project for homeless persons.
- (b) Purchase a single-family home and rehabilitate it to contain two or three apartments to be used as permanent housing for homeless persons.

- (c) Purchase a residential property and construct an apartment complex which will be used as permanent housing for homeless persons.
- (d) Renters displaced because their homes were purchased with NSP funds are “generally eligible”<sup>3</sup> for relocation assistance and payments.

**Comments:**

There are significant questions concerning eligible uses of funds, the fairness of the original allocations, the interpretations of terms and legislative intent, and the ability to make a dent in the foreclosure problem given the restrictions on both the income limits of the target population and the permitted uses. New York City, along with other major metropolitan areas, is particularly impacted in specific ways.

- *Tenant protections:* For relocation benefits and payments to be effective, additional monies need to be allocated to cover this expense. Furthermore, stakeholders have posited that displacement of renters is in fact adding to the foreclosure crisis and are wondering whether some mechanisms could be adopted to prevent that from happening.
- *Fund allocation:* The actual HUD allocation for New York State is approximately \$100 million, significantly less than estimates prepared by independent analysts.<sup>4</sup> HUD’s definition of foreclosure, one where title has passed, impacted the allocation and in this respect, New York is seriously disadvantaged because of the amount of time needed to process and complete a foreclosure. In other states, the process is significantly shorter and easier.
- *Unit allocation:* HUD allegedly counted every building in foreclosure as one unit. A troubled multifamily building, or a troubled four-family home, would have equal weight as a single family unit. If this was the methodology used, it put a city like New York at a real disadvantage since many properties in the City contain more than one unit.<sup>4</sup>
- *Income targeting.* Several practitioners believe that the income targeting required by the Act is too low and that the 50% median mandated for 25% of the funds should be raised to at least 80% of median. There is real demand and real need at that level. Lenders/owners are looking for people with decent credit ratings to whom they can provide mortgages for these newly renovated homes; at 50% of median, many people can’t pay the rent and don’t have a good enough credit rating to qualify for a mortgage. Buildings and homes targeted exclusively to low income residents are hard to fill up, especially in New York City where mixed income developments are being encouraged.

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<sup>3</sup> The phrase “generally eligible” is not further defined.

<sup>4</sup> To see what an alternative allocation would have been, see “Raising the Roof to Provide a Floor” by Andrew Jakobovics, Center for American Progress, July 28, 2008

- *Cost adjustments.* Though too late for this program, HPD would have liked to have seen a bump or cost adjustment in the calculations for the allocation of the fund.
- *Arcane program rules.* One consultant, who is currently implementing a pilot program to assist recipients around the country to use the NSP money quickly and efficiently, is finding that the regulations as promulgated by HUD are encrusted with program income rules and technical difficulties which make it extremely difficult to develop an effective program. Further, in many communities, including New York City, there is no market, no subsidy and no capital to use these funds effectively.
- *Efficient use of funds.* Housing agencies, including HPD, are currently negotiating with various large financial institutions to acquire properties. These agencies are finding that they are not getting a mix of properties but rather the most deteriorated ones which cost more to bring back on line. This means that more of the money will go to rehabilitation rather than resale; on a per unit basis, the cost will be high and produce less benefits.

***Recommendations:***

- *In order to make the relocation requirements meaningful, the National Preservation Working Group<sup>5</sup> has recommended that an additional \$200 million be made available for relocation payments.*
- *A program to prevent further displacement of tenants as a result of foreclosures in order to contain the actual foreclosure crisis should be developed.*
- *If additional monies become available, provision should be made for high cost adjustments in the calculations and allocation of funding.*

**Current New York Initiatives:**

- Citibank and Citi Foundation awarded a planning grant to New York to design programs to stabilize neighborhoods impacted by vacant foreclosed properties which will be recipients of the NSP funds. The grants, to be administered through the Housing Partnership Network, will enable local housing organizations to design programs tailored to the needs of their local communities. Coupled with federal funds, it will assist nonprofits build the infrastructure, partnerships and tools needed to help these troubled neighborhoods.
- The National Community Stabilization Trust was recently established by a consortium of Enterprise Community Partners, the Housing Partnership Network, the Local Initiatives Support Corporation (LISC) and NeighborWorks America. The Trust will coordinate the transfer of real estate owned properties from

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<sup>5</sup> Letter from NPWG to leaders of House of Representatives dated November 14, 2008.

financial institutions to local housing organizations (presumably recipients of NSP funds) to ensure that they are returned to the affordable housing stock. Pilot programs are currently open in New York City as well as in Cleveland and Minneapolis. In New York, the Trust will work through Neighborhood Restore, the Center for New York City Neighborhoods<sup>6</sup> and the Partnership to develop a plan to distribute the funds being provided through the Program.

- In early November, the New York State Housing Finance Agency issued for public comment its draft plan for distributing \$54.5 million in Neighborhood Stabilization Program (NSP) funds, of which \$5.3 million is being allocated to NYC. The plan to buy, renovate and resell foreclosed homes was available for public comment through November 21<sup>st</sup>, was filed with HUD by December 1st and approval is expected by early January, 2009.

HFA requested expressions of interest from local governments and nonprofit organizations as a first step towards distributing funds to eligible communities. About 50 entities replied, indicating there was demand for some \$117 million in funding. Some 700 to 900 housing units are expected to be renovated and remarketed through the program. A limited portion of the funds will be used for demolition and to create local land banks. However, these uses must be part of comprehensive plans for revitalization or redevelopment of the sites for affordable housing.

- New York City announced on October 30<sup>th</sup> that it plans to use its \$24 million in NSP funds to buy up to 115 foreclosed homes to stabilize neighborhoods to be refurbished into 250 to 300 housing. It is anticipated that some of these funds will be used for buildings in HPD's 7(A) program which are operating under court receiverships.

### **Low-Income Housing Tax Credits**

- (a) The statute provides for a temporary increase in volume cap for low-income housing tax credit in calendar years 2008 and 2009. The current allocation will be increased by \$0.20 for New York State which translates into approximately \$3.9 million of additional funding annually.
- (b) Non-federally subsidized buildings placed in service after enactment and before Dec. 31, 2013 will have an "applicable percentage" of no less than 9%.<sup>7</sup>
- (c) The definition of "federally subsidized" is modified by removing below-market federal loans from the definition, thus allowing 9% credit for all federally subsidized

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<sup>6</sup> A new not-for-profit organization created by the City, the Center for NYC Neighborhoods (CNYCN) is charged with assisting homeowners at risk of mortgage foreclosure throughout the five boroughs. The Center for NYC Neighborhoods is an independent entity that is funding a major expansion and coordination of counseling and referral services, legal assistance, loan remediation, preventive outreach and education, training, research and advocacy around sub-prime lending and mortgage foreclosures.

<sup>7</sup> On November 13, 2008, the IRS issued Notice 2008-106 which clarifies that the 9% floor may be applied retroactively to buildings whose taxpayer had previously made an irrevocable elections of less than 9% prior to enactment of the new statute.

- properties (except tax-exempt bond financed properties) placed in service after July 30, 2008.
- (d) Expands the “difficult to develop area” definition and allows the allocating credit agency to give the 130% boost in credits to any project which needs the increase in order for it to be feasible (for buildings placed in service after effective date).
  - (e) The minimum rehabilitation expenditures in a 24-month period to 20% of adjusted basis (from 10%) or \$6,000 per unit (from \$3,000) are increased, along with various inflation adjustments.
  - (f) The allowable space for community service facilities in small projects is increased.
  - (g) The eligible basis of a building may not include costs financed with a federally funded grant (for buildings placed in service after effective date). It clarifies that rental, operating and interest reduction payments are not considered federal grants requiring a reduction in basis.
  - (h) The housing credit related-party rule (for buildings placed in service after effective date) is relaxed to allow related-party interest up to 50%, rather than 10%.
  - (i) The 10-year non-acquisition period for existing buildings is waived for buildings which are substantially federally or state assisted (for buildings placed in service after effective date).
  - (j) The prohibition on using tax credits for Section 8 moderate rehabilitation projects is repealed.
  - (k) The time limit for incurring 10% of project costs is extended from six months to one year.
  - (l) The recapture bond rule on disposition of a building continuing as qualified low income building is repealed, provided taxpayers subject themselves to a three year statute of limitations following the recapture event.
  - (m) Energy efficiency and historic nature of buildings are to be considered in making credit allocations for allocations after Dec. 31, 2008.
  - (n) Eligibility of housing credit apartments is extended to students who received foster care help.
  - (p) The general public use requirement is clarified so as not to exclude buildings restricted to individuals with special needs, sharing common occupation/interests or members of a group based on federal, state, or local programs/requirements.
  - (q) The prohibition on the 30% boost for HOME-assisted properties in QCTs or DDAs is eliminated for properties placed in service after July 31, 2008.

**Comments:**

- Of particular note in this group of changes is the ability to use tax credits for properties which were originally renovated under the Section 8 Moderate Rehabilitation Program. Many of these properties are in desperate need for rehabilitation and the tax credit program has been off limits to them until now.
- The provision allowing students coming out of foster care is viewed as beneficial. For example, LISC is developing a program to link youth aging out of foster care with permanent housing developments owned by partner CDCs and provide them with workforce opportunities and wrap-around support services. HCCI, one of LISC’s CDC partner, is in front of this issue and is dedicating/designing units in

its properties for youth who want to go back to school. The change will allow youth to benefit from additional schooling.

- DHCR issued guidelines in November concerning requests for additional credits for projects already approved, when needed as a result of a decrease in equity contributions. Its new guidance is based on certain provisions of the Act as follows:
  - The maximum per unit credit allocation is raised to \$22,000.
  - The maximum per project credit allocation is raised to \$1,430,000 for standard projects and to \$1,650,000 for projects with more than 50% of its units for large families or persons with special needs.
  - The 30% discretionary boost now allowed will also be used selectively to fill funding gaps for projects already approved and to be placed in service after July 31, 2008.

### ***Recommendations***

- *Clarification is needed on the "public use" requirements: there will be many special interest/needs groups looking to provide housing for a discrete group of residents under this clause. To date, there has been no interpretation given for this provision.*
- *The 10 year term is too restrictive for many investors in today's marketplace. Some entities not currently investing in the LIHTC would invest if the term was adjusted to a five year credit recovery instead of the ten year period currently in place.*
- *The Affordable Housing Tax Credit Coalition recommends that the term "substantially" in paragraph (i) above be defined as buildings which are more than 20% assisted.*
- *A five year carryback would encourage additional investors; due to market conditions, former investors do not currently have the need for tax credits. A carryback provision would expose new investors to the value of tax credit investment.*
- *CRA footprint expansions are recommended; this would allow banking institutions to receive credit for investments in projects that are currently outside their CRA envelope.*
- *A change in the at-risk rules would allow closely held C corporations to invest in LIHTC projects, thereby again expanding the investor universe.*
- *For credits awarded between 1/1/07 and 12/31/10, make tax credits temporarily refundable to arms-length corporate investors to reduce the risk of return for investors who face temporary business losses<sup>8</sup>*
- *Housing credits can now be used against AMT liability; the revised carryback rule should allow these credits to be used against AMT liability in the prior five year period as well as for properties placed in service before 2008.<sup>9</sup>*

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<sup>8</sup> Letter to House Congressional leaders dated November 14, 2008 prepared by the National Preservation Working Group. The Affordable Housing Tax Credit Coalition also supports this recommendation

<sup>9</sup> The Affordable Housing Tax Credit Coalition offered this recommendation in an October 2008 paper.

- *Allow tax credit investors to carry forward or backward taxable income for up to five years from other tax years.*<sup>10</sup>
- *Allow housing credit agencies an additional year to make allocations before having to return unused credits to the national pool.*<sup>11</sup>

### **Coordination of Low Income Housing Tax Credit and Tax-Exempt Bond Programs with HUD**

- (a) HERA requires HUD, within six months from enactment, to implement administrative and procedural changes to expedite approval of HUD multifamily projects funded in conjunction with housing tax credits or tax-exempt housing bonds. Lists types of actions HUD may take to do so.
- (b) It also requires HUD to consult with the IRS and to take actions as appropriate to simplify coordination of rules, regulations, forms and approval requirements for combined funding.
- (c) HUD is to solicit recommendations from stakeholders to carry out these duties.
- (d) HUD must submit a report, no later than 9 months from bill enactment, identifying actions taken and stakeholder recommendations, and making legislative recommendations.

#### ***Recommendation:***

- *Dialogue with HUD and tax credit allocating agencies should be underway to assure that needed changes are made. This covers a lot of ground; input from users and stakeholders should be made quickly to assure a workable outcome. To date, no evidence of this communication is visible.*

### **Use of FHA Loans with Low Income Housing Tax Credits**

- (a) The need for HUD subsidy layering review of FHA-financed projects involving low income housing tax credits which undergo a tax credit subsidy layering review is eliminated, unless the ratio of loan proceeds to actual project cost is less than 80%.
- (b) HUD cost certification requirements for FHA multifamily housing loans which also use housing tax credits are also eliminated when the loan-to-cost ratio is less than 80%.
- (c) HUD may no longer require escrows of tax credit proceeds or posting of a letter of credit for FHA loans involving tax credits.
- (d) FHA multifamily loans that utilize housing tax credits are exempt from required periodic inspections.
- (e) HUD may rely on the tax credit allocating agency's compliance monitoring.
- (f) HUD must establish a pilot program for streamlined review of FHA multifamily mortgage insurance loan approvals through the appointment of designated underwriters.

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<sup>10</sup> This point is advocated by both the National Preservation Working Group and the Affordable Housing Tax Credit Coalition.

<sup>11</sup> Proposed by the Coalition.

- (g) Changes are to be implemented by January 31, 2009 and shall include, in addition to the above, actions to improve the efficiency of approval procedures, simplify approval requirements, establish deadlines for approvals, modify approval authority between field offices and DC, improve outreach to sponsors regarding required information, and request additional funds to increase staff.
- (h) A report must be made to Congress by the end of April, 2009 on steps taken, including legislative changes needed to facilitate prompt approval.

**Comments:**

- Few, if any, stakeholders have focused on these potentially important changes and simplification procedures which HERA has set forth. It would also appear that HUD has not given these provisions any serious consideration.

**Changes in Other HUD programs**

(a) *Section 8 Project Based Vouchers*

- The 25% limit on the number of units that may receive project based voucher assistance is to be measured on a project, rather than a building, basis.
- Increases the maximum Section 8 voucher contract period from 10 years to 15 years, including 15 year renewal terms.
- Permits project-based voucher rents in tax credit projects up to the normally allowed voucher maximum rent.
- Eliminates need for HUD subsidy layering review for project-based vouchers if a state or locality did a review for tax credit purposes.
- Provides that PHAs shall not be required to undertake any environmental review for housing assistance payments contracts unless otherwise required in law or regulation.
- Authorizes project-based vouchers in co-ops and buildings with elevators.
- Establishes clearer standards for voucher rent reasonableness for projects using housing tax credits.

(b) *Section 202 Housing for Elderly Persons*

- Requires delegated processing to a state or local housing agency of all new Section 202 elderly housing grants (capital advances) that also use other non-HUD funding sources.
  - a. Not limited to tax credit projects.
  - b. Firm commitments must be issued within 12 months of delegation.
  - c. Agencies may recommend rental assistance amounts in excess of those awarded by HUD; subject to final HUD approval but may be appealed.

(c) *McKinney-Vento Homeless Assistance.*

- Extends time period for completion of Shelter Plus Care projects that also use funding from housing tax credits.
- Authorizes 15-year terms for renewal of Shelter Plus Care permanent housing assistance contracts
- \$100 million appropriated for 2009 of which up to \$30 million can be used for emergency assistance grants for those who become homeless as a result of foreclosure.

(d) *Data Collection on Tenants of Housing Tax Credit Projects.*

- Requires state agencies administering housing tax credits to submit information to HUD annually regarding characteristics of projects financed through tax credits. Authorizes \$2.5 million in FY09 and \$900,000 in FY 2010 through 2013 for the costs of this subsection.

(e) *Energy Efficient Mortgages*

- HUD and EPA are to develop recommendations to increase the availability, use and purchase of energy efficient mortgages and carry out education and outreach programs to consumers, lenders, professionals, etc.
- Dollars are to be made available; no specific amounts are designated.

**Comments:**

- Only a few practitioners have focused on these potentially important changes and to date, HUD has not issued any guidance or regulations in these areas.

**Recommendations:**

- *Section 202: The changes to the program do not go far enough in the view of one developer of senior housing. First, the capital grants should be usable as a second or third subsidy, as it is in the Homes for Working Families program. Second, there is no provision allowing nonprofits to joint venture with for-profits. The Managing Member of the general partner is still required to be 100% nonprofit, even though the tax credit program is clearly more advantageous to investors when a for-profit general partner is involved. In addition, sites owned by for-profit developers would potentially become available for 202 housing if they could partner with, rather than turn the site over to, a nonprofit.*
- *Project Based Vouchers: The National Preservation Working Group has advocated that Congress allow owners of at-risk buildings with expiring rental or mortgage subsidies to convert enhanced tenant-based vouchers to project based support with consent of the housing authority.*

**Modifications to Tax-Exempt Housing Bond Rules**

- (a) Recycling of tax-exempt debt for financing residential rental projects within 6 months of repayment is now permitted.
- (b) Certain bonds issued to refinance loans will be treated as a refunding issue if issued within 4 years of original bond issue, with a maturity of no more than 34 years.
- (c) Such financing is extended to LIHTC under 42(h)(4)(A).
- (d) Coordination of certain rules applicable to low-income housing credit and qualified residential rental project exempt facility bonds is enhanced.
  - Determination of next available unit is aligned with credit rules.
  - Special rules for students are provided, making them consistent with credit rules.
  - Single-room occupancy units may be considered residential units for housing bond purposes.

### **Recommendations:**

- *There is unanimous feeling among all interviewees that the 4% credit should be fixed at 4% as it now is for the 9% transactions and that the 30% boost should also be permitted when necessary on 4% as-of-right tax credit deals.*
- *The tax-exempt/4% bond program should be modified by creating a permissible range of incomes, e.g., from 30-90% of AMI, as long as the average does not exceed 60% of AMI in order to reach a broader income range of tenants. The current income restrictions are re-creating pockets of poverty in certain inner city areas because the allowable population from which to draw residents is too restrictive and too narrow. While the 9% program should remain limited to very low income, the 4% program could be a vehicle for serving a broader range of persons in need of housing in high cost areas like NYC.*
- *The recycling provisions are expected to result in \$150 to \$200 million additional tax exempt bonds per year for New York City. However, requiring re-use within six months makes the refunded volume cap difficult to use; only projects which are ready to go once a refunding occurs will be able to take advantage of these funds. And only those developers with deep pockets and all financing in place will be able to move that quickly. The recycling provisions were modeled on mortgage revenue bond (SF) procedures but multifamily works differently. Therefore, the following legislative fixes should be explored:*
  - *Extend re-use period to one year instead of six months.*
  - *Provide a mechanism, e.g., pool, to hold the bond proceeds after refunding for reuse when new projects are ready. This could be done by changing the language to allow for one “recycling” rather than one “refunding.”*
  - *Change the requirement that more than 50% of costs must be financed with tax-exempt bonds in order to qualify for 100% tax credits for affordable projects. The current rule is responsible for over-issuance in the first place; reducing the requirement to 25% would allow more low income housing to be done since the volume cap would go further. This is probably a New York, or high cost, problem.*

### **Miscellaneous Changes to Tax-Exempt Housing Bond Rules**

- (a) Temporarily increases the set aside for housing bonds in 2008 to the applicable fraction of \$11 billion for each state. In New York, that translates into an additional 20 cents per resident or \$3.9 million.
- (b) Proceeds of qualified mortgage bond proceeds for bonds issued prior to December 31, 2010, as well as for mortgage credit certificates, may be used to refinance qualified subprime mortgages (adjustable rate single-family residential mortgage made after Dec. 31, 2001 and before Jan. 1, 2008).
  - The rule against prior homeownership is inapplicable.
  - The purchase price limitation is based on market value of residence in lieu of acquisition cost.
- (c) Alternative minimum tax limitations on tax-exempt housing bonds, low-income housing tax credit, and rehabilitation credits are repealed .

- (d) Tax-exempt interest on “certain”<sup>12</sup> housing bonds are exempt from alternative minimum tax.
- (e) A low-income housing credit can be taken against alternative minimum tax.
- (f) A rehabilitation credit is also allowed against alternative minimum tax.

**Comments:**

- Several people in the financial industry believe that the increase in volume cap in the bill has no real impact since very few developers are able to get financing and very few banks are writing Letters of Credit. Further, even when the market comes back, it is believed that lenders will be more cautious which makes volume cap increase irrelevant.
- According to SONYMA, there is a very limited class of single family borrowers who can be helped with simply a rate advantage to refinance qualified subprime mortgages made after 12/31/01. There are very low expectations on the impact of this provision of the bill.

***Recommendation:***

- *A two year extension on the volume cap should be sought, given the current economic climate.*

**Hold Harmless for Reductions in Area Median Gross Income**

- (a) The determination of area median gross income for projects after 2008 will not be less than the area median gross income for the project for the calendar year prior to the determination.
- (b) For HUD hold harmless impacted projects, the area median gross income is the greater of the sum of the area median gross income for 2008 plus the increase with respect to such project.
- (c) Exception to annual current income determination requirement is granted where the determination is not relevant.
- (d) Annual determination requirements are waived if there are no new residents with income exceeding applicable income limits.

**Comments:**

- In 2005 HUD, for the first time, used 2000 census data to determine AMI. In New York City they found that their prior interim adjustments had been incorrect and had resulted in the NYC AMI being too high. In order to mitigate the problems that would be created by suddenly lowering the NYC AMI, HUD implemented “hold harmless” provisions which froze AMI at the pre-existing levels. Over time, (5-10 years) actual AMI will eventually catch up to the “hold harmless” levels. This means that there will be negligible growth in NYC’s AMI until then. This provision of HERA provides an alternate method of increasing AMI for tax credit

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<sup>12</sup> See definition in HERA, Section 3022 (a).

projects, which will allow the actual annual growth of AMI to be added to the “hold harmless” number. This will have two effects in NYC: 1) AMI for Section 8 eligibility will now be different than AMI used for tax credit program eligibility and 2) older projects that were “HUD hold harmless impacted projects” will have higher income and rent determinations than new projects.

### **First Time Homebuyers**

- (a) 10% of the purchase price of a residence up to \$7,500 is allowed as a tax credit in the year of purchase, adjusted based on income for those with incomes between \$75,000 and \$150,000.
- (b) This provision is only eligible for arms length transaction.
- (c) It is not applicable to homes purchased with mortgage revenue bonds.
- (d) The credit is subject to recapture (15 year period) and limitations based on gain.

### **Bonds guaranteed by Federal Home Loan Banks eligible for treatment as tax-exempt bonds**

- (a) Any tax-exempt bond, including new money and refunding issues, may be eligible for FHLB guarantees from the date of enactment through Dec. 31, 2010.
- (b) Safety and soundness collateral requirements are added for federal home loan bank guarantees.

### **Home Ownership Preservation Entity (HOPE) Program**

- (a) A new FHA program to insure refinanced loans for distressed borrowers to support long-term, sustainable homeownership, the program is voluntary on the part of homeowners and existing loan holders and is authorized at \$300 billion.
- (b) It allows homeowners to avoid foreclosure by reducing the principal balance outstanding, and interest rate charged, on their mortgages.
- (c) It targets mortgage assistance to homeowners for principal residences only.
- (d) The administrative capacity of FHA is enhanced to carry out its expanded role.
- (e) It provide servicers of delinquent mortgages with additional methods and approaches to avoid foreclosure.

The following are the key provisions of the program:

- (a) The mortgagor must certify that it has not intentionally defaulted on the mortgage or any other debt.
- (b) The mortgagor shall have had a ratio of mortgage debt to income greater than 31 percent, taking into consideration all existing mortgages of that mortgagor at such time.
- (c) The mortgage shall not exceed 90% of appraised value and the appraisal must reflect current market value.
- (d) All prepayment fees and penalties on existing mortgages must be waived and all liens, including soft mortgages, must be satisfied by the FHA insured mortgage.
- (e) Mortgages must have a fixed rate and have a minimum 30 year term.

- (f) Maximum loan amounts shall not exceed 132% of the 2007 Freddie Mac loan limits.
- (g) No second liens are permitted for the first five years of the loan.
- (h) A formula for equity sharing is provided if the property is sold during the first five years: beginning in year one, HUD receives 100% of the equity; thereafter equity resulting from a sale is split 50/50 between HUD and the homeowner.
- (i) The program expires at the end of September, 2011.

**Concerns:**

- The impact of the legislation on NYC from this program is presumed to be minimal, given the small amount of resources for housing counseling.
- Few people will be able to take advantage of the program; it won't be effective for those people with properties under water who can't afford to refinance into a product which is only marginally better than what they now have.
- The legislation passed before there was a good understanding of the problem; the mortgage market is being driven other forces.
- HOPE for Homeowners does not work in NYC and is not working nationally because no one is agreeing to underwrite mortgages at 90% of appraised value.
- There is general concern about FHA's ability to function properly.
- This program is not expected to be appropriate for homeowners and/or owners of 1-4 family homes; it is structured for single family homes primarily.

***Recommendations:***

- *Counseling should be required for home owners and additional monies should be allocated.*
- *In NYC, the income limits are too low and it is unclear how the rules apply to 3-4 family homes; clarification should be requested.*
- *A workable program needs to be developed for homeowners of 1-4 family homes.*
- *To be effective, the program should allow certain classes of homeowners to get modifications from servicers and mortgagees. A second tier of homeowners will need an additional form of debt forgiveness to cover the gap between modification and the cost of foreclosure.*
- *Foreclosure prevention only applies to single family homes. Given the potential for multifamily defaults, and the possibility that the government would end up owning those mortgages under the proposed bailout plan, there is a need suggest possible remedies for these structures before a crisis occurs.*

**Modifications to the Historic Rehabilitation Credit**

- (a) The percentage of property that can be used by tax-exempt entities is raised from 35% to 50%.
- (b) "Energy efficiency of the project" and "the historic nature of the project" are two additional criteria states must use in allocating credits beginning in January 2009 among potential low income housing projects, in an attempt to encourage rehabilitation of certified historic structures. Expenditures back to December 31, 2007 can be included in project costs.

(c) Historic Tax Credits can now be used to reduce AMT for investors.

**Comments:**

- Inclusion of Historic Tax Credits in the AMT exemption provisions should ensure that HTC/LIHTC deals are not disadvantaged and may help attract new HTC investors as well.

**Miscellaneous Provisions of Interest**

- (a) HERA authorizes annual appropriations of \$25 million for improved technology, processes, program performance, elimination of fraud and appropriate staffing in connection with mortgage insurance programs under Title II.
- (b) HUD shall obtain recommendations from participants in private residential (SF and MF) mortgage lending and secondary markets on how to update and upgrade processes and technologies so that procedures for originating, insuring, and servicing conform to those customarily used by secondary market purchasers and shall report results to Congress within 12 months from enactment.
- (d) A 3-year demonstration program for up to 3,000 homeowners annually is authorized to test the effectiveness of alternative forms of pre-purchase homeownership counseling for eligible home buyers.
- (e) Risk based premium pricing on mortgages is forbidden in FY 09.

**Topics covered in HERA not addressed in this annotated summary:**

- FHA Manufactured Housing Loan Modernization
- Mortgage Foreclosure Protections for Service Members
- Changes affecting Rural Development

For additional information please access the Act directly at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ289.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ289.110.pdf) and/or refer to the resources listed in Appendix A which follow.

## Appendix A -Source Materials

1. **The 2008 Housing Act Special Report** - CD Publications, August 8, 2008
2. **H.R. 3221: The Housing and Economic Recovery Act of 2008: *An Initial Assessment of Some Potential Impacts on New York State*** - New York State Division of Housing and Community Renewal, September 3, 2008
3. **HDR Summary of HERA (HR3221)**, by Barry Jacobs - Housing Development Reporter
4. ***Historic Tax Credit Alert: New housing bill includes significant changes that affect the Historic Tax Credit***, by Forrest David Milder and Andrew S. Potts – Nixon Peabody, July 28, 2008
5. **Hope for Homeowners Program**, by Amanda Gengler – CNN Money, October 22, 2008 (Knowledgeplex)
6. **HUD Unveils Neighborhood Stabilization Program Formula Allocations - NAHRO Briefing from website**, October 22, 2008
7. **National Housing Trust Fund** - Sheila Crowley, National Low Income Housing Coalition, August 22, 2008 Webinar
8. **National Community Stabilization Trust Fact Sheet** – October 6, 2008
9. **Housing Tax Credit and Multifamily Bond Provisions of HR 3221: *The Housing and Economic Recovery Act of 2008*** - Richard S. Goldstein, Nixon Peabody, August 1, 2008
10. **Letter to Speaker Pelosi, Majority Leader Reid, Republican Leader Boehner, and Minority Leader McConnell** - The National Preservation Working Group, November 13, 2008
11. **Low-Income Housing Tax Credit Provisions of The Housing and Economic Recovery Act of 2008** – Presentation by Beth Mullen & John Mackey, Reznick Group, August 11, 2008
12. **Summary of H.R. 3221 (Final Version)** by Amanda Wahlig - Stewards of Affordable Housing for the Future, August 4, 2008
13. **Proposals to Stimulate Investment in Low Income Housing Tax Credit Properties** - Affordable Housing Tax Credit Coalition, October 2008
14. **Notice 2008-79: Tax-Exempt Housing Bonds and 2008 Housing Legislation, Part III - Administrative, Procedural, and Miscellaneous** – Aviva M. Roth and Carla Young, Office of Associate Chief Counsel (Financial Institutions & Products), US Department of the Treasury
15. **Raising the Roof to Provide a Floor** by Andrew Jakobovics – Center for American Progress, July 28, 2008
16. **Guide to Neighborhood Stabilization Program (NSP) Eligible Uses** – US Dept. of Housing and Urban Development, September 26, 2008
17. **Methodology for Allocation of \$3.92 billion of Emergency Assistance for the Redevelopment of Abandoned and Foreclosed Homes** - US Dept. of Housing and Urban Development, September 26, 2008
18. **The NSP Substantial Amendment** – New York State Housing Finance Agency, November 2008
19. **Increase Guidelines for Credit Equity Loss** – New York State Division of Housing and Community Renewal, November 2008