



## Articles

---

---

# A Brief Analysis of the National Housing Trust Fund

*Kathie Soroka*

I. Description of the Trust Fund .....	14
A. How the Trust Fund Will Be Distributed.....	14
B. What the Trust Fund Can Be Used for .....	15
C. How the Trust Fund Is Funded.....	16
II. Funding Illustration.....	16
III. Show Us the Money.....	18
IV. Trust Fund Implementation.....	20
A. Term of Affordability.....	20
B. Rent Limits and Other Affordability Requirements .....	21
C. Allocation of Trust Fund Dollars .....	21
D. Over-Income Units.....	22
E. Lenders' Rights.....	22
F. Use of Funds.....	22
V. Conclusion .....	23

The Housing Trust Fund, created by § 1131 of the Housing and Economic Recovery Act of 2008 (HERA),<sup>1</sup> is the first new federal housing production program since the creation of the HOME program in 1990. Other than the McKinney Act in 1987, which was targeted toward the homeless population, it is the first new production program for extremely low-income households since the Section 8 program was created in 1974.<sup>2</sup> The trust fund provides a dedicated source of funding not subject to annual appropriations, offers specific additional assistance to rental housing production, and makes extremely low-income households a priority. The U.S. Department of Housing and Urban Development (HUD) will make trust fund grants to each state, the District of Columbia, and U.S. territories (collectively referred to as “states” in this article).<sup>3</sup> The states, in turn, will provide funds to eligible recipients to help with the development, rehabilitation, and preservation of affordable housing projects for very low-income and extremely low-income households. HERA funds the trust fund by assessing a fee on the Federal National Mortgage Association (Fannie

---

*Kathie Soroka (ksoroka@att-law.com) is an attorney with Applegate & Thorne-Thomsen, P.C., in Chicago.*

Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), although amounts generated by this fee fall short of levels that trust fund advocates had desired. Although time will tell how substantial the impact of the trust fund will be, the basic structure established in this recent legislation provides a strong starting point.

### I. Description of the Trust Fund

Section 1131 creates the new trust fund by amending the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, legislation that regulates Fannie Mae and Freddie Mac, and generates funds by assessing a fee on those government-sponsored entities.<sup>4</sup> HUD will make grants to the states, each of which will then distribute its funds to affordable housing projects. Although each state must establish its own allocation plan, HERA requires compliance with certain overarching priorities, including an emphasis on rental housing for extremely low-income families. In this legislation, as in the Housing Act of 1932 and other housing assistance programs, *extremely low-income* refers to households earning 30 percent or less of the area median income (AMI), and *very low-income* refers to households earning 50 percent or less of AMI.<sup>5</sup>

#### A. How the Trust Fund Will Be Distributed

HERA entrusts HUD with administering the trust fund and distributing the funds to the states or state-designated recipients, such as the state housing finance agency, another housing and community development entity, a tribally designated housing entity (for Native Americans), or any other instrumentality of the state.<sup>6</sup> HUD, by regulation, will promulgate a distribution formula consistent with the requirements of the act. Although the act establishes a minimum amount of funding (\$3 million) to be distributed to each state,<sup>7</sup> it also specifies that HUD should distribute the funds according to the housing need in each state. It further requires that the distribution formula take into account each state's need relative to the national housing need in terms of the following five criteria:

1. the ratio of the state's shortage of housing for extremely low-income households to the national shortage of housing for extremely low-income households;
2. the ratio of the state's shortage of housing for very low-income households to the national shortage of housing for very low-income households;
3. the ratio of extremely low-income households in the state living without a kitchen or plumbing, living with more than one occupant per room, or paying more than 50 percent of its income to housing needs to the number of extremely low-income households nationally living in such conditions;
4. the ratio of very low-income households in the state paying more than 50 percent of their income to housing needs to the number of

- very low-income households nationally spending more than 50 percent of their income on housing; and
5. the cost of construction in the state compared to the cost of construction nationally.<sup>8</sup>

In other words, HERA intends to focus assistance in areas where the housing needs for extremely low-income and very low-income households are the greatest. Among these factors, it requires HUD to give “priority emphasis” to the first factor, the shortage of housing for extremely low-income households, but does not define what priority emphasis involves.<sup>9</sup>

Once states receive these grants from HUD, they will then allocate those funds to project recipients. To do so, each state must produce an allocation plan to establish priorities and processes for funding.<sup>10</sup> These plans may be similar to, but are separate from, the state’s qualified allocation plan that distributes the state’s Low-Income Housing Tax Credit (LIHTC) program allocation. HERA does not specify a timeline for producing these state allocation plans, but it does require states to commit their funds within two years of the grant in order to prevent having the funds revert back to HUD.<sup>11</sup> HERA also requires the opportunity for public comment on proposed plans<sup>12</sup> and requires fund recipients to meet eligibility standards, including demonstrated experience and capacity for activities allowed under the fund’s regulations.<sup>13</sup>

#### *B. What the Trust Fund Can Be Used for*

The explicit purposes of HERA are broad and straightforward: (1) “to increase and preserve the supply of rental housing for extremely low- and very low-income families, including homeless families” and (2) “to increase homeownership for extremely low- and very low-income families.”<sup>14</sup> In other words, trust fund assistance should be designated only for extremely low-income and very low-income households, those earning no more than 30 percent of AMI and 50 percent of AMI, respectively. Other provisions dictate that 75 percent of trust fund assistance must be used for extremely low-income households (or households whose incomes are at or below the federal poverty line) and 25 percent of assistance for very low-income households.<sup>15</sup> Within these limits, virtually all types of projects are eligible for assistance, including new construction, rehabilitation, preservation of existing affordable housing, rental projects, and homeownership projects. At least 90 percent of the trust fund assistance must be used for rental housing projects, and only 10 percent may be used for homeownership purposes.<sup>16</sup>

HERA also outlines certain prohibited uses that HUD is required to list in its regulations.<sup>17</sup> Funds may not be used for lobbying, advocacy, or other political uses; counseling services; travel expenses; or advice on tax returns. Although states are allowed to use up to 10 percent of their grants from HUD on administrative costs, HERA prohibits additional use of funds on

administrative matters, either by the states or the project recipients.<sup>18</sup> Project uses that violate trust fund rules will trigger a recapture of funds.<sup>19</sup>

These restrictions also apply to state loan repayment proceeds. To the extent that a state lends any of its trust fund money to a project and receives repayments or other returns on those loans, those returns add to the state's trust fund balance and are treated the same way as the trust fund grants from HUD. As such, these repayments will also be governed by the act and HUD regulations.<sup>20</sup>

Finally, HERA designates the trust fund assistance as "federal financial assistance" for purposes of civil rights laws. Thus, projects receiving trust fund assistance are subject to fair housing and other tenant protections.

### *C. How the Trust Fund Is Funded*

The legislation funds the trust fund by assessing a fee on all new mortgages purchased by Fannie and Freddie. This fee equals 4.2 basis points for each dollar of the unpaid principal balance of the new business purchases,<sup>21</sup> i.e., 0.042 percent, or 4.2 cents for every \$100 of new business. Although some estimates predict that the total amount generated by this fee will exceed \$600 million by 2012,<sup>22</sup> the legislation allocates portions of this fee to other uses. The act funnels the first 25 percent of the fee to underwrite the reserve fund of the HOPE for Homeowners (HOPE), which the act created to help prevent foreclosures.<sup>23</sup> Of the remaining 75 percent, 65 percent goes to the housing trust fund and 35 percent goes to the Capital Magnet Fund, another fund established by HERA.<sup>24</sup> However, HERA also funnels additional significant portions of the fee in its first years, after the first 25 percent of HOPE Program Reserve Fund payments, to pay the HOPE program administrative costs. This amounts to 100 percent of the fee in 2009, 50 percent in 2010, and 25 percent in 2011.<sup>25</sup> Therefore, the first funds will be available for the trust fund in 2010, and full funding will occur in 2012. Finally, HERA also gives authority to the Federal Housing Finance Agency (FHFA), the new regulator of Fannie and Freddie, to suspend the 4.2 basis point fee if it determines that the fee causes Fannie and Freddie to be undercapitalized or contributes to their instability.<sup>26</sup> Although previous drafts of the legislation contemplated a matching requirement, under which states would have to match funds to receive the HUD grants from the trust fund, the final version does not impose one.<sup>27</sup>

## **II. Funding Illustration**

It would be helpful at this point to calculate a state's potential allocation, but any attempts to do so would be speculative in the absence of the implementing regulations. We lack even preliminary information about some of the factors necessary for the calculations, such as how HUD will interpret HERA's provisions and what data sources it will use. Nevertheless, a thorough processing of the information above requires at least an attempt, albeit a speculative one, at such a calculation. Because the National Low Income Housing Coalition (NLIHC) has already grappled with these

informational shortcomings and required assumptions and has generated a preliminary estimated distribution formula,<sup>28</sup> key pieces of this article's calculation will be borrowed from the NLIHC's estimate.

Upon full implementation of the trust fund program in 2012, the Congressional Budget Office estimates, \$624 million will be generated by the 4.2 basis point fee imposed on Fannie and Freddie.<sup>29</sup> HERA requires that the first 25 percent of the funds generated by this fee be set aside for the HOPE Program Reserve Fund. However, it provides for the HOPE program to sunset after fiscal year (FY) 2011. Yet, the HOPE program will still have outstanding bonds in 2011. Therefore, the first question in calculating the allocation is whether the HOPE reserve fund terminates at the HOPE program sunset or survives until the HOPE bonds are retired. Note also that if the reserve fund terminates, then the additional funds collected in 2009, 2010, and 2011 to benefit the reserve fund, pursuant to § 1338(b)(1), would be added back to the trust fund and Capital Magnet Fund, pursuant to § 1338(b)(2). Assuming the reserve fund survives, our allocation calculation would first subtract 25 percent from the \$624 million generated, to be deposited into the reserve fund, leaving \$468 million.

Of that \$468 million, 35 percent goes to the Capital Magnet Fund, leaving 65 percent, or \$304.2 million, available for the housing trust fund. HUD would distribute that \$304.2 million according to a five-factor formula it is required to establish by July 2009. Although the act outlines these five criteria, it is unclear what data HUD will use in assessing them. One possible data source is the American Communities Survey (ACS), generated by the U.S. Census Bureau.<sup>30</sup> Although the ACS does not provide information about the U.S. territories, which also receive trust fund distributions under HERA and therefore factor into the calculation, it does provide information for the fifty states and the District of Columbia for four of the five factors that HERA delineates. NLIHC, therefore, used the ACS in its estimate of the distribution formula.

In the absence of more definitive guidance from HUD, this article will work from NLIHC's existing analysis. Using the ACS data, we can estimate (1) the relative shortage of housing for extremely low-income households in a state, (2) the relative shortage of housing for very low-income households in a state, (3) the relative amount of extremely low-income households living with inadequate kitchen or plumbing facilities or spending more than 50 percent of their income on housing needs, and (4) the relative amount of very low-income households spending more than 50 percent of their income on housing. The ACS does not provide data on the fifth factor, i.e., the relative construction costs in each state. Furthermore, although HERA requires that the first factor receive priority emphasis, it does not clarify what form that emphasis should take. To account for these two unknowns, the NLIHC estimate omitted the fifth factor from its calculation and gave double weight to the first factor. Under this analysis, with these assumptions, the most populous states generally receive a larger share of the distributions. For example, according to the NLIHC calculation, the

largest shares would go to California, New York, and Texas. Wyoming and North Dakota would receive the smallest shares.<sup>31</sup>

However, the shares allocated by this formula must be adjusted to account for the minimum distributions pledged by HERA. HUD is required to distribute at least \$3 million to each state and the District of Columbia (although no funding floor is required for the territories), which is roughly 0.99 percent of this estimated \$304.2 million available for distribution. Therefore, any state whose share of the housing needs as calculated by the five-factor formula above is less than 0.99 percent would receive more than its allocation according to that formula because it would receive \$3 million. For example, although Wyoming's share using the NLIHC calculation is 0.1 percent, or \$304,200, the state would nevertheless receive \$3 million. HERA splits pro rata the burden of reaching the funding minimum among these remaining states. The other states, those with more than a 0.99 percent share, would therefore receive less than their shares would otherwise indicate absent the \$3 million funding floor. According to the NLIHC analysis, twenty-one states (including the District of Columbia) have less than a 0.99 percent distribution share and would therefore receive the minimum \$3 million adjusted grant, totaling \$63 million. These twenty-one states have a total of 8.7 percent of the distribution share according to the formula, which would otherwise account for \$26.46 million of the trust fund. Therefore, the remaining thirty states would split the extra \$36.54 million burden. For example, Illinois has a 4.2 percent share of the distribution formula, according to the NLIHC analysis, which would equal roughly \$12.7 million of the \$304.2 million. However, when this \$304.2 million is reduced by the \$36.54 million necessary to account for the minimum distributions, Illinois's adjusted share drops by about \$1.5 million to roughly \$11.2 million.<sup>32</sup>

Of the \$11.2 million that Illinois would presumably receive, it could use up to 10 percent for administrative costs related to the trust fund, leaving \$10.08 million for distribution to affordable housing projects. Up to 10 percent of this amount may go to homeownership programs, leaving at least \$9.07 million for rental developments. Up to 25 percent of this amount may be used to target very low-income households, leaving at least \$6.8 million for assistance targeted to extremely low-income renter households.

### III. Show Us the Money

As the funding illustration above demonstrates, the most significant unknown in the scenario is the magnitude of funding. As stated above, upon its initial full implementation in FY 2012, the trust fund is expected to generate \$304.2 million. According to our calculations, Illinois, one of the states with larger housing needs, will likely receive approximately \$11.2 million. In comparison, the chronically underfunded Illinois Housing Trust Fund supplies roughly \$20 million to housing projects in Illinois.<sup>33</sup> The FY 2008 allocations of Community Development Block Grant (CDBG) program and

HOME funds to the state of Illinois equal roughly \$31.6 million and \$21.6 million, respectively.<sup>34</sup>

Although the need for additional funds has been amply demonstrated, having the trust fund funded at roughly half the level of these other well-established funds is not a particularly bad starting point. Barring changes to the legislation or FHFA's long-term suspension of contributions to the program, the trust fund will benefit from a dedicated source of funding that will not be subject to annual appropriations or have to compete with other HUD programs. The trust fund program contains no sunset provisions. These features will make trust fund assistance particularly stable and desirable for the underwriting of projects. If advocates can find additional funding sources to tie into this existing structure, the trust fund could prove to have a lasting and effective impact on the nation's housing need.

The current state of the affordable housing industry demonstrates both the trust fund's need for increased funding and its potential positive impact. Over the past twenty years, the LIHTC program, administered in accordance with § 42 of the Internal Revenue Code, has become the most significant financial stimulus for the production of affordable housing. Until recently, although other forms of gap financing, such as the HOME Investment Partnerships Program (HOME program), Section 8 Housing Choice Vouchers (Section 8 program),<sup>35</sup> and state trust funds, have struggled to find political support and adequate funding, the strength of the tax credit market, sometimes yielding developers more than a dollar of equity per dollar of tax credit, kept projects feasible and development steady. Yet, even under those conditions, the shortage of affordable housing continued to grow. Even in the best of times, we were losing affordable housing at a faster rate than we were producing it.<sup>36</sup> The market's current downturn has revealed a further shortcoming in this reliance on tax credits. When demand by investors plummets, so does the per-credit yield to developers. With tax credits generating substantially less equity for developers, more than 20 percent to 25 percent less than two years ago, still deserving projects face increasing financing gaps and look to other subsidies and soft financing to provide greater assistance. Unfortunately, demand for these other sources far exceeds supply, making projects even harder to develop.

At the same time, the market's downturn creates an even greater need. Although commentators usually cast the foreclosure crisis as affecting mainly homeowners, the crisis also affects renters. A recent report by the Woodstock Institute, a Chicago-based nonprofit that promotes community economic development, reveals that a substantial number of foreclosures, i.e., 35 percent of filings in Chicago and 20 percent nationally, involved small multifamily rental buildings of two to six units.<sup>37</sup> In other words, foreclosures threaten rental housing as well as owner-occupied housing, and the demand for affordable rental housing intensifies.

Therefore, strong sources of soft financing are necessary to protect against these market downturns. Unfortunately, although the trust fund has a dedicated source of funding, that funding source, generated from

Fannie and Freddie's new business portfolios, is also affected by the market. Indeed, FHFA can suspend funding to protect Fannie and Freddie's financial stability. With Fannie and Freddie's current instability, FHFA may suspend contributions for 2009. Although the practical impact of this suspension is mitigated by the fact that 100 percent of the funds generated in 2009 would be allocated to the HOPE program in any case, the lesson is nonetheless dramatically clear. At the very time when the trust fund is most needed, its funding is in greatest jeopardy.

Affordable housing advocates must continue, therefore, to seek additional funding sources and find ways to leverage trust fund assistance with other programs. The Neighborhood Stabilization Fund, another fund created by HERA,<sup>38</sup> should not be overlooked. In contrast to the trust fund, the Neighborhood Stabilization Fund is funded at \$3.92 billion, an order of magnitude greater than the Housing Trust Fund. Although the Neighborhood Stabilization Fund was created as a means to stave off foreclosure, as the Woodstock Institute study reveals, foreclosure prevention and affordable housing preservation can have compatible objectives.

#### **IV. Trust Fund Implementation**

Though the importance of funding cannot be overestimated, much of the trust fund's impact will also be determined by HUD's regulation and implementation of the program. The program's regulations determine how, when, to what extent, and under what circumstances the funds are distributed and utilized.

Particularly at current funding levels, the trust fund will need to be used with other subsidy programs, and the regulations should be drafted with these other subsidies in mind. HUD should be mindful of how the trust fund requirements will affect and be affected by other affordability programs. As stated above, the LIHTC program has emerged as the most significant subsidy source for affordable housing production, so to be most effective, the trust fund regulations should be made particularly compatible with the existing realities of the LIHTC program. Even if the regulations do not explicitly prohibit using trust fund dollars with the LIHTC program or other subsidy programs, a number of factors, term of affordability, rent limits and other affordability requirements, allocation of trust fund dollars, over-income units, lenders' rights, and use of funds, among others, will influence whether in practice the funds can be combined effectively.

##### *A. Term of Affordability*

The standard period of affordability for the LIHTC program, including the additional affordability required by a standard extended-use agreement, is thirty years. For the trust fund program to be compatible with the LIHTC program, the trust fund program should not require a longer period of affordability. Furthermore, in order to avoid the negative effects of grant income for the LIHTC program, funds should be loaned, rather than granted, to projects at the state level, and the term length of these



loans should, as a general rule, extend as long as (or beyond) the period of affordability to reduce negative tax implications.<sup>39</sup>

*B. Rent Limits and Other Affordability Requirements*

Although HERA specifies that the trust fund should assist very low- and extremely low-income households, the regulations must detail how many units in a project must be affordable to these groups, how *affordable* is defined, and what rent limits fit within the affordability restrictions. Although other provisions of HERA have made rent setting more compatible among the LIHTC program, the HOME program, and the Section 8 program, each of these programs has different procedures and standards for setting the rent of an affordable unit. Trust fund regulations should mirror procedures for setting the rent of an affordable unit in these other programs. It is important to realize that rent limits and affordability requirements will also be shaped by how trust fund dollars will be allocated to certain units within an overall project, as discussed below.

*C. Allocation of Trust Fund Dollars*

The issue of how many units in a project can be designated as trust fund units and the problem of whether HUD will limit how many trust fund dollars can be allocated per project unit are closely related to the trust fund's affordability requirements. The HOME-funded unit analysis of the HOME program<sup>40</sup> provides an analogous example. The HOME program requires 20 percent of a project's HOME-funded units to be affordable to households at 50 percent of AMI, but not all of a project's units are necessarily classified as HOME-funded units. Developers allocate as much subsidy per unit as the regulations allow, therefore classifying as few units as possible as HOME-funded units and imposing the HOME program's affordability requirements on as few units as possible. Therefore, the HOME program's affordability requirements are significantly shaped by the per-unit subsidy limit imposed by the HOME program regulations. Similarly, the trust fund regulations may establish affordability requirements for trust fund-assisted projects, but the actual number of set-aside units will depend on the per-unit subsidy limit and how many of the development's units overall fit the definition of *trust fund project*. As a practical matter, how the trust fund dollars are allocated within a project may also be determined by the availability of operating subsidies. If the trust fund will be used primarily as a capital subsidy, in order to make trust fund projects viable, given the targeting to extremely low-income households, it seems likely that projects would need to tie trust fund subsidies to operating subsidies, such as Section 8 vouchers. In balancing affordability requirements and per-unit subsidy limits, trust fund regulations should consider the practical challenges inherent in operating extremely low-income units and the scarcity of operating subsidies.

#### *D. Over-Income Units*

What happens when the income of a household renting a trust fund unit increases? Other subsidy programs, such as the LIHTC program, deal with this question by allowing subsidized units to float in a development. In other words, affordability restrictions may not be affixed to specific units, but if an initially low-income set-aside unit becomes designated as a market-rate unit, the developer can restrict another unit in the project to comply with the affordability regulations. According to the LIHTC program's "next available unit" requirement, when household income in a set-aside unit increases beyond the set-aside threshold, that unit may still be considered to be a qualifying LIHTC unit if the next available unit of comparable size is rented to a household earning within the targeted income.<sup>41</sup> Trust fund regulations should contemplate similar provisions for over-income units.

#### *E. Lenders' Rights*

In creating trust fund restrictions, regulators should be mindful of the needs of project developers to secure additional financing, including commercial loans. No restriction should be so onerous as to make the project unattractive to commercial lenders. For example, as with other subsidy programs, affordability restrictions should terminate upon a foreclosure and sale of a failed property. On a state level, mortgage loan lien positions and repayment terms should be subordinated to private loan lien positions and repayment terms. Affordability restrictions must balance providing meaningful assistance to targeted households while allowing projects to generate sufficient income to support debt service.

#### *F. Use of Funds*

HERA limits the amount of trust fund money that can be used for administrative expenses and prohibits certain other political or miscellaneous uses, as discussed above. The regulations will need to clarify what expenses fall under these prohibitions, as well as what other types of expenses are restricted. For example, will the regulations restrict the use of trust fund dollars on developer fees or reserves? In providing appropriate government oversight of public funds, regulators should keep practical considerations in mind. In practice, projects do not typically have excess funds to spend on unnecessary costs. For example, it is doubtful that limiting the use of funds to hard construction costs would reduce the amount of soft costs incurred in connection with a development. Instead, the developer would likely perform artificial mental gymnastics to trace funds to appropriate uses. The more that restrictions limit to what types of costs developers can allocate trust fund dollars, the more complicated the coordination of subsidies becomes and the harder it becomes to fully use trust fund assistance. Any restrictions on the use of trust fund money should mirror existing guidelines in other programs, such as the familiar basis-eligible items that generate tax credits in the LIHTC program. The regulations should also clarify what

events trigger a recapture of the trust fund moneys and what the process for recapture should be.

These questions are just a few factors that will shape the structure of the trust fund and, consequently, will affect its impact on affordable housing. To the extent that trust fund regulations differ from regulations in place for other subsidy programs, potential conflicts could cause administrative hassles or make the trust fund more difficult to utilize.

Despite the importance of the implementing regulations, it is unclear when HUD will issue guidance. HERA requires HUD to establish the funding allocation formula, through regulations that require public notice and comment, within twelve months of the bill's enactment.<sup>42</sup> Because HERA gives HUD no deadline for promulgating other regulations, it may decide either to limit the regulations at that time to the distribution formula or to issue all of the program's regulations simultaneously. Similarly, although the states are also required to issue allocation plans, they are not required to specify a time limit for establishing these plans. It does, however, require states to use their trust fund grants within two years of distribution or to return the funds to HUD.<sup>43</sup>

## V. Conclusion

The current state of the housing market underscores the need for available soft gap financing, particularly financing that works well with existing subsidy programs. The trust fund is a long-fought-for attempt to bridge chronic financing gaps for affordable housing development. Although advocates have secured several positive programmatic features for the trust fund in this authorizing legislation, several more nuances will be revealed with the promulgation of implementing regulations. Although current funding levels suggest that the trust fund will have only a modest initial impact, the stability and permanence of the program provide a good foundation to support future growth. If allowed to grow, the trust fund may prove to have a lasting and significant impact on the country's housing needs.

---

1. The Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) [hereinafter HERA], creates the Housing Trust Fund by amending the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, 106 Stat. 3941 (1992) (Safety and Soundness Act). References to trust fund provisions in this article, unless otherwise indicated, will cite amended sections of Pub. L. No. 102-550, Safety and Soundness Act of 1992, 12 U.S.C. § 4502. Where sections of HERA are specifically referenced, Pub. L. No. 110-289 will be cited.

2. See National Housing Trust Fund website, [www.nhtf.org](http://www.nhtf.org), as maintained by the National Low Income Housing Coalition, a longtime lead advocate for the trust fund.

3. See Safety and Soundness Act, Pub. L. No. 102-550, § 1303(17) (1992). Terms for the trust fund program are defined in § 1303: "The term 'State' means the States of the United States, the District of Columbia, the Commonwealth of

Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.” No other territories of the United States are inhabited.

4. HERA, Pub. L. No. 110-289, § 1131, 122 Stat. 2654, 2711 (2008). This section falls under Division A—Housing Finance Reform, Title I—Reform of Regulation of Enterprises, Subtitle B—Improvement of Mission Supervision.

5. These definitions for *extremely low-income* and *very low-income* are found in 24 C.F.R. § 5.603 (2008); AMI limits can be found among the datasets on the HUD user website, [www.huduser.org/datasets/il/il08/index.html](http://www.huduser.org/datasets/il/il08/index.html) (last visited Sept. 30, 2008).

6. Safety and Soundness Act, Pub. L. No. 102-550, § 1338(c)(2) (1992). This article will refer to the role states play in the trust fund program, but all such references should be read to infer potential delegation by the states to their designated instrumentalities, as allowed in § 1338(c)(2).

7. Safety and Soundness Act, Pub. L. No. 102-550, § 1338(c)(4)(C) (as amended by HERA, Pub. L. No. 110-289, § 1131, 122 Stat. 2654, 2711 (2008)).

8. *Id.* § 1338(c)(3)(B) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

9. *Id.* § 1338(c)(3)(C) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

10. *Id.* § 1338(c)(5) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

11. *Id.* § 1338(c)(10)(B) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

12. *Id.* § 1338(c)(5)(B) (as amended by HERA, Pub. L. No. 110-289, § 1131, 122 Stat. 2654, 2711 (2008)).

13. *Id.* § 1338(c)(9)(A) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

14. *Id.* § 1338(a)(1) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

15. *Id.* § 1338(c)(7)(A) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)). Income targets in the act tie to “extremely low-income families” but only the term *extremely low-income renter household* is defined within the act. This article assumes that for purposes of § 1131 of the act, *extremely low-income families* means households earning no more than 30 percent of the AMI, as determined by HUD, *see* 24 C.F.R. § 5.603 (2008), which is consistent with the prevailing definition in the affordable housing industry and the definition of *extremely low-income renter household*, Pub. L. No. 102-550, § 1338(f)(1) (1992). The federal “poverty line” is delineated in the Omnibus Budget Reconciliation Act of 1981, 45 U.S.C. § 9902(2) (2008).

16. Safety and Soundness Act, Pub. L. No. 102-550, § 1338(c)(10)(A) (as amended by HERA, Pub. L. No. 110-289, § 1131, 122 Stat. 2654, 2711 (2008)).

17. *See id.* § 1338(c)(10)(D) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

18. *Id.* § 1338(c)(10)(D)(ii) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)). Presumably, this means trust fund moneys, like HOME Funds, must be used for approved project-related expenses. Some practitioners have questioned whether using such funds for developer fees would be prohibited.

19. *Id.* § 1338(e)(1)(B) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

20. *Id.* § 1338(c)(10)(C) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

21. *Id.* § 1338(c)(7)(A) (as amended by HERA, Pub. L. No. 110-289, § 1131, 122 Stat. 2654, 2711 (2008)).

22. *See, e.g.*, CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 3221: HOUSING AND ECONOMIC RECOVERY ACT OF 2008 (July 23, 2008).

23. Safety and Soundness Act, Pub. L. No. 102-550, § 1337(e) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)); *see also* HERA, Pub. L. No. 110-289, § 1402, 12 U.S.C. § 1707 (2008) (amending the national Housing Act to establish the HOPE reserve fund). HERA establishes this reserve fund to provide an alternative source of funds for its new HOPE for Homeowners (HOPE) program, which provides foreclosure prevention assistance. Should proceeds of the Federal Housing Administration (FHA)-insured mortgages and HOPE program bonds fall short of government obligations under this program, FHA can utilize this reserve fund. The Safety and Soundness Act § 1338(b)(2) (as amended by HERA § 1131) states that funds in this reserve should be returned to the trust fund (and the Capital Magnet Fund discussed below) at the “termination” of the HOPE program. It is unclear whether this termination refers to the HOPE program’s sunset on September 30, 2011, or the expiration of the bonds issued in connection with the HOPE program in roughly thirty years.

24. Safety and Soundness Act, Pub. L. No. 102-550, § 1337(a)(1)-(2)(B) (as amended by HERA, Pub. L. No. 110-289, § 1131, 122 Stat. 2654, 2711 (2008)). The Capital Magnet Fund is a subaccount of the Community Development Financial Institutions (CDFI) Fund, used to promote community economic and business development. Proceeds will be distributed to CDFI certified by the U.S. Department of the Treasury for use for affordable housing, economic development, and community service facilities.

25. Safety and Soundness Act, Pub. L. No. 102-550, § 1338(b)(1) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

26. *Id.* § 1337(b) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).

27. For a history of the advocacy for the trust fund, see the National Low Income Housing Coalition (NLIHC), [www.nlihc.org](http://www.nlihc.org) (last visited Sept. 30, 2008). The legislative history also contemplated, but ultimately rejected, provisions that would allow HUD to make grants to cities as well as states and that would impose mixed-income requirements on assisted projects.

28. *See* National Housing Trust Fund, [www.nhtf.org](http://www.nhtf.org) (last visited Sept. 29, 2008); *see also* NATIONAL LOW INCOME HOUSING COALITION, DATA TO ESTIMATE DISTRIBUTION FORMULA FOR THE NATIONAL HOUSING TRUST FUND (Sept. 24, 2008), available at [www.nlihc.org/doc/Distribution-Formula.pdf](http://www.nlihc.org/doc/Distribution-Formula.pdf).

29. *See* CONG. BUDGET OFFICE, *supra* note 22.

30. *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, [www.census.gov/acs/www/index.html](http://www.census.gov/acs/www/index.html) (last visited Sept. 29, 2008).

31. Note that the NHLIC analysis excluded the U.S. territories because no data was available for them, but it is likely safe to assume that they, too, would receive the smallest shares under this distribution formula, except for Puerto Rico, which has a larger population roughly equal to that of Oregon. Oregon’s share of the distributions, according to NHLIC, would be 1.4 percent.

32. Admittedly, this calculation is an approximate estimate of an otherwise more complicated equation, but for the purposes of this article, it is adequately accurate, particularly given the shortcoming in compiling the data necessary for calculating the distribution formula.

33. See the Illinois Housing Development Authority website ([www.ihda.org](http://www.ihda.org)), specifically information on the Housing Trust Fund, available at [www.ihda.org/ViewPage.aspx?PageID=46](http://www.ihda.org/ViewPage.aspx?PageID=46).

34. See U.S. DEP'T OF HOUS. & URBAN DEV., COMMUNITY PLANNING AND DEVELOPMENT PROGRAM ALLOCATIONS FOR FY 2008: ILLINOIS, available at [www.hud.gov/offices/cpd/about/budget/budget08/states/il.xls](http://www.hud.gov/offices/cpd/about/budget/budget08/states/il.xls).

35. As used in this article, *HOME program* refers to the HOME Investment Partnerships Program, administered in accordance with 24 C.F.R. § 92 (2008); and *Section 8 program* refers to the Housing Choice Vouchers program, administered in accordance with 24 C.F.R. §§ 982–83.

36. See, e.g., GEOFF SMITH, FORECLOSURE CRISIS IMPACTS CHICAGO'S RENTAL HOUSING MARKET 1 (May 2008), available at [www.woodstockinst.org](http://www.woodstockinst.org). The report cites research by the Real Estate Center at DePaul University and states that affordable rental housing decreased by 9,000 units each year between 1990 and 2005. According to the report, in 2000, demand exceeded supply by 34,000 units; and in 2005, this disparity had risen to 114,000.

37. *Id.*

38. HERA, Pub. L. No. 110-289, § 2301, 122 Stat. 2654, 2850 (2008). According to § 2301(c), "Use of Funds," subsection (1): "Any State or unit of general local government that receives amounts pursuant to this section shall ... use such amounts to purchase and redevelop abandoned and foreclosed homes and residential property."

39. Under the LIHTC program, grant income does not generate tax credits and a "real debt" tax analysis must be completed for each deal to demonstrate that project loans can be respected as loans. When the project's loans are due, real debt analysis should demonstrate that, at least theoretically, they can be repaid or refinanced without additional government subsidies. Affordability requirements in place after a loan is due restrict the project's value and its ability to generate income, thus making it harder to make this necessary theoretical repayment.

40. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., HOME Per-Unit Subsidy Limits, [www.hud.gov/offices/cpd/affordablehousing/programs/home/limits/subsidylimits.cfm](http://www.hud.gov/offices/cpd/affordablehousing/programs/home/limits/subsidylimits.cfm) (last visited Sept. 29, 2008).

41. See I.R.C. § 42(g)(2)(D) (2008).

42. Safety and Soundness Act, Pub. L. No. 102-550, § 1338(c)(3)(A) (as amended by HERA, Pub. L. No. 110-289, § 1131, 122 Stat. 2654, 2711 (2008)).

43. *Id.* § 1338(c)(10)(B) (as amended by HERA, Pub. L. No. 110-289, § 1131 (2008)).