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FORUM ON AFFORDABLE HOUSING
AND COMMUNITY DEVELOPMENT LAW

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From the Editor-in-Chief

Tim Iglesias

As I begin my term as Editor-in-Chief, I want to thank Laurie Hauber for her generous and graceful service as Editor-in-Chief, Laura Schwartz and Brandon Weiss who served as Associate Editors, and Jim Kelly, former Senior Editor. I’m particularly grateful to Laurie and Brandon for staying on. I want to warmly welcome Emily Blumberg and Sara Silverstein, both associates at Klein Hornig LLP, as new Associate Editors. I feel sincere gratitude to Wendy Smith, our dedicated Managing Editor, and to Dawn Holiday, Forum Manager, for their tireless work. Finally, I appreciate Amy McClain’s leadership and the entire Forum Governing Committee for their collaboration on the Journal. I feel privileged to do this work, especially in the company of such a wonderful team.

Writing in the immediate wake of Harvey, Irma, Maria, and Nate, and the current wildfires in Northern California, it is impossible to be silent. Given the magnitude of each of these tragedies and their cumulative effects, it is inevitable that some Forum members and Journal readers are affected. Indeed, two pieces planned for this issue were unable to be done because the authors were disrupted by the storms, and my own relatives in Puerto Rico are struggling mightily. I feel deep sadness for the individuals and families whose lives have been directly or indirectly interrupted and disordered. I hope that their lives will return to normal quickly.

On a professional level, we always ask: What is the role of affordable housing, fair housing, and community economic development lawyers in response to broken communities? Forum Chair Amy McClain’s column offers an answer in the context of distressed communities. She mines the 2017 Distressed Communities Index to understand the challenges presented, offers a hopeful example of success, and encourages our legal community to continue its important work. And, as a direct contribution to reconstruction efforts, the Forum has generously made its book Building Community Resilience Post-Disaster by Diane Standaert and Dorcas Raejeana Gilmore freely available online at: https://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=289790393&term=5530026ebk. Please be sure to share this link with others who may benefit from the book.

Tim Iglesias is Professor of Law at the University of San Francisco School of Law. He is co-author of the Legal Guide to Affordable Housing Development Law (ABA 2011) and numerous articles. He welcomes comments from readers at iglesias@usfca.edu.
We are all aware of the ongoing affordable housing crisis, the need for investment and redevelopment in disadvantaged communities, the harms of current discrimination, and the legacy of segregation. The coming of every new administration offers an occasion to rethink our assumptions, revisit our commitments, resolve longstanding issues, and the potential for opening up big and new questions. It’s not news to anyone that federal policy on any topic could change under the current administration and Congress. In line with the Journal’s overall goal to be an important forum where key issues are raised, considerations and arguments discussed, and solutions are articulated, the primary theme of this issue is the opportunities and challenges for affordable housing, fair housing, and community development in the new administration. Ten months in, these arenas are still rife with uncertainty, but it’s worthwhile to start the conversation. Because of the ongoing uncertainty and likely piecemeal developments, this will be an ongoing theme for future issues. (Note: Due to publication deadlines, some authors were not able to update their essays to incorporate information available when this issue was printed.)

Ronald Terwilliger’s essay *Solving the Affordable Housing Crisis: The Key to Unleashing America’s Potential* opens the theme contributions with a helpful overview of the current and impending affordable housing crises. He and several contributors explain the continued importance and value of several current affordable housing programs and policies. They advocate for increased investment in affordable rental housing, especially the Low Income Housing Tax Credit (LIHTC), Section 8 vouchers, and New Market Tax Credits (NMTC). In *Through Sound Tax Policies, President Trump and Secretary Carson Can Advance Supportive Housing*, Deborah De Santis of the Corporation for Supportive Housing helpfully explains how LIHTC and NMTC are critical for supportive housing development. Several essays raise concerns about funding reductions, proposed deregulation, and limited enforcement of civil rights and environmental protection. Yet the essays do not merely defend the status quo and raise concerns. Rather they offer new ideas for consideration, e.g., a Renters’ Tax Credit as part of any federal tax code overhaul, converting the federal mortgage interest deduction into a credit available to all taxpayers, expanding Social Impact Bonds, and much more. The essays also explore broader themes, including readjusting the balance between support for homeownership and rental housing as complementary, improving public-private partnerships, and refining interagency coordination.

In *Fair Housing and Environmental Justice: Strategies and Challenges*, Megan Haberle of the Poverty & Race Research Action Council advocates using HUD’s existing authority to advance environmental justice consistent with its mission and the need to address disaster relief and climate change. Her analysis is both broad and deep—identifying the numerous housing policy areas and programs that affect environmental justice and articulating the specific linkages between these policies and programs and environmental justice outcomes.
Audrey Johnston, a rural housing expert, provides a primer on the alphabet soup and organizational complexity of federal rural housing and community development programs within the distinctive context of rural America’s housing challenges in her essay *Rural Housing in Modern America*. She considers Congress’s response to the administration’s initial budget proposals to reorganize the U.S. Department of Agriculture. She then offers concrete suggestions for improving the effectiveness of current programs that build single family and multifamily housing as well as contribute to local economic and community development. Given the importance of the urban-rural dimension of our national divide, it is more important than ever that housing and community development practitioners and advocates understand rural America.

*The Nation’s Challenge and HUD’s Charge: Creating Communities of Opportunity for All*, an essay by Jorge Soto and Morgan Williams of the National Fair Housing Alliance, addresses the prospects for fair housing enforcement and its critical role in creating efficient housing markets and communities of opportunity for all. After chronicling the advances made under prior administrations of both parties, they frame the opportunity that the current administration has to make additional progress. After marshaling empirical evidence linking discrimination and residential segregation to economic costs and health risks to members of protected classes, they detail the integral role that fair housing programs and enforcement play in HUD’s mission, and they encourage HUD to seize the opportunity to lead in establishing equal housing opportunities for all.

Three of the theme contributions highlight the work law schools and transactional attorneys can do in the context of the current administration. In *Expanding Our Reach: Direct Client Representation vs. Policy and Advocacy Impact in a Transactional Clinic*, Joseph Pileri of Georgetown University Law Center examines transactional clinics at law schools in the context of the legal needs presented by the new administration. He explores the tradeoffs between individual client representation and advocacy toward the goal of maximizing the impact that transactional clinics can make. This analysis includes being deliberate about what client communities they serve, what types of business models they facilitate, and how they leverage academic prowess and resources in legislative and policy advocacy.

Priya Baskaran of West Virginia University College of Law and Michael Haber of the Maurice A. Deane School of Law at Hofstra University pursue a similar tack in *Transactional Clinics as Change Agents in the Trump Era: Lessons from Two Contexts*. Drawing lessons from their distinct contexts—Appalachia and suburban New York City—the authors richly describe the wide range of services they provide for small businesses, nonprofits, cooperatives, and other entities that cannot afford private counsel, how they have experimentally adapted their clinics to particular challenges raised in the current administration with careful attention to a variety of salient contextual factors, and lessons learned so far from their pedagogical modifications. They conclude with thoughtful and concrete suggestions for how
community development and other transactional lawyers can advance social justice outside of a clinical context.

Finally, Susan Jones of George Washington University Law School provides a solidly grounded basis for hope in Is Social Innovation Financing Through Social Impact Bonds the Last Hope for Community Economic Development Programs During the Trump Administration? The essay first explains the basics of a Social Impact Bond (SIB), an innovative, public-private partnership financing mechanism that leverages private investment to support a high impact social program which, it turns out, is not actually a bond. The essay then highlights the bipartisan support for this novel financing tool—from Goldman Sachs to advocates for homeless people, ex-offenders, at-risk youth and green infrastructure—and documents widespread use of SIBs across the country. The essay concludes with insightful reflections on the critical role that SIBs can play in the community economic development movement during the current administration and beyond.

This issue’s Commentary offers a timely review and examination of the Community Reinvestment Act (CRA) in three integrated essays. Paul Kabout (former Vice President at Federal Reserve Bank of Cleveland) lays the groundwork by providing a clear overview of the CRA in his contribution History and Overview of the Community Reinvestment Act. In The Community Reinvestment Act’s Impact on Low Income Housing Tax Credit Investment, Nancy Amstadt (RBC Capital Markets, LLC) dissects banks’ CRA-driven interest in LIHTC in contrast to economic investors. She then explains how banks’ CRA motivations influence how LIHTC syndicators structure their fund offerings and how syndicators work with their investor and developer partners. And, in The Community Reinvestment Act, Banks and the Low Income Housing Tax Credit Investment, Professor Cassandra Harvard (University of Baltimore School of Law) explains CRA’s synergistic relationship to LIHTC and offers suggestions for improving it by addressing incongruences in pricing, syndication costs, and geography. The genesis of this Commentary was a panel at the October 2016 Forum Bootcamp in Cleveland.

Matt Festa of South Texas College of Law reviews The Well-Tempered City: What Modern Science, Ancient Civilizations, and Human Nature Teach Us About the Future of Urban Life by Jonathan F. P. Rose, which was the focus of a plenary session at the Forum’s 2017 annual conference. This issue also includes reviews of three recent Forum Beginner’s Guides, one by David Kroot, a partner at Goldfarb & Lipman, LLC; another by Taisha Sturdivant, an associate at Klein Hornig LLP; and the third by Cynthia Langelier Paine, Special Counsel, and Schuyler Armstrong, an associate, at Katten Muchin Rosenman LLP. This issue’s organizational profile features Mission Economic Development Agency, a dynamic community organization in San Francisco’s Mission District that is creatively addressing gentrification. Under the guidance of Emily and Sara, five contributors—Jody Campbell (Georgetown University Law Center), Shanellah Verna
(Ballard Spahr LLP), Alec Rubenstein (Robinson+Cole LLP), Theresa A. Omansky (Emmet, Marvin & Martin, LLP), and Crystal Malone (HUD)—have summarized two annual analyses of national affordable housing needs; three academic articles that explore the linkages between housing and race, health, and intergenerational mobility; and a law review article presenting the duty to affirmatively further fair housing as a tool for addressing vacant properties in a way that expands housing choice.

In the next issue we plan to offer lessons learned from Hurricane Katrina, Superstorm Sandy, and similar natural disasters regarding how to make reconstruction more equitable. And, in light of the fiftieth anniversary of the passage of the federal Fair Housing Act, we will examine the numerous important and recurring tensions between fair housing law, the development of affordable housing, and community development that arise out of efforts to achieve fair housing.

My goals as Editor-in-Chief for 2017–2019 are to make the Journal more useful for Forum members, more interactive with membership, better integrated with other Forum activities, and more influential for advocacy. I also want to connect scholarship and practice better, to expand and facilitate access to Journal, and to increase coordination with HUD and other relevant federal agencies. I have some ideas about how to pursue these ambitious goals, and I welcome your thoughts. This is your journal. What do you want? How can we do better? Please email me your thoughts and suggestions at iglesias@usfca.edu.
A recent report touches on key issues that we, as community economic development and housing lawyers, seek to address—the need to build vibrant communities that are able to adapt and to overcome community disinvestment. Building cohesive, interdependent communities becomes more important in an era of increasing divisiveness and lack of cooperation on our national scene. In the Journal’s last issue, I touched on the growing income disparity among American households. This is a disparity demonstrated, in part, by HUD’s report that, despite overall economic growth for the nation, households with “worst case housing needs” had grown between 2013 and 2015. And, we also know, at least by anecdote, this income disparity tends to be concentrated within certain communities and regions in the country. Rust belt cities and rural areas, for example, felt the economic downturn of 2008 more acutely than others. How has the recovery touched those communities? Are the rent-burdened households with ongoing income stagnation concentrated more in certain communities?

The 2017 Distressed Communities Index released by the Economic Innovation Group provides a picture of how communities are rebounding from the economic fallout that began in 2008. This analysis is based on a zip code, city, county, and congressional district level analysis. The report: (1) identifies five tiers of communities: prosperous, comfortable, mid-tier, at risk, and distressed; and (2) defines seven criteria for ranking communities: high school diplomas, housing vacancy rates, adults not working, poverty rate, median income rate, change in employment, and change in businesses established.

The top five communities deemed distressed are located in the Northeast and Midwest: Cleveland, Ohio; Newark, New Jersey; Buffalo, New York; Detroit, Michigan; and Toledo, Ohio. At the same time, the states of Alabama and Mississippi have the highest percentage of residents living in distressed communities. The challenges facing cities and communities lagging behind the rest of the country often arise from long-standing disinvestment associated with the death of manufacturing and old industrial mainstays. The challenges facing these communities were in place in 2008 and have only deepened since then. There is a lack of improvement in the distressed communities. Rather, these communities were among the only tier to actually lose more jobs and business establishments after 2008.²

Meanwhile, the already prosperous communities are only becoming more affluent. According to the 2017 Distressed Community Index, these communities were poised to take the greatest advantage of the economic growth of recent years because of certain favorable conditions. For example, 45 percent of the nation’s advanced degree holders live in these prosperous communities, the highest concentration in the country.³ Between 2011 and 2015, these communities experienced a 52 percent increase in jobs and a 57 percent increase in the establishment of businesses.⁴

Lagging cities face a growing struggle to overcome decades of disinvestment and infrastructure needs. For instance, more than one third of the nation’s brownfield sites are located in distressed zip codes where the resources needed to put those sites back to productive use are thin or nonexistent.⁵ These communities, like those devastated by the 2017 hurricane season, are at a dire point of needing to rebuild while uncertain about what will be the means for rebuilding.

The key point of divergence between prosperity and distress is jobs and business establishment. So, what is the path forward for distressed communities? How can community economic development lawyers be at the forefront of laying the groundwork for jobs and long-term economic growth? What does it take to rebuild a community from the ground up? What are the necessary tools? Do we have the national will to support funding for infrastructure repair and replacement, and environmental remediation, and to provide the business incubation incentives and tax credits needed to turn the situation around?

Communities like Eau Claire, Wisconsin, may provide some inspiration. An article posted on citylab.com late this summer reviews a number of initiatives that have helped turn the town around to become the second

². Id. at 4–5.
³. Id. at 14.
⁴. Id.
⁵. Id. at 19–20.
fastest growing city in Wisconsin. In 2002, after the lumber industry died down and then the Uniroyal tire plant closed, downtown Eau Claire was desolate. Since then, Eau Claire has been on the move, starting with efforts to clean up problem properties along the river that runs through downtown and the decision by Uniroyal Credit Union to move its headquarters to an old industrial site on the waterfront. More than a decade later, the community is growing with new businesses, community parks, and events, and a focus on arts and culture—there is a buzz in the community. Behind the buzz, I am sure, are teams of unsung lawyers structuring the deals to make adaptive reuse of buildings and build new space, establish new businesses, draft leases, promote arts initiatives, protect green space, and foster business incubation. And, hopefully, successes like Eau Claire provide us the motivation to dig in and work to help turnaround other communities facing distress.

User Guide to HUD’s Previous Participation Review Process
(aka “2530” Approval)
American Bar Association (2017)
6×9/135 pages/$39.95 (shopABA.org)

Review by Cynthia Langlier Paine and Schuyler Armstrong

As many parties and individuals who work with projects assisted or regulated by the U.S. Department of Housing and Urban Development (HUD) are aware, navigating HUD’s Previous Participation Review (informally known as the “2530 process”) can be a difficult and challenging endeavor, particularly for those unfamiliar with the process. To make the sometimes arduous process even more complicated, in October 2016, HUD published a Final Rule¹ and Processing Guide² updating the agency’s existing Previous Participation Review Process. With the new Final Rule and Processing Guide changing previously understood guidance, even those who have gone through 2530 review many times before may be left mystified by the revised procedures.

Luckily, the User Guide to HUD’s Previous Participation Review Process (aka “2530 approval”) by Kathie Soroka and Elizabeth J. Friedgut seeks not only to guide its readers through HUD’s updated 2530 process, but also to lay a foundation for understanding the underlying history and policy behind the 2530 requirements. The User Guide is thoughtful and well written by practitioners whose specialty expertise with the 2530 process and depth of knowledge shows throughout. It is apparent that the authors’ knowledge comes not only from a great understanding of the regulations


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and published guidance, but also from their own experiences going through the Previous Participation Review Process.

From a practitioner’s standpoint, the User Guide is a one-stop shop for everything 2530. Included as an addendum to the User Guide is a copy of the both the Final Rule and the Processing Guide, putting these documents at readers’ fingertips. However, recognizing that regulations and guidebooks are not always easy to understand or implement practically, the User Guide attempts to provide more detail and context to HUD’s published documents. For example, Chapter 1 helps the reader confirm whether a proposed transaction would even be subject to 2530 requirements by providing additional detail in an easy-to-read manner as to what is meant by both “Covered Projects” and “Triggering Events,” two important terms in the 2530 world.3

Chapter 2 takes on one of the biggest questions that arises in the 2530 context: who must report their previous participation (i.e., who is a “Controlling Participant”). By issuing the Final Rule and Processing Guide, HUD has replaced its prior bright line test of requiring reporting by those entities or individuals holding at least twenty percent to twenty-five percent ownership of a Specified Company, to a fuzzier trigger concept of “control”—requiring reporting by those entities or individuals who will substantially have financial and operational control of an Owner, Borrower, Management Agent, or General Contractor.4 As the User Guide notes, through the Final Rule and the Processing Guide, HUD appears to be narrowing the number of participants required to undergo Previous Participation Review by limiting reporting to those entities or individuals with control, while also maintaining the agency’s discretion to require reporting from entities who may not initially appear to have control, but whose participation may put a project at risk. The Processing Guide provides a list of examples of which entities and individuals HUD would normally (but not always) identify as “Controlling Participants” and which entities and individuals HUD would normally (but not always) exclude from the reporting requirements. These non-exclusive lists leave open significant ambiguity, but Chapter 2 of the User Guide annotates these lists with additional detail and real word examples,5 helping to make the Processing Guide more accessible in a practical manner for its readers.

Chapters 3 and 4 go into more detail regarding how to actually prepare the 2530 submission. Chapter 3 provides a detailed discussion of how to address HUD’s organizational chart requirements. Again, the User Guide’s annotations to the guidance provided in the Processing Guide relating to

4. See id. at 12-13.
5. See id. at 23.
organizational charts helps readers better understand not only HUD’s requirements, but also how to generate an organizational chart that reflects the stakeholders request as to which entities HUD should treat as Controlling Participants. The User Guide provides several sample organizational charts as visual aids. Additionally, Chapter 4 covers in detail the additional information required for an actual 2530 submission, including project information and the previous participation details that must be submitted. A nice analysis of whether a paper or electronic system submission is appropriate is provided, which can help newcomers to the Previous Participation Review Process weigh their options when considering submission styles.

No previous participation submitter wants to deal with “flags” in HUD’s system, but in some cases it is unavoidable. Fortunately, Chapters 5 and 6 provide a great resource for any 2530 applicant who runs into a flag. Chapter 5 has helpful tables setting forth the various types of flags (categorized by level of seriousness), why the flags may have been placed in HUD’s system, and the period of time the flags will remain. Further, the User Guide explains the new flag notification procedures set forth in the Processing Guide and how such notifications can be used to help avoid previous participation disapproval. Chapter 6 offers additional guidance on overcoming flags that may have arisen on a stakeholder’s path to 2530 approval by providing not only a description of how HUD will evaluate the presence of a flag, but also setting forth a list of practical tips to obtain approval despite the presence of a flag.

As mentioned above, the authors’ experience with 2530 approval is clear and particularly shows in Chapter 7, where they lay out a list of “Do’s and Don’ts” for the 2530 process. This list provides a resource for individuals submitting 2530 applications for the first time, or for those who are experiencing difficulties with a particular submission.

In addition to the practical guidance contained in the User Guide, the book does an excellent job of explaining the history, policy, and purpose behind the Previous Participation Review and the 2016 changes. By explaining that the main purpose of the 2530 process is to evaluate whether an entity’s or individual’s participation poses a risk to the relevant HUD project, and how each requirement relates to HUD’s evaluation of this risk, the User Guide puts the requirements contained in the Final Rule and Processing Guide in a clearer light. Understanding what informa-

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6. See id. at 38.
7. See id. at 39, 118–22.
8. See id. at 51. Note: The User Guide does not address the HUD Active Partners Performance System (APPS).
9. See id. at 55–62.
10. See id. at 64.
11. See id. at 77.
12. See id. at 79.
13. See id. at 5.
tion HUD is looking for will help practitioners best prepare their 2530 sub-
missions to facilitate HUD’s review and approval.

As discussed above, the authors of the User Guide make an enormous
effort to provide clarity to the guidance set forth in the Processing
Guide and the Final Rule. To the extent the guidance remains unclear
or vague in certain areas is largely a result of the fact that HUD’s imple-
mentation of the requirements and guidance in the Final Rule and Pro-
cessing Guide has only just begun. HUD has remained vague in its own
guidance to retain discretion over the process, and it appears that only
time will tell how certain requirements will be enforced. We would sug-
gest that the Forum consider providing updates to the User Guide as
both HUD and the affordable housing industry adapt to the changes.

Overall, the User Guide is a successful attempt to provide clear and di-
rect guidance on approaching a sometimes difficult to navigate regulatory
process. This book can be a helpful addition to the reference library of any
attorney whose practice may involve HUD assisted or regulated projects.

Beginner’s Guide to the Fair Housing Act
Amy M. Glassman & Nydia M. Pouyes
American Bar Association (2016)
6×9/40 pages/$39.95 (shopABA.org)

Review by Taisha N. Sturdivant

In 1968, Congress declared “it is the policy of the United States to pro-
vide, within constitutional limitations, for fair housing throughout the
United States.”14 In connection with its declaration of policy, and in recog-
nition of the need to combat and prevent segregation in housing, Congress
passed the Fair Housing Act of 1968 (FHA). Although the FHA was
passed into law approximately fifty years ago and significantly amended
thirty years ago, three more recent developments in interpretations of the
law add significant color to the statute’s text. Beginner’s Guide to the Fair
Housing Act, written by Amy M. Glassman and Nydia M. Pouyes of Bal-
lard Spahr LLP, provides a comprehensive overview of the developments
and the ways in which they may impact local governments, public hous-
ing authorities, private non-profit and for-profit developers, landlords,
lenders, realtors, and brokers (collectively, “housing providers”) and the
lawyers who advise them.

14. 42 U.S.C. § 3601

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office of Klein Hornig LLP.
While the focus of *Beginner’s Guide* is the FHA, the authors commence the guide by alerting housing providers and their attorneys to their obligations to comply with various other federal laws, such as Section 504 of the Rehabilitation Act of 1973, the Architectural Barriers Act of 1968, Titles II and III of the Americans with Disabilities Act of 1990 and the Age Discrimination Act of 1975, all of which were enacted to alleviate existing housing discrimination and to curtail future discrimination.

The synopsis of federal fair housing laws is followed by an in-depth overview of the FHA itself. Each subsequent chapter guides readers through the three critical and recent developments to the FHA. The authors assert that each of these developments have caused state and local agencies that approve and facilitate housing development to do so with a greater sensitivity to fair housing requirements. Consequently, there may be a heightened chance of liability for housing providers who run afoul of the law.

The *Beginner’s Guide* includes six chapters:

- Chapter I: Overview of Fair Housing Laws
- Chapter II: Fair Housing Act
- Chapter III: New Developments in Fair Housing: Discriminatory Effects
- Chapter IV: Affirmatively Furthering Fair Housing
- Chapter V: Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices
- Chapter VI: Resources for Fair Housing Act Compliance

The first chapter identifies the specific groups of people protected against discrimination under federal fair housing laws. Next, it defines actions that constitute discrimination, names the range of potential defendants and identifies the multitude of federal laws that, often in tandem with one another as well as state and local laws, prohibit discrimination against protected classes. This overview is fruitful, particularly for new practitioners who might conflate the various federal fair housing laws, because it maps out the overlapping and diverging elements of each.

The second chapter is divided into seven sections. The first section recounts the history of the FHA from its inception until the *Guide’s* publication. Specifically, it details how, as first passed by Congress, the FHA prohibited discrimination only in the sale, rental or financing of dwellings and in other housing-related activities on the basis of race, color, national origin, or religion, but was later expanded to afford more groups protection under the law. As amended, the FHA proscribes discrimination based on sex, disability and familial status in addition to the previously mentioned bases. Furthermore, the first section also carves out those actions that are exempt from liability under the FHA. For example, with the exception of producing discriminatory advertisements, owners who
occupy buildings with no more than four units are typically permitted to discriminate.15

The second section of Chapter 2 highlights the fundamental components of the FHA: (1) the prohibition against intentional discrimination; (2) the recognition of the theory of discriminatory effects/disparate impact; and (3) the duty to affirmatively furthering fair housing. Section three describes in great detail additional protections for persons with disabilities granted by the FHA. Section four describes design and construction standards imposed on certain multifamily dwellings to ensure those dwellings are accessible to and usable by people with disabilities. Section five addresses the relationship between protections and housing opportunities for older persons and the sometimes competing fair housing protections for families with children. On the one hand, the FHA prohibits discrimination based on familial status, meaning, generally, pregnant women and families with children under the age of 18 may not be subject to discrimination by virtue of their familial configuration. On the other hand, under the Housing for Older Persons Act of 1995 and the FHA, housing can be restricted to persons aged 55 or older. The authors go on to describe the various conditions that must be met in order for housing for older persons to be exempt from the prohibition against familial status discrimination.

Section six sheds light on the Department of Housing and Urban Development’s Equal Access Rule requiring that public housing or HUD-assisted housing be made available without regard to actual or perceived sexual orientation, gender identity, or marital status. The authors note HUD’s indication that, while separate and distinct, a violation of its Equal Access Rule may also violate the FHA.16 Finally, section seven of chapter two describes HUD’s statutory authority to administer, interpret, and enforce the FHA. Not only do the authors identify HUD’s general authority, they also specifically reference HUD’s Office of Fair Housing and Equal Opportunity and the Office of General Counsel where the power to enforce the FHA has been delegated. Importantly, the authors recognize the various additional private nonprofit organizations that also investigate and pursue fair housing claims. Because of its comprehensiveness, the final section of chapter two effectively introduces housing providers to agencies and organizations that field complaints, the administrative and

15. 24 C.F.R. § 100.10(c).
16. Notice PIH 2014-20, “Program Eligibility Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD’s Equal Access Rule,” § 10 (acknowledging sexual orientation, gender identity nor marital status is explicitly protected under the FHA, but inferring that, based upon court rulings, sex-based discrimination, specifically discrimination based on non-conformance with sex stereotypes, may open the door for complaints under FHA involving sexual orientation or gender identity).
adjudicative processes in which cases are handled, and the range of remedies available to claimants who prevail.

The third chapter introduces the first of three recent developments the authors believe will impact the actions of housing providers and, consequently, should also impact the actions of their attorneys. Historically, HUD and federal appellate courts across the country have agreed that disparate impact claims are cognizable under the FHA. The theory of disparate impact does not require proof of intent to discriminate and applies when an otherwise neutral policy has a disproportionately negative effect on members of a protected class that is not justified by a legally sufficient reason. Notwithstanding the consensus from HUD and appellate courts, the authors note the intense debate as to whether the statute itself provides for such liability. In an attempt to settle the question, over a period of several years the Supreme Court agreed to hear three cases that would enable it to offer guidance through its decisions. Two of the cases, Magner v. Gallagher\textsuperscript{17} and Mount Holly Gardens Citizens in Action, Inc.,\textsuperscript{18} settled. However, the Court heard the third case, Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs (ICP),\textsuperscript{19} and ultimately recognized disparate impact claims as viable under the FHA.

In 2013, while the defendant’s appeal was pending, HUD issued a Discriminatory Effects Rule, which articulated a liability rule in the form of a three part burden-shifting test. First, the claimant bears the burden of proving its \textit{prima facie} case that a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a protected class.\textsuperscript{20} If the \textit{prima facie} case is proven, the burden of proof shifts to the respondent to prove a legally sufficient justification for the challenged practice. If the respondent demonstrates the practice was necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, the burden shifts again to the claimant.\textsuperscript{21} The charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.\textsuperscript{22} The Court’s ICP opinion both appeared to endorse HUD’s rule and also to subject disparate impact claims to certain somewhat unclear limitations. As such, the authors opine that ICP has created greater awareness about the disparate impact theory of liability and possibly continued the controversy. Therefore, housing providers, especially government de-

\begin{itemize}
\item 17. 132 S. Ct. 548 (2011).
\item 18. 133 S. Ct. 2824 (2013).
\item 19. 135 S. Ct. 2507 (2015).
\item 20. 24 C.F.R \S 100.500(c)(1).
\item 21. 24 C.F.R \S 100.500(c)(2).
\item 22. 24 C.F.R \S 100.500(c)(3).
\end{itemize}
fendants, who are the most common targets of disparate impact claims, and their attorneys should carefully follow developing case law.

Chapter four explores the second of the recent developments in interpreting the FHA, HUD’s codification of its regulatory interpretation of the duty to affirmatively further fair housing. This provision in the FHA lay somewhat dormant until recently. As the authors put it, the brief, vague provision charges HUD and other covered entities to administer their programs and activities relating to housing and urban development in a manner that affirmatively furthers the FHA. More specifically, the duty applies to (1) local and state governments that receive Community Development Block Grants, HOME Investment Partnership funding, Emergency Shelter Grants or Housing Opportunities for Persons with AIDS formula funding from HUD and (2) public housing agencies that receive Section 8 or Section 9 assistance from HUD. The authors aptly point to earlier HUD guidance issued in 2013 that explained, to some extent, what it means to affirmatively further fair housing. However, HUD did not codify this regulatory interpretation into a regulation until 2015. The regulation now sets forth more robust guidelines to enable grantees to reach measurable fair housing goals. For example, grantees must analyze HUD-provided data and utilize local knowledge to proactively identify and then eliminate barriers to developing housing in “areas of opportunity,” or neighborhoods with more desirable public services and amenities than economically disadvantaged ones. If grantees are developing housing in blighted, low-income racially and ethnically concentrated areas, they are mandated to use the assessment tools to revitalize those communities.

The authors credit the combination of fair housing advocacy groups, 2009 HUD v. Westchester County litigation, and a 2010 Government Accountability Office audit for collectively resuscitating the vague clause. They also note that the Affirmatively Furthering Fair Housing Rule has resulted in increased attention to these mandates. The authors provide useful context for the recent changes and also thoroughly explain the technical features of three assessment tools HUD has offered for its program participants to conduct the required analysis of impediments to fair housing.

Chapter five assesses the third and most recent rule HUD proposed to strengthen and provide more guidance to individuals attempting to comply with the FHA. The proposed rule entitled, Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Prac-
tices Under the Fair Housing Act,\textsuperscript{27} aims to streamline standards for investigating and adjudicating alleged quid pro quo and hostile environment harassment claims. The authors focus primarily on what they note as the expansion of liability the rule would create. The proposed rule would provide for direct liability for a principal’s own actions. However, the authors suggest it would also establish vicarious liability for the actions of a principal’s agents, regardless of whether the principal was aware of the violation. While HUD might take the position that the rule merely clarifies existing principles of direct and vicarious liability under the FHA, the authors highlight the potential significance of the proposed rule and suggest that the final rule deserves careful review.

Chapter six offers resources from HUD and the Department of Justice, as well as from various states and localities. By including these resources the \textit{Beginner’s Guide} strikes a careful balance between, on the one hand, cautioning housing providers and their attorneys about the emergence of more stringent fair housing compliance issues and, on the other hand, providing resources to help promote compliance with rules that are arguably beneficial for communities across the United States. In addition, the \textit{Beginner’s Guide} is useful for new and more seasoned practitioners because it highlights macro level policy motivations for the disparate impact, affirmatively furthering fair housing and harassment developments, while also delving into the various practical and technical aspects of each rule.

At the time of publication, and in the wake of the three developments covered in \textit{Beginner’s Guide}, the authors had rightly espoused an appropriate degree of uncertainty concerning the likely outcomes of enforcement of the developments moving forward. For example, with regard to disparate impact, the authors stated that “only time will tell” how courts and HUD implement the guidance from \textit{ICP}. On remand, in light of the HUD rule and court’s guidance, \textit{ICP} was dismissed for the plaintiff’s failure to establish a prima facie case.\textsuperscript{28} Moreover, a year after \textit{ICP}, Amy M. Glassman co-authored a subsequent article noting that guidance from the case created “difficulty for many plaintiffs to make a \textit{prima facie} showing of disparate impact.”\textsuperscript{29} With regard to affirmatively furthering fair housing, the authors asserted in the \textit{Beginner’s Guide}, “it is unclear how HUD will assess compliance with affirmatively furthering fair housing.” Interestingly, the False Claims Act, a federal law that imposes civil penalties on individuals and companies who defraud governmental programs, was first employed as a mechanism for enforcing compliance with the duty to affirmatively further fair housing in \textit{Westchester}. Since \textit{Westchester},

the use of the False Claims Act as a tool in fair housing cases seems less viable. In addition to the general uncertainty accompanying any changes in law, the Beginner’s Guide immediately preceded a shift in the United States political climate. Thus, as the federal government’s priorities shift under President Trump and the focus on compliance with the more recent FHA developments potentially abates, Beginner’s Guide will serve as an especially useful tool because compliance with general principles of fair housing will remain a critical undertaking for the foreseeable future.

Beginner’s Guide to Tax-Exempt Bonds for Affordable Housing
Alysse Hollis and Richard M. Froehlich
American Bar Association (2016)
6×9/55 pages/$39.95 (shopABA.org)

Review by M David Kroot

As an entry in the ABA’s Beginner’s Guide series, this book succeeds in some aspects, while in others it fails to provide adequate background or includes details on relatively uncommon situations that may not be useful to a beginner. The book concentrates on affordable multifamily housing and does not discuss the use of tax-exempt bonds or mortgage credit certificates for affordable ownership housing. There is also a concentration on structures that are most common in New York City, which may be natural, given that one of the authors is the General Counsel of the New York City Housing Development Corporation.

At the time of writing this review, Congress is considering federal tax reform proposals that may eliminate or change the types of tax-exempt bond financing discussed in this Beginner’s Guide. Thus, depending on

30. See United States ex rel. Freedom Unlimited, Inc. v. City of Pittsburgh, U.S. Dist. LEXIS 43701 (2016) (dismissing False Claims Act suit on basis that plaintiff’s allegations against city must be independent from publicly available information); United States ex rel. Hanna v. City of Chicago, 834 F. 3d 775 (2016) (affirming lower court decision to dismiss False Claims Act claim where plaintiff failed to meet heightened pleading requirements mandated in anti-fraud cases); and United States ex rel. Edward R. Washington, III v. City of New Orleans, WL 956497 (2012) (granting motion for summary judgment in favor of city reasoning that plaintiff did not provide specific evidence of fraud because city’s request for federal funding did not require an annual analysis of impediments to affirmatively furthering fair housing.)

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the fate of tax reform legislation, both this review and the book itself may become outdated.

The Introduction and Chapter 1 set out a useful summary of the types of tax-exempt debt for multifamily rental housing, with a clear description of governmental purpose bonds, bonds issued for use by 501(c)(3) entities, and multifamily bonds that can be used with Low Income Housing Tax Credits (LIHTC). The discussion provides basic information about income and rent issues required for projects financed with qualified multifamily bonds. This is also where the urban bias of the volume first appears, with a reference to housing specified for particular groups in the Internal Revenue Code as including elderly, special needs, and artists’ housing. However, it omits reference to farmworker housing, as well as any mention of the U.S. Department of Agriculture, which is a major source of rural housing financing that serves as takeout financing for tax-exempt bonds and of housing assistance subsidies comparable to HUD’s Section 8 program.

Chapter 2 provides a good description of a conventional bond structure in which the issuer appoints a trustee to handle typical lender functions. While there is mention of direct lenders, the beginner could become confused with the list of parties and the process because it concentrates on the issuer-trustee structure. It would have been helpful to break the chapter into two parts, with one explaining the traditional structure and the other outlining the direct loan model. While most of the chapter offers practical advice useful for a novice, the discussion of the process and procedure required under the Tax Reform and Fiscal Responsibility Act of 1982 (TEFRA) is rather formalistic and does not provide the reader with a real sense of how the resolutions are drafted and hearings are carried out.

The Tax and Securities discussion in Chapter 3 provides a good outline of the basic tax rules, although some concepts, such as “arbitrage” or “weighted average maturity of the bonds,” are not defined for the reader. The securities section describes federal security law concepts and requirements. There is no mention that lawyers should be aware that states may also have their own securities requirements.

The discussion of specific structures in Chapter 4 is clear and provides good background on such topics as the inverted yield curve, the benefit and difficulties of having project-based Section 8 assistance, and the structure of FHA-insured cash-collateralized bonds. Unfortunately, the chapter leaves out the widely used structure in which a non-exempt takeout loan is not collateralized but instead relies solely on committed funding sources for permanent financing, including LIHTC equity. The chapter concludes with an interesting history of how tax-exempt bonds were used for multifamily housing in what the authors call the “wild west” days.

The final chapter features a discussion of recycled bonds and bifurcated structures as a tool for multifamily housing. The discussion is almost completely oriented to the situation in New York City where a combination of high demand for tax-exempt multifamily bonds, specific
zoning incentives, and the manner in which property tax exemptions are granted make this a useful structure. While it is quite interesting to those of us who are used to arcane bond financing methods, its limited applicability and complicated rules would not seem to be in line with the book’s orientation to lawyers just being introduced to the field.

One difficulty in writing a guide such as this is incorporating information that will not become stale immediately. The book does a good job of this, and so it should continue to be useful until we find out if a major overhaul of the tax code or banking laws changes the landscape for use of tax-exempt bonds or bank investment in affordable housing. Another challenge is providing information that is useful on a national level, since states have different allocation systems, real estate markets, and loan and subsidy sources. I would not expect the book—especially given its brevity—to address specific local concerns, but it would be valuable to point out the important role of local issues to those who are new to the field.

Overall, the book is clearly written and does a number of things well, but some aspects of multifamily bond financing could be expanded, most notably at the expense of the final chapter. The first four chapters of the volume could be used as an introductory text for new lawyers or those being introduced to the field as long as mentors and trainers supplement it with some of the missing information.

Jonathan F.P. Rose’s *The Well-Tempered City* is that very rare book that combines contemporary thinking about land use with provocative public-intellectual analysis of the future of our social organization and packages them together into a considered philosophical tract that is part theory and part memoir. Because the book provides a very personal view of land use based on the author’s lifetime of experience, it will divide readers on the substantive outcomes of his views. But Rose’s deeply thoughtful narrative—which invokes history, land use policy, and current practices—persuades the reader that we are at a critical moment in society with respect to how
we organize our communities. When that narrative is explained in the context of Bach’s Well-Tempered Clavier, the book emerges as a singular contribution to the land use literature.

From the outset, Rose seeks to ground his vision of the city in history, culture—and, perhaps surprisingly, but effectively—music. For this alone, the book is remarkable in translating the author’s views to both the technical expert and the generally informed citizen. The narrative is organized around five themes: coherence, circularity, resilience, community, and compassion. Rose’s overlying thesis is that the contemporary city is both the best expression and the optimal form for humanity. He uses these five themes to explain how modern architecture and land use rules offer an admittedly imperfect platform to translate these values into our communities.

Throughout the book Rose is adept at using evidence and arguments from history and culture to buttress his theory that the city is the climax, or at least the current apex, of human society. One could critique the teleological nature of the narrative, which seems to assume at the outset that the city provides the superior form of living. Rose’s theoretical commitments—toward his five themes and their suggested outcomes of a more profitable, just, and fair society—could possibly be upheld in a less urban, and more suburban and rural, form of society. One might suggest that a planner could regulate in a manner that promotes individual freedom while still incorporating concerns about coherence, circularity, resilience, community, and compassion. However, Rose is definitely a fan of the contemporary city. He has a particular vision for the city and the virtues of this vision can be debated, but that is a strength of the book—the reader knows where Rose stands. His assertions are the subject of debate that will follow in the wake of this original and provocative work.

Land use law is tied strongly to our contemporary understanding of how our society should be ordered and how our communities should look—for better or for worse. The Well-Tempered City sets forth a particular normative vision of land use, based on the author’s personal experience and vision. Rose believes that the city is the third, and the most important, evolutionary development of human organization. We are in a stage of historical development that has progressed from the hunter-gatherer mode to a society formed around agriculture to our present dynamic of urban development (which includes contemporary suburban and rural organization). Rose views this trajectory as a salutary development. Some readers might disagree with Rose’s unapologetic preference for the city as the optimal mode for social organization, but the beauty of his book is that he makes his preference clear and marshals his evidence forcefully.

Rose’s master stroke is to tell the story of his lifetime’s work in the fields of land use and social organization in the context of classical music. Upon first glance, this comparison of land use practices to classical music might seem contrived. Rose, however, convinces the reader that this analogy is both sincere and entirely appropriate. The book’s invoca-
tion of the underappreciated Bach musical work from which it derives its title shows even a casual reader how social organization is ultimately dependent on both technical and cultural factors. More importantly, the title theme of a “well-tempered” city ties together Rose’s advocacy for a planned urban society with Bach’s passion for the rational order, both of which necessarily flow from natural principles. In a certain sense, both Rose and Bach invoke a certain sense of natural order that can be applied to cities and music alike. Any reader will finish *The Well-Tempered City* with an appreciation for Rose’s brilliant blueprint for human flourishing grounded in the modern urban form. The thoughtfulness of the volume will ensure that it will remain a classic in the field.

This book is an instant canonical work in the field and a must-read for any planner, land use lawyer, public policy advocate, and interested citizen. The vision of land use and urban development that Jonathan Rose sets forth in *The Well-Tempered City* will be contested, but the sociological and literary quality of this magisterial book makes it required reading. Even (or especially) those who might critique Rose’s unapologetic advocacy of the modern city as the culmination and future of human achievement must acknowledge the forcefulness of his historically and socially grounded analysis. Anyone interested in land use, housing, urban affairs—or in the future of American social organization—should read and appreciate Jonathan Rose’s *The Well-Tempered City*. 
Organizational Profile

Mission Economic Development Agency—Combatting Displacement in San Francisco’s Mission District, Family by Family and Block by Block

Christopher Gil and Karoleen Feng

Background of Organization

San Francisco’s Mission District has been a neighborhood of opportunity and a hub for Latino residents, businesses, arts, culture, and services since the late 1960s. The neighborhood has a historic and current identity as an important, welcoming home for immigrants.

San Francisco is home to 121,774 Latinos, which is 15.3 percent of the city’s population; the Mission District is currently 41 percent Latino. While that number may sound substantial, in 2000, Latinos represented 60 percent of Mission District residents. In just fifteen years, there have been 8,000 Latinos displaced—over 25 percent of this community.

Stemming such displacement has catapulted the Mission Economic Development Agency (MEDA) into an enhanced role as an innovator and risk-taker—leveraging resources to stand up for what the community needs. Those needs have changed over the years, especially in the last five years.

MEDA’s evolution is characterized by three phases. MEDA started in 1973 working with only small businesses, primarily those owned by immigrants, to achieve financial opportunities in spite of systemic banking and regulatory barriers. There was a need for such culturally relevant services, and during this first phase, MEDA filled that void by helping newcomers create an asset—viable businesses. Over the next few decades, in the second phase, MEDA expanded its approach by providing bundled services to create generational assets. These services include financial coaching, job training, free tax preparation, technology training, housing opportunities (focused on below-market-rate options and foreclosure prevention), and operating as the lead agency for Mission Promise Neighbor-
hood (a network of support services to help families achieve economic stability and support their children’s academic achievement). In its third phase, MEDA has matured into a comprehensive, community-development organization and anchor institution of the Mission District. This third phase has involved increasing the staff and budget to create the capacity to proactively respond to a displacement crisis for family-serving businesses and low-income immigrant families.

MEDA’s direction is set by its vision statement, and describes the future the service provider wants for its clients:

We envision generations of Latino families with sufficient financial assets to thrive, and the ability to call San Francisco their permanent home. Inspired by the past and present life of the Mission District, families are rooted in vibrant, diverse and forward-thinking communities, have opportunities to grow and are actively engaged in the civic and political life of their neighborhoods and the institutions that affect their lives.

MEDA’s core purpose is stated in its mission statement, which, given the nonprofit’s continued evolution, reflects a broader purpose and focus on community development:

Rooted in the Mission and focused on San Francisco, MEDA’s mission is to strengthen low- and moderate-income Latino families by promoting economic equity and social justice through asset building and community development.

**Housing Issues in the Mission District**

San Francisco’s Mission District is in the heart of the nation’s highest-cost housing market. The dramatic rise in the cost of housing in the Mission District over the past decade has made this neighborhood one of the most dramatic examples of gentrification in the country. As a transit- and freeway-accessible neighborhood with a vibrant local culture, the Mission District has become highly desirable for Silicon Valley employees seeking housing in a conveniently located urban neighborhood. With the newer residents’ significantly higher earnings, landlords have responded by actively evicting long-term tenants through no-fault evictions (using California’s Ellis Act, which allows landlords to evict tenants to remove all the units in a building from the rental market) or low-fault evictions (taking advantage of tenants’ lack of knowledge of their rights). Typically, these landlords plan to take advantage of the market by converting former rental buildings into tenancies-in-common (TICs), the first step to condominium conversion in San Francisco.

1. Cal. Gov’t Code Ch. 12.75. In San Francisco’s rent ordinance, “withdraw[ing] from rent or lease all rental units” is included as a cause for eviction. S.F. Admin. Code § 37.9(a)(13).
Housing cost burdens for low-income families in the Mission District are staggering. A “cost-burdened household” is defined by Housing and Urban Development (HUD) as a household spending more than 30 percent of monthly income on housing. According to U.S. Census’ American Communities Survey data, approximately 70 percent of the households that rent in the Mission District and earn less than $75,000 per year are housing cost burdened. In fact, $75,000 per year appears to be a key income threshold for whether households stay in the Mission District.

The Median Household Income (MHI) in the Mission District is $73,610, while Latinos in the Mission District have an MHI of $47,943. Even more distressing, Latino families with children under the age of 18 in the Mission District have an MHI of only $43,944; therefore, it should not be surprising that the Latino immigrant population is rapidly decreasing.

Perhaps more than anywhere else in the nation, a place-based strategy where housing affordability stabilized the neighborhood became critical for the ongoing racial, ethnic, and income diversity of the Mission District. During the same period of tremendous loss of families, government investment in affordable housing slowed to a trickle. The dearth of place-based solutions meant there was an urgent need for MEDA to leverage the community’s trust—and the relationships built over the years—to create stable and affordable housing in the Mission District for low-income families.

**MEDA’s Response**

In 2014, MEDA created the Community Real Estate team with the ambitious goal of preserving or producing 1,000 affordable homes by 2020, coupled with 100,000 square feet of affordable commercial and nonprofit space. These numbers would bring the neighborhood back to 2010 numbers, starting a reversal of the trend of displacement of Latinos. The good news is that these numbers were met in May 2017, well ahead of schedule, with new goals now set for 2020. This jumpstart would not have happened without the City of San Francisco’s opportune focus in 2013 and 2014 on its Small Sites Program\(^2\) (discussed below) and the pres-

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\(^2\) San Francisco’s Small Sites Program is “an acquisition and rehabilitation loan program for multi-family rental buildings . . . created to protect and establish long-term affordable housing in smaller properties that are particularly vulnerable to market pressure resulting in property sales, increased evictions and rising tenant rents.” Notice of Funding Availability, Acquisition and Rehabilitation Financing for Small Sites Program Properties, issued by the Mayor’s Office of Housing and Community Development of the City and County of San Francisco, July 2014, http://sfmohcd.org/sites/default/files/FileCenter/Documents/8103-Small%20Sites%20NOFA%202014.pdf; see also Small Sites Program Program Guidelines, MAYOR’S OFFICE OF HOUSING & COMMUNITY DEVELOPMENT (rev. 9/30/16), http://sfmohcd.org/sites/default/files/SSP%20Underwriting%20Guidelines_PUBLISHED%209-30-16.pdf.
ervation and rebuilding of public housing through HUD’s Rental Assistance Demonstration (RAD) Program. Such a quick impact would not have been possible without an indefatigable, twelve-person team, featuring everyone from expert project managers and those with real estate experience to homegrown junior staff and recent graduates focused on urban planning, the latter being groomed by senior staff. The results would also not have been achieved without community advocacy for the City of San Francisco to aggressively respond to the changing demographics, organizing by tenants, and a bevy of funders backing MEDA’s innovative community-development strategies.

MEDA has implemented four affordable-housing strategies:

1. Preserving and improving existing affordable housing;
2. Constructing new affordable housing;
3. Conducting outreach to tenants regarding tenants’ rights and assistance with affordable-housing opportunities; and
4. Revising land-use policy.

1. Preserving and improving existing affordable housing

MEDA employs two strategies for the work of preserving affordable housing stock in the Mission District.

The first strategy involves MEDA redefining public housing via HUD’s RAD Program, through which MEDA is rehabilitating five properties with years of deferred maintenance. The San Francisco RAD program was implemented to transfer public housing from the San Francisco Housing Authority (SFHA) into ownership and management by affordable housing developers. The San Francisco Mayor’s Office of Housing and Community Development (MOHCD) and the SFHA chose MEDA, based on its local expertise, to assume ownership of the sites, partnering with BRIDGE Housing to leverage their years of affordable housing management in the field. As an equal partner in the joint-venture ownership, MEDA’s approach to community engagement is rooting residents more deeply in vibrant, diverse, and forward-thinking communities. As of October 2017, three RAD properties have been completely rehabilitated, with two more scheduled to be finished by spring 2018. The result will be 439 units of safe, secure, and quality housing.

As a second strategy for preservation of existing stock, MEDA is taking housing out of prospective private-market speculation and placing the housing into permanent affordability through the City of San Francisco’s Small Sites Program. This program offers nonprofits needed funds, which are typically combined with a private loan, to purchase four to twenty-five unit apartment buildings with tenants vulnerable to eviction—tenants ranging from artists to teachers to single moms. MEDA’s focus is on buildings that house families attending Mission District schools, are located
along Mission Street (the main commercial corridor of the neighborhood), or are at risk of speculation from new construction on the immediate block.

The Small Sites Program in the Mission District is a public investment in the purchase of buildings where households are vulnerable to displacement. Tenants of buildings of these sizes are the most at risk because of the huge profit differential between the current tenancies and potential future residents. Buildings have been sold and bought in the Mission District, and in San Francisco overall, based on the assumption that rent-controlled tenants can be removed and replaced with higher-paying tenants or owners. The City’s Small Sites Program preserves the affordability of these buildings through acquisition by mission-driven developers or sponsors like MEDA before they are purchased by profit-driven entities likely to evict and displace existing tenants. Small Site Program funding makes up the difference between the market value of the buildings and the income from the apartments’ rents, thereby ensuring that the sellers get market value and can exit ownership of the building, tenants continue to pay affordable rents, and MEDA, as a community-based organization, becomes the owner/manager and can stabilize the building as a long-term asset in the neighborhood.

As of October 2017, MEDA has purchased 15 Small Sites Program buildings with 93 households saved from possible eviction. Over 20 percent of these households have students in Mission District schools, and two of the buildings are on Mission Street.

2. Constructing new affordable housing

MEDA is partnering with trusted San Francisco developers, Chinatown CDC and the Tenderloin Neighborhood Development Corporation (TNDC), to develop new affordable housing for families, children, transitional-aged youth, and seniors (many formerly homeless). MEDA has four such developments in the pipeline in the next few years. These sites were secured through community advocacy from market-rate developers and from publicly owned land. MEDA was awarded the right to develop these properties by winning RFPs from MOHCD. MEDA will use local financing for the building, stacked with four percent low-income housing tax credits and tax-exempt bonds, as well as California’s Affordable Housing and Sustainable Communities financing. For deeper income targeting, MEDA will use San Francisco’s Local Operating Subsidy Program and Project Based Section 8 subsidy.

The portfolio of 494 proposed units includes:

- 1296 Shotwell (94 senior units, with 19 for formerly homeless seniors; estimated 2020 open date)
- 2060 Folsom (127 family units, with 29 for transitional-age youth; estimated 2020 open date)
- 1990 Folsom (143 family units, with 35 for formerly homeless families; estimated 2021 open date)
• 681 Florida (130 units, with 32 for formerly homeless families; starts construction around the time neighboring 2000 Bryant market-rate developer finishes its project)

Additionally, MEDA will push forth cultural place-keeping by offering commercial spaces in these new buildings to nonprofits and arts organizations, which are also at risk of displacement from the community because of escalating rents. These commercial neighbors will support and reinforce families in the buildings and nearby homes, especially when coupled with the bundled services MEDA provides.

3. Conducting outreach to tenants regarding tenants’ rights and assistance with affordable-housing opportunities

MEDA works closely with tenants’ rights organizations to ensure families can resist prospective eviction; if eviction does occur, MEDA’s Housing Opportunities Program prepares families for their below-market-rate (BMR) options. When the team meets with families, regardless of whether the families are ultimately referred to a tenants’ rights agency or helped directly by MEDA, MEDA’s team explains San Francisco tenants’ rights, including:

• The sale of a building does not mean tenants must vacate their units because the new landlord must respect the original rental agreement.
• A tenant does not have to take a buyout offer from the owner. Additionally, the landlord must advise the City that such an offer has been made, with specified tenants’ rights information then mailed to the tenant.
• Oral evictions are illegal. All eviction notices must be in writing from the court, and all tenants have the right to defend themselves in front of a judge.
• Only the sheriff can physically evict a tenant.

4. Revising land-use policy

This strategy ensures that existing land-use policies and regulations are revised to directly address displacement and the loss of diversity in the neighborhood. In 2015, MEDA established the Mission Action Plan 2020 (MAP 2020) as a planning process for the community to actively engage the Planning Department, MOHCD, and the Mayor’s Office of Economic and Workforce Development to assess existing policies and their implementation processes. Prior to this more-comprehensive strategic process, the community and the City were often engaged in adversarial conversations that resulted in only incremental solutions.

MEDA participates in several neighborhood-based, citywide and statewide coalitions that advocate for the Mission District’s continuing diversity. Neighborhood organizations, activists, and residents reacted to the housing crisis by hunkering down into survival mode, rallying in large
protests and using their individual relationships with policymakers. MEDA’s role in land-use policy has also been to solidify and support community members in strategic analysis and clear communications.

The next complex land-use process that MEDA is working on with the City is to create a Special Use District (SUD) along the Mission Street commercial corridor as a means to preserve family-serving businesses and to maintain the character of this corridor. There is no commercial rent control in San Francisco so once a business lease expires, the landlord usually raises the rent to the new market rate. Also, as the clientele of low-income business owners are displaced from the community, the customer base dwindles and the business eventually ceases operation.

The primary outcomes of MEDA’s work to revise existing land-use policy are:

- **To engage the Mission District** and especially those most affected by gentrification and housing disparities (low-income and working-class residents, single-room occupancy residents, Spanish-speaking tenants, local school families, school workers, and small-business owners), and to develop popular support and advocacy for the changes necessary to protect their right to remain in the Mission District.

- **To develop an inspiring framing that prioritizes housing equity** as a central planning principle with regard to housing preservation/production and preservation of community resources for all decisions by local activists and, through advocacy, to be incorporated by City staff/elected officials.

- **To combat the loss of families in the Mission District** via a housing-preservation strategy that combines tenant protections, regulations to encourage tenants and nonprofits to purchase vulnerable multi-unit buildings, and ensures that sufficient resources are dedicated to the neighborhood for that purpose.

- **To achieve a percentage of low-income housing that keeps pace with market-rate development**, including funding for new construction and identification of publicly and privately owned sites to be purchased by the City of San Francisco, plus providing the tools for neighborhood residents to access this new housing.

- **To preserve vital community resources**, including small businesses, legacy businesses, and cultural/community resources.

- **To increase low-income residents’ job pathways** into growing sectors of the economy.

**Case study: Affordable Housing Preservation Through the Small Sites Program**

When the MEDA Community Real Estate team saw a realtor’s prominently placed billboard advertising that 3329–3333 20th Street in the Mis-
sion District was on the market, they knew of the urgency to reach out to the tenants, who could all be vulnerable to eviction.

Like tenants in many buildings in the Mission, the residents of the small, nine-unit 3329–3333 20th Street feel they live in a community within a community. The rent-controlled apartments are all occupied by Latino immigrant families, many of whom have lived in the building for more than two decades. They are day laborers, painters, and restaurant back-of-house workers. To make ends meet—and to better the lives of the next generation—these San Franciscans toil daily for long hours, earning far, far less than the money made by the high-income newcomers now moving onto the block.

When MEDA met with the tenants to explain the Small Sites Program, they immediately understood the value of this possibility. The residents had seen the displacement of friends and family living in other buildings in the Mission District. Small properties are ripe for speculators to come in and evict tenants by finding low-fault reasons to force them out, to buy them out for higher-paying tenants, or to convert all the units to tenancies in common, the legal first step toward condo conversion.

Residents in the Mission often live in overcrowded apartments or informal arrangements. MEDA assessed the situations with the residents. Because all twenty-four tenants agreed with the plan for MEDA to buy the building—the Small Sites Program requires that everybody on a signed lease must agree to the possibility of MEDA becoming their landlord—they decided to organize and fight possible displacement. The residents were asked to speak with the landlord about selling to MEDA via the Small Sites Program. Such organizing is necessary because, while MEDA offers a competitive bid, the organization cannot do an all-cash offer and a thirty-day close, which are typical in the current private market. MEDA’s closing timeline is closer to ninety days, and its purchase is typically loan-financed.

As an innovative program of the City of San Francisco, each building purchase has tested and pushed the established guidelines for the program. As with earlier buildings, MEDA presented the financial and physical feasibility of the building, as well as the income qualifications of these residents, for the City’s approval. MEDA also secured a first mortgage on the building to complete the purchase.

When this building was purchased with the financial assistance of the Small Sites Program, these residents breathed a communal sigh of relief, with the building stabilized in MEDA’s hands as the new owner. Living in an older building that had fallen into disrepair, they also knew that MEDA’s ownership meant that common areas and units would be rehabilitated, and the building would be made earthquake safe.

**Conclusion**

MEDA’s work has evolved over four decades from an agency providing free services for immigrants to build assets in a neighborhood of opportunity to actively engaging in preserving and rebuilding the neighbor-
hood’s opportunities as the Mission District experienced unprecedented gentrification. With new strategies developed to prevent displacement, San Francisco’s Mission District can now remain a neighborhood of opportunity for all, for generations to come. MEDA has pioneered a community development model integrating affordable housing, land-use policy and economic pathways—a model that is ripe for replication in other cities with gentrification challenges. Most importantly, the dialogue in the Mission District has changed, with the new question being, “What is MEDA’s next strategy to preserve or produce affordable housing?”
Opportunity and Housing Access

Arthur Acolin and Susan Wachter, 19:1 Cityscape 135–49 (2017)

This article examines the intertwined relationship between where a person lives and the opportunities that person has access to, focusing on the impact of affordable housing on intergenerational mobility. College graduates tend to be attracted to central locations where a greater number of amenities are easily accessible. As a result, there is a concentration of high-productivity jobs in higher-cost metropolitan areas with improved amenities. As cities have become more desirable places to live, increased housing costs in such areas have displaced many of the lower-skilled and lower-income residents who previously lived there, forcing them to move to lower-opportunity areas in cities’ outskirts and in the suburbs. This dislocation perpetuates poverty by providing lower-skilled, lower-income residents with less access to the educational and employment opportunities of the central locations. Providing lower-income households with greater access to higher-opportunity areas would positively impact the lives of these individuals and their children.

Federal programs aimed at addressing this issue have resulted in increased college attendance and earnings for families and have proven that there are long-term consequences of a lack of affordable housing serving as a barrier to mobility. Two programs that have made a difference are the Moving to Opportunity (MTO) program, which offered housing vouchers to selected families living in high-poverty public housing projects to enable them to move to lower-poverty neighborhoods, and the Section 8 Housing Choice Voucher program, which provides rent subsidies to low-income families to enable them to afford housing closer to better schools. In order to address the growing spatial inequality of opportunity and its negative affect on intergenerational mobility, a strategic policy framework at the federal, state, and local level is needed to increase affordable housing in opportunity areas as well as improve access to quality education, promote jobs, and incentivize economic and community development in lower-opportunity areas.

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Out of Reach 2017: The High Cost of Housing

Andrew Aurand Ph.D., MSW, Dan Emmanuel, MSW, Diane Yentel, MSW, Ellen Errico, and Marjorie Pang, National Low Income Housing Coalition

In the 2017 edition of *Out of Reach*, an annual report by the National Low Income Housing Coalition, the organization documents just how difficult it is for low-wage workers to afford their rent. As stated in the report, the 2017 national housing wage—the hourly wage full-time workers must earn in order to afford a safe rental home without spending more than 30 percent of their income on rent—for a one-bedroom unit is $17.14 per hour. As of 2017, this number is 2.4 times higher than the federal minimum wage of $7.25 per hour. Simply put, housing is too expensive for low-wage workers.

With home ownership decreasing, the demand for rental housing skyrocketed in 2016, resulting in a 26.5 percent increase in rental households since 2006—a record 43.3 million households. However, with high demand, “household income has not kept up with the rising cost of rental housing.” As such, one of the issues that the report speaks to is raising the minimum wage. The report states that “[i]ncreasing the minimum wage is an important step to raise wages for the lowest paid workers. . . .” Nonetheless, even residents of states that have a higher minimum wage than the federal level still have trouble affording modest rental homes.

The report goes on further to discuss the inadequate supply of affordable rental housing for those with the lowest incomes. One problem is that affordable rental homes are already occupied by households with higher incomes. In fact, 3.5 million rental homes that are affordable to extremely low income families are unavailable to them because of occupancy by families with higher incomes.

As the report goes on to show, despite millions of renters struggling to afford modest homes, there is a known solution. The government could realign federal tax expenditures and, as a result, properly fund the nation’s housing programs that serve extremely low income families and those who are the most vulnerable in the current state of this housing crisis. What seems to be lacking is the motivation in government to do what is necessary to fix this ever-growing problem.

Race and Assisted Housing


This article examines racial disparity and socioeconomic variation among neighborhoods and argues that there is no evidence of racial disparity in the type of governmentally assisted housing programs or their physical condition and quality of management during the 2000s. The sampling pool included black and white households that moved into assisted housing during the early 2000s with at least with at least one child between the ages of 10 and 17. These children were then compared by
their level of education, employment, and earnings in 2011. As compared to data from past decades, the isolated factor of living in assisted housing did not predict significant differences in life outcomes for black and white children. Relatively increased parity was also found in the quality of assisted living housing experienced by black and white families. However, a considerable racial skew in neighborhood concentrations of white and black families living in assisted housing remains. Citing historical and structural forces, the article explains that black families are significantly more likely to live in central cities, where there is more concentrated poverty. According to the article, structural challenges, family need, and local politics contribute to the concentration of black families in the inner cities. The article suggests, however, that black children who had access to relatively better schools and public services in their neighborhoods were more likely to have better outcomes in young adulthood than those who did not, and that when socioeconomic differences are controlled for, the young adults achieved at comparable levels, regardless of race.

**Cigarette Smoking and Adverse Health Outcomes Among Adults Receiving Federal Housing Assistance**


The authors of this study examine the demographic and health characteristics of cigarette smokers and nonsmokers living in HUD-assisted housing, as well as the frequency of adverse health outcomes associated with smoking and second-hand smoke for persons living in HUD-assisted housing. Cigarette smoking and second-hand smoke exposure are more prevalent among populations below the poverty level. Housing remains a crucial site for evidence-based tobacco prevention and control measures because of the amount of time spent in homes and the fact that most second-hand smoke exposure now occurs in homes. Multifamily housing, especially HUD-assisted housing, presents particular challenges relating to second-hand smoke exposure. HUD has promoted smoke-free policies for federally assisted housing, including a recent rule requiring public housing agencies administering public housing to implement a smoke-free policy.

In that context, the authors conducted this first-of-its-kind analysis using data from the National Health Interview Survey, together with data from the U.S. Department of Housing and Urban Development. The data showed that the rate of cigarette smoking among adults receiving HUD assistance was almost double the rate in the general adult population. The findings also indicated that, as compared to nonsmokers, cigarette smokers receiving HUD assistance were more likely to have adverse health outcomes: fair or poor health, chronic obstructive pulmonary disease, disability, asthma, serious psychological distress, an emergency room visit in the past year, and work loss days in the past year.
The authors cite the health benefits of the implementation of evidence-based tobacco prevention and control measures, as well as the economic and safety benefits, concluding that housing assistance programs offer an important opportunity for the implementation of such measures, including smoke-free policies, that can improve the quality of life for all residents.

**Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing**


This article focuses on how the 2015 Final Rule for Affirmatively Furthering Fair Housing under the Fair Housing Act impacts efforts by local governments to confront the challenge of vacant properties and provides an opportunity to meaningfully expand housing choice. The Fair Housing Act can be used as more than a tool to challenge existing unlawful practices and policies. The Fair Housing Act obligation to Affirmatively Further Fair Housing (AFFH) presents a key opportunity to affect decision-making by local governments, dismantle segregation, and promote residential choice that is finally gaining traction nearly fifty years after the enactment of the Fair Housing Act.

States, participating jurisdictions, and public housing authorities that receive HUD funding not only must avoid practices and policies that deny housing opportunities to groups protected under the Fair Housing Act, but also must take affirmative steps to end segregation in housing and increase meaningful housing choice for those protected groups—regardless of the cause of the existing segregation or barriers. Under the AFFH Final Rule, recipients of HUD funding must now submit to HUD an Assessment of Fair Housing, which provides an opportunity for HUD and its funding recipients to discuss what they are doing “to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from segregation.” While each participating jurisdiction must individually comply with its AFFH duty, the AFFH Final Rule also encourages regional collaboration.

Addressing vacant properties, which negatively affect neighborhoods, has become an urgent priority for many older American cities. The author argues that many of the most effective code enforcement and land banking strategies for managing the vacant property epidemic are market-sensitive. Thus, the author suggests, local governments required by the AFFH Final Rule to submit Assessments of Fair Housing to HUD should formulate innovative, market-based methods to address vacant properties that achieve the goals of promoting fair housing choice and fostering inclusive communities free from segregation. Counties, municipal agencies, and other localities that respond to vacant property challenges with market-sensitive approaches to code enforcement and land banking, the author argues, affirmatively further fair housing if they are cognizant of potential un-
intended consequences and do not otherwise violate the Fair Housing Act’s prohibitions. In addition, the AFFH Final Rule’s regional emphasis may assist jurisdictions that require regional cooperation to implement their strategies, and locating vacant property strategies within the AFFH framework may benefit vacant property reforms.

The State of the Nation’s Housing 2017

Joint Center for Housing Studies of Harvard University

The 2017 edition of this report examines a variety of national housing trends, noting significant advantages and disadvantages faced by different sectors of the housing market as compared to prior years and pre-recession conditions. Although the report highlights improvements in household growth, single-family and multifamily construction levels, and household diversity, many of these vary greatly by region, income level, and status as either a homeowner or a renter, among other factors. For instance, over the last decade, the construction of entry-level homes fell by more than half, and despite increased homeownership rates for Asian and Hispanic persons, the homeownership gap widened between black and white households to levels not seen since World War II.

The report also highlighted that significant challenges persist in the affordable rental market, as evidenced by a sharp increase in the number of severely cost-burdened households (especially as compared to owner-occupied housing) and a rise in the number of high-poverty neighborhoods, particularly in rural communities and the fringes of metropolitan areas. Additionally, regulatory and financing constraints, coupled with shortages in the construction labor force, have limited affordable housing supply; the majority of new rental units have skewed towards the higher end of the market, which, together with low vacancy rates, have contributed to rising rents. In the end, the authors stress the importance of keeping housing policy at the center of all fiscal and regulatory debates, deploying innovative problem solving and resource allocation strategies locally, and addressing the pivotal role federal funding must play in tackling the nation’s housing challenges.
Solving the Affordable Housing Crisis: The Key to Unleashing America’s Potential

J. Ronald Terwilliger

As someone who has worked in the homebuilding industry for more than forty-five years, I have never seen the housing situation more desperate. The combination of rising rents and unsustainable housing costs is wreaking havoc on families across America.

Inexplicably, the affordable housing crisis is generally an afterthought in our public discourse. Health care, tax reform, infrastructure, and the latest political scandals dominate the attention of lawmakers in Washington. Yet the affordable housing crisis has a very real impact on millions of our fellow citizens and responding resolutely to it is profoundly important for our nation’s economy and future prosperity.

In 2016, nearly twenty-one million families paid rents considered unaffordable under federal standards, up from 14.8 million in 2001. Approximately eleven million of these households were “severely” cost-burdened, spending in excess of fifty percent of their incomes on housing alone.1 Rent increases continue to outpace inflation in most local housing markets.

While rental cost burdens hit lower-income families the hardest—in 2016, more than 83 percent of renter households with annual incomes under $15,000 were cost burdened—they also are impacting moderate-income households in communities throughout the country. Make no mistake: This problem is national in scope and not reserved exclusively to the big cities along America’s two coasts.

Unfortunately, many older Americans are suffering. According to Enterprise Community Partners, 1.8 million seniors devote more than one

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out of every two dollars in income to rent.\textsuperscript{2} Most rely exclusively on Social Security, and some are forced to scrimp on essentials like nutritious food and medical care just to make ends meet. Cities as different as Louisville, New Orleans, and Hartford have registered some of the largest gains in the proportion of cost-burdened senior renters over the past decade.\textsuperscript{3}

The major engine driving today’s soaring rents is the acute shortage of affordable rental homes. The U.S. Department of Housing and Urban Development reports that, in 2015, there were only 62 affordable and available rental homes for every 100 “very low-income” households and just 38 for every 100 families with “extremely low-incomes.”\textsuperscript{4} This supply-demand imbalance has grown worse over the past decade.

Soaring rents are having a major spillover effect in the homeownership market, making it even more difficult for young families to accumulate funds for a mortgage down payment. This fact has conspired with years of stagnating incomes; tighter-than-normal underwriting standards; record levels of student loan debt; and the continuing fallout from the subprime debacle to weigh heavily on the national homeownership rate, which has plummeted more than five percentage points since reaching a high of 69.2 percent in 2004. The homeownership rate for minority families has fallen dramatically over the past several years, while the rate for those aged thirty-five to forty-four has dropped to 1960s levels.\textsuperscript{5} The result is millions of households who are shut out of the wealth-building opportunities that homeownership can provide.

**Rental Demand Is Poised to Intensify**

These twin problems—soaring rents and diminished access to homeownership—are likely to worsen in the coming years absent a comprehensive and sustained public policy response. Why? One word: Demographics.


\textsuperscript{3} Id.


America is growing increasingly diverse. Minorities will be responsible for the lion’s share of new household formation over the next fifteen years. The Urban Institute projects that minorities will account for seventy-seven percent of overall household growth from 2010 to 2020 and a staggering eighty-eight percent from 2020 to 2030.6 Unfortunately, the median incomes of African American and Hispanic families continue to lag significantly behind those of whites and Asian Americans, a circumstance that will complicate the ability of many to become homeowners.

At the same time, our nation also is growing older. The number of Americans aged sixty-five and above is projected to exceed seventy-four million by 2030, nearly a doubling of the number in 2010.7 By 2030, more than one in five Americans will be a senior citizen.8 As they grow older, many seniors will seek to downsize into smaller homes, with millions expected to move out of homeownership into rental housing.

These demographic changes—the increasing diversity of the U.S. population along with a steep increase in the number of seniors—mean that the already strong demand for rental housing will intensify even more in the coming years. A drop in the national homeownership rate to sixty percent or even lower is not a far-fetched notion.

Is America prepared for this onslaught of new rental demand? Not at all. It’s as if we are in a slow-motion movie, knowing what’s coming next but failing to take the steps necessary to avoid the impending calamity.

It’s true that supply-demand forces are at work and that the production of new multifamily rental homes has dramatically increased in recent years. But most of this new production is at the higher end of the rental market. As Harvard’s Joint Center for Housing Studies points out, “the total number of units renting for less than $800 declined by over 260,000 from 2005 to 2015, a time when the overall rental stock increased by over 6.7 million units. The shift in the rental stock toward the high end is also clear from the 32 percent rise in real median asking rents since 2000.”9

Building new rental housing that is affordable to those at the bottom of the income ladder remains an extremely difficult task, absent substantial government subsidies. In far too many communities, land-use, permitting, and other regulatory requirements unnecessarily raise the cost of developing new affordable rental homes, often acting as an insurmountable barrier to their production. Yet, the continuing scarcity of affordable rental homes will put upward pressure on rents, contributing to housing instability for millions of families.

Unsustainable Housing Costs Are Challenging Fundamental Assumptions

The impact of unsustainable housing costs can be pernicious, impacting not only a person’s pocketbook but his psyche as well. With so many Americans suffering under these burdens, a foundational premise of our society is now under assault—the idea that every American, despite his or her initial station in life, has the opportunity to advance through hard work and forge a better future. Rising levels of income inequality only serve to exacerbate these concerns.

Take the case of thirty-four-year-old Nicole. She is a single mother with two children, an eleven-year-old son and a nine-year-old daughter. Nicole was raised by her grandmother and grew up in an inner-city public housing development. Encouraged by her grandmother, she managed to graduate from high school, receiving good grades, but never quite had the financial wherewithal to attend college. She desperately seeks a better life for her children, hoping they will have opportunities she never had.

Those who know Nicole are not surprised by her strong work ethic. For the past eight years, she has been employed as a clerk in the payroll department of a large corporation headquartered in the downtown area of a major U.S. city. Nicole makes $48,000 annually and is proud of what she has been able to achieve. She is well liked by her colleagues and considered an exemplary employee.

Housing has been a constant source of stress in Nicole’s life. As a child, she developed asthma triggered by the dust and mold in her public housing unit. Today, cobbling together the funds to pay for her modest two-bedroom apartment is the one concern that keeps her up at night.

Rent is Nicole’s biggest expense, consuming more than forty percent of her monthly income. As a result, she is unable to contribute to the 401(k) plan offered by her employer. Every precious dollar is devoted to paying her household costs, which also include groceries, transportation, clothing, and speech therapy for her son. Saving money for a mortgage down payment to buy a home of her own is a dream that Nicole long

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ago discarded. Getting an associate’s degree to improve her career prospects is financially impractical.

These obstacles have not stopped Nicole from trying to control her own destiny. During the past five years, she has moved three times to find a less expensive apartment. However, these repeated moves, each time pushing her further away from her place of employment and into less desirable neighborhoods, are taking a toll on her two children, who have been forced to switch public schools with each move. Her son’s grades have been progressively declining, and he seems more and more disinterested in his studies. Her daughter has grown increasingly withdrawn, no doubt upset that the close friendships she has formed are constantly being interrupted.

Over the years, Nicole has received modest annual pay raises, a fact for which she is thankful. But, unfortunately, she has learned that her rent will be increasing by ten percent in two months’ time—the demand for apartments is so great that the market will easily absorb this price increase. Nicole feels trapped, never quite able to lift herself out of the pile of expenses that are smothering her. She is contemplating another move, this time to a less-expensive one-bedroom apartment where she intends to sleep on the living room couch. But the apartment is in a tough neighborhood with public schools that rank among the worst in the city. A new fear begins to overtake Nicole—the fear that she is failing her children.

While this story is a fictional one, it is a composite of the real-life experiences of millions of hard-working families who are struggling just to get by in the America of 2017.

**Needed: Greater Investment in Affordable Rental Housing**

To remedy this unacceptable situation, our nation must undertake a major and sustained investment in the production of new affordable rental housing. To this end, a significant expansion of the highly successful Low-Income Housing Tax Credit program is essential. Senate Finance Committee Chairman Orrin Hatch (R-UT) and Senator Maria Cantwell (D-WA) have recently introduced bipartisan legislation (S. 548, the Affordable Housing Credit Improvement Act) that would increase federal support for the Housing Credit by fifty percent. Enactment of this bill would represent an important first step in closing the affordable supply gap.

HUD Secretary Ben Carson also has spoken of the need to “take a more business-like approach on how the public sector can reduce the regulatory barriers so the private market can produce more housing for more families.” Secretary Carson is right to call attention to the regulatory-barrier problem. The challenge will be identifying how the federal government can most effectively encourage local communities to examine their regulatory policies to ensure they promote, not discourage, the production and preservation of affordable rental homes. Using the bully pulpit of HUD will be critical, not only to cajole but also to commend those communities that take affordable housing seriously. New “carrot-and-stick”
approaches that condition access to federal funds on the adoption of regulatory policies that favor affordable housing also should be explored.

Beyond these supply-side steps, additional resources are necessary to support demand-side measures—for example, higher levels of funding for Section 8 vouchers—that can ease the rental cost burdens borne by so many families. Unfortunately, federal rental assistance programs help only one out of five eligible households. Proposals to create a new Renters’ Tax Credit should also be front-and-center on the Congressional agenda.

During its recent consideration of comprehensive tax reform, Congress missed a critical opportunity to rebalance federal housing spending to support those households with the greatest needs. Under existing law, the federal government spends approximately $200 billion annually to support housing. Nearly seventy percent of this amount is used to fund three specific “tax expenditures”—the mortgage interest deduction, the deduction for local property taxes, and the exclusion of capital gains on sales of principal residences—that overwhelmingly benefit higher-income homeowners. Only thirty percent of federal housing dollars currently support rental housing, although renter households have annual median incomes that are about half that of homeowners.

While Congress slightly modified the mortgage interest deduction, the largest of the homeownership subsidies, by reducing the amount of debt eligible for the deduction from $1 million to $750,000 (for new home purchases), it failed to sweep the savings generated by this change into programs like the Low-Income Housing Tax Credit that help families struggling at the economic margins. Congress also failed to convert the mortgage interest deduction to a credit. The overwhelming majority of households making under $100,000 in annual income do not itemize on their federal tax returns and therefore cannot claim the deduction. Converting the mortgage interest deduction to a credit would have allowed millions of these families, both existing homeowners who do not itemize


12. The Terner Center for Housing Innovation at UC-Berkeley and the Center on Budget Policies and Priorities have put forward detailed proposals for a renters’ tax credit. Congressman Joseph Crowley (D-NY) also has recently introduced legislation, the Rent Relief Act (H.R. 3670), that would provide refundable tax credits to households burdened by rental costs that make under $125,000 annually.


as well as those seeking to purchase a home for the first time, to access the subsidy.\textsuperscript{15}

Looking ahead, Congress will have the opportunity to make significant changes to housing policy when it considers proposals to reform Fannie Mae and Freddie Mac, now in their tenth year of government conservatorship. Expanding access to affordable homes should also be a part of the conversation if and when Congress takes up an infrastructure package, a key Trump administration priority.

What we can no longer afford is the continued silence about the crisis in housing. An America with so many of its citizens living in unstable housing situations is an America that is failing to live up to her great potential. For those like Nicole and her children, we must and can do better.

Through Sound Tax Policies, President Trump and Secretary Carson Can Advance Supportive Housing

Deborah De Santis

As the debate surrounding tax reform continues to reverberate on Capitol Hill, it is vital that the Trump administration, particularly U.S. Housing and Urban Development Secretary Ben Carson, demonstrate its commitment to homes for all Americans by fully supporting and advancing proposals to maintain and enhance the federal Low Income Housing Tax Credit (LIHTC), multifamily housing bonds, and the New Markets Tax Credit (NMTC) program.

Our Gravitas and Housing Expertise

Corporation for Supportive Housing (CSH) has decades of experience and a successful record helping communities create the housing that has been instrumental in addressing some of our most pressing challenges as a society. As a national nonprofit and Community Development Finance Institution (CDFI) that works with groups across the nation to create supportive housing—affordable housing connected to health care and other community supports—we see firsthand the vital roles the LIHTC, housing bonds, and NMTC play in developing homes and access to much-needed services for individuals and families at the lowest end of the income scale. Since 1991, CSH has been helping communities and providers empower those in need of housing. Over these twenty-six years, the LIHTC, housing bonds, and NMTC have been the drivers creating, preserving, and strengthening most of the affordable housing we help build and much of the rest developed throughout our country.

This housing has benefitted impoverished seniors, persons with disabilities, our veterans in trauma, working families that struggle to make ends meet, people facing chronic homelessness, and others who would

1. CDFI Fund, U.S. Dep’t of the Treasury, Community Development Financial Institution Fund: List of Certified Community Development Financial Institutions (CDFIs) with Contact Information as of March 31, 2017.

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find themselves on our streets or confined to institutions if not for the permanent, stable homes and independence that the LIHTC, housing bonds, and NMTC make possible.

In large part because of these three programs, supportive housing has become a platform from which extremely low-income individuals and families can access services, such as medical care, mental health recovery, drug treatment, job training, and family reunification. In many cases, these services and other supports are the reasons why people who lived on the streets or in institutions for years are able to remain housed and healthy once they have a place of their own.4

These financing tools blended with CSH advocacy efforts and technical expertise are responsible for the creation of 200,000 supportive housing units that have become real homes and transformative springboards for individuals and families facing challenges they once thought insurmountable.

**Housing Needs and LIHTC’s Overall Impact**

Over eleven million American families pay more than half their incomes in rent and each day find it harder to keep a roof over their heads.5 We need to do more to make sure they have a home they can pay for because inability to afford housing is a major cause of homelessness and instability that can lead to drug abuse, mental health deterioration, family separation, and significant medical problems.6

The LIHTC and the extraordinary partnerships it produces have enabled the rehabilitation and construction of approximately three million affordable rental homes, including supportive housing, for vulnerable Americans.7 With few exceptions, this housing is well built and maintained.8 It strengthens thousands of urban, suburban, and rural communities. Harvard’s Joint Center on Housing has identified the LIHTC as the most successful affordable housing program in American history.9

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8. *Id.*

Since 1986, the LIHTC has provided fourteen million people with rental homes they can afford, and it generates 96,000 jobs annually and $3.5 billion in annual taxes and other revenue to local economies.\(^\text{10}\) It remains vital to developing and preserving affordable housing in a broad range of neighborhoods to revitalize impoverished areas in which our nation has chronically underinvested.

**The Importance of LIHTC to Supportive Housing**

The creation of supportive housing depends greatly on the LIHTC and housing bonds. Virtually every housing credit agency in the country creates some form of supportive housing development through its programs.\(^\text{11}\)

In supportive housing, affordability of the home forms the platform of stability that allows very vulnerable people to focus on the complex challenges (e.g., disability, substance use, unemployment, or mental illness) that are holding them back. Once people know they can afford housing and make a home for themselves, they can address their long-neglected needs and receive the help that improves their health and well-being. This formula for bettering their lives leads to lower overall costs borne by the public for health care; child welfare; public safety; and other services on the federal, state, and local levels.\(^\text{12}\)

Of the supportive housing directly supported with public funds, eighty percent moved forward because of the LIHTC\(^\text{13}\) and housing bonds. For example, over 125 supportive housing developments found in Arizona, Florida, Illinois, New Hampshire, Ohio, Texas, and Utah would not be a reality today without the LIHTC.\(^\text{14}\)

We estimate if the LIHTC is expanded just fifty percent, another 100,000 supportive housing units would be developed above the projected pipeline, creating real homes for thousands of Americans hoping for better outcomes and yearning for a way forward toward economic suffi-
ciency. The Affordable Housing Credit Improvement Act of 2017 (S. 548) would protect and improve both the LIHTC and multifamily housing bonds as part of any federal tax reform effort. Because of the critical need for supportive housing and the LIHTC’s demonstrated effectiveness in enabling the development of supportive housing, the Trump/Carson administration should enthusiastically push this bill.

**Investment Needs and the NMTC’s Overall Impact**

The fundamental principle behind the NMTC is that expanding or bringing new services to underserved areas, particularly those with supportive housing within or nearby, depends greatly on access to capital. There are attractive investment opportunities in low-income communities, but the cost and availability of capital in such “New Markets” (as they are branded) are prohibitive and therefore an impediment to economic growth. Furthermore, investors and firms often lack sufficient information to assess property value or consumer demand in low-income communities, where informal economies distort data. All of these factors translate into the unavoidable reality that private financial institutions often avoid investing in the poorest neighborhoods.

The capital gap in underserved markets impedes the construction or renovation of community services facilities that create jobs and economic opportunity and improve the quality of life. This never-ending cycle means some areas languish in poverty with little hope for a way out.

Fifteen years after the NMTC’s inception, the need for flexible capital is as great today as ever before in low- and moderate-income rural, urban, and native areas underserved by commercial lenders and sometimes forgotten by policymakers in Washington. A recent study by the Initiative for a Competitive Inner City found that “organizations and firms in low-income census tracts received 21 percent fewer loans than would be expected, based on the number of such groups in the tracts,” even with a healthy demand for capital and an untapped consumer base. As a result, inner city and other low-income neighborhoods are underserviced, forcing residents to leave their neighborhoods to access what they need.


17. *Id.*

18. *Id.*

19. *Id.*

The NMTC has a strong and proven track record in meeting the capital needs of low-income neighborhoods and communities. By law, all NMTC investments must be made in economically distressed neighborhoods and communities. Between 2003 and 2014, $38 billion in direct NMTC investments were made and, in turn, these commitments leveraged nearly $75 billion in total capital to businesses and revitalization projects in communities with high rates of poverty and unemployment. More than seventy-two percent of all NMTC investments have been in communities exhibiting severe economic distress, including unemployment rates more than 1.5 times the national average, a poverty rate of thirty percent or more, or a median income at or below sixty percent of the area median.

The NMTC helps enhance community revitalization efforts by financing community facilities and other important quality-of-life amenities. Between 2003 and 2014, more than 1,400 NMTC projects involved community amenities like health care facilities, schools, nonprofit service providers, and child care centers. In short, the program delivers not only hope but an effective strategy to lift the neighborhood and its residents up and out of poverty.

A recent Urban Institute study examined the extent to which the NMTC helps communities add quality of life, improve services, and finance community facilities. The research found that eighty-eight percent of NMTC projects brought direct or indirect improvements to their communities, including parks, playgrounds, shopping centers, health clinics, and other amenities.

The NMTC program is an investment in individuals, local neighborhoods, and the economy. It transforms the lives of millions of Americans.

21. Id.
26. A Decade of the NMTC, supra note 24.
through the plethora of services provided in facilities financed through the tax credit and builds stronger communities and local economies by serving as a catalyst for broader economic development.

The Importance of New Markets Tax Credits to Supportive Housing

Ensuring individuals and families genuine access to life-improving services is paramount to their success. There is a direct correlation between access to supports, especially regular and preventive health care, and housing retention.\textsuperscript{28} The NMTC program enables the provision of these services. And supportive housing strengthens connections between housing and services for populations who need them.

For example, CSH has received three NMTC allocations totaling $130 million\textsuperscript{29} to finance thirteen projects that serve low-income, high-health-need individuals who are homeless or at risk of homelessness with such vital supports as community health centers; social, educational, and/or workforce development programs; and mixed-use projects with supportive housing that include on-site access to the aforementioned programs.

For supportive housing tenants, the NMTC allows the services they need for recovery to be physically located down the street, next door, or in the building where they are living so that their way forward is within reach.

The New Markets Tax Credit (NMTC) Extension Act of 2017 (S. 384) would provide indefinite authorization for this incentive and increase its annual allocation, also indexing future growth of NMTC to inflation. In addition, it offers Alternative Minimum Tax (AMT) relief, thereby ensuring NMTC investors the same consideration as is currently provided to those investing in other federal tax credit programs. Because the NMTC program has proven to be a successful tool in the critical task of linking housing to support services in low-income communities, the Trump/Carson administration should strongly promote passage of the bill.

Conclusion

Given their utmost importance to both the creation of affordable housing that low-income Americans rely on and the access to services critical to the success of so many, the LIHTC, housing bonds, and NMTC must be preserved and expanded when our leaders produce federal tax code reform. They are solid and impactful federal investments in individuals,


local communities, and the economy. They transform the lives of millions of Americans, many of whom are able to afford their homes for the first time. This, in turn, improves their communities and local economies in ways that benefit all of us.

As head of the major U.S. government agency entrusted with the development of affordable housing and communities, U.S. Housing and Urban Development Secretary Carson is uniquely positioned to carry the banner for the Trump administration as Congress determines the course of the LIHTC, housing bonds, and NMTC and their expansions.

Secretary Carson has publicly cited the public-private partnerships intrinsic to LIHTC, housing bonds, and NMTC as models for the creation of more affordable housing.30 As our lawmakers contemplate where exactly to place the LIHTC, housing bonds, and NMTC in the vast puzzle that is tax reform, the Trump administration must now translate Secretary Carson’s endorsement into deeds and support and approve vastly improved and bigger tax credits, putting the pieces together that will lead to better lives for more Americans wanting to realize the dream of living in an affordable home they can call their own.

Fair Housing and Environmental Justice: New Strategies and Challenges

Megan Haberle

Introduction

Fair housing and environmental justice are deeply intertwined, though they have long operated in separate siloes among both policymakers and advocates. In recent years, the importance of connecting these issues has been brought home in acute ways. This included the public exposure of lead poisoning in Flint, Michigan (which gave momentum to successful efforts to raise HUD’s lead threshold), and the disastrous impacts of Hurricanes Katrina, Sandy, and Harvey (highlighting the need not only for emergency preparation, but also for proactive, equitable climate adaptations).

Environmental justice (EJ) and fair housing advocacy both take place against a complex backdrop of racial segregation, disparities in access to political power, municipal fragmentation, boundary-drawing around resources, disinvestment, and administrative silos. Progress can be slow even in progressive administrations. However, HUD itself holds important environmental health responsibilities and is empowered to undertake important EJ strategies. For example, HUD can improve oversight of the siting of subsidized housing; provide housing choice away from environmental burdens through housing vouchers; offer funding to directly address household and community EJ needs; develop guidance, policies, and technical assistance regarding climate change and other EJ issues; and incentivize state and local EJ improvements through its spending power. Environmental justice is part of the agency’s legal responsibilities

1. See, e.g., Title VI of the Civil Rights Act of 1964 (requiring nondiscrimination by recipients of federal financial assistance); Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) (providing for nondiscrimination by public and private actors and requiring HUD and its recipients to “affirmatively further fair housing”); Exec. Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994) (requiring federal executive agencies and the entities to which they extend financial support or project approval to “identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations”); the National Environmental Policy Act (NEPA) and implementing regulations, 24 C.F.R. §§ 58.5–58.6 (requiring site reviews); Memorandum of Understanding on Environmental Justice and Executive Order 12898 (signed by seventeen federal agencies, including HUD, in 2011); HUD Site &
and overlaps with its broad missions of advancing coordinated development, nondiscrimination and desegregation, and effective administration of housing and community development programs.²

HUD made a number of meaningful advances for environmental justice within its programs in past administrations. Yet despite the compelling real-world connections among environmental justice and housing and community development, EJ considerations have lacked structural force and consistency across HUD programs. Instead, federal housing programs have only sporadically addressed EJ concerns. For example, HUD’s 2016–2020 EJ Strategy reported on a number of fine programmatic initiatives but lacked guidance applicable to how other programs should promote EJ outcomes. Some of HUD’s most important and largest program areas still place residents in harm’s way. Communication between EPA and HUD remains inadequate, and there is insufficient oversight or concrete action being taken to follow sight standards for affordable housing units. In concrete terms for vulnerable American households, to live in subsidized housing often means to risk environmental health exposures that are damaging and inequitable. In addition, the potential for federal funding (including HUD funding) to serve as meaningful leverage for equitable, forward-looking local and state action on emerging EJ issues—such as climate change—remains undeveloped.

Still, the HUD of the Obama years, which worked constructively with the resources offered by progressive think tanks, universities, and social justice organizations, made a number of notable steps forward. This included the issuance of the Affirmative Furthering Fair Housing (AFFH) regulation, discussed below. It also included energy improvements for subsidized housing; “healthy homes” initiatives to address exposure to lead, radon, and other toxins, which can have a severe life-long impact on children’s brain development, school attendance, and other aspects of health; disaster-preparedness competitions, with the potential to scale up innovations that protect vulnerable communities from flood hazards; improved health and safety inspections for subsidized housing; data development and sharing with the Environmental Protection Agency (EPA) and the Department of Health and Human Services (HHS); the “Green and Healthy Homes Initiative” public-private partnership, which finances retrofits for low-income households in response to the high utility-cost burdens that will be exacerbated by severe weather; a program of Tribal Government Consultations; and the formulation of a Climate Change Adaption Plan

². 42 U.S.C. § 3541 (congressional statement of purpose in establishing HUD); id. § 3601 et seq. (Fair Housing Act).
to enable the agency to assess and mitigate risks more systematically. In its 2016–2020 EJ Strategy, HUD also indicated plans to continue its collaboration with the Department of Transportation (with implications for access to healthier neighborhoods, shortened commute times, and exposure to air and noise pollutants) and to issue guidance on civil rights enforcement relating to EJ.4

As discussed below, however, the initiatives developed by the last administration left much work to be done. In addition, the Trump administration’s focus on deregulation and its rollbacks to civil rights and environmental enforcement are presenting serious new challenges.

Emerging Challenges and Opportunities

Interagency Coordination and Environmental Enforcement

Robust environmental enforcement and remediation in low-income neighborhoods is a crucial public health need and must accompany the siting standards and residential mobility options discussed below. In addition, better communication and coordination between EPA and HUD are needed in order for each of these agencies to know when subsidized housing residents are living in contaminated areas and take concrete measures to respond.

Unfortunately, however, environmental justice coordination between HUD and EPA has remained far too limited. A key feature of Obama-era housing programs was the growing momentum behind interagency programs as a strategy for community revitalization and the promotion of civil rights, but this mainly took place on the level of pilot programs and demonstrations, without strong requirements for action. For instance, the Sustainable Communities Initiative, a joint endeavor of HUD, EPA, and the Department of Transportation (DOT), supported regional, community-participation-intensive Fair Housing Equity Assessments, which served as test pilots for development of the Affirmatively Furthering Fair Housing (AFFH) rule and its “access to opportunity” analysis. HUD and EPA initiated data-sharing agreements to support the Assessments of Fair Housing (AFH) and other processes. Importantly, HUD and EPA signed a Memorandum of Understanding in January 2017 providing that they would “improve communication when either identifies a nexus between HUD Properties and [Superfund] sites which EPA has


4. Id. at 12, stating: “[w]hile current investigation guidance does not specifically address environmental justice, the Office of Fair Housing and Equal Opportunity (FHEO) is in the process of revising guidance for investigators to encompass EJ complaints, compliance reviews, voluntary compliance and enforcement actions dealing with EJ issues.”
identified as of potential health concern for housing residents.” 5 This action was prompted by the recognition of the high number of subsidized units near such sites. While a promising step, the MOU did not create binding or enforceable obligations. Further monitoring and advocacy are needed to ensure that HUD and EPA follow through on the agreement and that they actually take remediation measures and offer relocation options.

In addition, EPA has fallen far short (even during the Obama years) in protecting EJ communities. As the 2016 report of the U.S. Commission on Civil Rights documented, EPA’s EJ enforcement activities have long been severely inadequate, with lengthy backlogs, limited staff capacity, insufficient investigations, and weak penalties (if any). 6 This failure to conduct basic enforcement activities will inevitably worsen throughout the Trump administration, which has drastically cut EPA funding and threatened to roll back environmental protections. (And it will likely do the same with civil rights laws and guidance.) 7 Environmental justice populations (low-income and minority communities) often are exposed to cumulative environmental burdens, which are unaccounted for by the floor-level protections set by general environmental standards. If those standards are loosened, it is these households who are likely to suffer first and most. Because there is currently no private right of action to enforce disparate impact claims under the Civil Rights Act of 1964, 8 residents of environmentally


6. U.S. Comm’n on Civil Rights, Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12898 (Sept. 2016), available at http://www.usccr.gov/pubs/Statutory_Enforcement_Report2016.pdf. Among the report’s findings is this critical assessment of the EPA: “The EPA has a history of being unable to meet its regulatory deadlines and experiences extreme delays in responding to Title VI complaints in the area of environmental justice. . . . EPA’s Office of Civil Rights has never made a formal finding of discrimination and has never denied or withdrawn financial assistance from a recipient in its entire history, and has no mandate to demand accountability within the EPA.”

7. As of mid-2017, the president had issued two executive orders directing all agencies to undertake retrospective reviews of regulations. See Comment Letter to HUD re: Reducing Regulatory Burden, Poverty & Race Research Action Council (June 14, 2017), available at http://prrac.org/pdf/Fair_Housing_Reg_Agenda_Comments.pdf.

8. See Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that there is no private right of action to enforce disparate impact regulations promulgated under Title VI).
burdened areas must show intentional discrimination or must rely on government actors to bring cases that are based on discrimination rather than violation of general environmental standards. While advocacy for robust state and local laws and enforcement can help in many areas, there is no replacement for strong federal action in others.

There remains a great need in many places to institute structural interventions to the distribution of environmental benefits and burdens across neighborhoods and metropolitan regions. These include greater transparency in funding distribution schemes (e.g., for Community Development Block Grants and other funding sources), \textit{ex ante} mechanisms such as health impact assessments or environmental justice reviews (e.g., as required under Federal Transit Administration guidance\(^9\)), and consistent enforcement that addresses cumulative environmental impacts. As the Trump administration pursues deregulation and privatization in housing and other infrastructure, exploration of these strategies at the state and local levels will be all the more important for civil rights advocates.

\textit{Site Standards and Reviews}

HUD’s Site and Neighborhoods Standards, which can be found in HUD’s Title VI regulations and various programmatic regulations, implement Title VI and VIII and provide general criteria for the siting of new subsidized units\(^{10}\). The current regulatory standards require, for example, that public housing sites “must be free from adverse environment conditions.” Under the National Environmental Policy Act (NEPA) and Executive Order 12898, HUD also requires an EJ analysis prior to project siting as part of the environmental review conducted by the Office of Environment and Energy (OEE).

HUD has significant room to improve in implementing its siting standards, reviews, and oversight. A 2016 audit found that “HUD did not adequately implement environmental requirements or provide adequate

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10. The standards provide that the site “must be accessible to social, recreational, educational, commercial, and health facilities and services . . . that are at least equivalent to those typically found in neighborhoods [consisting largely of unassisted housing].” 24 C.F.R. § 941.202(d). See also 24 C.F.R. § 941.202 (public housing) (“The site must be free from adverse environmental conditions, natural or manmade, such as instability, flooding, septic tank back-ups, sewage hazards or mudslides; harmful air pollution, smoke or dust; excessive noise vibration, vehicular traffic, rodent or vermin infestation; or fire hazards . . . or in which substandard dwellings or other undesirable elements predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.”).
oversight to ensure compliance with these requirements."  

And as HUD’s 2011–2015 EJ Strategic Plan stated:

Since 1970, HUD has implemented *Site and Neighborhood Standards* for HUD-assisted newly constructed and rehabilitated housing, requiring, for example, that such units be located in areas with access to amenities like transportation and educational and health facilities. Site and neighborhood standards are intended to prevent the use of HUD assistance in a manner that perpetuates or exacerbates segregation or that exposes residents to environmental or health hazards. However, that goal has not always been met. Furthermore, while attention is paid to site and location considerations for development of new federally-assisted housing to avoid building new properties in overburdened areas, federal housing investments that were made decades ago remain an important part of the full complement of affordable housing available to meet local housing needs. Recognizing the need to remediate existing cases of disproportionate exposure to hazards and address the lack of access to opportunities for federally-assisted housing residents in overburdened communities are critical aspects of achieving environmental justice.

In the current administration, efforts to bring in private capital to finance publicly supported housing are growing, in particular through the Rental Assistance Demonstration (RAD) program. This program will result in new housing siting, and public housing agencies must certify compliance with site and neighborhood standards. Public Housing Authorities also may use RAD as a component of neighborhood revitalization efforts. This initiative provides both opportunities (an influx of capital) and new oversight challenges (including the monitoring of siting and revitalization outcomes). The ongoing monitoring of RAD conversions, including where housing is sited and whether housing mobility options are provided for families, is an emerging focus of fair housing advocacy (and important to ensure that healthy residential options are available).

As well as addressing the location of subsidized units, HUD and public housing authorities should improve performance in helping Housing Choice Voucher households access a broader range of housing options and neighborhoods. Specifically, additional resources and counseling should be pro-

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vided to enable families to move from environmentally impacted buildings and areas.\textsuperscript{14}

\textit{The Affirmatively Furthering Fair Housing Rule}

Among the Obama administration’s civil rights accomplishments was the 2015 issuance of the Affirmatively Furthering Fair Housing (AFFH) rule,\textsuperscript{15} named as another element of HUD’s EJ Strategy. The rule implements the Fair Housing Act’s requirement that HUD “affirmatively further” the purposes of the Act by expanding housing choice and promoting integration. It takes a wide-lensed, realistic approach to fair housing issues by requiring program participants to examine EJ-related issues, such as environmental health.\textsuperscript{16} Program participants (i.e., HUD block grant recipients and public housing authorities) must conduct Assessments of Fair Housing (AFHs) that analyze the fair housing issues specific to their regions and identify strategies to address them. This includes an assessment of “access to opportunity” by protected classes with an evaluation of “environmental health.”\textsuperscript{17} HUD provides standardized federal data and mapping tools (including air quality data imported from EPA) for the process and prompts participants to supply relevant local data and qualitative information (largely at their discretion). It also requires them to incorporate public comments. The rule encourages local interagency consultations as well as interagency coordination strategies. And it prompts them to assess the role of “contributing factors” to fair housing issues, including the siting of public and private investments, factors affecting subsidized and affordable housing locations, factors affecting housing quality and affordability, and the “location of environmental hazards”:


\textsuperscript{15} 24 C.F.R §§ 5.150–5.168; see also Dep’t of Housing & Urban Dev., Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (July 16, 2015).


\textsuperscript{17} See HUD EXCHANGE, ASSESSMENT OF FAIR HOUSING TOOL FOR LOCAL GOVERNMENTS 5 (Jan. 2017), available at https://www.hudexchange.info/resource/5216/assessment-of-fair-housing-tool-for-local-governments/ (asking participants to “describe how disparities in access to environmentally healthy neighborhoods relate to residential living patterns in the jurisdiction and region. . . . Informed by community participation, any consultation with other relevant government agencies, and the participant’s own local data and local knowledge, [participants are asked to] discuss whether there are programs, policies, or funding mechanisms that affect disparities in access to environmentally healthy neighborhoods.”).
The geographic relationship of environmental health hazards to housing is an important component of fair housing choice. When environmental health hazards are concentrated in particular areas, neighborhood health and safety may be compromised and patterns of segregation entrenched. Environmental issues affecting health can include access to safe and clean drinking water, soil contamination, excessive air pollution, and indoor health hazards (lead based paint, radon, mold, asbestos). Relevant factors to consider include the type and number of hazards, the degree of concentration or dispersion (including in older housing stock), and health effects such as asthma, cancer clusters, obesity, etc. Additionally, industrial siting policies and incentives for the location of housing may be relevant to this factor.  

A primary required outcome is the incorporation of fair housing goals into a range of local, regional, and state planning processes. The participant submits the AFH to HUD for review along with a certification that it is fulfilling its AFFH obligation.

The AFFH rule and its Assessment Tools have great potential as inter-agency, regionwide planning platforms. However, because the rule was cautiously designed not to stray outside the limits of HUD’s regulatory authority, it allows significant local discretion. In light of limited resources for enforcement and technical assistance, its implementation will depend to a large extent on local agency cultures, personnel, and community engagement and organizing. Advocates can play an important role in ensuring that the AFH is properly used to document whether affordable housing, including HUD-subsidized housing, provides sufficient options in environmentally healthy areas.

EJ advocates, along with housing advocates and others, also may use the AFH process to document a range of environmental health disparities and the state or local mechanisms that drive or could remedy them (such as permitting strategies, health impact assessment legislation, zoning, and funding incentives). In this specific capacity, it seems more likely that the AFH will serve as an organizing tool, rather than as a legal tool. As a political matter, it is an open question how assertively HUD will exercise its discretion in determining that its recipients have violated their AFFH duties, and then rescind funding, for a broader scope of issues outside the traditional scope of AFFH as the courts have defined it. And, as a legal matter, it is unclear how far courts would go in approving such enforcement. This is a boundary unlikely to be pushed during the Trump administration.

19. AFFH Rule, 24 C.F.R. § 5.154 (“Each program participant shall conduct an AFH for the purpose of examining its programs, jurisdiction, and region, and identifying goals to affirmatively further fair housing and to inform fair housing strategies in the consolidated plan, annual action plan, the Public Housing Agency (PHA) Plan and any other plan incorporated therein, and community plans including, but not limited to, education, transportation, or environmental related plans.”).
As noted below, regulatory rollbacks and weakened enforcement may jeopardize the prospects for national consistency in robust fair housing planning, at least in the short term. However, the AFFH mandate is a statutory one, and localities ultimately benefit from coordinated planning processes, particularly those that advance intergenerational health outcomes. Advocates are optimistic that the AFFH framework and robust models generated by participants will have significant and lasting value.

**EJ, HUD, and Climate Change**

States and localities are engaged in planning for climate change, addressing both mitigation needs (such as emissions standards) and adaptation needs (such as flood control). Because of the ongoing disinvestment and cumulative environmental impacts encumbering many segregated communities, fair housing and equity planning policies are needed to inform both mitigation and adaptation. However, many of these plans currently lack equity criteria. This means that adaptation resources may not adequately serve vulnerable communities, including residents in HUD-subsidized households. The AFH process presents one opportunity to align fair housing and environmental justice analyses with climate change planning. Guidance on how the AFH might be used to formulate climate change or other environmental justice strategies has not been provided, and development of local models will be important for future policy formation.

In addition, HUD has so far developed a number of grant programs and initiatives relating to disaster relief and energy retrofitting (see discussion of HUD’s 2016–2020 EJ Strategic Plan, above). The inclusion of equity criteria in competitive grant structures, and nondiscrimination oversight, continues to be important. New infrastructure is likely be another area of growth for public-private partnerships and policy enacted through tax incentives, which have been trends in past Republican administrations and are a focus of Trump-era policy. Oversight mechanisms, and related advocacy, will need to respond to these developments.

**Conclusion**

Specific programmatic changes can be difficult to foresee with accuracy. Yet the Trump administration’s intended legacy is overall one of deregulation, privatization, and agency budget and enforcement cuts. All of these will deeply impact both fair housing and environmental justice. To respond effectively, we need both to cultivate progressive policies at the state and local levels and to continue vigilant advocacy on the federal stage with HUD and EPA. These agencies both need to more proactively engage in, and be held accountable for, policies that promote health for low-income households.

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I. Introduction

When Donald Trump was elected President of the United States in the 2016 election, his victory was largely credited to the turnout of the rural voter. In fact, while Trump lost in urban areas, he won sixty percent of the vote in the 2,332 counties that comprise rural America.1 Rural commu-

nities have higher rates of poverty and slower growing economies when compared to their urban counterparts. For the hardworking families living in these communities, capital investments, in the form of direct loan and grant programs for housing and community development, play an essential role in improving their quality of life.

This article will discuss the challenges facing modern rural America and provide suggestions for how the administration and policymakers can work with existing programs to support the people living in these communities. First, it will discuss what “rural” means and identify economic challenges facing rural communities in the modern era. Next it will discuss federal rural development programs, specifically within the U.S. Department of Agriculture (USDA), and the Low-Income Housing Tax Credit (LIHTC), which are essential to financing improved housing and community facilities in rural communities. This article will then discuss how the administration has addressed the rural need thus far, and also explore how Congress has responded to the administration’s initial reaction. Finally, this article will provide several recommendations for the administration going forward.

II. Identifying Modern Rural America

The first step in a discussion about addressing the challenges facing rural America is to identify what “rural” America is. This section will begin with a discussion of the different definitions of “rural,” followed by an overview of the economic and housing issues that rural communities face in the modern era.

A. Defining “Rural”

A challenge when examining issues facing rural America is identifying what is meant by “rural.” Typically, the meaning of rural is “defined in contrast to urbanicity,” based on an area’s population and its distance from a metropolitan area.2 Rural does not simply mean residing in a non-metropolitan county. In fact, according to the 2011–2015 American Community Survey, 54.4% of people living in rural areas also live within a Metropolitan Statistical Area (MSA).3


Complicating matters, almost every federal agency uses a different definition to define “rural.” The U.S. Census Bureau defines rural as “all population, housing, and territory not included within an urban area.” Urban areas are defined based on their population, and generally any area with a population of at least 2,500 is considered to be some type of urban area. The Office of Management and Budget (OMB) defines “rural” by contrasting metropolitan counties with nonmetropolitan counties. Metropolitan counties are defined as having populations exceeding 50,000 with a core urban area.

The U.S. Department of Agriculture (USDA) rural housing definition for “rural” is provided in Title V of the Housing Act of 1949, as amended. The Agriculture Act of 2014 (H.R. 2642) amended the definition of rural areas at section 520 of the Housing Act of 1949. “Rural” is defined as any open country, or any place, town, village, or city which is not . . . part of or associated with an urban area and which (1) has a population not in excess of 2,500 inhabitants, or (2) has a population in excess of 2,500 but not in excess of 10,000 if it is rural in character, or (3) has a population in excess of 10,000 but not in excess of 20,000, and (A) is not contained within a standard metropolitan statistical area, and (B) has a serious lack of mortgage credit for lower and moderate-income families, as determined by the Secretary and the Secretary of Housing and Urban Development.

4. See The Federal Definition of “Rural”—Times 15, WASH. POST (June 8, 2013), https://www.washingtonpost.com/politics/the-federal-definition-of-rural-times-15/2013/06/08/a39e46a8-cd4a-11e2-ac03-178510c9cc0a_story.html?utm_term=.40a87f21392. “U.S. government has at least 15 different official definitions of the word ‘rural,’ including 11 at the Agriculture Department alone. These definitions apply to different programs, often determining which local governments are eligible for rural-aid money.”

5. 2010 Census Urban Area FAQs, U.S. CENSUS BUREAU, https://www.census.gov/geo/reference/ua/uafaq.html (last visited July 12, 2017). The Census Bureau defines urban areas as “Urbanized Areas (UAs) of 50,000 or more people; Urban Clusters (UCs) of at least 2,500 and less than 50,000.” For a territory identified as a UC, at least 1,500 people must reside outside of institutional group quarters. Thus, under the Census Bureau’s definition, rural areas are only those areas with 2,499 or fewer people.


8. Id.


10. Id.
Areas that were classified as “rural” before October 1, 1990, are also considered rural through the decennial census, provided that these areas have populations of less than 35,000 and “are rural in character.”

This article will use several different definitions for “rural,” based on the topic under discussion. As a general matter, most national statistics on rural America come from the Census Bureau. However, the USDA Rural Housing Service programs are governed by the definition of section 520 of the Housing Act of 1949, as amended.

B. Characteristics of Rural America

In 1900, over sixty percent of the American population was rural. Over the past 117 years, the rural share of the population has steadily decreased, reaching just thirty percent by 1960. According to the 2010 decennial census, there are nearly sixty million people living in rural areas, accounting for around nineteen percent of the population.

Rural America has faced multiple events that have resulted in a continued history of economic hardship. The early rural economy, which was linked to agriculture markets and dependent on crop harvests, suffered through the unpredictability of crop pricing and natural disasters. This resulted in economic downturns that “threw millions of rural Americans into individual financial turmoil,” including the Great Depression of the 1930s and the farm crisis during the 1980s.

Available employment opportunities in rural communities have historically been blue-collar jobs as farmers or in manufacturing. While there have been modest increases in rural employment in recent years (an increase of 1.3% between 2013 and 2015), employment in rural areas is today below what it was prior to the Great Recession. In both urban and rural areas, service industries make up the greatest share of jobs and earnings. However, rural communities depend more on the production of goods for their employment opportunities, such as farming, forestry, fishing, and mining, which make up eleven percent of all rural earnings. In urban communi-

11. Id.
12. Rural America, supra note 6.
13. Id.
14. Id.
18. Id.
19. Id.
ties, jobs in these industries make up just two percent of earnings.20 Fifteen percent of rural earnings come from the manufacturing sector in urban communities, compared to nine percent in rural areas.21 Further, the type of job within these industries is also different in rural versus urban communities. For example, in urban areas, fifty-two percent of production jobs are managerial and professional, compared to just thirty-nine percent in rural areas.22

The median income in rural communities is frequently significantly below the median income in urban communities.23 For example, in 2012, nonmetropolitan median household income ($44,974) was slightly more than fifteen percent below the metropolitan median ($52,988). While the cost of living in rural communities is generally lower than in rural areas, rural families typically experience higher rates of poverty compared to their city-dwelling counterparts.24 The American Community Survey (ACS) found that the national poverty rate was 14.7% in 2015.25 The nonmetropolitan poverty rate that year was 17.2%, compared to 14.3% in metropolitan areas.26

Poverty is a persistent problem in rural areas. The USDA Economic Research Service (ERS) defines counties as being persistently poor when “20 percent or more of their populations were living in poverty over the last 30 years (measured by the 1980, 1990, and 2000 decennial census and 2007–2011 ACS 5-year estimates).”27 Based on this definition, the ERS has determined that there are currently 353 counties experiencing persistent poverty. Of these counties, 85.3% are nonmetropolitan.28 In other words, 301 nonmetropolitan counties—15.2% of all nonmetropolitan counties—are persistently poor. And research shows that persistent poverty is also a regional issue: eighty-four percent of all persistently poor counties are in the South, accounting for twenty percent of all Southern counties.29

20. Id.
21. Id.
22. Id.
23. Id.
26. Id.
28. Id.
29. Id.
In particular, child poverty in rural areas remains a large problem. In 2010, sixty-four percent of rural counties, compared to forty-seven percent of urban counties, had high child poverty, defined as counties where twenty percent or more of the children are in families with incomes below the poverty threshold. Of the 755 counties with persistent child poverty (meaning they have had high rates of child poverty for the past three decades), seventy-seven percent were nonmetropolitan. The detrimental effects of “growing up poor” are well documented, including negative impacts on children’s educational opportunities and outcomes as well as their health.

The population in rural areas has continued to decline over the past several years. Between July 2015 and July 2016, the Economic Research Service estimated that the number of people living in nonmetropolitan counties had declined by almost 21,000. Younger residents in rural communities tend to migrate to urban areas to pursue more educational and employment opportunities, as well as for social and cultural reasons.

Rural areas have less economic activity and a harder time attracting outside capital. Low population density means that it is harder for rural communities to achieve economies of scale. Smaller populations mean that rural residents have limited access to important support services, such as education, health care, and employment opportunities. And smaller populations mean that rural communities have a reduced tax base to fund those services or even provide basic updates to necessary infrastructure.

31. Id.
32. Id. at 2.
38. Id.
C. Housing in Rural America

Data from the 2010 census showed that there were around twenty-five million occupied housing units located in rural communities.40 Homeownership has historically been considered a center of the “American Dream,” and that is particularly true in rural areas. In rural communities, over seventy percent of homes were owner-occupied in 2010, compared to around sixty-five percent nationally, demonstrating that homeownership is the most prevalent form of housing for rural residents.41

Because rural houses are typically less expensive, the equity that rural Americans accumulate in their homes is generally less than the equity generated from homes in urban areas. For example, between 2010 and 2015, the average home value in urban areas grew 28.4%, compared to just 6.25% growth in value in rural areas.42

Moreover, of the estimated 25 million occupied homes in rural communities, 1.5 million are considered either moderately or severely substandard.43 “Substandard housing” means that a home lacks complete plumbing facilities, has inadequate or no heat, has no or inconsistent electricity, has exposed wiring, and/or has ongoing maintenance and upkeep issues. Substandard housing is a prevalent problem for low-income families. In fact, the 2011 American Housing Survey found that families earning less than thirty percent of the area median income (AMI) were more than three times as likely to live in substandard housing.44 Substandard housing is more common in rural and tribal areas than in urban areas; when compared to metro tracts, tribal census tracts are five times more likely to lack or have incomplete plumbing, and non-metro tracts are more than two times as likely to lack or have incomplete plumbing.45 Furthermore, indoor plumbing, a household feature most Americans take for granted, is unavailable to four percent of rural occupied units.46 Slightly

41. Id. at 34.
43. Housing Assistance Council, supra note 40, at 45.
more than ten percent of those units also have more than one occupant per room, signifying that inadequate units in rural areas are more likely to be overcrowded.47 While the primary form of housing in rural communities is home-ownership, around 7.1 million rural residents rent their homes, and rental housing accounts for 28.4% of the housing stock in rural areas.48 Around five million rural rental households, equaling about forty-one percent of all rural renters, are cost-burdened, which means they pay more than thirty percent of their income for housing costs. And twenty-one percent of all rural households that rent pay more than fifty percent of their income for housing.49

III. Federal Rural Housing Programs

USDA is the primary federal body engaged in rural community development programs through its Office of Rural Development (Rural Development). This section will discuss Rural Development’s mission, including a few key rural housing programs.

A. Brief History of Rural Development

The federal government began its engagement in rural housing during the Great Depression through the Federal Emergency Relief Administration.50 Following World War II, Congress enacted the Housing Act of 1949.51 Title V of the Housing Act authorized the Farmers Home Administration (FmHA), a former agency of USDA, to make loans and grants to farmers for the construction, improvement, or replacement of their homes or other farm buildings. FmHA’s authority was later expanded to include loans and grants for other rural residents, not just farmers, with the Rural Development Act of 1972, Title III of the Consolidated Farmers Home Administration Act of 1961.52

In 1994, Congress enacted the Department of Agriculture Reorganization Act, giving the Agriculture Secretary broad authority to reorganize


49. Mathur, supra note 46.

50. TADLOCK COWAN, CONG. RESEARCH SERV., RL31837, AN OVERVIEW OF USDA RURAL DEVELOPMENT PROGRAMS 1 (Feb. 10, 2016).


52. JASPER WOMACH, CONG. RESEARCH SERV., 97-905, AGRICULTURE: A GLOSSARY OF TERMS, PROGRAMS, AND LAWS, 2005 EDITION 58 (June 16, 2005).
the department and authorizing the creation of an Under Secretary for Rural Economic and Community Development within the department.\textsuperscript{53} As a result, USDA eliminated FmHA and divided its programs.\textsuperscript{54} The farm loan programs were transferred to the Farm Service Agency and the other programs were transferred to Rural Development.\textsuperscript{55}

Today, Rural Development offers loans, grants, and loan guarantees to support essential services, including housing, health care, water and wastewater systems, electronic and broadband infrastructure, and economic development in rural communities.\textsuperscript{56} Rural Development has three core mission agencies: the Rural Housing Service (RHS), the Rural Utilities Service (RUS), and the Rural Business-Cooperative Service (RBS).\textsuperscript{57} The section that follows will provide greater detail on several key RHS programs.

\section*{B. Key Rural Housing Service Programs}

Title V of the Housing Act of 1949 gave FmHA authority to make direct loans for the purchase or repair of rural single-family housing.\textsuperscript{58} Today, RHS makes direct loans, grants, and loan guarantees to help low- and very-low-income rural families purchase or rehabilitate their own homes. In addition, it provides loans, grants, and guarantees to private, nonprofit, and for-profit developers and to local governments for the purchase and rehabilitation of multifamily housing.\textsuperscript{59} In fiscal year (FY) 2016 alone, RHS assisted around 140,000 families buy, finance, or repair their homes by providing more than $19 billion in financing.\textsuperscript{60}

\subsection*{1. Single-Family Housing Programs}

The Section 502 Direct Loan Program is the only federal program that targets homeownership loan opportunities to low- and very-low-income rural households. For this program, “low-income” is defined as between fifty and eighty percent of AMI for low, and “very-low income” is defined as below fifty percent of AMI.\textsuperscript{61} Through the Section 502 Direct Loan Program, USDA provides direct loans to low- and very-low-income families,
with interest rates from one percent.\textsuperscript{62} Borrowers are able to obtain 100\% financing and loan terms for up to thirty-three years.\textsuperscript{63}

RHS also offers the Section 502 Guaranteed Loan Program. RHS provides private lenders loan guarantees for up to ninety percent of the loan principal for loans to low- and moderate-income families for the purchase of their homes.\textsuperscript{64} This program targets families with incomes between 80\% and 115\% of the AMI.\textsuperscript{65}

Unlike the Section 502 Guaranteed Loan Program, the Direct Program overwhelmingly serves families with lower incomes. In fact, Section 502 Direct borrowers have an average income of almost half that of the Guaranteed Program borrowers—$28,268 to $48,000 respectively.\textsuperscript{66} Further, by law forty percent of the households receiving Section 502 Direct loans must be very-low income.\textsuperscript{67} In FY 2016, RHS provided 7,113 Section 502 Direct loans, totaling over $960 million.\textsuperscript{68}

The Section 523 Mutual Self-Help Housing Technical Assistance Program enables low- and very-low-income families to work together to build their own homes under the supervision of qualified nonprofit organizations. Self-Help Housing makes homes affordable by enabling the participating families to use “sweat equity” to reduce the cost of homeownership by fifteen percent and learn valuable construction skills.\textsuperscript{69} The families work together in groups of six to twelve to construct their homes, performing approximately sixty-five percent of the labor. No one moves in until the construction on all of the homes is completed. The participating families often use the Section 502 Direct Loan Program to finance their mortgages.\textsuperscript{70}

Currently there are around 100 organizations in thirty-six states, Puerto Rico, and the Marshall Islands that participate in the Self-Help Housing Program. Due to funding for the program either being cut or frozen over the past decade, most organizations receiving grants have not seen

\textsuperscript{62. Id.}

\textsuperscript{63. Id. For families with incomes below sixty percent of the AMI, the loan can be for up to thirty-eight years. Id.}

\textsuperscript{64. Id. at 10–11.}

\textsuperscript{65. Id.}


\textsuperscript{67. 2015 EXPLANATORY NOTES, supra note 66, at 3.}

\textsuperscript{68. USDA RURAL DEVELOPMENT 2016 PROGRESS REPORT, supra note 60, at 10.}

\textsuperscript{69. COWAN, supra note 50, at 12.}

\textsuperscript{70. Id.}
an increase in eight years. Since the program’s inception, over 50,000 families have completed construction of their homes.

Communities in rural America have a high percentage of low-income homeowners aging in place, making the preservation of existing single-family housing stock essential. RHS operates several programs designed to assist rural families seeking to repair or rehabilitate their home. Two RHS programs work to address this need: the Section 504 Loan and Grant Program and the Section 533 Housing Preservation Grant Program.

The Section 504 Loan and Grant Program provides funding for individual home repair and rehabilitation with an emphasis on the elderly. These funds can be used to finance the repair of roofs and toilet facilities and to improve the water supply. Unfortunately, this program’s usefulness is limited for two reasons. For over thirty years, the lifetime limit for Section 504 Grants has been $7,500. And a borrower is required to provide security for Section 504 Loans of $7,500 or more, typically by taking out a mortgage on the home.

The Section 533 Housing Preservation Grant Program makes funds available to nonprofits that manage housing rehabilitation programs. These funds can be provided as loans and grants with program delivery costs compensated to the nonprofit. Multifamily property owners in rural areas may receive these grants if they agree to make their rental units available to low- and very-low-income occupants.

2. Multifamily Housing Programs

USDA has served as the primary funding source for rural multifamily housing for the past fifty years. The Section 515 Rural Rental Housing Loans have been a critical tool for improving the quality of affordable rental housing in rural America. As of June 2016, there are 417,511 Section 515 units of affordable rental housing in 13,877 properties.

71. For example, in FY 2005, section 523 was funded at $34 million and in FY 2017 it was funded at $30 million.


73. Cowan, supra note 50, at 11.


75. Id.

76. Cowan, supra note 50, at 12.

77. Id.

Through this program, for-profit and nonprofit developers are eligible for low-cost long-term direct loans for the construction or rehabilitation of rural rental housing. In return for low-interest loans, tenant rents are set at thirty percent of the family’s income. Eligibility is limited to low-income households, with incomes not exceeding fifty percent of the AMI. Section 515 loans are fifty-year loans or thirty-year loans amortized for up to fifty years and feature interest rates subsidized to as low as one percent.

All rental housing units financed with Section 515 are exclusively targeted to those with the greatest needs, including lower-income families, the elderly, and persons with disabilities. Vast majorities (92.25% as of 2015) of Section 515 tenants have very-low incomes, earning no more than fifty percent of the AMI. The average Section 515 tenant earns just $12,377 each year. In addition, 62% all Section 515 households are elderly or disabled tenants, 31.2% are headed by persons of color, and 71.1% are headed by women. Because the Section 515 Loan Program can be combined with other rental subsidy programs, including the Section 521 Rural Rental Assistance Program, rents are more affordable to these at-risk populations. In fact, the average rent for a one-bedroom, Section 515-financed housing unit is just $488 per month. For many Section 515 tenants with limited means, the lower rents under the Section 515 program can mean the difference between being able to afford basic needs, such as nutrition and health care, and forgoing those needs to pay for rent.

A 2004 Comprehensive Property Assessment and Portfolio Analysis found that none of the Section 515 properties had the financial reserves to meet their projected capital needs for ongoing maintenance and repairs. At the time, it was estimated that $2.6 billion in additional funding was needed over the next twenty years—in the form of rental assistance or other financing tools—in order to preserve the portfolio.

In response to the findings from the 2004 report, in 2006, Congress established a Multifamily Housing Preservation and Revitalization (MPR) demonstration program, which authorized USDA to employ a variety of financ-
ing options to preserve the Section 515 and Farmworker housing properties in its portfolio. The goal of the MPR program is to revitalize the properties and extend their affordable use by recapitalizing properties through restructuring USDA multifamily housing loans and leveraging resources for other federal and state programs. This includes both Section 515 and Section 514 mortgages and is often done in conjunction with grants, private debt guaranteed under Section 538, tax credits, and other sources. The MPR has financed an estimated 26,459 units in 1,218 properties between 2006 and 2014.85 To date, the MPR effectively leverages three times its funds in investments from LIHTC and other sources. However, it remains a demonstration program subject to annual appropriations.

In 2016, USDA released a Comprehensive Property Assessment and Portfolio Analysis, which analyzed USDA’s Section 515 properties, its farm labor housing properties, Section 538 financed developments, and projects refinanced under the MPR program.86 The 2016 report found that the financial need to preserve the portfolio had more than doubled in the past twelve years, and it is now estimated that $5.596 billion will be needed over the next twenty years.87 Of that amount, $4.7 billion would be needed for Section 515 developments.88

More and more Section 515 properties are expected to exit the portfolio due to prepayment or mortgage maturity in the next twenty years. USDA data on the portfolio show that the rate of maturation and prepayment between 2016 and 2027 averages around seventy-four properties per year.89 In 2028, the number of properties exiting the USDA portfolio skyrockets to 407, averaging 556 properties per year between 2028 and 2032.90 Between 2032 and 2050, an estimated 12,530 properties will mature or be prepaid.91

Finally, RHS finances housing for domestic farm laborers through the Section 514 and 516 loan and grant program. Section 514/516 “is the only nationwide program to provide housing for farm laborers.”92 Loans and grants are used to purchase and renovate housing for domestic farm laborers, including retired and disabled farm laborers, and their families.93 Section 514 loans have an interest rate of just one percent and can

85. Id.
87. Id. at 2.
88. Id. at 22.
90. Id.
91. Id.
92. COWAN, supra note 50, at 12.
93. Id.
be repaid over thirty-three years. Section 516 grants can be used to cover up to ninety percent of the development cost. USDA has financed some 36,000 farm labor housing units for a cost of $1.27 billion. However, the level of funding for farm labor housing has steadily decreased over the years. Between FY 2009 and FY 2015, RHS awarded just 228 farm labor housing loans and grants totaling $241,343,356.

C. The Low-Income Housing Tax Credit

The Low-Income Housing Tax Credit (LIHTC) was created in 1986, was made permanent in 1993, and serves as the primary financing tool for developing and preserving affordable rental housing in communities all over the nation. LIHTC provides investors with a dollar-for-dollar federal tax liability reduction for ten years, in the form of annual tax credits, in exchange for financing for the development of affordable rental housing. Properties financed by LIHTC must comply with LIHTC eligibility requirements, which include rent restrictions and availability to low-income tenants, for fifteen years.

While LIHTC is a federal tax program, it is administered by the states, typically through state housing finance agencies. State housing finance agencies develop qualified action plans (QAPs), which are used to review and award applications from developers. A recipient developer leverages the credit to obtain the financial resources needed for a rental housing project. There are two types of LIHTCs: the nine percent credit and the four percent credit. Nine percent credits subsidize seventy percent of the low-income unit cost without additional federal subsidies, while the four percent credit subsidizes about thirty percent of the low-income unit cost for new construction with additional subsidies.

It is important to note for the subject of this article that between 1987 and 1994, thirty-one percent of all affordable housing properties financed with LIHTC also leveraged Section 515 Rural Rental Housing Loans. As funding for Section 515 has been reduced, rural communities find it more difficult to attract LIHTC investments. Between 1995 and 2009,
only nine percent of LIHTC-financed rental properties leveraged Section 515 funds.102

IV. Rural America Under President Trump

As discussed above, rural communities are smaller and have higher rates of poverty, which limits the tax base and results in less public financing for social services and infrastructure investments.103 In addition, many large nonprofit organizations, which play a gap-filling role in addressing community development needs, are located in metropolitan centers.104 Federal funding for community development programs has been reduced in recent years, and Rural Development programs have been cut particularly hard. Although it is early in the Trump administration, it remains to be seen whether the president will enact policies to address the economic and infrastructure issues facing rural communities. This section will discuss the administration’s approach to rural development thus far, as well as how Congress has acted in the first months of the Trump presidency.

A. The Administration’s Initial Response

Since taking office, the administration has indicated an intention to disinvest in Rural Development programs. Starting with the release of the so-called Skinny Budget in early May, the administration proposed to eliminate the Under Secretary for Rural Development and many of the programs that rural families depend on for housing and community services.

1. USDA Reorganization

On May 11, 2017, Sonny Perdue, the Secretary of Agriculture under President Trump, announced plans to reorganize the Department of Agriculture.105 In an official Secretary’s Memorandum, Advancing U.S. Agricultural Trade and Improving Service to Agricultural Producers, the Department stated that it would establish an Under Secretary for Trade and Foreign Agricultural Affairs and “elevate the importance of the activities carried out by the Rural Development mission area by” eliminating the Under Secretary for Rural Development and having the three Rural Development agencies report directly to the Secretary.106

104. Id. at 521.
106. Id.
This reorganization, which came in response to the President’s Executive Order 13781, *Comprehensive Plan for Reorganizing the Executive Branch*, was met by widespread concern from those who live and work in rural communities, as well as members of Congress. The Secretary submitted a Report to Congress on the proposed reorganization; however, it was largely silent on the rationale behind eliminating the Under Secretary for Rural Development. The administration stated that it would appoint an Assistant to the Secretary for Rural Development to help oversee these programs in place of the Under Secretary, but few details on the Assistant’s authority were released.

Rural advocates remained skeptical that eliminating the Under Secretary for Rural Development would in any way elevate the standing of Rural Development programs. The Rural Development portfolio—made up of the programs administered by RHS, RBS, and RUS individually—requires the dedication, authority, and proficiency of an Under Secretary to oversee their administration. The Secretary has many existing responsibilities that would limit his or her time to address the needs of the portfolio. Further, unlike the Under Secretary, the Assistant to the Secretary would not have the same level of authority to address the needs of rural Americans and is not a Senate-confirmed position, making the role less accountable to Congress.

With the release of the FY 2018 budget request, concern over the reorganization grew among those working in rural community development.

2. The Budget Request

On May 23, 2017, the administration released its Budget Request, *A New Foundation for American Greatness*. It included a $54 billion cut to nondefense programs overall and a $54 billion increase to defense pro-


grams. Further, the budget included deep cuts to—or complete eliminations of—almost all of the programs within the Rural Development mission area. The Budget Authority (BA) for programs in the rural development mission area was reduced by a total of $867 million from the FY 2017 level, representing a thirty-one percent reduction. As for specific programs, the RBS was completely eliminated; RUS programs fell from $8 billion programs to $6.2 billion, principally due to the elimination of the rural water-sewer loans ($1 billion) and grants ($480 million); and BA for housing programs administered by RHS dropped from $1.6 billion to $1.36 billion.110 Almost every direct loan and grant program, including Section 502 Direct, Section 504, Section 523 Mutual Self-Help Grants, Section 515, and Section 514/516 Farmworker Housing Loans and Grants, were zeroed out in the budget.111 Thus, while the Section 502 Guaranteed Loan Program remained intact, the programs designed to assist the lowest-income rural Americans were slashed.112

The budget request also created a new program, Rural Economic Infrastructure Grant Program, which was funded at almost $162 million. This program combined grants for low-income housing repair made by RHS (both Section 504 grants and Section 533 grants), grants for rural community facilities, grants for telemedicine distance learning, and grants to finance broadband transmission in rural areas.113 All four programs are individually zeroed out in the FY 2018 budget request and grouped together in the Rural Economic Infrastructure Grant Program—although a specific funding level for each grant type is not specified. Of the total funding amount, $80 million was set aside for communities in Appalachia through June 30, 2018. The 2018 USDA budget summary states that in creating a single account, Rural Development will be able to better allocate funds to projects that need them most.114

B. Congress Responds

Rural Development programs are funded through the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriation bill. By July 2017, both the House and Senate Appropriations Committees had approved their respective bills and reported them to the floor.

111. Id.
112. Id.
113. Id.
114. Id.
1. House Bill

The House Appropriations Committee reported out a bill that included a $350 million reduction to rural development programs. However, even with that reduction, the House Agriculture Appropriations bill (H.R. 3268) did not approve any of the outright eliminations proposed by the Trump administration in the Budget Request. For example, H.R. 3268 funded the Section 502 Direct Program at $900 million, Section 523 Mutual Self-Help Technical Assistance Grants were funded at $25 million, Section 504 loans were funded at $24 million, and Section 515 was funded at $23.39 million.

However, the House did follow the budget on two points. First, it did not fund the Office of the Under Secretary for Rural Development. Instead, it funded the Assistant to the Secretary for Rural Development at about the same level as the Under Secretary was funded in FY 2017.

Second, the House bill included the new grant program from the Budget Request, which it called the Rural Economic Infrastructure Account (REIG). The House bill funded this account at $122 million, setting aside $60 million for Appalachian communities. The House bill specifies that each eligible activity under the account must receive at least fifteen percent of the total provided under the Account—around $18.403 million per program. This means these crucial programs are at risk of significant cuts. For instance, in FY 2017, Rural Housing Assistance Grants, which included Section 504 grants and HPG, were funded at $33.701 million. If the Account is included in the final FY 2018 bill, these programs will receive at least a $15 million decrease.

2. Senate Bill

Total funding for the Senate Agriculture Bill (S. 1603) was about $350 million below a freeze at the FY 2017 rate, giving the Committee the flexibility to preserve Rural Development programs. As a result, many of RHS programs were funded at the FY 2017 rate, and several saw increased funding levels. Section 502 Direct Loans were funded at $1 billion, Section 523 Mutual Self-Help Grants were funded at $30 million, and Section 504 Loans were funded at $26.278 million, all level with FY 2017. The bill funds the multifamily programs level with the FY 2017 enacted rates as well: with Section 515 funded at $35 million, Section 514 at

117. Id.
120. Id.
$23.855 million, and Section 516 at $8.336 million. The MPR program is funded at $41.4 million. Notably, the bill does not include the REIG Account. The Senate bill instead funded the programs separately.121

The text of the Senate bill as submitted by the Appropriations Subcommittee on Agriculture was silent on the issue of the Under Secretary; however, Senator Tester (D-MT) submitted a bill and report language in the manager’s package, which was adopted by the full Committee, to fund the Office of the Under Secretary for Rural Development. Also included in that amendment was language that amends the Department of Agriculture Reorganization Act of 1994 to require that the Agriculture Secretary establish at USDA the position of Under Secretary for Rural Development and that the Under Secretary position is a Senate-confirmed position. In the end, the Senate bill provides funding for the Assistant to the Secretary for Rural Development and for the Office of Under Secretary for Rural Development.122

V. Recommendations for Modern Rural America

As shown in Part III, the administration already has many tools at its disposal to address the housing needs of rural communities. However, to improve the effectiveness of these programs, the administration should ensure that existing programs are adequately funded and review their policies and procedures to identify areas where improvements to existing programs can be made.

A. Adequately Fund Rural Housing Service Programs

For rural communities to develop and sustain strong local economies, certain basic services must be in place, including housing, water and wastewater systems, and broadband. Because rural communities are unable to spread the costs of these services on their own through private capital, federal investments and strong appropriations levels for Rural Development programs are essential.123

For over fifty years, USDA Rural Development has improved housing, utilities and community facilities, and economic opportunity for rural America. For example, in just FY 2016 alone, Rural Development made available over $29 billion in loans, guarantees, grants, and related assistance to over 157,000 individuals, businesses, nonprofit corporations, cooperatives, and governments.124 Rural Development has a proven track record

121. Id.
122. Id.
124. USDA RURAL DEVELOPMENT 2016 PROGRESS REPORT, supra note 60.
of success in managing this portfolio and protecting the federal government’s investment in America’s small town and farming communities.

The administration’s budget request is insufficient to support the housing and community development needs of rural Americans. Adequately funded Rural Development programs allow rural communities to address issues that they would otherwise be unable to because of a lack of economies of scale. For example, multifamily housing properties in rural communities average around thirty units per building, significantly smaller than the large apartment buildings present in the rest of America. Without the Section 515 loan program, these communities, and the people living in them, would be unable to afford decent rental housing.

The administration must support direct loan and grant programs to provide housing and community development services for low- and very-low-income rural families. Funding guaranteed loan programs alone are insufficient to meet the needs of rural communities, due to the low incomes of the residents. Of the active USDA Section 502 Loan portfolio, over seventy percent of Guaranteed loan borrowers are moderate income and only twenty-one percent are low income. Comparatively, Direct loan borrowers are entirely low or very low income: slightly more than sixty percent are low-income borrowers and nearly forty percent (39.1%) are very low income. In other words, without the Direct loan program, the over 200,000 Direct borrowers would not have their homes.

B. Improvements to Single-Family Housing

Rural Development has a big impact in rural America through its direct loan and grant programs, but with fewer than 5,000 full-time employees, the agency needs support to ensure that rural Americans have access to affordable financing options for their homeownership needs. It is extremely difficult for USDA’s Rural Development and RHS to deliver uniform, timely assistance to rural residents and communities. To help ad-


128. Rural Development Datasets, supra note 66.

address this need, nonprofit organizations increasingly provide technical assistance to households through programs like the Section 502 intermediary packaging program and the Mutual Self-Help Housing Program. The administration should support these programs and work to improve their policies to make them more efficient.

The Section 502 Direct packaging program was created to address the capacity issues that Rural Development faces. Through this program, trained loan packagers and intermediaries help low-income rural families through the Section 502 Direct Loan processing system by collecting and reviewing all of the necessary financial information. Because the loan package is reviewed before it is submitted to USDA, Rural Development staff do not need to spend time working with individual loan applicants to ensure that their applications were properly completed. This allows Rural Development staff to focus their time and resources on the underwriting process and other responsibilities and speeds up the processing time for loan packages. This program has been successful, and the administration should use this as a model for other areas where partnership with qualified nonprofit organizations could assist the efficiency of Rural Development.

Finally, as mentioned above, the Section 504 program has not increased its grant or loan limits for over thirty years. Further, this program has been underutilized across the country because of its overly burdensome application procedures and offers very low reimbursement for packagers. The administration should review its regulations and procedures regulating the Section 504 program to improve its usefulness for rural Americans. The administration also should look for ways to increase the use of the program through potential partnership with nonprofit organizations.

C. Improvements to Multifamily Housing Programs

For rural multifamily housing, the administration has numerous resources available not only to improve existing rural rental housing developments, but also to increase the availability of affordable multifamily housing in rural communities.

First, the administration should immediately begin updating its rules and procedures to adopt the provisions included in the FY 2017 omnibus and the House and Senate Agriculture Appropriations Bills for Fiscal Year 2018. The provisions are designed to provide tools for preserving the


existing USDA rental housing portfolio and would go a long way towards incentivizing nonprofit engagement in the multifamily housing preservation effort. As with single-family housing, mission-driven organizations are an important resource for preserving and maintaining affordable rental housing in rural America. In recognition of this fact, Rural Development should revamp rules to increase participation by nonprofit organizations and public housing agencies, including formularizing procedures that encourage these organizations to use LIHTC financing in the acquisition and preservation of Section 515 and Section 514 developments. Under current regulations, nonprofit agencies cannot include LIHTC proceeds in calculating return on investment.

Affordable housing finance is a complex business, particularly in rural markets where the tenants have such low incomes. Existing property owners, as well as other nonprofit groups interested in participating in this effort, need additional technical assistance to acquire and preserve Section 515 and Section 514 developments. Currently, many of the owners of Section 515 and Section 514 properties acquired their properties in the mid-1970s. As a group, they are nearing retirement and may be interested in selling or transferring their properties to get out of the property management business. Technical assistance to help understand the relevant rules and regulations and to identify available resources could help these owners exit the portfolio without degrading the USDA multifamily housing portfolio.

Furthermore, because the availability of rural rental assistance is contingent on a property having a Section 515 or Section 514 mortgage, USDA must address the emerging increase of maturing mortgages. One tool that USDA has to do so is the MPR. The administration should consider ways to improve the MPR and other tools to extend financing in Section 515 and Section 514 properties to continue rental assistance in those properties.

Finally, while LIHTC is a key ingredient in the preservation process, it is becoming increasingly difficult for rural properties to get the nine percent credits with their deeper subsidy rates. It is particularly difficult for rural properties to obtain the additional subsidy necessary for the use of the four percent credits. Policymakers at the state level should consider providing additional nine percent credits to rural areas. Or, failing that, they should encourage the greater allocation of HOME Investment Part-

132. H.R. 3268; Consolidated Appropriations Act, 2017; S. 1603.
nership Program and Community Development Block Grant funds to facilitate the use of the four percent credit in rural areas.

VI. Conclusion

There is a lot to be done in rural America to address the higher rates of poverty and lower incomes that have prevailed in the region for all of recent history. President Trump has many important issues to tackle on his agenda, but he should make sure to address the needs facing rural communities, which voted heavily in his favor. Existing programs at USDA Rural Development, particularly those administered by RHS, are essential tools for assisting hardworking rural families to meet their affordable housing needs. Through targeted capital investments, in the form of direct loan and grant programs for housing and community development, and by making improvements to existing USDA programs, the administration can have a positive impact on the quality of life in these communities.
The Nation’s Challenge and HUD’s Charge: Creating Communities of Opportunity for All

Jorge Andres Soto and Morgan Williams

I. The Significant Economic Costs and Health Risks Associated with Housing Discrimination and Residential Segregation

II. Implementation of the Fair Housing Act Is Central to HUD’s Mission

III. HUD’s Fair Housing Regulations Reflect a Careful Assessment of and Commitment to Its Statutory Responsibilities

A. Disparate Impact Rule

B. Affirmatively Furthering Fair Housing Rule

C. Harassment Rule

D. Equal Access Rules

IV. HUD Should Remain a Leader in Ensuring Robust Fair Housing Enforcement and Equal Housing Opportunity for All

A. Houston Affordable Housing

B. Missouri Discrimination Legislation

C. Westchester County Analysis of Impediments

V. The Fair Housing Initiatives Program Has Proven to Be an Effective Tool for Leveraging Public-Private Partnerships to Challenge Illegal Housing Discrimination

VI. Conclusion

One of the greatest challenges that faces our nation is the creation of communities of opportunity for all. The avenues of success for individuals and families are determined largely by where they live and what opportunities are available to them. The federal Fair Housing Act (the Act), passed in 1968 and amended in 1988, is designed to both ensure nondiscriminatory access to housing and create integrated neighborhoods of opportunity. The U.S. Department of Housing and Urban Development (HUD) plays a critical role in creating equal housing opportunity as it is responsible for a wide array of programs to create and sustain housing opportunities for people from all walks of life. Central to these responsibilities is HUD’s obligation to enforce the Fair Housing Act. HUD’s mission to enforce and implement the Fair Housing Act is far-reaching and

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touches every aspect of HUD’s work. HUD must provide affordable housing and development opportunities for individuals and communities, and it also must work to affirmatively ensure that its programs follow the Fair Housing Act and that the private market complies with the law. HUD’s role in this regard goes well beyond the provision of housing subsidies, community development funds, and mortgage insurance—HUD protects the right to equal access to those provisions as well as all other housing and related services.

Dr. Ben Carson, as the new HUD Secretary, has an opportunity to build on significant advancement that previous administrations, Democratic and Republican alike, made to better ensure fair housing choice and opportunity. President Ronald Reagan signed into law the Fair Housing Amendments Act of 1988, expanding fair housing protections to include persons with disabilities and families with children and to strengthen the HUD administrative complaint process. President George H.W. Bush’s administration made permanent the Fair Housing Initiatives Program (FHIP), ensuring that private fair housing organizations could assist the federal government in enforcing the Fair Housing Act on the local level. President Bill Clinton created effective FHIP implementing regulations. The administration of President George W. Bush helped to establish a steady stream of funding opportunities that leveraged the private-public partnerships established by the Reagan and H.W. Bush administrations. Most recently, President Barack Obama’s administration clarified the long-standing requirement to affirmatively further fair housing and created a uniform standard for disparate impact liability.

All of these presidents and their HUD secretaries worked to secure and expand the benefits of housing choice. President Donald Trump’s legacy on fair housing has yet to be realized. In the wake of the recent horror in Charlottesville and the rise in white supremacist hate and violence, it is more evident than ever that work to confront prejudice and discrimination in its varied forms is far from complete.

Concern about Dr. Carson’s commitment to fair housing lingers. Prior to his nomination for HUD Secretary, his most well-known position on any housing issue derived from an op-ed published in 2015. In that piece, he negatively compared HUD’s Affirmatively Furthering Fair Housing (AFFH) rule to “the failed socialist experiments of the 1980’s[,]” referring to the busing of students. In his nomination hearing, however, Dr. Carson stated repeatedly that he would enforce HUD’s AFFH rule, take a holistic approach to tackling America’s housing challenges, support rental assis-

tance programs, and advance fair housing goals. As has been the case with prior administrations, fair housing practitioners and civil rights advocates must demand that this administration and Dr. Carson pursue robust enforcement and implementation of the Fair Housing Act and support them in their efforts.

In this article, we discuss the significant economic costs and health risks that result from housing discrimination and residential segregation that require vigorous fair housing enforcement to address. We demonstrate the centrality of enforcement of the Fair Housing Act to HUD’s mission and how key fair housing regulations are critical to the full implementation of the Act. These regulations include rules aimed at implementing the AFFH provisions of the Act; clarifying the standard of liability under the disparate impact doctrine; formalizing standards for the investigation of harassment under the Act; and clarifying that discrimination on the basis of sexual orientation, gender identity, and gender expression is prohibited in HUD-assisted or -insured housing. We then analyze several pending matters where HUD has an opportunity to show leadership in enforcement of the Fair Housing Act. Finally, we highlight the important role of the Fair Housing Initiatives Program in the effective enforcement of the Act.

I. The Significant Economic Costs and Health Risks Associated with Housing Discrimination and Residential Segregation Warrant Strong Fair Housing Enforcement

There is a strong national interest in ensuring that the Fair Housing Act is implemented to the greatest extent possible. Put simply, housing discrimination creates inefficiencies in housing and financial markets. Economists have studied the negative impacts of discrimination on free markets for more than fifty years. In 1957, Gary Becker, a University of Chicago economist, published the first systemic analysis of the effect of discrimination on economic markets. In it, he used economic theory to quantify the


costly effects of prejudice on the earnings, employment, and occupations of minorities. Since then, many studies have built on his work.\footnote{\textit{See, e.g.}, \textit{David Rusk, The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners} (The Brookings Inst. 2001), \textit{available at} \url{http://www.brookings.edu/~/media/research/files/reports/2001/10/metropolitanpolicy%20rusk/rusk.pdf} (finding that in the 100 largest metropolitan areas, black homeowners receive eighteen percent less value for their homes than white homeowners); \textit{John Yinger, Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination} 98–103 (Russell Sage Found. 1997) (estimating the annual cost of discrimination in the mid-1990s housing market at $2.0 billion for Blacks and $1.2 billion for Hispanics).}

Doug Massey and Nancy Denton, in \textit{American Apartheid: Segregation and the Making of the Underclass}, observed that “barriers to spatial mobility are barriers to social mobility, and where one lives determines a variety of salient factors that affect individual well-being: the quality of schooling, the value of housing, exposure to crime, the quality of public services, and the character of children’s peers.”\footnote{\textit{Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass} 150 (1993).} Hypersegregation of Black people and Latinos in urban areas leads to inferior access to public services, education, jobs, and transportation, all of which have a negative economic impact.\footnote{\textit{See id. at} 148–85.} Segregation also contributes to wealth inequality because, for example, American familial wealth is closely tied to home values and homes located in neighborhoods with high concentrations of nonwhites tend to be undervalued.\footnote{\textit{See generally Melvin L. Oliver & Thomas M. Shapiro, Black Wealth, White Wealth} 12–35 (Taylor & Francis 2006). In the aftermath of the foreclosure crisis, communities of color have experienced a disproportionate loss of wealth. Between 2005 and 2009, median wealth adjusted for inflation fell by sixty-six percent among Latino households and fifty-three percent among African American households, compared with sixteen percent among white households. \textit{Rakesh Kochhar et al., Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics} 1 (Pew Research Ctr. 2011), \textit{available at} \url{http://www.pewsocialtrends.org/files/2011/07/SDT-wealthreport_7-26-11_FINAL.pdf}.} Discrimination also imposes significant costs on minority households when they search for properties to purchase, “whether or not [they] actually encounter discrimination.”\footnote{\textit{John Yinger, Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing}, 42 J. Urb. Econ. 339, 340 (1997).}

Open markets, free from discrimination, are critical to the prosperity of the housing market in the United States.\footnote{\textit{See Brief for Real Estate Agent Trade Orgs. as Amicus Curiae at} 5–11, Inclusive Communities Project v. Tex. Dep’t of Hous. & Comm. Affairs, 135 S. Ct. 2507 (2015), \textit{available at} \url{https://www.americanbar.org/content/dam/aba/publications/supreme-court_preview/BriefsV4/13-1371_amicus_resp_RETradeOrgs.authcheckdam.pdf}} The adverse consequences of segregation have long plagued our country, and efforts to reverse our na-
tion’s historic relationship with separate-but-not-equal must begin with equal access to housing opportunity. Without robust fair housing enforcement, our nation will never escape from what the Kerner Commission Report concluded in 1968—that “[o]ur Nation is moving towards two societies, one black, one white—separate and unequal.”\textsuperscript{11} The report was commissioned by President Lyndon B. Johnson to examine the causes of civil unrest in cities across the United States in 1967. HUD’s fair housing rules are crucial to reducing housing discrimination and undoing the persistent disparities that result from residential segregation.

Where an individual lives also determines a number of factors affecting health, well-being, and life expectancy. People of color are far more likely to be exposed to substandard housing conditions, including proximity to toxic waste and exposure to lead and unsafe water sources. As Dr. Eldrin Lewis, a cardiologist at Harvard-affiliated Brigham and Women’s Hospital, puts it, when it comes to health and well-being, “your ZIP code is more important than your genetic code.”\textsuperscript{12}

Unfortunately, recent headlines offer a number of blatant examples of this reality. A recent report from the Michigan Department of Civil Rights explicitly states that its commission on the Flint Water Crisis found that systemic racism was instrumental in the disparate health outcomes that resulted from the water crisis.\textsuperscript{13} Similarly, the Centers for Disease Control reported that “3-percent of black children, compared to 1.3-percent of white children, have elevated blood lead levels.”\textsuperscript{14}

Environmental hazards outside the home also play a part in long-term health and well-being outcomes. More than half of the people who live within two miles of waste facilitates are people of color—a number that is highly disproportionate.\textsuperscript{15} Residents of communities of color are also more likely to have limited access to healthy fresh fruits, vegetables, and

\textsuperscript{11} See \textit{REPORT OF THENATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS} 91 (1968).
\textsuperscript{14} See \textit{Childhood Lead Poisoning}, CRS. FOR DISEASE CONTROL & PREVENTION, https://ephtracking.cdc.gov/showChildhoodLeadRisk.
meats. Nationwide, predominantly Black neighborhoods house approximately half as many chain supermarkets when compared to predominantly White zip codes, and Latino communities have only one-third as many. Recent research from California Polytechnic State University shows that African Americans are less likely to live in walkable communities.

Persistent residential segregation exposes communities of color to greater health risks. These disparities can be seen in national obesity rates of African American and Latino neighborhoods, at 47.8% and 42.5% respectively, in contrast to the rate for Whites at 32.6%. In addition, nearly half of all African Americans have cardiovascular disease of some kind, while for White Americans this number is one-third.

Life expectancy, as a result of all of these factors, is intrinsically linked to place. In 2013, The Robert Wood Johnson Foundation’s Commission to Build a Healthier America mapped the life expectancy data for a number of cities and found variations based on where individuals lived. For example, in the predominantly White Lakeview neighborhood of New Orleans, residents were expected to live approximately 80 years, while in the Treme neighborhood of New Orleans (eighty-seven percent African American), the average life expectancy was only 54.5 years.

These many studies linking race to environmental hazards, life expectancy, and heart disease do not even touch on the significant mental well-being and overall quality-of-life factors. Exposure to violent crime and trauma, for example, is more likely to occur in many urban neighborhoods where residents are primarily people of color. A recent study based out of Atlanta’s Grady Memorial Hospital found that half of its patients, the majority of whom were Black, knew someone who had been murdered, two-thirds had been victims of violent assault, and one-third...
had been sexually assaulted. As a result, nearly thirty-two percent of patients suffered from post-traumatic stress disorder (PTSD) symptoms. Similar data was found in twenty-one cities with high homicide rates, and research shows that a number of zip codes in the United States have higher PTSD rates than the rate among returned veterans who fought in Afghanistan and Iraq.23

From a purely practical standpoint, these statistics must alarm housing and community development officials at every level. The Joint Center for Housing Studies at Harvard University projects that seven out of ten new households formed, the primary driver of housing demand, by 2023 will be households of color.24 Access to safe and affordable housing free from discrimination, therefore, must be secured for the future economic and physiological well-being of the nation.

II. Implementation of the Fair Housing Act
Is Central to HUD’s Mission

Our nation has a shared interest in ensuring that housing opportunities are available to every individual, regardless of personal characteristics. This shared interest also is embedded in the mission of HUD. Passed in 1968, seven days after the assassination of Dr. Martin Luther King Jr., the federal Fair Housing Act prohibits discrimination in housing and housing-related services on the basis of race, color, national origin, sex, familial status, religion, or disability status.25 The Fair Housing Act’s judicial interpretations and administrative implementation articulate a coherent U.S. housing policy that supports the development and maintenance of diverse and inclusive neighborhoods where every person has the community assets necessary to lead a fruitful, fulfilling life of opportunity.

In 1965, in the Act establishing HUD, Congress declared that the general welfare of the nation and the health and living standards of the people require “sound development of the nation’s communities and metropolitan areas in which the vast majority of its people live and work.”26 Congress found that the establishment of an executive department is desirable to “achieve the best administration of the principal programs of the Federal Government.”27 As HUD is tasked with the duty to administer the

26. Id. § 3531 (2012).
27. Id.
Fair Housing Act, fulfilling the promises of the Act for every person in the United States is a central component of HUD’s mission.

III. HUD’s Fair Housing Regulations Reflect a Careful Assessment of and Commitment to Its Statutory Responsibilities

Over the course of the Fair Housing Act’s nearly fifty-year history, HUD has spent considerable time and energy clarifying liability rules under the law and policies to better implement the Act. HUD’s fair housing-related regulations reflect a careful assessment and commitment to its statutory responsibilities under the Act. Through the required and appropriate public comment periods and stakeholder engagement, HUD has carefully considered the costs, public benefits, regulatory burdens, and its own obligation to effectively implement the Fair Housing Act. HUD should preserve each of the regulations described below and continue to enforce them vigorously.

HUD has worked to issue helpful and important regulations that serve as tools for victims of housing discrimination, communities, fair housing practitioners, and the housing industry. These are detailed in the following subsections and include (1) the adoption of a unified standard of liability for disparate impact claims; (2) issuance of regulations and guidance to assist local and state governments and public housing authorities that receive housing and community development funding in meeting their responsibilities to affirmatively advance the goals of the Act, as required by the Act; (3) clarification of a long-standing absence of regulatory guidance concerning the Fair Housing Act’s protections against harassment and hostile living situations and the responsibilities of housing providers to avoid such illegal acts; and (4) explanation that discrimination based on gender nonconformity that affects LGBTQ people falls squarely within the established sex protection of the Act in HUD-assisted and -insured housing. HUD’s fair housing rules should be maintained because they advance important statutory interests, provide important benefits that outweigh their costs, and respond to existing needs.

A. Disparate Impact Rule

The Fair Housing Act prohibits both intentional and facially neutral but unjustified policies or practices that have an illegal disparate impact on housing choice. Over the past several decades, every federal circuit that considered the issue found that the Act included a disparate impact claim, but they articulated somewhat distinct standards of liability. HUD’s final Disparate Impact Rule was intended to provide a unified

framework for proving liability. As recently as 2015, the Supreme Court affirmed the continued viability and importance of disparate impact claims under the Fair Housing Act and reinforced the existing jurisprudence that HUD considered when drafting its regulation. For decades, HUD also has applied the disparate impact standard in its administrative enforcement of the Fair Housing Act. The rule provides clarity and consistency under a single standard of liability for housing industry professionals when faced with disparate impact claims and gives the public a greater understanding of their rights.

The discriminatory effects standard has consistently been interpreted to cover and is necessary to address a range of both land use and other practices. With the Supreme Court reaffirmation of disparate impact and subsequent lower courts’ application of HUD’s disparate impact rule, HUD has a strong legal foundation on which to pursue vigorous disparate impact enforcement.

B. Affirmatively Furthering Fair Housing Rule

HUD has a statutory mandate under Section 808(d) of the Act to administer its programs in a manner that “affirmatively furthers fair housing.” This provision was built into the Act from the statute’s inception in 1968 and has been upheld by federal courts on numerous occasions. Given that mandate, if HUD fails to provide its grantees with clear guidance about how to fulfill their AFFH obligation, it leaves them exposed to greater litigation risk.

For many years, local officials sought greater clarity and guidance from HUD about what they should be doing to affirmatively further fair housing. HUD’s previous approach to implementing the AFFH mandate—through the requirement that grantees periodically develop an Analysis...
of Impediments to Fair Housing Choice—was neither well-structured nor well-administered, as the U.S. Government Accountability Office (GAO) pointed out in its 2010 report on this subject. In 2015, HUD published its rule on Affirmatively Furthering Fair Housing. The approach detailed in this HUD rule addresses many of the criticisms that GAO highlighted and provides HUD grantees with more structure, clearer guidance, and needed resources for identifying and addressing fair housing problems in their communities.

The rule was developed with considerable public input. Before developing the rule, HUD conducted a listening tour across the country, in large and small communities, to get input from local officials and other stakeholders about their ideas and concerns. During the public notice and comment period, more than 1,000 public comments were submitted to HUD through the Regulations.gov website. The Assessment Tools for entitlement jurisdictions and Public Housing Authorities (PHAs) that accompany the rule each went through a two-part comment process, as required under the Paperwork Reduction Act. HUD was also careful to ensure that strong local control mechanisms were set in place with the AFFH rule. It provides for robust community input, which means that the plans developed reflect local priorities and respond to each community’s unique circumstances.

HUD is providing its grantees with training, technical support, and a substantial amount of valuable data about their communities, along with a powerful data and mapping tool to aid in understanding and analyzing the data. These are highly valuable resources, especially for smaller communities with limited data analysis and mapping capacity. This tool and the accompanying data are also available to the public, which is another important benefit of the rule.

In addition to cities, counties, and states, the regulation also applies to PHAs. As HUD grantees, PHAs are obligated to affirmatively further fair housing and have been so obligated since 1968. Despite this, few PHAs have taken steps to fulfill this obligation. As a result, residents of public


and other subsidized housing have not had the full benefit of their rights under the Act and often have found their housing choices limited to neighborhoods that are highly segregated with significant concentrations of poverty. In many cases, these residents have not had access to the same range of opportunities as their counterparts in neighborhoods with less poverty and less segregation. Having PHAs undertake a fair housing planning process that facilitates their analysis of the extent to which the residents they serve are connected to the full range of opportunities they need, and which leads to the development of strategies to better connect those residents to opportunity, can only work to the benefit of the residents, the PHAs themselves, and the broader community.

HUD is still finalizing the modifications to the data and mapping tool to extract data for PHA service areas. Because of this, PHAs are not yet required to comply with the new rule, and with only a few exceptions, have no practical experience with its requirements. The few exceptions are PHAs that have chosen to collaborate with their local jurisdictions on an Assessment of Fair Housing (AFH). These include the Housing Authority of New Orleans and the Philadelphia Housing Authority, both of which were in the first round of submitters under the new rule. The Housing Authority of Los Angeles is currently working with the City of Los Angeles on a collaborative AFH. All of these partnerships demonstrate an important component of the design of the AFFH rule, with which some PHA commenters may not yet be familiar—the option for PHAs to partner with other PHAs, with their local jurisdictions, with their states, or with some combination of the three to conduct their fair housing assessments. Such collaborations allow some of the administrative and technical aspects of the process to be shared, reducing the resources that any single member of the collaborative must allocate to the process. They also enable PHAs to get the benefit of the experience, ideas, and strategic recommendations of their partners and to identify opportunities to work with other grantees to accomplish common goals identified through the AFH process. Finally, these partnerships are more likely to consider and to analyze the relevant housing markets, which often can be regional, resulting in better assessments. Thus, once the AFFH rule is fully implemented, and PHAs begin to participate in conducting AFHs, they will likely find that the benefits far outweigh any costs.

The fair housing plans developed under this rule will help jurisdictions and PHAs use their federal housing and community development resources more strategically, thereby strengthening social and cultural ties and boosting economic prosperity. It is critical for HUD to preserve the Affirmatively Furthering Fair Housing regulation, to continue to support its grantees in complying with the rule, to provide sufficient resources to bolster the critically important community engagement requirement of the rule so that a diverse chorus of community members have a seat at the table, and to finalize the remaining rule components that are needed for its full implementation.
C. Harassment Rule

HUD’s Harassment Rule formalizes standards to be used in investigations and adjudications involving allegations of harassment based on the Act’s protected classes. The final Harassment Rule is rooted in HUD’s authority to interpret and administer the Act. In particular, Sections 3604(b) and 3617 of the Act expressly protect an individual’s right to be free from discrimination with respect to one’s housing and the use and enjoyment of one’s housing. Yet discriminatory harassment in housing continues across the nation. In 2016 alone, private fair housing organizations reported a total of 640 complaints of discriminatory harassment, up from 591 in 2015 and 379 in 2014. HUDA’s Harassment Rule is and will remain critically important to helping housing providers understand and abide by their obligations under the law and assist tenants in identifying illegal behavior that threatens the full enjoyment of their housing.

D. Equal Access Rules

HUD’s 2012 Equal Access Rule clarifies that discrimination on the basis of someone’s actual or perceived sexual orientation, gender identity, and gender expression that is based on gender nonconformity is prohibited in HUD programs, including HUD-assisted or insured housing. Housing providers regularly refuse to rent to LGBTQ people because they believe that person acts differently from their notion of how a person of a particular sex should act. In 2016, private fair housing centers reported 150 complaints based on sexual orientation and 44 complaints based on gender identity. This rule is essential to ensure equal housing rights for LGBTQ people.

In 2016, HUD issued a new rule concerning the application of the Equal Access Rule to the treatment of transgender and gender-nonconforming people in temporary housing, emergency shelters, and other buildings and facilities used for shelter that have shared sleeping or bathing facilities.


41. See 42 U.S.C. §§ 3604(b), 3617.


44. Nat’l Fair Hous. All., supra note 42, at 79.
LGBTQ people, and especially transgender and gender-nonconforming people, are significantly more likely to experience homelessness and housing instability than the general population. In fact, forty percent of young people experiencing homelessness identify as LGBTQ or gender nonconforming. Given the disproportionately high rate of need, it is critical for shelter providers to understand their legal obligations in serving transgender and gender-nonconforming people. This rule “benefit[s] clients . . . by assuring that all clients receive equal access and will benefit the [Community Planning and Development]-funded facilities by making compliance with HUD’s equal access requirements easier.” Given these benefits, it is an utmost necessity that this rule be preserved and enforced vigorously.

IV. HUD Should Remain a Leader in Ensuring Robust Fair Housing Enforcement and Equal Housing Opportunity for All

HUD has the statutory and moral obligation to ensure fair housing opportunities for all. Segregation is a human-made construct—the result of laws and barriers largely put into place by local, state, and federal governments. For far too long, the legacy of segregation has besieged our nation, and, as such, HUD must continue to be a leader in ensuring robust fair housing enforcement. The following three recent matters illustrate pending fair housing enforcement and planning cases—Houston affordable housing, Missouri discrimination legislation, and Westchester Analysis of Impediments—and demonstrate the need for ongoing HUD leadership in ensuring meaningful implementation of the dictates and policies of the Act.

A. Houston Affordable Housing

HUD recently advanced fair housing goals in finding that the City of Houston failed to comply with Title VI of the 1964 Civil Rights Act by submitting to racially motivated opposition to deny the proposed Fountain View development. In a January 11, 2017, letter to the City of Houston, Texas, HUD laid bare factual findings regarding the city’s long history of perpetuating segregation in its siting of affordable housing and in caving to discriminatory public opposition to the Fountain View development. It is important that HUD continues to hold the city accountable.


46. Id.


under the law for the benefit of the residents of Houston, and as a message to cities across the country. The Department and the city should enter into a Voluntary Compliance Agreement to work towards reversing the city’s entrenched legacy of segregation.

In coming to its decision, HUD found that a staggering twenty-five out of twenty-six of the Houston Housing Authority’s developments are located in majority-minority census tracts and that of the sixty-eight Low-Income Housing Tax Credit projects that were issued local counsel resolutions of support between 2011 and 2014, only eight were located in districts with majority white populations.49 In a 2011 letter from HUD rejecting Houston’s Analysis of Impediments to Fair Housing Choice (AI) for that year, the Department noted that the city is the most racially segregated city in the State of Texas and the thirteenth most segregated city in the country. In the same AI, the City of Houston itself identified a substantial amount of housing discrimination occurring in the region and stated that “the lack of awareness of fair housing rights and general tolerance of housing inequities contribute greatly to the problem.”50 Acknowledging this, the city should promote open housing choice when determining where to site affordable housing developments, and HUD should continue to expect this of them.

There is extensive documentation of blatant and systemic discrimination in Houston, but HUD may consider withdrawing the letter of findings.51 To withdraw the letter of findings would be a major setback to HUD’s mission and would cause great harm to Houston residents who are impacted by the city’s perpetuation of residential segregation. It also would disregard the civil rights of low-income families and deny them access to the opportunities and amenities that the Fountain View site offers. HUD must remain a leader in the enforcement of our nation’s fair housing laws. A clear message must be sent that HUD stands for fair housing opportunities for all people in the face of racially motivated local and other opposition.

B. Missouri Discrimination Legislation

In February 2017, HUD sent a letter to Missouri officials regarding pending legislation that threatens the state’s substantial equivalency status.52
S.B. 43 is extremely troubling as it could spell serious concerns for Missourians if the Missouri Commission on Human Rights (MCHR) could no longer participate in the Fair Housing Assistance Program, which reimburses state and local governments for investigating and adjudicating complaints from the public alleging covered housing discrimination.

The legislature amended the bill to address some of the Department’s concerns. The amended bill qualifies the pure intent standard of demonstrating discrimination, but still operationally serves to remove disparate impact liability from the law; it no longer shields political subdivisions from punitive damages; and rather than focusing on housing, it applies generally to employment and the Missouri Human Rights Act, which includes housing. Several additional concerns remain. The enacted bill, signed into law on June 30, 2017, by Missouri Governor Eric Greitens, requires that claimants first file an administrative complaint as a precondition to having a private right of action, precludes protections against retaliation regarding housing discrimination, and includes other substantive provisions that raise fundamental questions about the designation of Missouri’s state housing antidiscrimination law as substantially equivalent to federal law.53

After SB 43 was signed into law, HUD notified the Missouri Human Rights Commission in a July 14, 2017, letter of its determination that its state fair housing law was no longer substantively equivalent to the federal Fair Housing Act for the reasons stated above and proceeded to withhold referrals of discrimination complaints.54 HUD serves an important role of ensuring discrimination complaint processes are administered in a manner consistent with the dictates of the federal Fair Housing Act, and HUD must continue to uphold these standards when localities or states run afoul of the Act.

C. Westchester County Analysis of Impediments

HUD must continue to hold Westchester County, New York, accountable for its continued resistance to carrying out the dictates of the AFFH mandate under the law. For years, Westchester County accepted federal dollars and used them to concentrate low-income housing in neighborhoods with few community resources. These practices prompted landmark litigation against it for its failure to meet its duties under the Act,

their areas of jurisdiction. (See Sections 810(f) and 817 of the Act, and 42 U.S.C. § 3535(d).) And such state and local governments can receive federal funding for complaint administration under the Fair Housing Assistance Program. The regulations governing substantial equivalence are located at 24 C.F.R. Part 115.


which it certified it would meet with each acceptance of federal housing and community development dollars.\textsuperscript{55} For more than a decade, Westchester County has ignored its responsibility under both the Act and an existing federal consent decree that were intended to ensure that federal dollars help provide real opportunity for all of its residents. In all of the eleven Analyses of Impediments to Fair Housing Choice it submitted to HUD, the county has refused to identify exclusionary zoning ordinances as a contributing factor to its historical residential segregation despite the clear evidence presented by advocates countless times. It is as troubling as it is accurate that the Second Circuit recently concluded that “it is apparent that the county is engaging in total obstructionism”\textsuperscript{56} on this matter.

HUD’s July 18, 2017, decision to accept Westchester County’s Analysis of Impediments is an ominous sign regarding the level of analysis and action HUD may initially require of federal grant recipients.\textsuperscript{57} Local advocates nationwide ultimately may challenge such lax enforcement. Subsequently, the Fair Housing Justice Center and Westchester Residential Opportunities, both private fair housing organizations that serve the county, filed a lawsuit in federal court challenging laws that zone out African Americans in the Town of Bedford, a city in Westchester County.\textsuperscript{58} These claims and other issues raised by advocates with HUD ultimately may require Westchester County to acknowledge that its zoning and land-use practices contribute to its sustained residential segregation in future assessments of fair housing activities.

V. The Fair Housing Initiatives Program Has Proven to Be an Effective Tool for Leveraging Public-Private Partnerships to Challenge Illegal Housing Discrimination

HUD’s Fair Housing Initiatives Program (FHIP) provides unique and vital services to the public and the housing industry by supporting a network of private-public partnerships with local fair housing organizations working in their communities. FHIP is the only federal funding available for private fair housing organizations to carry out fair housing enforcement and education. Private nonprofit fair housing organizations are the only private organizations in the country that dedicate themselves

\textsuperscript{55} For more information, see \textit{Westchester Case, Anti-Discrimination Ctr.}, http://www.ant biaslaw.com/westchester-case.

\textsuperscript{56} United States \textit{ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.}, N.Y., No. 16-2540-cv(L), 689 F. App’x 71 (2d Cir. Apr. 28, 2017).


to educating communities about their fair housing rights and the housing industry about their responsibilities under the Act, and that enforce the laws intended to protect us all from housing discrimination.

In 1987, Congress recognized the need to support the development of experienced private fair housing organizations to foster compliance with the Fair Housing Act, to complement the work of local and state government agencies and the federal government, and to assist the public in better understanding its rights and local housing providers in complying with civil rights laws. With broad bipartisan support and the endorsement of Presidents Ronald Reagan and George H. Bush, Congress created FHIP as a pilot program and shortly thereafter fully authorized the program.

President Reagan’s statement on the passage of the Housing and Community Development Act in 1987, which established FHIP, referenced the importance of fighting housing discrimination:

I’m also gratified by another provision of this bill which authorizes HUD to fund local, private organizations that are working to end housing discrimination. Too often—one case is too many—families and individuals seeking to buy or rent homes still confront bigotry and discrimination. Well, the fair housing initiative program section of this bill will help ensure that such racism will not be tolerated.59

Subsequent General Accounting Office (GAO, now known as the Government Accountability Office) reporting noted HUD’s satisfaction with grantee performance in the early years of the program.60 HUD and Congress have subsequently continued to strengthen and rely on the program.

FHIP is a competitive, performance-based grant program that is critical to an effective national fair housing education and enforcement infrastructure. The key components of the FHIP program are

- The Education and Outreach Initiative (EOI), which funds fair housing groups with proven records to inform the public about its fair housing rights, as well as local housing industry professionals on how to operate within the bounds of the law;

- The Private Enforcement Initiative (PEI), which provides funding for highly experienced nonprofit fair housing organizations to carry out complaint intake and the testing and investigation of complaints received from the public. PEI also funds grantees to assist individuals in the formal complaint filing process with HUD or local or state civil rights agencies; and


• The Fair Housing Organizations Initiative (FHOI), which supports the creation of new private nonprofit fair housing groups and the continued development of existing organizations.

Educational programs are critical in teaching people how to recognize and report situations that appear to violate the law; they also work to educate the industry about its fair housing responsibilities to prevent future fair housing violations. Enforcement programs build off of the education components of the FHIP program when necessary. The PEI component of the FHIP program helps to weed out meritless complaints, freeing up courts and administrative adjudicatory bodies and focusing resources on the investigation of claims that may truly involve discrimination.

For each initiative, applicants must meet particular requirements intended to make the best use of taxpayer resources. To qualify for FHIP enforcement funding, private fair housing organizations must meet time and experience criteria to prove their expertise in complaint intake, testing for fair housing violations, filing of meritorious cases, and financial management.

In a 2011 study commissioned by HUD, the FHIP program was found to provide several benefits for the effective and efficient administration and enforcement of the Act.61 The study found that FHIP grantee organizations weed out cases that are not covered by civil rights statutes, thereby reducing the cost burden of lawsuits and mediation that clog up the nation’s judicial and administrative enforcement systems. The vetting of complaints by fair housing organizations, who tailor their strategies to meet specific local market conditions, saves resources for HUD and state agencies that do not have to investigate nonmeritorious complaints, allowing them to focus their resources on other verifiably illegal activities. Through this network of private-public partnerships, private fair housing groups provide significant advantages in the federal government’s effective implementation of the Act throughout the nation.

For every individual conciliation or settlement stemming from an action initiated by an FHIP-grantee, many more housing units that otherwise would have been kept off the market for persons in protected classes are made available through improvements in policies and practices that increase housing choice. Families with children and people with disabilities are among the most likely persons to file complaints of discrimination, making the FHIP program absolutely vital to protecting their freedom of housing choice. The primary reason these groups file the most complaints is that discrimination against these persons is often obvious or stated by

housing providers, such as statements that a housing complex limits occupancy to one person per bedroom or that a request for a reasonable accommodation for a service animal is denied.

Private fair housing organizations funded primarily through FHIP provide broad benefits to the public through partnerships with advocacy and industry leaders. Private fair housing organizations are engaged in important work that also expands affordable and equal housing. Housing has become increasingly unaffordable, and this disproportionately affects families with children, people with disabilities, and households of color. Private fair housing organizations work in tandem with industry groups (and their local affiliates) like the National Association of Real Estate Brokers, Mortgage Bankers Association, Freddie Mac Affordable Housing Advisory Council, National Association of Realtors, and others to address fair housing issues in the rental, real estate, lending, and insurance sectors. The work of fair housing organizations at the national and local levels is critically important in addressing housing issues that affect millions of Americans.

In Fiscal Years 2016 and 2017, FHIP was funded at $39.2 million, down from $42.5 million in Fiscal Year 2014. This small amount covers fair housing services for the entire nation. Without FHIP funding, individuals and families who experience housing discrimination would have few options to redress these wrongs, and systemic policies and practices that limit housing choice for people of color, families with children, persons with disabilities, and others would go unchecked. The FHIP program allows HUD to efficiently and effectively provide community-level implementation and enforcement of fair housing laws that far outstrip HUD's own capacity to enforce the law.

In 2016, there were 28,155 complaints of housing discrimination filed, and private nonprofit fair housing groups investigated seventy percent of these complaints, more than twice as many as all local, state, and federal government agencies combined.62 Virtually all the fair housing organizations that received complaints were funded primarily by FHIP. As this cost-saving benefit of the program has become clear, HUD has reduced its overall share of complaints as the number of complaints that FHIP grantees investigate has gone up. In the same 2017 HUD study, it was noted that FHIP funding is a “critical component of the U.S. civil rights enforcement infrastructure.”63 Seventy-one percent of the cases in which a FHIP organization is a complainant or co-complainant result in conciliation of the claim or a finding that discrimination likely took place versus thirty-seven percent of non-FHIP referred cases.64

62. NAT’L FAIR HOUS. ALL., supra note 42, at 7.
63. Id. at iii.
64. Id. at 55.
FHIP-funded organizations are also the only private groups with the capacity to investigate and test complaints of housing discrimination. Courts, researchers, and practitioners have all recognized testing as the most effective way to detect housing discrimination.\textsuperscript{65} HUD, state, and local government agencies and the Department of Justice often rely upon the testing capacity of FHIP-funded organizations to further investigate complaints.\textsuperscript{66}

In short, the Fair Housing Initiatives Program is one of the most effective and efficient tools in the federal fair housing toolkit with tremendous impact at an extremely modest cost.

\textbf{VI. Conclusion}

As the Trump administration and HUD Secretary Dr. Ben Carson take the helm in carrying forward the nation’s housing policy, fair housing practitioners, civil rights advocates, and HUD leadership must work together to ensure actions throughout the agency adhere to the letter and spirit of the Fair Housing Act. The Trump administration and Dr. Carson have an opportunity to build upon the fair housing policy advances that recent administrations have achieved. In order to create more efficient markets and healthy communities, as well as to fulfill its central mission to create communities of opportunity for all, HUD has the responsibility to preserve existing laws, policies, programs, and guidance that assist victims of housing discrimination; to support local governments working to comply with the Act; and to educate housing consumers about their rights and housing providers about their fair housing responsibilities.

\textsuperscript{65} See, \textit{e.g.}, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

\textsuperscript{66} For more information on fair housing testing, see \textit{Fair Housing Enforcement Organizations Use Testing to Expose Discrimination}, Evidence Matters (Office of Pol’y Dev. & Research, Dep’t of Hous. & Urban Dev., Spring/Summer 2014), https://www.huduser.gov/portal/periodicals/em/spring14/highlight3.html.
Expanding Our Reach: Direct Client Representation vs. Policy and Advocacy Impact in a Transactional Clinic

Joseph Pileri

The 2016 presidential election was met immediately around the country with calls to action for lawyers to provide legal representation and resources to vulnerable populations that would inevitably be affected by the incoming presidential administration. Lawyers showed up en masse, for example, at airports to offer services to travelers and families impacted by the executive order banning individuals from several predominantly Muslim countries from entering the country.1 Those lawyers were not alone. Calls also went out around the clinical community to use clinicians’ positions and resources in ways that further our work on behalf of communities which suddenly found themselves potential targets of a new administration. Many transactional clinicians saw the outcry as an “all hands on deck” alarm and asked themselves how they could help.

Transactional clinics, compared with other law school clinics, face unique challenges in responding to threats facing client populations. Our colleagues in other clinics offer students the opportunity to work on advocacy projects, community education initiatives, impact litigation, or other work designed to achieve outcomes beyond individual client representation. Many transactional clinics, however, are structured entirely around representing individual entrepreneurs, businesses, and charities in a range of legal issues. This focus is the result of two phenomena. First, a disproportionate number of law students plan to pursue a transactional practice after graduation compared to the number of transactional experiences available in law school. Second, all clinical experiences are time-limited, and students generally have relatively little transactional law experience to draw on, limiting the amount of work that a transactional clinic can take on during the course of a semester. Representing individual businesses or nonprofits seemingly restricts the impact of students’ work—they can only represent one or two clients per semester. Many businesses and nonprofits remain unserved.

Every clinic faces trade-offs between directly representing individual clients and taking on projects with broader policy and advocacy goals. For transactional clinics, that trade-off is between giving students hard-to-obtain transactional experience through representing individual entrepreneurs and organizations and allowing students to assist a wider group through other initiatives. Balancing these trade-offs is particularly important for clinicians interested in leveraging student resources to make their clinics agents of change in a community.

This commentary explores different options for accomplishing these broader goals, trade-offs that these options pose, and how clinicians navigate those challenges. The following summarizes ideas and challenges, and suggests ways to balance trade-offs and further integrate change-making into clinic design. In the wake of the 2016 election, transactional clinicians will undoubtedly increasingly design clinic work around impact. This commentary aims to help those clinicians in that effort.

I. Making an Impact Through Direct Representation

Transactional clinics can be and already are impactful using a model of individual client representation. Transactional clinicians often pursue impact through individual client representation by (a) targeting a specific set of clients from underserved neighborhoods or backgrounds, such as returning citizens or program participants from a small business incubator in an economic redevelopment zone; and (b) representing nonprofit organizations whose programmatic work aligns with the goals of the clinic. Those goals include supporting disadvantaged entrepreneurs, supporting community economic development, furthering the growth of social enterprises and other mission-based organizations, creating sustainable businesses, building and preserving affordable housing, and addressing economic inequality.
Due to the various structures and mandates of transactional clinics, some clinicians are more limited in their ability to choose clients. Certain law schools require that transactional clinics serve student entrepreneurs and other clients affiliated with the university, while others are required by their university or funders to make their services widely available to the public. Several clinicians described having to balance these mandates with the desire to pursue broad impact, while others indicated that their ability to be change agents was heightened by having to take any client that comes through the door—a “public defender” model of guaranteed representation means that clients will not be denied representation because of sophistication or experience.

Below are examples from clinicians who have leeway in choosing clientele that have opted to take mission and impact into account when retaining clients. These examples demonstrate the ways that mission can be built into clinic design and the impact that transactional clinics can have on vulnerable communities.

A. Representing Returning Citizens

Since the spring 2014 semester, Georgetown’s SENL Clinic has worked with and actively recruited returning citizen clients or nonprofit clients that assist returning citizens. The SENL Clinic provides legal support to social enterprises, small businesses, and nonprofits in D.C. In spring of 2014, SENL Clinic students represented Women Involved in Reentry Efforts in its formative stages of development. The W.I.R.E. is a network of formerly incarcerated women who have successfully navigated the reentry process who in turn help mentor other returning women and educate policymakers and community members on the particular challenges women face during reentry. The student attorneys advised the W.I.R.E’s board of directors on entity structure options and the tax-exemption application process. The student attorneys also drafted governance documents and created a board manual for the W.I.R.E’s board of directors.

Student attorneys in the SENL Clinic also represented a returning citizen who had already started his own successful business and wanted to start a nonprofit to help other returning citizens learn job skills. The student attorneys assisted the returning citizen client with structuring the relationship between his for-profit business and the nonprofit arm, as well as


as preparing and filing all documents necessary for registration and tax exemption. SENL Clinic students presented legal workshops on various small business issues to participants in Aspire to Entrepreneurship, a pilot project for returning citizens developed by the D.C. Department of Small and Local Business Development, the D.C. Department of Employment Services, the Court Services and Offender Supervision Agency for D.C., Capital Area Asset Builders, and the D.C. Office of Returning Citizens. SENL Clinic students assisted a social enterprise that sells coffee and uses the proceeds to provide economic opportunity and job training to D.C.’s marginalized communities, including returning citizens. Finally, SENL student attorneys represented a returning citizen from the Aspire to Entrepreneurship pilot program in developing a business plan for his small business.

These projects accomplish several goals. First, they help individual returning citizens build businesses and organizations that are legally compliant and have structures that are thought out and built around specific organizational needs. They also create models that other returning citizen entrepreneurs can use when founding and growing their own organizations. By working with returning citizens and educating them on legal issues around entrepreneurship, the SENL Clinic empowers returning citizens to take control over their economic futures and put entrepreneurial ideas into action.

Following the success of these individual client projects, the SENL Clinic is exploring other broader projects to support returning citizen entrepreneurs. As the clinic director, Professor Alicia Plerhoples seeks out other opportunities to work with and support returning citizens in D.C. She is in talks now with a out-of-town small business incubator for returning citizens that is looking to expand and open a second incubator in Northern Virginia. She also has reached out to officials in D.C. government about the possibility of the SENL Clinic providing technical support for a potential initiative to encourage D.C. businesses to hire returning citizens.

B. Serving Entrepreneurs of Color

The EIC at Boston College gets a majority of its clients from small business incubators/accelerators Smarter in the City and AccelerateBoston. The incubators are located in two of Boston’s poorest neighborhoods, Roxbury and Dorchester, respectively. Both accelerators incorporate supporting entrepreneurs of color into their missions. Smarter in the City was the first accelerator in the Dudley Square area of Roxbury, a Boston neighbor-
hood that is not known for entrepreneurship. A high-tech accelerator, Smarter in the City provides six months of free workspace and professional mentorship to minority entrepreneurs.

The EIC provides free legal services to the accelerator cohort and alumni of both incubators. Smarter in the City is intentional about diversifying tech and diversifying entrepreneurship. The organization purposefully set up shop in Dudley Square rather than across the Charles River in Kendall Square, Boston’s well-known “innovation district” where MIT is located and where most entrepreneurial investment is directed. This partnership has been mutually beneficial for the EIC and Smarter in the City. The Smarter in the City projects are especially exciting for EIC students because the entrepreneurs working at the incubator are engaged in cutting-edge work. The startups need sophisticated and complex legal assistance, which EIC’s students are ready to offer. AccelerateBoston supports nascent small business owners in the Dudley Square and Roxbury communities as these neighborhoods begin to experience what looks like gentrification. AccelerateBoston helps community businesses within Roxbury and Dorchester stay in the community and mitigate displacement as the city strives to innovate and develop.

Both organizations are intentional about addressing the lack of opportunity for entrepreneurs in communities of color generally and in specific neighborhoods in Boston in particular. Smarter in the City, for example, explicitly states that it is showing a new face to both the city and the high-tech sector to overcome misconceptions about diverse peoples’ capabilities. By focusing on these neighborhoods, the EIC attempts to create some form of equality of access and to empower residents of the neighborhood by providing free legal advice that they otherwise would not have received. Diversifying entrepreneurship by focusing on a particular geographic community addresses racial justice, income inequality, and wealth inequality. Like the SENL Clinic, the EIC’s representation of businesses that are incubated by these organizations positions them to grow their operations and receive additional funding. This work also allows businesses to be stronger and more resilient in the face of legal risk, thereby increasing the odds that these companies survive and thrive and contribute to economic betterment in their communities.

C. Embracing Impactful Economic Models

In addition to the two examples discussed above, transactional clinics can effectuate change by implementing economic models like worker cooperatives or other worker-owned business structures. These models give economic power to members of underserved communities and have the potential to generate wealth for workers and communities that have been historically denied access to wealth. Recommending those models, however, must be balanced against client-centered lawyering. Students may recommend worker cooperatives or other models to their clients, but decisions about entity choice and business structure remain with
the client. That said, reference to the current political climate and the challenges that face client communities can be a powerful context for student recommendations. Economic models that enhance worker bargaining or political power vis-à-vis local governments and powerful private sector entities may be especially appealing to workers who feel disenfranchised. Clients will doubtlessly look to us for guidance on navigating what is sure to be a challenging and frightening time for many.

II. Impact Through Other Means

For the reasons discussed above, some clinicians find that using direct client representation as their sole tool for advocating for change is inadequate. While many clients are engaged in the work of coalition building and advocacy, student attorneys’ work is often limited to advising on contractual, corporate, tax, intellectual property, and other legal matters. Clinicians and students may feel disconnected from their clients’ advocacy and service work, and the clinic will necessarily limit its reach to the number of clients it can serve in a given semester. For that reason, transactional clinics increasingly pursue impact through alternative models of student work. Those models include (a) working with community coalitions in policy advocacy and other projects, including providing technical assistance to local government economic development initiatives; and (b) hosting workshops, clinics, or educational sessions for community members.

A. Legislation and Policy

Several transactional clinics already do or have begun to integrate legislative and policy advocacy directly into their clinic design. Legislative and regulatory reform,7 supporting efforts like “Ban the Box” legislation that seek to remove obstacles to employment8 and eliminating barriers to micro-enterprise,9 policy areas especially ripe for transactional clinics


8. “Ban the Box” refers to “a national campaign by civil rights groups and advocates for ex-offenders, aimed at persuading employers to remove the check box that asks if applicants have a criminal record from their hiring applications.” Transactional clinics, like those at Wake Forest University School of Law, help raise awareness for this campaign. Ban the Box, PRO BONO PROJECT, WAKE FOREST SCH. OF LAW, http://probono.law.wfu.edu/our-projects/ban-the-box/ (last visited July 10, 2017).

to add their expertise and experience. Some clinicians prepare action research reports\textsuperscript{10} and other white papers on these issues. These projects not only add support to the position in question; they also build the clinic’s reputation as a leader in a space and, in turn, attract more clients. Furthermore, they give students the opportunity to develop skills to which they would otherwise not have exposure through direct representation. Students working on legislative and policy projects have the opportunity to navigate complex multiparty ethical issues, learn and understand regulatory frameworks from the perspective of an advocate, collaborate and develop relationships with other students and organizations, manage large projects, and translate their legal knowledge and judgment into material that is to be broadly consumed.\textsuperscript{11}

Not all advocacy projects require the use of students, and clinicians often have the time and flexibility to undertake projects outside of their work with students. Beyond student-supervised work, clinicians, in their role as faculty members and scholars, can take on policy advocacy and other projects themselves that leverage their experience working with students and clients but do not require that students sacrifice valuable experiential time. Scholarship presents the opportunity for faculty to rigorously delve into issues affecting clients and propose legal solutions to these problems.Clinicians are well positioned to add stories from client work to otherwise esoteric or abstract debates. Professor Plerhoples, for example, is in the beginning stages of writing a book about building smart public policies to support returning citizen entrepreneurs. Some students may want to take on such projects, but this method does not require additional work from students or detract from the clinic’s ability to service its clients.

It also was suggested that transactional clinics can support advocacy measures by organizing clients and helping build coalitions of like-minded entrepreneurs and organizations. Transactional clinics often represent entrepreneurs from the same or similar communities or organizations with related missions. George Washington University Law School’s Small Business & Community Economic Development Clinic, for example, hosted a citywide convening on boosting entrepreneurship among returning citizens. Transactional clinicians can leverage their connections

\textsuperscript{10} For a discussion of action research, a method that combines action and service learning, see Susan R. Jones & Shirley J. Jones, \textit{Innovative Approaches to Public Service Through Institutionalized Action Research: Reflections from Law and Social Work}, 33 UALR L. REV. 377 (2010).

\textsuperscript{11} For a detailed discussion of the educational benefits of complex advocacy projects in a transactional clinic, see Laurie Hauber, \textit{Complex Projects in a Transactional Law Clinic}, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 247 (2009).
within the communities they serve and use their position to foster partnerships that bring advocates and would-be advocates together.

B. Educating the Community

Some clinics include community education among the projects that students handle. In these clinics, students give community workshops or develop educational materials to disseminate to the public or prepare form documents, guides, and other educational materials. The Community Development Clinic at the University of Massachusetts Law School developed a database for animal shelters that multiple organizations now use in their work. The SENL Clinic and others ask students to give workshops on legal issues affecting nonprofits and small businesses to accelerators, nonprofits, and other organizations working with the clinics’ clientele. The Small Business Legal Clinic at Lewis & Clark Law School has been working with local businesses in Oregon since the election to give entrepreneurs and business owners who depend heavily on immigrant workers “know your rights” presentations on businesses’ and employees’ rights in case of a raid by Immigration and Customs Enforcement.

Several clinicians noted that these projects require a substantial time commitment from students and that it is easier to fit these projects into a year-long clinic. That said, in addition to their impact, projects like these give students the opportunity to practice public speaking and writing for nonlawyers, important skills for when they enter practice.

III. Conclusion

Over a year since the presidential election, many of our colleagues may be interested in using their position to be agents of change in a way that goes beyond the services they provide individual clients. Transactional clinicians around the country are looking to redouble efforts described above and potentially supplement those efforts with new initiatives. The prospective implications of the new administration on our clients and their communities fuel this interest.

Nonetheless, some clinicians are reticent to be (or appear to be) too political or to bring their own political leanings into the classroom. Doing so has the potential to create an inimical classroom environment or alienate students with opposing political views. By producing animosity or devoting substantial amounts of classroom time to political arguments, time and effort that would otherwise be spent in service of clients is wasted. Some clinicians go so far as to bring in outside speakers on more politically sensitive issues to preserve their own appearance of impartiality.

Generally, however, the urgency of the current moment, combined with exposure to live clients, allows both faculty and students to overcome any perceived political differences. Exposure to clients and their work is powerful for students. Aside from learning real-world lawyering skills, students often absorb their clients’ sense of mission through their
representation. Further, clinicians’ enthusiasm and passion for their work are contagious. No matter the structure or methods, students pick up on that enthusiasm from professors. We should be thoughtful about how we integrate impact into our clinical design, but in turbulent times we can all be examples of passionate, tireless advocacy for our students. Doing so will ultimately have the biggest impact on our clients, our students, and our communities.
Transactional Clinics as Change Agents in the Trump Era: Lessons from Two Contexts

Priya Baskaran and Michael Haber

I. Introduction

The results of the 2016 presidential election and the efforts by the Trump administration to make sweeping changes to a wide range of federal policies have left communities across the country feeling overwhelmed and threatened. In its first year, the Trump administration has been working steadily to slash budgets for health care, housing, infrastructure, schools, and other public benefits that help low-income and middle-class Americans, while adopting policies and engaging in rhetoric that has made many immigrants, Muslims, people of color, and LGBTQ people feel increasingly vulnerable and marginalized.

The authors of this commentary run law clinics that provide pro bono corporate and transactional legal services to small businesses, nonprofits, cooperatives, and other entities that cannot afford private counsel. We teach at different law schools, in different geographical regions, and, since the election, we have both sought to work through our clinics to help our communities understand and confront the changes brought by the new administration. We work in very different contexts—Appalachia and suburban New York City—and the commentary begins by exploring how these contexts have led us to undertake this work differently. It then looks at the specific changes we have made in the design of our clinic seminars and in the kinds of cases and community projects we have undertaken and describes some lessons we have learned from these initial experiments as we seek to continue these efforts in the future.

Corporate and transactional lawyers sometimes find it hard to identify pro bono projects that mesh well with their skills and experience because litigation is often a more visible, tangible need for people who cannot afford attorneys. The article concludes with some ideas of ways that CED lawyers and other corporate and transactional attorneys can engage in similar work outside of the clinical context.

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II. Social Justice Lawyering and Transactional Law in Different Contexts

Although our contexts and the names of our clinics are different, there are a number of similarities between the substantive legal work done by the Community and Economic Development Clinic (CED Clinic) at the Maurice A. Deane School of Law, Hofstra University (Hofstra Law), and the Entrepreneurship and Innovation Clinic (EILC) at West Virginia University College of Law (WVU Law).

The CED Clinic at Hofstra Law represents twenty-five to thirty-five nonprofit organizations each semester, plus a handful of microenterprises, worker-owned cooperatives, social enterprises, advocacy coalitions, and other groups. Broadly speaking, cases at the CED Clinic fall in four categories:

(1) **Startup corporate and transactional law**—Helping new nonprofits, microenterprises, worker co-ops, social enterprises, and other entities structure their organizations or companies, choose corporate entities, and apply for tax exemption or negotiate and structure corporate finance terms;

(2) **Affordable housing development**—Helping both traditional community development corporations and community land trusts finance and develop affordable housing;

(3) **Collaborative “community lawyering” with advocacy organizations, community organizing groups, and coalitions of community groups**—Helping our clients understand the details of current laws and helping to support their organizing campaigns through legal research, policy writing and advocacy, and, less commonly, legislative drafting and litigation; and

(4) **General corporate law**—Working with our largely nonprofit client base on corporate and regulatory compliance, general contract drafting and negotiation, employment law, intellectual property, and other areas of law.

The EILC at WVU Law provides general transactional legal services to small businesses, nonprofits, community organizations, and individual entrepreneurs in West Virginia. WVU Law is the sole law school in West Virginia, emphasizing the importance of the EILC’s work in both training students and serving our client base. The EILC’s caseload includes the following broad categories:

(1) **Intellectual property**—Providing a variety of IP related services, ranging from advice on protecting IP to official registration with state and federal agencies. The EILC is part of the USPTO Law Clinic pilot program and provides assistance to clients seeking fed-
eral trademark registration. Through the generous support of the Claude W. Benedum Foundation, the EILC also assists student entrepreneurs throughout the state in seeking intellectual property protection through provisional patents, trademark registration, and copyright registration;2

(2) General corporate work—Advising clients on corporate and regulatory compliance, general contract drafting and negotiation, and employment law, much like the CED Clinic at Hofstra Law; and

(3) Transactional assistance to nonprofits and microenterprises—Serving a number of nascent social enterprises seeking advice on structuring. We advise these clients on the benefits and burdens of tax exemption, securities issues and other financing regulations, and general entity structuring options.

Our clinics share three underlying pedagogical goals common to many law clinics, what Professor Carolyn Grose, in her analysis of decades of scholarship about the aims of clinical pedagogy, calls clinicians’ “loose consensus” on pedagogical goals: (1) teaching students to generalize from their experiences and skills developed in one context so they can be used in other situations; (2) skills training, exposure to the lawyering process, and the development of professional judgment and values; and (3) exposing students to social justice and critical thinking through legal practice.3

As Professor Grose notes, social justice and critical thinking skills are approached by clinicians in a variety of ways. Some clinicians seek to expose students to the “underbelly” of the legal system—not the sophisticated appellate jurisprudence that is the focus of doctrinal classes, but the rough justice of the rules and procedures that are the day-to-day reality of the vast majority of lawyers’ practices when grappling with state agencies, small-dollar contracts, and county courts.4 In addition, clinicians may seek to train students to think critically about the legal system as a whole and about their place within it.5 Clinicians commonly seek to provide access to justice to the many low- and middle-income people who are

1. The Law School Clinic Certification program enables law students to practice before the USPTO under the strict supervision of licensed Law School Faculty. EILC students have the opportunity to complete trademark applications for clients. They also have the opportunity to respond to office actions and work closely with USPTO examining attorneys, https://www.uspto.gov/learning-and-resources/ip-policy/public-information-about-practitioners/law-school-clinic-1.
4. Id. at 495.
5. Id.
unable to afford legal representation. Finally, some clinicians seek to expose law students to injustice and the role that they may play as lawyers in helping low-income or marginalized people to obtain justice.

Transactional clinics are more likely to embrace some of these approaches to social justice and critical thinking skills than others. Whether the clients of a transactional clinic are mostly start-up businesses, nonprofits, social enterprises, or other types of entities, most transactional clinics focus their work on smaller, less well-resourced, less sophisticated entities that cannot afford private representation. Many transactional clinics aim to serve clients coming from or seeking to help communities in need of services, opportunities, and local economic development, regardless of whether their programs are framed as CED clinics or as business clinics. But while some transactional clinics focus on exposing law students to injustice and the role that they may play in helping low-income or marginalized people to obtain justice, many do not make this connection. In our current moment, ignoring how the Trump administration’s agenda impacts our clients and the communities we serve is not an apolitical act.

Our efforts to expose law students to injustice and the role that they may play in helping people to obtain justice are rooted in our contexts: the demographics and economies of our local communities, how the Trump administration’s agenda impacts our clients and the communities we serve, as well as the backgrounds and demographics of our student populations. For instance, Long Island, the iconic suburb of New York City that is home to Hofstra Law, is both deeply segregated and increasingly diverse, as the white population has declined and the number of Asian and Latino residents has more than doubled since 1990. West Virginia, conversely, is fairly homogeneous and White. While both regions have seen economic difficulties, Long Island’s median income remains very high despite often-segregated areas that face widespread poverty. West Virginia experiences high rates of poverty and unemployment, with almost 18 percent of households living below the poverty line and almost 7 percent unemployment.

6. Id. at 496.
7. Id.
8. ERASE RACISM, HOUSING AND NEIGHBORHOOD PREFERENCES OF AFRICAN AMERICANS ON LONG ISLAND 6 (2012) (“Long Island is one of the most racially segregated regions in the country.”).
11. ERASE RACISM, supra note 8, at 13.
Our students come to our clinics from different backgrounds, with quite different ideas about national politics and the Trump administration’s agenda, and with different career plans. Hofstra Law’s student body is relatively diverse, while at WVU Law, minority students typically make up between 8 percent to 11 percent of the class. A majority of students who have taken Hofstra Law’s CED Clinic in recent years are looking forward to incredibly lucrative careers at large law firms in New York City, while at WVU Law, a significant number of graduates will remain in the state and many work for very small firms of two to ten attorneys.

III. Changes to Our Clinics in the Trump Era

A. Seminar Design

1. EILC, WVU Law

Like all transactional clinics, EILC is tasked with turning students into actual practitioners, albeit under the student practice rule. Even students who have taken the basic business law courses like Business Organizations are still unfamiliar with the intersections between tax, financing strategies, IP ownership, liability, and the host of other factors that impact transactional practice. Each semester, the EILC includes primers on the blackletter law involving IP, partnership tax, unrelated business income for public charities, and other key topics.

Given the challenges of covering the basics of transactional practice, the EILC seminar did not initially include anything related to the national election. Post-election, it became clear that Appalachia was the center of a national dialogue both in the popular media and through policy discussions. Aside from the occasional, uncreative jokes, few people thought much about West Virginia or Appalachia until the 2016 election thrust it into the national limelight. Starting in the fall of 2016 as Donald Trump’s campaign began to gain momentum, there were many articles commenting on West Virginia as “the heart” of Trump country. These articles pre-
sented a number of theories for Trump’s popularity, ranging from continued economic disenfranchisement as the state’s major industry declined to darker motivations arising from geographic and cultural isolation.\textsuperscript{17} Regardless of the reasons behind his popularity, 68 percent of votes cast in West Virginia were in support of Donald Trump—the largest per capita support of any state.\textsuperscript{18}

As a program that advocates for West Virginia communities, there are some genuine concerns as to whether the Trump administration serves the best interests of the EILC’s clients. From the beginning, his proposed policies and budget cuts have burdened the economically distressed communities and individuals in West Virginia. For example, his proposed funding cuts continue to target the Appalachian Regional Commission (ARC)—a vital driver of jobs, training, and infrastructure development.\textsuperscript{19} The ARC is a partnership between federal, state, and local governments to create a regional economic development agency. The ARC serves thirteen states, though only West Virginia is entirely encompassed within the ARC’s boundaries. The ARC was formed to create a regional economic development strategy to combat the crippling poverty in Appalachia. ARC projects have funded vital infrastructure, including providing potable water and wastewater services to communities.\textsuperscript{20} The ARC also funds important workforce development initiatives, including retraining workers discarded by the shrinking coal industry.\textsuperscript{21} In June, the ARC awarded $899,791 to PRIDE Community Services “to develop a pool of construction trade professionals for the region.”\textsuperscript{22} The project will provide training pro-

\textsuperscript{17} See generally \url{https://www.nytimes.com/2017/03/04/opinion/sunday/i-remember-when-appalachia-wasn't-trump-country.html?_r=0}, \url{http://www.vanityfair.com/news/2016/02/donald-trump-supporters-west-virginia}.

\textsuperscript{18} \url{https://www.nytimes.com/elections/results/west-virginia}.

\textsuperscript{19} \url{https://www.washingtonpost.com/national/trumps-budget-targets-rural-development-programs-that-provide-a-quiet-lifeline/2017/03/21/0899fe5e-0df1-11e7-9b0d-d27c98455440_story.html?utm_term=.7287cb5d68e5}.

\textsuperscript{20} \url{https://www.arc.gov/about/index.asp}.

\textsuperscript{21} \url{https://www.arc.gov/news/article.asp?ARTICLE_ID=558}.

\textsuperscript{22} See \url{https://www.arc.gov/images/grantsandfunding/POWER2017/ARCEconDiversificationAwardsSummaries6-14-2017.pdf}. 
grams in construction trades as well as placement services for jobs. Additionally, the program provides support for individuals interested in starting construction-based small businesses in the region. The ARC has previously funded agricultural projects as well, including a farm incubator and training program. A joint initiative between the Coalfield Development Corporation, a 501(c)(3) organization and local redevelopment corporations across four counties, the Refresh Appalachia projects work to create sustainable small farms, creating jobs while increasing access to affordable produce for Appalachian communities. The loss of the ARC would be devastating to West Virginia, leading to a reduction in annual earnings by $15.7 million. Although these changes have not been executed yet, their very consideration indicates that the health and stability of Appalachia may not be a priority for the president.

The EILC must help students understand the very real consequences of Donald Trump’s proposed policies on our state. Many students have expressed support for this presidential administration, both by frank admission and contextual conversations. A social justice perspective helps students lay aside personal politics and critically examine government through the lens of community advocacy. As many of students will stay in West Virginia, the impact of developing these critical thinking skills can be significant. They are positioned to play an important role in deciphering the intersection of law and politics in their communities.

Using a social justice framework in seminar also enables frank and open discussions about poverty, race, and isolationism. The EILC is engaged in supporting economic development efforts of disenfranchised communities. All vulnerable communities share the burden of poverty; yet each community also experiences unique obstacles, like immigration status, substance-abuse issues, lack of infrastructure, or decaying infrastructure. As the media continued to depict Appalachia as homogenous and intolerant, it became important to draw deliberate connections between poor communities across the country. These connections served as an important opportunity to discuss both EILC students’ growing frustration with their perceived stereotyping by the national media as well as shed light on their biases when contemplating the problems of unfamiliar communities.

2. CED Clinic, Hofstra Law

Students in Hofstra Law’s CED Clinic sometimes have a hard time connecting deeply with the founders of our client entities, especially when those clients were formed by, and represent the interests and desires of,
low-income people or people who are unsophisticated about the types of
details that are required by government agencies in the process of forming
and structuring corporate entities. Clinic students tend to develop far
closer professional relationships with the younger, college-educated foun-
ders of client entities than they do with the founders of clients who come
from less similar backgrounds.

As a question of training students to become corporate lawyers, the
CED Clinic has rarely focused on this as a significant issue. One core com-
petency that the CED Clinic aims to instill in all students is the ability to
distinguish the corporate “persons” of our clients from the natural persons
who appear before us as the agents or founders of those entities. So when
students decline to conflate those agents or founders with our clients, it had
previously been counted as a pedagogical success, not a failing—better to
stick clearly on the side of legal ethics and client loyalty than to press stu-
dents in a direction that might cause them to lose track of those professional
priorities. But in our new era, when those agents or founders are low-
income people of color, immigrants, or LGBTQ people seeking to undertake
a project to help improve or protect their communities, the pedagogical tool
of ignoring the personal interests of the founders or agents of an entity to
concentrate exclusively on the interests of our organizational client may
take that approach to too far an extreme. Part of providing our legal services
to the community means engaging with community members in a mean-
ingful way, beyond narrow talk of corporate filings and financing options.
That means making a certain kind of human commitment to these individ-
uals, even if that commitment is not one to which we are bound by the rules
of legal ethics.

In the Trump Era, the CED Clinic has tried to teach students to prior-
itize our ethical obligation to our client entities, but also to try to connect
meaningfully with the people affiliated with those clients. Of course, this
can be a significant challenge for many law students, but it does prepare
students to be more effective community advocates and, hopefully, more
responsive and thoughtful lawyers for any kind of corporate entity they
go on to represent in their careers. To try to strike this balance, students
in the CED Clinic attend community meetings and client meetings
where there is no specific need for a lawyer25 in order to spend time fo-
cused on the stories of the people involved in our client entities. Students
are asked to look for ways that lawyers might be able to help with the is-
sues raised in community meetings, even if that legal work might not be
something the CED Clinic could take on itself. This approach has in fact
led the Clinic to become involved in some of the community projects
and collaborations described in Section B.2.

25. Naturally, client approval was obtained prior to attendance at such a client
meeting.
B. Clients and Other Community Projects

1. EILC, WVU Law

The EILC engaged in a number of larger impact projects in addition to direct services to clients. These projects are used as a vehicle for exploring (1) the intersection between law and policy and (2) opportunities for transactional attorneys to leverage their skills to create solutions. These projects have always responded to the needs of clients or communities. For example, the EILC was approached by a community organization concerned about a prevalent housing scam. In the summer of 2016, Southern West Virginia was crippled by a devastating flood that destroyed entire towns. One of the issues uncovered during the aftermath of the flood was the prevalence of “Rent-to-Own” scams. These scams target individuals who cannot secure traditional financing for home buying because of credit issues or insufficient savings for a down payment. A landlord will approach them with an option to buy a piece of property through rent and a small monthly installment. The tenants mistakenly believe they are entering into a seller-financed home purchase, but instead are entering into a lease with an “option to purchase” at some future date. Landlords also shift traditional burdens like repairs or taxes onto families in Rent-to-Own contracts, explaining (incorrectly) that they are owners/buyers and therefore responsible for these expenses. During the flood, some families lost homes they had personally invested money and time into repairing. These families could not receive homeowner assistance from FEMA because they did not own the home. They were only entitled to the significantly smaller “renter’s recovery” from FEMA. Families also could not receive assistance from charity groups rehabbing homes because they did not have the deed. Some individuals were even compelled by landlords to use their FEMA renter’s recovery money to fix a home they did not own. Often this small recovery amount was insufficient to repair the significant damage to the home. The EILC created consumer protection educational materials that were distributed throughout the county. The materials were designed to inform victims of their rights as well as help them avoid future scams.

The EILC continued this impact project model in creating resources for vulnerable communities in the new political climate. The EILC created educational materials and a sample contract surrounding temporary guardianship agreements. Many vulnerable, undocumented parents are concerned about losing custody of minor children if they are detained by ICE. These families are seeking education on their rights and assistance in protecting their children. They may want their children to stay with a neighbor or another caregiver rather than enter the foster-care system. They need information on collecting important medical, school, and other records to ensure their children can receive educational and medical services. The EILC helped prepare educational materials to help parents understand their rights and what proactive steps they should take in pre-
paring for possible separation. The EILC students also drafted a sample temporary guardianship agreement that could be used as evidence in court.26

The prospect of separation is a problem faced by other vulnerable parents as well, including parents entering a residential substance abuse treatment program. This project was an opportunity to create a tool for all vulnerable families in danger of losing custody of their children and an important means to discuss common ground between these groups. As substance abuse is a pervasive problem in West Virginia and one that can engender sympathy from students, it proved to be fertile ground for discussing the ways in which undocumented individuals are dehumanized much like individuals struggling with addiction.

2. CED Clinic, Hofstra Law

Hofstra Law’s CED Clinic has looked to push the boundaries of what we take on in our transactional clinic to be more responsive to new community needs arising out of changes brought by the Trump Era. This year, the CED Clinic has engaged in community education, policy advocacy, and collaborative efforts with other clinics—all work that would have been somewhat unusual in prior semesters.

Our major community education effort developed in response to requests from local small business owners and nonprofits that employed immigrants legally authorized to work through the Obama-era Deferred Action for Childhood Arrivals (DACA) program, which the Trump administration has announced plans to terminate.27 After developing some advice for a specific client, the CED Clinic wrote and disseminated a short white paper for local small businesses and nonprofits with immigrant workers who are confronting questions about DACA-authorized employees.

We also partnered with a client organization to conduct the legal research for its policy advocacy paper on regional segregation and the need for local governmental agencies to take meaningful steps to fight segregation in the face of planned federal cuts to affordable housing and fair housing programs.28 Although such a research project was outside of our ordinary legal work, many of our affordable housing develop-

26. In West Virginia, only a court can appoint a temporary guardian for minor children. However, agreements can be used as evidence for the parent’s intent, allowing families to create a plan in the event of separation.


per clients and many local community groups were gravely concerned that the Trump administration’s plans to slash HUD funding would destroy their housing opportunities and make Long Island a less welcoming place for people of color, immigrants, seniors, and low-income people.

Finally, the clinic has engaged in collaboration with other Hofstra Law clinics across our ordinary divisions. In the spring of 2017, the New York State Senate was considering the Liberty Act, which would adopt a state policy prohibiting local law enforcement from detaining or questioning individuals for suspected violations of immigration law or from asking about immigration status unless that status is an element of a suspected crime, or from holding immigrants beyond the period of time they are being held for state-related purposes. Hofstra Law Clinic faculty consulted with community organizations that are clients of the CED Clinic to determine what advocacy strategies might be most useful, and Hofstra Law Clinic faculty jointly wrote an op-ed describing the benefits of the bill. More recently, the CED Clinic has begun to explore the potential for collaborative projects around immigrant worker-owned cooperatives with our Deportation Defense Clinic.

The Hofstra Law CED Clinic has also made changes in how it selects its start-up nonprofit clients. The clinic previously prioritized client diversity as a core goal, seeking out clients that were varied in their sophistication, size, histories, and that reflected the geographical, racial, and ethnic diversity of the region. In the Trump Era, we have placed a greater emphasis on serving communities most under threat by the Trump administration’s policies, in particular Latino and immigrant communities.

IV. Lessons Learned for Our Clinics

A. How to Reduce Tensions in the Classroom

A vital component of the clinical classroom is creating a supportive and open environment to discuss sensitive and controversial topics. There are a variety of pedagogical tools used by clinicians including implicit bias trainings, discussion guidelines, and role-playing. Students in transactional or business law clinics often do not expect controversial social and political topics to arise as they might in criminal justice or family law clinics. This makes outlining expectations and classroom discussion guidelines at the outset that much more important.

Both of our clinics aim to provide a structure for tackling complex or controversial subjects. The students in Hofstra Law’s CED Clinic tend to be politically moderate or somewhat liberal and focused on practice in large, corporate law firms. For this group, potentially controversial topics

like cross-cultural lawyering and implicit bias are sometimes met by students who are less shaken by these ideas than they are uninterested in these topics, feeling that they are of less importance to their careers than the "real" legal work of negotiating contracts or drafting corporate documents. But discussing how implicit bias can impact women, people of color, and others in the supposed meritocracy of law schools and law firms\(^{31}\) can make the discussion more impactful for at least some students, and we try to move from that conversation to one where we discuss how similar forces may be at play in our clients’ lives.

WVU Law’s EILC provides structure for tackling complex topics by taking the following measures. First, the clinic emphasizes that attorneys must demonstrate the necessary “discipline required to address thorny situations with equanimity and critical insight.”\(^{32}\) This means actively engaging with topics that are politically and personally sensitive in the classroom. Second, the EILC uses an established framework—a modified version of the “five-lesson framework” outlined by Patti Alleva and Laura Rovner in *Seeking Integrity: Learning Integratively from Classroom Controversy*—to ensure respectful and honest discussion of controversial topics.\(^{33}\) Alleva and Rovner ask five questions to help students to deconstruct a topic, allowing them to fully engage while being cognizant of the personal and political tensions. The framework questions are assigned as part of guided discussion worksheet students must complete prior to class. The use of discussion questions requires students to invest the necessary time to examine and unpack difficult topics.

For each sensitive issue, students must answer:

1. What are the substantive law issues raised by this moment?
2. Is there a role the law is or should be playing in resolving the social/policy issues at stake?
3. What are the biases, assumptions, history, values, and other factors that may be affecting the positions people take on these issues?
4. Speaking personally, how do you feel about this topic?
5. What role should personal values play in our advocacy or position? Are these reasonable expectations? How would you achieve common ground or respectful disagreement?


\(^{33}\) Id. at 389.
Finally, the EILC uses structured classroom discussion to unpack these sensitive political and social topics. Class begins with an exploration of the five factor framework assigned in the discussion questions, enabling students to share their legal and policy issue spotting. The use of multimedia can help transition the discussion into the more personal and sensitive topics. For example, when teaching a class on the "Muslim Ban," I used an old episode of *This American Life* that outlined the refugee visa process. The episode provided key context for the longstanding issues with refugee visas as well as important insight into the legal issues, including vetting. The use of multimedia also allows students to react to the media and story, making them more comfortable to discuss the issue as opposed to defend their personal position. Once students are actively engaged in the discussion, personal responses and beliefs can be integrated into the discussion more easily. This creates the necessary foundation to explore the tensions between our beliefs, the law, the beliefs of others, and methods for reaching a resolution. Class ends with an emphasis understanding the varying perspectives and that resolution to these problems is unclear.

B. Collaboration Across Legal Fields

It is not uncommon for transactional lawyers in general, or lawyers who work in affordable housing and community development law in particular, to develop extremely narrow areas of expertise: lawyers may come to develop tremendous sophistication and specialization in tax-credit housing finance, green building law, or land use law, and rarely have cause or opportunity to look outside of that specialty. Because that level of specialization and expertise is not always needed in the clinical context, it is comparatively easy for transactional clinicians to tackle novel issues or to collaborate with other lawyers when new issues or crises arise for at-risk communities, communities of color, or low-income communities. For all transactional lawyers, but especially for those of us, like many clinicians, with more generalist practices, it is important to take this opportunity to understand how we can collaborate across practice areas to better understand and serve these communities.

C. Importance of Context

Our experiences at Hofstra Law and WVU Law demonstrate that engaged conversations with our students and colleagues and meaningful legal work that upholds the best values of the legal profession can help us become change agents in the Trump Era. One key to success is crafting a deliberate strategy that allows us to use our areas of expertise to meet the needs of our local contexts. An important theme in both of our clinics is exposing law students to injustice and the role that they may play as

lawyers in helping low-income or marginalized people to obtain justice. This requires our students to meaningfully engage with controversial topics and issues that affect our clients, their owners, members or employees, and their communities. This exposure is part of training the next generation of transactional lawyers to view critical thinking and an orientation toward justice as a part of their professional obligations.

V. Conclusion: How Community Development and Other Transactional Lawyers Can Undertake Similar Work Outside of a Clinical Context

In his article *Transactional Legal Services, Triage, and Access to Justice*, Professor Paul Tremblay argues that while transactional legal services are often seen as less important than litigation when viewed through the frame of triage, the importance of transactional lawyers in the struggle for social justice becomes far clearer when we employ a “long-term, capacity-building, and capital-nurturing metric” as our framework for analyzing the impact that we can play in providing access to justice.35 There are ample opportunities for transactional attorneys to provide critical legal assistance in support of people of color, immigrants, Muslims, LGBTQ communities, and low-income communities that seem to be increasingly under attack in the wake of the presidential election, and it is important for transactional lawyers to recognize that our skills may be used to serve immediate and obvious client needs, but can be just as important when used in support of the longer-term and capacity-building needs of at-risk communities.

Transactional lawyers are needed to provide direct legal services, advise clients on specific topics, and provide broader educational workshops that can provide information to a community desperate to understand new or proposed laws or policies. Some examples include the following:

- Transactional lawyers are needed to help undocumented business owners create succession plans to save their enterprises if they are detained. An immigrant’s business could be his or her life’s work, the main source of income for his or her family, and an important economic driver in his or her town—employing community members, providing key services, and sponsoring Little League teams.

- Transactional lawyers are needed to help employers understand the legal landscape to protect undocumented workers and ensure that their businesses continue to function in the event of sudden changes to their employees’ work status, ICE raids, or other government interference. Transactional lawyers are needed to take on simple contract work, like creating temporary guardianship agreements or powers of attorney to help families regain personal possessions of detained rela-

atives. If a person is detained while driving the family car, a power of attorney can help that person’s partner or spouse recover that vehicle, an essential possession for transportation to work or school.

• Transactional lawyers are needed to provide capacity-building legal support for nonprofits. Nonprofits venturing into working with undocumented communities can be subject to additional scrutiny, emphasizing the need for proper structure and compliance with state laws and IRS regulations. Attempting to participate in the sanctuary movement can have substantial implications for organizations, their governing boards, and even their individual members.36

• Transactional lawyers are needed by the broad network of organizations working with vulnerable communities who are often in need of additional assistance. Many charities and religious organizations are eager to have lawyers staff advice clinics, prepare documents, or hold workshops to educate the community on their rights. Transactional attorneys should explore opportunities to collaborate with these groups.

• Transactional lawyers are needed to adapt the legal toolkits that have been created by law firms, clinics, and legal services groups for one jurisdiction to be useable in other states or localities. For example, our clinics have adapted some of the materials created by the Small Business Legal Clinic at Lewis and Clark Law School, which has created robust educational materials on Business Succession Planning for undocumented business owners in Oregon,37 and the power of attorney form developed by the Arizona-based nonprofit No More Deaths that can be used to reclaim the possessions of detained immigrants and migrants.38

In these and many other ways, corporate and transactional lawyers have the skills to support communities of color, immigrants, Muslims, LGBTQ people, low-income communities, and other marginalized groups at a time of tremendous risk and justified concern. The need for these transactional legal services seem likely to only continue to grow and transactional lawyers should look for opportunities to stand up for those at the greatest risk in the Trump Era.

Is Social Innovation Financing Through Social Impact Bonds the Last Hope for Community Economic Development Programs During the Trump Administration?

Susan R. Jones

I. SIBs in the United States

A. The New York City Rikers Island Jail SIB:
   An Anti-Recidivism Social Service Intervention

B. Center for Employment Opportunities (CEO), New York’s Next Big SIB

C. Massachusetts Juvenile Justice Pay for Success Initiative (Massachusetts Juvenile Justice PFS)

D. Massachusetts Chronic Homelessness PFS Initiative (Massachusetts PFS Initiative)

II. Federal, State, and Local Government, Nonprofit, Higher Education, and Legal Support for SIBs

A. Federal Support

B. State and Local Support for SIBs

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The election of Donald Trump as president of the United States has caused an upset in American politics and further divided the country.¹ According to a 2017 American Psychological Association report, more than half of Americans said that the 2016 presidential election was “a very or somewhat significant source of stress in their lives”² and it seems matters have only gotten worse post the election. It is said that presidents are best judged by history but Trump’s campaign rhetoric, echoed by his actions in the first year of his presidency, and top cabinet appointments are worrisome when it comes to representing low-income, people of color, vulnerable, and underrepresented people. A few Trump insiders have been applauded by white supremacist groups.³ Indeed, former Chief Strategist Steve Bannon returned to Brietbart News Network, an alt-right aligned news opinion and commentary website and has vowed to further Trump’s policies of eliminating Obama era programs.⁴ Attorney General Jeffrey Sessions, an opponent of the Voting Rights Act of 1964, was rejected by a Republican Congress in 1986 for espousing racist views.⁵

⁵ Mary Troyan, Sessions’ Senate career shows mixed record on Voting Rights Act support, USA Today (Nov. 24, 2016), https://wwwusatoday.com/story/news/
Trump’s Supreme Court pick, Neil Gorsuch, is a legal conservative, expected to tip the scales of justice to the right. While increasing defense spending, the Trump budget proposes deep cuts in community economic development (CED) programs, eliminating, for example, the Community Development Block Grant Program.

One thing Democrats and Republicans seem to have agreed upon is the viability of social impact bonds (SIBs), also known as pay for success bonds, a public-private partnership touted as an innovation in social program financing, offering favorable interventions in prenatal and early childhood education and reductions in ex-offender recidivism and providing services for at-risk youth. U.S. SIBs are “backed by $91.6 million in private investment.” New SIBs are rapidly evolving. One study shows that eleven states and the District of Columbia have enacted some form of legislation relevant to SIBs and twenty-four states are exploring the use of SIBs or implementing SIB projects in areas of social need. Another study estimates that “39 states are in the midst of SIBs feasibility studies” while “nine SIBs are currently underway in the implementation stage” and “more than 50 more are in development.”

The Nonprofit Finance Fund (NFF), which monitors SIB activity through its website (www.payforsuccess.org), shows 164 results for all SIB activity, including legislation, projects and opportunities, one completed project, and twelve SIBs in progress.\(^{13}\) To further illustrate how fast the SIBs field is moving and the number of actors involved, The Urban Institute (UI), supported by the Laura and John Arnold Foundation, created a Pay for Success Initiative (PFSI) to strengthen Pay for Success (PFS) projects. It reports fifteen active PFS projects, six of which address homelessness.\(^{14}\)

The first SIB, a recidivism reduction project, commenced in 2010 at Peterborough Prison in the U.K., was lauded as a success in 2014.\(^{15}\) During five years of operation, supported by a team of social ventures, the Peterborough SIB involved two groups of 1,000 male prisoners serving short prison sentences and resulted in a 9 percent recidivism rate, exceeding the 7.5 percent outcome target. At the conclusion of the Peterborough SIB, seventeen investors saw a return of capital plus a 3 percent invest-


\(^{14}\) Maya Brennan, *Ending Family Homelessness: An Opportunity for Pay-for-Success Financing*, *URB. INST.* (Aug. 2017), available at http://pfs.urban.org (last visited Sept. 28, 2017); see also Press Release, U.S. Dep’t of Housing & Urb. Dev., HUD & DOJ Award $8.7 million to Prevent and End Homelessness, Pay for Success Model to Support Permanent Supportive Housing for the Reentry Population, June 24, 2016, available at https://hud/press/press_releases_media_advisories/2016?HUDNo_16-099 (last visited Sept. 29, 2017). The PFS grantees, grant amounts, and locations are: The Corporation for Supportive Housing ($1.3 million, Los Angeles); Third Sector Capital Partners, Inc. ($1.3 million, Eugene/Springfield/Lane County, Oregon); United Way of Anchorage ($1.3 million, Anchorage/Matanuska-Susitna Borough, Alaska); Rhode Island Coalition for the Homeless, Inc. ($1,297,624, State of Rhode Island); University of Utah ($1.3 million, Tucson/Pima County Arizona); American Institutes for Research ($1.3 million, Montgomery County/Prince George’s County, Maryland); and Ending Community Homelessness Coalition, Inc. ($881,376, Travis County/Austin, Texas).

ment return; it was said to have facilitated more than £300 million through 89 SIBs in nineteen countries.¹⁶

There is SIB activity in Australia, Belgium, Canada, France, Germany, India, Ireland, Israel, Korea, the Netherlands, New Zealand, Peru, Poland, Portugal, Switzerland, the United Kingdom, and the United States.¹⁷ Social impact investing is monitored by the Global Impact Investing Network, “a nonprofit organization dedicated to increasing the scale and effectiveness of impact investing around the world” and commonly referred to as “the GIIN.”¹⁸

SIBs took root in the United States in 2012 and have been described as “complicated financial vehicle[s] . . . unfamiliar to most investors” and “an emerging must-have practice area for all major wealth managers.”¹⁹ Notwithstanding the rapid growth in the field, there has been little written in the legal literature²⁰ about federal support for SIBs, state legislation, local activity, and the rapid growth of SIBs and their impact on CED. In addition, in today’s unprecedented tumultuous political climate, it is also useful to consider how SIBs are viewed in the nonprofit sector, the role of higher education with respect to SIBs, and how lawyers are supporting the development of the field. Some observers believe, despite their growth, that the number of SIBs may be limited because they are complex legal contracts, involving multiple parties, lacking uniform


legal drafting models, with high transaction costs.\footnote{Mark Hrywna, \textit{Massachusetts Launches Non-Guaranteed Social Impact Bonds}, \textit{Nonprofit Times} (Jan. 29, 2014), http://www.thenonprofittimes.com/news-articles/massachusetts-launches-non-guaranteed-social-impact-bonds/; see also Teicher, \textit{Authorizing Pay for Success Projects}, supra note 11.} At the same time, other observers compare the emergence of SIBs to that of the Low Income Housing Tax Credit and New Market Tax Credits programs, now well entrenched in the legal and policy landscape.\footnote{22. The Local Income Housing Tax Credit (LIHTC), which was made possible under Internal Revenue Code Section 42, “is an indirect federal subsidy for qualified low-income housing . . .” Investors earn tax credits in exchange for equity in affordable housing projects. \textit{The Legal Guide to Affordable Housing Development} 251–54 (Tim Iglesias & Rochelle E. Lento, eds. 2011). NMTC, administered through the Community Development Financial Institution Fund of the U.S. Treasury Department, gives credit to taxpayers who make Qualified Equity Investments in Qualified Community Development Entities. \textit{Id.} at 380–81.}

This article examines whether this new, fast growing, and innovative investment strategy can be an effective CED tool at a time when governments around the world are considering pay for success models and cash-strapped U.S. states are seeking ways to cut costs and improve service delivery to needy populations. SIBs are generally structured so that the government pays investors a return on investment only for programs with measureable and proven results but there are other models, including base interest rates, that allow a return to investors prior to program evaluation.\footnote{23. Hyrwna, \textit{Massachusetts Launches Non-Guaranteed SIB}, supra note 21; see also Teicher, \textit{Authorizing Pay for Success Projects}, supra note 11. For example, in the Utah SIB investors were paid a base interest rate of 5.0%, see \textit{infra} note 139.}

Part I explains what social impact bonds are, how they work, and why they are gaining traction. Part II examines the federal government’s support for SIBs, state and local level involvement with SIBs, and the roles nonprofit organizations, universities, and lawyers play in SIB deals. Part III is a case study of D.C.’s Pay-For-Success Contract Authorization Act of 2014,\footnote{24. D.C. \textit{Code} § 2-211.01 (2016); D.C. \textit{Code} § 2-211.03 (2016).} which enables a pay for performance fund.\footnote{25. \textit{Id.}} It also discusses SIB projects underway and in the planning stages in the Nation’s Capital.\footnote{26. \textit{Id.}} D.C. is among the jurisdictions that have enacted SIB enabling legislation.\footnote{27. Hathaway, \textit{Social Impact Bonds}, supra note 10 (The National Conference of State Legislatures reports that eleven states and the District of Columbia have enacted SIB legislation: Alaska, California, Colorado, Idaho, Maine, Maryland, Massachusetts, New Jersey, Oklahoma, Texas, Utah, and the District of Columbia).} Part IV considers whether SIBs are the last hope for social programs during the Trump administration and their potential impact on CED movement.
I. SIBs in the United States

A SIB is a form of impact investing, a broad term for many types of investments with positive social, economic, and/or environmental goals coupled with a financial return. The Global Impact Investing Network (GINN) defines impact investments as those “made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return.” The GINN and J.P. Morgan reported in an annual survey that there is “a total of USD 77 billion in capital allocated to impact investing.” Impact investors are diverse, ranging from pension funds, financial advisors, family foundations, and institutions to government investors and nonprofit organizations. According to the GINN, impact investing is governed by four core characteristics. The first, intentionality, means that the investor must intend for the investment to have a positive social or environmental benefit. Second, the investor must expect a return on investment or a return of capital. Third, impact investing involves a range of financial returns and asset classes. The rate of return may range from below market to risk adjusted and include “cash equivalents, fixed income, venture capital, and private equity.” Fourth, impact must be measured.

SIBs are a relatively new form of impact investing. Contrary to its name, a SIB is not a bond; the name is derived from investors’ interest in the social impact of the investment alongside a financial return. A SIB has been defined as a “contract with the public sector or governing authority, whereby it pays for better social outcomes in certain areas and passes on part of the savings achieved to investors.” The investment bank Goldman Sachs defines it as “an innovative and emerging financial instrument that leverages private investment to support high impact social programs.”

The first U.S SIBs were created in 2012 in New York and Massachusetts. SIBs are known as Pay for Success Financing, Pay for Success

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31. GINN, What You Need to Know About Impact Investing, supra note 29, at 1.
32. Id.
33. Id.
Bonds, and Pay for Success Contracts (PFS) because payment is contingent on measurable outcomes and successful completion of the chosen social program. SIBs are also distinguishable from socially responsible investing. SIBs and PFS are used interchangeably but the term SIB is used more often in international context.

As innovative financing tools, SIBs are public-private partnerships between multiparty stakeholders—investors, state and local governments, nonprofit organizations, and private foundations—which enter into legal contracts to finance and oversee social programs where stakeholders agree that there can be measurable results and cost savings to government from investment in these social programs. SIB sponsored social programs have included prenatal and early childhood education, enhancing academic achievement, workforce readiness, reducing ex-offender recidivism, services for at-risk youth, reducing child abuse and neglect, homelessness prevention, preventative health, assisting foster care children, and the environmental effects of climate change through green infrastructure. If the programs are successful and save the government money, investors will receive a return on their initial investment, which may be from the government’s cost savings.

While each SIB is different, SIBs basically work as follows: The government identifies a social service need and a beneficiary population, contracts with an intermediary to broker the SIB, specifies required outcomes, and pays the investors a fee if contractual performance benchmarks are met and save the government money. What makes SIBs different from other kinds of public-private partnerships is this: the government repays the investors only after social service results have been achieved. If the social service results are not achieved, the government does not pay for the social program. Governments may use the cost savings from a successful program. The New York SIB is the Center for Employment Opportunity, available at http://data.gov.uk/sib_knowledge_box/new-york-state-reducing-offending. The Massachusetts SIB is the Massachusetts Juvenile Justice Pay for Success Initiative, available at https://data.gov.uk/sib_knowledge_box/massachusetts-reducing-juvenile-reoffending (last visited Sept. 30, 2017).

37. TriLinic Global, What is the Difference Between Impact Investing and Socially Responsible Investing, http://www.trilincglobal.com/trilinc-blog/difference-impact-investing-socially-responsible-investing/ (last visited July 24, 2017) “Impact investing is distinctly different from socially responsible investing in that socially responsible investing typically applies a set of negative or positive screens to a group of publicly listed securities—for example, a mutual fund that avoids investments in tobacco, alcohol and firearms. Impact investing goes beyond a passive screen by actively seeking to invest in companies or projects that have the potential to create positive economic, social and/or environmental.”


SIB outcome to fund payments to investors. Investors, also known as impact investors or social impact investors, such as banks, private investors, and foundations, lend money to one or more nonprofit social service organizations. A number of investment banks such as Bank of America, Merrill Lynch and Goldman Sachs, have invested in SIBs.40

The intermediary organization is said to have the most significant role because it oversees the SIB; contracts with the government; chooses the nonprofit service provider; raises capital from impact investors; and provides multi-year funding to one or more nonprofit organizations that have a proven, effective, replicable, and scalable social service intervention. The intermediary also works with an evaluation advisor as well as an independent assessor. A nonprofit service provider is chosen for the delivery of a preventive, evidence-based social program. An evaluation advisor monitors the SIB’s progress and works with the intermediary and the nonprofit service provider to make improvements as needed throughout the life of a SIB. Finally, an independent assessor monitors the government’s repayment structure to investors if pre-determined contractual performance targets are met.41

To better understand how SIBs work and their impact on CED, the next section examines a few of these new SIBs.

A. The New York City Rikers Island Jail SIB: An Anti-Recidivism Social Service Intervention42

The Rikers Island SIB in New York City was designed to address the social problem of recidivism among juveniles, sixteen-to-eighteen years of age, serving time at Rikers Island, New York City’s largest jail. Almost 50 percent of these incarcerated youth reoffended within one year of being released and were not receiving social services to help them be successful after incarceration. The New York City government contracted with the


42. OFFICE OF JUSTICE PROGRAMS IN THE BUREAU OF JUSTICE STATISTICS, https://www.bjs.gov/index.cfm?ty=qa&iid+322 (last visited Sept. 28, 2017). Definitions may vary by state. Rikers Island is sometimes referred to as a prison but according to the Office of Justice Programs in the Bureau of Justice Statistics, “[j]ails are locally operated short-term facilities that hold inmates awaiting trial or sentencing or both, and inmates sentenced to a term of less than one year, typically misdemeanants. Prisons are longer-term facilities run by the state or federal government that typically holds felons and persons with sentences of more than one year.”
nonprofit social research intermediary, MDRC, with a goal of reducing recidivism for an annual group of 3,000 young men leaving Rikers Island. MDRC managed two nonprofit service providers, the Osborne Association and Friends of Island Academy. MDRC received a $9.6 million loan from Goldman Sachs, the investor that provided working capital for the Rikers Island anti-recidivism social service intervention.

The Rikers Island SIB is unique because Bloomberg Philanthropies guaranteed the four-year loan to MDRC “by making a grant of $7.2 million to MDRC,” which held “the grant in a guarantee fund to back the loan from Goldman Sachs.” In the event juvenile recidivism on Rikers Island was not reduced by 10 percent, MDRC could “use the grant to repay Goldman Sachs a portion of their principal.” This arrangement meant that if the SIB failed to meet the 10 percent target, as did happen, Goldman’s end loss would be only $2.4 million instead of its entire $9.6 million investment.

The evaluation advisor in the Rikers Island SIB was the Vera Institute of Justice. It used an “evidence-based intervention . . . called the Adolescent Behavioral Learning Experience” focused “on personal responsibility education, training, and counseling . . .” In July 2015, the Vera Institute found that the SIB had not reduced recidivism and the program ended in August 2015. In this instance, the government did not pay investors, but had the SIB been successful and resulted in a 8.5 percent to more than 10 percent recidivism reduction rate, Goldman’s profit could have been between $500,000 and 2.1 million, depending on rate of “recidivism.”

43. Costa, New York City and Massachusetts to Launch the First Social Impact Bond Programs, supra note 36.
44. Osborne Association, http://www.osborneny.org (last visited July 24, 2017) The Osborne Association “has an 84 year history of leadership working with currently and formerly incarcerated men, women, and children and families affected by incarceration.”
45. Friends of the Island Academy, http://www.friendsny.org (last visited July 24, 2017). Friends of Island Academy is “a non-profit that supports and brings opportunity to youth during and after their time in New York City jails.”
47. Costa, New York City and Massachusetts to Launch the First Social Impact Bond Programs, supra note 36.
48. Chen, Goldman to Invest in City Jail Program, supra note 46.
49. Id.
50. Vera Institute of Justice, https://www.vera.org/about (last visited July 24, 2017). The Vera Institute of Justice seeks “to drive change . . . urgently build and improve justice systems that ensure fairness, promote safety, and strengthen communities.”
51. Id.
Even though it did not meet its targeted goals, the Rikers Island SIB was labeled a “highly useful tool” and hence a success for a number of reasons. First, governments traditionally spend money on social programs such as reducing recidivism regardless of whether the programs achieve their goals. SIBs allow the government to measure impact and in this case to assess why the evidence-based cognitive behavioral therapy program, deemed effective at recidivism reduction in other contexts, was unsuccessful in Rikers Island. Second, and most significantly, New York City taxpayers did not pay for this social experiment. Third, private capital bore the risk of testing the innovative idea. Fourth, because SIBs require data, metrics, and benchmarks, nonprofit service providers and government can gain insight from data and use it more effectively; this result is not available in a traditional social service model where data is collected after the fact, tracking the amount of service provided or the number of beneficiaries receiving the service. Fifth, the New York City government contends that the buy-in from Rikers Island officials planted seeds for other criminal justice innovations. Sixth, given Goldman’s role as the first major SIB investor, interest in this impact investment strategy has grown. Seventh, despite the Rikers Island SIB’s failure, Goldman has invested in three more SIBs, one of which was deemed a success. This shows an underlying commitment by Goldman to social innovation through SIBs.

Critics argue that SIBs are not without challenges. First, they cost the government real money because they require time spent by government officials and staff. Second, SIBs divert investments away from philanthropy and increase the burden on the third sector, thereby undermin-
ing claims that the private sector is bearing the SIB risk. Third, the complexity of social problems requires comprehensive and multiple interventions and not short-term results; “quick fix” approaches to social problems may hinder public discourse about the complexities and realities of social problems. Finally, critics observe that privatizing social services is not the answer. “Other approaches, such as reducing misdemeanor arrests, disrupting the school-to-prison pipeline, changes to the bail system, and raising the age of criminal responsibility would have significant impact on the numbers who cycle though Rikers. If the goal is to solve social problems, not privatize the public sector, we should consider a simpler solution—public investment in schools, jobs, social programs, and innovative criminal justice.”

B. Center for Employment Opportunities (CEO), New York’s Next Big SIB

In contrast to the Rikers Island SIB, supported by institutional investors, including Goldman Sachs, which backed the SIB with its own capital, the CEO SIB tested private investors’ appetite for social impact investing. “Bank of America and Merrill Lynch offered the investment to its private banking clients [and] . . . more than 40 high net worth investors committed to $13.5 million.” While the minimum investment was $100,000, the average individual investment was $300,000 for five-and-a-half years. Investors in the CEO SIB included the likes of the Sorenson Impact Foundation, 

60. Cohen, What We Learned from the Failure of the Riker Island Social Impact Bond, supra note 52.
62. Id.
63. Cohen, What We Learned from the Failure of the Riker Island Social Impact Bond, supra note 52.
64. See also Sorenson Impact, http://sorensonimpact.com/about/ (last visited May 13, 2017). James Lee Sorenson, the son of a billionaire who left his fortune to charity, created the Sorenson Impact Foundation, which is “working on three separate but closely related projects, including the Sorenson Global Investment Center (commonly known as the SGII Center), pay for success financing, and an impact investing fund.” Devin Thorpe, Wealthy Entrepreneur Focused on Impact Investing, FORBES MAG. (Feb. 25, 2015), https://www.forbes.com/sites/devinthorpe/2015/02/25/wealthy-entrepreneur-focuses-on-impact-investing/#11376b9372d2.
the Robin Hood Foundation, the Laura and John Arnold Foundation, and the Pershing Square Foundation.

The CEO SIB was brokered by the intermediary, Social Finance, the path breaking nonprofit that helped to plant the UK SIBs model in the United States. The development and multi-party negotiation process, which took fifteen months, resulted in a 130-page contract between the parties: New York State; the intermediary, Social Finance; and CEO, the subcontractor.

Like other SIB service providers, CEO is a high-performing nonprofit with thirty-five years of experience perfecting its own social enterprise employment program and “its four-step process of life-skills training, transitional job training, full-time placement, and job retention . . .” CEO’s longstanding program, measured by a 2004 random-assignment trial “achieved a 16 to 22 percent reduction in recidivism for recently released participants; some high risk groups showed even better results.”

Like the Rikers Island and other prison recidivism SIBs, CEO estimates that its program will provide the state with a cost savings of “$60,000 per individual per year.” Once again demonstrating that each SIB is different, a U.S. Department of Labor pilot program testing PFS contracts will cover service delivery repayment in the program’s initial two years. Investor repayment will commence if CEO is able to reduce recidivism by “36.8 bed-days per person, or 8 percent, compared to individuals not receiving CEO’s services and better performance results may earn investors up to 12.5 percent after five and a half years.”

While some expect single digit returns, after “the minimum is met, investors get 100 percent

65. ROBIN HOOD FOUNDATION, https://www.robinhood.org/ (last visited July 6, 2017). The mission of the Robin Hood Foundation “is to improve the living standards for 1.8 million low-income New Yorkers.”

66. LAURA AND JOHN ARNOLD FOUNDATION, http://www.arnoldfoundation.org/ (last visited July 6, 2017). “The Laura and John Arnold Foundation’s core objective is to improve the lives of individuals by strengthening social, governmental and economic systems.”


68. See CENTER FOR EMPLOYMENT OPPORTUNITIES, https://ceoworks.org/ (last visited July 24, 2017). “CEO’s employment model is built on a social enterprise that provides crew-based maintenance labor services for primarily public sector customers. CEO operates 70+ work crews every day, serving transit agencies, housing authorities, parks departments, and more, and offering participants paid employment within a week of enrollment in the program.”

69. Bank, Rebuilding Lives, supra note 19, at 5.

70. Id.

71. Id.

72. Id.
of the state’s savings until their capital is repaid, then split additional savings 50-50 up to the cap.” 73 If the reduction in recidivism in better than anticipated, the state benefits from the savings.74

The CEO SIB results will be measured by the New York State Department of Corrections and Community Supervision using a randomized control trial (RCT)75 comparing 2,000 CEO participants to non-CEO participants. Chesapeake Research Associates76 is the independent evaluator and investors will receive quarterly project updates.77 The SIB, which began in 2013, has an investment life of five and a half years and remains underway.78

C. Massachusetts Juvenile Justice Pay for Success Initiative
(Massachusetts Juvenile Justice PFS)

While the Rikers Island SIB award was a brokered, close-door deal, announced by former New York City Mayor Michael Bloomberg, the Massachusetts SIB was based on solicited proposals for intermediaries and nonprofit service providers in the areas of chronic homelessness and juvenile justice.79 In addition to the Massachusetts Juvenile Justice PFS, a $27 million effort and the largest PFS investment in the United States, the Commonwealth has authorized a total of $50 million for PFS projects.80 The Massachusetts SIB is a partnership between Third Sector Capital Part-

73. Id.
74. Id.
76. See NONPROFIT FINANCE FUND, Chesapeake Research Associates, http://www.payforsuccess.org/organization/chesapeake-research-associates (last visited July 6, 2017) (Chesapeake Research Associates is a policy research and evaluation firm based in Annapolis, Maryland.).
80. Id.
ners,81 the intermediary; Roca,82 the service provider; the Commonwealth of Massachusetts; and six private investors.83 Its goal is to reduce the government’s yearly incarceration expenses of $55,000 per person and reduce the number of incarceration days by 40 percent. If the goal is met, Massachusetts would save nearly “$1 million to $45 million” while success payouts would be $0 to $27 million.84 Throughout this SIB, Roca will receive monthly referrals from criminal justice agencies of young men deemed to be high risk who will participate in its program aimed at increasing employment opportunities and reducing recidivism.85

Massachusetts was the first state to enact PFS legislation86 and a “Social Innovation Financing Trust Fund”87 designed to assuage concerns about whether Massachusetts “would honor the contracts if the governorship changes hands or parties.”88 Massachusetts engaged Third Sector Capital Partners as the intermediary to oversee, manage, and launch its PFS initiative and to work with the nonprofit service providers and investors. Roca, the nonprofit service provider, was chosen because of its twenty-five years of experience operating a “job readiness, educational, and life skills non-

81. THIRD SECTOR CAPITAL PARTNERS, INC., http://www.thirdsectorcap.org/ (last visited July 8, 2017). Third Sector is a 501(c)3 “nonprofit advisory firm” that has “worked with four communities to launch six Pay for Success contracts.” It collaborates “deeply with communities to re-write how they contract for social services, re-aligning vast amounts of public resources to move the needle on social problems.” Founded in 2011, Third Sector has offices in Boston, San Francisco, and Washington, D.C.

82. See ROCA, http://rocainc.org/ (last visited July 8, 2017). “Roca’s mission is to disrupt the cycle of incarceration and poverty by helping young people transform their lives.”


85. Id.

86. See generally MASS. GEN. LAWS Ch. 10, § 35VV (2012); Teicher, Authorizing Pay for Success, supra note 11, at 5; see also CORPORATION FOR NATIONAL & COMMUNITY SERVICE, http://www.nationalservice.gov/programs/social-innovation-fund (last visited July 24, 2017).

87. See generally MASS. GEN. LAWS Ch. 10, § 35VV (2012).

88. Teicher, Authorizing Pay for Success, supra note 11, at 5; see also Deborah Burand, Globalizing Social Finance: How Social Impact Bonds and Social Impact Performance Guarantees Can Scale Development, 9 N.Y.U. J. L. & BUS. 447, 473–78 (2013) (explaining political risks in SIBs deals, the importance of executive leadership within the government hosting a SIB, the risks of changing leadership and the need for “special authorization and appropriate legislation to ensure that the host government has sufficient legal authority to bind itself to a long-term pay for success contractual obligation”).
“profit” and its use of “proven behavioral change theories,” along with a “proven track record of reducing incarceration rates among highest risk individuals.” Agreeing to “defer $3.3 million in fees, which will be paid only if the agreed-upon outcomes are met,” Roca’s “intensive four-year program includes outreach, case management, life skills, educational, pre-vocational and employment training, and work opportunities with community partners.” If the program is successful, Roca would be able to expand its work to include 391 more men, serving a total of 1,320 formerly incarcerated persons over a nine-year period.

Third Sector Partners facilitated $10 million dollars from private investors including: the Goldman Sachs Social Impact Fund ($9 million in loans); the Kresge Foundation ($1.5 million in loans); Living Cities ($1.5 million in loans); the Laura and John Arnold Foundation ($3.7 million in grants); New Profit Inc. ($2 million in grants); and the Boston Founda-

89. Costa, New York City and Massachusetts to Launch the First Social Impact Bond Programs, supra note 36.
92. Goldman Sachs Social Impact Fund, http://www.goldmansachs.com/what-we-do/investing-and-lending/impact-investing/index.html (last visited July 8, 2017). “The GS Social Impact Fund is one of the first domestic impact investing vehicles to be sponsored by a major financial institution, and is being launched by the Urban Investment Group (‘UIG’), which has invested over $5.0 billion of GS capital in impact investing from 2001 to date.” The fund provides a double bottom line of a “financial return and measureable social impact,” giving investors the chance to “deploy capital to address a range of pressing social challenges in the U.S, while also seeking a risk-adjusted financial return.”
93. See Kresge Foundation, http://kresge.org/ (last visited July 8, 2017). “The Kresge Foundation is a $3.6 billion private, national foundation that works to expand opportunities in America’s cities through grantmaking and social investing in arts and culture, education, environment, health, human services and community development in Detroit.”
96. See New Profit Inc., http://www.newprofit.org/ (last visited July 7, 2017). “New Profit Inc. (New Profit) is a national nonprofit venture philanthropy fund” whose “mission is to break down the barriers that stand between people and opportunity in America.” It “works with visionary entrepreneurs, philanthropists, and other partners to upend the status quo and transform the way America
tion ($300,000 in grants). Unlike the Rikers Island SIB, in which Bloomberg Philanthropies guaranteed 75 percent, SIB financing is not guaranteed by other nonprofits or foundations in the Massachusetts Juvenile Justice PFS.

Throughout the project, Massachusetts will pay 5 percent annual interest to Goldman Sachs, a primary lender, and 2 percent annually to two junior lenders, Kresge Foundation and Living Cities. In the final year of the project “Roca and Goldman could receive up to $1 million and Kresge and Living Cities up to another $300,000 each. . . .” The contract for the Massachusetts Juvenile Justice PFS SIB is for seven years with a possible two-year extension if positive outcomes are achieved.

D. Massachusetts Chronic Homelessness PFS Initiative (Massachusetts PFS Initiative)

The second SIB in the Commonwealth, the Massachusetts Chronic Homelessness PFS Initiative, launched at the end of 2014, is a six-year initiative to provide 500 supportive housing units for up to 800 people, almost half of Massachusetts’ 1,500 chronically homeless people. The PFS contract partners include United Way of Massachusetts Bay and Merrimack Valley, the fundraising intermediary; the Massachusetts Hous-
ing and Shelter Alliance, an the lead partner; and two major investors, the Corporation for Supportive Housing, which is the first Community Development Financial Institution (CDFI) to invest directly in a PFS, and Santander Bank. NA. Root Cause is the independent evaluator. The Harvard Kennedy School Social Impact Bond Technical Assistance Lab, now known as the Government Performance Lab (GPL), which provides free technical expertise to state and local governments, assisted with the initiative by providing the Commonwealth with help on design and data analysis.

Enabled through the Massachusetts Social Innovation Financing Trust Fund, which authorizes up to $50 million in PFS contracts and the state’s full faith and credit, this PFS contract is financed by $1 million in philanthropic support and partner investments mentioned earlier. If the PFS Initiative successfully provides housing to chronically homeless individuals for one year, Massachusetts will be able to not only cover its costs for the intermediary and the evaluator, but it will also be able to repay investors a return of up to 5.33 percent. Michael K. Dirkin, President of the United Way of Massachusetts Bay and Merrimack Valley, observed that

103. See MASSACHUSETTS HOUSING AND SHELTER ALLIANCE, http://www.mhsa.net/ (last visited July 8, 2017). “The Massachusetts Housing and Shelter Alliance (MHSA) is a nonprofit, public policy advocacy organization dedicated to ending homelessness in Massachusetts.”

104. See CORPORATION FOR SUPPORTIVE HOUSING, http://www.csh.org/ (last visited July 8, 2017). The mission of the Corporation for Supportive Housing is “to advance solutions that use housing as a platform for services to improve the lives of the most vulnerable people, maximize public resources and build healthy communities.”

105. See ROOT CAUSE, http://www.rootcause.org (last visited, July 8, 2017). Root Cause operates from the core belief that while “there are hundreds of thousands of organizations and funding streams committed to social progress,” organizational advancement requires: (1) “forward-thinking leaders in philanthropy, business, nonprofit, and government,” who possess “the skills and organizational capacity to continuously assess and improve;” (2) “information on social issues and the performance of organizations working on social issues . . . readily available to help funders and practitioners make informed decisions toward quantifiable improvement in social issues;” and (3) “strategic collaboration between government, philanthropy, nonprofits, and business to maximize resources and spread solutions.”


the PFS “has the potential to be a game-changer for how human services are delivered in the Commonwealth.”

Initial assessments of the Massachusetts PFS Initiative in June 2016 show the 250 newly housed individuals used various and costly city services just six months before being housed, including “18,917 nights in shelter; 1,816 days in hospital; 541 emergency room visits; and 690 nights in detox treatment.” The Massachusetts PFS Initiative includes health services offered by the MassHealth Pay for Success Community Support Program for People Experiencing Chronic Homelessness, an innovative model nationally recognized for using Medicaid funding to help with supportive housing.

II. Federal, State, and Local Government, Nonprofit, Higher Education, and Legal Support for SIBs

A. Federal Support

At the federal level, two SIB bills have been introduced with bipartisan support, but neither bill was enacted into law. In 2014, during the 113th Congress, U.S. Representatives Todd Young (R-IN) and John Delaney (D-MD), supported by additional co-sponsors, introduced H.R. 4885, the Social Impact Bond Act. This bill called for “a one-time $300 million fund at the U.S. Department of Treasury to support the development of new social impact bond deals at the state and local level over the next ten years.” The House companion bill, the Pay-for-Performance Act (S. 2691), was introduced by Senators Michael Bennett (D-CO) and Orrin Hatch (R-UT) and also called for “a $300 fund at Treasury to support PFS at the state and local level.”

PFS was specifically mentioned in Obama administration budgets for 2012 through 2017. In 2012, the Department of Justice Bureau of Justice Assistance awarded $58 million to improve the reentry of returning cit-
zens. In 2013, the Department of Labor made grants totaling $24 million in Workforce Innovation Fund Grants piloting PFS. In 2016, the Department of Education “announced nearly $3 million in grants for PFS feasibility studies to expand high-quality pre-school opportunities” in the wake of the 2015 passage of the Every Student Succeeds Act (ESSA), which replaced No Child Left Behind. ESSA allowed school districts to make PFS investments. Funding appropriated in 2014 and 2015 enabled a partnership between the Departments of Justice and Housing and Urban Development for a 2016 grant of $8.7 million to prevent and end homelessness through permanent supportive housing. The PFS effort created effective ways to address the intersection between homelessness and criminal justice through the creation of supportive housing.

The Corporation for National Community Service (CNCS), a federal government agency with oversight for the volunteer programs AmeriCorps and Senior Corp., was expanded in 2009 to include the Social Innovation Fund (SIF), which became a “$1 billion social impact incubator, creating public-private partnerships that deliver high-impact, community-based solutions that work.” In 2014, CNCS awarded grants to eight SIB supporting organizations. The Trump administration’s proposed budget elimi-
nates funding for CNCS and hence SIF. Notwithstanding the proposed budgetary cuts, observers believe that Trump’s policies will have a strong effect on issues of concern to impact investors, such as social issues and the environment.\textsuperscript{124}

At the executive level, the Obama White House created the Office of Social Innovation and Civic Participation in 2009 “to advance opportunity, equality, and justice by creating a more outcomes driven government and social sector.”\textsuperscript{125} In 2015, it created a Pay for Success Interagency Learning Network to “deepen and widen knowledge about how PFS can test innovative ideas, scale what’s working, and drive better outcomes.”\textsuperscript{126} President Obama also issued several Presidential Memorandums relevant to PFS to improve government outcomes and environmental protection.\textsuperscript{127} Trump is rolling back Obama era laws and policies and replacing them with new ones.\textsuperscript{128}

On January 13, 2017, the U.S. House of Representatives introduced a new bill, H.R. 576, the Social Impact Partnership to Pay for Results Act (SIPPRA), which would provide $100 million for PFS.\textsuperscript{129} If passed, SIPPRA would “give state and local governments the opportunity to apply for funding to support evidence-based programs through outcome-driven ‘social impact partnerships’ like PFS,” and it would create a Federal Interagency Council on Social Impact Partnerships and a Commission on Social Impact Partnerships. The Council would be responsible for reviewing and approving funding applications while the Commission’s role would be to conduct research and other assistance to aid federal level PFS activity. SIPPRA is similar to an earlier bill, H.R. 5170, approved by the U.S.

\textsuperscript{124.} Id.


\textsuperscript{126.} A search of WhiteHouse.gov shows no specific references to SIBs or PFS (last visited Sept. 29, 2017).


\textsuperscript{129.} Leslie Cornell & Amy Curran, \textit{Inroads to Innovation: State Adoption of Pay for Success Legislation}, CHAPMAN AND CUTLER LLP (Apr. 2017) http://www.chapman.com/media/publication/755_Chapman_Inroads_to_Innovation_Pay_for_Success_Legislation_0417.pdf. This report contains a sample state model for PFS but there is no evidence that any states have adopted it.
House of Representatives in June 2016. H.R. 5170 was sent to the Senate but not voted on. To date, the most robust PFS activity is at the state level, but there is no uniform or typical PFS contract.

B. State and Local Support for SIBs

While various levels of federal involvement have helped to plant SIBs in the U.S. policy lexicon, SIB activity in the states has been robust. As noted earlier, the NFF reports twelve SIBs in progress with 164 listings of SIB projects, opportunities, and legislation while the Urban Institute reports fourteen projects currently underway.130

In addition to the SIBs analyzed above in Part I, two additional SIBs—the only successful U.S. SIB and the first county level SIB—are analyzed below because they illuminate some of the ways SIBs contribute to the CED movement. The Utah High Quality Preschool Program was the first SIB to target early childhood education and the first to be declared “a resounding success.”131 Salt Lake City is a recognized innovator in measuring public spending.132 The Cuyahoga Partnering for Family Success in Cuyahoga County, Ohio, was the first county level SIB designed to address homelessness and child welfare.

1. The Utah High Quality Preschool Program
   Targeting Early Childhood Education (Utah SIB)—The Only Successful U.S. SIB to Date

   The Utah SIB began in August 2013 and emerged from a “collective impact partnership” involving “key stakeholders.”133 This SIB was designed to reduce the costs of remedial pre-school education and reduce the opportunity gap for low-income students by increasing access to a school readiness educational program. The United Way of Salt Lake served as the SIB intermediary but prior to entering into the SIB in 2010, the United Way “had begun moving away from the organization’s 111-year-old-model-focused on raising and distributing funds–embracing a new approach based on collective impact.” Collective impact partnerships are


131. Jeff Edmondson, Bill Crim & Allen Grossman, Pay-for-Success is Working in Utah: For the first time, a US social impact bond has paid off for investors, STANFORD SOCIAL INNOVATION REV. (Oct. 27, 2015), https://ssir.org/articles/entry/pay_for_success_is_working_in_uta

132. WINTER INNOVATION SUMMIT, http://www.innovationsummit2017.com (last visited July 24, 2017). It is noteworthy that social innovation thought leaders convened at the Third Annual Winter Innovation Summit in Salt Lake City in January 2017; a social and innovation convening. Salt Lake County has been hailed as an innovator in using data and evidence to hold government accountable for measurable public spending of limited public funds.

133. Id.
aligned with features of a successful SIB because these partnerships involve diverse stakeholders such as the business community, educators, government, nonprofit, and philanthropic organizations that collaborate to identify a specific area they want to improve, set goals and timelines for improvement, identify success, and appropriate interventions. In Utah, this collective impact partnership included StriveTogether, "a national network of cross-sector community partnerships focused on improving public education." United Way worked with StriveTogether to identify the education gap the Utah SIB was designed to address.

Twenty-four hundred preschoolers were already enrolled in the Utah High Quality Preschool Program but the SIB investment enabled an additional 595 preschoolers to participate. The Granite School Districts, the SIB service provider, found that 110 of 595 low-income pre-school students in the school district, ages three and four, would likely need special education services in grammar school. Special education "is generally associated with higher levels of truancy, juvenile crime and other problems." Students in "the high impact preschool program" took a "Peabody Picture Vocabulary Test, a "predictive evaluation "and "indicator of their likely usage of special education and remedial services." These 110 students were placed in the Preschool Program, which prepared them for early education. Prior to the SIB, the Preschool Program "had already been shown to decrease the need for special education, but it had not been able to expand to meet the demand." The program was deemed a success when only one of the 110 preschoolers needed special education. The cost savings from special education expenditures saved the school districts and government "$281,550 in a single year, based on a state resource special education add-on of $2,607 per child."
Investors in the Utah SIB included Goldman Sachs, which loaned $4.6 million to the United Way, and J.B. Pritzker, which provided “a subordinate loan up to $2.4 million to United Way of Salt Lake, reducing risk to the senior lender if the preschool program proves to be ineffective.”\textsuperscript{143} For each of the 109 students who did not need special education, “Goldman and its partner got about $2,500 and will receive that each year, through the sixth grade, that the students avoid special education, with the amount decreasing in years after that.”\textsuperscript{144} Utah SIB investors were paid “95% of the avoided costs of $2,470 per child for every year, Kindergarten through Sixth Grade, to repay the senior and subordinate debt plus a base interest rate of 5.0%.”\textsuperscript{145} Going forward, success payments drop to “40% of the savings, or $1,040 per child per year of special education services avoided, to be paid as success fees to Goldman Sachs and J.B. Pritzker.”\textsuperscript{146}

The absence of state enabling legislation in 2013 meant that investors were paid by the United Way. In 2014, Utah passed HB 96, enabling the state to assume “the role of repayment organization for the second, third, fourth and fifth year of the project,” which included an expansion of the program to 3,500 youngsters over five years.\textsuperscript{147} The state also established a “School Readiness Board, comprised of appointees from the State Department of Workforce Services, Utah State Office of Education, and Utah State Charter School Board, business leaders, community leaders and other stakeholders.”\textsuperscript{148} In another demonstration of the premise that each SIB is different, this board is charged with entering into SIB financing contacts with investors on behalf of the state. Exercising its authority in 2014 and 2015, the board extended PFS contracts for the remaining cohorts.

After the failure of the Rikers Island SIB, the Utah SIB was a “public relations victory for Goldman, which has been trying to reform its reputation as an institution focused solely on the bottom line.”\textsuperscript{149} After the success of the Utah SIB, “Goldman raised $150 million from clients for a social impact fund, and a number of other social impact bonds are moving ahead with backing from other financial institutions.”\textsuperscript{150}

2. Cuyahoga Partnering for Family Success Program Addressing the Problem of Homelessness in Ohio (Cuyahoga County Homelessness SIB)—The First U.S. County Level SIB

The Cuyahoga County Homelessness SIB resulted from a 2012 request for response (RFR) to launch a PFS program “to address the social chal-
lenges of child welfare and youth/adolescent mental health” as well as other services. The City of Cleveland is in Cuyahoga County, which is the first county level SIB. The goal of the RFR was to identify county partners and specific service populations. Once these areas were identified, “the County and its partners . . . [proposed] the projects to local and national funders interested in Social Innovation Financing.” In this way, the Cuyahoga SIB followed the Massachusetts SIB model of an open government procurement process for seeking service providers.

Because the county spends approximately $35 million yearly on foster care, the goal of the Cuyahoga SIB is to reduce the number of homeless children in foster care and save the county money. Extended stay foster care has many negative results, including educational delays and negative impacts on future employment prospects. The Cuyahoga SIB aims to reduce out-of-home foster care by serving 135 homeless mothers who have children in foster care. The homeless mothers will receive twelve to fifteen months of intensive treatment to reunify and stabilize the family and address issues of trauma in partnership with the SIB’s housing partners, the Cuyahoga Metropolitan Housing Authority, Emerald Development and Economic Network, Inc., and Famicos Foundation.


154. About Us, CUYAHOGA METROPOLITAN HOUSING AUTHORITY, https://www.cmha.net (last visited July 8, 2017). The Cuyahoga Metropolitan Housing Authority (CMHA) owns and manages property and administers subsidy programs to provide eligible low-income persons good, safe, affordable housing.

155. About Us, EMERALD DEVELOPMENT AND ECONOMIC NETWORK, INC., http://www.edeninc.org/ (last visited July 8, 2017). For more than twenty-five years, the Emerald Development and Economic Network, Inc. (EDEN) has provided “housing to the most vulnerable individuals and families.”

156. See COMMUNITY WEALTH.ORG, http://www.community-wealth.org (last visited July 8, 2017); FAMICOS FOUNDATION, http://www.famicos.org (last visited July 8, 2017). Famicos Foundation was “founded in 1969 in response to poverty and civil unrest.” “One of the oldest community development corporations in the City of Cleveland,” it is a not for profit housing developer that has “acquired, renovated or constructed over 700 units of affordable housing.”
Ferral partners include Cuyahoga County’s Office of Homelessness,\textsuperscript{157} the Domestic Violence & Child Advocacy Center,\textsuperscript{158} and the Cuyahoga County Division of Child and Family Services.\textsuperscript{159} The service provider, FrontLine Service will use a “Critical Time Intervention (CTI), an evidence-based homelessness transition therapy.”\textsuperscript{160} FrontLine Service, based in Cleveland, is Ohio’s largest homeless service provider.

The Cuyahoga SIB has attracted $4 million in investments, including $1.5 million from the Reinvestment Fund;\textsuperscript{161} a senior lender and junior loans from the Cleveland Foundation;\textsuperscript{162} Sisters of Charity Foundation “owns and operates 326 units of affordable housing in Cleveland and also manages 276 Cleveland Housing Network lease purchase homes.”

\textsuperscript{157} See CUYAHOGA OFFICE OF HOMELESSNESS, http://ohs.cuyahogacounty.us/ (last visited July 17, 2017). The mission of the Cuyahoga Office of Homelessness Services is to work “in partnership with the community” while facilitating “a continuum of care of prevention, shelter services and permanent supportive housing intended to prevent and reduce homelessness.”

\textsuperscript{158} DOMESTIC VIOLENCE & CHILD ADVOCACY CENTER, https://www.facebook.com/dvcac/ (last visited July 17, 2017). The purpose of The Domestic Violence & Child Advocacy Center is “(1) To prevent and reduce incidences of domestic violence and child abuse through education and public awareness; (2) To ensure the safety of the child victim, the non-offending caregiver or domestic violence victim through a coordinated, holistic approach to individuals and families; (3) To support the adult and guide them through the process of the judicial D.C. F.S. system; (4) To meet the needs of the child and adult victim in dealing with their trauma; and (5) To create the most effective child, adult, and family-focused system response for victims.”

\textsuperscript{159} See CUYAHOGA COUNTY DIVISION OF CHILD AND FAMILY SERVICES, http://cfs.cuyahogacounty.us/ (last visited July 17, 2017) (believing that families belong together, the goal of the Cuyahoga County Division of Child and Family Services is to work with families and neighborhoods).

\textsuperscript{160} See Marcia Chong, Cuyahoga County Partnering for Family Success Program, THIRD SECTOR, http://www.thirdsectorcap.org/portfolio/cuyahoga-county-partnering-for-family-success-program/ (last visited July 24, 2017). CTI is a case management approach to prevent homelessness for mentally ill people after they are discharged from institutions, such as shelters, prisons, and hospitals. See also Center for Advancement of Critical Time Intervention, https://www.criticaltime.org/ (last visited Sept. 30, 2017).

\textsuperscript{161} See REINVESTMENT FUND, https://www.reinvestment.com/ (last visited July 17, 2017) “Reinvestment Fund is a catalyst for change in low-income communities.” It “integrates data, policy and strategic investment to improve the quality of life in low-income neighborhoods” and “uses analytical and financial tools” to “bring high-quality grocery stores, affordable housing, schools and health centers to the communities that need better access—creating anchors that attract investment over the long term and help families lead healthier, more productive lives.”

\textsuperscript{162} See CLEVELAND FOUNDATION, https://www.clevelandfoundation.org/ (last visited July 17, 2017). “The Cleveland Foundation’s mission is to enhance the
of Cleveland, which includes recoverable grants; and the Nonprofit Finance Fund. The SIB evaluator is the Case Western University Center on Urban Poverty and Community Development at the Jack, Joseph and Morton Mandel School of Applied Social Sciences. Enterprise Community Partners, Inc. is participating in the project as a manager and fiscal agent. Repayment rates range from $1.7 million to $5 million depending on rates of foster care reduction. The Cuyahoga SIB is five years and remains underway.

C. SIBs and Nonprofit Organizations

Nonprofit organizations have different roles in SIB contracts serving not only as social service providers but also as investors, intermediaries, and evaluators. Indeed, as the third sector, the nonprofit community is essential to the growth and success of SIBs.

The Rockefeller Foundation, whose motto is “innovation for the next 100 years,” views “innovation, and impact investing, and social impact bonds, like ‘pay-for-success’ projects” as part of “the rapidly growing field of innovative finance.” The Foundation observes that in 2013 lives of all residents of Greater Cleveland, now and for generations to come.” As a community foundation, it works with “donors to build community endowment, address needs through grantmaking, and provide leadership on key community issues.”

163. See SISTERS OF CHARITY FOUNDATION OF CLEVELAND, http://socfcleveland.org/ (last visited July 17, 2017). The mission of the Sisters of Charity Foundation of Cleveland “is to extend the values of Jesus Christ by improving the lives of people most in need, with special attention to families, women and children living in poverty.”

164. See Chong, Cuyahoga County Partnering for Family Success Program, supra note 160; see also Actionable Intelligence for Social Policy, Cuyahoga County Childhood Longitudinal Integrated Data (CHILD), https://www.aisp.upenn.edu/network-site/cuyahoga-county-oh/ (“The Center on Urban Poverty and Community Development at the Jack, Joseph and Morton Mandel School of Applied Social Sciences, Case Western Reserve University “is a leading research center that uses its integrated child welfare and homelessness data systems” to help the SIB parties and partners “identify, the size characteristics and potential cost savings associated with the Program’s target families.”).

165. Social Innovation Research Center, Pay-for-Success in Child Welfare: A Case Study (Feb. 2015), http://www.thirdsectorcap.org/wp-content/uploads/2015/03/Pay_for_Success_in_Child-Welfare_-_A_Case_Study.pdf (explaining the first appropriation was approved by the county council in September 2014. Payments to investors will be made within 45 days of the program’s five-year completion date).


alone, there were “$85 billion in federal funding cuts” to the states. The Trump administration promises even more. While philanthropies and foundations fund many types of social programs at a cost of $37.3 billion based on 2011 estimates of charitable giving, additional resources are available. If private resources are brought into the impact-investing field, there is potentially “up to $1 trillion” in “commercial capital over the next ten years,” and these investment dollars can be applied to SIBs.

Since 2010, the Nonprofit Finance Fund (NFF), a 501(c)(3) nonprofit organization and a Community Development Financial Institution with more than thirty-five years of experience “improving the financial health of nonprofit organizations,” has helped build the PFS field as an investor in PFS projects and as an intermediary for federal grants and philanthropic dollars assessing the viability of PFS projects. NFF “administers the Pay for Success Learning Hub, (www.payforsuccess.org), the leading national repository for education and information on Pay for Success,” and has “conducted more than 200 PFS trainings, presentations, webinars, workshops, and convenings across the country for service providers, governments and investors.”

Segments of the nonprofit community have been cautious about SIBs, noting that PFS projects have had mixed results and are “neither the cure-all remedy for every social problem or public funding short-fall as promoted by some nor the guaranteed disaster in every circumstance warned by others. Rather, they are nuanced tools that can be appropriate for a variety of social problems and can be designed to reduce or eliminate risk.”

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168. See Social Impact Bonds, Rockefeller Foundation, https://assets.rockefellerfoundation.org/app/uploads/20140921195626/Rockefeller-Foundation-Social-Impact-Bonds.pdf (last visited July 24, 2017) (showing federal cuts to the states in the following areas: community and regional development ($3.5 billion); income security and social services ($32.5 billion); employment and training ($3.6. billion); and education ($37.8 billion)).


170. Id. at 168.

171. See Community Development Financial Institutions Fund, https://www.cdfifund.gov/about/Pages/default.aspx (last visited July 8, 2017). According to the Community Development Financial Institution Fund (CDFI), CDFIs “share a common goal of expanding economic opportunity in low-income communities by providing access to financial products and services for local residents and businesses.” CDFIs can be banks, credit unions, loan funds, microloan funds, or venture capital providers. CDFIs are helping families finance their first homes; supporting community residents starting businesses; and investing in local health centers, schools, and community centers. CDFIs strive to foster economic opportunity and revitalize neighborhoods.

in certain situations.” Accordingly, the National Council of Nonprofits created “Principles for Consideration of New Funding Mechanisms” to guide entities considering PFS projects or other types of innovative funding. The seven principles include the following:

1. Promoting Innovation. Promoting funding innovation is important; nonprofit organizations have been at the forefront of solving social problems that government may not be able to address. Innovative funding should be investigated and supported but will not be appropriate to address some longstanding social problems.  

2. Protecting Communities Above All. This principle, aligned with CED goals, makes clear that social safety nets are important, that innovative funding should take care to avoid “potential negative and unintended consequences on individuals and communities,” and that pilot programs testing innovation “must produce clear data and results while maintaining or improving positive results for individuals they are designed to help.” If pilot programs fail, communities must not be harmed.  

3. Recognizing the Role of Government. Innovative funding should support government, the primary entity responsible for essential public services. Innovative funding must not “replace public obligations or view them as tools for shifting government responsibilities onto the private sector.”  

4. Reforming Government-Nonprofit Contracting. Existing contracting mechanisms between nonprofits and government are plagued with issues such as late payments to nonprofit suppliers, mid-contract changes, and burdensome reporting requirements that must be remedied. Even in innovative financing, these same problems “may impede efficiencies and compound existing barriers to success.”  

5. Building Strong Partnerships. The nonprofit community has a strong history and record of working with multiple stakeholders such as business and government. It stresses the need for mutual respect and values and fair and equitable dispute resolution mechanisms that do not interfere with service delivery, as well as creating role and capabilities clarity. The parties to new funding mechanisms,

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174. Id.  
175. Id.  
176. Id.
which may be newly introduced to each other, must adhere to these historical strengths in the nonprofit community. 177

6. Focusing on Realistic Outcomes. Measurement of new funding mechanisms must be meaningful and will often involve multi-year contracts. Short and long-term outcomes must be measureable and supported by governments.

7. Ensuring Transparency. The use of public funds requires transparency in all dealings including new funding mechanisms. 178 Inevitably, the for-profit investment community and the nonprofit community must work together closely in order to achieve beneficial results in SIB deals.

The Center for Effective Philanthropy, whose mission is to “provide data and create insight so philanthropic funders can better define, assess and improve their effectiveness and, as a result, their intended impact,” undertook research to understand how much money foundations invest in impact investing. The report suggests that while there is “considerable rhetoric about aligning impact and investments . . . the proportion of dollars allocated to impact investing is small” with “few investment dollars allocated with considerations other than financial returns in mind. . . .” 179

D. SIBs and Universities

Universities are also supporting and encouraging the use of SIBs and they are working in various capacities, such as pro bono technical consultants and evaluators. The Government Performance Lab at Harvard University Kennedy School (GPL), which grew out of its Social Impact Bond Technical Assistance Lab (SIB Lab), provides technical assistance to governments and conducts research on how they can perform better and save money. Established with support from the Rockefeller Foundation in 2011, the SIB Lab helped the first SIBs in New York and Massachusetts. Through national competitions in 2013–2014, GPL selected twenty government partners for its technical assistance services. 180 GPL reports “nine of the GPL’s TA-recipient jurisdictions have launched PFS projects, account-
ing for more than two thirds of the thirteen projects in the nation.”\textsuperscript{181} Working with the What Works Cities Initiative of Bloomberg Philanthropies,\textsuperscript{182} GPL expanded its work in “results-driven contracting projects” to help cities better deploy public dollars using PFS principles. Another GPL focus areas is helping governments to achieve results by focusing on their “core spending.”\textsuperscript{183}

The Sorensen Impact Center, housed in the Policy Lab at the David Eccles School of Business at the University of Utah has also supported SIB projects. The Sorenson Center’s mission is to accelerate positive and sustainable social change though cross-sector collaboration, data, and private capital.”\textsuperscript{184}

As noted earlier, Case Western Reserve University’s Center on Urban Poverty and Community Development at the Jack, Joseph and Morton Mandel School of Applied Social Sciences is the evaluator in the Cuyahoga County Homelessness SIB.\textsuperscript{185}

A 2017 Pay for Success and Social Impact Finance 2.0 conference was held at the “Social Entrepreneurship Program at the University of Virginia, the Darden School of Business Institute for Business and Society, and Frank Batten School of Leadership and Public Policy in partnership with the Federal Reserve Bank of Richmond, Quantified Ventures and Third Sector Capital Partners.”

Social impact investing tools like SIBs are linked to a broader global social entrepreneurship movement and lawyers are central to this work. In May 2017, New York University Law School launched the Grunin Center for Law and Social Entrepreneurship, “the first center of its kind at a law

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\textsuperscript{181}. \textit{Id.}


\textsuperscript{183}. \textit{Id.}


\textsuperscript{185}. \textit{See} Chong, \textit{Cuyahoga County Partnering for Family Success Program}, supra note 160, at 38.
school,” placing it at the forefront of “a movement that transforms the way law creates positive impact in the world” and positioning the Center as a “trailblazer in social justice and education innovation.”

E. SIBs and Lawyers

SIBs are complex multi-party contracts and each of the parties is likely to need legal counsel. That reality, coupled with data from the GIIN of $77 billion in impact investing, shows the “unparalleled potential of the impact investing market coupled with the social enterprise sector that is exceeding expectations in both growth and impact.”186 As a result, “there is an increased demand to master the evolving legal and financial frameworks available to social enterprises and impact investment funds.”187 To that end, TrustLaw,188 “the Thomson Reuters Foundation’s Global pro bono legal program, has created a two-day Social Enterprise and Impact Investing Training program.189

In the Cuyahoga County Homelessness SIB, for example, Kutak Rock, LLP provided pro bono counsel to FrontLine Services. Enterprise Community Partners received pro bono legal help from Orrick, Herrington & Sutcliffe, LLP while the George Gund Foundation received legal counsel from BakerHostetler. Stroock & Stroock & Lavan LLP provided pro bono legal services to the Nonprofit Finance Fund, and Miles and Stockbridge PC provided pro bono legal assistance to the Reinvestment Fund. Law firm support for SIBs is likely not limited to pro bono assistance as legal fees should be part of SIB transaction costs.190

It is noteworthy that a May 3, 2017, posting on payforsuccess.org showed that the “Local Initiative Support Corporation (LISC) is seeking an experienced firm that can provide LISC with legal services through the development, launch, and initial implementation of three projects selected by LISC.”191

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187. Id.


189. Id.

190. Lawyers specializing in municipal bonds, community development and tax exemption, project finance and public private partnerships, and legislation and appropriations are needed in SIB deals.

III. SIBs in the District of Columbia

The D.C. Pay-for-Success Contract Authorization Emergency Act of 2014 defines a pay-for-success contract (PFS) as a contract between the city and a social service intermediary that establishes outcome-based performance standards for social programs performed by nonprofit service providers and initially funded by private investors through a social impact funding instrument and provides a mechanism by which investors shall receive a return of their investment and earnings thereon only if outcome-based performance standards are met by the social service intermediary.

Other provisions in the law define a social service intermediary as a 501(c)(3) organization or an affiliated legal entity capable of entering into a PFS contract, with outcome-based performance standards, that contracts with service providers capable of delivering social services by raising capital to deliver those social services using a social impact funding mechanism and program administration, investor relations, and project management.

The law authorizes the mayor to enter into PFS contracts and sets forth the specific requirements for each contract, including outcome performance targets, an independent evaluation, and the intermediary’s detailed scope of service. The PFS contract must provide the amount and timing of payments to the social service intermediary based on performance benchmarks determined by the independent evaluator. In addition, the law requires a sinking fund “under which the Mayor shall request a multi-year appropriation for every fiscal year that the contract is in effect, in an amount equal to the expected payments that the District would ultimately be obliged to pay in the future based upon the service provided, if performance targets are met.” The city must be able to review the payments made by the intermediary via reporting requirements and the mayor must determine that the PFS contract will result in performance and budgetary savings to D.C. The law establishes a PFS Contract Fund to be administered by the mayor or her designee. An estimated amount of the funds required for PFS contracts must be placed in the fund each year and the money must be used to pay for PFS contracts. The law further instructs the chief financial officer to create separate PFS contract accounts and advises that the interest earned from the fund must not revert to the unrestricted fund balance of the city’s general fund, thereby making the funds continually available.

192. D.C. CODE § 2-211.01 (2016).
193. Id.
194. D.C. CODE § 2-211.02 (2016).
195. D.C. CODE § 2-211.03 (2016).
A. D.C. Water Environmental Impact Bond (EIB)

In September 2016, Goldman Sachs announced the first U.S. environmental SIB in the form of a D.C. Water Environmental Impact Bond (EIB). An EIB is defined as “a pay-for-performance contract that addresses an environmental issue.” EIBs, like other PFS contracts, monetize future cost savings and are a mainstay of environmental finance. This EIB will “fund the initial green infrastructure project in its D.C. Clean Rivers Project, a $2.6 billion program to control stormwater runoff and improve the District’s water quality . . .” A $25 million tax exempt bond, the EIB is designed to address the pollution of D.C.’s water caused by combined sewer overflows (CSOs), an environmental problem associated with frequent, intense, and severe periods of rainfall that is linked to climate change. The EIB will be used to install green infrastructure projects “primarily in the public-right-of-way and include permeable pavement and bioretention (e.g., rain gardens).” When there is more rain than sewer systems can handle “stormwater and sanitary sewer overflow into area watersheds.”

The contracting parties to the EIB include the D.C. Water and Sewer Authority (D.C. Water), the service provider and outcomes payor, and investors Goldman Sachs and Calvert Foundation. D.C. Water will pay for installing the green infrastructure while the risks of creating and managing a storm runoff system will be shared by both D.C. Water and the investors. Once again proving that each PFS is different, D.C. Water will not only serve as service provider but will also evaluate pre-construction estimates of improvement in a three-stage process. First, D.C. Water will measure the stormwater runoff before the green infrastructure is installed.

198. See D.C. Water, http://www.dcwater.com/clean-rivers-project (last visited July 17, 2017) “The Clean Rivers Project is D.C. Water’s ongoing program to reduce combined sewer overflows (CSOs) into the District’s waterways—the Anacostia and Potomac Rivers and Rock Creek. The project is a massive infrastructure and support program designed to capture and clean wastewater during rainfalls before it ever reaches” the District’s rivers.
199. Id.
201. Id.
Second, it will predict reductions in that runoff. Third, it will monitor post-construction results to compare the actual storm runoff against the results of green infrastructure installation. This third stage will measure percentage reductions that will trigger success payments.

D.C. Water has identified three performance success payment levels based on runoff reduction. First, if water runoff is reduced by 41.3 percent, D.C. Water will pay investors $3.3 million. Second, if runoff reduction underperforms and is between 18.6 percent to 41.3 percent, no contingent payment will be due. Finally, if runoff reduction is less than 18.6 percent, investors will make a “risk share payment to D.C. Water of $3.3 million.”

Success results will be confirmed by an independent engineering firm chosen by the investors.

Another anticipated benefit of the EIB is a Green Jobs Program in partnership with the Water Environment Federation, which will “train and certify District residents to construct, inspect, and maintain green infrastructure facilities.” D.C. Water hopes that 51 percent of the newly created Green Jobs Program employment opportunities will be filled by 51 percent of D.C. residents who are certified by the program. It also hopes that the EIB will be a model for other jurisdictions needing to advance green infrastructure. Overall, “D.C. Water believes that the green infrastructure can improve water quality, enhance air quality, increase property values, beautify neighborhoods, cool extreme summer temperatures, support natural habitats, enhance public space, and support local jobs.”

Observers believe that EIBs for issues such as improving water quality are more advantageous than other SIBs for three reasons. The first is that natural resources like water are associated with revenue streams and are less reliant on government funding and, therefore, more attractive to conservative impact investors. A second and associated advantage is that metrics exist for these scientifically based EIBs that are more reliable than the behavioral metrics of a control group of people. Third, the existence of ready-made environmental markets along with a lack of dependence on new government regulations may make EIBs easier to create.
B. Latin American Youth Center—A D.C. SIB in Development

The Latin American Youth Center (LAYC) SIB will scale up its “Promoter Pathway Program,” which uses cases managers to support youth for four to six years, helping them with school, employment, and healthy lifestyles. The parties in the SIB include LAYC, the service provider; the Local Initiative Support Corporation (LISC), the intermediary; and the District of Columbia Department of Health, the outcomes payor.207

LISC, a national community economic development intermediary, selected LAYC, a “mentoring and advocacy model for vulnerable teens and young adults,” as a SIB technical assistance funding recipient. As a funding intermediary since 1990, LISC has invested more than $16 billion to help low-income communities. It received a “$1.33 million federal grant from the Corporation for National and Community Service (CNCS) Social Innovation Fund (SIF)” to help organizations like LAYC “design first-time PFS programs.”208 LISC’s role in developing the LAYC SIB is more like “a nonprofit investment bank,” thereby expanding its traditional CED intermediary role. In its expanded role, LISC will provide “expertise to help structure programs” that help organizations “go out into the market to raise capital,” find “ways to quantify impact,” and report “outcomes to investors, government partners and the field as a whole.” As noted earlier, as a program of the CNCS, a federal government agency that also operates the AmeriCorps and Senior Corp volunteer programs, SIF has been the federal government’s billion dollar social enterprise incubator, fostering workable community based solutions and high-impact public-private partnerships.209

IV. The Last Hope for the CED Movement During the Trump Administration?

Hopefully, SIBs are not the last hope for CED during the Trump administration but properly used, they are a tool in today’s CED movement. Given the number of SIBs underway in the United States and worldwide, it seems clear that the SIBs have become a viable financing mechanism in the face of government cutbacks. SIBs are part of an array of social innovation financing tools that are closely aligned with the social enterprise movement as well as the CED movement. Broader than conventional economic development, CED seeks to improve low-income and working class
communities beyond purely economic considerations. CED requires that community stakeholders exercise democratic participation rights and contribute to meaningful and sustainable efforts to combat and eliminate homelessness, create safe and affordable housing, and good living wage jobs while fostering neighborhood businesses, worker cooperatives, and other avenues to create healthy communities.210 Given the goal alignment of CED and SIBs, both comprised of partnerships between nonprofits, for profit businesses, and government, great weight should be given to the National Council of Nonprofits Principles for Consideration of New Funding Mechanisms, discussed earlier. Most important, SIBs should do no harm.

While some are skeptical about the role and leverage that investment banks have in SIBs and caution that there are insufficient end-of-program results to prove their worth, the involvement of CED intermediaries such as Community Enterprise Partners and LISC is encouraging. A robust and continuous dialogue between CED and SIB advocates is required as SIB contracts terminate and evaluation results are released. At the same time, the Trump administration’s proposed budget cuts and rescission of Obama era policies may fuel the impact investment community’s goal of making markets work for social good.211

Citing the “creativity of SIB enthusiasts,” some argue for an alignment of SIB and crowd funding and further suggest that enhancements could be found by “exploring venues in which SIBs might be deployed and mechanisms through which they can be funded and subsidized.”212 One SIB promoter Erdem Ovacik, “who is also committed to advancing democracy,” calls for making “the number of persons invested in the SIB a success-parameter in the procurement of SIBs. In other words, making the number of citizens on the SIB a part of the SIB scoring, and preferring to accept SIB contracts that involve [a] greater number of citizens.”213 At present “citizens ‘do not have access to fund or affect these (SIB) instruments at this time’ and that “broader citizen engagement and investment in SIBs would be beneficial in ways that institutional investors such as foundations or Wall Street can’t deliver. . . .”214 This includes “generating broader public support for the SIB projects, providing potential volunteers, participating in board meetings of SIB implementing agencies, and “report[ing] back to [the] public about challenges and successes

211. ROBIN, THE POWER OF IMPACT INVESTING, supra note 40.
213. Id.
214. Id.
achieved by the SIB.” 215 Interestingly, Ovacik posits that there has been a “7-15 percent annual return based on the track records of SIBs.” 216 There is another important concern about who is calling the shots on this emerging social policy instrument because a number of U.S. SIBs rely heavily on institutional investors, such as Goldman and Bank of America. “If the selection of social programs warranting public support is going to be tied to the willingness of Wall Street investment houses to put in money up front, there is no way to avoid the implication that Wall Street will be highly influential in signaling to government and nonprofits what kinds of SIB projects merit support and what kinds don’t.” 217

SIB proponents, highlighting the distinction between “pure return-seeking investors” and “impact-seeking investors” believe that the growth of PFS will be encouraged by impact-seeking investors. 218 “PFS’s potential contribution will actually be to unlock philanthropic and foundation assets in buffering the risk for return-seeking capital or, in some cases, to entirely finance certain PFS projects. SIB proponents also contend that a limited number of nonprofit service providers, like Roca in the Massachusetts Juvenile Justice PFS, will be in a position to deliver measurable social impact and governmental cost savings. Indeed, only a few “high performing” nonprofit groups have been parties to PFS contracts and observers worry that an unintended consequence of this reality is that other nonprofits that are unable to raise funds could be thwarted in their ability to provide high quality social services. 219 Savings witnessed in early PFS contracts, governed by “new efficiency benchmarks” may be subject to political pressure forcing lower success payments, causing private capital to “flee existing PFS markets.” 220 Some observers also worry that PFS projects venturing beyond the early PFS models in anti-recidivism and early education and expanding into areas such as mental health may find it difficult to quantify impact. 221

An examination of the first PFS projects, as discussed earlier, shows three lending categories: “senior lenders, junior lenders, and venture philanthropists.” 222 Early SIB programs involved evaluations known as randomized control trials (RCT) to assess outcomes. RCT is “judged to be the most credible method of evaluating whether a social program is effective.” 223 A few of the newer SIBs in education, such as the Utah SIB, have been criticized because standardized testing to measure special edu-

215. Id.
216. Id.
217. Id.
219. Id. at 29.
220. Id.
221. Id.
222. Id. at 29.
223. Baron, Rigorous Program Evaluations on a Budget, supra note 75.
cation is not as rigorous as RCT. 224 RCT is often viewed as expensive but some contend that the “increasing ability of social policy researchers to conduct randomized controlled trials . . . at low costs could revolutionize the field of performance-based government.” 225

Another concern going forward is the high transaction costs, ranging from 7 percent to 10 percent, of SIBs. While some costs, such as legal and audit accounting fees, are mainstays in all types of government contracts, some argue that fees for the intermediary providing oversight are not necessary. Indeed, in the UK Peterborough SIB, the very first SIB, the government ended up assuming the role of the intermediary, which is an option available to other governments. 226

A substantial take away from the analysis of SIB activity in the United States to date is that that mission-led and philanthropic capital are “critical and enabling” to the emerging industry. 227 American foundations have an estimated $700 billion in assets but annual grants in the last ten years have amounted to only $40 billion, leading to criticisms about “low levels of program related investments,” 228 averaging “only about $500 million a year on average.” 229 Impact investing by the largest U.S. foundations is “roughly one-half of 1 percent of grant spending” and “2 percent of endowment spending.” 230 Accordingly, there is substantially more room for SIB investment which could impact CED.

SIB policy makers and actors should consult with CED advocates to ensure community benefits and to look beyond SIBs cost savings to community “well-being.” 231 As one scholar explains:

The successful SIB only capitalizes on the funding provided by eager impact investors, but also integrates a more equitable CED model that forges new

225. Baron, Rigorous Program Evaluations on a Budget, supra note 75.
226. Id. at 35.
228. Robin Ehrenberg, Examples of Program-Related Investments T.D. 9762, INTER- 
    ar08.html. (Internal Revenue Code “Section 4944(a) imposes an excise tax on a 
    private foundation that makes an investment that jeopardizes the carrying out of 
    its exempt purposes (a ‘jeopardizing investment’). Section 4944(c) provides that 
    investments that are program related investments (‘PRIs’) are not jeopardizing 
    investments. Section 4944(c) defines a PRI as an investment: (1) the primary 
    purpose of which is to accomplish one or more of the purposes described in 
    section 170(c)(2)(B); and (2) no significant purpose of which is the production of 
    income or the appreciation of property.”).
230. Id.
    more-cost-savings (last visited Sept. 29, 2017).
multiracial coalitions, links community-based initiatives to broad-based structural reform, and advances economic justice through community accountability and ownership. Innovations such as the micro-SIB model, equity crowdfunding platforms, and the impact bond fund model . . . offer a promising path for the future of this financial tool.232

The amount of private capital potentially available for PFS projects can greatly benefit CED. As SIB contracts terminate and evaluation results are analyzed, more about the role of SIBs in CED will be revealed. Only time will tell.

History and Overview of the Community Reinvestment Act

Paul Kaboth

Congress enacted the Community Reinvestment Act (CRA) in 1977 as a legislative response to community concerns with “redlining.” Community spokespeople alleged that financial institutions were refusing to lend in specific geographic locations, primarily minority and low-and-moderate income neighborhoods. The lack of lending in these neighborhoods, either intentionally or by the lack of effort by financial institutions, contributed to neighborhood “disinvestment,” and the ongoing deterioration to inner city neighborhoods.

The purpose of the CRA is to encourage deposit taking institutions insured by the Federal Deposit Insurance Corporation to meet all the consumer credit needs of the communities in which they gather deposits, consistent with safe and sound banking operations. CRA requires a periodic review of the insured depository institution’s lending record in meeting the credit needs of its entire community. While no direct enforcement power is associated with poor CRA performance, an institution’s CRA record is considered as part of an institution’s application for the expansion of its activities, including mergers and acquisitions of other entities.

General Structure of CRA Reviews

While the regulatory review of a financial institution’s CRA performance factors the geographic and asset size of the institution as well as the complexity of the lending products and deposit and other services offered, the banking agencies have “standardized” the general structure of the public performance evaluation. The general structure of the performance evaluation is (1) a review and discussion of the institution’s assessment area or areas; (2) any factors that potentially affect institutional performance, referred to as the performance context; (3) review and discussion of its lending record; and (4) review and discussion of the community development-related investments and services by the institution.

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Each of these specific portions of the evaluation is discussed in further detail below.

**Review of Assessment Area or Areas**

In reviewing an institution’s assessment area or areas, if it operates in multiple states or locations, the examiner reviews to ensure that, in identifying assessment area or areas, bank management has included one or more whole Metropolitan Statistical Areas (MSAs) or Metropolitan Divisions (MDs) or contiguous political subdivisions, e.g., counties, cities, or towns. Further, the review ensures that management has included the geographies where the institution has its main office, branches, and deposit-taking ATMs; as well as the surrounding geographies in which the institution originated or purchased a substantial portion of its loans. Further, the review verifies that the assessment area or areas consists only of whole census tracts and consists of separate delineations for areas that extend substantially across MSA/MD or state boundaries unless the assessment area is located in a multi-state MSA/MD. The examiner will review each assessment area to ensure it does not reflect illegal discrimination and does not arbitrarily exclude any low- or moderate-income area or areas, taking into account the institution’s size, branching structure, and financial condition.

**Review of Performance Context**

As part of reviewing factors that have the potential to affect the performance in meeting the institution’s obligations under CRA, to the extent the data is available, the examiner will review standardized worksheets and other agency information sources to obtain relevant demographic, economic, and loan data for each assessment area under review. Further, the examiner will obtain for review the Consolidated Reports of Condition (Call Reports)/Thrift Financial Reports (TFR), Uniform Bank Performance Reports (UBPR)/Uniform Thrift Performance Reports (UTPR), annual reports, supervisory reports, and prior CRA evaluations of the institution under examination to help understand the institution’s ability and capacity to respond to safe and sound opportunities in the assessment area or areas for retail loans, and community development loans, investments, and services. Included in this review is consideration of any limitations imposed by size, financial condition, or statutory, regulatory, economic, or other constraints which have the potential to affect the institution’s ability to meet the needs of identified assessment area or areas in a safe and sound manner.

In developing a view of the performance context, the examiner will discuss with the institution’s management and consider any information the institution may provide about its local community and economy, including community development needs and opportunities, its business strategy, its lending capacity, or any other information that assists in the evaluation of the institution. In conjunction with the review of pertinent data regarding the needs of the institution’s assessment area or areas, the ex-
aminer will review summaries of community contacts prepared by the regulatory agencies to obtain information that assists in the evaluation of the institution. As necessary, the examiner may contact local community, governmental, or economic development representatives to update or supplement this information. Finally as part of this review, the examiner will review any comments from the public received by the institution or the agency since the last CRA examination.

In reviewing the public evaluations and other financial data, the examiner will determine whether any similarly situated institutions, in terms of size, financial condition, product offerings, and business strategy, serve the same or similar assessment area(s) and would provide relevant and accurate information for evaluating the institution’s CRA performance. The examiner would consider, for example, whether the information in the review could help identify lending and community development opportunities available in the institution’s assessment area or areas that are compatible with the institution’s business strategy and consistent with safe and sound banking practices. The examiner may identify constraints affecting the opportunities to make safe and sound retail loans, community development loans, qualified investments, and community development services compatible with the institution’s business strategy in the assessment area or areas. And finally, the examiner would identify successful CRA-related product offerings or activities utilized by other lenders serving the same or similar assessment area or areas.

Review of Lending Record

All banking agencies use the same approach when completing a review of a financial institution’s lending record in considering CRA lending performance. The examiner will consider the bank’s loan applications, originations, and denials reported since the last CRA evaluation. The data considered is the institution’s federally reported Home Mortgage Disclosure Act Data, small business loans originated, and other CRA-related loans not considered as part of the community development investments and services test. For the purposes of the CRA, small business loans are defined as loans to businesses with the original amount of the loan being equivalent to or less than $1 million. Large institutions have the option to include consumer loans for consideration, provided the consumer loan data is provided electronically.

The examiner reviews the institution’s geographic spread of loans throughout the identified assessment area or areas, focusing on any gaps in census tracts or political subdivisions that have little or no loan activity. For smaller institutions, the examiner will calculate the proportion of loans originated within the institution’s assessment area or areas. This ratio is used to identify the focus on the institution’s lending. If gaps are identified in lending activity, the examiner will focus on any factors that may affect lending within the census tract or political subdivision and verify their conclusion with management of the institution. Review-
ing the geographic scope of the institution’s lending is done for each type of loan considered, mortgage, small business, and consumer loans if applicable.

Subsequent to reviewing the geographic scope of the institution’s lending activity, the examiner will then analyze the number of loans originated to low, moderate, middle and upper income geographies and individuals, using the Census income definitions for income categories referred to previously. Low income census tracts or households have less than 50 percent of the median family income for their respective MSA or MD, or state. For each assessment area, the examiner will categorize the individual census tracts or political subdivisions by income. Moderate income census tracts or households have between 50 and 80 percent of the median household income; with middle income tracts or households having between 80 and 120 percent of the median household income. Upper income census tracts or households exceed 120 percent of the median household income. The examiner reviews all of the aggregate of the originated loans within each income category to consider the overall distribution of lending. In considering the distribution, the examiner will compare the institution’s distribution to that of the other lenders operating in the same market.

Subsequent to looking at the census tract distribution of lending, the examiner will conduct a similar analysis using the reported income for the borrower for all originated loans. The examiner will categorize the loans by income category of the borrower and review the institution’s overall distribution across the low, moderate, middle, and upper income categories. For mortgage originations, the examiner will compare the institution’s distribution relative to the other lenders operating within the same market. When reviewing consumer loans submitted by the institution, the examiner will not have competitor information and will review the overall distribution of consumer loans by income category.

In considering small business lending, the examiner will review the geographic distribution of originated loans within the assessment area or areas to ensure that the entire market is being serviced. Any gaps would be discussed with management to understand the market and institutional strategy of the entity.

**Review of Community Development-Related Investments and Services**

**Investments**

The examiner will identify the institution’s qualified investments by reviewing the institution’s investment portfolio and supporting investment documentation. At the institution’s option, the examiner will include in his or her review the investment portfolio or portfolios, and related documentation, of affiliates of the institution. In reviewing the documentation associated with community development-related investments, the examiner, as necessary, will obtain a prospectus or other information that de-
scribes the investment and the geographic area or areas, or the income characteristics and demographic information of the population or populations served by the investment. To avoid the potential of including the investment in the analysis of the portions of the review, the examiner will determine whether the investments have been considered under the lending or service tests, as well as whether an affiliate’s investments have been claimed by another institution.

The examiner’s review of the investments would be in consideration of the extent to which qualified investment opportunities have been available to the institution, as well as the institution’s responsiveness to opportunities for qualified investments. Further, the examiner will assess the degree to which investments serve low- and moderate-income areas or individuals, designated disaster areas, or distressed or underserved non-metropolitan middle-income geographies. Finally, the examiner will review the investments to consider the use of any innovative or complex investment vehicles, and in particular, those that are not routinely provided by other investors.

**Services—Retail Banking Services**

The examiner would determine from information available in the institution’s public CRA file the distribution of the institution’s branches among low-, moderate-, middle-, and upper-income geographies in the institution’s assessment area or areas, as well as the hours of operation and loan and deposit products available through each branch in the network. In reviewing the branch network, the examiner would evaluate the institution’s record of opening and closing branch offices since the previous examination. The examiner would be focused on any information that could indicate whether changes have had a positive or negative effect, specifically on low- and moderate-income geographies or individuals.

The examiner would evaluate the accessibility and use of alternative systems for delivering retail banking services, such as proprietary and non-proprietary automated teller machines (ATMs), loan production offices, banking by telephone or computer systems, and bank-at-work or by-mail programs. The examiner assesses the quantity, quality, and accessibility of the institution’s service-delivery systems provided in low-, moderate-, middle-, and upper-income geographies, and would consider the degree to which services are tailored to the convenience and needs of each census tract or political subdivision by evaluating the network and alternative systems’ extended business hours including weekends, evenings, or by appointment, and by providing bi-lingual services in specific geographies.

**Services—Community Development**

In addition to retail banking services, the examiner would review and identify the institution’s community development services, including services through affiliates. The examiner would determine whether services
have been considered under the lending or investments tests and are not claimed by other affiliated institutions.

The examiner would evaluate institutional performance using information obtained in the performance context procedures, especially with regard to community needs and institutional capacity. The examiner would determine the extent of community development services provided in the institution’s assessment area or areas, considering their innovativeness, including whether they serve low- or moderate-income customers in new ways or serve groups of customers not previously served. The examiner would also consider the degree to which the services serve low- or moderate-income areas or individuals and their responsiveness to available opportunities for community development services. In addition, the examiner would consider the extent of community development services in the broader statewide or regional area that includes the assessment area or areas, but will not benefit the assessment area or areas and do not support organizations or activities with a purpose, mandate, or function that includes serving geographies or individuals located within the institution’s assessment area or areas.

**Rating Scheme**

The banking agencies have developed an interagency rating system to assign consistent ratings for the financial institutions supervised. The ratings system has four designations: Outstanding, Satisfactory, Needs Improvement, and Substantial Noncompliance. For institutions with ratings of Needs Improvement and Substantial Noncompliance, applications for the establishment of additional branches or the expansion of banking powers would not be entertained by the respective agency that supervises the institution. Moreover, mergers and acquisitions by institutions, including parent holding companies, with depository institutions with Needs Improvement and Substantial Noncompliance ratings would be problematic. Finally, the depository institution’s CRA ratings and the performance evaluation are made available to the public, either by request to the institution or the banking agency.

**Supervisory Expectations and Complexity of Review**

As noted previously, supervisory expectations for CRA performance increase, depending upon the size, scope of operations, and complexity of retail banking services and loan products offered by the institution. To that end, the banking agencies have constructed three types of reviews, with increased requirements and supervisory expectations as asset size of the institution increases. Asset sizes are inflation-adjusted, and the agencies publicize changes to the asset thresholds annually.

For community or small banks and thrifts, defined as those entities with assets less than or equal to $304 million as of 2017, the examiner’s evaluation consists of a review of the institution’s lending record. For
small banks, investments and services can enhance a “Satisfactory” rating so that the institution could achieve an Outstanding rating if such a rating is not already warranted.

For intermediate-sized banks and thrifts, entities with asset between $304 million and $1.2 billion as of 2017, an Intermediate Small Bank evaluation is conducted. The evaluation is an abbreviated review consistent with that of larger organizations, which focuses on a review of lending performance and a review of community development investments and services. Intermediate Small Banks are expected to demonstrate performance under the investment and/or service tests.

For large banks or thrifts, defined as any institution with assets exceeding $1.2 billion as of 2017, a full CRA review is conducted. The review includes a review of lending performance, review of community development investments, review of community development services, and any other considerations.

For large institutions, the Consumer Financial Protection Bureau (CFPB) also conducts fair lending reviews for any institution with assets over $10 billion, which must be factored into the performance assessment. The federal banking supervisory agencies coordinate with CFPB on the fair lending analysis to understand as early as possible any potential issues or concerns discovered during the review. Adverse findings by the CFPB can lower the CRA rating of the institution, even if lending and community development performance is satisfactory.

CRA’s Impact Since Its Inception and Its Future

Since enacted, proponents and opponents have debated the need for the Act as well as its impact. Because the CRA has been modified repeatedly and the financial services marketplace has changed dramatically in the last forty years, quantifying the impact of CRA proves to be difficult. A number of empirical studies have been conducted; the overwhelming majority of these papers have concluded that CRA has succeeded in increasing lending in low-and moderate-income neighborhoods. Further, while our nation’s inner cities have not been “transformed” by the CRA, redlining and disinvestment from urban areas has been reversed since the inception of the CRA.

Studies have shown that access to both the mortgage lending and small business credit markets has been enhanced by financial institution lending subject to the CRA. Some critics have charged that the CRA, through declining lending standards and/or governmental mandates, was the primary cause of the subprime mortgage crisis. While unsupported by data or empirical study, this view of profligate lending to low-and-moderate borrowers can be viewed as a nod to the effectiveness of the CRA in providing access to credit for these individuals. For the three most recent years of reported data, financial institutions originated $227 billion in community development loans and $689 billion of small loans.
to businesses and farms as reported to the Federal Financial Institutions Examination Council.\(^1\)

In conversations with financial service representatives regarding the availability of affordable housing, many bankers and market participants indicate that without the CRA and the Low Income Housing Tax Credit, affordable housing development in the United States would be non-existent. The Department of Housing and Urban Development reports that the Low Income Housing Tax Credit program supported nearly 31,000 projects creating 2.3 million units of affordable housing between 1995 and 2015.\(^2\)

While measuring the impact of the CRA is challenging, what is clear is that the development of financial and credit markets have outpaced the CRA and challenge its effectiveness. More than 60 percent of mortgage funding is provided by the secondary market, or entities that are not subject to the CRA. The growth and development of the “fintech” credit providers has eroded small business lending by banks and thrift institutions. Additionally, the fintech revolution and the continued development of Internet banking are rendering the physical bank branch less profitable and less relevant. Many proponents of the CRA, as well as its critics, have called for “modernization” of the Act. Whether to redefine what an assessment area is or to broaden the scope of institutions covered, changes to the CRA are necessary to continue its effectiveness.

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1. National Aggregate Reports for the years 2013, 2014, and 2015; Table 1—Originations and Purchases for Small Business and Farm Loans; and Table 3—Community Development Lending, Federal Financial Institutions Examination Council, https://www.ffiec.gov/craadweb/national.aspx.

The Community Reinvestment Act’s Impact on Low Income Housing Tax Credit Investment

Nancy R. Amstadt

Introduction—CRA and LIHTC Investing

The Community Reinvestment Act (CRA) is the leading driver for corporate investment in affordable housing projects utilizing the Low Income Housing Tax Credit (LIHTC). The purpose of CRA is to encourage banks to help meet the credit needs of communities in which they operate, including low and moderate income neighborhoods, consistent with safe and sound banking operations.\(^1\) LIHTC projects qualify as public welfare investments by providing housing to low and moderate income tenants and therefore have a presumption of qualifying as a CRA investment.

While investors choose to participate in LIHTC projects for varying reasons, CRA consideration has driven banks to be the largest segment of LIHTC investors. CRA considerations are consistently the highest driving factor for investment in and pricing of LIHTC projects. In fact, CRA is such a driving force in LIHTC investing, if CRA requirements were to change drastically in the future and banks did not have this requirement of investment in low income neighborhoods for areas in which they do business, the overall industry of low income housing would likely look dramatically different.

CRA as a Motivating Factor for LIHTC Investors

Generally, investors in LIHTC fall into one of two investor buckets. There are investors that are economically driven and those that are driven by their CRA requirements.

Those that are economically driven are evaluating a project or a fund with multiple projects based on the economic return the investment is projected to produce. Economic investors are generally less concerned with the location of the project since they are not using the investment to fulfill CRA requirements relating to any specific location need. The concerns regarding location for an economic investor are based in the real estate market for underwriting purposes rather than based in choosing a location driven by fulfilling CRA requirements. Economic investors are very

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price sensitive and their participation in LIHTC investment ebbs and flows as market forces push pricing up or down.

CRA driven investors make their LIHTC investment decisions based on the footprint of their CRA needs. As Paul Kaboth notes in “Review of Assessment Area or Areas” in the prior article of this commentary, the location of CRA investment for banks is driven by the institution’s Assessment Area for CRA. The Assessment Area is driven primarily by where the financial institution has its offices, branches, ATMs, and where the institution is originating substantive numbers of loans.

Those investors driven by CRA considerations tend to be less sensitive to pricing than purely economic investors. While the prices they are willing to pay for participation in a transaction move up and down with market fluctuations, pricing is not the primary factor they are taking into account and they do not exit the LIHTC market based solely on less favorable economics. To these CRA motivated investors, it is important that they are participating in the LIHTC market in a meaningful way in the locations that match their Assessment Area. CRA investors have an investment goal to positively impact the institution’s CRA rating.

Currently, we are looking at a period of fluctuation in the LIHTC market. Since the 2016 elections, with a shift to a Republican controlled White House, Senate, and House of Representatives, the potential for tax reform and lower corporate tax rates is in a significantly heightened state. This is causing investors of all types and motivations to alter their behavior during this time of uncertainty.

Predicting how each type of investor will react during uncertainty is a difficult task and one that is certain to prove many predictors wrong. The one thing we can say for certain is that the economic-driven investors will continue to make investment decisions based on the market conditions and where pricing is heading compared to other investments that these investors could put their dollars within the risk profile of the company. CRA motivated investors will continue to be in the market. However, the risk of lower returns due to the potential of lower tax rates may cause some decreases in pricing during the uncertain period while the market is guessing what Congress and the President ultimately will do. The question then becomes, to what extent economic investors will take advantage of any lowering of pricing that occurs during this uncertain time period.

While tax reform is certainly the issue of the day and one that is at the forefront of every investor’s and syndicator’s mind, regulatory reform is also a large part of the political agenda since the 2016 elections. While rollback and repeal of various banking regulations is on the table in a major way, a repeal of the Community Reinvestment Act is not likely nor has it entered the marketplace as a fear that is influencing the behavior of investors.

Direct Investing vs. Syndicator Investing

CRA motivations and the impact these motivations have on choosing transactions affects both investors that are engaging in direct investments and those investing through a syndicator. Direct investors are those that seek their own investment opportunities and enter a transaction directly at the project level rather than working with a syndicator of LIHTC transactions. Generally, those investors that engage in direct investing tend to be larger institutions that have significant staff and infrastructure to be able to evaluate transactions on their own, move through the underwriting and closing process, and have asset management staff to monitor performance and compliance of the transactions after they invest. Additionally, the majority of investors that invest directly also do investing through syndicators. It is not typical for a financial institution to engage only in direct investments in LIHTC.

LIHTC investing through a syndicator entails the investor choosing the syndicators with which to do business. The syndicators act as the intermediary for assisting LIHTC investors in finding transactions meeting their stated requirements, handling much of the transaction underwriting on behalf of the investor, taking the transaction through to closing, and providing continued asset management services on behalf of the investor. Generally, the LIHTC investor is investing through a fund set up by the syndicator. That investment fund becomes the investor into the LIHTC project entity. A February 16, 2017, report by the U.S. Government Accountability Office on the role of syndicators in LIHTC identified 36 active syndicators as of October 2015. In the syndicator/investor relationship, the parties work very closely with the goal of fulfilling each investor’s CRA obligations.

Additionally, there are economic investors that sometimes do take CRA location into account. A market segment exists where economic investors work through syndicators seeking product that they can re-syndicate further up the chain by adding additional protections to the transactions. These investors are generally not of an industry type that would seem to fall within CRA consideration investors but because they are making their investment decisions based on the ability to syndicate to their client base, CRA becomes a main driver in their investment decision making.

How CRA Fits into the Two Types of Fund Investing: Proprietary and Multi-Investor Funds

As noted above, investors that participate in the LIHTC market through a syndicator are generally investing through an investment fund that is managed by a syndicator. There are two types of funds syndicators offer as investment vehicles; proprietary funds and multi-

investor funds. Both of these investment vehicle types allow institutional investors to receive allocation of CRA benefits for the properties in which the funds invest.

Proprietary funds are investment vehicles set up by a syndicator in which only one investor participates. The fund invests in multiple LIHTC projects with the tax benefits flowing to the investor from the fund entity. The fund is generally either a limited partnership or a limited liability company that is taxed as a partnership. This allows the tax benefits to flow to the investor according to its ownership percentage in the fund. Proprietary investments allow investors to have a substantial amount of input and control over the investments chosen for the fund and how the fund is operated.

**Typical Proprietary Fund Structure**

<table>
<thead>
<tr>
<th>Syndicator—Fund GP or MM (0.01% ownership)</th>
<th>One Fund Investor LP or Member (99.9% ownership)</th>
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<tbody>
<tr>
<td><strong>Investment Fund Vehicle</strong> Typically LP or LLC</td>
<td></td>
</tr>
<tr>
<td>LIHTC Project 1, Jersey City, New Jersey</td>
<td>LIHTC Project 2, Los Angeles, California</td>
</tr>
<tr>
<td>LIHTC Project 3, Miami, Florida</td>
<td>LIHTC Project 4, Madison, Wisconsin</td>
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</table>

The example LIHTC projects shown here for this proprietary fund would be selected and approved by the fund investor based on the investor’s CRA Assessment Area. The syndicator and the investor would then pursue those particular LIHTC projects through a bidding process. The price the investor is willing to pay for each such investment is partially driven by its CRA need where each project is located.

The process that takes place between investors and syndicators participating in proprietary funds is one that is tailored to the particular investor and allows significant flexibility for meeting a particular investor’s CRA needs. Typically, a proprietary investor will share its CRA Assessment Area with its syndicator partners and work together to source deals in the proper area to satisfy the institution’s CRA needs. The CRA Assessment Area is the main driver in determining the transactions on which to bid. Bidders in the marketplace are completing against each other to win a particular LIHTC transaction. As will be discussed further
on in this article, this creates high competition and increased pricing for LIHTC transactions located in CRA markets that have a large number of banking institutions.

Multi-investor funds, as their name would indicate, include multiple investors in a single fund. A syndicator establishes and manages the fund, which makes investments in multiple projects. Multiple investors hold ownership interests, allowing the tax benefits to flow to the investors based on their ownership percentage in the fund. These multi-investor funds can range from fairly small investment funds with only a few investors (often referred to as a “‘club fund’”) to very large funds with investment amounts in the several hundred millions of dollars and a significant number of investors in a single fund.

Typical Multi-Investor Fund Structure

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</thead>
<tbody>
<tr>
<td>Syndicator Fund</td>
<td>0.01%</td>
<td>22%</td>
<td>19%</td>
<td>14.5%</td>
<td>25.8%</td>
</tr>
<tr>
<td>GP or MM</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fund</td>
<td>18.69%</td>
<td>25.8%</td>
<td>14.5%</td>
<td>19%</td>
<td>0.01%</td>
</tr>
</tbody>
</table>

This sample of a typical multi-investor fund chart depicts what would be a fairly small fund of this type. As the chart indicates, there can be many investors and many projects in a single fund that need to be properly paired together for CRA purposes.

Multi-investor funds are much more complex than proprietary funds in terms of CRA. In the multi-investor fund, all of the various institutions investing in the fund are receiving tax benefits from the same LIHTC projects in which the fund invests. The tax benefits from each project partnership flow to each investor based on the individual investor’s ownership percentage in the fund. For example, in the chart above, the Fund Investor labeled with 22% as its ownership interest will generally receive 22% of the tax credits and other tax attributes that flow from each of the ten listed LIHTC projects. The same is true of each of the other investors based on its percentage ownership noted. However, CRA does not “‘flow’” in that same way. It would be nearly impossible to put together a fund that matches the CRA needs of each investor in a multi-investor fund using a straight, proportional split.

Investors coming into a multi-fund investment scenario do not have the luxury of working with the syndicator in determining exactly what proj-
ects in which the fund will invest and precisely where those projects will be located. Generally, a multi-investor fund is marketed as a group of properties that have been selected with additional “‘slots’” for investments in the fund that will target a certain CRA area for potential investors. Investors are usually not as actively engaged with the syndicator in selecting and pursuing the specific projects. The puzzle of determining what CRA eligibility matches are available for each investor in the fund can be challenging. As it relates to these types of community development related investments, multiple institutions cannot claim CRA in the same investment dollars. Therefore, the appropriate mix of projects matching the CRA needs of a significant group of investors, without any overlap in those CRA allocations, needs to be carefully crafted.

As we look at the organizational charts of both a typical proprietary fund structure and a typical multi-investor fund structure, it is interesting to imagine what changes, if any, sweeping tax reform could make to these structures and to how the LIHTC practice generally functions. Certainly a mere change in corporate tax rates would not necessitate changes to the legal structure of how these deals are consummated. The same would apply if we are faced with changes to depreciation schedules or deductibility of certain types of expenditures. However, if we were to imagine a truly sweeping tax reform, where changes were made to the taxation scheme of pass through entities or changes in taxation such that LLCs were no longer taxed as partnerships, what impact could we see in the legal world regarding how we structure these transactions? It seems that if such a broad reform were to occur the potential structural changes that the legal community could devise are as broad and difficult to predict as predicting exactly what the changes to the tax code will look like. However, given the political conversation and timing, it is difficult to imagine that type of all encompassing tax reform, at least in the near term.

**Demonstrating CRA Allocation Methodology Through a Hypothetical Multi-Investor Fund**

The methodology in allocating CRA in a multi-investor fund is best illustrated by way of example. In the coming pages, we will explore an example of a hypothetical multi-investor fund with five investors and fifteen projects in which the fund is investing. The example also includes hypothetical cities in which the projects are located as well as the total dollar amount being invested by each of the five investors. The total amount invested in this hypothetical fund is $100 million with the total amount of fund equity associated with all of the total projects equaling $100 million. This example represents a simplified version of what a typical multi-investor fund would look like.

Each investor wishes to have CRA allocated to it equaling 100% of the dollars it invests in the overall fund. However, for each investor, that allocation needs to be in locations that are within the institution’s CRA Assessment Area without any overlap with other investors. This becomes
difficult in very high population markets, such as major city centers, because many institutions are looking for their investment dollars to be allocated to projects in these same areas.

Multi-Investor Fund—CRA Distribution Example

<table>
<thead>
<tr>
<th>Fund Investors</th>
<th>LIHTC Investments in the Fund</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investor 1</td>
<td>LIHTC Property 1—Miami, FL</td>
</tr>
<tr>
<td>National Footprint</td>
<td>Investing $20 Million</td>
</tr>
<tr>
<td>Investor 2</td>
<td>LIHTC Property 2—Ft. Lauderdale, FL</td>
</tr>
<tr>
<td>Footprint is National but Major Markets Only</td>
<td>Investing $19 Million</td>
</tr>
<tr>
<td>Investor 3</td>
<td>LIHTC Property 3—St. Paul, MN</td>
</tr>
<tr>
<td>National Footprint</td>
<td>Investment Size: $4,600,000</td>
</tr>
<tr>
<td>Investor 4</td>
<td>LIHTC Property 4—Helena, MT</td>
</tr>
<tr>
<td>Southeastern Footprint</td>
<td>Investing $20 Million</td>
</tr>
<tr>
<td>Investor 5</td>
<td>LIHTC Property 5—Blue Summit, MO</td>
</tr>
<tr>
<td>Non-Financial Institution</td>
<td>No CRA Requirements</td>
</tr>
<tr>
<td>Economic Investor</td>
<td>Investing $25 Million</td>
</tr>
<tr>
<td>LIHTC Property 6—Denver, CO</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 7—Spokane, WA</td>
<td></td>
</tr>
<tr>
<td>Investment Size: $10,200,000</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 8—Newark, NJ</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 9—Nashville, TN</td>
<td></td>
</tr>
<tr>
<td>Investment Size: $7,500,000</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 10—Holbrook, AZ</td>
<td></td>
</tr>
<tr>
<td>Investment Size: $6,850,000</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 11—Oroville, CA</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 12—Ft. Stockton, TX</td>
<td></td>
</tr>
<tr>
<td>Investment Size: $6,400,000</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 13—Greensboro, NC</td>
<td></td>
</tr>
<tr>
<td>Investment Size: $4,750,000</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 14—Seattle, WA</td>
<td></td>
</tr>
<tr>
<td>LIHTC Property 15—Fayetteville, NC</td>
<td></td>
</tr>
<tr>
<td>Investment Size: $6,300,000</td>
<td></td>
</tr>
</tbody>
</table>

From a tax benefit perspective, each investor in this example will receive its share of tax benefits and attributes from each property in the fund proportionate to its ownership. For example, Investor 1 holds a 20% stake and will receive 20% of the tax attributes from each of the fifteen listed properties. However, the allocation for CRA purposes needs to match each investor’s specific needs based on that institution’s footprint. The following chart shows an example of how the CRA associated with each of these projects could be allocated among the five investors to meet each investor’s specific CRA needs.
### Example CRA Allocations per Investor

<table>
<thead>
<tr>
<th>Investor</th>
<th>Region</th>
<th>Properties</th>
<th>Allocations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investor 1</td>
<td>National</td>
<td>Property 3 (St. Paul, MN)</td>
<td>$3,600,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 6 (Denver, CO)</td>
<td>$8,600,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 7 (Spokane, WA)</td>
<td>$3,400,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 11 (Oroville, CA)</td>
<td>$1,000,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 14 (Seattle, WA)</td>
<td>$3,400,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>TOTAL</strong></td>
<td><strong>$20 Million</strong></td>
</tr>
<tr>
<td>Investor 2</td>
<td>Major Market National</td>
<td>Property 1 (Miami, FL)</td>
<td>$5,500,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 2 (Ft. Lauderdale, FL)</td>
<td>$1,500,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 8 (Newark, NJ)</td>
<td>$3,800,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 9 (Nashville, TN)</td>
<td>$6,250,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 11 (Oroville, CA)</td>
<td>$1,950,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>TOTAL</strong></td>
<td><strong>$19 Million</strong></td>
</tr>
<tr>
<td>Investor 3</td>
<td>National</td>
<td>Property 1 (Miami, FL)</td>
<td>$191,348</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 2 (Ft. Lauderdale, FL)</td>
<td>$76,345</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 3 (St. Paul, MN)</td>
<td>$1,000,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 6 (Denver, CO)</td>
<td>$1,800,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 7 (Spokane, WA)</td>
<td>$3,576,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 8 (Newark, NJ)</td>
<td>$500,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 10 (Holbrook, AZ)</td>
<td>$1,500,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 11 (Oroville, CA)</td>
<td>$1,708,701</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 12 (Ft. Stockton, TX)</td>
<td>$947,606</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 13 (Greensboro, NC)</td>
<td>$4,750,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 14 (Seattle, WA)</td>
<td>$3,300,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 15 (Fayetteville, NC)</td>
<td>$150,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>TOTAL</strong></td>
<td><strong>$16 Million</strong></td>
</tr>
<tr>
<td>Investor 4</td>
<td>Southeastern U.S.</td>
<td>Property 1 (Miami, FL)</td>
<td>$3,000,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 2 (Ft. Lauderdale, FL)</td>
<td>$6,100,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 13 (Greensboro, NC)</td>
<td>$4,750,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Property 15 (Fayetteville, NC)</td>
<td>$6,150,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>TOTAL</strong></td>
<td><strong>$20 Million</strong></td>
</tr>
<tr>
<td>Investor 5</td>
<td>No CRA</td>
<td><strong>TOTAL</strong></td>
<td><strong>$0</strong></td>
</tr>
</tbody>
</table>
Each investor is allocated a portion of the deals that fit with the respective investor’s Assessment Area. The CRA allocations are specific to each property and each investor rather than tracking an investor’s ownership in the overall fund. To illustrate, look to LIHTC Property 2 located in Fort Lauderdale, Florida. The CRA allocation for this property has been allocated such that Investor 3 is receiving a CRA allocation of $76,345 for investment in LIHTC Property 2 (which represents only 1% of the amount the fund is investing in LIHTC Property 2) despite the fact that Investor 3 holds a 16% ownership stake in the fund. Investor 4 is receiving a CRA allocation of $6,100,000 in LIHTC Property 2 (representing 79% of amount the fund is investing in LIHTC Property 2) although Investor 4 holds a 20% ownership stake in the fund. In determining which project, or portion of a project, gets allocated to a specific investor for CRA purposes, each investor’s footprint is the controlling factor. The investors in the hypothetical fund that have a national footprint have the most flexibility for allocating CRA. They have CRA requirements throughout the country and in many differing types of markets. Conversely, an investor similar to Investor 4 that has a footprint limited to the Southeastern portion of the United States will have a more limited investment profile for the fund. Investor 4 will want its investment dollars to go to a fund where the mix of projects includes transactions in its Southeastern footprint. CRA allocation outside of that footprint would not be attractive to Investor 4. Therefore, the blend of project locations and the profile of the CRA motivated investors in the multi-investor fund need to be matched to each other.

While the amount of CRA allocated to a particular investor for a specific project in the fund does not have to follow its ownership percentage in the fund, the total amount for each project being allocated among investors cannot exceed the total amount the fund is investing in that particular project. In other words, there cannot be any overlap of more than one investor claiming CRA for the same investment dollars in a transaction. The following table illustrates on a project by project basis that no more than 100% of each project has been allocated. Therefore, there is no overlap between investor allocations in a single property.

In addition to not having any overlap, such that more than 100% of the investment dollars in any project is allocated to the investors, no investor may be allocated more CRA investment than the total amount of that institution’s investment. Therefore, while the total fund size is $100 million, only $75 million of investment amount is being allocated in CRA to the fund investors. That is represented by the unallocated portion shown in the table. The reason for this unallocated portion of the fund investment is that Investor 5 in the fund is an economic investor and does not have CRA requirements. No CRA is allocated to Investor 5 for this reason. Investor 5’s investment amount is $25 million, which equals the total amount that is not allocated for CRA purposes. Even though there is investment in projects that has not been allocated to any investor, Investors
### Project by Project CRA Allocations

<table>
<thead>
<tr>
<th>Investor</th>
<th>Property 1</th>
<th>Property 2</th>
<th>Property 3</th>
<th>Property 4</th>
<th>Property 5</th>
<th>Property 6</th>
<th>Property 7</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Miami, FL</td>
<td>Ft. Lauderdale, FL</td>
<td>St. Paul, MN</td>
<td>Helena, MT</td>
<td>Blue Summit, MO</td>
<td>Denver, CO</td>
<td>Spokane, WA</td>
</tr>
<tr>
<td>1</td>
<td>$0</td>
<td>$0</td>
<td>$3,600,000</td>
<td>$0</td>
<td>$0</td>
<td>$8,600,000</td>
<td>$3,400,000</td>
</tr>
<tr>
<td>2</td>
<td>$5,500,000</td>
<td>$1,500,000</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>3</td>
<td>$191,348</td>
<td>$76,345</td>
<td>$1,000,000</td>
<td>$0</td>
<td>$0</td>
<td>$1,800,000</td>
<td>$3,576,000</td>
</tr>
<tr>
<td>4</td>
<td>$3,000,000</td>
<td>$6,100,000</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>5</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>Total Allocated</td>
<td>$8,691,348</td>
<td>$7,676,345</td>
<td>$4,600,000</td>
<td>$0</td>
<td>$0</td>
<td>$10,400,000</td>
<td>$6,976,000</td>
</tr>
<tr>
<td>Total Property</td>
<td>$8,700,000</td>
<td>$7,700,000</td>
<td>$4,600,000</td>
<td>$5,700,000</td>
<td>$5,200,000</td>
<td>$10,400,000</td>
<td>$10,200,000</td>
</tr>
<tr>
<td>Total Unallocated</td>
<td>$8,652</td>
<td>$23,655</td>
<td>$0</td>
<td>$5,700,000</td>
<td>$5,200,000</td>
<td>$0</td>
<td>$3,224,000</td>
</tr>
</tbody>
</table>

TOTAL UNALLOCATED: $25 Million
1 through 4 cannot receive additional CRA allocation since they have already been allocated the full amount of their respective investments.

Once the puzzle of CRA allocations among the various types of investors in a multi-investor fund has been decided, the CRA allocations for each investor need to be documented. This typically occurs through a CRA letter or other type of agreement. Each investor receiving a CRA allocation within the multi-investor fund enters into an agreement with the syndicator setting out the projects and the investment amount for which that institution is being allocated CRA.

As the examples used in this hypothetical multi-investor fund show, it is a delicate balance to source the proper mix of investors with the proper mix of LIHTC projects such that each investor that has CRA requirements receives the full amount of CRA allocation based on its investment. The goal of the syndicator is to source those investments that will most closely align with its investor base that participates in multi-investor funds and to create a fund that can strike the proper balance for each investor.

Timing in CRA Motivated Investments—The CRA Cycle

Whether an investor is participating as a direct investor or working with a syndicator, and whether it is investing with a syndicator on a proprietary basis or in multi-investor funds, another very important element each investor takes into account is the timing of its institution’s CRA cycle. As Paul Kaboth notes in the first article of this Commentary, the CRA requires periodic review of an institution’s record of helping to meet the credit needs of the entire community, including low and moderate income communities. The period of time being examined by a financial institution’s CRA examiner is that financial institution’s CRA cycle. The CRA cycle of a financial institution also dictates the timing of when an institution is committing to LIHTC projects and putting its investment dollars into LIHTC projects. Financial institutions try to balance their LIHTC commitments and investment dollars so that they are meeting their CRA requirements but without over investing beyond those requirements for the period of a CRA cycle. In other words, if an institution has set a goal to invest $20 million in a specific geographic area of the country during its current CRA cycle, it will work to manage its investment so that it is not investing significantly more than the stated goal during the specific CRA cycle. If the goal for that location has already been met, an institution will often manage its commitments so that additional investment in that location takes place after the end of the existing CRA cycle so it can begin to work toward its goal for the following CRA cycle.

4. Kaboth, supra note 2, at 391.
CRA’s Impact on Negotiation of LIHTC Investment Terms

As the biggest driver in LIHTC project investment, CRA acts as a factor in many facets of negotiating an institution’s investment in these projects. While we have examined the mechanics of how CRA functions in the LIHTC investor market, it is also important to understand the impact CRA plays in the LIHTC market. Through the examples provided, it has been demonstrated that it is a difficult and important exercise to obtain LIHTC projects within a financial institutions CRA Assessment Area. Because many financial institutions, and often most of the large financial institutions, are operating in competition in the larger cities throughout the country, those financial institutions also have CRA investment requirements to fulfill in those cities. This creates significant competition for these financial institutions to present attractive bids for development projects in major markets. The competition created by multiple financial institutions seeking LIHTC investment opportunities in these high population areas drives the price investors are willing to pay to invest in these high demand projects. Conversely, in more rural areas, where there are a smaller number of banks serving a particular location, the demand for CRA participation in those areas is lower. As a result, banks are not competing as heavily to participate in LIHTC investments in these more rural areas. This directly impacts the pricing that developers can expect for their projects in these varying locations.

Additionally, the level of demand for a project due to its location in a high value CRA area has a direct impact on the terms that the parties are able to negotiate into the limited partnership agreement for that project. While it may be intuitive that projects in high value CRA areas are competitive in pricing, the CRA competitiveness also allows developers to dictate more favorable terms for their projects since they have multiple institutions competing to invest in the limited projects that are available.
CRA and Historic Tax Credit Investments

While the focus of this piece is CRA relating to low income housing tax credit investment, many developers and investors that participate in the LIHTC market also participate in the Historic Tax Credit (HTC) market. Therefore, this is a brief look at how the two programs are different in terms of CRA.

LIHTC projects specifically target low income tenants and therefore have a presumption as being CRA eligible investments. HTC projects, however, do not carry a presumption of being CRA eligible. As portrayed in the Venn diagram below, while all low income housing tax credit projects carry the presumption of being CRA eligible, some HTC projects are CRA eligible while others are not. Those HTC projects that qualify as both HTC and LIHTC projects keep their presumption of being CRA eligible investments. For HTC projects that do not specifically include a LIHTC component, those projects may still qualify as CRA eligible investments.

Interplay of HTC and LIHTC for CRA Eligibility

HTC projects that do not contain a LIHTC component can still qualify as CRA eligible investments if the project includes community services that are targeted to low and moderate income individuals, has an economic development component such as financing a small business, or serves to revitalize or stabilize an underserved or distressed area, low and moderate income areas or a designated disaster area.

To qualify under the requirement of having an economic development component for financing a small business, the HTC project must meet one of two tests: the size test or the purpose test. The size test involves financ-
ing a business with gross annual revenues of $1 million or less or be structured to meet certain Small Business Administration Development Company size eligibility requirements. The purpose test under the economic development standard requires that the HTC project must support permanent job creation retention or improvement for low or moderate income individuals; be a low or moderate income census tract; or be in an area targeted for redevelopment by federal, state, local or tribal governments.

To qualify under the requirement of revitalizing or stabilizing an area, the HTC project must be in a distressed nonmetropolitan middle income area, a low to moderate income area, or a designated disaster area. The HTC project must support retention of existing businesses or residents or attract new businesses or residents. If the HTC project is in an underserved nonmetropolitan middle income area, the HTC project must include an activity that addresses essential community needs.

As we look at the potential of regulatory reform on the horizon, changes to the CRA could potentially alter some of these requirements for qualification. While regulatory reform generally is certainly on the agenda for financial institutions, the CRA, at this time, does not seem to be a priority of the current administration.

Since HTC projects are more subjective than LIHTC with regard to CRA eligibility, it is important that an institution work with its regulatory contacts to determine if the project meets the necessary requirements. Just as with LIHTC projects, the HTC project must be in the financial institution’s Assessment Area.

Conclusion

The CRA plays a significant and influential roll in the tax credit marketplace and particularly so with regard to LIHTC investments. The need for financial institutions to invest in LIHTC projects in order to meet their community investment requirements makes CRA one of the driving factors that influence LIHTC investment strategies. CRA is the driving force in financial institutions decisions regarding pricing and timing of their LIHTC investments and certainly is the single largest factor in determining where they are placing their investment dollars. Through competition for LIHTC projects in high value CRA areas, CRA serves as a driver not only on negotiating pricing but also on substantive business and legal terms of the transaction. Less obvious, but just as important, is how all of the factors driving LIHTC investment for CRA purposes influence how LIHTC syndicators structure their fund offerings and how syndicators work with their investor and developer partners.

While the specter of tax reform and regulatory reform are ever present with decision makers within investors and syndicators, this uncertainty has not driven investment dollars away from the market generally, nor has it left investors paralyzed while we all wait for Congress and the administration to come to a consensus. Certainly broad reforms such as a repeal of the CRA or a sweeping change to the system of taxation in our
country would dramatically alter the landscape for both CRA motivated investors and economic investors. However, those types of industry changing broad reforms do not seem likely. Generally, the industry is predicting and planning for the potential of lower corporate tax rates and other tax changes that may impact the economics of these transactions, rather than the existence of the marketplace.
The Community Reinvestment Act, Banks, and the Low Income Housing Tax Credit Investment

Cassandra Jones Havard

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I. Introduction

The Low Income Housing Tax Credit (LIHTC) is the largest and the oldest affordable housing program in the country. The LIHTC encourages private investment in affordable rental housing. Created in 1986, it has produced 49,905 projects and approximately $2.97 million in affordable rental housing units. The projects represent an estimated $8.5 billion in tax credits. Since its inception, it has created 95,700 jobs; contributed


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$3.5 billion in state, local, and federal taxes; and $9.1 billion in wages and business income annually.\textsuperscript{4} A typical 100-unit LIHTC property, in its first year, on average, provides $8.7 million in additional wages for local workers and business profits; creates $3.3 million in additional federal, state, and local tax revenue; and supports 116 jobs.\textsuperscript{5} As a consequence, the quality and supply of affordable housing has improved and neighborhoods have stabilized. Even though the tax credit finances nearly 100,000 affordable homes for low income households each year, tremendous needs remain unmet.\textsuperscript{6}

The program is a unique public-private partnership that plays an important role in community development. The program responds to the increasing demand for rental housing for low-and moderate-income (LMI) persons while providing state and local governments with tax revenues and the economic sector with jobs. As investors, banks partner with developers and state and local agencies to earn tax credits and real estate losses that lower their federal tax liabilities. Joining with banks is efficient for developers because they often need to raise less money from individual investors. Using LIHTCs, both developers and investors have played a pivotal role in fundamental changes that have occurred in the affordable rental housing market. LIHTCs provide an advantage for financial institutions because financing loans for affordable housing development is an allowable way to meet their obligations under Community Reinvestment Act (CRA).\textsuperscript{7}

LIHTC creates a synergistic relationship between developers and financial institutions because of the banks’ obligation to lend to individuals of varying incomes and small businesses. As discussed in the first of these three articles, “History and Overview of the Community Reinvestment

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\textsuperscript{5} Id.

\textsuperscript{6} According to a \textit{Frontline} report, the annual production of LIHTC housing has decreased from 70,000 housing units in 1997 to fewer than 59,000 units in 2014. \textit{Frontline}/National Public Radio, \textit{Affordable Housing Program Costs More, Shelters Fewer}, May 9, 2017, 12:31 P.M., http://www.npr.org/2017/05/09/527046451/affordable-housing-program-costs-more-shelters-less (analysis of data from the National Council of State Housing Agencies, State HFA Factbooks, 1997–2014).

\textsuperscript{7} \textit{Government Accountability Office}, \textit{Community Reinvestment Act: Challenges in Quantifying Its Effect on Low-Income Housing Tax Credit Investment}, GAO-12-869R (2012) (discussing the demand for LIHTC housing and how CRA and other factors influence the market, including investors’ equity contributions).
Act,” under the CRA, federally regulated financial institutions must meet the credit needs of the communities in which they accept deposits. The CRA’s goal is to incentivize bank lending and investment activity to low and moderate-income LMI borrowers. By participating in LIHTC projects, financial institutions facilitate the financing and ultimately the availability of the affordable rental housing stock for LMI. While the CRA provides accountability on whether banks meet community lending needs, the underlying issue of how effectively these two federal polices, LIHTC and the CRA, implement the nation’s affordable housing policy is the issue.

II. Identifying Congruencies

A. LIHTC and the CRA

LIHTC aligns financial institutions with community needs and financial returns. It uniquely incentivizes private capital lending and investing in financing affordable housing and other community development activities. Tax credits are available to investors when projects provide affordable housing to qualifying low-income tenants. The projects must be built within specified periods and operated with financial and operational discipline and according to regulatory requirements over a fifteen-year compliance period.

LIHTC provides banks with a safe and sound investment in the affordable housing arena. Banks may meet their CRA requirements by partici-
pating in LIHTC-financed projects. Banks, as experts in commercial lending and real estate underwriting, enhance the credit availability in the communities they serve. Under the CRA, banking regulatory agencies conduct an annual evaluation of banks to determine how well banks serve all segments in their geographical assessment area. Designed to combat the constant discriminatory practices of redlining and disinvestment, the CRA requires banks to provide access and return capital to these communities. Providing access to fair credit restores capital to neighborhoods and diminishes income inequalities. Yet, for financial institutions whose CRA performance is made public annually, there is a need to balance profitable investment opportunities that also fulfill their CRA requirements with financial returns. LIHTCs allow banks to do both simultaneously.

**B. Affordable Housing Success**

1. **CRA and the LIHTC Program**

CRA and LIHTC are compatible by design. Banks play a primary role in providing the financing for LIHTC projects. While LIHTC is designed to incentivize bank participation, banks can easily justify participating in a LIHTC project because it directs lending to address a community need, affordable rental housing. Furthermore, the multiple participants, i.e., housing credit agencies, state and municipal lenders, private lenders, syndicators, and developers that all play very particular and specialized roles, have developed the specialized expertise that contributes the needed market discipline primarily due to CRA requirements.

Banks may choose to participate in LIHTC projects in two different ways. They either are investors or specialized lenders. If they choose to become investors, they use LIHTCs to provide equity in exchange for the tax credits. If they participate as lenders, they provide the projects with either short-term or long-term financing. Banks are experienced in housing development and commercial real estate finance, and LIHTC provides them with a resourceful way to meet the credit needs of their communities, which they may not feel obligated to do without the CRA requirement.

A LIHTC project qualifies for CRA credit under the investment test. Typically, CRA credit is given in the year the investment is made although

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13. Redlining refers to a lender’s process of outlining certain poor neighborhoods on a map in order to indicate areas considered “too high” a risk for lending. Disinvestment is the practice of taking deposits from an inner city community and investing them elsewhere, where risks are perceived to be lower, and where financial institutions feel more comfortable doing business.
14. See Gov’t Accounting Office, Community Reinvestment Act, supra note 7, at 6-7.
15. See 2001 Interagency CRA Questions and Answers, 12(s) & 563e.12(r)-4; 2001 Interagency CRA Questions and Answers, .23(a)-1 and .12(s) & 563e.12(r)-4.
the benefits from the investment last for the length of the project. To earn credit, banks must use LIHTCs in the communities they service.\textsuperscript{16} Banks have been responsive to community development needs and opportunities in their geographic assessment areas (AAs). A bank may also earn CRA credit for activities outside of its AA.\textsuperscript{17}

Specifically, banks receive CRA credit for community development activities related to LIHTC projects and funds, provided the activities benefit a bank’s assessment area or a broader statewide or regional area that includes the bank’s AA(s). The bank’s AA(s) need not receive an immediate or direct benefit from the bank’s participation in the activity, provided the purpose, mandate, or function of the activity includes serving geographies or individuals located within the institution’s AA(s).\textsuperscript{18}

Multiple opportunities exist for banks to earn CRA credit for LIHTC-related financing. These include direct investments in LIHTC projects, pre-development financing or construction/permanent financing to LIHTC projects, investments in funds that specialize in funding and managing LIHTC projects, and technical assistance to nonprofit organizations that help identify and counsel potential low- or moderate-income residents.\textsuperscript{19}

Banks can earn significant financial returns based on their experience in underwriting and management of long-term financed projects. As an asset class, historic returns on investments and loans in LIHTC projects have been competitive with similar alternative investment opportunities. The involvement of syndicators, which frequently manage the LIHTC projects that banks participate in, has contributed significantly to the overall program’s success and to the low foreclosure rate.\textsuperscript{20}

\textsuperscript{16} See 2001 Interagency CRA Questions and Answers, .12(i) & 563e.12(h)-5 and the 2007 proposed Interagency CRA Questions and Answers, .23(a)–2 that address the geographic requirements for qualified funds.


\textsuperscript{18} See Kaboth, supra note 8, at X.

\textsuperscript{19} See Interagency Questions and Answers Regarding Community Reinvestment, 75 Fed. Reg. 11642, 12(g)(4)(ii)-1, Mar. 11, 2010; see also OCC Bull. 2012-8, Community Reinvestment Act Consideration for Gulf Coast Disaster Area Activities: Extension of Deadline (Feb. 27, 2012); Office of the Comptroller of the Currency, Community Developments Fact Sheet: Designated Disaster Areas and Consideration under the Community Reinvestment Act (Oct. 2012), www.occ.gov/topics/community-affairs/publications/fact-sheets/fact-sheet-designated-disaster-areas-cra.pdf. Two other common investments that banks make for CRA credit are state and municipal revenue bonds that specifically support affordable housing (including 4 percent LIHTC projects) and, under certain circumstances, disaster areas that are outside these areas, provided the bank has adequately been responsive to needs in its AA(s).

\textsuperscript{20} A study found that “the incidence of foreclosures in housing tax credit properties continues to compare very favorably with the foreclosure rate of market-rate multifamily properties and other real estate asset groups.” See The Low Income Hous-
Banks can widen their own lending opportunities and potentially gain entry into other lending markets by participating in LIHTC projects. The projects require additional loan products and bank services, such as pre-development and acquisition loans, bridge loans, construction loans, permanent mortgage financing, letters of credit, and warehouse lines of credit. Thus, involvement with LIHTC-related clientele provides more lending opportunities for the banks.

Finally, LIHTCs can be used to leverage other tax credit investments. For some transactions, LIHTCs can be pooled with historic tax credits (HTC) or renewable energy tax credits (RETC) or state housing tax credits. Using “twined” or multiple tax credits can improve the internal rates of return on these transactions, making them attractive to investors.

The success of the LIHTC program is due to its taxpayer protections, low default rates, and allocation of credits on a per capita basis to all states. By combining a tax benefit to investors with the reduction of property debt, the program has accomplished its goal of delivering low and affordable rents and minimizing loan defaults. Taxpayer exposure to failure is reduced because of the possibility of tax credit losses. LIHTC-qualifying properties have oversight and compliance requirements that require close supervision by developers and investors. If the subsidized properties become non-performing, private investors must repay a fraction of the tax credits. Investors are required to have significant capital at risk, contributing to careful underwriting and appropriate workouts to avoid failing properties and recapture of tax credits.

Industry guidelines have proven particularly effective in helping developers and investors sustain and strengthen the housing tax credit in the development of affordable housing. Inappropriate valuation can have a negative impact on the review of a potential investment opportunity. To ameliorate shortcomings that are inherent in this highly special-
ized business, the LIHTC industry has established well-developed guidelines and best practices. These standards, which address concerns about financial risk avoidance, risk management, and risk mitigation contribute to the high success rate of projects. The industry’s underwriting guidelines provide specific evaluation tools for affordable rental housing projects factors that are measurable and effective. Assessing such factors such as location in a neighborhood, market demand, rents and expenses, project financing rates and terms, and partnership terms in a competitive market are unique to the LIHTC project and affect the financial expectations for all participants. The industry guidelines on compliance and monitoring, which are essential for owners, also have had a positive impact on project development. Owners need effective processes to meet the planning, construction, and operation requirements in order to claim and maintain tax-credit status.

2. CRA and Housing Finance Agencies (HFAs)

The real estate capital market for the LIHTC is unique in that the supply of housing tax credits is fixed by statute. The demand, however, for housing tax credits derives in significant part from the CRA. The interaction between the two requires efficient monitoring to ensure that the intended beneficiaries, affordable housing residents, receive the envisioned benefits.

The Internal Revenue Service allocates tax credits proportionately to states based on each states’ population size. The LIHTCs are then allocated to and administered through state housing and finance agencies. Housing finance agencies (HFAs) in turn distribute LIHTCs to private developers. This delegation of authority provides local oversight and allows the program to be sensitive to local needs.

HFAs have significant discretionary authority in funding and monitoring. In performing this function, each state agency creates its own methods and rating systems for evaluating applicants on reviewing costs at application, allocation, and placed-in-service projects. HFAs evaluate LIHTC proposals to ensure that they meet the specific statutory preferences and selection criteria. Additionally, they allocate tax credits, deter-

24. The Affordable Housing Investment Council (AHIC) is the LIHTC trade association, focusing on standardizing underwriting, database collection, and reporting. See https://www.ahic.org.
25. “AIHC produces best practices for the housing credit field, guidelines that are widely adopted by our members and partners in the affordable housing industry.” See Acquisitions/Underwriting on the “Tools and Resources” page of the AHIC website, http://www.ahic.org/tools-resources/.
27. OCC, Low-Income Housing Tax Credits, supra note 21, at Part II.D.1.
28. GAO, Community Reinvestment Act, supra note 7, at 14.
mining the reasonableness of development costs, and monitoring project compliance during the lifetime of the deal.

The shared goal of developing LIHTC affordable rental housing aligns the objectives of banks with those of HFAs. HFAs help lenders meet their business development and CRA goals for community-oriented and affordable lending. HFAs make awards based on the annual qualified allocation plan (QAP),\textsuperscript{29} which targets affordable housing priorities and ranking and selection procedures for projects.

HFAs have a broad mission of developing programs that promote affordable housing generally, which includes housing for the elderly, the disabled, and low- and moderate home ownership, not just affordable rental housing. Banks benefit when tax credits are directed toward LIHTC properties that can be CRA-qualified, a much narrower HFA mandate. The LIHTC allocation process does not provide banks with a particular advantage, although QAPs can address specific set-asides or preference points for their priorities. Admittedly, those priorities are usually selected with the lure of financial incentives to motivate private sector investments from banks and non-banks. HFAs can target tax credits several ways. Incentivizing development through QAPs is problematic, however. If housing location is prioritized in high-poverty areas that are also consistent with banks’ assessments areas, banks are drawn to these developments to receive favorable regulatory benefits. It is inconsistent with the statutory scheme to challenge this designation by financing a project that will receive less credit.

The QAP selection process awards preferences, in the form of extra points, to encourage developers to submit projects more likely to serve particular populations or locations.\textsuperscript{30} The QAP also may establish a set-aside, reserving a specific percentage or dollar amount of any given year’s tax credit allocation for projects more likely to serve particular populations or locations.\textsuperscript{31}

The cost of the land and the LIHTC-allowable rents dictate specific considerations about the geographic placement of the property. Selection cri-

\textsuperscript{29} See 26 I.R.C. 42(m)(1)(C).

\textsuperscript{30} The QAP must also address how the selected projects have complied with LIHTC’s three preferences: (1) projects for very low-income persons that will serve income-eligible residents for the longest period of time; (2) projects that serve the tenants with the lowest incomes; and (3) projects that serve qualifying tenants for the longest period of time, and are located in a qualified census tract and the development of which contributes to a concerted community revitalization plan.

teria are tailored to local conditions. HFAs can award a qualified “basis boost.” This increases the tax credits up to 30 percent for projects that the Department of Housing and Urban Development (HUD) has identified as designated cost areas. HUD designates Difficult Development Areas (DDAs) and Qualified Census Tracts (QCTs) for the purpose of administering the LIHTC program. The “basis boost” is an implicit endorsement to develop affordable housing in areas that are blighted and filled with urban decay. The presumption is that the construction of affordable housing in these areas will stabilize these deteriorating communities. As discussed below, neither HUD nor the IRS provide HFAs with uniform standards for evaluating the use of the “basis boost” or for determining whether LIHTC projects meet fair housing goals. This failure to specify the standard that HFAs should use has resulted in banks gravitating only towards those projects that will yield them the most CRA credits. Whether residents are similarly advantaged by these LIHTC placements is open to debate.

III. CRA and LIHTC

Although the LIHTC and the CRA are a constructive collaboration, there are several inefficient policies that if more aligned would make their connection stronger. The question becomes what barriers have constrained the most efficient use of LIHTCs. As argued below, incongruences in pricing, syndication costs, and geography should be examined.


33. Section 42 allows for an increase or “boost” of up to 130 percent in the eligible basis in a qualified census tract or difficult development area and after 2008 amendments, discretion to designate any building, regardless of location, as eligible for a boost of up to 130 percent of the eligible basis.

34. A DDA is “an area which has high construction, land, and utility costs relative to area median gross income.” 26 U.S.C.A. § 42(d)(5)(B)(iii)(I).

35. A QCT is a census tract “either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent.” 26 U.S.C.A. § 42(d)(5)(B)(ii)(I).

36. A GAO audit found that some HFAs gave an automatic basis boost without regard to the criteria. GOVERNMENT ACCOUNTABILITY OFFICE, SOME AGENCY PRACTICES RAISE CONCERNS AND IRS COULD IMPROVE NONCOMPLIANCE REPORTING AND DATA COLLECTION 49, GAO-16-360 (2016).

37. This presumption behind the “basis boost” was not supported with studies or even congressional debate. See Orfield, Racial Integration and Community Revitalization, supra note 1, at 1779.
A. Pricing

Almost 85 percent of the equity for all LIHTC investments comes from banks subject to the CRA.38 Pricing in LIHTC projects is most affected by the dominance of large banks participating in this market.39 Large banks have a significant demand for LIHTCs because the tax credits help the banks meet their CRA investment requirements.

The investment test allows banks to use various qualified community development investments, including LIHTC projects. The investment test considers the dollar amount of qualified community development investments, the innovativeness and complexity of qualified investments, and the responsiveness of qualified investments to credit and community development needs, and whether the investments differ from those provided by most private investors.40

Tax credit pricing has evolved over time into a two-tier pricing system. Developers charge prices based on the CRA value of the project to banks. The pricing and yield trends are directly related to an over-supply of capital and an under-supply of LIHTC credits. CRA dictates the competition for the limited supply of LIHTC credits in banks’ CRA assessment areas. Developers sell tax credits for more than $1.00 in the most competitive CRA markets. In less attractive CRA markets, developers sell tax credits for $1.00, but the actual tax credit that can be used for CRA obligations or against operating losses.

The presence of large national banks has a deleterious effect on the pricing infrastructure of the LIHTC program. A bank’s CRA obligation is based on the amount of the bank’s core capital or the volume of the bank deposits. This translates into a “high value CRA” requirement, or a higher demand for “CRA capital” at the home office of large, national banks, usually located in a major city. Because the home offices of several large, national banks may be geographically close, the CRA assessment areas may overlap. This creates extreme competition for tax credits in certain locations. This demand can outstrip the supply of available tax credits. Large banks are willing to pay a premium of up to $.20 for the $1 housing credit.41 This “CRA-motivated demand” is in urban markets that have

39. “Large banks” are institutions with more than $1.16 billion in assets. 12 U.S.C.A. §§ 2901–2908.
40. Under the regulation, the types of investments that satisfy the CRA investment test include, among other things, support for organizations that help finance small businesses and support for financial intermediaries (such as community development corporations) that lend or facilitate lending to low- and moderate-income areas. See 12 C.F.R. § 345.23 (1995).
41. See Cohen Reznick, LIHTC Syndicators, supra note 38, at 1.
a high demand for all types of housing, which in turn increase the need for more affordable housing, including LIHTC projects.\(^{42}\)

This is juxtaposed against those projects in which housing tax credit investors must acquire tax credits at a discount. Small bank and other investors make up the second price tier because they purchase tax credits that have a discounted value, receiving less than $1.00 tax credit for each $1.00 of equity invested.\(^{43}\) Small banks in large urban markets are precluded from competing given the high demand and low supply of the tax credits and the smaller banks’ inability to participate in the inevitable bidding war that large banks wage. Additionally, although there may be significant need for affordable housing in small cities or rural areas, the lower tax credits and lack of investors for LIHTC projects in these areas decreases the supply. In these markets, the tax credit receives a discounted value, with investors receiving $.85 for the $1.00 tax credit.\(^{44}\) Discounting the tax credit is necessary in order for investors to receive a return of capital with a minimum yield on the investment given the rent restrictions.

Finally, a bank may receive positive consideration toward its regulatory rating for LIHTC investments in the broader statewide or regional areas that includes its assessment area. Although these are qualified investments, banks may receive less CRA credit because of the investment’s location. As discussed below, changes as to the calculations for the CRA investment test would reduce these extreme pricing spreads.

\section*{B. Syndication}

Many LIHTC projects are organized as partnerships with investors as limited partners and the syndicator as the general partner. LIHTC developers work with syndicators, which provide technical expertise and consultation services to the developer. Tax credit syndicators purchase affordable housing credits from LIHTC developers for sale to investors. They then earn profits by selling the tax credits to investors at a higher price or by purchasing tax credits on behalf of investors for a fee. Investors willing to become partners in LIHTC partnerships are limited partners, with a large ownership percentage in the property but otherwise are

\footnotesize{42. A GAO report found a 20 percent to 30 percent pricing differential in LIHTC investments in large urban markets. Gov’t Accounting Office, \textit{Community Reinvestment Act}, supra note 7, at 14.}

\footnotesize{43. The market price of tax credits fluctuates, but in normal economic conditions the price typically ranges from the mid-$0.80s to low-$0.90s per $1.00 tax credit. The larger the difference between the market price of the credits and their face value ($1.00), the larger the return to invest. Mark P. Keightley, \textit{An Introduction to the Low-Income Housing Tax Credit} Congressional Research Service 7-5700 (2017), www.crs.gov.}

\footnotesize{44. Ross Clarke, \textit{The Low Income Housing Tax Credit (LIHTC): Challenges Presented by the Onset of Year 15} in \textit{St. Louis} at 6, https://www.stlouisfed.org/~media/Files/PDFs/Community%20Development/Research%20Reports/lihtc_report.pdf.}
not directly involved in project development. As discussed in the companion piece “The Community Reinvestment Act’s Impact on Low Income Housing Tax Credit Investment,” syndicators provide legal and accounting services required to pool the tax credits, monitor projects for the investors, and sometimes fund reserves for legal and administrative costs.\(^\text{45}\)

Syndications spread the risk among many different investors and place the primary responsibility for monitoring the portfolio with the syndicator. Syndicators pool projects, recruit investors, and provide monitoring and compliance services for a fee. Syndicators focus on designing a project in a way that maximizes returns. Pricing for the tax credits is set by the market and depends on both the demand for the credit relative to supply and on the return expectations of investors. Although ownership arrangements vary, typically the limited partner investors calculate their investment yield based only the value of the tax credit stream and their share of property losses, particularly depreciation.

The syndicator, which maintains a minimal ownership stake, is responsible for ensuring the property generates enough cash flow for ongoing debt repayment and remains in compliance with income and rent restrictions.\(^\text{46}\) Annualized yields for LIHTC syndication funds return between 5 percent and 7 percent to investors.\(^\text{47}\)

The syndication process by its nature reduces monies available for funding a tax credit project. Syndicators purchase the tax credits for sale to investors from developers at a discount. A LIHTC syndication earns upfront fees and lower ongoing asset management fees on the projects they syndicate. As a best practice, HFAs usually limit the amount of the syndicator’s fee that can be supported by the credit. This limit is typically a percentage of total costs.\(^\text{48}\) Whether those fees are in fact reasonable given the actual project demands is not always examined by HFAs.\(^\text{49}\) Requiring sufficient transparency in syndicator fees ensures that the equity raised through are not improperly absorbed by fees.


\(^{46}\) Id.


\(^{48}\) According to a GAO report, syndication fees may have declined recently due to pressures from both developers and investors. See *General Accountability Office, Low-Income Housing Tax Credit: The Role Of Syndicators* 9, GAO-17-285R (2017).

\(^{49}\) According to the GAO, the IRS does not collect or maintain that data on the development costs of LIHTC projects. In thirty years, only seven of the fifty-eight HFAs have been subject to audits. A report is expected in early 2018 regarding LIHTC developments placed in service between 2011 and 2015 for twelve housing finance agencies. See Statement of Daniel Garcia, GAO Auditor, Testimony before
A further concern with syndicated tax credits is the quality of the underwriting when there are diverse investors. As discussed above, large metropolitan areas account for a significant amount of CRA credit and a fiercely competitive market. Competition may lead to even more complexity in pricing risks and returns. With high demand and limited supply, underwriting in a syndicated deal becomes critically important. Controls that require adequate transparency in pricing the risk and returns of the LIHTC project become more important. Whether there is sufficient oversight by HFAs regarding underwriting of deal terms is unclear.

C. Geography

CRA has impacted the inefficiencies of where LIHTC development occurs. Demands and shortages are directly attributable to whether banks, especially large banks, will receive CRA credit. Further, placement of LIHTC projects is driven by whether the project meets the annual QAP and therefore will receive a basis boost.

The basis boost is encouraging an overdevelopment of LIHTC projects in high-poverty neighborhoods. Under HUD regulations, the basis boost should be given to developers when it is part of a community revitalization plan, which is an attempt to rehabilitate a distressed community. Instead, investors are attracted to the basis boost to make returns on the project more profitable. Investors’ return is determined in part by the market price of the tax credits. LIHTC projects do not produce income. Investors’ profits are derived solely from the value of the tax credit. The increased property basis gives investors a greater yield and equity price per credit. This makes the project more profitable in the long run. Additionally, the higher credit gives investors a larger offset against their income tax liabilities as a return on investment.

Senate Finance Committee, Aug. 7, 2017; see also GAO, ACTIONS NEEDED TO STRENGTHEN OVERSIGHT AND ACCOUNTABILITY, supra note 3.


52. Despite the statutory requirement that a project receiving a basis boost must be a part of a community revitalization plan, one author describes the community revitalization provision as “nonbinding in practice.” Megan Randall, Redefining Revitalization: An Analysis of Community Revitalization in Texas’ Low Income Housing
The LIHTC regulations require three different preferences that FSAs must include in the QAP. 53 There are, however, no federal guidelines determining the weight to be given to each of these preferences, or how HFAs should balance these preferences against other considerations, such as market studies, financial feasibility, and the developer’s readiness to proceed. 54

This is problematic as it results in disparate applications of affordable housing siting standards across the country. While it is important to realize need to allow state housing credit agencies autonomy to create affordable housing according to the characteristics of their states, analysis of developments placed in service over the last decade demonstrate that an increasing number of developments are being sited in DDA/QCTs. 55

Furthermore, a GAO study found that although HSAs monitored compliance with the discretionary “basis boosts” awards, the criteria for awards and practices to determine the reasonableness of costs varied widely. 56 The LIHTC program, consistent with HUD’s fair housing objectives, is also designed to promote racial integration and to de-concentrate poverty. 57 As funding agency, HFAs should consider the geographical

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53. QAPs must also give preference to projects that (1) serve residents with the lowest income; (2) serve income-eligible residents for the longest period of time; and (3) are located in qualified census tracts (QCTs) or difficult development areas (DDAs), as long as the project contributes to a concerted community revitalization plan.

54. HFAs did not use appropriate criteria in creating the QAP as required by LIHTC regulations. See GAO, Some Agency Practices Raise Concerns, supra note 36, at 10.


56. GAO, Actions Needed to Strengthen Oversight and Accountability, supra note 3, at 10.

57. In response to criticisms that HFAs were not properly assessing the placement of LIHTC projects, HUD issued Affirmatively Furthering Fair Housing (AFFH), a rule requiring that federal agencies and federal grantees further the purposes of the Fair Housing Act. HUD’s AFFH requires program participants to take meaningful action rule to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities by requiring an Assessment of Fair Housing (AFH). The rule identifies four fair housing issues that program participants will assess: (1) patterns of integration and segregation, (2) racially or ethnically concentrated areas of poverty, (3) disparities in access to opportunity, and (4) disproportionate housing needs. 24 C.F.R. § 5.5251 (2016). See generally Joint
placement of LIHTC properties. HFAs openly influence the siting of LIHTC properties. Developers decide which projects to develop based on the QAP. Recent challenges to LIHTC placements caused HUD to require all federal agencies and federal grantees to comply with fair housing requirements. The Affirmatively Furthering Fair Housing (AFFH) requires HFAs and developers to at a minimum consider whether LIHTC projects are better placed in higher opportunity, lower poverty neighborhoods. HFAs should create market incentives for project siting that will create both economic development and opportunity for low- and moderate-income persons. Developing uniformity in the application of the “basis boost” is an issue that requires additional attention.

Finally, the Trump administration has advocated economic regulation changes that could negatively impact the LIHTC. Specifically, the repeal of the Dodd-Frank Wall Street Reform and Consumer Protection Act is touted as necessary to lessen the regulatory compliance standards for banks. Any modification to the CRA will most likely make it less stringent, given the industry’s long-standing active opposition to the statute.

Similarly, a tax reform proposal is anticipated that would reduce certain tax liabilities to arguably spur more economic growth and development. The Trump administration proposes reducing the corporate tax rate from 35 percent to 15 percent. As discussed in the companion piece, “The Community Reinvestment Act’s Impact on Low Income Housing Tax Credit Investment,” this would lower the incentive for investors to participate in LIHTCs.

Both of these could disrupt the production of affordable housing under the LIHTC program as presently configured. Ultimately, that would reduce the number of units developed and negatively affect affordability. Whether special considerations could be carved-out to avoid the negative effects on LIHTC and affordable housing is hypothetical, at best. Notwithstanding these possible reforms, there are specific changes to CRA that

IRS-HUD ADMINISTRATION COULD HELP ADDRESS WEAKNESSES IN OVERSIGHT, supra note 32.

58. This was underscored by the Supreme Court’s ruling in Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015), that even policies that unintentionally segregate minorities to low-income areas violate the Fair Housing Act.

59. HUD recognized the potential implications of QAPs to create communities of equal opportunity and studied which QAPS were used to improve equal access to opportunity. See HUD, The Effect of QAP Incentives on the Location of LIHTC Properties (2010), https://www.huduser.gov/portal/pdredge/pdr_edge_frm_asst_sec_050415.html.


61. Amstadt, supra note 45.

61. Id.
could go a long way towards ameliorating the statute’s inefficiencies with respect to LIHTC.

IV. Proposed Reforms

Despite the impact that the LIHTC has made in providing capital for affordable housing development, there are areas of concern that require attention to improve the program’s efficacy. The same is true for the CRA. In order to make the LIHTC and the CRA more compatible, both programs need to be updated to make them more complementary. Below is a brief discussion of how the inefficiencies discussed above—pricing, syndication, and geography—can be improved make LIHTC projects and CRA financing more complementary.

A. Pricing

Given that the demand for LIHTC housing exceeds the supply, developing LIHTC projects in weak or tertiary markets is problematic. Investors are less willing to invest in these markets because they will receive a lower return for their investments. Before the financial crisis, Fannie Mae and Freddie Mac, the government-sponsored entities that operate the home mortgage secondary market, were active participants in the LIHTC market and were willing to take lower premiums in order to meet their affordable housing goals. Without GSE participation, the supply of affordable renting housing in “not so hot” markets has decreased precipitously. This is in part because competitive large banks, as investors, are willing to pay a premium for the tax credit in “hot markets” in their assessment areas even if the return is below market. Moreover, there is little incentive to invest in LIHTCs outside of banks’ assessment areas if there is no regulatory benefit.

The largest single determinant of housing tax credit pricing is based on the CRA investment test value of a given property’s location. The premium investors pay when investing in housing tax credit projects is driven far more by the CRA value of those tax credits than by any notion about the value of it being a higher-quality real estate investment. But, this is facilitated by the way that banking regulators calculate a bank’s core deposits volume.

An adjustment needs to be made so that the deposit total equals only deposits for individuals and corporations that are physically located in the geographical assessment area. Currently, deposits of individuals and businesses that reside outside of the areas as well as foreign deposits are included in that calculation. This would mean that similar to the

62. The two GSEs made up approximately forty percent of market, making it difficult to find new CRA-indifferent investors with real estate underwriting knowledge and an appetite for specialized long-term investments. See Roberts, supra note 9, at 13.
CRA lending test, the CRA investment test would become a statistical measurement and comparison of the type of investment.

Presently banks' CRA ratings cannot be correlated with their LIHTC investments because qualified investments are not listed separately. Also, "extra" CRA credit may vary within the AA based on how the secondary project satisfies community need. Changing the CRA investment test calculation to an equivalent of the actual investment would encourage banks to make more LIHTC qualified investments. The change would also make it consistent with CRA credit earned under the lending test. Similar to the lending test, qualified investments should not be reduced when awarding CRA credit.

Constraining banks that are willing to make LIHTC investments to their AAs ignores the realities of the market and of funding. After the financial crisis, Fannie Mae and Freddie Mac exited the LIHTC market. Their involvement encouraged investments in underserved LIHTC markets. The financing void means that if a bank does not need CRA credit, it will not find these underserved markets attractive. Allowing banks to get additional CRA credit brings funding to less popular areas.

Similarly, while the dollar amount of the investment test is explicit, regulators could be more explicit in defining the specific criteria and the other factors in a way that would favor banks' LIHTC investments outside of their AAs. A "safe harbor" for these investments could create a presumption that they automatically merit the highest ratings on the investment test factors. Participation in a regional or national LIHTC investment fund satisfies the other three factors, e.g., innovation and complexity, responsiveness of qualified investments to credit and community development needs, and the degree to which qualified investments are not provided routinely by private investors. Given that the funds are directed toward an already identified area of need, the presumption favoring the investment seems appropriate.

**B. Syndication**

HFAs must determine whether the LIHTC project is a solid investment and consider the qualitative issues in LIHTC proposals. Uniform underwriting standards and developer fee cost containment method would contribute toward transparent funding in LIHTC syndications. Both measures are ways to maximize the amount of funds used for actual development of the affordable housing.

How to determine if LIHTC developers are using reliable data to support the projected operating costs is critical. Reviewing the areas where in-

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64. In its examination of CRA and the LIHTC, the GAO presumed that CRA increases investor demand for LIHTCs but was unable to quantify the extent of any effect of CRA on LIHTC equity contributions because of the way the data is reported. See Gov’t Accounting Office, Community Reinvestment Act, supra note 7, at 14.
accurate projections are likely to cause underperformance is important for assessing long-term viability. The underwriting process requires an assessment of operating expenses to determine whether the project will perform well financially. While syndicators are usually experienced developers, how their funds are used and the fees assessed is unclear. Giving HFAs a uniform way to assess the reasonableness of all development and operating expenses is an important step toward evaluating the financial feasibility of proposed properties.

An HFA’s “best practice” compiles a database of the operating expenses of historical data from other projects. This allows the HFA to compare the projected LIHTC projects with historical operating costs. The operating costs database should include at a minimum: management fees, administrative expenses, utilities, maintenance expenses, real estate taxes, and property insurance. In the absence of adequate operating cost data, the HFA should assess the reasonableness of the developer’s supporting data supporting the operating expense projections. If HFAs follow an accepted process, there will be less variability among project evaluations and the approval process will be streamlined. This is particularly important for banks.

It is difficult to analyze the determinants of LIHTC pricing because complete and reliable data on LIHTC investor equity contributions are not readily available. Some HFAs limit or place a cap on developer’s fees and industry advocates argue that fees are clearly within a reasonable range contrary to recent reports. HFAs need a developed approach for regulating project fees that is transparent to investors and regulators.

C. Geography

There are two issues regarding geography that should be addressed. The first is geographic differences in demand, which also correlate with price. The LIHTC program requires investors that are familiar with long-term real estate investments. Banks are particularly suited as investors but are hampered by the requirement that they invest in their geographical assessment areas. This also impedes LIHTC’s objective to provide affordable housing because many high-need areas are overlooked. Rural communities, which are often serviced by smaller community

67. The National Council of State Housing Agencies recommends that HFAs adopt limits on developer and building fees. See https://www.ncsha.org/resource/ncsha-recommended-practices-housing-credit-allocation-and-underwriting-2010#Developer_Fee_and_Builder_Fee_Limits.
banks, are particularly disregarded. Addressing the underlying policies that drive the availability and siting of LIHTC must be addressed.

Sustaining the LIHTC supply requires changes to a bank’s CRA footprint. Many banks are now part of a regional or national system. Allowing banks to invest in nationwide or regional funds, which would mean geographies beyond their immediate AAs, could prove beneficial in increasing the affordable rental housing stock. CRA credit should be given for projects based on a regional comprehensive plan of LIHTC projects or in nationwide plans.68 These plans would identify the affordable rental housing needs in a wider geographical area. These placements should be encouraged to ease both the bidding and pricing weaknesses in large cities as well as LIHTC placements outside of economically distressed areas. Spreading out the CRA obligation among the national and regional markets will make LIHTC investments a less competitive, more accessible option for small, rural, and mid-size cities.69 This would encourage more participation by all banks and broaden the LIHTC investor pool.70

The second issue regarding geography is the use of the “basis boost” which makes projects more profitable, but places them in high poverty concentrated areas. While removing the incentive of the “basis boost” in development of those areas will result in a decrease of project siting in the poorest areas, the continued concentration of poverty that it encourages requires re-thinking its purpose. QAPs, when they are not properly scrutinized as the GAO study reports, can promote expensive, LIHTC projects that are segregated. LIHTC proposals submitted to HFAs for review may be determining affordable housing needs carte blanche.

68. A bank earns CRA credit for community development activities even if the institution’s assessment area(s) will not benefit from them. The community development activity must “benefit geographies or individuals located somewhere within a broader statewide or regional area that includes the institution’s assessment area(s).” These are essentially additional investments because the regulation requires the institution to be responsive to community development needs and opportunities within its assessment area(s). See CRA Q&A §__26(c)(4)–1, which explains responsiveness in terms of the intermediate small bank community development test and provides additional insight regarding responsiveness. (Mar. 11, 2010).

69. Roberts, supra note 9, at 13.

well as its fair housing potential. Consequently, HFAs are relieved of the burden of creating high opportunity, integrated communities.

It is important to recognize that the “basis boost” is needed because it permits the development of affordable housing in areas where land and construction costs are high enough to effectively bar the development. But breaking the cycles of poverty ensures that affordable housing residents have access to economic, social, and educational opportunities, HFAs must craft QAPs that incentivize the development of LIHTC housing in more affluent, high-opportunity areas.

A better option might be to reinforce the federal government’s stated policy of de-concentrated poverty by creating an additional source for the “basis boost.” Similar to the QCT, HUD could designate the preferred census tract (PCT), a census tract where either only 25 percent or less of the households have an income that is less than 60 percent of the area’s median gross income for such year, or which has a poverty rate of no more than 15 percent. QCT presently requires a 50 percent poverty rate. HSAs have the authority to give preference to LIHTC projects sited in a preferred census tract. HUD has the sole authority to designate those DDAs which will qualify for the 130 percent “basis boost.” HERA now permits HFAs to designate DDAs using any criteria they deem appropriate.

The addition of a PCT to the pre-existing DDA and QCT preferences will grant LIHTC developers more flexibility in siting affordable housing that provides residents not only in affordable rental housing, but also the inclusive benefits of living in a low poverty/high opportunity area. This step represents a significant increase in autonomy and more importantly provides the framework to incentivize development in low poverty/high opportunity areas to the same extent of HUD-designated DDA/QCTs.


72. A recently issued IRS notice requires that LIHTC Qualified Allocation Plans (QAPs) give preference to projects in qualified census tracts (QCTs) only if there is a “concerted community revitalization plan” containing more components than just the LIHTC project. See Satisfying the Required Qualified Allocation Plan Preference in Section 42(m)(1)(B)(ii)(III) (Concerning Concerted Community Revitalization Plans), IRS Notice 2016-77.


74. Kelly D. Edmiston Low-Income Housing Tax Credit Developments and Neighborhood Property Conditions, Federal Reserve Bank of Kansas City (2011) (positing that policies should be developed to ensure that proximity to LIHTC developments is associated with good neighborhood outcomes); see also Steven Michael Knight, Addressing the Dichotomy of Federal Affordable Housing Policy and Program Implementation, http://ssrn.com.
This recommendation is also consistent with a recent IRS notice that re-
iterates that QAPs that contain a preference for LIHTC projects located in
QCTs must to a “concerted community revitalization plan.”75 The IRS No-
tice serves as a reminder that QCTs are low income/high poverty areas
where concentrations of poverty risk can exacerbate community revitali-
ization.76 The QCT preference is reserved for plans that demonstrate that
the LIHTC project will provide an additional benefit to the neighborhood.
In other words, placement of a LIHTC property cannot in and of itself con-
stitute community revitalization.

Finally, although beyond the scope of this paper, questions remain
about the length and scope of the tax credit and the viability of a second-
ary market to create more financing for the LIHTC program.

V. Conclusion

LIHTC is a critical part of the government housing programs, eclipsing
the public housing program, as a way of providing government assisted
affordable rental housing. The benefits of the tax credit program are its
unique public-private partnership and the high success rate of projects.
As the complexity of developing affordable housing increases so do the
challenges of assessing consequences and assigning accountability for
those outcomes. Finding solutions to sustain and strengthen the housing
credit will make it a more efficient and effective tool for the development
of affordable housing. Making the implementation of LIHTC and CRA ef-

75. The other two preferences are for LIHTC projects serving residents with the
lowest incomes and for those serving income-eligible residents for the longest pe-
period of time. IRS Notice 2016-77, supra note 72.

76. Id.