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COMMENT

ONE SIZE DOES NOT FIT ALL: AN EXAMINATION OF REFORM PROPOSALS FOR FHFA, FANNIE MAE, AND FREDDIE MAC, AND THE UNIQUE POSITION OF MULTIFAMILY HOUSING

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INTRODUCTION

Single-family homes and multifamily homes make up the American housing industry. Under a single-family scenario, the owner of the property occupies the home, and these homes are generally known as residential properties. Under a multifamily scenario, multiple individuals or families live in various units within the building. The individuals or families do not own the particular unit; instead, the individuals or families who occupy the unit rent from the owner of the property. These multifamily housing buildings are considered rental properties.

Individuals who want to purchase a home typically borrow money from a lender to finance the purchase in the form of a promissory note, which is secured by a mortgage. However, not everyone can afford to purchase a home. Therefore, multifamily housing serves an important role by offering rental options to those who are not in a position to purchase housing¹ and, more importantly, provides affordable housing for many low- and moderate-income individuals.² Additionally, multifamily housing provides homes in urban areas for young individuals not ready to purchase a house, employees who need to move for their work, and older individuals who are looking to downsize their living spaces.³

1. See RECAP REAL ESTATE ADVISORS, GOVERNMENT-SPONSORED ENTERPRISES AND MULTIFAMILY HOUSING FINANCE 2–3 (2010) [hereinafter GOVERNMENT-SPONSORED ENTERPRISES], http://www2.nhc.org/media/files/Recap_NHC_GSE_Core_Functions.pdf (describing the importance of multifamily housing and the government's support of the sector).

2. See 12 U.S.C. § 4502(14)–(16) (2012) (classifying low- and moderate-income families as families with lower incomes compared to the area's median income); see also *id.* §§ 4562–64 (establishing goals for providing affordable single-family and multifamily housing for low- and very-low income families).

3. See CTR. FOR AM. PROGRESS (CAP) & NAT'L COUNCIL OF LA RAZA, MAKING THE

The Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) are two government-sponsored enterprises (GSEs)⁴ involved in both single-family housing and multifamily housing finance. The agencies were originally created to help ensure that financing for homes would be available and affordable to more consumers; their primary function is to provide liquidity to the housing finance market.⁵ Fannie Mae and Freddie Mac created a secondary mortgage market⁶ to provide this liquidity to the market. The GSEs function by purchasing mortgages originated from private financial institutions, such as mortgage lenders or banks, and combining them together into securities through a process called securitization.⁷ Fannie Mae and Freddie Mac then sell the securities to investors, acting as middlemen between private lenders and investors.⁸ Given that Fannie Mae and Freddie Mac have an implicit government guarantee to fund delinquent mortgages, investors are interested in purchasing these securities because there is less risk that investors will lose money.⁹ As a result, the GSEs' involvement in home financing has been and is meant to benefit the housing market by freeing up more capital for lenders, which permits lenders to make more loans, and in turn helps keep costs such as interest rates down.¹⁰ Keeping costs low provides more Americans the opportunity

MORTGAGE MARKET WORK FOR AMERICA'S FAMILIES 16 (2013), <https://www.americanprogress.org/wp-content/uploads/2013/06/AccessAffordHousing1.pdf> (stressing the need for multifamily housing for a variety of segments of the population).

4. A government-sponsored enterprise (GSE) is "a privately owned, federally-chartered financial institution with nationwide scope and specialized lending powers that benefits from an implicit federal guarantee. . . ." THOMAS H. STANTON, GOVERNMENT-SPONSORED ENTERPRISES 1-2 (2002).

5. 12 U.S.C. § 1716.

6. A secondary mortgage market is "a system whereby mortgages are originated and transferred." See VINOD KOTHARI, SECURITIZATION 324 (2006). See generally David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab*, 42 GA. L. REV. 1019, 1028 (2008) (summarizing the structure of the secondary mortgage market).

7. See Carol J. Perry, *Rethinking Fannie and Freddie's New Insolvency Regime*, 109 COLUM. L. REV. 1752, 1758-59 (2009) (reviewing how securitization provides liquidity in the secondary mortgage market).

8. *Id.* See generally Reiss, *supra* note 6, at 1030 (positing securitization as "the most important and abiding financial innovation in recent history").

9. Thomas H. Stanton, *Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises*, 5 ADMIN. L.J. 395, 406 (1991).

10. See STANTON, *supra* note 4, at 2 ("The major government benefit is the authority to borrow money in the so-called agency credit market at rates close to Treasury's."); KOTHARI, *supra* note 6, at 97-102, 327 (discussing different ways securitization lowers costs and how securitization has made the mortgage system more efficient).

to obtain mortgages and become homeowners.¹¹

The government promoted single-family housing because it believed that homeownership was a benefit to society.¹² Since 2000, homeownership rates have decreased and more individuals are choosing to live in a multifamily scenario.¹³ While more individuals still live in single-family residential housing than in multifamily housing, multifamily renter households have increased by more than 1.1 million between 2011 and 2012 alone,¹⁴ and by the end of the decade, the number of renters will likely rise from 3.8 million to 5.0 million.¹⁵ As of 2012, 65% of people live in single-family housing and 35% of people live in multifamily housing.¹⁶ Single-family homeownership has continued to decrease over the past eight years from 66.1% to 65.4%.¹⁷ This downward trend translates to a decrease of 161,000 homeowners in 2012.¹⁸ The change reflects the reality that multifamily housing demand is increasing, and thus, there is an increased importance in the financing of multifamily housing.

Fannie Mae and Freddie Mac control billions of dollars of capital in the housing market. Historically, Fannie Mae and Freddie Mac held 40% of the total market share,¹⁹ but their share expanded to 70% in 2009,²⁰ and the total amount of government-backed loans accounted for roughly 90%

11. KOTHARI, *supra* note 6, at 323–24 (stating that securitization of housing finance enables affordable homeownership).

12. See U.S. DEP'T OF TREAS. & U.S. DEP'T OF HOUS. & URBAN DEV. (HUD), REFORMING AMERICA'S HOUSING FINANCE MARKET 1 (2011), <https://www.treasury.gov/initiatives/Documents/Reforming%20America's%20Housing%20Finance%20Market.pdf> [hereinafter TREASURY REPORT] (noting that owning a home builds wealth and helps many realize the “American Dream”).

13. CHRISTOPHER MAZUR & ELLEN WILSON, U.S. CENSUS BUREAU, HOUSING CHARACTERISTICS: 2010 5–7 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-07.pdf> (reporting homeownership rates decreased from 66.2% in 2000 to 65.1% in 2010).

14. JOINT CTR. FOR HOUS. STUD. OF HARV. U., STATE OF THE NATION'S HOUSING 2013 22 (2013), <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2013.pdf> [hereinafter HARVARD REPORT].

15. See CAP, A RESPONSIBLE MARKET FOR RENTAL HOUSING FINANCE 1 (2010) <http://www.americanprogress.org/wp-content/uploads/issues/2010/10/pdf/multifamilyhousingreport.pdf> [hereinafter RENTAL HOUSING REPORT] (arguing that such numbers will be problematic, as there has been a decline in construction of multifamily rental properties).

16. *Quick Facts: Resident Demographics*, NAT'L MULTIFAMILY HOUS. COUNCIL, <http://www.nmhc.org/Content.cfm?ItemNumber=55508> (last updated Sept. 2015).

17. HARVARD REPORT, *supra* note 14, at 3.

18. *Id.*

19. FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE), AN OVERVIEW OF FANNIE MAE'S MULTIFAMILY MORTGAGE BUSINESS 6 (2012), https://www.fanniemae.com/content/fact_sheet/multifamilyoverview.pdf [hereinafter FANNIE MAE MULTIFAMILY REPORT].

20. *Id.* at 6.

of all loans in 2012.²¹ Specific to the multifamily housing sector, Fannie Mae and Freddie Mac held over 84% of multifamily mortgages in 2009.²² In 2011, the amount of multifamily loans owned by Fannie Mae and Freddie Mac was valued at \$44 billion.²³

Although Fannie Mae and Freddie Mac currently have a large influence in the housing market, their existence is not without problems. In 2008, the nation went into recession and the housing market collapsed,²⁴ causing Fannie Mae and Freddie Mac to suffer significant losses. In response, the government placed Fannie Mae and Freddie Mac into conservatorship.²⁵ Since 2011, the housing market has been back on the upswing and Fannie Mae and Freddie Mac have both generated significant revenue.²⁶ Fannie Mae reported a \$10.1 billion profit in 2013,²⁷ and Freddie Mac reported a profit of \$5.0 billion in the second quarter of 2013 alone.²⁸ These increased profits, in turn, have slowed attempts to restructure the Federal Housing Finance Agency (FHFA), Fannie Mae, and Freddie Mac,²⁹ as the GSEs' profits are paid to the U.S. Treasury to repay the cost of the bailout.³⁰ Investors, economists, and critics have changed their position on the future of these companies altogether.³¹ Still, many groups are concerned that these entities must be restructured to reduce taxpayer risk.³² Researchers,

21. HARVARD REPORT, *supra* note 14, at 20.

22. RENTAL HOUSING REPORT, *supra* note 15, at 10.

23. OFF. OF INSPECTOR GEN. (OIG), FED. HOUS. FIN. AGENCY (FHFA), AUD-2013-004, FHFA'S OVERSIGHT OF THE ASSET QUALITY OF MULTIFAMILY HOUSING LOANS FINANCED BY FANNIE MAE AND FREDDIE MAC (2013), http://fhfaigov/Content/Files/AUD-2013-004_2.pdf.

24. See *infra* Part I.E.

25. See *infra* Part I.D–E.

26. Margaret Chadbourn, *Freddie Mac Posts Second-Biggest Profit in its History*, CHI. TRIB. (May 8, 2013), http://articles.chicagotribune.com/2013-05-08/business/sns-rt-us-usa-freddiemac-earningsbre9470i1-20130508_1_freddie-mac-u-s-mortgage-money-fannie-mae.

27. Press Release, Fannie Mae, Fannie Mae Reports Net Income of \$10.1 Billion and Comprehensive Income of \$10.3 Billion for Second Quarter 2013 (Aug. 8, 2013), http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/q22013_release.pdf.

28. See Press Release, Freddie Mac, Freddie Mac Reports Net Income of \$5.0 Billion for Second Quarter 2013, Comprehensive Income of \$4.4 Billion (Aug. 7, 2013), http://www.freddiemac.com/investors/er/pdf/2013er-2q13_release.pdf.

29. Clea Benson, *Congress Looks to Fannie Mae, Freddie Mac to Raise Federal Funds*, BLOOMBERG (Dec. 21, 2011, 7:25 AM), <http://www.bloomberg.com/news/2011-12-21/congress-looks-to-fannie-mae-freddie-mac-to-raise-federal-funds.html>.

30. *Id.*

31. Bethany McLean, *Taking Government Out of the Mortgage Business is Harder than it Looks*, REUTERS (Aug. 20, 2013), <http://blogs.reuters.com/bethany-mclean/2013/08/20/getting-government-out-of-the-mortgage-business-is-harder-than-it-looks/>.

32. See TREASURY REPORT, *supra* note 12, at 1. See generally BIPARTISAN POLICY CTR., HOUSING AMERICA'S FUTURE 16 (2013), http://bipartisanpolicy.org/sites/default/files/BPC_Housing%20Report_web_0.pdf [hereinafter HOUSING AMERICA'S FUTURE]

financial commenters, and others have presented various proposals, from maintaining conservatorship to moving toward a completely private-lending model.³³

The current state of Fannie Mae and Freddie Mac has provided an environment replete with administrative questions, such as: what role should the federal government have in the future of the multifamily housing industry; are FHFA, Fannie Mae, and Freddie Mac a benefit to society anymore; and, what would society be like based on the implementation of various proposals? Considering the large role and impact of Fannie Mae and Freddie Mac, proposed reforms to the GSEs should not be based on politically expedient solutions because any reform to these entities will have a huge impact on both homeowners and investors.³⁴ Many, including Congress,³⁵ have discussed numerous options regarding Fannie Mae and Freddie Mac reform,³⁶ with the general consensus that FHFA, Fannie Mae, and Freddie Mac should eventually be wound down.³⁷ Nevertheless, “there is no agreement about what should take their place or how large a role the government should play” in the housing market.³⁸ Furthermore, most discussion is focused on single-family housing³⁹ and does not appear to weigh the effects reform proposals might have on multifamily housing. In

(illustrating bipartisan support of taxpayer protection).

33. See generally JOHN GRIFFITH, CAP, THE \$5 TRILLION QUESTION: WHAT SHOULD WE DO WITH FANNIE MAE AND FREDDIE MAC? (2012), <http://www.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/gsereformmatrix.pdf> (comparing twenty-one plans to reform the GSEs).

34. See *supra* notes 26–28 and accompanying text.

35. See discussion *infra* Part II.A–B.

36. See generally GRIFFITH, *supra* note 33.

37. See TREASURY REPORT, *supra* note 12, at 2, 12–13 (detailing ways to increase private capital while Fannie Mae and the Federal Home Loan Mortgage Corporation (Freddie Mac) are wound down); Press Release, U.S. Dep’t of Treasury, Treasury Dep’t Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tgl684.aspx> (summarizing steps to accelerate wind down and providing possible objectives the wind down will achieve).

38. Chadbourn, *supra* note 26; see also Evan Weinberger, *GOP’s Fannie, Freddie Wind-Down Bill Moves to House Floor*, LAW360 (July 24, 2013, 12:23 PM), <http://www.law360.com.proxy.wcl.american.edu/articles/459340/gop-s-fannie-freddie-wind-down-bill-moves-to-house-floor> (demonstrating Republicans support minimal government involvement and Democrats support more significant government involvement). But see Evan Weinberger, *Top Sens. Want Fannie, Freddie Reform Bill By Year’s End*, LAW360 (Sept. 12, 2013, 1:59 PM), <http://www.law360.com/articles/472282/top-sens-want-fannie-freddie-reform-bill-by-year-s-end> (explaining that some Republicans “want to see more of a government role in the mortgage market”).

39. See generally Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489, 1494 (2011) (arguing that the elimination of Fannie Mae and Freddie Mac is too extreme of a solution).

short, reforms are needed. However, given the positive influence GSEs have had on the multifamily market,⁴⁰ and the generally strong performance of the GSEs' multifamily business, legislators and regulators need to be wary of providing sweeping reforms that apply to both the single-family and multifamily sectors.

This Comment addresses the impact of recently proposed legislation to Congress on the multifamily housing industry. Part I discusses the housing market, history of FHFA, Fannie Mae, and Freddie Mac, the housing collapse, and why the multifamily market remained stable during the collapse. Part II summarizes proposals that were proposed to Congress for the future of FHFA, Fannie Mae, and Freddie Mac but ultimately never made it past the floor. Part III examines these proposals' effects on the housing market with specific focus on the multifamily sector if either were to receive Congress's seal of approval. This Part will determine if there is a need for any reform and, if so, what changes could be made. Specifically, the issues of liquidity, taxpayer protection, and availability of affordable housing are key goals of the multifamily housing sector and, as such, must be considered when evaluating the most appropriate reform. Finally, Part IV concludes that proposed reforms should not apply to the multifamily industry and instead the GSEs should be spun off from the single-family industry and operate as GSEs that function solely within the multifamily housing finance industry.

I. HISTORY AND CURRENT STATE OF FHFA, FANNIE MAE, AND FREDDIE MAC AND THEIR ROLE IN MULTIFAMILY HOUSING

A. History of Housing Options and Financing 20th Century to Present

Housing options are categorized in two ways: single-family housing and multifamily housing. A single-family home is likely what individuals think of as traditional housing: a stand-alone structure that provides shelter for one family. Typically single-family housing is owner occupied, meaning the individual who owns the house resides in the house. Given that a home is the largest purchase any one person makes in his or her life, a buyer or owner will often secure a mortgage in order to finance his or her home.

A mortgage is a monetary loan from a lender to the owner for which the owner pledges the purchased house and property as security for the loan.⁴¹ In order to evaluate whether an individual qualifies for a mortgage, lenders

40. See discussion *infra* Part I.E.

41. See 12 U.S.C. § 1707(a) (2012); see also *Multifamily*, FANNIE MAE (Dec. 21, 2011), <http://www.fanniemae.com/portal/funding-the-market/mbs/multifamily/index.html> (explaining the life of a multifamily loan).

use a process called underwriting, which analyzes the risk that a borrower will default on the loan. Various financial institutions, such as private banks, or credit unions, provide the money for individuals to obtain a mortgage.

The same, or similar, lenders also provide financing for multifamily properties. Multifamily housing consists of multiple individuals, or households, all living under the same roof but in separate units.⁴² An example of multifamily housing is an apartment complex. Typically a tenant rents a unit from the owner of the entire complex. Owners of multifamily complexes need mortgage financing in the same way individuals need mortgage financing of their single-family home. Like single-family owners, individuals or, more commonly, entities will seek mortgage loans to finance their ownership of multifamily buildings. However, multifamily mortgages are for much larger loan amounts than single-family loan amounts.

Prior to the establishment of Fannie Mae and Freddie Mac, private lenders were the sole source of housing finance for single-family and multifamily homes in America.⁴³ Homeownership was less common than it is today because people had trouble securing reasonable loans from private lenders. Private lenders required high down payments and short maturities, which made homeownership difficult.⁴⁴ Congress established Fannie Mae and Freddie Mac “to address concerns that private financial institutions were not adequately meeting the credit needs of homebuyers.”⁴⁵

The creation of GSEs provided a solution to the limitations of private lenders.⁴⁶ GSEs are able to buy mortgages from private lenders and then create mortgage-backed securities from those mortgages, freeing up capital

42. FANNIE MAE MULTIFAMILY REPORT, *supra* note 19, at 1.

43. See ALEXANDER GARVIN, *THE AMERICAN CITY* 196 (2002) (discussing the housing market up until and during the Great Depression).

44. HOUSING AMERICA’S FUTURE, *supra* note 32, at 40; see also Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSP. 93, 94 (2005) (explaining that borrowers had difficulty paying the full remaining mortgage principal due at maturity).

45. *Proposals for Improving the Regulation of the Housing Government Sponsored Enterprises: Hearings Before the S. Comm. on Banking, Hous., & Urban Aff.*, 108th Cong. 309 (2004) (statement of David M. Walker, Comptroller General of the United States); see also KEVIN R. KOSAR, CONG. RESEARCH SERV., RS21663, GOVERNMENT-SPONSORED ENTERPRISES (GSEs) 2 (2007) (“The economic rationale for GSEs is the belief that, without such government-sponsored institutions, a critical area of necessary debt financing would be underserved or served inefficiently.”).

46. STANTON, *supra* note 4, at 2 (“The government charters each GSE, gives it special benefits and subsidies, and attempts to direct its activities to serve high-priority public purposes in sectors, such as housing and agriculture, that policymakers believe are not adequately served by private capital.”).

that is then available to other borrowers.⁴⁷ This process creates liquidity: more capital is available, which allows lenders to fund more mortgage loans.⁴⁸ Mostly, Fannie Mae and Freddie Mac guarantee the timely repayment of principal and interest on the securities that they issue to investors in the event of a default. In other words, Fannie Mae and Freddie Mac guarantee a mortgage and, in doing so, absorb the credit risk from private lenders and investors.⁴⁹

B. Fannie Mae History

Congress created Fannie Mae in response to an emerging housing crisis during the Great Depression. During the Great Depression, unemployment rates rose, which led to more homeowners defaulting on their mortgages.⁵⁰ In response to the housing crisis, President Franklin D. Roosevelt and Congress created Fannie Mae, through the National Housing Act of 1934⁵¹ to provide relief to the housing market.⁵² Fannie Mae's immediate purpose was to provide liquidity to the housing market to remove lenders' financial burden⁵³ and to increase housing availability for low- and moderate-income families.⁵⁴ Fannie Mae was mandated to purchase both single-family and multifamily mortgages⁵⁵ from private lenders—providing more cash to private lenders—which in turn generated capital for private lenders to fund additional mortgage loans.⁵⁶ Thus, the secondary mortgage market was born. Due to the increased availability of mortgages with affordable terms, more Americans were able to purchase homes and live the “American Dream.”⁵⁷

47. Winston Sale, *Effects of The Conservatorship of Fannie Mae and Freddie Mac on Affordable Housing*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 287, 301 (2009).

48. See Perry, *supra* note 7, at 1758–59 (describing how the GSEs help an “illiquid” asset become a liquid asset in the housing industry).

49. See generally KOTHARI, *supra* note 6, at 25–26 (discussing securitization as a tool of risk management).

50. OIG, FHFA, A BRIEF HISTORY OF THE HOUSING GOVERNMENT-SPONSORED ENTERPRISES 1, <http://fhfaoig.gov/Content/Files/History%20of%20the%20Government%20Sponsored%20Enterprises.pdf> (last visited Jan. 27, 2016); see also Green & Wachter, *supra* note 44, at 94–95 (explaining that nearly one in ten homes were in foreclosure).

51. National Housing Act of 1934, 12 U.S.C. §§ 1701–1750 (2012).

52. *Id.* § 1716.

53. *Id.* See generally *Supporting the Multifamily Market*, FANNIE MAE, <https://www.fanniemae.com/multifamily/about-multifamily> (last visited Jan. 27, 2016) (providing various financing options for the multifamily industry).

54. WHITEHOUSE.GOV, GOVERNMENT SPONSORED ENTERPRISES 1431, <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/gov.pdf> (last visited Jan. 5, 2016).

55. 12 U.S.C. § 1716.

56. See *supra* notes 4–7 and accompanying text.

57. See TREASURY REPORT, *supra* note 12, at 1.

At the time of its enactment, Fannie Mae was a federal government agency. However, in 1968, Fannie Mae was converted to a GSE.⁵⁸ GSEs are neither governmental agencies nor wholly private companies; they are stockholder owned, private entities that the government creates to further a public purpose.⁵⁹ GSEs differ from true government agencies because not all laws that apply to government agencies apply to them.⁶⁰ Additionally, while the government directly controls an agency, it only regulates and supervises a GSE.⁶¹

When the government converted Fannie Mae into a GSE in 1968, Fannie Mae was partitioned into two entities: a private corporation and a publicly financed institution.⁶² As a private corporation, Fannie Mae no longer operated with an explicit guarantee that the government would insure investors against mortgage defaults within its mortgage-backed securities.⁶³ Although Fannie Mae was no longer a true federal agency,⁶⁴ it still functioned in a similar manner as prior to the partition. Liquidity was still a primary focus, and Fannie Mae was still obliged to provide affordable housing options.⁶⁵ Today, as a GSE, Fannie Mae does not possess an explicit government guarantee, but there is an implication that the government financially protects the GSE because of its federal charter and history.⁶⁶ The perception of a government guarantee is strongly supported because the government did bailout the GSEs.⁶⁷ After its conversion to a GSE, Fannie Mae was primarily funded by private investors, but Fannie

58. See STANTON, *supra* note 4, at 17.

59. See *id.* at 16.

60. See *id.*; see also KOSAR, *supra* note 45, at 1 (explaining additional distinctions between GSEs and agencies).

61. See STANTON, *supra* note 4, at 17.

62. See 12 U.S.C. § 1716b (2012) (establishing the Government National Mortgage Association (Ginnie Mae) as the publicly financed institution).

63. Unlike Ginnie Mae, Fannie Mae does not have the explicit insurance of government-guaranteed mortgages. Compare *id.* § 1719(b) (requiring the GSEs to include explicit language that they are not guaranteed by the federal government), with *id.* § 1721(g)(1) (pledging the “full faith and credit of the United States . . . to the payment of all” Ginnie Mae accounts). See generally GINNIE MAE, <http://www.ginniemae.gov/pages/default.aspx> (last visited Oct. 9, 2015) (providing a general overview of Ginnie Mae’s functions).

64. 12 U.S.C. § 1716.

65. See *id.* § 4501(7) (“[Fannie Mae and Freddie Mac] have an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families in a manner consistent with their overall public purposes.”).

66. See Sale, *supra* note 47, at 291 (suggesting that the GSEs’ federal charters and related special benefits led to this implication); see also Reiss, *supra* note 6, at 1042-50 (discussing the various perspectives supporting the notion that the GSEs have an implicit government guarantee).

67. See *infra* Part II.E.

Mae's operation and purpose did not significantly change. Today, its multifamily business continues to purchase multifamily loans from private lenders,⁶⁸ provide liquidity in the housing market, and meet certain affordable housing goals.⁶⁹

C. Freddie Mac History

Congress created a second GSE, the Federal Home Loan Mortgage Corporation (Freddie Mac), with the enactment of the Emergency Home Finance Act of 1970.⁷⁰ Unlike Fannie Mae, Freddie Mac was never a true federal agency; it began as a privately owned entity.⁷¹ Congress chartered Freddie Mac to provide competition for Fannie Mae⁷² and to further expand the secondary mortgage market. Specifically, Freddie Mac's statutory purpose, like Fannie Mae's, is to promote and expand the secondary mortgage market by providing capital to purchase mortgages.⁷³ Both entities operate in similar fashion.⁷⁴ Fannie Mae and Freddie Mac do not actually lend money to borrowers, but instead purchase mortgages from private lenders,⁷⁵ which they pool and securitize, and then sell to investors.⁷⁶

D. Federal Housing Finance Agency

The Federal Housing Finance Agency (FHFA) supervises and regulates Fannie Mae and Freddie Mac. The enactment of the Housing and Economic Recovery Act of 2008 (HERA) created the FHFA.⁷⁷ The FHFA

68. FANNIE MAE MULTIFAMILY REPORT, *supra* note 19, at 6.

69. 12 U.S.C. § 1716 (2012).

70. Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450, 451 § 301–303 (1970) (codified as amended at 12 U.S.C. § 1451–59).

71. Stanton, *supra* note 9, at 411.

72. There were concerns that Fannie Mae was a monopoly and would force non-guaranteed mortgages out of the housing market. See Kate Pickert, *A Brief History of Fannie Mae and Freddie Mac*, TIME (July 14, 2008), <http://content.time.com/time/business/article/0,8599,1822766,00.html>; see also Rob Alford, *What Are the Origins of Freddie Mac and Fannie Mae?*, HISTORY NEWS NETWORK (Sept. 19, 2008), <http://hnn.us/article/1849> (“For the first thirty years following its inception, Fannie Mae held a veritable monopoly over the secondary mortgage market.”).

73. 12 U.S.C. § 1452.

74. See Elyse Boyle, Note, *Eliminating the Risk to Taxpayers: Privatizing Fannie Mae and Freddie Mac*, 43 SUFFOLK U. L. REV. 163, 168 (2009) (explaining how Freddie Mac's purposes “paralleled those of Fannie Mae”); see also Stanton, *supra* note 9, at 410–11 (operating under similar charters and both guaranteeing mortgage-backed securities).

75. Perry, *supra* note 7, at 1758.

76. See *supra* notes 6–7 and accompanying text.

77. Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended at 12 U.S.C. §§ 4501–4642 (2012)).

superseded Fannie Mae and Freddie Mac's prior regulator, the Office of Federal Housing Enterprise Oversight.⁷⁸ Currently, like its predecessor, the FHFA is required to ensure a stable and liquid market and minimize taxpayer losses.⁷⁹ Its purpose is to oversee and regulate the GSEs' "safety and soundness."⁸⁰ Additionally, the FHFA ensures that the GSEs purchase a specific amount of mortgages geared to and "to meet the then-existing unaddressed needs of" low- and moderate-income families and renters.⁸¹ The biggest change in the FHFA's role is that it was given more expansive regulatory power with the ability to place Fannie Mae and Freddie Mac under conservatorship if necessary.⁸²

E. Housing Collapse

In the past decade, Fannie Mae and Freddie Mac experienced financial problems resulting from increased mortgage defaults in the single-family sector. To start, the economic recession increased unemployment, and borrowers lacked funds to pay their monthly mortgages. Additionally, lenders were quantity driven and offered riskier loans.⁸³ Financing for single-family housing was riddled with poor underwriting due to loose underwriting standards⁸⁴ that allowed individuals to obtain mortgages they could not afford.⁸⁵ Fannie Mae and Freddie Mac loosened their

78. The Office of Federal Housing Enterprise Oversight (OFHEO) was created through the enactment of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992. Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, 106 Stat. 3941 (codified as amended at 12 U.S.C. §§ 4501–4642 (2012)).

79. See generally David Reiss, *Fannie Mae and Freddie Mac and the Future of Federal Housing Finance Policy: A Study of Regulatory Privilege*, 61 ALA. L. REV. 907, 919–21 (2010) (discussing the similarities and differences between the OFHEO and the FHFA).

80. U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), GAO-09-782, FANNIE MAE AND FREDDIE MAC 8 (2009), <http://www.gao.gov/new.items/d09782.pdf> [hereinafter GAO FANNIE AND FREDDIE] (describing the responsibilities of FHFA officials located at Fannie Mae and Freddie Mac as assess[ing]... ongoing financial performance and risk management"); see 12 U.S.C. § 4513(a)(1) (2012) (describing the principle duties of the FHFA); see also *About FHFA*, FHFA, <http://www.fhfa.gov/AboutUs> (last visited Oct. 18, 2015).

81. 12 U.S.C. § 4563(a)(1), (d)(2).

82. *Id.* § 4501.

83. For further discussions see Boyack, *supra* note 39, at 1516.

84. For example, the OFHEO released a report alleging widespread accounting errors against Fannie Mae. See generally OFHEO, REPORT OF THE SPECIAL EXAMINATION OF FANNIE MAE 15–17 (2006) <http://www.fhfa.gov/Preview-FHFAWWW/webfiles/748/FNMfindingstodate17sept04.pdf>, (announcing that Fannie Mae was misstating its earnings in order to portray Fannie Mae as a financially stable company).

85. See generally Boyack, *supra* note 39, at 1513–18 (2011) (describing that housing prices plummeted and loan defaults significantly increased due to poor underwriting standards).

underwriting requirements and began purchasing some of these riskier single-family loans.⁸⁶ However, multifamily underwriting was not subject to the same miscalculations.⁸⁷ Multifamily underwriting was much more rigorous, due to the sheer size of multifamily loans.⁸⁸ The larger the loan, the greater the risk to the GSEs if any single loan defaulted. In addition, multifamily loans require prudent underwriting practices because the collateral for a multifamily loan is more complex than single-family collateral.⁸⁹ The security for multifamily loans, such as an apartment complex, is used to generate income from rentals, as opposed to a single unit simply used for dwelling purposes.⁹⁰ Even in the midst of the housing bubble, this created incentives for the GSEs to keep underwriting standards tight. Underwriters ensured that multifamily borrowers were qualified for loans by basing underwriting on actual income, rather than on projected income.⁹¹ Notwithstanding these sound practices in the multifamily housing market, the single-family housing problems were so great⁹² that Fannie Mae and Freddie Mac needed a government bailout.⁹³

86. See generally Peter J. Wallison, *The True Origins of this Financial Crisis*, AM. SPECTATOR (Feb. 2009), <http://spectator.org/articles/42211/true-origins-financial-crisis> (arguing that Fannie Mae and Freddie Mac purchased “sub-prime loans (those made to borrowers with blemished credit) . . . and Alt-A loans (those made to speculative buyers or without the usual underwriting standards)” to compete with private lenders).

87. See Sale, *supra* note 47, at 304 (noting that in 2008, only 0.16% of multifamily loans guaranteed by Fannie Mae were “seriously delinquent,” compared with 1.72% “single-family mortgages guaranteed by Fannie Mae for the same period”); Jamie Woodwell, *The GSEs, FHA Multifamily-JUST THE FACTS [Mortgage Banking]*, INSURANCENEWS.NET (JUNE 22, 2012), <http://insurancenewsnet.com/oarticle/2012/06/22/The-GSEs-FHA-Multifamily-JUST-THE-FACTS-%5bMortgage-Banking%5d-a-347126.html> (stating that in 2011 delinquency rates for Fannie Mae multifamily mortgages were 0.59% while delinquency rates for single-family mortgages were 3.91%, and Freddie Mac multifamily and single-family mortgage delinquency rates were 0.22% versus 3.59% respectively); MORTGAGE BANKERS ASSOCIATION, MBA COMMERCIAL REAL ESTATE/MULTIFAMILY FINANCE (2013), (showing that at the end of 2012, “the delinquency rate for multifamily loans held or insured by Freddie Mac was 0.19%. . . . [The] delinquency rate for multifamily loans held or insured by Fannie Mae . . . was 0.24%).

88. FANNIE MAE MULTIFAMILY REPORT, *supra* note 19, at 4.

89. Examples of complex collateral include cell towers leases, clubhouses, and pools. See generally *id.* at 4.

90. *Id.* at 4.

91. *Id.* at 3, 10.

92. See also NAT’L MULTIFAMILY HOUS. COUNCIL, KEY PRINCIPLES FOR PRESERVING LIQUIDITY AND STABILITY FOR MULTIFAMILY IN A REFORMED HOUSING FINANCE SYSTEM 5, https://www.nmhc.org/uploadedFiles/Articles/Analysis_and_Guidance/NMHC-NAA%20GSE%20Reform%20Principles.pdf [hereinafter KEY PRINCIPLES FOR PRESERVING LIQUIDITY] (last visited Oct. 4, 2015) (stating that the losses experienced in the single-family sector have “overshadowed the strong performance of their multifamily programs”).

93. There are various arguments for and against a bailout. Compare ROBERT E.

The government, acting under the power authorized by HERA, seized the GSEs in September 2008⁹⁴ and placed them under conservatorship.⁹⁵ HERA gave the FHFA the power to “take such action as may be necessary to put [Fannie Mae and Freddie Mac] in a sound and solvent condition” and to reorganize, rehabilitate, or wind up the affairs of the entities.⁹⁶ The FHFA has a statutory responsibility to ensure that “the operations and activities of [Fannie Mae and Freddie Mac] foster liquid, efficient, competitive, and resilient national housing finance markets. . . .”⁹⁷ Governmental funding under conservatorship allowed Fannie Mae and Freddie Mac to continue to provide liquidity to the housing mortgage market.⁹⁸ HERA established a \$200 billion cap on taxpayers’ money put into each company, and per the terms of the conservatorship, taxpayers are owed all of the companies’ profits.⁹⁹ The United States Treasury eliminated the cap in December 2009.¹⁰⁰ Now, Fannie Mae and Freddie

WRIGHT, BAILOUTS: PUBLIC MONEY, PRIVATE PROFIT 2 (2010), *with In Economics, What is a Bailout?*, WISEGEEK, <http://www.wisegeek.com/in-economics-what-is-a-bailout.htm> (last visited Oct. 9, 2015) (“struggling firms should simply be allowed to go bankrupt, as [they] lack [the] ability to cope with the market.”). *See generally* Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. CORP. L. 469 (2010) (discussing the examination of bankruptcy versus bailout options for financial institutions).

94. Press Release, FHFA, Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac (Sept. 7, 2008), <http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Director-James-B-Lockhart-at-News-Conference-Announcing-Conservatorship-of-Fannie-Mae-and-Freddie-Mac.aspx> [hereinafter Lockhart Press Release]; *see also* HERA § 1145, Pub. L. No. 110-289, 122 Stat. 2654, 2734 (codified at 12 U.S.C. § 4617 (2012)) (appointing the conservator). Some argue the takeover was unconstitutional. *See* Complaint, *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014) (No. 1:13-cv-01025-RCL) (alleging that the government unlawfully seized investor’s shares of the companies in 2008); Richard Epstein, *An Unconstitutional Bonanza*, HOOVER INST., (Nov. 11, 2013), <http://www.hoover.org/research/unconstitutional-bonanza> (“The statute is flatly unconstitutional because it denies individuals and their property the protections afforded against the government by the Fifth Amendment.”).

95. Conservatorship is “a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations” and “restor[ing] the balance between safety and soundness.” *See* Lockhart Press Release, *supra* note 94.

96. *See* HERA §§ 1145(a)(2), (b)(2)(D)(i).

97. 12 U.S.C. § 4513(a)(1)(B)(ii) (2012).

98. *About FHFA*, *supra* note 80.

99. 12 U.S.C. § 4617 (reducing taxpayer losses is also an objective of the FHFA as conservator).

100. *Bailout Tracker: Fannie Mae*, PROPUBLICA, <http://projects.propublica.org/bailout/entities/158-fannie-mae> (last visited Sept. 24, 2015) (removing the cap in order to preserve stability in the mortgage market whereby “the Treasury will cover Fannie Mae and Freddie Mac’s losses . . . no matter how large”); Evan Weinberger, *End of Fannie and Freddie is in Sight*, LAW360 (Aug. 7, 2013, 6:40 PM), <http://www.law360.com.proxy.wcl.american.edu/articles/459130> (noting that the actual combined bailout amount is around \$188 billion); Ilyce Glink, *How Much Do Fannie and Freddie Still Owe Us?*, CBS MONEYWATCH (May 29,

Mac must make payments based on their net value above a capital reserve level, as opposed to paying dividends based on a 10% annual rate.¹⁰¹ The Obama administration stated that the FHFA strategy would implement beginning in February 2011 and “reduce the role of [Fannie Mae and Freddie Mac] and, ultimately, wind down both institutions.”¹⁰² In 2013, the FHFA responded by mandating that the GSEs reduce originations of all loans by 10% per year.¹⁰³

II. PRIOR PROPOSALS FOR THE FUTURE OF FHFA, FANNIE MAE, AND FREDDIE MAC

Congress has considered multiple proposals with respect to housing reform, but in response to the conservatorship of the GSEs, new reforms have developed. In 2013, two housing reforms proposals were submitted to Congress. The first was the Protecting American Taxpayers and Homeowners Act (PATH),¹⁰⁴ and the second was the Housing Finance Reform and Taxpayers Protection Act (Corker-Warner).¹⁰⁵ PATH centered entirely on single-family housing reform, while Corker-Warner concentrated mostly on single-family housing reform. Both proposals called for reduced government involvement in the single-family housing industry to prevent a future bailout.

A. *Protecting American Taxpayers and Homeowners Act*

At the writing of this Comment, PATH was one of two legislative proposals to housing reform pending in Congress. Sponsored by Representative Scott Garrett (R-NJ), PATH was introduced in the House of Representatives on July 22, 2013.¹⁰⁶ The legislation’s main goal was to create a privately funded housing finance market to reduce risk to taxpayers.¹⁰⁷ To accomplish this goal, PATH proposed to reduce the

2013, 7:43 AM), <http://www.cbsnews.com/news/how-much-do-fannie-and-freddie-still-owe-us/> (“Fannie Mae has paid \$95 billion of its \$117 billion debt, and Freddie Mac has paid \$30 billion of its \$72 billion debt.”).

101. See *Bailout Tracker*, *supra* note 100 (detailing specific dividend payments since the bailout).

102. TREASURY REPORT, *supra* note 12, at 2.

103. FHFA, CONSERVATORSHIP STRATEGIC PLAN: PERFORMANCE GOALS FOR 2013, http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2013EnterpriseScorecard_508.pdf (last visited January 5, 2016).

104. Protecting American Taxpayers and Homeowners Act of 2013 (PATH Act), H.R. 2767, 113th Cong. (2013).

105. Housing Finance Reform and Taxpayers Protection Act of 2013, S. 1217, 113th Cong. (2013).

106. H.R. 2767.

107. *Id.*

government's role in the housing finance industry,¹⁰⁸ create a national mortgage market utility (Utility),¹⁰⁹ and reduce government regulation of private financial institutions.¹¹⁰

PATH aimed to decrease the government's role in the housing financing industry in two ways. First, PATH called for the dissolution of Fannie Mae and Freddie Mac within five years.¹¹¹ During the five-year transition period, PATH would require the GSEs to reduce their mortgage portfolios by 15% each year and participate in a risk-sharing program covering at least 10% of the GSEs' business, where the credit risk is shared with or assumed by private companies.¹¹² Additionally, PATH would repeal the GSEs' mandatory affordable housing goals.¹¹³ At the end of the transition period, PATH would repeal the GSEs' charters and ultimately dissolve the GSEs altogether.

Second, PATH proposed reforms to the Federal Housing Administration (FHA) to further reduce the government's role in the housing finance market. PATH would restructure FHA as an independent agency¹¹⁴ to provide and insure mortgages for first-time and low- and moderate-income homebuyers in the single-family sector only.¹¹⁵ PATH would require the FHA to decrease its insurance coverage of individual mortgages from the current 100% to 50% of the original principal amount of the loan over a period of five years.¹¹⁶ Additionally, FHA would charge a premium on all loans to cover the cost of providing mortgage insurance.¹¹⁷ Under PATH, there would be no government involvement in the housing finance market beyond the proposed reforms to FHA after the GSEs were dissolved.

In addition to reducing the government's footprint in the single-family housing industry, PATH would create the Utility to address weaknesses in the housing market infrastructure.¹¹⁸ Under PATH, the Utility would not be a government entity and would be subject to supervision by the FHFA.¹¹⁹ The Utility would not originate or insure single-family mortgages.¹²⁰ Rather, the Utility would serve as a vehicle to develop

108. *Id.* § 234.

109. *Id.* at §§ 303(12), 311.

110. PATH Act, H.R. 2767, 113th Cong. §§ 401–14 (2013).

111. *Id.* §§ 103–04.

112. *Id.* §§ 105–06.

113. *Id.* § 104.

114. *Id.* § 211.

115. *Id.* § 212.

116. PATH Act, H.R. 2767, 113th Cong. § 234 (2013).

117. *Id.* at § 235.

118. *See id.* § 303.

119. *Id.* § 311(c)(2).

120. *Id.* § 312(c)(1).

improved standards and uniform procedures to increase private originating, servicing, and securitizing of residential mortgages.¹²¹ PATH would require the Utility to operate a securitization platform accessible to all private lenders,¹²² provide a central repository for mortgage related documents and information,¹²³ and create a system to classify mortgages based on their degree of credit risk to help inform investors of such risk.¹²⁴ These requirements aimed to improve standards and information availability and, thereby, address weaknesses that previously discouraged private capital in the housing market.¹²⁵

Finally, PATH aimed to remove, repeal, or delay legislative restraints on private financial institutions.¹²⁶ PATH would require regulators to conduct a study examining the impact of government regulation on private institutions.¹²⁷ The study would determine if private capital would create greater fluctuations than the GSEs and whether such fluctuations would make the housing finance industry more or less safe.¹²⁸ Given that PATH purported a housing market comprised of mostly private institutions, PATH would prescribe new rules based on the results of the study in relation to the single-family housing market.¹²⁹

B. Housing Finance Reform and Taxpayers Protection Act

Similar to PATH, the Housing Finance Reform and Taxpayers Protection Act¹³⁰ facilitated the wind down of Fannie Mae and Freddie Mac.¹³¹ The bipartisan bill,¹³² led by Senators Bob Corker (R-Tenn.) and Mark Warner (D-Va.), was introduced to the Senate on June 25, 2013.¹³³ Corker-Warner aimed to phase out the FHFA and the GSEs within five

121. *Id.* § 312(b).

122. PATH Act, H.R. 2767, 113th Cong. § 313 (2013).

123. *Id.* § 331.

124. *Id.* § 322.

125. *Id.*

126. *See generally id.* §§ 401-14 (detailing various exceptions to recent legislative reforms).

127. *Id.* § 401.

128. PATH Act, H.R. 2767, 113th Cong. § 401 (2013).

129. *Id.*

130. Housing Finance Reform and Taxpayers Protection Act of 2013, S. 1217, 113th Cong. (2013).

131. *Id.* § 501.

132. Co-Sponsors include United States Senators Mark Warner, D-Va.; Mike Johanns, R-Neb.; Jon Tester, D-Mont.; Dean Heller, R-Nev.; Heidi Heitkamp, D-N.D.; Jerry Moran, R-Kan.; Kay Hagan, D-N.C.; Mark Steven Kirk, R-Ill.; Joe Manchin, D-W.V.; Saxby Chambliss, R-Ga.; and Mark Begich, D-Alaska. *S.1217 - Housing Finance Reform and Taxpayer Protection Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/1217/cosponsors> (last visited Jan. 30, 2016).

133. S. 1217.

years of enactment.¹³⁴ Specifically, the bill proposed that the GSEs decrease their mortgage loan portfolios by at least 15% each year.¹³⁵ The main purpose behind the proposed reforms was to protect taxpayers from future bailouts,¹³⁶ which would be accomplished through a housing finance system comprised of private institutions and governmental involvement.¹³⁷

Corker-Warner, unlike the wholly private financed housing industry under PATH, would preserve a government role in the housing market through the establishment of the Federal Mortgage Insurance Corporation (FMIC).¹³⁸ The FMIC would be a government corporation that would oversee the housing finance market.¹³⁹ It would allow for a government backed guarantee and would regulate private financial institutions' ability to utilize such government insurance.¹⁴⁰

In order to be insured by FMIC, Corker-Warner required borrowers to provide 20% equity in the mortgage and lenders to agree to absorb the burden of the first 10% of the mortgage risk.¹⁴¹ In the event of default, the originating private lender would absorb the first 10% of mortgage loss and the government would absorb the remaining 90% of mortgage loss.¹⁴²

Additionally, FMIC would oversee an insurance fund subsidized by a small fee incorporated into mortgage interest rates.¹⁴³ This fund would further reduce taxpayer liability because the fees provided an additional source of capital before tax dollars are utilized.

Unlike PATH, Corker-Warner addressed the multifamily market. The proposed legislation would consolidate the existing multifamily mortgage delegated underwriting and servicing program and commercial mortgage execution K-series bond securities issuance programs¹⁴⁴ of Fannie Mae and Freddie Mac, respectively.¹⁴⁵ The FMIC would oversee and continue

134. *Id.* §§ 301, 501–02.

135. *Id.* § 505.

136. *See generally* Housing Finance Reform and Taxpayers Protection Act of 2013, S. 1217, 113th Cong. (2013).

137. *Id.* § 101.

138. *Id.* § 201.

139. *Id.*

140. *Id.* § 216.

141. *Id.* § 201.

142. Housing Finance Reform and Taxpayers Protection Act of 2013, S. 1217, 113th Cong. § 202(a)(2) (2013).

143. *Id.* at § 203.

144. *See Supporting the Multifamily Market*, *supra* note 53 (providing information on Fannie Mae's multifamily mortgage servicing program); *see generally* FREDDIE MAC MULTIFAMILY SECURITIZATION, FREDDIE MAC (2013), http://www.freddiemac.com/multifamily/pdf/mf_securitization_investor-presentation.pdf (providing information on Freddie Mac's multifamily mortgage servicing program).

145. S. 1217, § 601.

Fannie Mae and Freddie Mac's current multifamily housing guarantees.¹⁴⁶

Finally, the proposal addressed the need for government-dedicated capital to provide affordable housing for low-income households. Corker-Warner called for the creation of a Capital Magnet Fund (CMF)¹⁴⁷ and the renewed utilization of the National Housing Trust Fund (NHTF)¹⁴⁸ to support the development and preservation of affordable multifamily rental housing and single-family housing. To finance these two funds, the FMIC would assess a small fee for all government-guaranteed loans made by a private lender.¹⁴⁹ Twenty-percent of the fee would be allocated to the CMF and the remaining 80% to the NHTF.¹⁵⁰ The United States Department of Housing and Urban Development would oversee the NHTF and the United States Department of the Treasury would oversee the CMF. The money from these funds would be used to obtain mortgages for affordable housing.¹⁵¹

III. EXAMINATION OF PROPOSALS ON THE HOUSING MARKET

Housing reform commenters typically identify three elements as the main objectives motivating the demand for change in the housing market: (1) liquidity; (2) taxpayer protection; and (3) availability of affordable housing.¹⁵² These three benchmarks are foundations that should be considered with any reform to the multifamily housing industry.

First, liquidity has been a primary purpose since the conception of the GSEs. While liquidity is important across the housing market, it is of particular concern to multifamily housing owners because the loans required to purchase multifamily buildings are larger than single-family loans. Even with the GSEs in the secondary market, there are drastically fewer lenders with the expertise and resources to originate multifamily loans.¹⁵³ With fewer lenders originating multifamily mortgages, a liquidity

146. *Id.*

147. *Id.* at § 403.

148. Housing Finance Reform and Taxpayers Protection Act of 2013, S. 1217, 113th Cong. § 402 (2013); *see also* 12 U.S.C. § 4501 (2012) (authorizing a fund that allocated Fannie Mae and Freddie Mac profits to affordable multifamily housing, even though the FHFA discontinued contributions after the establishment of conservatorship).

149. S. 1217, § 401(a).

150. *Id.* § 401(a)(2).

151. *Id.* § 401(a).

152. These factors are reoccurring themes throughout the examining of housing reform. *See generally* H.R. 3221, *Housing and Economic Recovery Act of 2008*, DEMOCRATIC POL'Y COMM'N (July 25, 2008), http://www.dpc.senate.gov/dpcdoc.cfm?doc_name=lb-110-2-123 (summarizing that the United States Treasury weighs taxpayer protections and HERA prioritizes liquidity and affordable housing).

153. *See DUS Lenders*, FANNIE MAE, <https://www.fanniemae.com/multifamily/dus-lenders> (last visited Oct. 18, 2015) (listing only twenty-five multifamily lenders approved by

reduction would have a more detrimental effect on the multifamily sector than on the housing market generally.

Second, limiting taxpayers' liabilities reduces the risk of a taxpayer-funded bailout and potentially allows for lower taxes, or for tax money to be used for more productive purposes. While taxpayer protection is a concern, it is much less of a concern in the multifamily industry compared to the single-family industry because the multifamily industry is much smaller than the single-family industry¹⁵⁴ and, therefore, has less overall impact even if the loans begin to default. Moreover, the multifamily industry has traditionally suffered fewer losses than single-family housing because underwriting standards have remained rigorous.¹⁵⁵

Finally, providing affordable housing for low- and moderate-income families has always been a key component of the GSEs' overall public purpose. While the United States government supports affordable housing through a variety of mechanisms, the GSEs' role in the affordable multifamily housing sector facilitates the creation of affordable rental housing for many in need.

A. Liquidity

One of the goals and successes of the GSEs is the creation of liquidity. As stated in Part I, liquidity is the introduction of additional capital into the market. Liquidity is particularly important in the multifamily housing industry because it frees up capital for lenders to provide more loans on more attractive terms.¹⁵⁶ While private lenders may be able to fund numerous single-family mortgages, they may only be able to fund one or two multifamily mortgages with the same amount of money since multifamily loans are much larger. Without the GSEs securitizing these mortgages and injecting more capital into the multifamily market, private lenders would face a less liquid market, which would result in greater interest rates, making it harder to obtain multifamily mortgages. In turn, a less liquid market may possibly cause borrowers to cancel new housing projects and reduce the housing supply.¹⁵⁷ Both PATH and Corker-

Fannie Mae).

154. *See Mortgage Debt Outstanding*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Dec. 2015), <http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm>.

155. *See supra* notes 86–87 and accompanying text.

156. GOVERNMENT-SPONSORED ENTERPRISES, *supra* note 1, at 11.

157. FANNIE MAE, ANALYSIS OF THE VIABILITY OF FANNIE MAE'S MULTIFAMILY BUSINESS OPERATING WITHOUT A GOVERNMENT GUARANTEE 74 (2012), https://www.nmhc.org/uploadedFiles/Articles/External_Resources/FNMMF2012ScorecardResponse.pdf; FREDDIE MAC, REPORT TO THE FEDERAL HOUSING FINANCE AGENCY 7, 32 (2012), http://www.freddiemac.com/multifamily/pdf/fhfa_report_freddiemac_

Warner had an impact on liquidity, but each option would have had an adverse effect in the multifamily housing industry.

PATH would most likely reinstate liquidity problems.¹⁵⁸ Under the fully privatized funding model, only private lenders would finance the mortgage market and current guarantees would disappear. This would limit mortgage liquidity, and due to a lack of countercyclical capital,¹⁵⁹ credit would tighten.¹⁶⁰ The United States Treasury explains, “Complete privatization would limit access to, and increase the cost of, mortgages for most Americans too dramatically and leave the government with very little it can do to ensure liquidity during a crisis.”¹⁶¹ In the absence of GSE involvement to insure these mortgages, liquidity in the multifamily sector will be limited¹⁶² and detrimental to the public.¹⁶³ As previously seen in a government-less housing industry, larger down payments will be required and mortgage rates will most likely be higher.¹⁶⁴ Given that private lenders are profit driven and multifamily underwriting requires more expertise and resources, fewer lenders may find it attractive to provide mortgages. Credit will tighten—as GSEs are no longer guaranteeing the repayment of principal and interest—resulting in much less liquidity within the housing industry. PATH failed to address the repercussions of less liquidity in the housing market.

While PATH would hurt both the single-family and multifamily industry by limiting capital, it is likely that the multifamily industry would have suffered more because multifamily loans are typically harder to secure. Private lenders would be restricted to allocating money toward loans for which they have the capital. Furthermore, many lenders do not have the resources to securitize loans. There are fewer multifamily lenders because multifamily underwriting requires more resources and expertise.¹⁶⁵

multifamily_market_analysis.pdf.

158. See KEY PRINCIPLES FOR PRESERVING LIQUIDITY, *supra* note 92, at 4 (refuting the claim that a privatized market can fully replace the liquidity offered by the GSEs).

159. See GOVERNMENT-SPONSORED ENTERPRISES, *supra* note 1, at 3 (“Countercyclical liquidity mitigates damage from sudden, system-wide contraction in credit availability. It implies expansion when private credit is scarce and then contraction as private credit becomes more available.”).

160. See *id.* at 3.

161. TREASURY REPORT, *supra* note 12, at 26.

162. See GOVERNMENT-SPONSORED ENTERPRISES, *supra* note 1, at 2 (stating that currently, the GSEs are the means by which the government provides countercyclical liquidity).

163. See generally KEY PRINCIPLES FOR PRESERVING LIQUIDITY, *supra* note 92, at 6 (“As a result of the liquidity provided by the GSEs, the United States has the best and most stable rental housing sector in the world.”).

164. See *supra* notes 45–47 and accompanying text.

165. See *supra* notes 87, 152–53 and accompanying text.

However, PATH proposed the Utility to aide lenders in the securitization of mortgages.¹⁶⁶ Yet, the Utility would be established for single-family mortgages, and PATH did not address if this Utility would be applicable to multifamily mortgages. Additionally, the Utility would be insufficient because the lack of workable specifics in the bill does not provide a guarantee that this platform would truly create the securitization market that the bill envisioned.

By contrast, it is likely that liquidity would be more available under a Corker-Warner regime. Given that Corker-Warner espoused a limited government guarantee, capital for the housing market and, thus, liquidity is more achievable than under the PATH regime. However, in a Corker-Warner scenario, the United States Treasury observes that reducing “Fannie Mae and Freddie Mac’s ability to guarantee loans . . . could limit the availability of mortgage credit [and] shock the housing market.”¹⁶⁷ The market is still in a fragile state¹⁶⁸ and thus sensitive to the smallest change in the economy.¹⁶⁹

In line with the FHFA’s statutory mandate to reduce the role of government in the mortgage market, the FHFA sent Congress a strategic plan in February 2012 laying out future objectives for Fannie Mae and Freddie Mac. Specific to multifamily housing, the strategic plan required the GSEs to analyze “the viability of [their] multifamily operations without government guarantees.”¹⁷⁰ The FHFA concluded that without governmental support, the multifamily businesses of the GSEs would return little value to the mortgage market because they would function like private lenders.¹⁷¹

Furthermore, the PATH and Corker-Warner approach were likely to create even more disastrous effects in times of severe economic stress in the housing market. During the housing crisis in 2008, when many private lenders left the mortgage market, the GSEs were the main source of capital

166. See *supra* Part II.A.

167. TREASURY REPORT, *supra* note 12, at 23.

168. *Id.* at 9, 11 (“Any such changes [to the housing market] should occur at a measured pace that allows borrowers to adjust to the new market, that preserves widespread access to affordable mortgages . . . and that supports, rather than threatens, the nation’s economic recovery.”).

169. See generally Carrie Stradley Lavargna, *Government-Sponsored Enterprises Are “Too Big to Fail”: Balancing Public and Private Interests*, 44 HASTINGS L.J. 991, 1012 (1993) (“The failure of a large financial institution poses systemic risks to the economy because it would disrupt the markets for federal funds, government securities, mortgage-backed securities, and even foreign exchange.”).

170. FHFA, A STRATEGIC PLAN FOR ENTERPRISE CONSERVATORSHIPS 16 (2012), http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/20120221_StrategicPlanConservatorships_508.pdf.

171. See generally GAO FANNIE AND FREDDIE, *supra* note 80.

for financing rental housing.¹⁷² The additional capital GSEs provide to lenders helps stabilize the mortgage market in times of stress by ensuring sufficient resources for loans.¹⁷³

If PATH and Corker-Warner were implemented, liquidity in the multifamily housing market would likely tighten considerably, or in the event of an economic downturn, freeze up completely. Should this occur, it is unlikely that the multifamily housing industry would be able to “build the 300,000 new apartments needed each year to answer the growing demand for rental housing, meet the needs of our 35 million residents and continue supporting millions of jobs across the country.”¹⁷⁴ Such financial consequences need to be taken into consideration when shaping housing reform.

B. Protecting Taxpayers

In a bailout, the federal government uses taxpayer dollars from the United States Treasury to cover the obligations of a private company. When the GSEs were placed under conservatorship by the FHFA and subsequently bailed out, taxpayers bore the cost of the GSEs’ losses.¹⁷⁵ The primary role of the FHFA as conservator is to soundly regulate the GSEs on behalf of taxpayers.¹⁷⁶ Eliminating the implied government guarantee of the GSEs obligations would decrease the risk to taxpayers.

Both PATH and Corker-Warner aim to reduce the ultimate cost to taxpayers by limiting governmental involvement in the housing industry. The scenario that would pose the lowest risk to taxpayers is a private multifamily housing market, a composition sanctioned by PATH. Under a completely private model, the government would have little to no involvement, and therefore, taxpayers would no longer be at risk for “guarantees covering most of the nation’s mortgages.”¹⁷⁷ Under a privatized multifamily housing industry, it is possible there is no future threat to taxpayers to bail out the GSEs. However, as in the most recent economic downturn, the federal government has also bailed out

172. See *supra* notes 19–22 and accompanying text.

173. TREASURY REPORT, *supra* note 12, at 27–28 (explaining that a private model may lead to an industry dominated by larger lenders that have more resources to support lending, forcing smaller lenders out of the picture).

174. Press Release, National Multifamily Housing Council, Apartment Industry Response to Housing Finance Reform Legislation (June 25, 2013), <https://www.nmhc.org/Content.aspx?id=5864>.

175. *Bailout Recipients*, PROPUBLICA, <http://projects.propublica.org/bailout/list> (last updated Oct. 2, 2015) (listing the various bailouts throughout history and showing that the GSE bailout is considered one of the most expensive taxpayer-funded bailouts in history).

176. *About FHFA*, *supra* note 80.

177. TREASURY REPORT, *supra* note 12, at 27.

corporations that are not GSEs.¹⁷⁸ From these previous bailouts, it is clear that simply removing the GSEs from the picture may not entirely protect taxpayers from funding a bailout if the government deems the industry important enough. As a result, PATH would potentially greatly reduce costs to taxpayers.

Corker-Warner would also reduce potential costs to taxpayers, though not as much as PATH. Under Corker-Warner, the government would continue to insure a small number of mortgage loans. Any amount of governmental involvement, albeit a small one, would impose a risk on taxpayers. Corker-Warner aimed to mitigate this risk by establishing the FMIC. Before the government relied on taxpayers' funds for a bailout, FMIC would insure delinquent mortgages. So while there continued to be a risk to taxpayers, Corker-Warner does a fair job of balancing this risk with the need for liquidity provided through government involvement. However, the FMIC seemed like it would function similarly to the way that the GSEs already function for the housing market. Thus, it is unclear how the FMIC would protect taxpayers any more than the GSEs.

Instead of taxpayers bearing the risk of mortgage default, private lenders will be forced to absorb this burden. As a result, the lack of a government guarantee would theoretically force private lenders to be "more careful with the mortgages they issue."¹⁷⁹ The consequences of the mistakes that led to the housing market collapse in 2008 could deter private lenders from repeating such mistakes.¹⁸⁰ Specifically, by having a private configuration, the elimination of the FHFA and the GSEs essentially wipes the slate clean and the government can start anew with tightened standards. Government insurance provokes poor lending standards because there is a reliance that taxpayers will serve as a backstop when mortgages go bad.¹⁸¹ The United States Treasury concedes, "[Government involvement] runs too high a risk of crowding out private capital . . . and putting too much taxpayer money at risk."¹⁸² If the housing market were to collapse again, taxpayers may be called on to bailout the GSEs a second time. While private lenders would likely take more of a burden in a private scenario as is suggested by PATH and Corker-Warner, specific focus on the multifamily housing industry shows that protecting taxpayers is less applicable in the multifamily sector given that the multifamily housing industry comprises a smaller total

178. See, e.g., *Bailout Recipients*, *supra* note 175 (listing the various bailouts).

179. Weinberger *supra* note 38.

180. See *supra* notes 88–89 and accompanying text.

181. Weinberger *supra* note 38 (paraphrasing the statement of Sen. Pat Toomey, R-Pa., at a PATH Act Senate hearing where Sen. Toomey said that "a government guarantee can spur bad lending and risky management practices").

182. TREASURY REPORT, *supra* note 12, at 26.

percentage than single-family mortgages¹⁸³ and multifamily mortgages are more thoroughly underwritten. Even if the government enacted PATH or Corker-Warner, there is no guarantee that the government would not bail out private lenders, and the taxpayers would be funding another bailout.

Critics of government involvement in the housing industry often cite concern over taxpayer protection. The scenario that would pose the highest risk to taxpayers is a fully government-funded housing market.¹⁸⁴ Today, investors supply the funds used by the GSEs to purchase mortgages, but the historically implied government guarantee of the GSEs' obligations still creates risk to taxpayers. However, since 2011, Fannie Mae and Freddie Mac have been generating profits. One of the most positive aspects of government conservatorship is that the profits from the GSEs are looped back into the government.¹⁸⁵ Fannie Mae and Freddie Mac are generating incredible amounts of money for the United States Treasury.¹⁸⁶ As a result, motivation behind housing reform has decreased¹⁸⁷ as Fannie Mae and Freddie Mac report record-breaking profits¹⁸⁸—"The White House has estimated that taxpayers might end up seeing a \$51 billion profit on the federal funds injected in Fannie Mae and Freddie Mac if the two companies remain in conservatorship through fiscal year 2023."¹⁸⁹ Unfortunately, if the GSEs are wound down, pursuant to PATH or Corker-Warner, the government would have lost the benefit of the current income stream from the GSEs.

Therefore, PATH and Corker-Warner are not appropriate solutions for the multifamily finance market. As previously discussed, although taxpayer protection is important, it is less pressing in the multifamily housing industry than the single-family industry.

183. See *supra* notes 87, 153–54 and accompanying text.

184. See generally Reiss, *supra* note 6, at 1080–81 (arguing that privatization is the only way to protect taxpayer liability). While Boyle's Note only focused on the single-family industry, the same argument can be made with multifamily housing as the federal government implicitly supports both single-family and multifamily housing through Fannie Mae and Freddie Mac. See Boyle, *supra* note 74, at 184 (arguing that the cost to taxpayers undermines any negative repercussions of privatization, such as higher interest rates).

185. Ironically, Fannie Mae and Freddie Mac's recent profits are helping the economy by being allocated across the federal government to make up the financial deficits that a particular agency was experiencing. See also Benson, *supra* note 29.

186. See Chadbourn, *supra* note 26; see also Weinberger, *supra* note 100 (helping the government post a \$116.5 billion surplus in June 2013 after Fannie Mae and Freddie Mac made \$66.3 billion in dividend payments to the United States Treasury).

187. Chadbourn, *supra* note 26 (increasing profits have "undercut the urgency . . . lawmakers have felt to wind [the GSEs] down").

188. See *supra* notes 27–29 and accompanying text.

189. See Chadbourn, *supra* note 26.

C. Availability of Affordable Housing

One of the key reasons the government initially became involved in the housing market was to improve the availability of affordable housing.¹⁹⁰ Various government programs in the multifamily housing industry provide affordable housing through affordable rental programs, and demand for affordable rental housing has risen in recent years. Low-income renters increased from 7.10 million in 2009 to 8.48 million in 2011; unfortunately, rental costs rose 6% between 2008 and 2011, while incomes dropped more than 3%.¹⁹¹ The demand for affordable housing cannot be ignored.

In part, the lack of affordable housing is due to the increased complexities associated with providing affordable housing. Affordable housing is more multifaceted than a traditional market rate transaction¹⁹² because it typically consists of many layers of intricate financing.¹⁹³ Additional layers of complication create greater risk of default because each element comprising the loan transaction creates a reasonable chance for a borrower to default under the terms of the transaction.¹⁹⁴ Additionally, more complexities lead to more costs—it costs more for lenders to underwrite affordable properties¹⁹⁵ and more for attorneys to work on these transactions.¹⁹⁶ Higher costs, higher risks, and higher interest rates (because of the higher risks) all make affordable housing less desirable, particularly to the private industry, which is looking to maximize profit.¹⁹⁷

Both PATH and Corker-Warner would hurt efforts to increase affordable rental housing for two reasons: first, they would reduce the availability of affordable housing in general; and second, neither weighs the

190. See *supra* Part I. See generally CAP, MAKING THE MORTGAGE MARKET WORK FOR AMERICA'S FAMILIES 5, 16 (2013), <https://www.americanprogress.org/wp-content/uploads/2013/06/AccessAffordHousing1.pdf> (asserting the benefits of affordable housing include creating a more flexible workforce, which can move to take advantage of new work opportunities, reduce homelessness, and help families provide stable environment for children).

191. OFFICE OF POL'Y DEV. & RESEARCH, HUD, WORST CASE HOUSING NEEDS 2011 1 (2013), https://www.huduser.gov/Publications/pdf/HUD-506_WorstCase2011_reportv3.pdf.

192. A market rate transaction is a conventional loan with no affordability component. See Interview with Nicholas A. Pirulli, Partner, Krooth & Altman LLP, in Kensington, MD (Nov. 10, 2013) (stating that market rate transactions involve faster executions and less complications).

193. *Id.*

194. *Id.* (explaining that layers of financing include, but are not limited to, tax abatements, ground leases, restrictive covenants and that less complications result in lower risk).

195. *Id.* (reiterating that underwriting for affordable housing has to be more conservative to ensure that the project and the loan will succeed).

196. *Id.*

197. *Id.*

benefits of, and increasing need for, affordable rental housing. The PATH bill missed the mark completely with low- and moderate-income housing options because it did not expressly address affordable housing at all. This is a huge oversight because, as discussed above, private lenders are not likely to create a sufficient market to support an adequate amount of affordable housing.

Corker-Warner also failed to implement affordable housing goals. Affordable housing options are an important component of the multifamily industry and the bill did not assure that the fees collected by the CMF and NHTF would result in the same opportunities for low- and moderate-income families as currently exist. The bill did not elaborate on any affordability requirements and did not specify if the fees collected through the limited governmental involvement would generate enough money to support affordable housing needs at the levels the GSEs currently do.¹⁹⁸

Additionally, while the underlying theme of both PATH and Corker-Warner was taxpayer protection,¹⁹⁹ it is possible that taxpayers will bear an even greater burden in providing affordable housing through the direct government funding of public housing.²⁰⁰ The government will either allocate taxpayers' resources to give a bailout, if necessary, to the current housing finance system, which uses private funds to support affordable housing but requires a government backstop, or it can use taxpayer dollars to build public housing.

Privatization may also significantly limit the affordable housing available to the public.²⁰¹ Affordable housing conflicts with profit maximization and, thus, affordable housing is less attractive to private lenders.²⁰² Capital in a private-only housing finance system is concentrated in high-end properties, as opposed to affordable rental properties.²⁰³ Due to the sophistication and costs of affordable housing transactions, in order to create a sufficient supply of affordable rental units, the government needs to provide incentives for property owners to compensate them for providing affordable

198. See *supra* notes 147–148 and accompanying text (describing the two funds but failing to include specific target funding numbers).

199. See *supra* Part III.B.

200. See Interview with Nicholas A. Pirulli, *supra* note 192 (arguing that it is possible the on-going expense of public housing could be more costly than a one-time bailout and that traditionally, public housing is a failure). See generally Michael A. Stegman, *The Fall and Rise of Public Housing*, REG., Summer 2002, at 64, 64, 70 (discussing the start of public housing in the 1970s, its decline, and its potential comeback).

201. GOVERNMENT-SPONSORED ENTERPRISES, *supra* note 1, at 16.

202. HOUSING AMERICA'S FUTURE, *supra* note 32, at 84 (stating that without government support, development of affordable housing options is difficult due to high land prices and construction).

203. KEY PRINCIPLES FOR PRESERVING LIQUIDITY, *supra* note 92, at 7.

housing. Fannie Mae and Freddie Mac provide assistance and incentives for affordable housing where the market cannot.²⁰⁴ Without Fannie Mae and Freddie Mac, it is unlikely the market would be able to provide loans that would meet current affordable housing needs.

IV. ONE SIZE DOES NOT FIT ALL

The future of the GSEs' role in the housing finance market continues to be the subject of debate. PATH and Corker-Warner did not effectively address the concerns of the multifamily housing industry. The best solution for this industry is to spin off the Fannie Mae and Freddie Mac multifamily housing programs. Also, the GSEs will no longer have a role in the single-family housing industry.

There are several reasons why Fannie Mae and Freddie Mac should be spun off into GSEs that deal strictly with the multifamily realm. First, the housing market collapse was not due to the failure of the GSEs in the multifamily realm.²⁰⁵ Second, GSEs are vital to the wellbeing of those in need of affordable housing.²⁰⁶ Third, GSEs provide liquidity that the market may not otherwise provide.²⁰⁷ Finally, the concern to protect taxpayers is not as great as in the single-family sector because multifamily mortgages comprise much less of the total amount of mortgage debt in the housing industry.²⁰⁸ The need for single-family reform is driving the housing reform agenda. Fannie Mae and Freddie Mac's multifamily housing programs are working well, generating profits, and, therefore, should remain in place. Fannie Mae and Freddie Mac are required to provide affordable housing options to low-and moderate-income families. Such a purpose is important because of the growing demand for affordable rental options for the public.²⁰⁹ The presence of GSEs would also keep affordable housing goals strong. A private market is not good for affordable housing because profits are not as high.²¹⁰ Single-family housing reform

204. See, e.g., Interview with Nicholas A. Pirulli, *supra* note 192 (clarifying that Fannie Mae and Freddie Mac assist by providing loans with lower interest rates than private lenders, and incentives include housing assistance payments contracts, low-income housing tax credits, or tax abatements, as well as noting that these government-funded incentives decrease the difference between the rent cost and the amount a tenant can pay); see also KEY PRINCIPLES FOR PRESERVING LIQUIDITY, *supra* note 91, at 1–2 (indicating that affordable housing markets are underserved by the market, but the GSEs multifamily programs ensure that affordable housing is available by providing capital in all markets).

205. See *supra* notes 86–88 and accompanying text.

206. See *supra* Part III.C.

207. See *supra* Part III.A.

208. See *supra* Part III.A–C.

209. See generally RENTAL HOUSING REPORT, *supra* note 15, at 31, 39.

210. See *supra* Part III.C.

should not overshadow the GSEs' positive presence in the multifamily industry.

This proposed reform to the FHFA, Fannie Mae, and Freddie Mac is the most beneficial because it preserves the status quo, sustains affordable housing options, and keeps the multifamily market liquid. As seen in the pros and cons above, these factors are important to the success of the multifamily industry. While this recommendation is not the most ideal circumstance for taxpayers in a single-family scenario, as discussed previously, the multifamily industry is unique in that the risk to taxpayers is mitigated.²¹¹ However, the likely repercussions to liquidity and affordable housing demonstrate that privatization weakens the primary purposes the GSEs have served. The public interest is best served by ensuring that Fannie Mae and Freddie Mac continue to play a role in the multifamily housing industry.

Multifamily housing reform discussions are important because the rental market is expected to become a larger percentage of the housing industry in the future.²¹² Congress needs to take action, yet no clear legislative consensus has emerged until recently. The PATH bill was problematic mostly because it did not propose any reform to the multifamily housing industry and was subject to criticism²¹³ because it would remove government assistance and oversight from the housing finance market. On the other hand, the Corker-Warner bill had been praised as a great start to bringing reform to Fannie Mae and Freddie Mac.²¹⁴ Generally, both proposals would wind down Fannie Mae and Freddie Mac, replacing them with private financial institutions. While the recommendations set forth in the PATH and Corker-Warner legislation may bring significant improvements to the single-family housing industry, they did not provide suitable reforms to the future of the multifamily housing industry.²¹⁵ These proposed reforms were sweeping in nature and operate under the assumption that proposals that are dominantly single-family in nature were

211. See *supra* Part III.B.

212. KEY PRINCIPLES FOR PRESERVING LIQUIDITY, *supra* note 92, at 2.

213. See Weinberger, *supra* note 38 (stating that House of Representative members want to see more of a government role in the mortgage market); *H.R. 2767: Protecting American Taxpayers and Homeowners Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2767> (last visited Jan. 21, 2016); Lydia DePillis, *A Quick-and-Dirty Guide to the Housing Finance Reform Battle*, WASH. POST (July 30, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/30/a-quick-and-dirty-guide-to-the-housing-finance-reform-battle/> (noting that community banks, consumer protection advocates, the National Association of Home Builders, and Democrats oppose the bill).

214. See Weinberger, *supra* note 99 ("President Obama has thrown his weight behind Senate legislation for winding down Fannie Mae and Freddie Mac. . .").

215. See *supra* Part II.

the answer to multifamily housing reform as well. Lawmakers should return to the drawing board and propose legislation that has a multifamily focus, taking into account the different environments where the multifamily market will be most beneficial to the public, as seen in Part III.

CONCLUSION

Housing industry reform cannot simply be handled with changes to the single-family housing industry. Congress must recognize that multifamily housing should be analyzed separately from single-family housing reform. By examining the unique position of multifamily housing, it is possible that there is a future for the FHFA and GSE involvement that will continue to benefit society.

PATH and Corker-Warner were two proposals that would significantly change the housing finance industry. PATH called for the winding down of the FHFA and the GSEs and espoused a housing finance market comprised entirely of private funding, without addressing the effects that this would have on the multifamily housing industry. Corker-Warner preserved a small governmental role in the housing industry but also supported the phasing out of the FHFA and the GSEs. It acknowledged the multifamily housing industry, but did not propose any significant changes to the current multifamily housing industry structure.

The proposals were examined based on liquidity, taxpayer protection, and availability of affordable housing. These elements are reoccurring themes throughout housing reform discussions and provide benchmarks to determine the implications these proposals will have on multifamily housing.

Unfortunately, both proposals failed to adequately examine Fannie Mae and Freddie Mac's unique role in the multifamily housing industry. In light of this failure, the recommendation is to spin off Fannie Mae and Freddie Mac's multifamily housing programs and let them continue to meet the needs of the multifamily housing industry.