

MORTGAGE FORGIVENESS DEBT RELIEF ACT OF 2007

[T]he housing market is in crisis. Subprime mortgages and predatory lending practices are more prominent than ever. Home values have plunged 15 to 20 percent this year and foreclosures in the first 6 months of this year alone have surged 55 percent over the same period in 2006 I have seen the joy in families' eyes when they have been able to purchase their first home and achieve the American Dream. I have seen the tears when they struggle to make their payments and their dream is taken away [L]osing your home to foreclosure is an unthinkable ordeal. The way I see it, if you are unfortunate enough to lose your home to foreclosure because you are struggling, you have suffered enough. You shouldn't be punished further by being taxed on what you no longer own.

—Representative Dennis Cardoza (D-Cal.)¹

We want people to have a place they can call their own. After all, it's an essential part of the American Dream. And we want that dream to extend throughout our nation.

—President George W. Bush²

In the wake of the 2007 American housing market collapse and contemporaneous mortgage crisis, Congress has taken action heralded as “protect[ing] families from higher taxes when they refinance their homes”³ by enacting the Mortgage Forgiveness Debt Relief Act of 2007 (the “Act”).⁴ Central to the Act is a provision that, subject to certain conditions, temporarily excludes debt forgiven by a mortgage lender on a borrower's primary residence from taxable income.⁵

Faced with rising mortgage debt in a failing housing market, many Americans have struggled to stay financially stable while avoiding foreclosure. Furthermore, recent studies have projected that the slump will continue, with no foreseeable relief for troubled homeowners.⁶ The Internal Revenue Code (the “Code”) previously placed a financial burden on homeowners who renegotiated a home loan with a lender by adding a tax assessment to the already financially and emotionally difficult process of home

¹ 153 CONG. REC. H11, 256 (daily ed. Oct. 4, 2007).

² Press Release, Office of the Press Sec'y, President Bush Signs H.R. 3648, The Mortgage Forgiveness Debt Relief Act of 2007 (Dec. 20, 2007) [hereinafter, Act Press Release].

³ *Id.*

⁴ Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142 (codified at I.R.C. § 108 (Supp. II 2008)). The Act was approved by the House by a 386-27 vote and unanimously consented to by the Senate. 153 CONG. REC. H11,297 (daily ed. Oct. 4, 2007) (Roll No. 948); 153 CONG. REC. S15,642 (daily ed. Dec. 14, 2007).

⁵ I.R.C. § 108 (Supp. II 2008).

⁶ See generally, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING (2007).

refinancing and/or foreclosure.⁷ The Act eases that burden by excluding the gains from forgiveness of home mortgage debt from homeowners' taxable income.⁸

As a theory of income taxation, it is well-settled that that "a debtor who ultimately pays back [fewer borrowed funds] than [were] received [in a loan transaction] enjoys a financial benefit,"⁹ regardless of how such funds were spent. For this reason, the Code includes discharged debt—whatever the reason for discharge—in its definition of "gross income"¹⁰ and considers it taxable.¹¹ Prior to ratifying the Act, Congress had provided exceptions to this general rule in only four limited circumstances.¹² Subject to certain limitations, the Act adds an additional exception for "qualified principal residence indebtedness which is discharged before January 1, 2010."¹³ Under the new exception, a qualifying homeowner does not have to include, as a portion of her taxable income, debt a lender forgives in consideration of the declining value of her underlying property or her financial condition.¹⁴ The Act thereby eliminates treatment of forgiven debt as an increase in the homeowner's tax liability, and removes the tax disincentive to negotiating mortgage debt discharge agreements.

With a worsening mortgage crisis, home values are expected to erode further and American families face an increasing risk of foreclosure.¹⁵ The Act's legislative history suggests that some members of Congress expect the Act to help stem this tide by mitigating the burdens placed on borrowers during the refinancing process and by encouraging lenders and homeowners to work together to settle valuation, loss of equity, and interest rate issues before foreclosure becomes necessary.¹⁶ Most members support the Act as a way to decrease the difficulties borrowers face by decreasing their tax liabil-

⁷ I.R.C. § 108 (Supp. I 2007).

⁸ See I.R.C. §§ 108(a)(1)(E), 108(a)(2)(C), 108(h) (Supp. II 2008) (amending I.R.C. § 108 (Supp. I 2007)).

⁹ 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES & GIFTS ¶ 7.1 (3d ed. 1999).

¹⁰ See *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931) (holding that forgiveness of a taxpayer's debt is "accession to income," and therefore included in the Code's definition of gross income).

¹¹ I.R.C. § 61(a)(12) (Supp. I 2007).

¹² I.R.C. § 108(a)(1)(A) (exempting discharges occurring "in a title 11 case"); § 108(a)(1)(B) (exempting discharges occurring "when the taxpayer is insolvent"); § 108(a)(1)(C) (exempting discharges with respect to "qualified farm indebtedness"); § 108(a)(1)(D) (exempting discharges with respect to certain "qualified real property business indebtedness").

¹³ I.R.C. § 108(a)(1)(E).

¹⁴ See *id.*

¹⁵ See ELLEN SCHLOEMER ET AL., CENTER FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 4 (2006) (finding that "[n]ow that the housing boom has cooled, fewer delinquent borrowers will have the equity needed to refinance their loan or sell their home to avoid foreclosure" and that "foreclosures are more likely in housing markets with lower house price growth").

¹⁶ See, e.g., 153 CONG. REC. S15,985 (daily ed. Dec. 19, 2007) (statement of Sen. John Sununu (R-N.H.)).

ity.¹⁷ However, although legislators have broadly attacked taxation of discharged debt as “unfair and unwarranted,”¹⁸ they have nonetheless included provisions that limit the Act’s ability to completely exempt such transactions from taxation.¹⁹ Further, with little available data on the population of homeowners that stand to benefit from the reduced tax consequences of debt forgiveness agreements on home loans, the reach of the Act is unclear. This is especially true because many homeowners affected by the Act may be otherwise exempt from taxation under a different exception. This Recent Development explores Congress’s rationale and expectations for the Act, why certain provisions are controversial, and whether and to what extent the Act will affect American homeowners. It will argue that while the Act is certainly a helpful and reasonable step in assisting homeowners who would otherwise face large tax liability in already harsh circumstances, it has a narrow application, and its remedial effects will likely be limited.

I. THE EFFECTS OF THE MORTGAGE CRISIS ON AMERICAN HOMEOWNERS

As evidenced by its legislative history, the Act was a direct response to the recent American housing slump, and the subsequent subprime mortgage crisis.²⁰ Although a booming housing market and a corresponding increased demand for borrowed funds stimulated a rise in subprime lending during the earlier part of the decade, these risky debt arrangements have proved to be dangerous in the recently-weakened market.²¹ As noted by former Representative Jack Kemp (R-N.Y.), “[t]he subprime mortgage meltdown exists because there was an abundance of liquidity and soaring property values in many areas of the country, which allowed for exuberant lenders to provide ill-advised subprime loans, particularly Adjustable Rate Mortgages, which represent about 60% of foreclosures.”²² Now that the housing bubble has burst, and prices have begun to drop, “Americans’ homes are in jeopardy because the value of their [homes are] less than their actual mortgage[s].”²³ While rising prices had afforded economically distressed homeowners the

¹⁷ See, e.g., 153 CONG. REC. H11,291–92 (daily ed. Oct. 4, 2007) (statement of Rep. Stephanie Tubbs Jones (D-Ohio)).

¹⁸ 153 CONG. REC. S15,985 (daily ed. Dec. 19, 2007) (statement of Sen. John Sununu).

¹⁹ See *infra* Part IV.

²⁰ See, e.g., 153 CONG. REC. H16,770 (daily ed. Dec. 18, 2007) (statement of Rep. Stephanie Jones); 153 CONG. REC. H11,256, (daily ed. Oct. 4, 2007) (statement of Rep. Dennis Cardoza).

²¹ See LOSING GROUND, *supra* note 15, at 8 (noting that although “[s]ome have heralded the growth in subprime lending as a positive break-through in extending credit . . . this increased access has come at a great cost to many families, since the highest rate of home foreclosures occurs among subprime home loans”).

²² *The Housing Decline: The Extent of the Problem and Potential Remedies: Hearing Before the S. Comm. on Finance*, 110th Cong. (2007) [hereinafter *Housing Decline Hearing*] (statement of Jack Kemp, Founder and Chairman, Kemp Partners) (available at <http://www.finance.senate.gov/hearings/testimony/2007test/121307testjk.pdf>).

²³ *Id.*

benefit of increasing home equity to ease the path to refinancing, many borrowers now face debts larger than their underlying assets. As explained by Representative Earl Blumenauer (D-Or.), by April 2009, two million loans, many of which initially carried subprime rates, will adjust to a higher rate.²⁴ At the same time, Goldman Sachs predicts a fifteen percent drop in housing values, while others predict price declines of up to thirty percent.²⁵ If values decrease by the maximum expected amount, nearly twenty million homeowners will face home values which do not cover their outstanding mortgage debt.²⁶

The Center for Responsible Lending (“CRL”) projects that approximately twenty percent of subprime mortgages negotiated in 2005 and 2006 will eventually go into foreclosure.²⁷ As CRL notes, other studies have predicted foreclosure rates of up to fifty percent.²⁸ Additionally, CRL has forecast that these results will occur quickly, with as many as 1.7 million foreclosures predicted by late 2009.²⁹ Although investor and non-owner occupied homes have historically been viewed as having the highest risk of default, currently “88% of foreclosures are suffered by people living in their primary residence.”³⁰ Especially with regard to foreclosures on primary residences, “[t]he losses will inevitably have ripple effects throughout the economy and our society as over two million families lose their physical shelter, their major source of financial security, and the social benefits of homeownership.”³¹

While the lending and housing crises have direct effects on subprime borrowers and others struggling to meet mortgage liabilities, the economic consequences of the crises have far-reaching and indirect effects for a broader section of American homeowners. As CRL reports, studies have shown that foreclosure on one home causes the value of nearby homes to drop by an average of nearly one percent.³² The studies further show that “[t]he impact [is] even higher in lower-income neighborhoods, where each foreclosure drop[s] home values by an average of 1.44 percent.”³³ Based on these estimates, CRL has projected that 40.6 million homes will lose \$202 billion in value because of neighboring foreclosures, with individual home-

²⁴ 153 CONG. REC. H16,771 (daily ed. Dec. 18, 2007).

²⁵ *See id.*

²⁶ *See id.*

²⁷ CENTER FOR RESPONSIBLE LENDING, SUBPRIME SPILLOVER: FORECLOSURES COST NEIGHBORS \$202 BILLION, at 4 (2008).

²⁸ *Id.* (Lehman Brothers and Credit Suisse have projected foreclosure rates of thirty and thirty-six percent, respectively, while First American Real Estate Solutions has projected a fifty percent foreclosure rate).

²⁹ *Evolution of an Economic Crisis? The Subprime Lending Disaster and the Threat to the Broader Economy: Hearing Before the Joint Econ. Comm.*, 110th Cong. 6 (2007) (statement of Martin Eakes, Center for Responsible Lending).

³⁰ *Id.* at 5–6.

³¹ LOSING GROUND, *supra* note 15, at 4.

³² SUBPRIME SPILLOVER, *supra* note 27, at 1.

³³ *Id.* (citation omitted).

owners within that group losing an average of \$5,000 of property value.³⁴ Although California, New York, and Florida are expected to face the largest value losses for neighboring properties in terms of both quantity of homes and magnitude of loss, 24 states will likely face individual declines of over \$1 billion.³⁵

II. GOALS OF THE ACT

Over the last few years political, economic, and academic leaders, perceiving the magnitude of harm likely to result from a lending and housing crisis, have urged Congress to take action to reduce both the risk of foreclosure and the severity of consequences should foreclosure arise. Responding to these concerns, Congressman Kemp suggested to Congress in December 2007 that its “immediate goal should be to meet proactively the legitimate needs of perhaps millions of American families who are at risk of losing their homes.”³⁶ In his recommendations, Congressman Kemp laid out a three-pronged approach to addressing the mortgage crisis, with the first step being to exclude forgiven mortgage debt from taxable income.³⁷ Others have promoted a more targeted approach to such exclusions, indicating that “it would be desirable for Congress to enact a specific exception for predatory home mortgage loans to the general rule that forgiveness of debt produces taxable income.”³⁸

In response to these proposals, Congress enacted the Mortgage Forgiveness Debt Relief Act of 2007, which “seeks to calm financial markets, aid local communities, and support one of our most basic American aspirations: homeownership.”³⁹ Preserving the potential to realize the “American Dream” appears to be at the forefront of many legislators’ goals in passing the Act. Representative John Larson (D-Conn.) emphasized the need to “preserve the American Dream,”⁴⁰ while Representative Stephanie Tubbs Jones (D-Ohio) elaborated on this concept:

[A]most all of us dream of a day when we can have a place of our own. For most Americans, buying a home is the single best investment they will ever make. It is the first step to building

³⁴ *Id.*

³⁵ *Id.* at 2. (CRL predicts that 7,505,584 California homes will lose an aggregate value \$60,631,000,000. In New York 3,552,642 homes will lose \$36,841,000,000, and in Florida 3,667,230 homes will lose \$20,281,000,000).

³⁶ *Housing Decline Hearing*, *supra* note 22 (statement of Jack Kemp).

³⁷ *Id.* at 2 (The second step “is a limited change to our bankruptcy laws to provide relief for distressed homeowners,” and the third is to provide “better scrutiny of lending practices and the rating agencies themselves.”).

³⁸ Stephen Cohen & Laura Sagar, *Why Civil Rights Lawyers Should Study Tax*, 22 HARV. BLACKLETTER L.J. 1, 14 (2006).

³⁹ 153 CONG. REC. H16,770, (daily ed. Dec. 18, 2007) (statement of Rep. Ron Lewis (R-Ky.)).

⁴⁰ 153 CONG. REC. H16,771, (daily ed. Dec. 18, 2007) (statement of Rep. John Larson).

wealth and can provide financial leverage for a family for a variety of things, including starting a business or funding an education. Therefore, we must put safeguards in place to ensure that people are able to keep their homes and not be thrown into further debt.⁴¹

On the Senate floor, Senator Debbie Stabenow (D-Mich.) echoed similar notions:

[The Act] will allow more people to be able to get refinancing . . . [and] to be able to keep their homes. That is what we all want, the American dream of keeping our homes, of making sure our families have a roof over their head, that we can invest in equity in a home as part of creating that middle-class dream for ourselves, for our families, and it is how we strengthen the community when we have home ownership.⁴²

Upon signing the bill into law, President Bush reiterated the importance of fostering homeownership, describing it as “an essential part of the American Dream,” which he hoped to make more readily attainable.⁴³

Ironically, however, the concept of individual homeownership as the fundamental accomplishment in the “American Dream” seems to have largely precipitated the increased demand for mortgage funds among first-time homeowners.⁴⁴ Additionally, without the advent of subprime mortgages and availability of lenders willing to take on high-risk loans, these homeowners would likely not have qualified for mortgage borrowing.⁴⁵ These high-risk lending instruments have played a principal role in spurring the mortgage crisis, with over half of foreclosures in 2007 occurring on subprime mortgages.⁴⁶ But despite the fact that the lure of the “American Dream” and the imprudent investment decisions it caused largely produced

⁴¹ 153 CONG. REC. H16,772 (daily ed. Dec. 18, 2007) (statement of Rep. Stephanie Tubbs Jones).

⁴² 153 CONG. REC. S15,642 (daily ed. Dec. 14, 2007) (statement of Sen. Stabenow).

⁴³ Act Press Release, Office of the Press Sec’y, *supra* note 2.

⁴⁴ See Edward M. Gramlich, Federal Reserve Governor, Remarks at the Community and Consumer Affairs Department Conference on Predatory Lending (Dec. 6, 2000) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2000/20001206.htm>) (noting that “access [to subprime mortgages] gives people from all walks of life a shot at the American dream . . . [b]ut along with this positive development have come increasing reports of abusive lending practices . . . many of which can result in consumers losing much of their equity in their home, or even the home itself . . .”); see also Mary Alice Robbins, *A Primer on the Subprime Crisis*, TEX. LAW., Mar. 3, 2008, at 11, 11, available at <http://www.law.com/jsp/tx/pubarticleTX.jsp?id=1204287429019> (“A combination of the American dream of homeownership and financial innovation contributed to the current subprime lending crisis.”).

⁴⁵ See Anna Beth Ferguson, *Predatory Lending: Practices, Remedies and Lack of Adequate Protection for Ohio Consumers*, 48 CLEV. ST. L. REV. 607, 609 (2000) (“Subprime lending allows borrowers whose loan applications were previously rejected by prime lenders an increased chance to secure a loan.”).

⁴⁶ Ben S. Bernanke, Chairman, Federal Reserve, Remarks at the Independent Community Bankers of America Annual Convention (March 4, 2008) (transcript available at <http://www.federalreserve.gov/newsevents/speech/bernanke20080304a.htm>).

the mortgage crisis, many members of Congress have emphasized the importance of maintaining the attainability of this “Dream” as a goal in enacting the Act.⁴⁷

For many homeowners who face decreasing equity, have difficulty making payments on predatory mortgage products, and encounter the possibility of foreclosure, the only effective method of retaining ownership of their homes is negotiating discharges with lenders.⁴⁸ Because transaction costs make foreclosure tremendously expensive for lenders, banks and other mortgage holders have an incentive to renegotiate with borrowers when forgiveness of outstanding debt helps to avoid foreclosure.⁴⁹ While borrowers have an obvious incentive to avoid losing their homes, the prospect of a large tax liability, assessed under the pre-amendment Code in connection with such debt extinguishment, may have decreased the frequency with which refinances were arranged.⁵⁰ Facing foreclosure, homeowners who see no way out can avoid adding the insult of additional taxes to the injury of losing their homes by simply not renegotiating their debts. But because taxes are not forgiven in bankruptcy proceedings, those on the fence are faced with a difficult decision. Do they gamble that they will be able to keep their homes by trying to refinance, with the possibility looming over them that if they try and fail they will still owe taxes on forgiven debt? Or do they simply cut their losses and give up their homes in bankruptcy? By reconfiguring incentives, the Act reduces the possibility that borrowers who might otherwise benefit from debt forgiveness will be deterred from doing so.⁵¹

In addition to promoting homeownership, another motivating force behind the Act was the notion that an increased tax burden on homeowners who are already struggling to meet mortgage payments and are possibly facing foreclosure is unnecessarily harsh.⁵² Representative Tubbs Jones explained that, in considering the issue, there was a clear perception that taxing borrowers on debt forgiven with respect to a principal residence represented a “double whammy of . . . losing [a home] to foreclosure and . . . getting

⁴⁷ See *supra* text accompanying notes 39–43.

⁴⁸ See Bernanke, *supra* note 46 (“In cases where refinancing is not possible [due to a borrower’s inability to meet eligibility criteria], the next-best solution may often be some type of loss-mitigation arrangement between the lender and the distressed borrower.”); see also 153 CONG. REC. H11,294 (daily ed. Oct. 4, 2007) (statement of Rep. James R. Langevin (D-R.I.)) (“[F]amilies . . . unable to keep pace with their ballooning mortgage payments . . . may either try to renegotiate the terms of their mortgage . . . or be forced to foreclose on their homes.”).

⁴⁹ See Bernanke, *supra* note 46 (“Loss mitigation is made more attractive [for lenders] by the fact that foreclosure costs are often substantial.”).

⁵⁰ See 153 CONG. REC. H11,291 (daily ed. Oct. 4, 2007) (statement of Rep. Richard E. Neal (D-Mass.)) (explaining that the Act seeks “to keep [taxpayers] in their home[s] and to [encourage them to] work out . . . arrangement[s with lenders] to help them keep paying [their mortgages]” because a “looming” tax bill would be “counterproductive.”).

⁵¹ See *id.*

⁵² See 153 CONG. REC. S15,985 (daily ed. Dec. 19, 2007) (statement of Sen. John Sununu) (“The last thing someone struggling to stay in their home needs is a huge tax obligation on income that they never saw.”).

slapped with a tax bill”⁵³ Not only is this “double whammy” exceedingly burdensome, but it is not intuitive that forgiven debt represents taxable financial gain, and the average American is unlikely to understand it as such.⁵⁴ Addressing this concern, the Act “[prevents] the unexpected tax consequences of foreclosure from hurting homeowners already smarting from the loss of their homes.”⁵⁵

To accomplish these stated goals, Congress amended section 108 of the Code, which provides for the taxation of income realized from the discharge of indebtedness.⁵⁶ Although such discharges are generally includible in a taxpayer’s annual gross income, the Code previously allowed for only four exceptions: discharge in bankruptcy, in insolvency, of farm indebtedness, and of certain business property indebtedness.⁵⁷ The Act adds a fifth exception if “the indebtedness discharged is qualified principal residence indebtedness which is discharged before January 1, 2010.”⁵⁸ Generally, mortgage debt forgiveness qualifies if the underlying property is the taxpayer’s primary residence. The Code imposes requirements for the amount of time a taxpayer must spend living in that residence for it to be considered “primary” under this exclusion.⁵⁹ This serves to eliminate from the exception many vacation homes and investment properties. Further, the Act limits the amount of excludable discharge of indebtedness to \$1 million per taxpayer (or \$2 million for married taxpayers filing jointly).⁶⁰ The Act further attempts to narrow its target to those homeowners whose debt is forgiven because their property values or abilities to pay have been damaged by the housing crisis. To that end the Act does not apply “to the discharge of a loan if the discharge is on account of services performed for the lender or any other factor not directly related to a decline in the value of the residence or to the financial condition of the taxpayer.”⁶¹ Because the Act applies retroactively to January 1, 2007, discharges between that date and January 1, 2010 are not taxable. While the taxpayer is relieved from recognizing the amount of the qualified mortgage debt discharge as income, the transaction serves to reduce the taxpayer’s basis in the property by the full discharge amount.⁶²

⁵³ 153 CONG. REC. H16,770 (daily ed. Dec. 18, 2007) (statement of Rep. Stephanie Tubbs Jones).

⁵⁴ See, e.g., WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 146 (Erwin Chemerinsky et. al. eds., 14th ed. 2006) (“The notion that a person can have income from the discharge of indebtedness may not be intuitively obvious to a person who is not versed in tax law”).

⁵⁵ 153 CONG. REC. H16,770 (daily ed. Dec. 18, 2007) (statement of Rep. Stephanie Tubbs Jones).

⁵⁶ Mortgage Forgiveness Debt Relief Act of 2007, *supra* note 4.

⁵⁷ I.R.C. § 108 (Supp. I 2007).

⁵⁸ Mortgage Forgiveness Debt Relief Act of 2007, *supra* note 4.

⁵⁹ I.R.C. § 121.

⁶⁰ Mortgage Forgiveness Debt Relief Act of 2007, *supra* note 4.

⁶¹ *Id.*

⁶² *Id.* (providing that in the event of a future sale or disposition of the property the taxpayer’s basis is subtracted from the proceeds received to determine the amount of taxable gain realized). The concept of basis in federal income tax law is notoriously complex. Its complete intricacies are beyond the scope of this Recent Development. For present purposes, we use

III. LEGISLATIVE JUSTIFICATIONS FOR THE ACT VIS-À-VIS TAX LAW

Although the pre-amendment Code provisions were seemingly harsh—taxing as income transactions resulting in neither cash nor other obvious tangible benefit to the taxpayer—the taxation of discharged indebtedness is a widely accepted practice embedded in our taxation system.⁶³ However, when viewing the subprime mortgage crisis through the lens of foreclosure’s effect on an individual—as Congress generally does in the Act⁶⁴—one is more likely to see taxation of discharged indebtedness as an unnecessary cruelty against those already facing severe financial troubles. In this vein, legislators have focused on the plight of financially distressed individuals, not the theoretical justification for the tax, and have hailed the Act as “[a]ddressing . . . Tax Code inequity.”⁶⁵ Concentrating on the pre-amendment Code’s seeming unfairness, Representative Stephanie Tubbs Jones explained that “[i]t doesn’t seem right for individuals in this circumstance to face a tax bill when they really have no increase in their net worth.”⁶⁶ Throughout the legislative process, members of Congress emphasized the intangible nature of what the Code previously described as taxable income by dubbing the concept of gain realized from discharged indebtedness, “phantom income.”⁶⁷ Representative Dennis Cardoza acknowledged the incomprehensible nature of the tax, stating that “[f]amilies are shocked—and frankly so am I—when they receive a tax bill for something they no longer own simply because of phantom income that is created when the so-called gift is forgiven.”⁶⁸ In addition to highlighting the burden of this tax on distressed homeowners, especially for those with few assets with which to pay a tax assessment, members of Congress have further characterized such taxation as illogical, ignoring its theoretical and legal justifications.⁶⁹

“[t]he dominant rule [that] the taxpayer’s basis of property is the cost of acquiring the property . . . [which] is generally the amount paid for the property in cash and/or property, plus acquisition costs.” DANIEL Q. POSIN & DONALD B. TOBIN, *PRINCIPLES OF FEDERAL INCOME TAXATION OF INDIVIDUALS* 174 (7th ed. 2005) (citation omitted). Basis will often be adjusted upward or downward from the initially determined amount. For an in depth explanation of the complexities of basis, see *id.* at 173–210.

⁶³ *See, e.g.*, *United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 582 (1991) (“[I]f the taxpayer is . . . released from his obligation to repay, the taxpayer enjoys a net increase in assets equal to the forgiven portion of the debt”); *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931).

⁶⁴ *See infra* text accompanying notes 65–69.

⁶⁵ 153 CONG. REC. H16,770 (daily ed. Dec. 18, 2007) (statement of Rep. Ron Lewis); *see also* 153 CONG. REC. H11,290 (daily ed. Oct. 4, 2007) (statement of Rep. Sander Levin (D-Mich.)) (“[W]e’ve been emphasizing the importance of fairness . . . [and] equity in the code, [and] we’re taking steps to make the Tax Code more equitable.”).

⁶⁶ 153 CONG. REC. H16,770 (daily ed. Dec. 18, 2007) (statement of Rep. Stephanie Tubbs Jones).

⁶⁷ *See, e.g., id.* (statement of Rep. Ron Lewis).

⁶⁸ 153 CONG. REC. H11,256 (daily ed. Oct. 4, 2007).

⁶⁹ *See* 153 CONG. REC. H11,289 (daily ed. Oct. 4, 2007) (statement of Rep. Charles Rangel (D-N.Y.)) (“It’s a commonsense piece of legislation that when the banks and those that

However, when mortgage debt forgiveness is considered in isolation from the event triggering the need for debt discharge (i.e., foreclosure or a decrease in property value), taxing the transaction is both fair and equitable. When an individual assumes a liability to repay a future debt, her net worth is decreased because the liability offsets the value of assets owned. For a homeowner, the liability to repay mortgage debt offsets the value of the home against which she borrowed. For instance, if, upon property acquisition, a \$500,000 mortgage is secured by a home worth \$500,000, the homeowner's net worth is unchanged. If the lender later extinguishes a portion of the homeowner's mortgage debt, the liability decreases and a corresponding increase in net worth results. Continuing with the example, if the lender decreases the mortgage debt owed to \$400,000, the homeowner's net worth increases to \$100,000. From a tax law perspective, the homeowner has realized a gain; and according to generally accepted tax theory this gain should be taxable as income.⁷⁰

Imagine instead that the homeowner in our example experiences a decrease in the value of her property to \$400,000 in the period between receiving the loan and having it partially extinguished. In such a scenario, even as its justification remains, the taxation of such debt forgiveness begins to seem unfair. If the homeowner now holds a \$400,000 mortgage on a \$400,000 home, it is more difficult to justify taxing a \$100,000 "gain." However, because the decrease in property value is separate from the discharge of indebtedness, the \$100,000 forgiveness is still considered a realized gain for purposes of tax law. Because the Code aims to achieve fairness by taxing individuals in direct relation to ability to pay,⁷¹ it is equitable to tax an individual whose equity is "freed" by extinguished debt. Whether or not such equity actually exists, however, is a separate question.⁷²

Although the taxation of discharged indebtedness is theoretically justified, the Code often carves out tax exemptions in order to provide incentives for taxpayers to take certain economically efficient or otherwise desirable actions.⁷³ Therefore, even though taxation of discharged indebtedness is congruent with traditional tax theory, by excluding forgiven mortgage debt from taxable income, the Act removes one potential obstacle to the "American

hold the mortgage decide to give forgiveness on some parts of that loan, that these parts of the loan not be considered as income and does not create a taxable event.")

⁷⁰ See, e.g., WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION, *supra* note 54, at 146 ("[A]s a matter of pure tax logic [the inclusion of discharged indebtedness in taxable income] is not debatable.").

⁷¹ See *id.* at 6 ("The tax literature has long used the term 'ability to pay' to describe the attribute that might justify requiring some people to pay more tax than others.").

⁷² In the case where no funds exist with which to pay the levied tax, the taxpayer would likely be either insolvent or bankrupt. As noted, the Code provides an exemption for discharged indebtedness in the case of an insolvent or bankrupt taxpayer. The Act merely creates an additional exemption, and would have no incremental effect on a taxpayer in this situation.

⁷³ See, e.g., FEDERAL INCOME TAXATION, *supra* note 54, at 3 ("Much of the complexity of the present tax laws is attributable to provisions designed to encourage particular kinds of economic activity.").

Dream” of homeownership, creating a policy-oriented tax incentive consistent with those frequently afforded by other Code provisions.⁷⁴ As such, the Act is consistent with the Code’s usual contemplation of the tax system’s effects on certain economic behaviors, and is not completely at odds with traditional tax theory.

IV. THE ACT’S CONTROVERSIAL PROVISIONS

Even though the Act, which the House approved by a 386-27 vote and to which the Senate unanimously consented,⁷⁵ was touted as a “bipartisan bill . . . unanimously approved by the Ways and Means Committee, and [having] the strong support of [national] organizations,”⁷⁶ it is not wholly without controversy. Given the disapproval of taxing discharged mortgage debt expressed by many members of Congress, the Act’s limiting provisions, including its three-year sunset provision and \$1 million ceiling, arguably detract from its stated goals. Further, despite Congress’s seeming intent to completely exempt mortgage loan forgiveness from taxation, the corresponding reduction in tax basis serves to delay, but not forgive, tax liability.

A. *The Three-Year Sunset Provision*

While earlier versions of the Act would have indefinitely exempted discharged indebtedness on a qualified personal residence,⁷⁷ the enacted version’s exemption provision applies only to discharges negotiated after December 31, 2006 and before January 1, 2010.⁷⁸ If Congress intended to remedy a Code provision that was fundamentally unfair—one that represented a “double whammy” wholly unjustified with regard to the taxpayer’s ability to pay—the time limitation is contradictory to that objective. Similarly, legislators who lauded the Act as consistent with the Tax Code’s many provisions giving incentives to homeownership will find it difficult to rationalize why, after only three years, this purpose is no longer sufficient to keep the Act alive. Representative Blumenauer identified the arbitrary and ineffective nature of the time limitation, expressed his disappointment in the Senate amendment to that effect, and noted that there is not any foreseeable

⁷⁴ See, e.g., I.R.C. § 121 (Supp. I 2007).

⁷⁵ 153 CONG. REC. H11,297 (daily ed. Oct. 4, 2007); 153 CONG. REC. S15,642 (daily ed. Dec. 14, 2007).

⁷⁶ 153 CONG. REC. H11,256 (daily ed. Oct. 4, 2007) (statement of Rep. Dennis Cardoza); see also 153 CONG. REC. H11,291 (daily ed. Oct. 4, 2007) (statement of Rep. Richard E. Neal) (identifying the bill as “the most bipartisan bill in the last 7 years on the Ways and Means committee”).

⁷⁷ See H.R. 3648, 110th Cong. § 1(a) (2007).

⁷⁸ Mortgage Forgiveness Debt Relief Act of 2007, *supra* note 4.

“circumstance where . . . Congress would like to apply tax rates on phantom income when [somebody] is under water, getting a loan forgiven[].”⁷⁹

The limitation appears to stem from the notion that “the current problems with the mortgage and real estate markets are considerable, but they’re not permanent.”⁸⁰ Expectations about the nation’s economic health thus may have played a significant role in the Act’s formation, contrary to what the strong rhetoric by some members of Congress about the Code’s fundamental unfairness might suggest. However, even if Congress’s favorable outlook on the American economy and housing market accounts for the Act’s January 1, 2010 end date, it does not explain the start date. No member of Congress contended that mortgage debt discharged prior to January 1, 2007 is not as worthy of equivalent tax forgiveness as similar debt forgiven after that date, yet the Act does not cover earlier discharges.

The likely justification for the start date is administrative feasibility, as historical transactions are more difficult to trace than those that are current. While this may be true, “any . . . financial entity that discharges the indebtedness of any person during any . . . year must file an information return (Form 1099-C) with the Internal Revenue Service respecting such discharge.”⁸¹ Because of this requirement, it seems unlikely that either taxpayers or the IRS would face any unreasonable difficulty in proving and verifying debt extinguishments. Also, the IRS has procedures in place to provide tax refunds to those taxpayers who have previously paid taxes in conjunction with discharged indebtedness now exempt under the Act.⁸² Section 6511 of the Code outlines the rules under which taxpayers may submit amended returns and receive credits due to changes in the law, innocent error, or other allowable circumstances.⁸³ The Code requires taxpayers to file such amended returns within three years of the filing of the original return or within two years of payment of tax.⁸⁴ While retroactively applying the Act’s provisions to years prior to 2007 would necessitate some burden on the IRS in refunding paid taxes, it is not clear why the usually applicable rules for amendment should not provide an administratively feasible retroactive start date. Apart from procedural considerations, there is little plausible substantive rationale for the start date, as the mortgage crisis was well underway during 2006.⁸⁵

⁷⁹ 153 CONG. REC. H16,771 (daily ed. Dec. 18, 2007) (statement of Rep. Earl Blumenauer).

⁸⁰ 153 CONG. REC. H16,770 (daily ed. Dec. 18, 2007) (statement of Rep. Sam Johnson (R-Tex.)).

⁸¹ I.R.S. Priv. Ltr. Rul. 2003-36-030 (June 6, 2003) (quotations omitted).

⁸² See I.R.C. § 6511 (Supp. I 2007).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ One could argue that a more basic explanation should prevail here: that the federal government is not interested in returning large amounts of previously collected tax revenues to citizens at a time when it is already running a deficit. But unexpected federal expenditures are a regular part of accommodating complex and shifting national needs, as is evidenced by the fact that the IRS is in the process, as this Recent Development goes to press, of issuing eco-

Aside from the inconsistencies between legislators' justifications for the Act and the limited life of the exemption provision, it is also difficult to understand exactly how Congress reached the conclusion that a three-year life would be adequate to accomplish its goals. As the Joint Center for Housing Studies of Harvard University noted in its recent report on the State of the Nation's Housing, "[i]t is too early to determine when the housing slump will end."⁸⁶ Although Representative Sam Johnson (R-Tex.) gave a general explanation that he has "confidence in the American economy and in the fact that real estate markets will rebound,"⁸⁷ he makes no mention of why the Act should rely on the assumption that this recovery will occur within three years.

Professor Deborah Geier of the Cleveland-Marshall College of Law justifies the limitation on other terms. According to her analysis, Congress writes the Code so that it taxes personal losses, such as those associated with personal residences, because of the belief that those losses result from an individual's poor behavior or neglect—in short, from behavior not deserving of tax relief.⁸⁸ In today's market, however, personal residence losses often occur due to market conditions out of the taxpayer's control, making tax relief for these losses justifiable.⁸⁹ Because market conditions will likely recover, she recommends that the current relief provision be temporary.⁹⁰ She does not, however, provide a clear rationalization for the arbitrary three-year term.

B. *The Exemption of Only \$1 Million*

A second limitation that narrows the Act's reach is a provision limiting the amount of excludable discharged mortgage indebtedness to \$1 million for each taxpayer and \$2 million for married taxpayers filing jointly.⁹¹ Given legislators' characterization of the Act as an equitable refusal to tax homeowners on "phantom income" never actually realized, no compelling explanation for the monetary cap follows. Likewise, Professor Geier argues that this ceiling is incongruous with an attempt to shield homeowners from tax liability when the triggering transaction arises due to market forces beyond their control.⁹² Under her reasoning, the taxpayer, without regard to the mag-

conomic stimulus checks to taxpayers. Simply saving money, therefore, is an unsatisfying answer to questions about the seemingly arbitrary and ineffective start date Congress has chosen.

⁸⁶ STATE OF THE NATION'S HOUSING, *supra* note 6, at 4.

⁸⁷ 153 CONG. REC. H16,770 (daily ed. Dec. 18, 2007) (statement of Rep. Sam Johnson).

⁸⁸ See *Housing Decline Hearing*, *supra* note 22 (statement of Deborah A. Geier, Professor of Law, Cleveland-Marshall Coll. of Law, Cleveland State Univ.) (transcript available at <http://www.finance.senate.gov/hearings/testimony/2007test/121307testdg.pdf>).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Mortgage Forgiveness Debt Relief Act of 2007, *supra* note 4.

⁹² *Housing Decline Hearing*, *supra* note 22 (statement of Deborah A. Geier).

nitude of discharged debt, bears no responsibility for the property's decline in value and should, therefore, not be subject to taxation.⁹³

Like the Act's three-year time limit, the ceiling seems to represent the view that although it is important, especially in today's crises, to provide some relief to taxpayers who are at risk of losing their homes, taxation on discharged debt is legitimate and should not be waived for those not truly in need of financial assistance. Such a rationale may also serve to target those borrowers who are victims of subprime lending and other predatory mortgage products, while weeding out high-income taxpayers defaulting on traditional fixed-rate mortgages that have never been exempted from taxation. As suggested by Stephen Cohen and Laura Sager, one way to provide assistance only to "taxpayers of modest means [who] are the principal targets of predatory lending" is to limit relief to "a relatively modest amount, e.g., \$100,000."⁹⁴ However, it is unlikely that Congress expected the Act to target this class of borrowers by extending the exclusion to \$1 million. Again, the limitation's intended purposes are not clear and the chosen value remains unjustified.

C. *The Effect on Property Basis*

A third provision limiting the Act's effectiveness is the reduction in the taxpayer's basis that occurs when qualified discharged mortgage debt is excluded from income.⁹⁵ If, as many members of Congress hope, the Act allows a taxpayer to retain her home through refinancing and an associated debt extinguishment, the discharged mortgage debt does not completely escape taxation. Rather, taxation is merely delayed until future sale or disposition of the home.⁹⁶ When the taxpayer sells or otherwise disposes of the mortgaged property, taxable gain will be realized to the extent of the reduction in basis (i.e., the amount of exempted discharged debt). If the Act has as pervasive an effect on homeowners as legislators hope and appear to expect, it would alleviate current problems at the expense of creating widespread future tax liabilities.⁹⁷ While these homeowners are certainly struggling to acquire the funds with which to pay these taxes now, there is no assurance taxpayers will have acquired the necessary liquid assets at some future date.

⁹³ *Id.*

⁹⁴ COHEN & SAGAR, *supra* note 38, at 14.

⁹⁵ Mortgage Forgiveness Debt Relief Act of 2007, *supra* note 4.

⁹⁶ *Id.* See also, I.R.C. § 1017(a) (Supp. I 2007) (providing that if "an amount is excluded from gross income . . . relating to discharge of indebtedness . . . and . . . any portion of such amount is to be applied to reduce basis, then such portion shall be applied in reduction of the basis of any property held by the taxpayer . . ."); I.R.C. § 1001(a) (providing that "[t]he gain from the sale or other disposition of property shall be the excess of the amount realized [from the sale or disposition] over the adjusted basis . . .").

⁹⁷ This argument takes as its starting assumption that the housing market will recover to the extent that homes will regain past values and even appreciate further. This is in obvious tension with some experts on the topic and the general trend in the market today. This goal, however, underlies much of the support for the Mortgage Forgiveness Debt Relief Act itself.

Like the time and monetary limits contained within the Act, the inclusion of a basis reduction provision is difficult to justify if the Act is viewed as relieving taxpayers from penalties associated with a market decline over which they had no control. If taxpayers deserve real tax relief, any effective assistance should be in the form of total forgiveness, and not merely deferral.⁹⁸

The problems associated with basis reduction are already mitigated in at least two situations, although it is unclear how many of those affected by the Act will benefit from these circumstances. First, if a property is sold in foreclosure, no property is retained for which basis may be reduced.⁹⁹ However, as one of legislators' prevailing goals in enacting legislation was to encourage "homeowners and their lenders to work out alternative payment plans that prevent individuals from losing their homes,"¹⁰⁰ it is unclear that the foreclosure population will be the primary beneficiaries of the Act.¹⁰¹ Indeed, the basis reduction may hit hardest those whom the Act is designed to help. Second, where a taxpayer takes advantage of debt forgiveness exemptions and subsequently sells the mortgaged property for a gain, a portion of that gain likely will escape taxation under section 121 of the Code.¹⁰² While the general tax rule is that all realized gains upon sale or disposition of property are taxable as income,¹⁰³ section 121 exempts from taxation a portion of realized gain attributable to the sale or disposition of a qualified primary residence.¹⁰⁴ Where a taxpayer qualifies under the requirements of section 121, to the extent the amount of discharged debt falls within the excludable amount under that section, the taxpayer escapes taxation. If, however, members of Congress are correct in their expectations that the housing market will recover (as evidenced by the Act's limited life), homeowners may see future taxable gains that greatly exceed the amount eligible for exclusion from income.

V. THE ACT'S UNCLEAR CONSEQUENCES

Although legislators have expressed their expectations that the Act will "give homeowners peace of mind as they navigate the current difficulties in the housing market,"¹⁰⁵ the actual beneficial effects of the law are unclear. Representative Ron Lewis (R-Ky.) identified the limited value of the Act, explaining it as "a good first step toward addressing the mortgage situation

⁹⁸ See *Housing Decline Hearing*, *supra* note 22 (statement of Deborah A. Geier).

⁹⁹ See *id.*

¹⁰⁰ 153 CONG. REC. S15,985 (daily ed. Dec. 19, 2007) (statement of Sen. John Sununu).

¹⁰¹ See *infra* Part V.

¹⁰² I.R.C. § 121 (providing for up to \$250,000 of excludable gain for an individual taxpayer and up to \$500,000 for married taxpayers filing jointly upon the sale or disposition of a qualified personal residence).

¹⁰³ See I.R.C. § 1001.

¹⁰⁴ See I.R.C. § 121.

¹⁰⁵ 153 CONG. REC. H16,770 (daily ed. Dec. 18, 2007) (statement of Rep. Stephanie Tubbs Jones).

. . . .”¹⁰⁶ Despite Congress’s stated intent that the Act address broad problems facing homeowners, in practice it is most likely to benefit only a narrow aspect of the mortgage crisis: the ease with which lenders and borrowers can negotiate mortgage debt forgiveness. As noted above, the Act addresses the situation in which, after evaluating the homeowner’s declining home value or precarious financial condition, a lender agrees to forgive some portion of a borrower’s outstanding mortgage debt. The Act seeks to build a bridge between the parties where negotiations are otherwise impeded by the borrower’s unwillingness to face taxation on the discharge. Without the Act, homeowners may have been more likely “to dump their properties on the market because they [could not have gotten] a workout on the loans that they [now can] because it would [have raised] their taxes to come to a different arrangement with their lender.”¹⁰⁷

However, it seems unlikely that, prior to passage of the Act, taxpayers would have voluntarily submitted themselves to foreclosure proceedings as an alternative to accepting a taxable debt discharge. This seemingly irrational choice becomes more comprehensible, though, when considering the taxpayers’ probable lack of liquid funds with which to pay taxes and their potential inability to borrow these monies due to bad credit. Though it is difficult to imagine that the majority of borrowers fall under this limited category without also being bankrupt or insolvent, in which case the Act provides no additional benefit,¹⁰⁸ if the Act does in fact prevent widespread foreclosure by easing negotiations between lenders and borrowers, the long-term effect may be to stimulate the housing market and general economic recovery. If homeowners are able to avoid foreclosure and keep their homes, “we won’t have that glut of supply in the housing market . . . prices will stabilize and not drop . . . more Americans [will] have more home equity, more Americans will have economic confidence, and our economy can rebound.”¹⁰⁹

Despite this positive outlook, the Act may overstate lenders’ willingness to forgive mortgage debt with respect to borrowers who are not in bankruptcy or insolvent. Prior to Congress’s passage of the Act, section 108 of the Code provided exemptions for discharges of indebtedness to bankrupt and/or insolvent taxpayers.¹¹⁰ As such, the Act provides no additional benefits to homeowners who fall into either of those two categories. There is little data identifying how many lenders have been willing to discharge mortgage debt when the borrower is neither bankrupt nor insolvent, but rather merely facing losses in home equity or difficulties meeting mortgage payments. As suggested by the terms of the Act and by the situation Congress hopes to remedy through enacting it, lenders are expected to be willing to negotiate

¹⁰⁶ *Id.* (statement of Rep. Ron Lewis).

¹⁰⁷ 153 CONG. REC. H16,771, *supra* note 24 (statement of Rep. Rob Andrews (D-N.J.)).

¹⁰⁸ See *supra* text accompanying notes 12 and 72 and *infra* note 110.

¹⁰⁹ 153 CONG. REC. H16,772, *supra* note 41 (statement of Rep. Rob Andrews).

¹¹⁰ I.R.C. § 108.

debt extinguishments in situations where the borrowers are walking the line between solvency and bankruptcy.¹¹¹ But even if this is an accurate assessment of lenders' readiness to forgive debts owed to them, it may be the case that the population of borrowers "on the fence" is small, with the majority of homeowners nearing foreclosure falling into the bankrupt or insolvent categories.¹¹² Between the uncertainty in lenders' likelihood to forgive debts, the unknown magnitude of the population of targeted homeowners, and the previously discussed limiting provisions contained within the Act, there appear to be many impediments to the Act's effectiveness over its three-year life.

VI. CONCLUSION

In response to the recent downturn in the American housing market and associated subprime mortgage crisis, Congress, heeding the suggestions of economists, academics, and politicians alike, has taken action to alleviate some pressure on troubled homeowners. The Mortgage Forgiveness Debt Relief Act of 2007 provides current tax relief to homeowners whose lenders agree to settle qualified mortgage debts for less than the outstanding loan value because their property value was lost during a revaluation or they have suffered financial hardship.¹¹³ Despite the long-standing theoretical acceptance of taxation of discharged indebtedness, legislators have agreed on the justifications for including an exception to such taxation, including the fundamental unfairness of taxing already burdened taxpayers and the economic desirability of avoiding foreclosure.

A closer look at the Act's provisions, however, such as its three-year life, one million dollar cap, and basis reduction, reveal inconsistencies between members of Congress's stated purposes and rationalizations for the Act and the relief the Act actually provides. Further, many questions remain about how many homeowners will fall under the Act's ambit and how many lenders will be willing to make the requisite debt discharges in order to trigger the Act's relief provision. For taxpayers whose lenders either agreed or were forced to discharge mortgage debt in consideration of bankruptcy or insolvency, the Code had already provided tax relief by excluding the amount of the forgiveness from income.¹¹⁴ Both the Act's effectiveness and its ability to extend relief to homeowners during the current housing market

¹¹¹ See Act Press Release, Office of the Press Sec'y, *supra* note 2 ("The [Act] will increase the incentive for borrowers [having difficulty making mortgage payments] and lenders to work together to refinance loans . . .").

¹¹² *But see Housing Decline Hearing*, *supra* note 22 (statement of Deborah A. Geier) (Although homeowners may be "functionally insolvent (with credit card and mortgage debt exceeding the reduced value of the home and other assets outside retirement accounts), they are not legally insolvent and thus gain no protection from the insolvency exclusion." The Act would also protect this class of taxpayers.).

¹¹³ See Mortgage Forgiveness Debt Relief Act of 2007, *supra* note 4.

¹¹⁴ I.R.C. § 108.

decline are dependent on the size of the population of potentially affected homeowners. It is unclear how many homeowners who face foreclosure and a related discharge of indebtedness are not also bankrupt and/or insolvent, so it is unclear how far the Act will go to alleviate the subprime mortgage crisis.

Additionally, there is little data showing how willing lenders are to forgive mortgage debt for homeowners who are not otherwise bankrupt and/or insolvent. The more limited these classes of American homeowners, the more unlikely it will be that the Act will lead to an economic turn-around. Many members of Congress seem to envision the Act as bringing together lenders and borrowers in negotiations, avoiding foreclosure through refinancing, and stimulating the housing market by decreasing the number of foreclosed homes for sale.¹¹⁵ However, this chain of remedial events is dependent upon the existence of a class of homeowners who, but for the Act's tax relief provisions, would be unwilling or unable to accept a discharge of mortgage debt because of the associated tax liability. Uncertainty as to the size of this population calls into question the Act's future effectiveness. Although the Act seeks to achieve the laudable goals of easing tax burdens on distressed Americans, avoiding foreclosure by facilitating the path to refinancing, and remedying the failing housing market, its ability to achieve these results is unclear.

—*Rachel Carlton**

¹¹⁵ See 153 CONG. REC. H16,771-72 (daily ed. Dec. 18, 2007) (statement of Rep. Rob Andrews).

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