2011

Don't Burst the Bubble: An Analysis of the First-Time Homebuyer Credit and Its Use as an Economic Policy Tool

Sarah J. Webber
University of Dayton, swebber1@udayton.edu

DON'T BURST THE BUBBLE: AN ANALYSIS OF THE FIRST-TIME HOMEBUYER CREDIT AND ITS USE AS AN ECONOMIC POLICY TOOL

SARAH J. WEBBER*

I. INTRODUCTION

In 2008, faced with a looming real estate crisis, Congress hastily acted to stabilize the economy by offering a first-time homebuyer credit. This tax credit was trumpeted as a solution to the excess inventory of homes for sale and to stop the free-fall in home values. The credit, however, failed to deliver on its promises. By analyzing the first-time homebuyer credit, its creation, its implementation and its economic impact, this Article concludes that, when compared to alternative policy solutions, Congress erred in using the tax code to implement a first-time homebuyer credit.

II. THE EVOLUTION OF THE HOMEBUYER CREDIT

Recent economic trends have tested the ability of the real estate industry to withstand a major housing recession, and, in particular, the glut of homes either for sale or in foreclosure.[1] In 2008, Congress attempted to rescue the real estate industry and "jump start" the housing market through the use of a first-time homebuyer credit. The credit was first enacted in the Housing and Economic Recovery Act of 2008 ("HERA") as a maximum of $7500 refundable credit to first-time homebuyers that must be repaid over the course of fifteen years.[2] Homes had to be purchased between April 8, 2008, and July 1, 2009.[3] Essentially, the initial

* Assistant Professor, University of Dayton School of Business Administration; C.P.A., M.B.A., J.D., L.L.M.. Thank you to the audience at the 2011 Annual Conference of the Academy of Legal Studies in Business, where I presented an earlier draft of this paper. I also extend my sincere gratitude for the editorial assistance of The John Marshall Law Review.

1. *See generally* MARK P. KEIGHTLEY, CONG. RESEARCH SERV., R40955, AN ECONOMIC ANALYSIS OF THE HOMEBUYER CREDIT (2009).
2. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3011, 122 Stat. 2654 (2008) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 26 U.S.C., 38 U.S.C., and 42 U.S.C.).
3. *Id.*

homebuyer credit served as a sixteen-year, interest-free loan.[4]

When HERA did not dramatically solve the real estate crisis, Congress took more drastic action. It passed the American Recovery and Reinvestment Act of 2009 ("ARRA"), which modified the first-time homebuyer credit.[5] The modifications increased the maximum amount of the credit, from $7500 to $8000, and turned the credit into a refundable credit that did not have to be repaid so long as the homebuyer remained in the home for at least thirty-six months.[6]

The first-time homebuyer credit was originally set to expire on December 1, 2009, but after reviewing testimony from industry experts and economists in October 2009, Congress determined that further stimulus was necessary. On November 6, 2009, President Obama signed the Worker, Homeownership, and Business Assistance Act of 2009 ("WHBAA").[7] The WHBAA extended the tax credit for purchase contracts signed before April 30, 2010, and expanded it to qualified, repeat homebuyers. The most recent homebuyer credits are codified in Section 36 of the Internal Revenue Code.[8]

A. Comparison of the Three Homebuyer Credits

The United States Government Accountability Office ("GAO") has summarized the three different homebuyer credits from 2008 through 2010.[9] The "x" indicates if the related eligibility requirement applies to first-time homebuyer credit ("FTHBC") for homes purchased under the HERA 2008, ARRA 2009, or the 2009-2010 WHBAA Acts.

---

4. The original I.R.C. Section 36 provision for the first-time homebuyer credit included a one-year grace period, and then followed with fifteen years of interest-free repayment. *Id.*

5. American Recovery and Reinvestment Act of 2009 (Stimulus Bill), Pub. L. No. 111-5, § 1006, 123 Stat. 115 (2009) (codified as amended in scattered sections of 6 U.S.C., 19 U.S.C., 26 U.S.C., 42 U.S.C., and 47 U.S.C.).

6. *Id.*

7. Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, 123 Stat. 2984 (2009).

8. I.R.C. § 36 (2010).

9. U.S. GOV'T ACCOUNTABILITY OFFICE, RECOVERY ACT: IRS QUICKLY IMPLEMENTED TAX PROVISIONS, BUT REPORTING AND ENFORCEMENT IMPROVEMENTS ARE NEEDED (Feb. 2010) [hereinafter RECOVERY ACT], *available at* http://www.gao.gov/new.items/d10349.pdf.

Eligibility Requirements	2008 HERA FTHBC	2009 ARRA FTHBC	2009-2010 WHBAA FTHBC
Date of purchase must be between April 9, 2008, and June 30, 2008.	X		
Date of purchase must be between January 1, 2009, and November 30, 2009.		X	
Date of purchase must be between December 1, 2009, and April 30, 2010, that provides for the closing on the sale before July 1, 2010. One-year additional time for those serving on duty outside the United States.			X
Home purchase must be principal residence.	X	X	X
No prior home ownership within the past three years.	X	X	X[10]
Taxpayers must have owned and used the same residence as their principal residence for any five consecutive years during the eight year period ending when they bought another property to use as their principal residence to be eligible for a reduced credit of $6,500.			X
Home cannot be a gift or inheritance.	X	X	X
Home cannot be acquired from a relative.	X	X	X
Home must be located in the United States.	X	X	X
Single filers: Modified adjusted gross income (MAGI) must be less than $95,000. Between $75,000 and $95,000 the credit phases out.	X	X	
Married filing jointly filers: MAGI must be less than $170,000.	X	X	

10. I.R.C. § 36(c)(1) (2011). The two credits passed in the WHBAA, the first-time homebuyer credit and the existing homebuyer credit, have differing requirements regarding prior homeownership. *Id.* To qualify for a first-time homebuyer credit, the taxpayer must meet the no prior homeownership within the past three years. *Id.*

Between $150,000 and $170,000 the credit phases out.			
Single filers: MAGI must be less than $145,000. Between $125,000 and $145,000 the credit phases out.			X
Married filing jointly filers: MAGI must be less than $245,000. Between $225,000 and $245,000 the credit phases out.			X
Taxpayer cannot be a nonresident alien.	X	X	X
Taxpayer must not have been allowed to claim the District of Columbia homebuyer credit for the current or any prior tax year.	X		
Home financing cannot come from tax-exempt mortgage revenue bonds.			X
Taxpayer must be at least 18 years old unless married.			X
Taxpayer cannot be eligible to be claimed as a dependent on someone else's tax return.			X
Taxpayer must attach a copy of the settlement statement to the tax return.			X
Home price cannot exceed $800,000.[11]			X

B. Specifics of the First-Time Homebuyer Credit

The most recent changes to I.R.C. Section 36, the first-time homebuyer credit, include a credit of ten-percent of the home purchase price up to a maximum of $8000 for first-time homebuyers and $6500 for existing homebuyers subject to income limitations, related party rules, and ownership tests.[12] Many of the technical rules are outlined in the chart above, but the general outline of I.R.C. Section 36 includes:

> (a) Allowance of credit; (b) Limitations (Dollar limitation, Limitation based on modified adjusted gross income, Limitation based on purchase price, and Age limitation); (c) Definitions; (d) Exceptions; (e) Reporting; (f) Recapture of credit; (g) Election to treat purchase in prior year; and (h) Application of Section.[13]

11. The limitation on total purchase price applies to both first-time and existing homebuyer purchases.
12. I.R.C. § 36 (2010).
13. *Id.*

The current homebuyer credits found in I.R.C. Section 36, apply to both first-time homebuyers and existing homebuyers, despite the credit being confusingly titled: "First-time Homebuyer Credit."[14] The initial extension and expansion of the tax credits for homebuyers required the real estate closing to occur before July 1, 2010, but because of overwhelming mortgage and loan processing requests, the closing deadline was extended to September 30, 2010.[15] The purchase contract, however, was still required to have been signed by April 30, 2010. An additional one-year extension, allowing a purchase contract date until April 30, 2011, applies to members of the uniformed services, members of the Foreign Service, and employees of the intelligence community. The extension applies to those who served "on qualified official extended-duty service . . . outside the United States for at least 90 days" between December 31, 2008, and May 1, 2010.[16] To understand the terminology of Section 36, one must understand the definitions of "first-time home buyer," "principal residence," and "purchase." These questions are answered below.

C. Explanation of the Technical Provisions of Internal Revenue Code Section 36

I.R.C. Section 36(c)(1) defines a first-time homebuyer as "any individual if such individual, (and, if married, such individual's spouse) had no present ownership interest in a principal residence during the three-year period ending on the date of the purchase of the principal residence to which this section applies."[17] A principal residence is not as readily defined within Section 36, but instead cross references the definition to I.R.C. Section 121. Interestingly, "principal residence" is not defined within Section 121, but the general definition is a home that the taxpayer occupies for the majority of the year.[18] Another key definition within Section 36 is what constitutes a "purchase." The term "purchase" means any acquisition that has the following characteristics:

> i. the property is not acquired from a person related to the person acquiring such property (or, if married, such individual's spouse), and
>
> ii. the basis of the property in the hands of the person acquiring such property is not determined

14. *Id.*
15. Homebuyer Assistance and Improvement Act of 2010, Pub. L. No. 111-198 (2010).
16. I.R.C. § 36 (2010).
17. *Id.* at (c)(1).
18. The actual definition of "primary residence" is based upon a "facts and circumstances" test under Treas. Reg. § 1.121-1(b)(2) (2002). Additionally, the regulations exempt purchases of vacation homes and rental property from qualifying for primary residence classification. *Id.*

I. in whole or in part by reference to the adjusted basis of such property in the hands of the person from whom acquired, or

II. under section 1014(a) (relating to property acquired from a decedent).[19]

Constructing a new home qualifies as a "purchase" made by the taxpayer on the date the taxpayer moves into the residence.[20] Finally, one is ineligible for the credit if one purchases the home from a spouse, ancestor, or lineal descendant.[21]

III. CREATION OF THE CREDIT

A. *Real Estate Industry's Dominant Presence in Politics*

The Center for Responsive Politics, a nonprofit watchdog group of political activity, lists the real estate industry as the twelfth largest-spending industry group within the United States for lobbying activity.[22] Between 1998 through 2011, the real estate industry spent $904,132,077 on lobbying.[23] The real estate industry has 632 lobbyists registered according to the Senate Office of Public Records.[24] In addition to a strong lobbying presence, the real estate industry has also significantly contributed to political campaigns.[25] Based on reports released by the FEC, in 2008 the real estate industry gave approximately $135 million in political campaign contributions.[26] The real estate industry has a vested interest in preserving and protecting the homeownership bias in the tax code.

The real estate industry is also lobbying for a large percentage of U.S. gross domestic product. Residential real estate is generally accepted to be tied to ten to fifteen percent of gross domestic product.[27] The largest lobbying group within the real

19. I.R.C. § 36(c)(2) (2010).
20. *Id.*
21. I.R.C. § 36(c)(5) (2010).
22. Ctr. for Responsive Politics, *Lobbying: Top Industries*, OPENSECRETS.ORG, https://www.opensecrets.org/lobby/top.php?indexType=i (last visited Oct. 28, 2011).
23. *Id.*
24. Ctr. for Responsive Politics, *Lobbying: Real Estates*, OPENSECRETS.ORG, https://www.opensecrets.org/lobby/indusclient.php?id=F10&year=a (last visited Oct. 28, 2011).
25. *Id.*
26. Ctr. for Responsive Politics, *Real Estate*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/indus.php?ind=F10 (last visited Oct. 28, 2011).
27. *See The State of the Nation's Housing Sector: An Examination of the First Time Buyer's Credit and Future Policies to Sustain a Recovery*: *Hearing Before the H. Comm. on Small Bus.*, 111th Cong. 1-3 (2009) [hereinafter *Housing Sector Hearing*] (opening statement of Nydia Velazquez, Chairwoman, H. Comm. on Small Bus.), *available at*

estate industry is the National Association of Realtors ("NAR"). NAR's objective is to lobby on behalf of licensed realtors working in the real estate industry.[28] NAR places blame on the mortgage industry for the current real estate industry crisis and has put pressure on Congress to address the issue of irresponsible and abusive lending, typical to low-income individuals, which has resulted in more foreclosures on family homes.[29] While the real estate industry clearly has a dominating presence in Washington, arguably, the NAR is at the forefront of this presence. Given the lobbying strength and sheer size of this industry indicates that any proposed tax changes relating to homeownership would face extreme scrutiny from the real estate industry.

B. Industry Experts Testify Before Congress

Prior to establishing the first-time homebuyer credit and at each subsequent modification, Congress took testimony from many witnesses and experts within the housing industry. The testimony from those working in the real estate industry during the final extension of the homebuyer credit shows overwhelming support for an additional extension of the credit as a means to stabilize home prices and remove excess inventory. Selected testimony from the debate over the final extension is included and analyzed below. This testimony is the most relevant because some data had already been compiled on the initial two versions of the credit offered under the HERA 2008 Act and the ARRA 2009 Act. It should be noted that no proponents were able to confirm whether the credit would stabilize the real estate market over the long-term. Instead, the proponents were primarily concerned with bringing buyers to the market as quickly as possible.

C. Swift Stabilization in the Real Estate Economy

Michael Pryor, president and CEO of Lenders Title Company, and president of The American Land Title Association ("ALTA"), spoke before the House Small Business Committee on behalf of ALTA. He spoke before the Committee as it was considering an extension of the first-time homebuyer credit in October 2009.[30] Mr.

http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=111_house_hearings &docid=f:52889.pdf; *see also* RESEARCH DIVISION OF THE NAT'L ASS'N OF REALTORS, THE EFFECT OF POLICY CHANGES ON HOMEOWNERSHIP FOCUS: FLORIDA 1, 5 (2010), *available at* http://www.floridarealtors.org/Research /upload/Effects-of-Policy-Changes-Florida-2010.pdf (citing an average GDP of 15.3% when ancillary services of the real estate market are included).

28. *Lobbying: Top Industries*, supra note 22.

29. Ctr. for Responsive Politics, *Real Estate: Background*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/background.php?cycle=2012&ind=F10 (last visited Oct. 28, 2011).

30. *Housing Sector Hearing*, *supra* note 27, at 6-8 (statement of Michael B.

Pryor confidently argued: "The extension and expansion of the first-time homebuyer credit is the greatest step Congress can take to stimulate the housing market."[31] According to Mr. Pryor, the expansion of the credit would "continue to bring consumers back to the market, reduce inventories of unsold homes, and stabilize home prices."[32] Mr. Pryor cites to a study by the National Association of Home Builders that showed that an extension of the credit through November 30, 2010, would have a dramatic increase on the sale of homes purchased, increase homes constructed, and generate tax revenues of $8.4 billion for the federal government.[33] Despite his support for the credit, even Mr. Pryor acknowledged, "[t]he first-time homebuyer transactions alone are not enough to clear the excessive amount of housing on the market."[34]

Since January 2009, there has been a slight but consistent increase in new and existing home sales, but the median sale price of homes has decreased.[35] In July 2009, the median price for new homes was down 11.5% from 2008 levels, and the same trend occurred for existing homes, showing a 15.1% decrease in median sale price.[36]

The title industry provides the foundation to freely buy and sell real estate within the United States, and the increase in foreclosure rates has significantly decreased revenues for the title industry.[37] The title industry has seen a forty percent reduction in premium revenue from 2005 to 2008 as a result of the real estate industry recession.[38] The decline in premium revenue appears to be slowing in 2009.[39] While home prices are still lower than averages a year ago, the increased number of transactions has helped the title industry. The title industry plays a pivotal role in executing the sale and exchange of property, and cannot be overlooked when evaluating the economic state of the real estate industry as a whole.

D. A Positive Impact on Home Construction

The statement of the National Association of Home Builders ("NAHB") before the House Small Business Committee on October 7, 2009, expressed optimism in the real estate industry as a result

Pryor, President, The Am. Land Title Ass'n).

31. *Id.* at 8.
32. *Id.*
33. *Id.*
34. *Id.* at 9.
35. *Id.*
36. *Id.* at 4.
37. *Id.*
38. *Id.* at 5.
39. *Id.*

of the first-time home buyer credit enacted under the American Recovery and Reinvestment Act of 2009. The housing market slump has been financially difficult for home builders, over eighty percent of whom are small businesses with less than $5 million in annual receipts.[40] New homes starts have seen an eighty percent decrease between January 2006 (with 2.3 million new starts), and April 2009 (with 479,000 starts).[41] The NAHB predicts there will be a slow and steady increase in housing starts, 568,000 for 2009 and 716,000 for 2010, but there are simply too many existing homes on the market combined with high rates of foreclosure that continue to restock the housing inventory.[42] "The tax credit is having a demonstrable positive effect on housing demand. . . . The positive impact of the credit is also seen in the job market."[43] As a result of the credit, NAHB calculates that 187,000 jobs were created within the housing sector and in other sectors of the economy driven by consumer spending.[44] The NAHB also contended that the homebuyer credit should be expanded to all home buyers and extended through December 1, 2010, which would "help soak up the excess supply and push house prices back in a positive direction."[45] The home building industry was counting on the homebuyer credit to help their industry rebound, and NAHB believed that further extension of the homebuyer credits was necessary for the building industry to continue to recover.

E. A Decrease in Home Inventories

The NAR sent Mr. Joseph Canfora to testify before the House Small Business Committee on October 7, 2009.[46] The NAR believed the first two versions of the homebuyer credits helped to bring many potential home purchasers into the market, and the credit worked as a tool to "help stabilize prices while at the same time taking some of the fear out of the marketplace."[47] The NAR saw the subprime mortgage crisis as the direct cause of the housing market decline and was concerned that many adjustable rate mortgages would continue to put strain on homeowners and the real estate industry.[48] A normal market created an inventory of six to seven months, or in other words, it would take six or

40. *Housing Sector Hearing*, *supra* note 27, at 5-6 (statement of Joe Robson, Nat'l Ass'n of Home Builders).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 40-41.
46. *Housing Sector Hearing*, *supra* note 27, at 8-9 (statement of Joseph L. Canfora, Nat'l Ass'n of Realtors).
47. *Id.* at 59.
48. *Id.* at 60.

seven months to sell all the for sale homes in the market.[49] The inventory hit a high point in November 2008, with more than a ten-month supply of homes on the market.[50] With the enactment of the first version of the credit, according to the NAR, home sellers saw a decline in the number of months their homes sat on the market for sale.[51] "The most recent data (August 2009) shows an inventory level of 8.2: closer to normal than at any time since 2007."[52] The NAR strongly supported the extension of the credit and maintained, "that the more robust the credit and greater its duration, the greater the chance that the housing market can perform its traditional role of helping the economy move out of a recession."[53]

IV. IMPLEMENTATION OF THE CREDIT

A. Administrative Difficulty of the Homebuyer Credits

When it enacted I.R.C. Section 36, Congress attempted to include strict guidelines and tests for eligibility. While these restrictions are designed to prevent abuse and fraud, the enforcement and policing of the restrictions has proven very difficult for the Internal Revenue Service.[54] The first-time homebuyer credit is reported to the IRS by filing form 5405. Taxpayers are required to report the purchase price, address of qualifying home, and date of purchase. Based on this information, the IRS is able to automatically reject returns that do not disclose or incorrectly report the information required on the form 5405.[55]

B. Policing the First-Time Homebuyer Credit

A GAO report in October 2009 declared that the IRS was facing great difficulty in enforcing compliance related to the First-Time Homebuyer Tax Credit.[56] This difficulty was further

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 61.
54. *See generally Administration of the First-Time Homebuyer Tax Credit: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 111th Cong. 3 (2009) [hereinafter *Homebuyer Tax Credit Hearing*] (statement of Hon. J. Russell George, Treas. Inspector Gen. for Tax Admin.), *available at* http://www.treasury.gov/tigta/congress/congress_10222009.pdf.
55. *See* I.R.S., INSTRUCTIONS FOR FORM 5405 (REVISED DEC. 2011), www.irs.gov/pub/irs-pdf/i5405.pdf (explaining the IRS can automatically reject a return that would claim a credit larger than the maximum credit available).
56. U.S. GOV'T ACCOUNTABILITY OFFICE, FIRST-TIME HOMEBUYER TAX CREDIT: TAXPAYERS' USE OF THE CREDIT AND IMPLEMENTATION AND COMPLIANCE CHALLENGES 5-7 (Oct. 22, 2009), *available at* www.gao.gov/new.items/d10166t.pdf.

announced in testimony by the Hon. J. Russell George, Treasury Inspector General for Tax Administration ("TIGTA"), addressing "Administration of the First-Time Homebuyer Credit."[57] The statistics gathered on the use of the first-time homebuyer credit through October 9, 2009, show over 1.2 million tax returns have claimed almost $8.5 billion in first-time homebuyer credits.[58] TIGTA's analysis showed there were over 19,300 returns filed for 2008 on which the taxpayer claimed the first-time homebuyer credit but the home had not yet been purchased.[59] Based on this data, TIGTA recommended that a settlement statement be attached to the return to verify homebuyer credit information disclosed on form 5405. The IRS initially rejected TIGTA's concerns over verification of data on 5405, and did not require settlement documentation.

Eventually, Congress agreed with TIGTA and extended the homebuyer credits in the WHBAA and required settlement statement documentation signed by both the buyer and seller.[60] The settlement statement requirement has become a difficult aspect of the credit for many homebuyers, given that each state has different regulations on the type of documentation required for a real estate purchase.[61] With this difficulty in mind, the IRS released a statement in February 2010, which declared that taxpayers were no longer required to attach a signed copy of the settlement statement if it is customary in the taxpayer's jurisdiction to issue the settlement statement without the original signature.[62] Subsequent TIGTA audits did not reveal additional taxpayer fraud on the actual settlement statements, which was an expected outcome given the technical nature of the settlement statement.

C. Congressional Testimony to Improve First-Time Home Buyer Credit Compliance

The House of Representatives Ways and Means Oversight Subcommittee held a hearing to determine the extent of abuse and fraud in claims for the first-time homebuyer credit in October 2009.[63] In Chairman John Lewis's opening statement to the

57. *Homebuyer Tax Credit Hearing*, *supra* note 54, at 3.
58. *Id.* at 2.
59. *Id.* at 4.
60. Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, 123 Stat. 2984 (2009).
61. *First-Time Homebuyer Credit*, I.R.S., http://www.irs.gov/newsroom/article/0,,id=204671,00.html (last accessed June 21, 2011).
62. *Id.*
63. *Homebuyer Tax Credit Hearing*, *supra* note 54, at 3 (opening statement of John Lewis, Chairman, Subcomm. on Oversight of the H. Comm. on Ways & Means).

subcommittee, he acknowledged that the IRS has worked diligently to develop a way to quickly process returns claiming the first-time homebuyer credit, however, "this quick response came at a cost."[64] "The Service processed over one million returns claiming the credit before new fraud filters were in place."[65] As a result of this rapid processing prior to fraud detection, over 100,000 IRS investigation files have been opened involving the credit.[66] A great difficulty facing the IRS in enforcing proper use of the homebuyer credit for taxpayers is verifying whether a homeowner has previously owned a home.[67] The IRS has implemented computer programs, designed by TIGTA, to search for previous home ownership. The programs are designed to search the previous three years of income tax returns for an individual to see if any evidence exists of homeownership on the tax return.[68] However, the filters have many shortcomings, and the homebuyer credits were still significantly abused by taxpayers. [69]

A subsequent report from the GAO in February 2010, indicates that "as of February 1, 2010, [the] IRS had frozen about 140,000 refunds pending civil or criminal examination, and as of December 2, 2009, had identified 175 criminal schemes and had 123 criminal investigations open."[70] A significant concern identified in the GAO report is how the IRS intended to enforce the repayment of the homebuyer credit for homeowners who fail to meet the three-year ownership test.[71] Overall, the GAO report indicates that the IRS made great progress in implementing computer assisted fraud detection, but there is still a concern that the credit may have many been taken by many ineligible filers.

D. Control Weaknesses Continue to Be Problematic

In June 2010, additional TIGTA auditing of IRS controls, which properly administer the first-time homebuyer credit, showed significant improvements to IRS implementation, but many control weaknesses remained.[72] The three main areas of

64. *Id.* at 4.
65. *Id.*
66. *Id.*
67. *Id.* at 42 (statement of James R. White, Dir., Strategic Issues, U.S. Gov't Accountability Office).
68. *Id.* at 13-14 (statement of Hon. J. Russell George, Treas. Inspector Gen. for Tax Admin.).
69. *See id.* at 13-15 (explaining two shortcomings the filters have, and the result of those shortcomings).
70. RECOVERY ACT, *supra* note 9, at 22-23.
71. *Id.* at 23.
72. TREAS. INSPECTOR GEN. FOR TAX ADMIN., RECOVERY ACT: ADDITIONAL STEPS ARE NEEDED TO PREVENT AND RECOVER ERRONEOUS CLAIMS FOR THE FIRST-TIME HOMEBUYER CREDIT (2010) (Reference No. 2010-41-069), *available at* http://www.treas.gov/tigta/auditreports/2010reports/201041069fr

weaknesses within the report are claims by the incarcerated, multiple claims on the same address, and home purchase dates outside of the purchase deadlines. The report first identifies a material weakness in the administration of the credit to the incarcerated. "Based on our statistical sample of 306 returns, we estimate that at least 1,295 prisoners received refunds totaling more than $9.1 million for fraudulent Homebuyer Credits claimed on their 2008 tax returns."[73]

An even greater control weakness has occurred with multiple credit claims for the same home purchase.

> We determined 18,832 taxpayers filed claims for the Homebuyer Credit using a total of only 7,695 addresses. In order to be included in our population, the street addresses . . . and the zip codes had to match exactly. In each instance, more than $8,000 was being claimed for one address. The amount of these 18,832 claims totaled more than $134 million[.][74]

The final material weakness exists in the purchase date of the eligible home. "We identified 2,751 claims filed on Tax Year 2008 electronic tax returns totaling almost $18.8 million that were based on homes reportedly purchased prior to [the initial credit eligibility date of] April 9, 2008."[75]

These weaknesses demonstrate that this credit has lead to widespread fraud and abuse. Although the IRS has worked diligently to curb abuse, many fraudulent refund requests have been processed prior to IRS investigation or have simply slipped through the fraud filters. While the IRS response to the TIGTA audit was to take immediate action to prevent abuse in the areas indentified, the amount of time and financial resources dedicated to punishing or clawing back fraudulently-awarded credits have been substantial. The costs of the fraud could have been avoided, in large part, if Congress had not implemented the first-time homebuyer credit as a refundable credit in the tax code.

E. Criminal Charges

The Department of Justice ("DOJ") has pursued numerous cases of taxpayer fraud as a result of the first-time homebuyer credit. The DOJ has filed suit against preparers who have filed multiple false claims of the credit[76] as well as individuals filing false returns under other taxpayers' social security numbers claiming the credit and routing the credit refunds to their own

.pdf.

73. *Id.* at 7.
74. *Id.* at 8.
75. *Id.* at 10.
76. United States v. Salinas (S.D. Tex. filed Sept. 30, 2009), *available at* http://www.justice.gov/tax//LSalinas_Complaint.pdf.

bank accounts.[77] An employee of the IRS has also fraudulently claimed the homebuyer credit for an improper tax year and faces criminal charges from the DOJ.[78] Overall, the abuse has lead to criminal charges for preparers and individual taxpayers, with the likelihood that more charges may be filed as additional credit refunds requests are investigated.

F. Closing the Tax Gap

In June 2011, Congress requested the National Taxpayer Advocate, Nina Olson, and Michael Brostek, the director of tax issues for the GAO, testify as to ways to close the tax gap.[79] The tax gap is commonly defined as the difference between the amount of revenue that would be collected if every taxpayer paid the correct amount of tax due versus the actual amount of tax revenues received for a given tax year. Both Ms. Olson and Mr. Brostek referenced the first-time homebuyer credit in their testimony, and cited fraud concerns. "If taxpayers do not have confidence in the tax system or do not believe that it is easy to understand and treats everyone fairly, then voluntary compliance is likely to decline."[80]

Given the technical rules and eligibility requirements surrounding the first-time homebuyer credit, it can be argued that many taxpayers perceive unfairness in the credit. Director Brostek also discussed the issues of fraudulent claims of the homebuyer credit, stating "[s]ome tax expenditures also provide taxpayers who intend to evade taxes with opportunities to do so."[81] Ms. Olson described the misreporting of credits in comparison to deductions. "Although the overall net misreporting percentage is significantly higher for credits (at 26.3 percent) than for deductions (at 5.4

77. *Justice Department Announces Indictment, Lawsuits Targeting False Tax Claims*, ACCOUNTINGWEB (Feb. 10, 2011, 12:14 PM), http://www.accountingweb.com/topic/tax/justice-department-announces-indictment-lawsuits-targeting-false-tax-credit-claims (stating indictment announced for John Brownlee of Philadephia on February 10, 2011).

78. Michael Doyle was a twenty-year veteran and supervisor at the IRS who erroneously claimed the homebuyer credit for a home purchased in 2007. Albert McKeen, *IRS Veteran Charged with Fraud for Claiming Tax Credit on Hudson Home*, NASHUATELEGRAPH.COM (Mar. 29, 2011), http://www.nashuatelegraph.com/news/913839-196/irs-employee-allegedly-files-fraudulent-tax-return.html.

79. *See generally Complexity and the Tax Gap: Making Tax Compliance Easier and Collecting What's Due: Hearing Before the S. Comm. on Finance*, 112th Cong. (2011). The Taxpayer Advocate is an independent division of the IRS that acts as an intermediary between taxpayers and the IRS. The GAO acts as an independent watchdog for Congress and often takes on an internal auditor role for the federal government.

80. *Id.* at 1 (testimony of Michael Brostek, Dir., Gov't Accountability Office).

81. *Id.* at 13.

percent) in the aggregate, it is even higher for every other item that is not subject to information reporting[.]"[82] Because the tax credit was distributed as a refundable tax credit via filing of the individual income tax return, this created a tremendous opportunity for fraud. The data verification of eligibility often occurred after the credit had been distributed. If verification to determine eligibility prior to the issuance of the refund check had occurred, reliance on IRS fraud filters to detect erroneous homebuyer credit claims could have been avoided. Given the lack of accuracy of IRS fraud filters for the homebuyer credit, the ability to verify data prior to return filing would have prevented many fraudulent and erroneous claims of the first-time homebuyer credit.

V. Economic Impact

A. Credit Claims Processed

While the IRS will continue to process the claims of military and foreign service workers through the 2011 tax return season, statistics have been published through July 3, 2010, indicating there were much higher numbers of credits claimed for the refundable payment credit as opposed to the initial interest-free loan version of the credit:

Through July 3, 2010, IRS reported the following:

> About 1 million claimants claimed $7.3 billion in interest-free loans through the Housing Act provision. . . . These claimants will begin repaying their loan beginning next tax filing season, which starts in January 2011.
>
> (2) About 2.3 million claimants claimed a total of $16.2 billion using both the Recovery Act and Assistance Act provisions. Of these claimants:
>
> About 1.7 million claimed about $12.1 billion using the Recovery Act provision. . . . This represents half of all claims, making it the most frequently used version of the FTHBC.
>
> Nearly 600,000 claimed about $4.1 billion using the Assistance Act provision. Of these, close to 400,000 claimed about $2.9 billion using the first-time homebuyer option, and nearly 200,000 claimed $1.2 billion using the long-time homeowner option. . . . These numbers in particular are likely to increase because IRS is still processing FTHBC returns and this version can be claimed on tax returns filed during the 2011 filing season.[83]

82. *Id.* at 32 n.132 (testimony of Nina E. Olson, Nat'l Taxpayer Advocate).
83. U.S. Gov't Accountability Office, Tax Administration: Usage and Selected Analyses of the First-Time Homebuyer Credit 3-4 (2010), *available at* http://www.gao.gov/new.items/d101025r.pdf.

B. Real Estate Economic Activity

Two strong indicators of the economic state of the real estate industry are the foreclosure rate and median home prices. Realty Trac, an online monitor of real estate activity, estimates there will be three million homes in foreclosure during 2010, setting a new record for the number of foreclosures in a year.[84] "House prices that gained in the past six months will falter again after the government ends support for the mortgage market," Robert Shiller, co-creator of the S&P/Case-Shiller home price index stated.[85] The rising foreclosure rate is extending into states and cities that had previously avoided high foreclosure rates, indicating that the foreclosure problem is becoming more widespread.[86] Twenty-one percent of homes at the end of the third quarter of 2009 were "under water," whereby the outstanding mortgage on the home exceeded the home's value.[87] Overall, home prices have fallen twenty percent from their peak in the early 2000s, and are down an additional 6.9% from 2008 price levels.[88] The housing credits are able to move more potential buyers in the market, but the question remains whether these new buyers are in the proper financial condition to be entering the serious financial commitment of homeownership. The increasing rate of foreclosures indicates that bringing buyers into the market is not going to solve all of the problems facing the real estate industry, and Congress must look beyond the use of tax credits to create long-term stability in the real estate market.

Current market data for the first quarter of 2011 and final 2010 quarter shows results in line with industry predictions. Home prices fell each month during the last quarter of 2010 and the first quarter of 2011.[89] In April 2011, home prices rose by approximately 0.8%.[90] An uptick was expected, however, due to the spring-summer home-buying season.[91] According to the U.S.

---

84. Dan Levy, *Las Vegas, California Cities Top Forclosure List for 2009*, BLOOMBERG (Jan. 28, 2010), *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aklLFiVfqsws.

85. *Id.*

86. *Id.*

87. Brad Finkelstein, *Credits' Effects May Determine Future Price Trend*, MORTGAGE SERVICING NEWS, Jan. 12, 2010, http://www.mortgageservicingnews.com/msn_features_reo/-470188-1.html

88. *Id.*

89. *See generally* STANDARD & POOR'S RATINGS SERVS., www.standardsandpoors.com (last visited June 29, 2011).

90. Press Release, PR Newswire, April Seasonal Boost in Home Prices According to the S&P/Case-Shiller Home Price Indices (June 28, 2011), *available at* http://www.prnewswire.com/news-releases/april-seasonal-boost-in-home-prices-according-to-the-spcase-shiller-home-price-indices-124644558.html.

91. *Id.* (quoting David M. Blitzer, Chairman, Index Comm. at S&P Indices).

Census, sales of new single-family homes rose by 13.5% between May 2010 and May 2011.[92] Approximately 2.6% of homeowner housing was vacant through the first quarter of 2011.[93] Homeownership rates continued to fall to 66.5% from their all-time high of 69.4% in 2004.[94] Nevertheless, "[t]he degree of hemorrhaging seems to be slowing."[95] From April 2010, through May 2011, the foreclosure filing rate fell by thirty-three percent, but this drop may be due, in part, to the "robo-signing" foreclosure scandal.[96] Although the foreclosure *filing rate* continues to fall, the homes are not going anywhere; Zillow.com estimates that foreclosed houses make up nearly one-fourth of all homes on the market.[97]

C. Correlation Does Not Equate to Causation

The strongest case for the homebuyer credits' impact on the economy is evaluated in a report from the Congressional Research Service ("CRS"), *An Economic Analysis of the Homebuyer Tax Credit*, from December 2009.[98] In this report, analyst Mark Keightley expresses the opinion that home prices and the real estate market appear to be stabilizing, but this stabilization cannot be solely attributed to the homebuyer credits.[99] Mr. Keightley expresses the concern that "a correlation, however, does not imply causation" when discussing the impact of the homebuyer credits in improving the real estate economy.[100] Home prices have indeed fallen dramatically across all segments of the housing market, however, the foreclosure rates are affecting some portions of the housing market more than others. In analyzing the housing

92. Press Release, U.S. Census Bureau & U.S. Dept. of Hous. and Urban Dev., New Residential Sales in May 2011 (June 23, 2011), *available at* http://www.census.gov/const/newressales_201105.pdf.

93. Press Release, U.S. Census Bureau, Residential Vacancies and Homeownership in the First Quarter of 2011 (July 29, 2011), *available at* http://www.census.gov/hhes/www/housing/hvs/qtr111/files/q111press.pdf.

94. *Id.*

95. Leah Schnurr, *WRAPUP 3 – Decline in U.S. Home Prices Ebbs*, CONSUMERS GLOOMY (June 28, 2011, 3:40 PM), http://www.reuters.com/article/2011/06/28/usa-economy-idUSN1E75R0H220110628 (quoting Anthony Chan, chief economist at JPMorgan Private Wealth Management in New York).

96. Les Christie, *Foreclosures Fall for 8th Straight Month*, CNNMONEY (June 16, 2011, 9:12 AM), http://money.cnn.com/2011/06/16/real_estate/foreclosures_housing_market/index.htm (quoting James Saccacio, the CEO of RealtyTrac).

97. Jon Prior, *Foreclosures Approach 25% of the Housing Market: Zillow*, HOUSINGWIRE (June 7, 2011, 1:53 PM), http://www.housingwire.com/2011/06/07/foreclosures-nearing-25-of-the-housing-market-zillow.

98. KEIGHTLEY, *supra* note 1.

99. *Id.* at 1.

100. *Id.*

industry, there appears to be a divergence in the occurrence of foreclosures in the higher-end market and homes in the lower price range.[101] The lower-end homes are seeing a decrease in the foreclosure rate, while the higher-end homes are increasingly going into foreclosure.[102] This creates an interesting problem for Congress in implementing housing recovery. It appears one segment of the market has begun its recovery and stabilization while another segment is still awaiting recovery. The top one-third of the housing market is likely to experience difficult times ahead unless the economy, and especially the unemployment rate, improves. If Congress continues to support homebuyer credits, Congress will essentially be subsidizing the purchase of high-end homes in foreclosure. This bolsters the argument from the Center on Budget and Policy Priorities: Congress would be better off attempting to prevent the foreclosure in the first place.[103]

The estimated impact of the mortgage rates and home pricing tend to have a stronger impact on the cost of homeownership than the homebuyer credits under both the HERA in 2008[104] and the ARRA in 2009.[105] As Mr. Keightley stated, "[t]he results suggest that home prices, and to a lesser degree mortgage rates, may have been quantitatively more important in reducing the cost of becoming a homeowner than the first-time homebuyer tax credit."[106] It is clear that homeowners purchasing with the homebuyer credits received some cost benefit from the credit.[107] But the CRS calculations indicate the successful stabilization may have occurred regardless, or at the very least, stabilization was significantly aided by forces beyond the homebuyer tax credits: price declines and mortgage rate decreases.[108]

101. *Id.* at 6.

102. *Id.* (citing Nick Timiraos, *Foreclosures Grow in Housing Market's Top Tiers*, WALL ST. J., Oct. 13, 2009, http://online.wsj.com/article_email/SB125530360128479161-lMyQjAxMDI5NTE1MjMxMDIzWj.html. According to research from zillow.com, at the start of 2011 there was also a disparity in the price fluctuations between high-end and low-end homes. High-end homes lost only .74% of value versus a full 1% for low-end homes. Prior, *supra* note 97.

103. Douglas Rice & Robert Greenstein, *Proposed Expansions of Homebuyer Tax Credit Would be Highly Inefficient and Squander Federal Resources*, CTR. ON BUDGET AND POL'Y PRIORITIES (Oct. 27, 2009), http://www.cbpp.org/files/10-27-09hous.pdf.

104. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

105. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

106. KEIGHTLEY, *supra* note 1, at 10.

107. *Id.*

108. *Id.* at 10-14.

D. A Finite Number of Home Purchasers

It is difficult to dispute the fact that the homebuyer credits, to some extent, have helped drive home purchases during 2009 and have reduced the excess inventory of homes on the market. While the jury is still out on whether the effect of the homebuyer credits will continue, chief economist at Zillow.com,[109] Stan Humphries, states that there typically is an increase in foreclosure rates in the winter months.[110] The increase in demand as a result of the credits may help offset some of the typical price declines.[111] This may be a positive result of the tax credit, but Mr. Humphries is cautious to note that this stabilization may only be temporary because the credits are scheduled to expire.[112] Mr. Humphries further hypothesizes that this current increase in demand may only be temporary and we may see a decline in demand soon.[113] It can be argued that there is a finite number of potential homeowners in the U.S., and the current homebuyer credits are serving those individuals who would have chosen to purchase a home in the near future regardless of the tax incentive to do so. The credits may bring a home buyer to the market sooner, but does not increase the total number of home buyers.

E. A Temporary Price Stabilization

The CATO Institute's director of financial regulations studies, Mark Calabria, insists that the housing market crisis is a direct result of a "housing bubble."[114] Mr. Calabria contends that, "[t]he tax credit largely acts to keep housing prices from falling further. However, that is how markets are supposed to clear in an environment of excess supply. If there's too much housing, the way to address that is to allow housing prices to fall[.]"[115] Once prices are able to stabilize on their own, then buyers will come back into the market.[116]

The credits may have also dangerously encouraged the building of new homes in an already saturated market.[117] "The damage done by creating a false floor to housing prices is that builders don't respond to inventory, they respond to prices, and as

109. Zillow.com is a website dedicated to tracking home prices and trends in locations throughout the United States.
110. Finkelstein, *supra* note 87.
111. *Id.*
112. *Id.*
113. *Id.*
114. Mark A. Calabria, *More Hot Air for the Home Ownership Bubble*, CATO INST. (Oct. 27, 2009), http://www.cato.org/pressroom.php?display=ncomments&id=297.
115. *Id.*
116. *Id.*
117. *Id.*

long as there is a positive gap between prices and construction costs, builders will build."[118]

F. Too Few "New" Homebuyers

Since its enactment, the homebuyer credit has affected a large number of homebuyers. Lawrence Yun, chief economist for the National Association of Realtors, stated at the group's annual conference that the use of the homebuyer tax credits is estimated to affect up to 2.6 million homebuyers.[119] Of the group, two-thirds would have purchased a home regardless of the credit.[120] The homebuyer credits are not bringing a high percentage of "new" buyers into the market, but are simply creating an incentive to enter the market within the time prescribed by the homebuyer credits. This theory is similar to Mr. Humphries's analysis that demand will decrease unless the homebuyer credits continue.[121]

Mr. Yun also points out that there is a large group of potential homebuyers who have chosen to forgo ownership and remain in the rental market. "There are 16 million renters who have the income level to purchase a home, but chose not to."[122] While the real estate industry sees these renters as a large pool of untapped buyers, there are certainly many valid arguments why one should not purchase a home, even if financing is not an issue. Homeownership is an investment, and there are a lot of costs associated with the initial home purchase. In addition, homeowners take on the additional cost of repairs, maintenance, and upkeep that renters are able to forgo. Renters are much more transient than homeowners and can easily pick up and move to a new location without the stress and costs of trying to first sell a home. Many renters are making a sound economic decision by staying out of the housing market, and the solution to the housing crisis should not be to force or to over-encourage these renters into homeownership through tax credits.

G. The Negative Impact on the Rental Industry

An often overlooked side of the argument against homeownership bias is the impact this bias has on the rental industry. The Center for Budget and Policy Priorities ("Center") published a Special Series: Economic Recovery Watch, discussing the economic impact of the homebuyer credit and explaining that

118. *Id.*
119. Lew Sichelman, *Home Tax Credits to Boost Housing by 15%*, NAT'L MORTGAGE NEWS, Nov. 30, 2009 [hereinafter Sichelman I]; and Lew Sichelman, *Credit 'Better' than Price Drop*, NAT'L MORTGAGE NEWS, Nov. 30, 2009 [hereinafter Sichelman II].
120. Sichelman I, *supra* note 119.
121. Finkelstein, *supra* note 87.
122. *Id.*

moving a renter into a home merely shifts a vacancy from the homeownership market to the rental market.[123] "The rental housing market has been largely ignored by policymakers, even though the rental vacancy rate has risen to a record high of 10.6 percent."[124] While some vacancies in the rental market preserve competitive rental pricing, an abundance of rental vacancies threatens neighborhood safety and can lead to an even further decrease in home prices.[125]

H. The Lost Tax Revenue

The Center also maintains that the homebuyer credits are very inefficient ways to improve the real estate market. Citing a study by Goldman-Sachs, "[t]he credit seems unlikely to generate more than half of the NAR's estimate or around 200,000 [additional homebuyers]."[126] The economist, Ted Gayer, at the Brookings Institution, notes that even if the NAR's estimates are accurate in bringing additional homebuyers into the market, the cost is extremely high.[127] "The homebuyer credit will cost the federal government about $15 billion in lost revenue, or about $43,000 for every home purchase that would not otherwise have occurred."[128]

VI. ALTERNATIVES EXISTED

A. Long-standing Homeownership Bias in the Income Tax Code

Homeownership bias has an established presence in our income tax system. It creates a multitude of incentives to ensure that the real estate market continues its role as a major component of our economy.[129] Several examples include the exclusion of gain on the sale of a residence, the home mortgage interest deduction gain on sale of residence exclusion, and the forgiveness of indebtedness related to the purchase of a home.[130] Under the basic rule of Internal Revenue Code Section 121, taxpayers who meet ownership and use tests may exclude $250,000 from the sale of his or her principal residence.[131] Married

123. Rich & Greenstein, *supra* note 103.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* (citing Ted Gayer, *Should Congress Extend the First-Time Homebuyer Tax Credit?*, BROOKINGS UP FRONT BLOG (Sept. 24, 2009), http://www.brookings.edu/opinions/2009/0924_tax_credit_gayer.aspx (last accessed July 25, 2011).
128. *Id.*
129. *See generally* I.R.C. §§ 121, 163 & 108(a) (2010).
130. *Id.*
131. I.R.C. § 121 (2010).

couples may exclude $500,000.[132] The home mortgage interest deduction found in Section 163 permits taxpayers to deduct qualified residence interest incurred as either acquisition indebtedness or home equity loans.[133] There are limitations on the total mortgage or home equity amount that may qualify for a deduction.[134] If the residence is a personal residence, then the taxpayer's deduction is an itemized deduction on Schedule A of the 1040 income tax return. As final example, the forgiveness of indebtedness provision found in Section 108(a) generally treats the forgiveness as income to the taxpayer, however, if the discharge of indebtedness occurs as a result of the financial condition of the taxpayer, and the debt was on the principal residence discharged between January 1, 2007, and January 1, 2013, then the debt forgiven is excluded from income.[135] While the provisions above have a long-standing place in our income tax code, Congress has pushed this bias to the extreme in recent years by expanding the homeownership bias in the income tax code through the use of refundable personal income tax credits.[136]

B. Historical Use of Tax Housing Credits

In recent decades, Congress has wrestled with making housing affordable for low to middle-income individuals. In the mid-1970s, the government provided a $2000 tax credit for the purchase of new homes in a time of unusually high mortgage interest rates to help reduce new home inventories.[137] In the 1990s, the Clinton administration made affordable housing a priority. With Congressional support, the federal government began addressing the goal of expanding home ownership, creating the National Partnership in Home Ownership.[138] To aid homebuyers in the District of Columbia, Clinton signed into law a

---

132. *Id.*
133. I.R.C. § 163 (2010).
134. *Id.*
135. I.R.C. § 108(a) (2010).
136. I.R.C. § 36 (2010).
137. *See* Wire Service, *First Time Home Buyers May Get $2,000 Tax Credit*, THE MILWAUKEE J. SENTINEL, Jan. 4, 1992, at A6 (discussing the $2,000 homeowner tax credit); *See also The Housing Crisis: Indentifying Tax Incentives to Stimulate the Economy: Hearing Before the H. Comm. on Small Bus.*, 110th Cong. 13 (2008) [hereinafter *Housing Crisis Hearing*] (testimony of Gary Engelhardt, Associate Professor, Econ. Dep't of the Maxwell Sch. of Citizenship & Pub. Affairs at Syracuse Univ.), *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=110_house_hearings &docid=f:42524.pdf (examining the effect of the $2000 tax credit).
138. Press Release, Office of the Vice President, Making the Dream of Homeownership a Reality: America Hits All-Time High Homeownership Rate (Oct. 23, 1997), *available at* http://clinton6.nara.gov/1997/10/1997-10-23-vp-announces-record-homeownership-level.html.

$5000 tax credit for first-time home buyers in 1997.[139] The D.C. Homebuyer Credit continues in the tax code today, and served as a model to the 2008 and 2009 credits. The success of the D.C. credit appears to be isolated based on economic research by Zhong Yi Tong, who found that D.C. home prices increased as a result of the D.C. credit.[140] "The DC credit was enacted during a period of substantial earnings growth across all segments of the labor market that is not the case currently."[141] It is possible that Congress perceived the success of the D.C. credit as an indication that a national tax credit would also create home price stabilization. The problem with this analogy is that the underlying economic conditions that existed at the issuance of the D.C. credit are far different than the difficult economic market of 2008.

C. Preventing Foreclosures Is a Better Policy

Extending the homebuyer credit to include existing homebuyers does not help solve the problem of supply and demand in the housing market.[142] If a homebuyer-credit eligible existing homeowner decides to move into a new home, the homeowner purchases the new home only to place his or her current home on the market. The there is no positive effect on the housing market: one house purchased and one house for sale. "There must be a more efficient way of stimulating the real estate economy, and efforts should be placed on repairing the economy as a whole, in particular focusing on improving unemployment rates, rather than attempt[ing] to stimulate one particular sector of the economy."[143] The narrow approach of focusing economic recovery efforts on the real estate industry does not provide a balanced approach to the economic crisis.

Preventing foreclosures is a critical component to long-term stabilization of the real estate industry. "If Congress decides some further intervention in the housing sector is warranted, it should consider providing additional assistance to families at risk of foreclosure or eviction due to job losses."[144] The Center's authors believe that preventing a foreclosure essentially creates the same economic result as converting a renter to a homeowner.[145] Beyond the economics of this argument, there must be societal one as well. Is society better served by moving an individual who currently pays rent for housing into a home, or taking an individual who does not currently have housing and aiding that individual in

139. *Id.*
140. *Housing Crisis Hearing*, *supra* note 137, at 72.
141. *Id.* at 73.
142. Rice & Greenstein, *supra* note 103.
143. *Id.*
144. *Id.*
145. *Id.*

paying for affordable housing? A strong argument supports the latter, and given the demonstrated inefficiency of the homebuyer credits, Congress should focus its spending efforts on aiding those who currently do not have housing available.

D. Additional Housing Provisions in the HERA Act

The original homebuyer credit in the HERA Act was part of numerous provisions to assist the troubled housing economy. Additional provisions of the Act promoted loan reform limits from the Federal Housing Administration ("FHA"), Fannie Mae, and Freddie Mac loans as well as FHA foreclosure rescue. The foreclosure rescue was targeted at homebuyers with subprime mortgages to assist with refinancing the mortgage and set aside $300 billion in funds for lenders to distribute to assist troubled mortgage holders.[146]

> Even then, lenders probably won't rush to participate in the program, which is voluntary, since it requires them to take pretty significant losses on the loan principal in most cases. Instead, banks have said that they'd prefer to use their own mortgage modification programs where they can better control the terms.[147]

While the total dollars allocated to foreclosure prevention, $300 billion, is astoundingly high, the administration of the aid has been poorly designed. Allowing the banks control over access to the mortgage assistance funds created an incentive for the banks to first offer their own version of assistance that could be much more lucrative to the bank than the potential losses that would arise from using federal assistance. The money spent on the first-time homebuyer credit should have been used to assist in the administration of foreclosure prevention and loan modifications to create long-term stability in the real estate market.

E. Argument Against the Use of the Tax Code

Congress should have looked at alternative ways to stabilize the housing market and improve the real estate sector of the economy beyond the use of the homebuyer credits. Congressional testimony from economist and housing expert, Gary Engelhardt, suggests that tax credits should only be used to promote long-term economic policy.[148] Further, the national housing credit will not have the desired impact in the markets that have experienced the

146. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1402, 122 Stat. 2654, 2807 (2008).

147. *See* Tami Luhby, *The* Other *Housing Rescue Starts Today: The FHA's $300 Billion Hope for Homeownership Program Is Now Open For Business. But Will Banks be Willing to Sign Up?*, CNNMONEY.COM (Oct. 1, 2008), http://money.cnn.com/2008/10/01/real_estate/hope_for_homeowners/index.htm.

148. *Housing Crisis Hearing*, *supra* note 137, at 74.

largest levels of price decline. "Hence, a national credit would provide a larger stimulus in cheaper markets. However, the markets with the greatest price decline and policy challenges are relatively expensive markets that saw substantial price run-ups."[149] This argument tends to support the notion that if price stabilization is the ultimate goal of the tax credit, the areas that have experienced significant price declines would not see price stabilization occur at pre-economic downturn prices even with the assistance of a large income tax credit.

Congress should focus its attention and efforts in creating a well-informed home purchaser who understands the risks and true cost of home ownership prior to the purchase of his or her home. The homebuyer credits have helped remove an excess of inventory within the housing market, but the credits cannot, and were never intended to, continue to subsidize the real estate industry indefinitely. The answer for long-term recovery and stabilization lies in better regulation of the industry as a whole to prevent abusive mortgage practices and allow for the market to settle and re-establish median home prices without short-term interference that only delays the inevitable: until there is growth in the United States economy as a whole, the median home value will decrease to reflect the current state of the economy. If the unemployment rate does not begin to improve, it is unlikely that the United States will see the end of the homeownership crisis in the near future. So long as foreclosures continue to rise, in particular in the top one-third of the housing market, the real estate economy faces a largely uphill battle to stabilization and improvement.

F. Monitoring of Eligibility Prior to Fund Distribution

The role of the IRS in administering the first-time homebuyer credit was also discussed by Nina Olson in her testimony on the tax gap. Putting the IRS in a dual role of both delivering and ensuring compliance with eligibility rules can lead to unnecessary burdening of the IRS and is problematic.[150] When Congress delegated the task of up-front substantiation to the IRS, the IRS was forced to process submissions manually.[151] "Moreover, in the case of the FTHBC, the determination regarding what form of documentation is acceptable is surprisingly complicated and falls outside of the IRS's core area of expertise."[152] Based on compliance concerns and the administrative burdens created by the first-time homebuyer credit, determining eligibility for a credit for homebuyers should have been administered outside of the income

149. *Id.*
150. Testimony of Olson, *supra* note 82, at 35.
151. *Id.* at 31.
152. *Id.*

tax code. Ms. Olson's general position is that social policies are often difficult to administer within the tax code. "Code-based social programs can undermine the IRS's ability to perform its core function of collecting taxes. Further, the current enforcement culture of the IRS may not be optimal for the administration of social benefits."[153] By tasking the IRS with the administration of the first-time homebuyer credits, valuable IRS enforcement resources were taken away from other areas.

VII. CONCLUSION

We may never know the exact impact of the homebuyer credits on the economy. As the GAO indicated in a February 2010, "the tax provisions' economic stimulus effect cannot be precisely isolated."[154] It cannot be denied, however, that several other factors may have contributed to stabilizing and improving the housing market in addition to the homebuyer credits, namely the decrease in home prices and historically low interest rates. Economists are able to estimate as to the impact of the homebuyer credits on the economy by analyzing price sensitivity of homebuyers as stated in the CRS February 2010 report.[155] Based on the CRS modeling, the ARRA tax credit resulted in a range of 42,790 to 128,371 homes purchased, and the WHBAA resulted in a range of 51,523 to 153,750 homes purchased.[156]

Not to anyone's surprise, those within the real estate industry have showed unconditional support for the homebuyer tax credits and championed the credits as the driving force of recovery in the real estate market. Based on an analysis of the expert testimony before Congress regarding the state of the real estate industry, the experts working within the real estate industry have failed to objectively evaluate the true economic benefit of the homebuyer credits. Specifically, they have not empirically demonstrated that the homebuyer credits stabilized the real estate market or that the recent, modest improvement in the market would not have occurred but for the credits. Despite these significant shortcomings, Congress nevertheless extended and expanded the credit twice, under the belief that the credit was crucial to stabilizing the real estate market. Yet despite the credits, economic data suggests that foreclosures continue to plague the

153. *See 2010 Annual Report to Congress*, NAT'L TAXPAYER ADVOCATE 1, 18 (Jan. 5, 2011), http://www.taxpayeradvocate.irs.gov/Media-Resources/Annual-Report-To-Congress-Full-Report.
154. RECOVERY ACT, *supra* note 9.
155. KEIGHTLEY, *supra* note 1.
156. *Id.* at 14. These results are much lower than real estate industry analyst estimates, which typically range between 200,000 and 400,000 for the ARRA credit; the NAHB projected the effect of the WHBAA credit at 180,000.

real estate market and home prices have yet to fully rebound.[157]

In evaluating possible alternatives, Congress should have forgone the first-time homebuyer credit and instead funded the administration of a subprime mortgage modification program. If Congress had designated an independent administrator of the $300 billion for subprime loan modification under the HERA Act, many foreclosures could perhaps have been avoided. Rather than relying on banks and private lenders to modify their own loans, such a program would have created an independent and more effective loan modification weapon. Given the high cost of foreclosures, their avoidance would have been a better long-term recovery policy.

But even if one believes that a $8000 maximum credit to homebuyers was necessary, it is difficult to argue that a refundable tax credit was the most effective and efficient vehicle. This point was championed by Nina Olson when discussing the first-time homebuyer credit. Olson stated: "The simple solution would have been to make the credit a HUD-directed spending program where the home buyer is given the money at closing."[158] By utilizing the tax code as a means to distribute the homebuyer credits, taxpayers did not receive their credit until months after closing on their new home. If the funds were available to the homebuyer sooner, then those funds could be used towards a down payment, used to defray moving costs, or used to buy furnishings. Additionally, making the funds available at closing would have created an up-front documentation requirement that would eliminate many of the fraudulent and abusive claims the IRS was forced to confront.

Homeownership is often a part of the American Dream, and buyers will re-enter the market for the right price. Congress must allow the housing market prices to adjust to demand without the interference of short-term, individual tax credits. Congressional efforts should be concentrated on stimulus for the economy as a whole to bring more Americans back to work. Housing is a basic human necessity, and our financial resources would be better spent aiding those who face foreclosure. At best, the homebuyer credits served to encourage those who had strong financial resources and could secure a mortgage into homeownership. At worst, the credits were a reward for an action that would have occurred regardless of the credits' existence for many first-time homebuyers. Buying a home is a major life decision with potential long-term effects. While the credit may sway some buyers who are on the fence regarding homeownership, it is more likely that a

157. Residential Vacancies Press Release, *supra* note 93, at 2.

158. Diane Freda, *First-Time Homebuyer Credit Wrongly Delivered Through Tax Code, Olson Says*, THE BUREAU OF NAT'L AFFAIRS (June 8, 2011) (citing National Taxpayer Advocate Nina Olson's remarks at the D.C. Bar Luncheon).

homebuyer is entering the market for a variety of reasons other than a tax credit. The credit serves the latter homeowner in a case of being "in the right place at the just the right time" in the home purchase decision time-line.

Preventing foreclosures should be a higher priority than moving an economically stable taxpayer from the rental industry into the homebuyer industry. Although a gallant effort was made by the IRS to enforce compliance with the first-time homebuyer credit provisions, fraud and abuse abounded. The credit required IRS resources to be redirected to focus on auditing the first-time homebuyer credit claims. Based on the economic data gathered on the homebuyer credits, the expert opinions analyzing the credits, and the current economic state of the real estate industry, Congress simply should shelve this economic policy tool if future real estate intervention is deemed necessary.