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Troy T. Kramer

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INTRODUCTION

The real estate market is experiencing a cultural change in the way that buyers purchase homes as Millennials begin to enter the market after the devastation of the Subprime Mortgage Crisis of 2008. Millennials are members of Generation Y and were born between 1981 and 1996.[1] Elder Millennials are individuals in their early forties and young Millennials are

[1] Michael Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/.

in their mid-twenties.[2] The recession stunted the financial growth of the Generation Y entering the market with limited opportunities for jobs and investments directly out of college.[3] Some scholars speculate that a timidness among Millennials, in the fallout of the Great Recession, has shifted the generation's priorities away from purchasing real estate.[4] Others believe the overall lack of economic health and wellbeing of our generation, racked with student debt, personal debt, and stagnant wages, contribute to the negative market trend of the past decade.[5] But the tides are changing; as Millennials become the largest share of the real estate market,[6] this slow growth in purchasing real estate could have a major impact on the economy long term that will change the way people purchase homes in the future.

New government regulation and oversight has changed the way banks can lend money and trade securities. Before 2008, property was a safe investment that only accrued value over time. However, that changed after the freefall of the housing market, which caused an unprecedented ripple through the global economy. Unemployment and foreclosure rates soared to historic highs.[7] The federal government had to step in, injecting

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[2] *See* Jennifer Dorozio, *Elder Millennial: This Is the Year They Turn 40*, CANADIAN BROAD. CORP. (Mar. 9, 2021), https://www.cbc.ca/news/canada/calgary/checking-up-on-elder-millennials-1.5939196.

[3] *See* Patrick Ow, *The Future of Work for Millennials (and Gen Z) is Bleak Unless ....,* THRIVE GLOB. (Oct. 5, 2019), https://thriveglobal.com/stories/the-future-of-work-for-millennials-and-gen-z-is-bleak-unless/.

[4] *See* Gerd Welke & Eric McLaughlin, *Perceptions of Home Acquisition Priorities by Millennials: The "Entitled Generation"*, 8 INT'L RSCH. J. OF APPLIED FIN. Issue 8, 505–513 (2015), https://search.proquest.com/docview/1960272838?pq-origsite=gscholar&fromopenview=true.

[5] *See* Megan Gorman, *How Millennials are Revolutionizing the Home Buying Process*, FORBES (Aug. 31, 2019), https://www.forbes.com/sites/megangorman/2019/08/31/how-Millennials-are-revolutionizing-the-home-buying-process/#68f4d0332a02.

[6] "Millennials have represented the largest share of the home buying market for the past five years in a row with the 2018 share at 36%." *Id.*

[7] *See Employment Rate in the United States from 1990 to 2020*, STATISTA, https://www.statista.com/statistics/192398/employment-rate-in-the-us-since-1990/#:~:text=USA%20%2D%20employment%20rate%201990%2D2020&text

trillions of dollars into the economy and overhauling the regulations of investment banks in efforts to prevent further devastation across the world.[8] The market has recovered and promoted the creation of new jobs and investment in business, but the effects of 2008 still leave Millennials apprehensive about buying homes.

This article will explore the Generation Y's approach to the real estate market and analyze how the Subprime Mortgage Crisis stunted Millennials' economic development. It also analyzes what ways legislation has changed and government has influenced the economy since 2008 to prevent another free fall of the global economy and to protect consumers from predatory lending practices and under-regulation of the financial sector. Further, this article will analyze how Millennials differ from previous generations in their method of purchasing homes and investing in real estate—with a specific eye towards advances in technology. This article also gives advice to first-time homebuyers on how to make smart decisions and avoid the pitfalls of 2008 in today's market.

With Millennials taking the place of Baby Boomers in the United States economy, it will be important to understand how Millennials are changing the way people invest in real estate and in what ways these changes have learned from the mistakes of the early 2000s.

I. THE NEW KIDS ON THE BLOCK

A. *Demographics of the Millennial Generation*

The demographics of the Millennial Generation give insight into its makeup of the population and the economic impact Millennials have as a whole.[9] There are 83.1 million Millennials, which makes up more than one-fourth of the United States population.[10] Twenty-one percent of Millennials still live at home with their parents, which is an important

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=The%20employment%2Dpopulation%20ratio%20represents,rate%20stood%20at%2056.8%20percent (last visited April 4, 2021).

[8] *See* Lee Hudson Teslik, *The U.S. Economic Stimulus Plan*, COUNS. ON FOREIGN RELS. (last updated Feb. 18, 2009), https://www.cfr.org/backgrounder/us-economic-stimulus-plan.

[9] *See* Jeff Gomez, *What the Real Estate Market Should Know about Millennials*, UPNEST (Oct. 19, 2015), https://www.upnest.com/1/post/what-the-real-estate-industry-should-know-about-Millennials-infographic/ (last visited Feb. 7, 2021).

[10] *Id.*

factor of the generational gap in the real estate market.[11] Furthermore, fifty percent of Millennials choose to rent rather than buy.[12] This leaves roughly twenty-nine percent of Millennials who are currently in the housing market or actively seeking to enter it. The average student debt of a Millennial with a bachelor's degree is roughly $30,000, and the Millennial Generation's average credit score is a 624.[13]

Millennials are considered the most educated generation in history.[14] Sixty-three percent of Millennials value receiving a college education, and of that sixty-three percent, nineteen percent have already graduated college and forty-four percent plan to graduate.[15] "The importance of homeownership to education has only increased over time. In 1997, the difference in homeownership between those with a high school degree and those with a college degree was [ten] percent. In 2016, the difference increased to [twenty-one] percent."[16] Receiving an education is one of the leading factors in the likelihood of a person purchasing a home.[17] As more Millennials continue to go to college and graduate with a degree, the rate of homeownership will increase, likely widening the gap between those who do and those who do not have a college degree.[18]

Millennials are also expected to benefit from the largest generational wealth transfer ever. The Millennial Generation is expected to inherit approximately $68 trillion in assets from the Baby Boomer

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *See* MARK FLEMING & ODETA KUSHI, 6 TRENDS POISED TO RESHAPE HOMEOWNERSHIP DEMAND 8 (2017), available at https://cdn2.hubspot.net/hubfs/17501/FA_Economics/whitepapers/First-American-Whitepaper_Six-Trends-Poised-to-Reshape-Homeownership-Demand.pdf?t=1500581509958&utm_campaign=FA%20%7C%20Economics%20Awareness%20Campaign&utm_source=hs_automation&utm_medium=email&utm_content=54168443&_hsenc=p2ANqtz-8Kc-doMqsKzND_gLjouvLo6vV5RQ9JC26nksBE_0YDhHixlvQWAfFh32-d3Ul4c9vvL4mnk8HFGavBXveo1lYxHwAXaQ&_hsmi=54168443 (last visited Feb. 7, 2021).
[15] *Id.* at 8.
[16] *Id.* at 8.
[17] *Id.*
[18] *Id.* at 9–10.

Generation over the next decade.[19] These assets are estimated to increase the Millennial Generation's wealth by 500%.[20] There are currently around 618,000 millennial millionaires, 93% of which have an estimated net worth between $1 million and $2.5 million.[21] The average millennial millionaire owns three houses and has a larger real estate portfolio than non-Millennials.[22] Once this wealth transfer happens, Millennials will be by far the wealthiest generation ever.

The aftereffects of the Great Recession had rampant effects on Millennial wages. The media has separately referred to Millennials as the "richest generation" and the "poorest generation."[23] In fact, they are both.[24] Full-time working Generation X (Gen X) and Baby Boomer males made eighteen percent and twenty-seven percent higher earnings, respectively, than Millennial males.[25] And full-time working Gen X and Baby Boomer females made twelve percent and twenty-four percent higher wages, respectively, compared to Millennial females.[26] However, household incomes have risen for Generation Y, likely as a result of a higher percentage of Millennial women entering the work force.[27] Although individual wages are lower compared to the two previous generations, Millennials have benefitted from higher household incomes overall due to higher dual income household rates.[28]

Generation Y is further spilt within itself between elder and younger Millennials because of their varying personal experience with the financial crisis of 2008.[29] Millennials over the age of thirty—which make

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[19] Olivia Raimonde, *There are More than 600,000 Millennial Millionaires in the US, According to Report*, CNBC (Oct. 16, 2019), https://www.cnbc.com/2019/10/16/us-has-more-than-600000-millennial-millionaires-according-to-report.html.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Hillary Hoffower, *Millennials Have Been Called the 'Brokest' and the 'Richest' Generation, and Experts Say Both of Those are True*, BUS. INSIDER (Jan. 29, 2019), https://www.businessinsider.com/millennials-wealth-generation-experts-data-2019-1.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Hillary Hoffower, *The Great Recession Split the Millennial Generation Down the Middle, Creating 2 Groups with Very Different Financial Habits*, BUS. INSIDER (Apr. 4, 2019),

up over half of Generation Y—were hit hardest during the Great Recession, suffering from wage stagnation, a tough job market, and high student loan debt while coming out of college.[30] Many Millennials suffered from the lack of job opportunities in their career fields and the inability to save money.[31] As of 2016, Millennials born in the 1980s were thirty-four percent below their expected wealth levels, according to the Federal Reserve Bank of St. Louis.[32] Older Millennials are playing catch up in buying homes, getting married, and having children later than expected due to the financial hardship.

Young Millennials have had the luxury of entering the job market during the recovery period after the recession and learning from the mistakes of their older peers.[33] They are much more risk averse and tend to save money at a higher rate than spending or investing money.[34] However, these young Millennials still experience the weight of high student debt, rising living costs, and rising wages that haven't kept up with inflation.[35] The St. Louis Federal Report also speculates that Millennials' higher education levels will lead to steeper incomes that will help the generation meet its financial needs for retiring in the future.[36]

B. *The Technological Revolution of the Real Estate Market*

The rise in the use of technology in the home-buying process has changed how real estate agents must strategize and market homes to Millennials. Coldwell Banker Real Estate found there is an increased demand for agents to use advanced technology when listing homes.[37] It found seventy-seven percent of homebuyers would like the option to take virtual reality tours when viewing home listings, and eighty-four percent

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https://www.businessinsider.com/millennial-generation-gap-great-recession-financial-crisis-money-habits-2019-3.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* Hoffower, *supra* note 23.

[37] *See* Donna Fuscaldo, *Home Buying Goes High-Tech as Millennials Become Largest Real Estate Buyers*, FORBES (Sept. 26, 2018), https://www.forbes.com/sites/donnafuscaldo/2018/09/26/home-buying-goes-high-tech-as-millennials-become-largest-real-estate-buyers/?sh=61f3c0637774.

want to see video footage of the property.[38] These virtual reality tours give buyers a 360-degree view that simulates walking through a home from the comfort of their own couch.[39] In 2017, forty-five percent of millennial homebuyers made offers on homes without even seeing them in person.[40] While Baby Boomer and Gen X buyers typically hire real estate agents to find homes, Millennials are circumventing that standard practice by using online tools and apps on their smartphones and tablets to find homes.[41]

Roofstock is a new real estate investment platform that allows Millennials to purchase investment properties without even seeing them.[42] The company performs all the due diligence, including inspecting homes and making them ready for the market before posting the listing on the Roofstock website.[43] These listings include information about the tenant, the monthly rental income, and the property manager of the home, and they allow home buyers to compare listings across the country.[44] CEO and co-founder, Gary Beasley, says ninety percent of Roofstock's clients purchase properties that are more than 250 miles away from their primary residences and never have to physically visit the property.[45] Seventy-five percent of its users are also first-time real estate investors.[46] Roofstock's number of investors increased 126% in 2018 and continues to grow rapidly.[47]

Mortgage companies are getting onboard with technology as well. Quicken Loans has created its Rocket Mortgage mobile service, which allows homebuyers to apply for mortgage loans right from their phones and close within thirty days.[48] Long gone are the days where home buyers must walk into a bank or mortgage branch location to apply for a home loan. Technology is playing an increasingly important role in the way Millennials invest and has changed the way homebuyers and sellers

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38 *Id.*
39 *See id.*
40 *Id.*
41 *Id.*
42 Donna Fuscaldo, *Real Estate Fintech Roofstock Doubles its Investor Base of Newbies*, FORBES (July 16, 2019), https://www.forbes.com/sites/donnafuscaldo/2019/07/16/real-estate-fintech-roofstock-doubles-its-investor-base-of-newbies/#60f579ea46cb.
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *See* Fuscaldo, *supra* note 42.

interact. Careers in the real estate market will have to keep up with technology when Millennials can finance, purchase, and close homes all on their smartphones from the comforts of their couches.

C. *Why Millennials are Moving Out of Cities*

The Millennial Generation is also changing market trends in terms of where they are buying homes.[49] Millennials are skipping urban cities for the suburbs and are looking for cool neighborhoods with walkable downtowns to raise families in rather than staying in big cities, which Forbes writer Ellen Paris calls "Hipsturbia."[50] The United States Census Bureau shows that 27,000 Millennials between the age of twenty-five and thirty-nine moved out of cities like New York and San Francisco for suburban living in 2018, which is the fourth consecutive year of declining Millennial populations in large cities.[51] Urban centers are no longer conducive for Millennials seeking to enter into the next stage of their lives.[52]

In part, this is also due to home prices themselves.[53] Homebuyers pay 26.5% of their monthly income for median-value homes in cities compared to 20.2% for similar homes in the suburbs.[54] These savings are encouraging Millennials starting families to move out of cities for more living space, bigger yards, quieter streets, and longer commutes. Millennials are beginning to use their newfound economic growth to chase the American dream of owning a home. But this step has taken almost a decade to make because of the devastation of the Subprime Mortgage Crisis. As they enter the market, it is important for Millennials to understand why the 2008 crisis had such a large effect on the housing

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[49] Ellen Paris, *Millennials with Families Are Leaving Major Cities for the Suburbs, Transforming Them into 'Hipsturbia'*, FORBES (Oct. 31, 2019), https://www.forbes.com/sites/ellenparis/2019/10/31/millennials-with-families-are-leaving-major-cities-for-the-suburbs-transforming-them-into-hipsturbia/#7a540b076746.

[50] *Id.*

[51] Alicia Adamczyk, *Millennials are Fleeing Big Cities for the Suburbs*, CNBC (Sept. 29, 2019), https://www.cnbc.com/2019/09/29/Millennials-are-fleeing-big-cities-for-the-suburbs.html.

[52] *Id.*

[53] *Id.*

[54] *Id.*

market so they can avoid making the same mistakes their parents' generation made.

II. THE IMPACT OF THE SUBPRIME MORTGAGE CRISIS

The Subprime Mortgage Crisis of 2008, also known as the Great Recession, was unprecedented in United States history for its impact on the global economy.[55] What drastically separates the 2008 recession from all its predecessor financial downturns is its genesis in the housing market.[56] The Subprime Mortgage Crisis of 2008 was not caused by the Great Recession; the Subprime Mortgage Crisis caused the Great Recession.[57] Real estate has always been viewed as one of the safest investments one can make that offers a tangible asset (the property itself) with steady growth in value over time.[58] Up until 2007, the mantra of investing was that you could never go wrong investing in property.[59] Unfortunately, the American dream of owning a home fueled by subprime lending practices and further investments into those practices created an economic bubble that burst and devastated investments, pensions, retirement funds, and housing prices overnight.[60]

Subprime mortgages began when lenders or brokers began making loans to borrowers who could not qualify for traditional mortgages.[61] These "subprime" borrowers were offered small down payments, high loan-to-value ratios on properties, and initial low interest rates that would increase over time (also known as "teaser rates").[62] These loans were almost deceptively affordable, filled with complex language borrowers could not understand that would trap them into loans they could not afford for very long.[63] These loans carry substantially more risk for borrowers and lenders than fixed-rate mortgages because as the interest

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[55] John V. Duca, *Subprime Mortgage Crisis*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime-mortgage-crisis.

[56] *Id.*

[57] *Id.*

[58] *See* Colin McArthur, *The 2008 Housing Crisis*, CTR. FOR AM. PROGRESS (April 13, 2017), https://www.americanprogress.org/issues/economy/reports/2017/04/13/430424/2008-housing-crisis/.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Chunlin Leonhard, *The Subprime Mortgage Crisis and Economic Checks and Balances*, BANKING & FIN. SERVS. POL'Y REP., 15, 16 (June 2012).

[63] *Id.*

rates increased after the teaser rate term expired, the risk of default on the loan was higher.[64] The subprime mortgage loan market increased "from $150 billion in 2000 to $650 billion in 2007," which accounted for roughly twenty-five percent of the mortgage market.[65]

A. *Enemy Number One: Mortgage-Backed Securities and Financial Derivative Products*

This dramatic growth of the subprime mortgage market in the early 2000s was fueled by the creation of mortgage-backed securities.[66] Mortgage-backed securities are tranches of bonds.[67] Investment banks created mortgage-backed securities from a loan pool of subprime and fixed rate mortgages to then sell to other investors.[68] These tranches were then rated by agencies like Standard & Poor's and Moody's Investor Service, receiving the lowest ratings for the riskiest bonds and the highest ratings for the safest bonds.[69] This process was called securitization.[70] "Securitization involves a lender pooling hundreds of subprime mortgages into securities, which are backed by those mortgages, and then selling those mortgage-backed securities to hedge funds and large financial institutions in a secondary market."[71] Investment banks sold billions of dollars of subprime mortgage-backed securities to domestic and global investors, shifting the risks to third-parties.[72]

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[64] Brian E. Robison & Mark A. Flessner, *An Immediate Look at the Legal, Governmental, and Economic Ramifications of the Subprime Mortgage Crisis*, ASPATORE SPECIAL REP. 14 (2007); *see also* John V. Duca, *Subprime Mortgage Crisis*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime-mortgage-crisis.

[65] *Id.*

[66] *See* McArthur, *supra* note 58.

[67] In French, tranche means a "slice." *Tranche*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/tranche#note-1 (last visited Sept. 16, 2020). A tranche refers to "an issue of bonds that is differentiated . . . by such factors as maturity or rate of return." *Id.*

[68] *See* Leonhard, *supra* note 62.

[69] *Id*.

[70] *See* Robison, *supra* note 64.

[71] *Id.*

[72] *See* Leonhard, *supra* note 62.

The problem was that it became nearly impossible to evaluate the risk of these complex mortgage-backed securities as the demand for them grew.[73] Banks continued giving risky subprime loans to borrowers who could not afford them.[74] The Banks then packaged and sold the subprime loans in higher-rated tranches of bonds, spreading the risk across the market.[75] Furthermore, Wall Street began creating financial products derived from mortgage-backed securities known as Collateralized Debt Obligations (CDOs), which were "primarily made up of [mortgage-backed securities] instead of the mortgage loans themselves."[76] Risky CDOs were "magically" given high ratings by rating agencies that unsuspecting investors eagerly purchased.[77] Wall Street even created CDO-derivative products, cyclically continuing the money-making machine.[78] "By mid-2007 the volume of outstanding securitized loans, both residential and commercial, had reached $741 billion, and in 2008, three-fifths of America's mortgages were bundled up and sold as agency-rated securities."[79]

Credit default swaps (CDS) are another financial derivative product that contributed to the 2008 crisis.[80] CDSs act as insurance that lenders buy from another investor, who agrees to reimburse the lender the value of the CDS plus any interest payments if the borrower defaults.[81] These CDS purchases transfer the credit risk from the lender (buyer) to the CDS seller.[82] The buyer then makes premium payments on the CDS until the maturity date of the contract.[83] CDSs were a primary cause of the 2008 crisis, as "CDS sellers like Lehman Brothers, Bear Stearns, and AIG defaulted on their CDS obligations."[84]

This changed in the summer of 2007 as interest rates on subprime loans began to skyrocket, "catching many borrowers off-guard, causing

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73 *Id.*
74 *See* Robinson, *supra* note 64 at 16.
75 *See* Leonhard, *supra* note 62.
76 *Id.*
77 *Id.*
78 *Id.*
79 MICHAEL T. MADISON ET AL., L. OF REAL EST. FINANCING § 3:5: THE SUBPRIME LENDING CRISIS, 2007–2010 (2010).
80 Justin Kuepper, *Credit Default Swap (CDS) Definition*, INVESTOPEDIA (Apr. 20, 2019), https://www.investopedia.com/terms/c/creditdefaultswap.asp.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*

them to default on the loans, and forcing them into bankruptcy."[85] As borrowers could not pay back their loans and banks began foreclosing on homes, more than two dozen subprime mortgage lenders filed for bankruptcy, which created a credit crunch across the Unites States' economy.[86] The United States Federal Reserve System's ("The Fed") Board of Governors Report on March 20, 2008, indicated "that home equity hit a record low of 47.9% in the [last] quarter of 2007," marking "the first time that homeowner debt . . . exceeded their equity since the Board . . . [began] track[ing] home equity data in 1945."[87] This meant that people were upside down in their mortgages, owing more on their homes than they were even worth.[88] With rising interest rates and declining house prices, homeowners could not refinance their mortgages or sell their homes, resulting in loan defaults and millions of foreclosures nationwide.[89]

B. Legislation in Response to the Subprime Mortgage Crisis

One of the largest pieces of legislation to arise from the Subprime Mortgage Crisis was the Housing and Economic Recovery Act (HERA) of 2008, which created the Federal Housing Finance Agency (FHFA) and modernized the Federal Housing Administration (FHA).[90] The FHFA replaced the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB) and was given broad authority to regulate government-sponsored enterprises (GSEs) like the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and Federal Home Loan Banks.[91] This new authority gave the FHFA power to establish capital standards, enforce its changes through cease and desists, penalties, and

[85] *See* Robison, *supra* note 64.
[86] *Id.*
[87] *See* Madison, *supra* note 79.
[88] *See id.*
[89] *Id.*
[90] *Housing and Economic Recovery Act of 2008*, CONG. RSCH. SERV. (Dec. 5, 2008), https://www.everycrsreport.com/files/20081205_RL34623_6d9c5bedb2a8b3803a554fd89a22947637acab27.pdf (last visited Sept. 23, 2020).
[91] *Id.*

officer replacement, restrict asset growth and capital distributions, and review new product offerings.[92]

HERA also established the HOPE for Homeowners Act of 2008, which authorized the FHA to insure up to $300 billion in new thirty-year fixed interest rate loans for struggling homeowners looking to refinance their mortgages.[93] To be eligible, homeowners "must have a mortgage debt to income ratio greater than [thirty-one percent] as of March 1, 2008,"[94] and the current lender must agree to "write-down the principal of the current loan to achieve a [ninety percent] loan-to-value ratio and to pay a [three percent] insurance premium."[95] However, HOPE shared fifty percent of the appreciated value of the home if the homeowner sells or refinances their home.[96] HOPE for Homeowners was estimated to help 400,000 borrowers refinance their homes.[97]

One of the bill's largest areas of focus was foreclosure prevention for military service members.[98] HERA prevented lenders from foreclosing on service members' homes within nine months of the end of their service.[99] It also increased the Veteran Affairs guarantee limit from twenty-five percent to 125% of Freddie Mac conforming loans through December 31, 2008, as allowed by the Economic Stimulus Act of 2008.[100] HERA allocated $150 million towards pre-foreclosure counseling to help families in need keep their homes and provided $3.92 billion to assist communities with a high rate of foreclosures.[101] These communities with high foreclosure rates suffered declined home values, higher crime, and divestment as a result of the increased number of empty houses.[102] This "Community Development Block Grant Fund" was used to purchase and

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[92] *Summary of the "Housing and Economic Recovery Act of 2008,"* NEV. LEGIS. 1, https://www.leg.state.nv.us/74th/Interim_Agendas_Minutes_Exhibits/Exhibits/Mortgage/E080408D.pdf.

[93] *See id.* at 3; *see also "Housing and Economic Recovery Act of 2008," supra* note 90, at 2.

[94] *See Summary of the "Housing and Economic Recovery Act of 2008," supra* note 92, at 2.

[95] *See "Housing and Economic Recovery Act of 2008*," *supra* note 90, at 2.

[96] *Id*. at 12.

[97] *Id*. at 2.

[98] *Id*.

[99] *Id*. at 15.

[100] *Id*.

[101] *See* NEV. LEGIS., *supra* note 92, at 4.

[102] *Id.*

rehabilitate foreclosed homes to stabilize these communities and their home values.[103] HERA also allowed the FHA to be more competitive with private lenders by increasing loan limits in high-cost areas to $625,000 and increasing down payment requirements on FHA loans to a 3.5% minimum.[104]

HERA also had an impact on affordable housing by providing a large boost to the Low-Income Housing Tax Credit (LIHTC), increasing the state LIHTC from $2 to $2.20 per capita, and placing a temporary ten percent increase in the small state minimum.[105] HERA "allowed states to designate [9% of] properties as difficult development areas and get a [30%] basis boost" and "allowed taxpayers to use LIHTCs against their alternative minimum tax (AMT) liabilities."[106] In 2003 and 2004, the National Council of State Housing Agencies created a housing tax credit force from state housing agencies to address state needs for affordable housing.[107] Mark Shelburne, a counsel and policy coordinator of the North Carolina Housing Finance Agency in 2008, said that HERA continues to impact affordable housing a decade later thanks to the 9% minimum that created more affordable housing options.[108] Shelburne said "[t]he most important lesson learned was the need for all LIHTC interest groups to work together" because "[m]aking something happen in Washington is always difficult, and the only hope is if everyone has the same message."[109]

Two months after the enactment of HERA, the Emergency Economic Stabilization Act (EESA) of 2008 was passed by Congress on October 3, 2008, to provide over $700 billion in relief to troubled assets and mortgage-backed securities.[110] The bill was originally voted against

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[103] *Id.*

[104] *See Housing and Economic Recovery Act of 2008*, *supra* note 90.

[105] Brad Stanhope, *A Decade Later, Impact of HERA Still Felt in Affordable Housing*, NOVOGRADAC (July 3, 2018), https://www.novoco.com/periodicals/articles/decade-later-impact-hera-still-felt-affordable-housing.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] Kimberly Amadeo, *What Was the Bank Bailout Bill?*, BALANCE (Aug. 22, 2019), https://www.thebalance.com/what-was-the-bank-bailout-bill-3305675.

by the House of Representatives on September 29, 2008, plummeting the Dow by 777.68 points.[111] Later reintroduced and passed, the bill created the Troubled Assets Relief Program (TARP), which provided $67.8 billion in bailouts to American International Group (AIG), $80.7 billion to General Motors and Chrysler, $20 billion to the Fed so banks could continue giving credit to homeowners and businesses, and apportioned $75 billion to help homeowners refinance their mortgages.[112] The bill also increased the Federal Deposit Insurance Corporation (FDIC) limit from $100,000 to $250,000 per account.[113]

The EESA also combatted home foreclosures by requiring the Treasury Department to refinance loans in danger of defaulting.[114] The EESA required that any assets purchased under TARP, by the government from banks, must include warrants resulting in taxpayers benefiting from the future growth of the banks.[115] It also did away with certain tax benefits and limited executive pay and bonuses to certain banks who participated in the program.[116] To restore liquidity in the credit market, instill confidence in the economy, and prevent further damage to the market by encouraging lending to qualified buyers, the EESA purchased mortgage-backed securities and stock from troubled banks.[117] President George W. Bush faced heavy criticism amid passing the EESA.[118] Many were concerned that the taxpayers would essentially be footing the bill for the poor decision making of large investment bankers who lined their pockets.[119] But the bill required the President to have a plan for recouping all its losses from the financial industry in order to protect the taxpayers.[120] In fact, the United States Department of the Treasury only disbursed $439.6 billion of TARP funds and by 2018, returned $442.6 billion to the Treasury for a $3 billion profit.[121]

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Jeannette L. Nolen, *Emergency Economic Stabilization Act of 2008*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Emergency-Economic-Stabilization-Act-of-2008 (last visited Feb. 17, 2020).
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See* Amadeo, *supra* note 110.
[119] *See* Nolen, *supra* note 114.
[120] *Id.*
[121] *Id.*

Designed to put $787 billion back into the economy, President Obama launched his own Economic Stimulus Package under the American Recovery and Reinvestment Act (ARRA) of 2009, four months after the EESA passed.[122] The final version of the bill had a spending limit of $840 billion.[123] The ARRA included seven components that stimulated economic growth, officially ending the recession in July 2009.[124] ARRA allocated $260 billion in tax cuts and credits to provide economic relief for families, invested $85 billion in federal infrastructure projects to create jobs, and provided $17 billion in renewable energy tax cuts.[125] It also invested over $138 billion in the United States Healthcare system, poured over $108.6 billion into education programs across the country, gave $18 billion towards scientific research and development in rural areas, and relieved small businesses with $730 million in tax deductions, credits, and loan guarantees.[126]

The ARRA had both marked successes and lackluster results as the United States began to climb out of recession.[127] Critics have been skeptical of the Stimulus Package's success, complaining that it substantially increased the national debt and did not encourage consumer spending as expected.[128] Many Americans did not notice any tax break on their returns, and some even expressed seeing an increase in their taxes in 2009.[129] Major criticism was found in the plan's extension on unemployment benefits by thirty-three weeks, stifling recipients' incentives to look for work.[130] But the United States economy grew at a rate of 1.7% in the third quarter of 2009, five months after ARRA passed, and added 2.4 million private sector and 1.7 million public sector jobs within the first eighteen months of ARRA.[131] In 2010 alone, the ARRA raised the gross domestic product (GDP) by roughly three percent ($500

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[122] Kimberly Amadeo, *ARRA, Its Details, with Pros and Cons*, THE BALANCE (July 30, 2019), https://www.thebalance.com/arra-details-3306299.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Kimberly Amadeo, *Obama's Stimulus Package and How Well It Worked*, THE BALANCE (Nov. 7, 2019), https://www.thebalance.com/what-was-obama-s-stimulus-package-3305625.

[128] *Id.*

[129] *See* Amadeo, *What Was the Bank Bailout Bill?, supra* note 110.

[130] *Id.*

[131] *Id.*

billion) and created more than 2.3 million jobs.[132] "Each dollar of the Recovery Act increased total economic output cumulatively by more than $1.30 between 2009 and 2013 . . . ."[133] By 2016, the United States had the fastest two-year drop in unemployment rate in thirty years with more than 14 million private sector jobs created over seventy-one months straight.[134]

In 2010, the Federal Government stepped in to protect the United States largest financial institutions with the Dodd-Frank Wall Street Reform and Consumer Protection Act.[135] Proposed by Senator Christopher J. Dodd (D-CT) and Representative Barney Frank (D-MA), the 2,300 page Act established new government agencies focused on regulating various components of the United States financial system that caused the Subprime Mortgage Crisis.[136] The Financial Stability Oversight Council and Orderly Liquidation Authority kept a close eye on the financial stability of the United States' largest financial institutions and potentially broke up those deemed "too big to fail."[137] The Consumer Financial Protection Bureau (CFPB) was established to prevent the predatory lending practices that lead to the Subprime Mortgage Crisis and also to oversee other types of consumer lending.[138] The CFPB has the power to enforce regulations on banks and credit unions with assets totaling more than $10 billion.[139] Banks and credit unions under the $10 billion threshold are monitored for consumer complaints.[140] The Volcker Rule gave regulators the power to "implement regulations for banks, their affiliates and holding companies, to prohibit proprietary trading, investment in and sponsorship of hedge funds and private equity funds, and to limit

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[132] Office of the Press Secretary, *FACT SHEET: Seven Years Ago, the American Recovery and Reinvestment Act Helped Bring Our Economy Back from the Brink of a Second Great Depression*, WHITE HOUSE (Feb. 25, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/fact-sheet-seven-years-ago-american-recovery-and-reinvestment-act-helped.

[133] *Id.*

[134] *Id.*

[135] Adam Hayes, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, INVESTOPEDIA (Sept. 1, 2020), https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp.

[136] *Id.*

[137] *Id*.

[138] *Id.*

[139] *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, (last visited Sept. 16, 2020), https://financialservices.house.gov/uploadedfiles/4173briefsummaryofd-f.pdf.

[140] *Id.*

relationships with hedge funds and private equity funds."[141] The Act also allowed the Securities and Exchange Commission (SEC) to regulate the trading of financial derivative products, like CDOs and CDSs, to increase transparency and prevent "too big to fail" institutions from making the same mistakes of the 2008 fallout.[142]

Critics of the Dodd-Frank Act worried that the Act would prevent American companies from competing with foreign competitors due to an undue burden placed on small banks.[143] Some worried the Act was too vague, leaving much discretion in the hands of the elected regulators to form policy over the banks.[144] The Wharton School of the University of Pennsylvania finance professor, Jeremy Siegel, said, "The regulators who are chosen could do harm or they could do good, depending on their view and understanding of the problems."[145] Siegel likes much about the legislation, including the establishment of the Financial Stability Oversight Council and clear order for claims payments to debt and equity holders.[146] However, he warned that the Council could become overbearing and prevent new growth, if the regulators mistake innovation in financial services for overexpansion of the financial services market.[147]

On May 24, 2018, President Donald Trump signed the Economic Growth, Regulatory Relief, and Consumer Protection Act, which changed various provisions of the Dodd-Frank Act.[148] This legislation, however, did not repeal and replace the Dodd-Frank Act as the CHOICE Act of 2017 attempted.[149] The new Act continues to impose tough regulation on banks, grants new authority and discretion to the Fed, and leaves the CFPB

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[141] *Id.*

[142] *See* Hayes, *supra* note 135.

[143] *Id.*

[144] '*A Major Transformation': The Pros and Cons of the Dodd-Frank Act*, WHARTON SCH. OF UNIV. OF PA. (Sept. 7, 2010), https://knowledge.wharton.upenn.edu/article/a-major-transformation-the-pros-and-cons-of-the-dodd-frank-act/.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *See* Hayes, *supra* note 135.

[149] Aaron Klein, *No, Dodd-Frank Was Neither Repealed nor Gutted. Here's What Really Happened*, BROOKINGS (May 25, 2018), https://www.brookings.edu/research/no-dodd-frank-was-neither-repealed-nor-gutted-heres-what-really-happened/.

intact.[150] The Dodd-Frank Act raised the enhanced regulation threshold by the Fed from $50 billion to $250 billion, but retained the Fed's right to apply these enhanced regulations on any specific bank with assets over $100 billion.[151] Aaron Klein from the Brookings Center on Regulation and Markets critiqued the new legislation, worrying that the deregulation of banks will simply boost profit margins rather than promote lending and allow smaller banks to go undetected in promoting predatory mortgages for racial minorities.[152] Klein does have faith in the continuance of the Dodd-Frank framework under the new Act, so long as the new financial regulators exercise prudence in doing their jobs, positing that partisan changes in personnel could have just as much effect as overhauling the Dodd-Frank Act itself.[153]

C. *The Legal Fallout of the Subprime Mortgage Crisis*

The Subprime Mortgage Crisis not only spurred new legislation out of Washington, D.C., but also gave rise a slew of class-action lawsuits against some of the biggest lenders in the United States for noncompliance with consumer disclosure agreements.[154] Over 448 lawsuits were filed related to the housing crisis in the fifteen months leading up to June of 2008; forty-six percent of the 170 lawsuits filed between January and March of 2008 were borrower class actions.[155]

Bank of America faced some of the greatest exposure to mortgage litigation out of all lenders after purchasing Countrywide Financial in 2008 and Merrill Lynch & Co. in 2009.[156] In 2011, Bank of America settled for $315 million in its mortgage-securities lawsuits against its subsidiary Merrill Lynch & Co.[157] This suit was brought by various public retirement systems, including the lead plaintiff Public Employee's Retirement System of Mississippi, who had invested in mortgage-backed securities

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[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] Nick Carey, *Lawsuits Accelerate Amid U.S. Housing Crisis*, REUTERS (May 23, 2008), https://www.reuters.com/article/us-usa-subprime-lawsuits/lawsuits-accelerate-amid-u-s-housing-crisis-idUSN2351356120080523.
[155] *Id.*
[156] Dan Fitzpatrick & Chad Bray, *Merrill Lynch to Pay $315 Million to Settle Mortgage-Loans Lawsuit*, THE WALL STREET JOURNAL (Dec. 7, 2011), https://www.wsj.com/articles/SB10001424052970204770404577082201565957974.
[157] *Id.*

that were not insured or backed by the government.[158] Bank of America's stock suffered as a result of the pending litigation, leaving "shareholders . . . worried about the impact of United States regulatory reform, lackluster revenues, higher capital requirements from regulators and weak loan demand."[159] This lawsuit alone related to $17 billion worth of mortgage-backed securities, which plaintiffs allege made untrue statements or omitted the underwriting standards used in originating the underlying mortgages, including "maximum loan-to-value ratios used to qualify borrowers[,] the appraisals of the properties underlying the mortgages[,] the debt-to-income ratios permitted on the loans[,] and the ratings of the mortgage pass-through certificates themselves."[160] The lawsuit also alleged that third mortgages, which were more than two months behind on payments, in foreclosure, or repossessed and owed by the bank, made up fifteen of the nineteen securities plaintiffs purchased.[161]

Bank of America also reached settlements of $475 million with shareholders, $624 million with Countrywide Financial, and $1.1 billion with Assured Guaranty Ltd., who had insured many of Bank of America's poor-performing mortgage bonds.[162] In *American International Group, Inc. v. Bank of America Corp.*,[163] American International Group (AIG), another mortgage bond insurer, brought a $10 billion suit against Bank of America and its Countrywide Financial and Merrill Lynch groups, after losing $28 billion in investments.[164] Taxpayers had already given AIG $182.3 billion in bailout money.[165] In the suit, AIG investors alleged that Bank of America fraudulently misrepresented the mortgage-backed securities they were underwriting.[166] AIG brought its suit in New York state court, and Bank of America removed the case to the United States District Court for the Southern District of New York pursuant to the Edge

[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] Am. Int'l Grp., Inc. v. Bank of Am. Corp., 712 F.3d 775 (2d. Cir. 2013) (hereinafter "*The AIG Case*").
[164] Jonathan Stempel, *AIG Sues BofA for $10 Billion, Alleges 'Massive Mortgage Fraud,'* INSURANCE J. (Aug. 8, 2011), https://www.insurancejournal.com/news/national/2011/08/08/209850.htm.
[165] *Id.*
[166] *The AIG Case*, 712 F.3d at 775.

Act,[167] but the Second Circuit remanded the case to state court, saying that the removal was not authorized under the statute.[168]

Bank of America denied the allegations, blaming AIG for its recklessness in chasing high yields and profits through making its own informed decisions to invest in the mortgage-backed securities in question.[169] AIG also intervened in Bank of America's $8.5 billion settlement with twenty-two other investors, including BlackRock, Inc. and MetLife, Inc.[170] However, in 2014, AIG agreed to dismiss its suits in New York and California and not intervene in the $8.5 billion settlement after Bank of America agreed to settle AIG's claims for $650 million.[171]

In total, Bank of America faced over $91.2 billion in legal settlements, judgments, and regulatory fines between 2008 and 2014.[172] These included a $16.65 billion settlement with the United States Department of Justice (DOJ), "the largest civil settlement with a single entity in American history."[173] Of the settlement, roughly $10 billion

[167] 12 U.S.C. § 632. Under the Edge Act, all civil actions arising from transactions involving international and foreign banking are governed by United States laws and therefore subject to original jurisdiction under the district courts of the United States. *Id.* This act allows the defendant of any such suit to remove the suit from state court to the proper federal district court. *Id.*

[168] *The AIG Case*, 712 F.3d at 777. Bank of America argued that case included some mortgage-backed securities in United States territories including Puerto Rico, Guam, the Virgin Islands, and the Northern Marina Islands, thus entitling them to removal under the Edge Act. *Id.* at 778. The Court, however, did not agree with Bank of America's argument, stating that "in order for its grant of federal jurisdiction and removability to apply, the suit must have a federally chartered corporation as a party, and the suit must arise out of an offshore banking or financial transaction of that federally chartered corporation." *Id.* at 784.

[169] *See* Stempel, *supra* note 164.

[170] Karen Freifeld, *BofA Pays AIG $650 Million to Settle Mortgage Disputes*, REUTERS (July 16, 2014), https://www.reuters.com/article/us-bankofamerica-mbs-settlement/bofa-pays-aig-650-million-to-settle-mortgage-disputes-idUSKBN0FL1B720140716.

[171] *Id.*

[172] John Maxfield, *The Complete List: Bank of America's Legal Fines and Settlements Since 2008*, MOTLEY FOOL (Oct. 1, 2014), https://www.fool.com/investing/general/2014/10/01/the-complete-list-bank-of-americas-legal-fines-and.aspx.

[173] Office of Public Affairs, *Bank of America to Pay $16.65 Billion Settlement in Historic Justice Department Settlement for Financial Fraud Leading Up to and During the Financial Crisis*, U.S. DEP'T OF JUSTICE (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

settled federal and state civil claims, and the remaining $7 billion went directly to homeowners and borrowers, who Bank of America's and its subsidiaries' conduct harmed.[174] Also included in its $91.2 billion total were settlements with the SEC (worth $7.65 billion), the FHFA (worth $9.5 billion), and Fannie Mae (worth $11.2 billion).[175]

Bank of America's ledger of legal fines and settlements makes Wells Fargo's $2.09 billion penalty from the DOJ look like "chump change." [176] Wells Fargo received this penalty from its violation of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) for selling mortgage-backed securities that it knew contained misstated income information and misrepresenting the quality of those securities.[177] In 2005, Wells Fargo loosened its requirements on housing loan applications by allowing borrowers to state their income without providing any supporting documentation.[178] "Wells Fargo sold at least 73,539 stated income loans that were included in [residential mortgage-backed securities] between 2005 to 2007, and nearly half of those loans defaulted, resulting in billions of dollars in losses to investors."[179] The DOJ noted that "[t]he claims resolved by this settlement are allegations only, and there has been no admission of liability."[180]

This was on top of Wells Fargo's $1.2 billion settlement it paid for its violations stemming from the FHA Direct Endorsement Lender Program.[181] Between 2001 and 2008, Wells Fargo misrepresented to the Department of Housing and Urban Development (HUD) that thousands of residential mortgage loans were eligible for FHA insurance when they

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[174] *Id.*
[175] *Id.*
[176] Office of Public Affairs, *Wells Fargo Agrees to Pay $2.09 Billion Penalty for Allegedly Misrepresenting Quality of Loans Used in Residential Mortgage-Backed Securities*, U.S. DEP'T OF JUSTICE (Aug. 1, 2018), https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-209-billion-penalty-allegedly-misrepresenting-quality-loans-used.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] Office of Public Affairs, *Wells Fargo Bank Agrees to Pay $1.2 Billion for Improper Mortgage Lending Practices*, U.S. DEP'T OF JUSTICE (Apr. 8, 2016), https://www.justice.gov/opa/pr/wells-fargo-bank-agrees-pay-12-billion-improper-mortgage-lending-practices.

were not, resulting in the federal government footing the bill for FHA insurance claims when some of those loans began defaulting in 2008.[182] This settlement, however, differs from Wells Fargo's FIRREA violation settlement in that it does admit liability for, among other violations, submitting the ineligible loans for FHA mortgage insurance and not self-reporting more than 2,900 problematic and fraudulent loans to the HUD.[183] HUD Inspector General David A. Montoya said,

> This matter is not just a failure by Wells Fargo to comply with federal requirements in FHA's Direct Endorsement Lender program – it's a failure by one of our trusted participants in the FHA program to demonstrate a commitment to integrity and to ordinary Americans who are trying to fulfill their dreams of homeownership.[184]

The DOJ has pursued other lenders guilty of similar misconduct, resulting in more than $4 billion in fines being returned to the FHA fund and the Treasury, as well as lawsuits where appropriate, according to Principal Deputy Assistant Attorney General Benjamin C. Mizer of the DOJ's Civil Division.[185] Mizer was grateful to the United States Attorney's Offices of the Southern District of New York and Northern District of California for cracking down on Wells Fargo in reaching this settlement.[186]

III. BIG BANKS OR BIG GOVERNMENT: WHO WAS REALLY RESPONSIBLE FOR THE CRISIS?

Although it was the banks bundling risky loans into falsely rated mortgage-backed securities and CDOs, many speculate as to the Federal Government's role in what lead to the crisis in 2008. For years, owning a home was integral to the American dream, something only white Americans could afford, leaving a large gap between them and minorities in the United States.[187] The 1990s and early 2000s saw pressure from both

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[182] *Id.*

[183] *Id.*; S*ee* United States v. Wells Fargo, N.A., No. 12–CIV–7527–JMF–JCF, 2016 WL 11572939 (S.D.N.Y. Apr. 8, 2016).

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] Daniel Press, *How the Federal Government Created the Subprime Mortgage Crisis*, FOUND. FOR ECON. EDUC. (Sept. 14, 2018),

political parties on the government to relax underwriting standards for mortgage loans to promote homeownership; democrats saw this as an opportunity to help racial minorities overcome the past of discriminatory housing laws and Republicans saw this as a way to give low-income households a piece of the American dream.[188] After the Great Depression, the FHA was created to insure mortgages and the Fannie Mae—and later, Freddie Mac—was established to buy mortgages insured by the FHA.[189] These government-sponsored enterprises (GSEs) would buy mortgage loans from lenders, package them into securities, and sell them to investors just like other banks in the United States.[190] However, there was an uneven application of the regulations, where the government GSEs were exempt from regulations that still applied to competing GSEs.[191] This resulted in government GSEs competing and frequently outperforming competitors with their larger and riskier investments.[192]

In 1992, the Clinton administration began implementing "affordable-housing goals" by requiring GSEs to lend a certain percentage of mortgage loans to low-income and minority groups.[193] The initial thirty percent quota slowly rose "to [forty percent] in 1996, then [fifty percent] in 2001, and up to [fifty-six percent] in 2008."[194] By June 30, 2008, roughly fifty-seven percent of the 55 million mortgages in the financial system were considered subprime or low quality mortgages.[195] However, it is unfair to blame the government as the sole cause of the Subprime Mortgage Crisis, as eighty-four percent of subprime loans made in 2006 were by private lenders.[196] It's a combination of Federal legislation, or the lack thereof, paired with private banking that lead to the crisis of 2008.

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https://fee.org/articles/how-the-federal-government-created-the-subprime-mortgage-crisis/.

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011), https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#6098064bf92f.

The Glass-Steagall Act of 1933 was originally passed in response to the stock market crash of 1929, effectively separating commercial banking from investment banking "to provide for the safer and more effective use of the assets of banks, to regulate interbank control, to prevent the undue diversion of funds into speculative operations, and for other purposes."[197] Congress hoped this would encourage banks to use credit towards industry, commerce, and agriculture rather than speculative investments.[198] This separation prevented commercial banks from using deposits and loans to underwrite securities and investment banks from cozying up to the commercial banks.[199] However, in 1999, President Bill Clinton passed the Financial Services Modernization Act (the Gramm-Leach-Bliley Act) as commercial banks began underwriting securities and selling insurance.[200] The Act gave the Fed supervisory powers to regulate the creation of these new financial holding companies (FHC) that allowed banks to be a part of a larger consolidated corporation involved in security and insurance underwriting whose total assets were less than $50 billion.[201] The Fed supervised these "umbrella" corporations and reviewed the reports of the state and federal authorities to protect the banks and their customers from risks taken by the FHC subsidiaries.[202]

With the repeal of the Glass-Steagall Act and the Fed reducing interest rates as low as one percent, asset managers began shifting their investments to high-yield-mortgage-backed securities and CDOs improperly marked with high tranche ratings.[203] The derivatives market soared while being essentially unregulated, "exempt from all oversight, counter-party disclosure, exchange listing requirements, state insurance supervision and, most important, reserve requirements."[204] AIG alone underwrote "$3 trillion in derivatives while reserving precisely zero dollars against future claims."[205] The SEC loosened its capital requirements on Wall Street's biggest banks—Goldman Sachs, Morgan

[197] Julia Maues, *Banking Act of 1933 (Glass-Steagall)*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/glass_steagall_act.

[198] *Id.*

[199] *Id.*

[200] Joe Mahon, *Financial Services Modernization Act of 1999, Commonly Called Gramm-Leach-Bliley*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/gramm_leach_bliley_act.

[201] *Id.*

[202] *Id.*

[203] *See* Denning, *supra* note 196.

[204] *Id.*

[205] *Id.*

Stanley, Merrill Lynch, Lehman Brothers, and Bear Stearns—which began leveraging investments at a 20:1, 30:1, and 40:1 ratio.[206] The Federal government overrode state predatory lending laws, allowing national lenders to sell riskier loan products in certain states.[207] Fannie Mae and Freddie Mac lost their market share to unregulated private lending firms, who relaxed their underwriting standards of credit scores, income, and loan-to-value ratios and sold these loan bundles to Wall Street.[208] This private firm and governmental oversight created the perfect storm heading directly for the subprime mortgage market, which lead to its collapse in 2008.[209]

Debate continues regarding whether private banks or the government are at fault for the cause of the Subprime Mortgage Crisis. Some blame the GSEs lowering their underwriting requirements in the 1990s to lure the private banks into drastically decreasing their underwriting standards; GSEs were buying mortgages with down payments as low as three percent by 1995 and zero percent by 2000.[210] Mayor of New York, Michael Bloomberg, said it was "Congress who forced everybody to go and give mortgages to people who were on the cusp" and that it is easy to blame the banks because "Congress certainly isn't going to blame themselves."[211] Others claim it was clearly the private banks at fault for the crisis because of their aggressive lobbying tactics to lower the capital requirements and repeal the Glass-Steagall Act that led to the Federal Government's deregulation of the financial sector.[212] However, some give credit to the Gramm-Leach-Bliley Act for easing the 2008 crisis by allowing banks "like Bear Sterns and Merrill Lynch to be acquired by FHCs rather than go bankrupt, or by allowing others like Goldman Sachs and Morgan Stanley to reorganize as FHCs."[213] Regardless of blame, GSEs, FHCs, and private firms alike learned the hard way what relaxing underwriting standards for mortgage loans will do to the national and global economy if proper oversight is not exercised.

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[206] *Id.* The net capitalization rule has a 12:1 ratio limit under normal SEC regulations. *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *See* Press, *supra* note 187.

[211] *See* Denning, *supra* note 196.

[212] *Id.*

[213] *See* Mahon, *supra* note 200.

IV. WHAT MILLENNIALS SHOULD LEARN FROM THE SUBPRIME MORTGAGE CRISIS BEFORE ENTERING THE MARKET

Rumors have been circulating since the beginning of 2019 that another recession will cause a slight dip in the real estate market, and these rumors are prompting questions from potential homebuyers.[214] Victims of the Subprime Mortgage Crisis may still suffer from the financial devastation of 2008. Skeptical Millennials may be weary of purchasing homes in the face of a future recession and in fear of a drastic decrease in home values. This begs the question: Will the looming recession ahead make buying a home more affordable? Will home prices drastically decrease and interest rates increase? Should buyers in the market wait for lower prices? The answer is—not necessarily.

This recession will not have the same effect on house prices as the last one did.[215] The 2008 recession was considered an anomaly in its effect on the housing market because the "recession [did not] cause the housing market to go into a freefall[; t]he housing market going into a freefall caused the recession."[216] The next recession will be more of a natural end to a booming economic cycle that is unrelated to defaulting mortgages.[217] Writer Jeff Andrews advises Millennials seeking to purchase a home to prioritize their overall financial situation, rather than try to ride the market;[218] steady income and current savings have a much greater effect on one's ability to purchase a home than the housing market's potential change in prices.[219]

Andrews, however, does caution Millennials to look at the markets in which they plan to purchase a home as well.[220] Supply spikes of homes along the west coast are signaling an overdue housing price

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[214] Clare Trapasso, *As Recession Fears Rise, Here's the Lowdown for Real Estate*, REALTOR.COM (Aug. 26, 2019), https://www.realtor.com/news/trends/how-the-coming-recession-will-affect-the-housing-market/.

[215] Jeff Andrews, *Will a Coronavirus-induced Recession Make it Easier to Buy a House?*, CURBED.COM (Apr. 9, 2020), https://www.curbed.com/2019/8/29/20837282/Millennials-recession-homebuying-prices.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

correction that may make it advantageous to wait to purchase a home.[221] But across the country, there isn't a high volume of homes being built to cause another 2008 surplus.[222] The anticipation of another recession may cause a housing shortage as sellers decide to postpone selling their homes, and while that normally would cause an increase in prices, that could be mitigated by the recession because fewer people can afford to buy.[223] Some anticipate prices to remain flat as home sales stagnate or even dip, and others expect a marginal decrease due to price corrections and slower sales.[224]

Millennials who are moving to new areas should also consider whether renting or buying a home is the more economically sound decision. This can depend on several factors, including how long you plan to live in one location and the market of the new city.[225] The Simple Dollar compares the average rental and mortgage payments of Pittsburgh and New York City.[226] In Pittsburgh the average monthly rental payment is $1,069 while the average mortgage payment is $560.[227] Over a period of five years, the choice to buy a home seems obvious when considering a savings of $30,540 from renting and gaining equity in a home.[228] However, owning a home entails other expenses not incurred when renting a property, such as maintenance costs, expensive repairs, homeowner's insurance, property taxes, and cost related to closing on the purchase.[229] Furthermore, a drop in housing prices could leave you selling your home at a net loss and still having to pay a realtor's commission on top of that.

Now consider New York City, where the average rental payment is $2,056 and the average mortgage payment is $2,399.[230] Housing prices in New York continue to increase annually.[231] "[T]he total market value of taxable real estate in New York surg[ed] from $969.4 billion in early 2015

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221 *Id.*
222 Trapasso, *supra* note 214.
223 *Id.*
224 *Id.*
225 Holly Johnson, *Home Financing Guide*, THE SIMPLE DOLLAR (Jan. 28, 2020), https://www.thesimpledollar.com/loans/home/home-financing-guide/.
226 *Id.*
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.*

to $1.072 trillion for the current fiscal year."[232] In a booming market like New York City, owning a home for a short term can still have substantial economic incentive. Millennials should consider how long they plan to live in one place, when they plan on having kids, and what their change in income may look like in years ahead before switching from renting to purchasing a home.

Understanding interest rates is important when it comes to buying and financing a home. A borrower's credit score, the loan-to-value (LTV) ratio, and the debt-service coverage ratio (DSCR) all factor into the amount of a loan and the interest rates lenders are willing to give.[233] The LTV is calculated by dividing the loan amount by the purchase price of the home.[234] Providing a higher down payment, and therefore having a lower the LTV ratio, allows lenders to consider the loan less risky.[235] Lenders calculate the DSCR by dividing the borrower's monthly net income by the mortgage costs.[236] The greater the DSCR, the more likely the borrower can cover the cost of the mortgage payment.[237] Having a good credit score, larger down payment, and adequate monthly income can be advantageous in securing or negotiating a lower interest rate, which can save borrowers thousands of dollars over time.

Mortgage interest rates are currently low and expected to stay that way. In 2019, interest rates were below four percent and dipped as low as 3.49% during the year.[238] And although interest rates are subject to change based on the economy and current events, mortgage rates are expected to stay below four percent in the upcoming year.[239] Homebuyers may not have much incentive to wait for lower rates but should consider if they can afford fifteen-year fixed mortgages over thirty-year fixed mortgages. Interest rates are currently around 3.16% for fifteen-year fixed loans and

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[232] *Id.*

[233] Robert Stammers, *Financing Basics for First-Time Homebuyers*, INVESTOPEDIA (Nov. 26, 2019), https://www.investopedia.com/articles/mortgages-real-estate/08/homebuyer-financing-option.asp.

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] Tim Lucas, *January 2020 Mortgage Rates Forecast (FHA, VA, USDA, Conventional)*, THE MORTGAGE REPORTS (Dec. 20, 2019), https://themortgagereports.com/32667/mortgage-rates-forecast-fha-va-usda-conventional.

[239] *Id.*

3.81% for thirty-year loans.[240] Although fifteen-year terms come with higher monthly payments, it builds equity faster and can save you thousands of dollars in the long run.

For homebuyers looking to enter the market, it is important to understand the procedural and financial process of purchasing a home. One of the biggest hurdles homebuyers face when entering the market is having a large enough down payment. Traditionally, lenders prefer a down payment twenty percent of the value of the home, but there are new programs that allow lower down payments for first-time homebuyers.[241] Conventional loans, for example, are not federally insured or guaranteed, but conform to the standards set by the GSEs Fannie Mae and Freddie Mac[242] and offer down payments as low as three percent down.[243] FHA loans also allow down payments as low as 3.5%.[244] However, a lower down payment can come at the expense of a higher interest rate, and lenders may require buyers to purchase private mortgage insurance.[245] Private mortgage insurance "insulate[s] the lender from default by transferring a portion of the loan risk to a mortgage insurer."[246] Lenders normally require mortgage insurance only if your LTV ratio is above eighty percent, meaning that you have less than twenty percent equity in your home.[247] Once you reach the twenty percent equity threshold, the private mortgage insurance is automatically eliminated and you no longer have to make that monthly payment.[248]

Millennials who plan to finance their homes should seek preapproval from multiple lenders, and compare the best mortgage rates to understand how much they can afford before they begin looking.[249] This

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[240] Natalie Campisi, *Current Mortgage Rates- Mortgage Interest Rates Today*, BANK RATE (Jan. 8, 2020), https://www.bankrate.com/finance/mortgages/current-interest-rates.aspx.

[241] Emily Starbuck Crone, *Tips for First-Time Homebuyers*, NERDWALLET (Mar. 29, 2019), https://www.nerdwallet.com/article/mortgages/tips-for-first-time-home-buyers.

[242] *See* Stammers, *supra* note 233.

[243] *See* Crone, *supra* note 241.

[244] *Id.*

[245] *See* Stammers, *supra* note 233.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *See* Crone, *supra* note 241.

will make you look like a more serious buyer to sellers and can give the buyer an advantage over other buyers in a competitive market when you have a preapproval letter in hand.[250] Millennials should also remember to budget for closing costs, either pay them upfront or lump them into the total of the mortgage loan.[251] *Caveat emptor*: do not make the mistake of skipping a home inspection or purchasing inadequate homeowner's insurance. Home inspections will reveal potential issues or repairs (depending on the thoroughness) that need to be addressed immediately and can be helpful when negotiating the purchase price of the home.[252] Compare different home insurance rates to find the best price and understand what each policy covers; cheaper policies may have fewer protections and higher deductibles.[253] Furthermore, if the home is in a high-risk zone for fires, flooding, or earthquakes, buyers may want to purchase additional coverage to ensure they are properly covered.[254]

V. CONCLUSION

Generation Y has had a complicated relationship with the real estate market that is slowly but surely mending. The 2010s have seen steady economic growth that provides reassurance for those that are skeptical because of the risks of buying a home. Confidence in the market is returning as new business and job opportunities become available for educated Millennials. To prevent a reoccurrence of the Subprime Mortgage Crisis, Millennials should learn from the mistakes of the generations before when purchasing a home.

Trends have begun to change as Millennials now represent the largest market share of homebuyers.[255] Student and personal debt still pose a challenge to entering the market, but the wealth gap between Millennials and the previous generations is closing as Millennials become the wealthiest and most educated generation in United States' history.[256] Now out of school, Millennials are ready to make real investments in property by moving to the suburbs to start families and settle down. As Millennials

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[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *See* Gorman, *supra* note 5.
[256] William G. Gale et al., *The Wealth of Generations, with Special Attention to the Millennials*, BROOKINGS (May 28, 2020), https://www.brookings.edu/research/the-wealth-of-generations-with-special-attention-to-the-millennials/.

begin entering the market, they are changing the way the real estate industry must cater to its clients. New technology is becoming increasingly important in the way people search for and purchase homes, which is forcing realtors to reassess what new homebuyers want in an agent-buyer relationship.

Millennials should heed the mistakes of the Subprime Mortgage Crisis when considering what kind of mortgages to borrow from lenders. The early 2000s were a vicious cycle of predatory lending by banks, ambitious purchasing and borrowing by homebuyers, and laissez-faire regulation of the investment banking industry. Lenders issued subprime mortgages to unqualified borrowers with low credit scores, little to no down payment, and no proof of income. Lenders then bundled these loans into mortgage-backed securities and financial derivative products like CDOs and CDSs and sold them with inflated tranche ratings for huge commissions. Millions defaulted, foreclosure rates skyrocketed, and people lost their homes, retirement plans, and investments overnight.

The government stepped in and took swift action with HERA to help homeowners refinance their mortgage loans and prevent further growth of the foreclosure rate. President Bush passed the EESA, which provided over $400 billion in bailouts for banks and American corporations and increased the FDIC limit from $100,000 to $250,000.[257] President Obama's ARRA promoted economic growth and ended the recession within five months by pouring over $800 million into creating jobs, investing in education, research, and infrastructure, and cutting taxes for many Americans.[258] The Dodd-Frank Wall Street Reform and Consumer Protection Act and President Trump's Economic Growth, Regulatory Relief, and Consumer Protection Act worked together to regulate the largest financial institutions of the United States to prevent

[257] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 100th Cong. (2008), https://www.congress.gov/110/plaws/publ343/PLAW-110publ343.pdf.

[258] Office of the Press Secretary, *FACT SHEET: Seven Years Ago, the American Recovery and Reinvestment Act Helped Bring Our Economy Back from the Brink of a Second Great Depression*, PRESIDENT BARACK OBAMA WHITE HOUSE, https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/fact-sheet-seven-years-ago-american-recovery-and-reinvestment-act-helped.

another complete freefall of the housing market.[259] The government's economic relief and stimulus investments helped stabilize the economy and refuel the United States job and housing markets after the devastation in 2008.

Litigation against the largest banks and mortgage lenders in the country followed. Bank of America and its subsidiaries faced lawsuits from AIG, the DOJ, the FHA, the SEC, and countless others, and paid over $91.2 billion in settlements, judgments, and penalties for its hand in the devastation of the economy.[260] Wells Fargo also paid billions of dollars for its violations of FHA regulations by knowingly misrepresenting its mortgage-backed securities and not self-reporting problematic loans.

The Subprime Mortgage Crisis became a blame game with banks and Congress pointing fingers at each other to assign fault. The Clinton Administration pushed for lower requirements from lenders to encourage homeownership and repealed the Glass-Steagall Act. GSEs like Fannie Mae and Freddie Mac accepted small down payments and pushed competitive quotas with less government regulation to issue more loans to borrowers. Private investment banks and firms chasing higher yields lobbied for lower capital requirements and underwrote mortgage-backed securities and financial derivative products with riskier loans.

Will the next recession influence the housing market? Potentially, just as any economic recession does. But the weight of the recession will be minimal compared to the Subprime Mortgage Crisis. Now may be a great time to buy. Interest rates remain low, making for an opportune time to invest in real estate. Millennials should understand the local housing market in the area where they are looking to purchase before deciding whether it is the right time to buy.

Buyers should be conscious of what they can afford before borrowing a loan and purchasing a home. Understanding how to properly finance a mortgage loan will help new buyers set themselves up responsibly down the road in uncertain markets. If possible, saving for a larger down payment will put borrowers ahead of the curve when they look

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[259] *See Economic Growth, Regulatory Relief, and Consumer Protection Act (P.L. 115-174) and Selected Policy Issues*, CONG. RSCH. SERV. (June 6, 2018), https://www.everycrsreport.com/reports/R45073.html.

[260] John Maxfield, *The Complete List: Bank of America's Legal Fines and Settlements Since 2008*, MOTLEY FOOL (Oct. 1, 2014), https://www.fool.com/investing/general/2014/10/01/the-complete-list-bank-of-americas-legal-fines-and.aspx.

at financing options. Fixed-rate loans and steady income will help curtail the risks of homeownership during financially troubling times. Buyers should also consider whether purchasing is the best financial decision for their current stage in life. While being a homeowner is exciting and rewarding, renting may still be the best fit for Millennials who prefer flexibility or are uncertain of their next steps.

The Subprime Mortgage Crisis created an economic gap too wide for many Millennials to close until now. And as Millennials enter the market, lenders should be vigilant to ensure that the loans they issue are solid investments that adhere to the requirements of the Federal Government to safeguard against another mortgage crisis. With safe investments and stricter regulation, it will be up to the rest of the market to make way for the Millennial generation and adapt to the new age of homebuying.