Owning up to the Problems:

Limiting the Use of an Assets Test for Determining Home Energy Assistance Eligibility

April 2013

Prepared by:

Roger D. Colton
Fisher, Sheehan and Colton
Public Finance and General Economics

Belmont, MA

Table of Contents

Using an Assets Test in Non-Energy Programs 1

The Low-Income Home Energy Assistance Program (LIHEAP). 5

LIHEAP Income Eligibility Limitations. 8

Eligibility to be Based on "Heating Cost to Income Ratio Alone" 8

Assets and LIHEAP Eligibility Based on Income. 10

The Unavailability of Assets to Meet Household Financial Exigencies. 14

The Treatment of Tenant and Homeowner Households. 19

Categorical Eligibility and Asset Tests. 22

The Aged as a Statutorily-Targeted Population for LIHEAP. 25

Administrative Problems with Implementing an Assets Test. 28

Summary and Conclusions. 29

As resources become tighter for distribution as home energy assistance, whether they are directed toward rate affordability assistance for public utilities,[1] or the distribution of energy assistance through federal[2] and state[3] grant programs, one eligibility limitation that some program administrators seek to impose involves an assets test.[4] Through an assets test, an otherwise income-eligible household might be excluded from receiving assistance if they own assets with a value beyond prescribed limits.[5]

The analysis set forth below concludes that for the federal Low-Income Home Energy Assistance Program (LIHEAP),[6] use of an assets test in eligibility determinations is inappropriate. In any event, the use of an assets test is difficult (and expensive) to administer and contrary to public policy. Section 1 below will examine assets tests for public programs not involving energy assistance. Section 2 will examine the implementation of an assets test within the context of the federal LIHEAP statute. Section 3 will consider an assets test within a broader public policy context involving home energy assistance.

Using an Assets Test in Non-Energy Programs

Assets tests have been roundly criticized for public assistance programs such as Medicaid,[7] the Supplemental Nutrition Assistance Program (SNAP) (formerly known as Food Stamps),[8] and Temporary Aid for Needy Families (TANF).[9] From the state's perspective, the elimination of an

---

[1] See e.g., § 305 ILCS 20/18 (Illinois 2012); see also, 4 Code of Colorado Regulation (CCR), §§ 3412, et seq. (2012); *Policy Statement on Customer Assistance Programs (CAP)*, Pennsylvania Public Utility Commission, Docket No. M-00920345 (July 2, 1992).
[2] See e.g., Low-Income Home Energy Assistance Program (LIHEAP). 42 U.S.C. §§ 8621, et seq. (2012).
[3] See generally, www.ncat.org/liheap for an inventory of state LIHEAP supplements.
[4] See e.g., *PECO Energy Company Universal Service and Energy Conservation plan for 2012 – 2015 Submitted in Compliance with 52 PA. Code §§54.74 and 62.4*, Docket No. M-2012-2290911 (Utility proposes to use assets test to determine eligibility for rate discount program for electric customers).
[5] "Assets" might include items such as homes, vehicles, savings accounts, retirement accounts, life insurance, and the like.
[6] 42 U.S.C. §§ 8621 et seq. (2012).
[7] For states with and without asset tests for Medicaid, see generally, Kaiser Family Foundation (January 2013). "No Asset Tests Required (Or Asset Test Limit) for Children's Medicaid and CHIP," available at www.statehealthfacts.org/comparetable.jsp?cat=4&ind=228 (last accessed March 23, 2013); see also, Kip Piper (June 2010). "Medicaid Expansion: Briefing for Medicaid Health Plans of America," Medicaid Health Plans of America: Washington D.C.
[8] For states with and without asset tests for SNAP, see generally, Food Research and Action Center (FRAC) (2013). "Expanding Access to SNAP: Eliminating the Asset Test," available at http://frac.org/newsite/wp-content/uploads/2009/05/map_eliminating_asset_test.pdf, last accessed on March 23, 2013; see also, FRAC (March 2009). "Heat and Eat: Using Federal Nutrition Programs to Soften Low-Income Households' Food/Fuel Dilemma," at 5 – 6, Food Research and Action Center: Washington D.C.
[9] See generally, Ethan Geilling, et al. (2012). "Eliminating Assets Tests: New Research, Challenges and Approaches," presentation to 2012 Assets Learning Conference, Corporation for Enterprise Development (CFED), available at www.eiseverywhere.com/file_uploads/94df60ae06b17ab32b7477886b06a9c7_CS1_EliminatingAssetTests_Combined.pdf.

assets test offers two cost-saving advantages. First, it reduces the administrative costs of implementing public assistance programs.[10] As one researcher found, "many of the states that eliminated asset tests in Medicaid or TANF did so to ease the workload of their caseworkers, to achieve administrative savings, and to simplify and streamline the eligibility processes for families."[11] In Oklahoma, this researcher reported, "removing the asset test for eligibility in Medicaid reduced the time needed to process applications."[12] In Arizona, the state "eliminated the asset test for the Medicare Savings Programs in 2001 after conducting a fiscal impact study"; that study "found that savings on administrative costs related to documenting assets roughly equaled the costs of benefits for additional persons who would enroll in the program."[13]Another researcher found that the "lack of consistency across programs [as to whether or not to use an assets test] makes it difficult to consolidate the applications of multiple programs into a single application," resulting in "costly and counterproductive inefficiencies."[14] Other states studied by the Kaiser Commission on Medicaid and the Uninsured, such as Pennsylvania and Missouri, reported that doing away with asset tests had led to savings in both time and money.[15]

A second cost savings arises for states because eliminating use of an assets test promotes self-sufficiency and reduces the time during which households receive assistance.[16] As Paulhus reported in West Virginia, "if families can accumulate savings toward education or retirement,

---

[10] "West Virginia would benefit from the elimination of asset tests. These tests are resource-intensive and expensive to administer, but have little effect on limiting eligibility. The elimination of asset tests should. . .ease the burden on eligible workers and reduce administrative costs." Elizabeth Paulhus (October 2011). "Save Up, Not Spend Down: Eliminating the Asset Test for Families in Medicaid and TANF," West Virginia Alliance for Sustainable Families: Charleston (WV).

[11] Save Up, Not Spend Down, supra note 10. See also, Joel Ferber (2004). "Preliminary Observations about the Report of the House Interim Committee on Medicaid Cost and Containment: Analysis of Key Provisions," Missouri Budget Project: St. Louis (MO) ("Missouri and other states eliminated assets tests for these Medicaid beneficiaries because they were administratively burdensome and resource-intensive for the State agency and created barriers to health care access for children and families."); see also, Lisa Chimento, et al. (2003). "Simplifying Medi-Cal Enrollment: Options for the Assets Test," Medi-Cal Policy Institute: Oakland (CA).

[12] Id. ("According to state officials, [removing the asset test] reduced administrative costs by $3.5 million. Even with an increase in benefits from additional caseloads, Oklahoma estimated that it would save at least $1.2 million.")

[13] Laura Summer and Les Thompson (2004). "How Asset Tests Block Low-Income Medicare Beneficiaries from Needed Benefits," prepared for the Commonwealth Fund, Health Policy Institute, Georgetown University: Washington D.C.

[14] Utah Health Policy Project (2009). "Remove Utah's Medicaid Asset Test: Eliminate Barriers to Self-Sufficiency," Utah Health Policy Project: Salt Lake City (UT).

[15] Save Up, Not Spend Down, supra note 10, citing Vernon Smith, et al. (2001). "Eliminating the Medicaid Asset Test for Families: A Review of State Experiences," The Kaiser Commission on Medicaid and the Uninsured: Washington D.C.

[16] "If families can accumulate assets without fear of losing assistance or being ineligible when they need assistance, they may become increasingly more self-sufficient and use Medicaid or TANF for shorter, more temporary periods. In the case of Medicaid, this would save the state money." Save Up, Not Spend Down, supra note 10, at 1. See also, Leslie Parrish (2005). "To Save or Not to Save? Reforming Asset Limits in Public Assistance Programs to Encourage Low-Income Americans to Save and Build Assets," New America Foundation: Washington D.C.

then they will be better able to support themselves with less assistance from the state. In turn, this should lead to reduced state expenditures."[17]

> The Office of Community Services, an agency of the U.S. Department of Health and Human Services has explained that asset building rather than income generation is instrumental to ending the cycle of poverty. According to the agency, 25% of households would not be able to sustain themselves for more than three months if they lost their income source, and 47% of American children live in households without significant financial assets. Finally, research conducted by the agency has established that the divorce rate is lower for families with assets, that families with assets are healthier, and that future generations of families with assets are less likely to live in poverty.[18]

In contrast to these state-oriented interests, from the perspective of the household, the elimination of an assets test provides both short- and long-term benefits. In the short-term, "assets can protect families from losses of income caused by unemployment or reduced wages, and unexpected occurrences such as car repairs or medical expenses. Having assets, usually in the form of savings that can be accessed quickly and easily, enables families to continue making ends meet even when income has been lost."[19] One Utah researcher reports that the state's assets test "prevents Medicaid enrollees from. . .building an emergency fund for when the car breaks down."[20] Forcing these households to liquidate their long-term assets (or whatever equity value they might have in those assets) in order to meet a short-term financial crisis is exactly the wrong step for a state public assistance office to take.

The inability to accumulate and keep savings generates an adverse impact on the long-term well-being of aging persons in particular. The problem arises because retirement savings of the aged get drawn-down over a multi-year period.

> Savings amounts that may sound high at first blush would contribute only a small amount of income if drawn down in regular monthly installments throughout an

---

[17] Save Up, Not Spend Down, supra note 10, at 9, citing Neuberger, et al. (2005). "Protecting Low-Income Families' Savings: How Retirement Accounts are Treated in Means-Tested Programs and Steps to Remove Barriers to Retirement Savings," The Retirement Security Project: Washington D.C.

[18] Vada Waters Lindsey, "Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction," 44 U. Mich. J.L. Reform 83, 87 - 88 (2010) (internal citations deleted).

[19] Save Up, Not Spend Down, supra note 10, at 2 ("Since the use of assistance programs tends to be cyclical, families should be able to retain their assets for when they become ineligible for services or choose to leave a program. Under the current system, families exiting Medicaid would not only lose health care coverage, but also have less than $1,000 in assets. Families leaving WV Works would no longer have income assistance, however meager, and would have less than $2,000 in assets.")

[20] Utah Health Policy Project, supra note 14 ("The asset test prevents Medicaid enrollees from. . .building an emergency fund for when the car breaks down.") See also, Orszag, P. (2001). "Asset Tests and Low Saving Rates among Lower-Income Families," Center on Budget and Policy Priorities: Washington D.C.

> individual's retirement. One analysis found that if Medicare beneficiaries' total countable assets –not just their retirement savings—were drawn down in monthly installments over their expected lifespan (based on age and gender), 90 percent of beneficiaries who otherwise have income below the poverty line would *still* have income below the poverty line. (emphasis in original)[21]

In the long-term, "assets have a powerful intergenerational effect."[22] Not only are children in families with assets able to access "opportunities like better schools, which in turn, connect them to better prospects in the future," but also "when these children grow older, they often receive transfers from their parents in the form of help with a down payment on a house, college tuition, or money for a car."[23]

In short, "the short- and long-term benefits of assets can help families build economic security by providing them with stability, opportunity and mobility."[24] Asset limits, one research organization concluded, "which were originally created to ensure that public resources did not go to 'asset rich' individuals, are a relic of entitlement policies that in some cases no longer exist."[25] According to CFED, "cash welfare programs. . .now focus on quickly moving individuals and families to self-sufficiency, rather than allowing them to receive benefits indefinitely. Personal savings and assets are precisely the kinds of resources that allow people to move off public benefit programs. Yet asset limits can discourage anyone considering or receiving public benefits from savings for the future."[26] The adverse impact of an assets test on savings is not simply theoretical. It has been empirically documented on numerous occasions.[27]

---

[21] Retirement Security Project (2008). "Removing Barriers to Retirement Saving in Medicaid and Supplemental Security Income," Retirement Security Project: Washington D.C., citing Marilyn Moon, et al. (June 2002). "Medicare Beneficiaries and their Assets: Implications for Low-Income Programs," The Henry J. Kaiser Family Foundation: Menlo Park (CA).

[22] Save Up, Not Spend Down, supra note 10. See also, Marilyn Moon, et al. (2002). "Medicare Beneficiaries and their Assets: Implications for Low-Income Programs," Henry J, Kaiser Family Foundation: Menlo Park (CA).

[23] Save Up, Not Spend Down, supra note 10; see also, Henry Chen and Robert Lerman (2005). "Do Asset Limits in Social Programs Affect the Accumulation of Wealth?", Urban Institute: Washington D.C.

[24] Save Up, Not Spend Down, supra note 10; see also, Removing Barriers to Retirement Savings, supra note 21.

[25] Corporation for Enterprise Development (October 2012). "Lifting Asset Limits in Public Benefit Programs," CFED: Washington D.C.

[26] Lifting Asset Limits, supra note 25; see also, Rourke O'Brien (2006). "Ineligible to Save? Asset Limits and the Savings Behavior of Welfare Recipients," New America Foundation: Washington D.C.

[27] Gordon McDonald, et al. (June 2005). "The Effect of Asset Tests on Saving," Retirement Security Project: Washington D.C., citing, R. Glenn Hubbard et al. (1995), "Precautionary Saving and Social Insurance," *Journal of Political Economy*, 103(2):360; Elizabeth Powers (1998). "Does Means Testing Welfare Discourage Saving: Evidence from a Change in AFDC Policy in the United States," *Journal of Public Economics*, 68:33; Jonathan Gruber and Aaron Yelowitz (1999). "Public Health Insurance and Private Savings," *Journal of Political Economy*, 106(6); Alex Maynard and Jiaping Qiu (April 2005). "Public Insurance and Private Savings: Who is Affected and by How Much," paper presented at the University of Albany; James Ziliak (2003). "Income Transfers and Assets of the Poor," *The Review of Economics and Statistics*, 85(1).

The Low-Income Home Energy Assistance Program (LIHEAP).

The federal LIHEAP program provides assistance to meet the home energy needs of income eligible households.[28] Under the LIHEAP statute, the term "home energy need" is defined to be limited to home heating and cooling costs.[29] As a federal block grant[30] program,[31] the federal government does not provide detailed oversight of state administration of LIHEAP.[32] Instead, the federal LIHEAP office,[33] has delegated broad authority to each state to administer the specifics of how LIHEAP is to be delivered so long as state program rules are not clearly in conflict with the federal statute.[34] Each state, however, must submit a "State Plan" each year,[35] promulgated after public input.[36] In addition, the state's governor (or a gubernatorial designee) must sign a list of "assurances" that certain statutorily-imposed program standards will be met.[37]

---

[28] 42 U.S.C. § 8621(a) (2012) ("The Secretary is authorized to make grants, in accordance with the provisions of this title, to States to assist low-income households, particularly those with the lowest incomes, that pay a high proportion of household income for home energy, primarily in meeting their immediate home energy needs.")

[29] 42 U.S.C. § 8622(6) (2012) ("The term 'home energy' means a source of heating or cooling in residential dwellings.")

[30] "In the late 1970s, the Advisory Commission on Intergovernmental Relations (ACIR) developed a list of characteristics of block grants, saying, 'a block grant may be defined as a program by which funds are provided chiefly to general purpose governmental units in accordance with a statutory formula for use in a broad functional area, largely at the recipient's discretion.'" Margy Waller (December 2005). "Block Grants: Flexibility vs. Stability in Social Services," The Brookings Institution, Center on Children and Families, Policy Brief #34, Washington D.C. According to Waller, "[p]roposals to block grant programs that previously guaranteed benefits to individuals who met a set of defined qualifications (called entitlements) present special issues because shifting from the guarantee to fixed funding ends the individual entitlement, as occurred with the welfare legislation in 1996." Id.

[31] See generally, 45 C.F.R. 96 (2012).

[32] See generally, *Copeland v. Perales*, 141 F.R.D. 11, 19 (NY Dist. 1992). ("The Court notes that Congress intended that states participating in LIHEAP 'be provided with the broadest possible latitude in the use of block grant funds and be free from all but the most minimal and necessary federal administration and regulatory direction.' Legislative history, *Pub. L. 97-35*, p. 909, 1981 U.S.C.C.A.N., Vol 2, pp. 396, 933.")

[33] The federal LIHEAP office is the Department of Health and Human Services, Administration for Children and Families, Office of Community Service, Division of Energy Assistance.

[34] See, note 38, infra.

[35] 42 U.S.C. § 8624(a)(1), (c)(1) (2012). ("Each State desiring to receive an allotment for any fiscal year under this title shall submit an application to the Secretary. . .As part of the annual application required in subsection (a), the chief executive officer of each State shall prepare and furnish to the Secretary, in such format as the Secretary may require, a plan. . .")

[36] 42 U.S.C. § 8624(c)(2) (2012) ("Each plan prepared under paragraph (1) and each substantial revision thereof shall be made available for public inspection within the State involved in such a manner as will facilitate timely and meaningful review of, and comment upon, such plan or substantial revision.")

[37] 42 U.S.C. § 8624(c)(1)(F) (2012). The LIHEAP assurances include, for example, assurances that the state will conduct outreach activities designed to assure that eligible households, especially households with elderly individuals or disabled individuals, or both, and households with high home energy burdens; will provide, in a timely manner, that the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs or needs in relation to income, taking into account family size; will limit expenditures on administration to no more than 10% of program funds, and the like.

While the LIHEAP statute confers substantial latitude on the states to administer LIHEAP as they see fit,[38] that latitude is not unfettered.[39] Two South Dakota cases from the Eighth Circuit Court of Appeals, for example, successfully challenged state restrictions on providing LIHEAP assistance to households also receiving utility allowances from the U.S. Department of Housing and Urban Development (HUD) for assisted housing. The first was *Crawford v. Janklow*,[40] a case in which a low-income tenant challenged a South Dakota state LIHEAP policy categorically excluding persons living in public or subsidized housing from receiving LIHEAP assistance.[41]

The State argued in *Crawford* that it was appropriate to withhold LIHEAP payments since the tenants had other resources available to help pay their utility bills, those resources being the "utility allowances" provided to tenants of public and assisted housing. The effect of the State's policy, the Eighth Circuit found, was that LIHEAP "withheld assistance. . .regardless of the relative incomes of families excluded because of their Section 8 residence as compared to families actually receiving [LIHEAP] subsidies."[42] That exclusion was unlawful, the Eighth Circuit held. According to the Court:

> The federal home energy assistance statute expressly limited the class of persons to which the states might award benefits to (1) those in households in which at least one individual received aid to families with dependent children, supplemental security income payments, food stamps, or various veterans' benefits; or (2) those in households meeting certain maximum income levels. 42

---

[38] 45 C.F.R. §96.50(e) (2012). ("The Department recognizes that under the block grant programs the States are primarily responsible for interpreting the governing statutory provisions. As a result, various States may reach different interpretations of the same statutory provisions. This circumstance is consistent with the intent of and statutory authority for the block grant programs. In resolving any issue raised by a complaint or a Federal audit the Department will defer to a State's interpretation of its assurances and of the provisions of the block grant statutes unless the interpretation is clearly erroneous.") See also, *Cabinet for Human Resources, State of Kentucky v. Northern Kentucky Welfare Rights Association*, 954 F.2d 1179 (6th Cir. 1992).

[39] See e.g., *Crawford v. Janklow*, 710 F.2d 1321 (8th Cir. 1983); *Clifford v. Janklow*, 733 F.2d 534 (8th Cir. 1984); *Boles v. Earl*, 601 F.Supp. 737 (W.D. Wisc. 1985); see also, LIHEAP Information Memorandum, "Use of LIHEAP Funds Coordinated with Vendor Assistance Programs" (July 10, 2010).

> "Any LIHEAP funds provided to low-income households to meet their home energy needs must be expended in accordance with the LIHEAP statute, HHS block grant regulations, State plan, and plan amendments. . .If a State wishes to coordinate its LIHEAP funds with a vendor's energy assistance program, such as a PIPP, the State must ensure that those LIHEAP funds continue to be governed by the LIHEAP statute, regulations and State plan.
>
> "If any LIHEAP funds coordinated with a vendor assistance program, including a PIPP program, are expended in a way that is different from the use of LIHEAP funds as described in the State's LIHEAP plan, the description for the use of LIHEAP funds under the vendor program must also be included in the LIHEAP plan. LIHEAP funds used by vendors in ways that are different than what is described in the LIHEAP plan may constitute an improper use of funds, and States may be held responsible for the repayment to HHS for the use of such funds."

[40] 710 F.2d 1321 (8th Cir. 1983).

[41] 710 F.2d at 1322.

[42] Id., at 1323.

> U.S.C. § 8624(b)(2) (Supp. V 1981). Within this class of persons, Congress left the states with discretion to determine eligibility for home energy assistance benefits. That discretion, however, is not unlimited. The states cannot declare a subclass of homeowners eligible for home energy assistance benefits to the exclusion of similarly situated renters.[43]

Four limitations in the federal LIHEAP statute are relevant to the question of whether use of an "assets test" is an appropriate limitation of LIHEAP eligibility:

- The statue provides that states may promulgate income eligibility so long as the eligibility does not go below 110% of the Federal Poverty Guidelines promulgated annually by the U.S. Department of Health and Human Services (DHHS), or above the higher of either 150% of the Federal Poverty Guidelines or 60% of State Median Income;[44]

- The statute provides that participants in certain specified public assistance programs are categorically-eligible for LIHEAP. The programs establishing categorical eligibility include: SNAP, SSI, TANF and certain means-tested veterans assistance programs.[45]

- The statute provides that tenant households and homeowner households shall be treated equally[46]; and

- The statute provides that LIHEAP shall be targeted to specified vulnerable populations, including the elderly, the disabled, and households with children under age six.[47]

The discussion below will briefly examine each of these statutory restrictions as they might apply to the imposition of an assets test.

The discussion below will consider the implications of the LIHEAP statutory provisions in light of asset restrictions imposed by LIHEAP offices in five different states. These states have been selected to reflect, as nearly as practicable, a range of geographic and climatic conditions. They include: Arkansas, Hawaii, Missouri, North Carolina and Oklahoma. The LIHEAP offices in these respective states impose the asset limitations set forth in Table 1 below.

---

[43] Id., at 1327.
[44] 42 U.S.C. §8624(b)(2)(B) (2012).
[45] 42 U.S.C. §8624(b)(2)(A) (2012).
[46]42 U.S.C. §8624(b)(8)(B) (2012).
[47] 42 U.S.C. 8624(b)(3) (2012). (A state shall "conduct outreach activities designed to assure that eligible households, especially households with elderly individuals or disabled individuals, or both, and households with high home energy burdens, are made aware of the assistance available under this title. . .").

Table 1. Asset Limitations for LIHEAP in Five Selected States	
State	Asset Restriction
Arkansas	$3,000 assets limit for all households, regardless of size, if at least one member is 60 years or older. $2,000 limit for all other households, regardless of size.
Hawaii	$4,000 per household.
Missouri	$3,000 per household.
North Carolina	$2,200 per household
Oklahoma	Assets cannot exceed $2,000 for a one person household or $3,000 for a two person household, add $50 for each additional person in the household
SOURCE: LIHEAP Clearinghouse, www.ncat.org/liheap (LIHEAP Heating Assistance Eligibility: Assets Test)	

LIHEAP Income Eligibility Limitations.

Eligibility to be Based on "Heating Cost to Income Ratio Alone"

The federal LIHEAP statute establishes income parameters within which state program administrators must set eligibility for the distribution of funds at the state level. Income eligibility may not fall below 110% of Federal Poverty Guidelines or fall above the greater of 150% of Poverty or 60% of State Median Income.[48] Imposition of an assets test, particularly one that does not exclude housing, will systematically exclude substantial numbers of households that fall within the mandatory income-eligibility range established by statute.

These income guidelines create substantive limitations on how a state may limit eligibility to receive LIHEAP benefits. The Eighth Circuit, in *Crawford*, held that:

> the states cannot design a subclass of eligibility which does not provide that "the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size." Id. § 8624(b)(5). In other words, if the states wish to narrow the number of persons eligible for assistance, they must exclude persons from the top of the class described by Congress, in terms of income and proportionate energy costs, rather than from the bottom. See, S.Rep. No. 97–139, at 909–910, reprinted in 1981 U.S.Code Cong. & Ad.News, at 933–934 (explaining states' discretion to set limits on eligibility while affirming the obligation to afford the priority described in section 8624(b)(5) to "participating households"). The State's categorical exclusion of persons living in subsidized or public housing from

[48] See, note 44, supra. Each year, the federal LIHEAP office publishes a schedule of minimum and maximum income eligibility levels. See e.g., "HHS Poverty Guidelines for Optional Use in Federal Fiscal Year (FFY) 2012 Federal Energy Assistance Programs and Mandatory Use in FFY 2013 Federal Energy Assistance Programs," IM-2012-04 (February 24, 2012).

[LIHEAP] violates this latter limitation.[49]

The Court found that "based on the statistics and charts reflected in the record, the Section 8 home energy subsidy received by some plaintiffs might not be as great as the [LIHEAP] subsidy otherwise available to persons with the same income and equal overall heating expenses."[50] It held that whether "the State's categorical exclusion violates section 8624(b)(5) cannot be disputed. That section simply mandates that any subclass devised by the State in distributing home energy assistance funds must be designed so that the greatest assistance goes to households with the lowest income and highest energy costs in relation to that income, accounting for family size."[51] A state's eligibility limitation is contrary to the LIHEAP statute, the Court held, if it bars a "recipient from establishing that her or his heating costs are proportionately higher than those of a [LIHEAP] recipient with greater income and equal family size."[52]

Subsequently, in *Clifford v. Janklow*,[53] the Eighth Circuit heard a challenge to the decision of the South Dakota LIHEAP office to reduce LIHEAP assistance to tenants of public and assisted housing, without denying such assistance in its entirety. Low-income households that were not tenants of public or assisted housing, South Dakota said, were "fully vulnerable" to their home heating costs, while low-income households that received utility assistance through HUD housing programs were only "partially vulnerable."[54] The Court held that, just as LIHEAP benefits could not be denied in their entirety, LIHEAP benefits could not be reduced due to the receipt of other public assistance. The Court began by reiterating its holding from *Crawford*, stating that:

> Section 8624(b)(5) was the basis for our ruling against the state's categorical exclusion of subsidized housing residents in *Crawford v. Janklow*, 710 F.2d at 1327. Section 8624(b)(5) requires states to provide "the highest level of assistance * * * to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size." 42 U.S.C. § 8624(b)(5) (Supp. V 1981). In *Crawford*, we interpreted this section to mean that "if the states wish to narrow the number of persons eligible for assistance, they must exclude persons from the top of the class described by Congress, in terms of income and proportionate energy costs, rather than from the bottom."[55]

[49] 710 F.2d at 1327.
[50] Id.
[51] Id.
[52] Id.
[53] 733 F.2d 534 (8th Cir. 1984).
[54] 733 F.2d 536 ("The state's plan designates residents of subsidized or public housing as "partially vulnerable" to heating costs because their shelter subsidies take into account heating expenses.")
[55] 733 F.2d 538 – 539, citing *Crawford v. Janklow,* 710 F.2d at 1327 (citing, S.Rep. No. 97-139, 97 Cong., 1st Sess. 909–910, *reprinted in* 1981 U.S.Code Cong. & Ad.News 396, 933–934).

According to the Court, "Section 8624(b)(5) restricts the state's discretion in fixing benefit levels for a certain class of applicants. It requires the state to give the highest level of benefits to applicants with (1) the lowest incomes and (2) the highest energy costs in relation to income."[56] The Court found that "it is clear that members of the plaintiff class are among those households with the lowest income in the state."[57] According to the Eighth Circuit, "the state's plan violated section 8624(b)(5) because it did not give the highest level of assistance to those with the highest energy costs in relation to income. . . [T]he district court was correct in ruling that the heating cost to income ratio alone should determine which households should receive the highest level of benefits the state makes available through [LIHEAP]."[58]

A similar state LIHEAP eligibility provision in Wisconsin was also struck down on a *Crawford* rationale.[59] The LIHEAP statute was subsequently amended specifically to allow states to take into consideration the receipt of HUD utility allowances in setting the level of LIHEAP benefits, but not to use such HUD assistance as a grounds to deny LIHEAP assistance in its entirety.[60]

Assets and LIHEAP Eligibility Based on Income.

LIHEAP asset limitations that do not distinguish between liquid and non-liquid assets[61] will, in the five states referenced, virtually certainly exclude homeowners from receiving LIHEAP assistance even though they have incomes that fall well below the statutory minimum LIHEAP eligibility standards. The population excluded would be substantial. Table 2 shows that homeownership is extensive, even within the population of families in Poverty.[62] Hawaii has the

---

[56] Id., at 539.
[57] Id.
[58] Id., at 540.
[59] *Boles v. Earl*, 601 F.Supp. 737 (W.D. Wis. 1985) ("Two separate issues are raised in *Crawford, Clifford,* and the instant case. The first is the legality of a complete exclusion (or delay) in payments to persons in subsidized housing. I find that plaintiffs' likelihood of success on this claim is high. 42 U.S.C. §8624(b)(5) requires that states give priority for payments under the Act to those persons with the greatest need. Exclusion of subsidized housing tenants violates § 8624(b)(5) because families with the same or greater need will be denied payments simply because they live in subsidized housing. *Crawford v. Janklow*, 710 F.2d at 1327.")
[60] Pub. L. 102–550, title IX, §927, Oct. 28, 1992, 106 Stat. 3885, as amended by Pub. L. 103–185, §1, Dec. 14, 1993, 107 Stat. 2244. ("SPECIAL RULE FOR LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM.--For purposes of the Low-Income Home Energy Assistance Program, tenants described in subsection (a)(2) who are responsible for paying some or all heating or cooling costs shall not have their eligibility automatically denied. A state may consider the amount of the heating or cooling component of utility allowances received by tenants described in subsection (a)(2) when setting benefit levels under the Low-Income Home Energy Assistance Program. The size of any reduction in Low-Income Home Energy [Assistance] Program benefits must be reasonably related to the amount of the heating or cooling component of the utility allowance received and must ensure that the highest level of assistance will be furnished to those households with the lowest incomes and the highest energy costs in relation to income, taking into account family size, in compliance with section 2605(b)(5) of the Low-Income Home Energy Assistance Act of 1981.")
[61] In the parlance of other social assistance programs, the distinction is between "available" resources and resources that are *not* available. See generally, notes 77 - 78, supra, and accompanying text.
[62] By statute, income eligibility for LIHEAP may not be set below 110% of the Federal Poverty Level. See, note 44, supra, and accompanying text.

lowest penetration, with just above one-quarter (27%) of the Poverty population being homeowners, while the remaining four states have more than one-third of their respective Poverty populations being homeowners. Married couple families have the highest penetration of homeowners within the Poverty population (with each state but Hawaii experiencing more than 50% homeownership status), while male-headed households (with no wife present) have noticeably higher homeownership rates than do female-headed households (with no husband present).

Table 2. Poverty Status in the Past 12 Months of Families by Household type by Home Ownership Status- Universe: Families

	Arkansas	Hawaii	Missouri	North Carolina	Oklahoma
Below Poverty Level	36%	27%	35%	35%	37%
Married couple family	52%	35%	55%	52%	52%
Male—no wife present	38%	27%	34%	35%	36%
Female—No husband present	25%	19%	23%	25%	25%

SOURCE: American Community Survey, Table B17019

The prevalence of home ownership is important because, even at the lowest home values, the value of homes exceeds the asset limitations set by the listed states, and the limitations would deny or reduce assistance to some households who have the lowest incomes. Table 3 sets forth two measurements of home value for owner-occupied housing units as published in the most recent Census data.[63] In the two states with the lowest home values, owner-occupied units in the bottom quartile of value[64] nonetheless still have homes valued at more than $60,000 (in contrast to the asset limitation of $2,000 for a non-elderly Arkansas household, irrespective of size; and $3,000 for a two-person Oklahoma household, with an additional $50 of assets allowed for each additional household member).[65] In the next range of values, Missouri and North Carolina have values of owner-occupied homes in the bottom quartile of values of between $84,300 and $93,300.

[63] This data presents three-year data for 2011 (i.e., 2009 – 2011) from the American Community Survey.
[64] A "quartile" of value means that 25% of homes have values at or below this value. The "median" value in Table 3 means that half of all owner-occupied homes have values more than this figure, while the other half have values less than this figure.
[65] See, Table 1, supra.

Table 3 . Value of Owner-Occupied Units: Median, Lowest Quartile					
	Arkansas	Hawaii	Missouri	North Carolina	Oklahoma
Median value /a/	$105,800	$510,600	$138,300	$154,300	$110,600
Lowest quartile value /b/	$61,900	$335,300	$84,300	$93,300	$66,800
SOURCE: /a/ American Community Survey, Table B25077. /b/ American Community Survey, Table B25076					

Table 3, in other words, documents that even if one assumes that all low-income homes fall within the bottom quartile of values in a state, these values would substantially exceed the asset limitations set by the state LIHEAP offices.

It is, however, not appropriate to make the assumption that all home values for low-income households would fall within the bottom quartile. While home values are not reported by Poverty Level, the American Community Survey does provide home values by dollars of household income. Table 4 below provides the data for the five study states. In Arkansas, even though the value of owner-occupied homes in the bottom quartile falls at $61,900 (as shown in Table 3):

- 52% of all homeowners with annual income less than $10,000 have homes valued at $60,000 or more, while nearly 28% have homes valued at $100,000 or more.

- 53% of all homeowners with annual income between $10,000 and $20,000 have homes valued at $60,000 or more, while 28% have homes valued at $100,000 or more.

Similarly, in Oklahoma, even though the value of owner-occupied homes in the bottom quartile falls at $66,800 (as shown in Table 3):

- 53% of all homeowners with annual income less than $10,000 have homes valued at $60,000 or more, while 29% have homes valued at $100,000 or more.

- 56% of all homeowners with annual incomes of between $10,000 and $20,000 have homes valued at more than $60,000, while 28% have homes valued at $100,000.

Table 4 shows a similar mismatch between the homes values for households with income of more than $20,000 and the asset limits established by the State LIHEAP offices.

Table 4. HOUSEHOLD INCOME IN THE PAST 12 MONTHS (IN 2011 INFLATION-ADJUSTED DOLLARS) BY VALUE - Universe: Owner-occupied housing units

	Arkansas	Hawaii	Missouri	North Carolina	Oklahoma
Less than $10,000:					
Value less than $60,000	48%	5%	38%	32%	47%
Value $60,000 to $99,999	24%	7%	22%	22%	24%
Value $100,000 to $199,999	19%	15%	26%	29%	21%
Value $200,000 or more	9%	73%	14%	17%	8%
$10,000 to $19,999:					
Value less than $60,000	47%	5%	37%	30%	44%
Value $60,000 to $99,999	25%	3%	25%	26%	28%
Value $100,000 to $199,999	21%	11%	28%	30%	21%
Value $200,000 or more	7%	81%	10%	14%	7%
$20,000 to $34,999:					
Value less than $60,000	35%	4%	26%	22%	35%
Value $60,000 to $99,999	29%	4%	27%	24%	30%
Value $100,000 to $199,999	27%	10%	35%	37%	27%
Value $200,000 or more	9%	82%	12%	17%	8%
$35,000 to $49,999:					
Value less than $60,000	26%	3%	17%	14%	24%
Value $60,000 to $99,999	29%	2%	25%	21%	30%
Value $100,000 to $199,999	34%	9%	42%	44%	36%
Value $200,000 or more	11%	86%	16%	21%	10%
SOURCE: American Community Survey, Table C25121					

The inclusion of households with incomes of up to $50,000 in Table 4 is based on the LIHEAP eligibility standards. If one assumes a maximum LIHEAP eligibility at 150% of Federal Poverty Level for 2011, the maximum annual income would range from $16,335 for a one-person household,[66] to $27,795 for a three-person household,[67] to $39,255 for a five-person household.[68] The home values set forth in Table 4, in other words, are well within the ranges of home values to be expected for households that are otherwise income-eligible for LIHEAP. As disallowed by *Crawford*, *Clifford* and *Boles*, the asset tests do not deny LIHEAP assistance based on the "heating cost to income ratio alone." In addition, the asset tests will deny assistance to some households who have the lowest income and highest energy bills relative to income, contrary to statute.[69]

The Unavailability of Assets to Meet Household Financial Exigencies.

Homeownership does not provide liquid assets that are available to address the energy affordability problems facing low-income households. Multiple types of risks are associated with the unaffordability of home energy. One state, Georgia, used LIHEAP "REACH" funds[70] to identify and respond to these various risks.

Through REACH, Georgia's Department of Human Resources (DHR), in collaboration with the community action agency Partnership for Community Action, Inc. of Decatur (GA), administered "Project Energize," an initiative to help address the need for energy assistance and reduce the energy burdens of low-income families.[71]

Project Energize targeted a specific segment of the LIHEAP client base: single-parent, female-headed DeKalb County households with children. Additional project eligibility criteria included living at the current residence for at least 12 months and not expecting to move within the next 12 months. Program outreach was targeted to families that had at least some income from wages.

Project Energize was designed to improve the energy self-sufficiency of participating households by addressing some of the systemic barriers to energy self-sufficiency, and to help families identify areas in which knowledge and behavioral changes would make a difference to long-term energy burden and payments. Project Energize provided an array of services to the 300

[66] 100% of Poverty Level in 2011 for a one-person household was $10,890.
[67] 100% of Poverty Level in 2011 for a three-person household was $18,530.
[68] 100% of Poverty Level in 2011 for a five-person household was $26,170.
[69] For a discussion of heating costs in homeownership units vs. renter units, see notes 86 - 91, infra, and accompanying text.
[70] 42 U.S.C. § 8626b (2012) (**R**esidential **E**nergy **A**ssistance **CH**allenge grant).
[71] Roger Colton (March 2006). "Georgia REACH Project Energize: Final Program Evaluation," at 19, prepared for Georgia Department of Human Resources: Atlanta (GA).

households that it intended to bring through the program. Included within that array of services were the following:

- Energy efficiency workshops;
- Mediation with energy providers to reduce arrearages and establish reasonable payment plans;
- Modified "weatherization" of housing units;
- Counseling in financial literacy and manageable budgeting;
- Referrals to community resources to serve as "effective bridges to outside services"; and
- Connecting families to "other services that can make a difference in their disposable income."

Not all of these interventions, however, were provided to all participants. Instead, the REACH project was designed to identify household-specific barriers to self-sufficiency and to implement the specific interventions for each individual household designed to overcome each of these barriers.

The Georgia REACH project engaged a "Risk Assessment Matrix" to guide the determination of which intervention(s) were appropriate to help clients address their home energy affordability problems. That Matrix allowed the REACH family advocates to identify a full range of issues arising as a result of home energy unaffordability.[72] According to the Georgia REACH Evaluation:

> by far the most commonly identified risk was simply that the household's income was insufficient. The inability to address financial exigencies also was a common risk. Indeed, the inability to respond to exigencies due to a lack of savings, as well as the inability to afford high winter bill burdens (an exigency unto itself), were the most commonly identified risks aside from inadequate income. The lack of control over expenses is a type of acknowledgment of the inability to handle unexpected (or unexpectedly high) household expenses.[73]

In addition to identifying what risks Georgia REACH participants faced, the Georgia REACH

[72] Georgia REACH Evaluation, supra note 71, at 23.
[73] Id., at 23 – 24.

program sought to assess the different attributes of the various risks facing REACH program participants. REACH staff accomplished this by using the Risk Assessment Matrix to categorize risks with respect to six different attributes. Each risk was ranked on a scale of 1 to 3 for each of these six attributes. The attributes included:

- Were the risks the result of long-term circumstances (1), or were they of recent vintage (3)?
- Were the risks foreseeable (1) or unforeseeable (3) on a monthly basis?
- Were the risks large/high (1) or small/low (3)?
- Were the risks controllable (1) or uncontrollable (3) by the household?
- Were the risks permanent (1) or temporary (3)? And
- Were the risks regularly experienced (1) or occasionally experienced (3)?[74]

The risks that the Georgia REACH participants identified as being problematic are precisely those that allowing a certain level of assets in the form of household savings could help address. Table 5 reports, for example, that the problems presented by a lack of household savings were long-term (1.02), foreseeable (1.86), big (1.03) and uncontrollable (1.76). At the same time, two related risks were similarly viewed. On the one hand, the problems presented by "high winter bill burdens" were viewed by Georgia REACH participants as foreseeable (2.24), big (1.06), uncontrollable (1.81) and occasional (1.68). On the other hand, the problems associated with "no control over expenses" were seen as long-term (1.00), foreseeable (3.00), big (1.06), uncontrollable (2.86), and regular (1.06). Even the problems arising from "kid-related expenses" were reported by Georgia REACH recipients as being long-term (1.02), foreseeable (2.90) and occasional (2.36).[75]

[74] Id., at 24.
[75] Id., at 24.

Table 5. Rating of Georgia REACH Participant Household Energy Risks by Risk Attribute[76]									
1	3	Carries Arrears (pay late fees)	No HH Savings	High Winter Bill Burdens	Kid-Related Expenses	No Control Over Expenses	Old & Inefficient Appliances	Home not Wx'd	Home is Leaky
Long-term	Recent	1.74	1.02	2.19	1.02	1.00	1.00	1.00	1.00
Unforeseeable	Foreseeable	1.95	1.86	2.24	2.90	3.00	2.19	1.86	2.82
High/Big	Low/Small	1.74	1.03	1.06	1.32	1.06	1.31	1.02	2.31
Controllable	Uncontrollable	1.82	1.76	1.81	1.33	2.86	1.59	1.12	2.51
Permanent	Temporary	2.13	1.68	1.68	1.36	2.86	2.13	1.50	1.32
Regular	Occasional	1.74	2.10	1.65	2.37	1.06	1.44	2.29	1.10
Number of observations in average		93	100	98	108	72	32	82	73

Excluding households that are income-eligible for LIHEAP because they have a certain level of assets, whether those assets are in the form of liquid resources (such as savings) or illiquid resources (such as a home), fails to serve a legitimate function given the risks such as those that the Georgia REACH participants identified. On the one hand, allowing savings accounts would help low-income energy assistance recipients to respond to those problems that they view as foreseeable, long-term, temporary and occasional. On the other hand, disallowing assets in the form of homes does not provide protections to low-income households against the risks that are faced by low-income households. Home values simply cannot be translated into financial resources in a time span and at a cost to make them a reasonable resource upon which to draw to meet uncontrollable, temporary, and occasional financial problems facing low-income energy assistance recipients.

Use of an assets test to exclude households from LIHEAP serves no rational function. Quite aside from the risk-based analysis used in Georgia, using the value of a home to determine eligibility for an income-based program is contrary to the principle that assets must be "available" to pay for household expenses at the time the money is needed. This "availability" principle, for example, can be found in the original limitation on assets established for the Aid to Families with Dependent Children (AFDC) program, now known as Temporary Aid to Needy Families (TANF).

[76] Id., at 24.

> Administrative and judicial interpretations of the purposes of the AFDC program have expressed approval of, and given content to, the availability principle. Shortly after the passage of the 1939 amendment, the Social Security Board, the federal agency originally charged with administering the AFDC program, issued a policy statement to guide the states in implementing the amendment. The statement required that for purposes of determining eligibility and grant size, income or resources must be "available to the applicant," must "actually exist," must not be "fictitious" or "imputed," and must "be actually on hand or ready for use when it is needed." The Board subsequently incorporated similar criteria into its official guidelines to the states. Successive federal agencies administering the AFDC program have promulgated regulations containing similar restrictions, and the Supreme Court has found that such regulations "clearly comport with" the Act.[77]

The value of a home, even if it is the equity value, is neither "actually available"[78] nor "actually on hand or ready for use when it is needed"[79] for purposes of paying a home energy bill.[80]

The rationale for using the "availability" principle to restrict the denial of energy assistance benefits based on the value of capital assets, even if valued at the equity amount, extends far beyond the imputation of non-existent resources that might be used to pay current bills. The very process of translating the net equity value of a home into cash, for example, has considerable costs associated with it unto itself. Even if one assumes that the homeowner could qualify for some type of credit line based on the value of a home –this ability to qualify for credit is doubtful if that owner is in the position of needing to access credit to pay basic living expenses such as home energy bills-- the process of acquiring the credit would involve not only financing fees, but legal fees, inspection fees, real estate fees, and the like. The process of converting a capital asset (such as a home) into cash, in other words, assumes access to a certain level of financial resources that are not likely to be available if the household is sufficiently in crisis to need such cash for basic living expenses with which to begin.

---

[77] Elizabeth Kolshom, "The Effect of the Federal Availability Principle on State AFDC Asset-Transfer Rules," 89 Colum. L. Rev. 580, 585 (1989) (internal citations omitted).
[78] Kolshom, supra note 77, *quoting*, *Lewis v. Martin*, 397 U.S. 552, 555 & n. 6 (1970) (quoting HEW Handbook of Public Assistance pt. IV, § 3131.7 (1967)); 45 C.F.R. § 233.20(a)(3)(ii)(D) (1987) ("To the extent not inconsistent with any other provision of this chapter, income and resources are considered available ... when actually available....").
[79] Kolshom, supra note 77, quoting, *RAM v. Blum*, 564 F.Supp. 634, 639 n. 14 (S.D.N.Y.1983).
[80] For example, most utility shutoff notices provide a 10-day notice prior to the termination of service for nonpayment. See generally, Roger Colton (2012). "Model Disconnection and Disconnect Notice Regulation: Philadelphia Water Department," Fisher, Sheehan & Colton: Belmont (MA).

Moreover, the forced sale of a capital asset in order to generate liquidity to pay basic living expenses is the antithesis of arms-length bargaining in a real estate transaction.[81] The time- and financial pressure to divest ownership in a home in order to receive sufficient cash to pay month-to-month bills would be in direct conflict with the goal the homeowner would otherwise pursue, to receive the best value for the home. An assets test would thus not merely force a low-income household to dispose of a fundamental long-term financial resource at a considerable cost, but also would likely force that household to dispose of the resource at less than its full value.

It is not merely the value of a home that would experience lost value due to forced sale, it is the value of other illiquid assets as well. Retirement funds (such as 401(k) accounts) and IRAs might have value, but also have substantial penalty clauses should the holder be forced to liquidate them prematurely.

It seems clear from the data and discussion above that asset limitations fall afoul of the holdings of *Crawford*, *Clifford* and *Boles*. Those federal courts clearly and explicitly held that "if the states wish to narrow the number of persons eligible for assistance, they must exclude persons from the top of the class described by Congress, in terms of income and proportionate energy costs, rather than from the bottom." As the *Clifford* court found as a factual matter, so would a court find with respect to the asset tests identified above: "members of the plaintiff class are among those households with the lowest income in the state."[82] Similarly, as the Eighth Circuit in *Crawford* and *Clifford* held as a legal conclusion, so too would a court hold with respect to the asset limitations discussed above, "the state's plan violated section 8624(b)(5) because it did not give the highest level of assistance to those with the highest energy costs in relation to income. . . [T]he heating cost to income ratio alone should determine which households should receive the highest level of benefits the state makes available through [LIHEAP]."[83]

The Treatment of Tenant and Homeowner Households.

Under the federal LIHEAP statute, states must provide an assurance that the LIHEAP program will treat homeowners and renters equally.[84] As established above, however, an asset test that does not exclude illiquid assets such as homes has precisely the opposite effect. An asset test that does not exclude housing adversely affects homeowners. It is unlikely, at best, that the home energy bills of homeowners will be lower than the home energy bills of renters. This is particularly true given the LIHEAP statutory restriction of "home energy" only to home heating

---

[81] See e.g., *Deel v. Lukhard*, 830 F.2d 1283, 1291 n. 1 (4th Cir.1987) (Motz, J., concurring), rev'd en banc sub nom. *Deel v. Jackson*, 862 F.2d 1079 (1988).
[82] Id.
[83] See text accompanying note 58, supra.
[84] See, note 46, supra, and accompanying text.

and cooling (excluding electricity, hot water, and other appliances such as gas cooking).[85] Indeed, it is a virtual certainty that energy bills for owner-occupied homes will exceed the energy bills for renter-occupied homes.

Home heating and cooling usage, and thus home heating and cooling bills, are primarily a function of temperatures and the amount of housing space heated and cooled. The U.S. Department of Energy's Energy Information Administration (EIA/DOE) publishes "energy intensity" figures for both home heating and home cooling.[86] According to the U.S. Department of Energy's Residential Energy Consumption Survey (RECS), the "consumption intensity" for home heating is set forth as:[87]

PU / (HDD x (HSF / 1000)

WHERE:

PU = physical units of fuel[88]

HDD = Heating Degree Days

HSF / 1000 = 1,000 square feet of heated floor space

Given this relationship between consumption and the size of housing units, it is thus not surprising that owner-occupied units tend to have higher heating/cooling consumption (and thus higher heating/cooling bills). The RECS publishes data for four Census Regions[89] and nine Census Divisions.[90] According to EIA/DOE, the average heated floor space by primary heating fuel is substantially higher for owner-occupied units than for renter-occupied units (see, Table 6).

---

[85] See note 29, and accompanying text.

[86] Energy Information Administration, Department of Energy, 2005 Residential Energy Consumption Survey, Table SH12, "Consumption Intensity by Main Space Heating Fuel Used 2005, Space Heating Intensity," available at www.eia.gov/consumption/residential/data/2005/c&e/spaceheating/pdf/tablesh12.pdf, last accessed March 23, 2013; see also, EIA/DOE, Table SH13, "Expenditure Intensity by Main Space Heating Fuel Used 2005, Space Heating Intensity," available at www.eia.gov/consumption/residential/data/2005/c&e/spaceheating/pdf/tablesh13.pdf, last accessed March 23, 2013.

[87] Cooling intensity is calculated in an identical fashion, substituting Cooling Degree Days (CDDs) for HDDs and substituting 1,000 square feet of cooled floor space for 1,000 square feet of heated floor space.

[88] For example, kWh of electricity, hundred cubic feet (ccf) of natural gas; gallons of fuel oil or LPG.

[89]Northeast, South, North and West.

[90] Northeast (New England, Mid-Atlantic); South (South Atlantic, East South Central, West South Central); North (East North Central, West North Central); and West (Mountain, Pacific). A map of the Census Regions and Divisions by states can be accessed at www.eia.gov/emeu/reps/maps/us_census.html (last accessed March 23, 2013).

Table 6. Average Heated Floorspace by Main Space Heating Fuel Used, 2005 (Heated Square Footage per Household)						
	Any Fuel	Electricity	Natural Gas	Fuel Oil	Kerosene	LPG
Owner-occupied	1,938	1,749	2,017	2,099	1,092	1,974
Renter-Occupied	1,011	947	1,039	1,214	N/A	1,105
SOURCE: U.S. Department of Energy, Energy Information Administration, 2005 RECS, Table SH11.						

Given this disparity in the amount of square footage of space that is heated by the various fuels, it follows that both heating consumption and heating bills will be higher for owner-occupied homes than for renter-occupied homes. The 2005 RECS data is set forth in Table 7. For each primary space heating fuel, consumption is greater for owner-occupied units than for renter-occupied units. Electricity consumption is 19% higher for owner-occupied units, while natural gas consumption is 16% higher. LPG consumption is more than 30% higher for owner-occupied units.

Table 7. Space Heating Consumption by Primary Heating Fuel and Tenure, 2005[91]					
	Electricity (kWh)	Natural Gas (ccf)	Fuel Oil (gallons)	Kerosene (gallons)	LPG (gallons)
Owner-occupied	2,266	51	672	147	571
Renter-Occupied	1,909	44	635	N/A	431
Ratio: Owner to renter	1.19	1.16	1.06	N/A	1.32
SOURCE: U.S. Department of Energy, Energy Information Administration, 2005 RECS, Table SH7.					

The fact that owner-occupied housing will contain more square feet of heated living space, and thus have both higher heating consumption and larger heating bills, than renter-occupied housing in the five study states considered in this discussion is likely. While the Census does not directly report living floor space, it does report data that can be used as reasonable substitutes. In particular, Table 8 presents the median number of rooms by tenure. A higher median number of rooms is likely to indicate a larger living space as well.

As Table 8 documents, owner-occupied units across-the-board have a higher median number of rooms in each of the five study states. Indeed, in the five states with asset tests, owner-occupied

[91] This data presents only the space heating usage. It is *not* the total usage by primary space heating fuel.

housing had between 1.5 (Arkansas, Hawaii, North Carolina, Oklahoma) and more than 2.0 (Missouri) more rooms than tenant-occupied housing did in 2011.

Table 8. Median Number of Rooms: Owner-Occupied vs. Renter-Occupied Homes					
	Arkansas	Hawaii	Missouri	North Carolina	Oklahoma
Owner-occupied	5.9	5.4	6.7	6.2	6.0
Renter-occupied	4.4	3.9	4.4	4.4	4.4
SOURCE: American Community Survey, Table B25021					

The data and discussion considered above leads to three conclusions, each of which independently, and certainly the three in combination, lead to the conclusion that adoption of an assets test either to exclude otherwise income-eligible households from receiving LIHEAP, or to reduce LIHEAP benefits to otherwise income-eligible households, is contrary to the LIHEAP statute:

- An assets test used to limit LIHEAP eligibility results in a disparate adverse impact on homeowners relative to tenants. An assets test tends to exclude homeowners from LIHEAP.
- Homeowners can be expected to routinely have greater home heating and cooling consumption, and correspondingly higher home heating and cooling bills, than tenants do.
- Homeownership is not limited exclusively to the highest income households. Indeed, some homeowners can be expected to regularly fall within a subgroup of low-income households that would be income-eligible for LIHEAP, which is demarcated by the lowest incomes and the highest home heating/cooling bills relative to income.

It is difficult to see how an assets test used to limit the participation of, or level of benefits to, otherwise income-eligible households in LIHEAP can be reconciled with the LIHEAP statutory language requiring that homeowners and renters be treated equally.

Categorical Eligibility and Asset Tests.

The federal LIHEAP statute provides states the flexibility to serve households having at least one member who also receives assistance under any of the following Federal programs (referred to as

categorical eligibility): (1) TANF; (2) Supplemental Security Income (SSI); (3) SNAP; and (4) certain needs-tested Veterans Benefits.[92] Categorical eligibility eliminates the use of an assets test for the households affected. Categorical eligibility means that participation in one public assistance program establishes eligibility for another public assistance program without further qualification.

The LIHEAP program can and should take guidance from SNAP in its application of categorical eligibility. The federal SNAP program has adopted categorical eligibility[93] with the resulting elimination of asset tests. Under federal law, "there are two basic pathways to gain financial eligibility for SNAP: (1) having income and resources below specified levels set out in federal law; and (2) being 'categorically,' or automatically eligible based on receiving benefits from other specified low-income assistance programs."[94] Categorical eligibility extends to households in which all members are either eligible for or receive benefits from TANF, SSI, and state-financed General Assistance programs.[95]

Households that are categorically eligible for SNAP, because they have already been through an income determination for the underlying programs, "bypass the income and resource tests" otherwise applicable to SNAP.[96] According to the Congressional Research Service, "categorical eligibility was seen as advancing the goals of simplifying administration, easing entry to the program for eligible households, emphasizing coordination among low-income assistance programs, and reducing the potential for errors in establishing eligibility for benefits."[97] These are the same administrative and program savings reported for elimination of the imposition of assets tests in Medicaid programs.[98]

The office of Food and Nutrition Services (FNS) within the U.S. Department of Agriculture, the federal agency that administers SNAP, has made clear to state program directors that SNAP may not impose an independent assets test for households entering SNAP through a categorical

[92] See generally, Office of Community Service (May 2012). "LIHEAP Eligibility Criteria," Department of Health and Human Services, Administration for Children and Families, Office of Community Services: Washington D.C.
[93] There are different types of categorical eligibility for SNAP. The distinction between these types of categorical eligibility are not relevant to our discussion here. For a discussion of SNAP categorical eligibility, see generally, Gene Falk and Randy Alison Aussenberg (July 17, 2012). "The Supplemental Nutrition Assistance Program: Categorical Eligibility," Congressional Research Service: Washington D.C.; Kathlee FitzGerald and Emily Holcombe (April 2012). "The Supplemental Nutrition Assistance Program," Congressional Budget Office: Washington D.C.
[94] CRS Categorical Eligibility, supra note 93, at 1.
[95] Id., at 2. In addition, the Congressional Research Service says, "federal law also provides a separate rule for all households where some, but not all, members receive benefits from TANF or SSI. In such households, recipients of TANF or SSI benefits are deemed to have passed the SNAP resource test. That is, the assets of household members who receive TANF, SSI, or GA are disregarded from the household's total resources when determining whether the household passes the asset test." Id., at 2, note 4, citing Section 5(j) of the Food and Nutrition Act of 2008.
[96] CRS Categorical Eligibility, supra note 93, at 2.
[97] Id., citing U.S. Congress, House Committee on Agriculture, report to accompany H.R. 2100, 99th Cong., 1st sess., September 13, 1985, H.Rept. 99-271, Part 1, at 142, Government Printing Office: Washington D.C.
[98] See, text accompanying notes 7 - 26, supra.

eligibility program. Only if the underlying program that makes a household categorically eligible for SNAP has an assets test is there "in effect a de facto resource limit for SNAP."[99] According to FNS, "SNAP law and regulations require States to deem resources for categorically eligible households. . .The State cannot require a resource limit if the program used to confer categorical eligibility does not have a resource limit."[100] SNAP categorical eligibility, in other words, is "increasingly being used by states to eliminate the SNAP asset test and raise gross income limits. . .As more states adopt broad-based categorical eligibility, the number of households that are categorically eligible for SNAP, and thus not subject to the SNAP asset and income tests, will continue to grow substantially."[101]

The same rules are likely to be applied to LIHEAP eligibility as well. Should low-income households enter a state's LIHEAP program through the statutory categorical eligibility process, the state may not impose an independent asset test to limit participation. To the extent that an underlying program establishing categorical LIHEAP eligibility imposes an asset test, that program will establish a de facto asset test for LIHEAP as well. To the extent that the underlying program does not impose an asset test, LIHEAP may not impose an independent asset limitation. Federal LIHEAP administrators should reach the same conclusion that federal program administrators have reached for SNAP: "The State cannot require a resource limit if the program used to confer categorical eligibility does not have a resource limit."[102]

This conclusion is particularly important for states using SNAP as the basis for categorical LIHEAP eligibility. Table 9 shows, for our five study states, whether the state uses an assets test for SNAP eligibility determinations. In four of our five study states (Hawaii, Missouri, North Carolina, Oklahoma), the state could not lawfully impose a LIHEAP assets test if it uses categorical eligibility for LIHEAP enrollment. None of these four study states uses an assets test for SNAP.

Table 9. Use of Assets Test for SNAP in Five Study States (2011).

	Arkansas	Hawaii	Missouri	North Carolina	Oklahoma
SNAP Assets Test?	Yes	No	No	No	No

SOURCE: Food Research and Action Center (FRAC) (2013). Expanding Access to SNAP: Eliminating the Asset Test, available at http://frac.org/newsite/wp-content/uploads/2009/05/map_eliminating_asset_test.pdf

[99] Arthur Foley (December 15, 2009). Memo to SNAP Regional Directors Regarding Categorical Eligibility Questions and Answers, USDA, Food and Nutrition Services: Washington D.C.
[100] Id., at Question 1.
[101] Carole Trippe and Jessica Gillooly (July 23, 2010). "Non-Cash Categorical Eligibility for SNAP: State Policies and the Number and Characteristics of SNAP Households Categorically Eligible Through those Policies: Final Memo," at 1, 9, Report to USDA/FNS, Mathematica Policy Research: Washington D.C.
[102] See, note 100, supra, and accompanying text.

This treatment of households found to be categorically eligible for fuel assistance under the federal LIHEAP statute is important, as well, because the LIHEAP statute explicitly provides that a "State may not differentiate in implementing this section between the households" found to be categorically eligible pursuant to clause (2)(A)[103] and households found to be income-eligible pursuant to clause (2)(B)[104] of the statute.[105] If, in other words, an assets test may not be applied to a categorically-eligible household for LIHEAP, neither may it be applied to an income-eligible household.

The Aged as a Statutorily-Targeted Population for LIHEAP.

Use of an assets test for LIHEAP is at fundamental odds with the federal statutory directive that LIHEAP be targeted toward households that have, among other things, aging household members. The LIHEAP statute makes clear that the energy assistance program shall be targeted to specified vulnerable populations, including the elderly.[106]

In contrast to this statutorily-required targeting of the aged, an assets test imposes an exclusionary factor based on age. There can be little question but that an assets test is most likely to have its most exclusionary impact on older households in the five study states considered in this discussion. Application of an assets test to limit LIHEAP eligibility tends to adversely affect older households more than households in general for two reasons.

First, older households disproportionately tend to be homeowners rather than renters. As the data in Table 10 documents, homeowner status and age march hand-in-hand in the five study states. In each study state, the highest penetrations of homeownership lie in the age brackets 60 through 84. The proportion of occupied units that are owner-occupied consistently increases from each age bracket to the next, until homeownership begins to decline in the highest age bracket (age 85 and older). The proportion of owner-occupancy for age brackets 65 to 84 are between 15% and 30% higher than for the age bracket 35 – 44. Indeed, with the exception of Missouri, the proportion of owner-occupancy for age brackets 65 to 84 is between 10% and 15% higher than for the age bracket 45 – 54. Clearly, in each of the five states studied, assets in the form of owner-occupied homes are more closely associated with aging households.

---

[103] 42 U.S.C. §8624(b)(2)(a) (2012).
[104] 42 U.S.C. §8624(b)(2)(b) (2012).
[105] 42 U.S.C. § 8624(b)(5) (2012).
[106] 42 U.S.C. 8624(b)(3) (The two other populations statutorily identified as "vulnerable" include households with disabled members and households with children under the age of six.)

Table 10. Percentage of Occupied Units that are Owner-Occupied by Age of Householder					
	Arkansas	Hawaii	Missouri	North Carolina	Oklahoma
All occupied units	67%	58%	69%	67%	68%
Age 15 – 24	17%	8%	17%	14%	19%
Age 25 – 34	45%	26%	49%	43%	48%
Age 35 – 44	63%	48%	67%	65%	63%
Age 45 - 54	72%	62%	75%	73%	73%
Age 54 – 59	78%	70%	79%	78%	78%
Age 60 – 64	81%	71%	82%	81%	83%
Age 65 - 74	84%	76%	84%	84%	85%
Age 75 – 84	83%	76%	81%	83%	83%
Age 85 and older	74%	75%	69%	73%	73%
SOURCE: American Community Survey, Table B25007					

Second, not only are older householders more likely to be homeowners in general, but older householders also tend to have higher equity value in their home and thus have higher asset levels. Because they are more likely to live in homes on which they have retired their mortgages, older homeowners are more likely to be excluded from assistance, due to the restrictions of an asset test. Unlike asset tests imposed for SNAP and TANF, and previously for Medicaid, which exclude illiquid assets or assets that are not "available" to help pay month-to-month bills, the five study states that impose an assets test for LIHEAP do not have similar exclusions.[107] Given that the value of a household's assets is not simply the value of the home, but rather the equity value a householder has in the home,[108] an aging homeowner with a paid-off mortgage is more likely to have a higher level of assets than a younger homeowner with substantial mortgage debt remaining to be paid.

[107] In contrast, the Connecticut LIHEAP programs imposes a limitation on "liquid assets," albeit making a distinction between homeowners and non-homeowners. Kentucky, also, limits its assets test to "liquid resources" and "liquid assets." LIHEAP Clearinghouse (2013). "LIHEAP Heating Assistance Eligibility: Assets Test," available at www.liheap.ncat.org/tables/FY2009/assets.htm (last accessed March 23, 2013).
[108] See, note 111, infra, and accompanying text.

Table 11 documents the relationship between age and the existence of a paid-off mortgage. As that Table shows, paid-off mortgages are overwhelmingly associated with aging householders. The Table shows that in each of the five states imposing an assets test for LIHEAP:

- Fewer than 20% of homeowners age 44 or younger have paid-off mortgages;
- Fewer than 30% of homeowners age 45 to 54 have paid-off mortgages;
- Fewer than 40% of homeowners age 55 to 59 have paid-off mortgages;
- Fewer than 50% of homeowners age 60 to 64 have paid-off mortgages.

In the five study states, the proportion of homeowners with paid-off mortgages substantially increases in the population of homeowners aged 65 to 74 years, and even more substantially increases in the population age 75 or older. When assets are recognized as not merely the fair market value of the home, but rather the equity value the owner has in the home, it becomes evident that imposition of an assets test will disproportionately exclude aging householders. In this regard, the imposition of an assets test is, at best, inconsistent with, and is perhaps in direct conflict with, the LIHEAP statutory directive to target aging households for receipt of federal energy assistance.

Table 11. Owner-Occupied Units with No Outstanding Mortgage by Age of Householder, Five Study States

Age of Householder	Arkansas	Hawaii	Missouri	North Carolina	Oklahoma
All occupied units	42%	31%	34%	33%	40%
Age 15 – 34	16%	12%	10%	13%	15%
Age 35 – 44	17%	10%	12%	12%	17%
Age 45 – 54	29%	17%	21%	21%	29%
Age 55 – 59	39%	26%	31%	29%	38%
Age 60 – 64	49%	31%	42%	38%	48%
Age 65 – 74	65%	44%	58%	55%	65%
Age 75 and older	84%	73%	82%	79%	84%

SOURCE: American Community Survey, Table B25027.

Administrative Problems with Implementing an Assets Test.

In addition to the statutory and legal problems with the imposition of an assets test to limit participation in LIHEAP identified above, the imposition of an assets test that fails to exclude an applicant's home poses numerous implementation problems from the perspective of the program administrator.

While an assets test may seem simple to design and implement, in fact, it would not be. For most people, the primary asset they have is their home. One first step in application of an assets test, therefore, would be to determine the "value" of the home (i.e., the value of the asset). To do so, a LIHEAP program would need to define "value." Would the "value" of the home, for example, be tied to fair market value or to the appraised value? In applying an assets test to households that are not categorically eligible for the federal Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps), the fair market value is used.[109] Who would determine that value? Who would pay for the determination of that value?

It is not merely a determination of the value of the home that is needed, however. A second step would be to determine the net value of the home.[110] The value of a person's home as an "asset," in other words, is neither the fair market value nor the appraised value. The value of the asset is the equity interest the household has in the home.[111] As discussed in detail above, the value of an asset is not simply the value of the home, but rather the value of the home minus the value of all remaining debt payments.[112] The LIHEAP office would need to establish what that equity value would be.

The fair market value of a home, as well as the equity value in that home, must be determined over time. As the United States has learned since 2008, the value of homes can vary widely in

---

[109] 7 C.F.R. § 273.8(c)(2) (2012). It is important to remember, however, that SNAP specifically excludes a home from consideration as a household resource. 7 C.F.R. § 273.8(e) (2012).

[110] See generally, R. Richard Banks, "'Nondiscriminatory' Perpetuation of Racial Subordination," 76 B.U. L.Rev. 669, 677 (1996) ("Net worth 'conveys the straightforward value of all assets less any debts.'")

[111] See e .g., 7 C.F.R. § 273.8(c)(2) (2012). (In determining the value of "resources" for purposes of Food Stamps, federal regulations allow the consideration of "non-liquid resources" as follows: "Nonliquid resources, personal property, licensed and unlicensed vehicles, buildings, land, recreational properties, and any other property, provided that these resources are not specifically excluded under paragraph (e) of this section. The value of nonexempt resources, except for licensed vehicles as specified in paragraph (f) of this section, shall be its equity value. The equity value is the fair market value less encumbrances.")

[112] In deciding the equity value of the home, it would then be necessary to determine whether to include only first mortgages, or to include first and second mortgages. How would one count a home equity loan that was negotiated in order for a household to purchase a new automobile? How would one count an outstanding mortgage that was taken out not for the purchase of the home, but to finance a college education? How would one even *know* what the purpose of an outstanding mortgage was?

the market. Housing values can decrease sharply and suddenly. Year-to-year fluctuations in housing values are largely independent of inflation. If a State were to determine that someone is "not eligible" for LIHEAP this year because the applicant's home is "worth too much," the State should be charged with providing notice to that customer if the application of an asset test would yield a different result in a different year due to changes in the housing market.

One interesting question posed by an assets test is whether it operates in a parallel application. The LIHEAP statute specifically provides that income eligibility may not be set below 110% of the Federal Poverty Level.[113] Despite this limitation, an assets test is used by some states to exclude households who otherwise have income below this minimum statutory level.[114] If a household with income *below* the minimum statutory threshold may be excluded because of high assets, however, may a state (or even *must* a state) then *include* households with income *above* the statutory threshold if the household has negative equity in their home?[115]

Summary and Conclusions.

In an era of decreasing resources for the provision of public and private assistance to help pay home energy bills, there is sometimes a desire by program administrators to ensure that assistance is reserved for households who "really need it." One technique used to limit assistance is through the imposition of an assets test in addition to traditional income eligibility.

Recent movement in non-energy public assistance programs has been to eliminate assets tests. The federal SNAP, Medicaid and TANF programs all have eliminated, or substantially scaled back, such program requirements. Not only has this move been found to help move households toward self-sufficiency, and thus away from a long-term reliance on program benefits, but elimination of the use of assets tests has also been found to generate administrative cost savings for the state.

Quite aside from the financial and policy reasons to eliminate the use of an assets test for LIHEAP, the use of an assets test appears to be in direct conflict with multiple portions of the federal LIHEAP statute. Using an assets test for LIHEAP eligibility cannot be reconciled with statutory requirements to target LIHEAP benefits based only on the heating bill to income ratio;

---

[113] See, note 44, supra, and accompanying text.
[114] See, Table 4, and accompanying text.
[115] According to the U.S. Department of Housing and Urban Development's (HUD) Office of Policy Development and Research (PDR), an estimated 23 percent of Americans owe more on their mortgages than their homes are worth, or have "negative equity." PDR (2013). "Negative Equity in the United States," HUD USER: available at www.huduser.org/portal/pdredge/pdr_edge_research_072012.html (last accessed April 7, 2013), citing, George Carter III (March 2012). "Housing Units with Negative Equity: 1997 – 2009," CityScape 14(1):149, U.S. Department of Housing and Urban Development: Washington D.C. Mortgages with negative equity value are also known as "under water" or "upside down" mortgages."

to treat homeowners and tenants alike; and to target the distribution of households to, among others, aged households.