

# The Effect of Reverse Annuity Mortgages on SSI

*Many poor, elderly persons own homes free of mortgage debt, yet still require SSI benefits to subsist. These house-rich, cash-poor senior citizens may significantly supplement their incomes by converting home equity into cash through Reverse Annuity Mortgages (RAMs). Analysis of current law reveals that income from RAMs may adversely affect eligibility for SSI benefits. This Comment proposes a model regulation which encourages the use of home equity conversion without detrimental results to SSI recipients. The proposed regulation would increase disposable income among the elderly and reduce federal spending for SSI.*

## INTRODUCTION

This Comment examines the dilemma of elderly<sup>1</sup> Americans who are house-rich and cash-poor. Large numbers of low-income<sup>2</sup> elderly own

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<sup>1</sup> For the purposes of this Comment, "elderly" or "senior" citizens are those age 65 or over. "As everyone knows, one's perception of 'elderly' is highly subjective, depending largely on one's own age." Limmer, *How Well Are We Housed? No. 4, The Elderly* at 3, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT (1982).

<sup>2</sup> Federal guidelines as of October 1981 set poverty levels at \$4310 for a single person, \$5690 for a couple. 45 C.F.R. § 1060.2-2 (1981). Estimates using a subsistence level under \$4300 per year suggest that 36% of those over 65 are living below the poverty line. Thus, 8.7 million elderly live in poverty. Thompson, *Homeowner's Equity: Providing Lifetime Annuities for the Elderly*, 13 FED. HOME LOAN BANK BOARD J. 23 (1980); see also Limmer, note 1 *supra*, at 6.

As of June 1981, there were 1,753,213 persons over 65 nationwide receiving SSI, including 134,965 recipients in California. 44 SOC. SECURITY BULL. No. 12, 47 (Dec. 1981). Public assistance recipients are often very old, unmarried persons. Researchers suggest that individuals in this group, which includes many widows, stand to gain the most from home equity conversion. Jacobs, *An Overview of the National Potential for Home Equity Conversion into Income for the Elderly*, A REPORT TO THE HOME EQUITY CONVERSION PROJECT 22 (Mar. 1982).

While low-income elderly homeowners tend to have less home equity, there are many low and moderate income families with substantial assets . . . . More than one in four elderly homeowners with incomes less than \$5,000 had at least \$30,000 in home equity. More than two in five with incomes between \$5,000 and \$10,000 had similar amounts.

*Id.* at 9.

homes free of mortgage debt.<sup>3</sup> Nonetheless, they may need Supplemental Security Income (SSI)<sup>4</sup> benefits under the Social Security Act (the Act)<sup>5</sup> to subsist. Although senior citizens may supplement their incomes significantly by converting home equity to cash,<sup>6</sup> this supplemental income may affect SSI eligibility.<sup>7</sup> Under current law, the SSI recipient may suffer a reduction<sup>8</sup> or termination<sup>9</sup> of benefits, or an overpayment penalty<sup>10</sup> due to payments received from home equity conversion.

Existing law does not address treatment of nontraditional income<sup>11</sup> derived from home equity conversion programs.<sup>12</sup> Such income has co-extensive qualities which allow its classification under several different

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<sup>3</sup> Jacobs, note 2 *supra*, at 2. Nearly 11 million persons (73%) over 65 are owners and occupiers of single family homes free and clear of mortgage debt. *Id.* Home ownership among the elderly is highest for couples (83%) and lowest for men living alone (52%). Limmer, note 1 *supra*, at 7.

<sup>4</sup> Supplemental Security Income for the Aged, Blind, and Disabled, Subchapter XVI of the Social Security Act, 42 U.S.C. §§ 1381-1382j (1976 & Supp. IV 1980).

<sup>5</sup> The Social Security Act, 42 U.S.C. §§ 301-1397f (1976 & Supp. IV 1980). See generally 81 C.J.S. *Social Security and Public Welfare* § 1 (1977). The Act provides for old age assistance, old age and survivors' benefits, railroad employees' retirement benefits under federal statutes, maternal and child welfare acts, acts relating to assistance to the blind and handicapped, medical care and disability benefits, and unemployment compensation under state and federal statutes.

<sup>6</sup> Through home equity conversion it is estimated that one-half of the unmarried senior citizens over 75 could increase their incomes by at least 25%; one quarter could gain 50%. Jacobs, note 2 *supra*, at 37.

<sup>7</sup> See Hagel, *Home Equity Conversion Programs: Are They Compatible with Public Entitlement Programs?*, 15 CLEARINGHOUSE REV. 254 (July 1981).

<sup>8</sup> 20 C.F.R. § 416.410 (1982) sets the amount of SSI benefits. It provides for a reduction of benefits when income not excluded under 20 C.F.R. §§ 416.1100-416.1182 (1982) is received. 20 C.F.R. § 416.570 (1982) provides for a reduction in SSI benefits through the withholding of a portion of the monthly benefit when an overpayment is being recovered. This Comment contemplates both these instances when the term "reduction in SSI benefits" is used.

<sup>9</sup> 20 C.F.R. § 416.202 (1982) states the eligibility criteria for SSI benefits. It includes income and resource limitations. When these limitations are exceeded SSI benefits are terminated.

<sup>10</sup> 20 C.F.R. § 416.708(c), (d) (1982) requires that a report be made to the Social Security Administration when income or resources change. Section 416.722(a) provides that penalty deductions from benefits will be made if a required report is not filed on time. This Comment refers to such penalty deductions when the term "overpayment penalty" is used.

<sup>11</sup> As used in this Comment, nontraditional income sources are those which are not addressed in 42 U.S.C. §§ 1381-1382j (1976 & Supp. IV 1980) and 20 C.F.R. §§ 416.101-416.2119 (1982).

<sup>12</sup> See note 31 and accompanying text *infra*.

legislative and administrative interpretations.<sup>13</sup> Case law demonstrates the dangers implicit in legislative and administrative silence on treatment of cash proceeds for SSI eligibility,<sup>14</sup> and also highlights the importance of an SSI regulation covering cash payments. Current law thus yields inconsistent and unpredictable results.

This Comment addresses the deficiency in the law and suggests changes which encourage the elderly to supplement their incomes through home equity conversion without detrimental results. Section I presents an overview of current efforts to unlock home equity for the elderly through the use of Reverse Annuity Mortgages (RAMs).<sup>15</sup> Section II focuses on the operation and application of SSI by examining administrative and legislative guidelines in statutes,<sup>16</sup> regulations,<sup>17</sup> Social Security Rulings<sup>18</sup> and the Social Security Claims Manual.<sup>19</sup> Case law<sup>20</sup> relevant to the classification of RAM proceeds for SSI eligibility is analyzed. Because none of the authorities examined adequately classify RAM payments for SSI, section III proposes a model regulation which would allow the elderly to supplement their incomes through RAM loans, but reduce their SSI benefits by one-third when funds from RAM loans are received.

## I. UNLOCKING HOME EQUITY FOR THE ELDERLY THROUGH REVERSE ANNUITY MORTGAGES

Home equity conversion provides "new asset management alternatives"<sup>21</sup> for the elderly. Despite living at subsistence levels,<sup>22</sup> low-income

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<sup>13</sup> See 42 U.S.C. §§ 1381-1382j (1976 & Supp. IV 1980); 20 C.F.R. §§ 416.101-416.2119 (1982).

<sup>14</sup> See *Schweiker v. Gray Panthers*, 453 U.S. 34, 56 (1981); *Beatty v. Schweiker*, 678 F.2d 359, 364 (3d Cir. 1982); *Randall v. Califano*, 500 F. Supp. 691, 696 (N.D. Cal. 1980).

<sup>15</sup> See note 29 *infra*.

<sup>16</sup> 42 U.S.C. §§ 1381-1382j (1976 & Supp. IV 1980).

<sup>17</sup> 20 C.F.R. §§ 416.101-416.2119 (1982).

<sup>18</sup> Soc. Security Admin., Dep't of Health and Human Servs., Soc. Security Rul. 78-26 (1978) [hereafter Soc. Security Rul. 78-26].

<sup>19</sup> SOC. SECURITY ADMIN., DEP'T OF HEALTH AND HUMAN SERVS. CLAIMS MANUAL § 12502(e)(1) (1979) [hereafter CLAIMS MANUAL] (copy on file at U.C. Davis Law Review office); see also note 97 and accompanying text *infra*.

<sup>20</sup> *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981); *Beatty v. Schweiker*, 678 F.2d 359 (3d Cir. 1982); *Randall v. Califano*, 500 F. Supp. 691 (N.D. Cal. 1980).

<sup>21</sup> National Center for Home Equity Conversion, *Home-Made Pension Plans: Converting Home Equity Into Retirement Income* 3 (Aug. 1982) [hereafter National Center].

<sup>22</sup> See note 2 *supra*.

elderly do possess some assets,<sup>23</sup> both liquid and nonliquid. The liquid assets, however, have little impact on meeting the basic needs of this age group.<sup>24</sup> Because the major asset held by most senior citizens is their nonliquid home equity,<sup>25</sup> many elderly persons holding sizable assets<sup>26</sup> still require SSI to survive.<sup>27</sup> Under the current law, conversion of home equity into income by these house-rich, cash-poor elderly may adversely affect their SSI eligibility.

A national demonstration project in Northern California currently designs and evaluates various mortgage instruments<sup>28</sup> which would al-

<sup>23</sup> Jacobs, note 2 *supra*, at 2. Jacobs' analysis of data from the retirement history survey indicates that nearly 80% of elderly respondents held some liquid assets; the median amount (in constant 1969 dollars) was less than \$4000. *Id.*

<sup>24</sup> *Id.* In contrast, the consideration of nonliquid assets may dramatically alter the spectre of poverty in old age. In today's economy, "outright ownership of the average home would be sufficient to put you in the top one or two percent of wealth holders in the United States." Sowell, *Thoughts and Details on Poverty*, 17 POL'Y REV. 11, 17 (Summer 1981) (emphasis added).

<sup>25</sup> Jacobs, note 2 *supra*, at 2. Almost three-fourths of elderly heads-of-household own their own homes. Limmer, note 1 *supra*, at 7. The breakdown of these 14.8 million heads-of-household over 65 is:

- 6.65 million (45%) consist of two people: a husband (who is at least 65 years old) and a wife (who may be of any age);
- 4.92 million (33%) consist of women living alone;
- 1.43 million (9%) consist of men living alone;
- 1.46 million (10%) consist of families in which the wife is absent;
- 456,000 (3%) consist of families in which the husband is absent.

Limmer, note 1 *supra*, at 3.

By definition, a household consists of one or more persons living together. Unlike a family, a household need not contain related members. The Limmer survey did not include elderly who live in households in which the head of the house is under 65. *Id.*

<sup>26</sup> "[T]he average value of an elderly-owned home is now substantially more than \$50,000." Jacobs, note 2 *supra*, at 2.

<sup>27</sup> UNLOCKING HOME EQUITY FOR THE ELDERLY 47, 222 (K. Scholen & Y. Chen, eds. 1980) [hereafter UNLOCKING HOME EQUITY]. In 1975, 45% of elderly with incomes over \$4000 had home equity of over \$20,000. *Id.* at 28. It is estimated that 17% of the present SSI population, about 340,000 persons, could derive significant benefit from a reverse annuity mortgage. *Id.* at 222.

<sup>28</sup> There has been no systematic use of home equity to finance daily living requirements and meet other financial obligations of the elderly. Jacobs, note 2 *supra*, at 5. But borrowing against the equity of one's home is new only in practice, not in theory. Yung-Ping Chen wrote the first American work on the concept of home equity conversion in 1965. UNLOCKING HOME EQUITY, note 27 *supra*, at 77.

There are two kinds of home equity conversion plans: sale plans and loan plans.

#### A. Sale Plans

1. *Split-Equity*: A split-equity sale plan allows the elderly homeowner to sell his house to a nonprofit group and live in it rent free for life; he receives

low senior citizens to derive supplemental income from home equity. The Reverse Annuity Mortgage (RAM) Program<sup>29</sup> seeks to increase

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free maintenance, payment of taxes and insurance, and a monthly check based on the value of the home and the owner's life expectancy. Upon death the home reverts to the organization. The Buffalo Home Equity Living Plan (HELP) is the first split-equity program of its kind in the United States. Initial seed money for the project was provided by the United States Department of Housing and Urban Development (HUD). Buffalo Home Equity Living Plans, Inc. (HELP) Factsheet, 1982 (copy on file at U.C. Davis Law Review office).

2. *Sale and Leaseback*: Under the sale and leaseback the senior sells his house at a discounted price to an investor (perhaps a savings and loan association) and leases it back for life. The investor pays taxes, insurance, maintenance, and a monthly check to the senior citizen; the investor gains the advantages of property appreciation and tax depreciation which accompany home ownership. The Fouratt Company, Monterey, California, is a for-profit corporation largely responsible for development and implementation of this concept. Thompson, note 2 *supra*, at 26; REVERSE ANNUITY MORTGAGE PROGRAM BROCHURE (1981) [hereafter RAM BROCHURE] (copy on file at U.C. Davis Law Review office).

#### B. Loan Plans

1. *Reverse Annuity Mortgage*: Under the reverse annuity mortgage (RAM) the senior homeowner uses his home as collateral for a loan. He retains title to his home and is responsible for all tax and maintenance costs. An initial lump sum payment may be used by the homeowner to purchase a separate annuity from an insurance company. The annuity benefits may be used to pay yearly interest to the lender. Annuity payments would provide "income protection against the risk of living longer than expected." UNLOCKING HOME EQUITY, note 27 *supra*, at 121.
2. *Reverse Mortgage*: This plan is similar to the RAM but does not involve the purchase of an annuity from an insurance company. In effect the lender provides an annuity by disbursing a fixed amount at designated intervals. UNLOCKING HOME EQUITY, note 27 *supra*, at 108.

Public and private nonprofit organizations, financial institutions, researchers, and community groups are developing and testing home equity conversion plans and delivery systems. Letter from Ken Scholen to Rep. Edward R. Roybal (Sept. 22, 1981) regarding testimony on the Home Equity Conversion Project (copy on file at U.C. Davis Law Review office).

<sup>29</sup> The RAM Program, established in Corte Madera, California, in 1980, is administered by the San Francisco Development Fund. It is funded through grants from the San Francisco Foundation, the Federal Home Loan Bank Board and the Ford Foundation. RAM BROCHURE, note 28 *supra*, at 3.

Participating lenders are matched with eligible seniors. Each loan is tailored to the particular needs of the elderly homeowner. The RAM Program provides public outreach, counseling, referrals and follow-up to all participants. To date 22 loans have been made, totaling \$3 million.

Senior citizens (62 or over) in Marin County, California, owning and living in single

disposable income without forcing senior citizens to sell their homes.<sup>30</sup> The RAM Program is a home equity conversion project<sup>31</sup> which offers

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family homes with little or no existing mortgage balance, may qualify. Generally, Marin County seniors have a greater income than other elderly persons, and none of the participants to date are SSI recipients. Maximum income allowed for participation in the RAM Program is \$19,680 for a single person, \$22,440 for a couple. *Id.*; Interview with K. Kenny, RAM Program Counselor, Corte Madera, Cal. (June 19, 1982) [hereafter Kenny] (copy on file at U.C. Davis Law Review office); see also Stix, *Marin County Woman Gets First Reverse Annuity Loan*, L.A. Times, Aug. 30, 1981, at 2, col. 1.

<sup>30</sup> Jacobs, note 2 *supra*, at 5. Traditionally, elderly owners had to sell their homes in order to meet expenses or realize home appreciation. Behavior and attitude surveys provide strong evidence that the elderly are reluctant to leave their homes. Jacobs, *The Housing of Elderly Americans*, UNIV. OF ROCHESTER DISCUSSION PAPER NO. 8103 (Dec. 1981) (copy on file at U.C. Davis Law Review office). Through home equity conversion, older owners may reap the benefits of home appreciation during their lifetimes and remain in their homes for a fixed number of years or until death. *Id.*

<sup>31</sup> Among the pioneers in home equity conversion are:

1. *Home Equity Conversion Project, Madison, Wisconsin*

This program was sponsored by the Administration on Aging and was funded under the Older Americans Act, 42 U.S.C. §§ 3001-3057g (1976 & Supp. IV 1980) to research, develop, and disseminate information on home equity conversion. The Project and its director have been the primary clearinghouse and resource center for all conversion projects nationwide. With recent funding, its efforts continue under the new name National Center for Home Equity Conversion. *Home Equity Conversion Housing and the Elderly: Present Problems and Future Considerations: Hearings Before the Subcomm. on Housing and Consumer Interests of the Select Comm. on Aging, House of Representatives, 97th Cong., 1st Sess. 78 (1981)* (Statement of Ken Scholen, Director, Home Equity Conversion Project).

2. *Buffalo Home Equity Living Plans, Inc. (HELP) Buffalo, New York*

HELP, a nonprofit corporation, provides the services of a bank's trust department, an appraiser, and a property manager to assist the elderly client. The United States Department of Housing and Urban Development granted HELP \$1.3 million to administer this innovative split-equity program. A primary goal of HELP is to preserve older neighborhoods by maintaining homes and reselling them to other senior residents. HELP PUBLICATION (copy on file at U.C. Davis Law Review office).

3. *Fouratt Corporation, Carmel-by-the-Sea, California*

Fouratt is a private, for-profit corporation that brings owner and investor together through its Senior Equity Plan. This plan utilizes a sale and leaseback arrangement permitting an investor to purchase the home of a senior citizen at a discount. The elderly owner receives a down payment and monthly installments with interest. At the time of the sale the senior citizen leases the home from the investor for a fixed rent, and receives a guaranteed right of occupancy until death.

Mortgage payments continue to the seller's estate should he die before it is paid off. In addition to his discounted sale price, the investor receives tax benefits and future appreciation. Fouratt receives a 4% sales commission. Shaman, *New Hope for the Elderly: Home Equity Conversion*, REAL EST. TODAY 38 (May 1982) (copy on file at

a loan from an institutional lender to an older homeowner in the form of monthly draws or disbursements.<sup>32</sup> Under the program, home equity serves as collateral, and the lender pays a fixed amount to the borrower every month for a scheduled number of years.<sup>33</sup> Each payment enlarges the loan balance on which interest is charged.<sup>34</sup> The monthly payment is determined by the appraisal value of the home,<sup>35</sup> the term of the loan,<sup>36</sup> and the age of the borrower.<sup>37</sup> The loan must be paid off or renegotiated at maturity.<sup>38</sup> The RAM Program utilizes three types of

U.C. Davis Law Review office).

4. *Senior Homeowner Cooperative Equity Conversion Project, Carteret Savings & Loan Association, Newark, New Jersey*

This plan is similar to Fouratt's but homes are priced considerably lower — from \$30,000 to \$78,000. Rather than sell to individual buyers, Carteret sets up limited partnerships for groups of investors in need of tax shelters. *Id.* at 40.

5. *American Homestead Inc., Moorestown, New Jersey*

American Homestead has made substantial progress toward a long-term reverse mortgage through its development of the "Century Plan:"

The plan provides monthly loan advances until the borrower dies, sells the home, or reaches 100 — whichever occurs first. The amount of the advances is determined by the borrower's life expectancy and the home's value. Interest accrues on the loan advances at a fixed, below-market rate. No repayment is due until the end of the term . . . the borrower agrees to give up some or all of any future appreciation on the home in addition to repaying all principal and interest. However, at the end of the term — that is when the borrower dies, moves, or reaches 100 — the borrower's total liability is limited by the value of the home at that time.

National Center, note 21 *supra*, at 17.

<sup>32</sup> SPECIAL STUDY ON REVERSE ANNUITY MORTGAGES, FINAL REPORT, SAN FRANCISCO DEVELOPMENT FUND, RAM PROGRAM, at 2 (Mar. 1981) [hereafter SPECIAL STUDY] (copy on file at U.C. Davis Law Review office).

<sup>33</sup> *Id.* at 22.

<sup>34</sup> Barnett, *Alternate Mortgage Instruments: How to Maintain Secured Lender Status*, 96 BANKING L.J. 6, 9 (1979); SPECIAL STUDY, note 32 *supra*, at 2. The participating lenders have agreed to a fixed rate loan of 14% interest for a term up to 12 years. Interest is charged on the loan balance as it accumulates. Weinrobe, *On the Accumulation of Interest with a Reverse Mortgage*, RAM PROGRAM PUBLICATION (Apr. 1981).

<sup>35</sup> Up to 80% of the appraised value of the home (maximum \$150,000) may be borrowed. RAM PROGRAM PRESS RELEASE (May 6, 1982) (copy on file at U.C. Davis Law Review office); RAM BROCHURE, note 28 *supra*, at 3.

<sup>36</sup> See note 31 *supra*.

<sup>37</sup> Life expectancy of the borrower is derived from actuarial tables and is used to determine income requirements over the borrower's remaining lifespan.

<sup>38</sup> The owner may sell his home and use the proceeds to pay off the loan. Depending upon property values and appreciation, some equity may remain after the loan is paid off. Other options include paying off the RAM prior to term, extending the loan be-

equity conversion loans and allows an initial lump sum disbursement option.<sup>39</sup> The lump sum payment may be used by borrowers to purchase an annuity,<sup>40</sup> thereby protecting them if they outlive the term of the loan.<sup>41</sup>

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yond the term, or converting from a RAM to a sale and leaseback arrangement. Weinrobe, *Discussion of Possible Options at End of Ram Loan Term*, RAM PROGRAM PUBLICATION (May 1982) (copy on file at U.C. Davis Law Review office).

<sup>39</sup> Assuming the fair market value of the home is \$150,000, the maximum amount loaned would be \$120,000 (80%). At 14% interest, the elderly borrower has the following loan options:

*Type I — Simple Reverse Mortgage*

The borrower receives a fixed interest rate, for a fixed term with fixed monthly income payments from the lender. For example, the borrower's monthly income on a 10-year loan would be \$463. If the homeowner elects an initial disbursement of \$5000 (to pay off an existing mortgage or for home remodeling), payments would be reduced to \$386 per month.

*Type II — Graduated Payment RAM*

The borrower receives a fixed interest rate for a fixed term but the monthly payments are graduated (6% annual increase). For a \$120,000 loan over a 10-year term, monthly income begins at \$375. By the tenth year monthly payments have increased to \$632. With an initial disbursement of \$5000 payments would start at \$312 and graduate to \$527.

*Type III — Renegotiable RAM*

Although similar to Type II, this plan offers the option of loan modification after three years, determined by any property value changes and the cost of living index. Property is reappraised and the maximum loan amount may be adjusted, thereby requiring a renegotiated interest rate. RAM PROGRAM BROCHURE, note 28 *supra*, at 2.

<sup>40</sup> Throughout this Comment, the terms 'reverse annuity mortgage' and 'reverse mortgage' will be used interchangeably. However, only some reverse annuity mortgages actually involve the purchase of an annuity:

A reverse mortgage provides a flow of income to a senior/homeowner either as a result of a rising loan or a fixed loan which is used to purchase an annuity. Either of these streams of income can be thought of as an annuity . . . . The difference between the two is simply that the rising loan will have a fixed maturity date, and the fixed loan with purchased annuity will typically continue to generate income for a period related to the life of the annuitant. It is entirely appropriate to discuss reverse annuity mortgages with or without a purchased annuity. Consequently, there is no difference between reverse annuity mortgages and reverse mortgages

SPECIAL STUDY, note 32 *supra*, at 22 n.8.

<sup>41</sup> When the term of the loan ends, the insurance company begins payment of the borrower's deferred annuity. Should the borrower die prior to the deferment period his purchase of a deferred annuity has been to no avail. Spradling, *Reverse Annuity Mortgages and the Due-on-Sale Clause*, 32 STAN. L. REV. 143, 149 (1979). The annuity would provide monthly payments to cover interest on the RAM, or provide interest plus income to the annuitant. SPECIAL STUDY, note 32 *supra*, at 54.



Financial institutions are the primary sources of reverse annuity mortgages.<sup>42</sup> The newly enacted Depository Institutions Act of 1982 extends the lending authority of national banks to make reverse annuity mortgages.<sup>43</sup> Prior federal legislation encouraged the savings and loan

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<sup>42</sup> Few financial institutions offer RAMs. Of 400 savings and loan associations surveyed in February 1982, only 0.5% said they currently offer RAMs. AMERICAN MORTGAGE INSUR. CO., SURVEY NO. 2, ADJUSTABLE RATE MORTGAGES 35 (Feb. 1982) (Raleigh, N.C.). Economic restrictions rather than legal or institutional barriers probably account for the scarcity. "[I]f at a rate of return that is acceptable to a lender, given his various options, the annuities that can be paid are too small to be acceptable to households, then the product is not economic[al]." UNLOCKING HOME EQUITY, note 27 *supra*, at 80.

Legal and institutional barriers may be eliminated. This comment proposes one effort to overcome the legal barriers to RAM expansion. When RAMs are proven profitable as well as workable for *all* interested parties, marketplace availability will mushroom. "The parties to these financial arrangements must find it in their self-interest to participate. One implication that follows is that those private institutions providing loans or selling annuities must earn an adequate rate of return with acceptable levels of risk." Jacobs, note 2 *supra*, at 23.

<sup>43</sup> On October 16, 1982, President Reagan signed the landmark Depository Institutions Act of 1982, Pub. L. 97-320, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1469, of which Title III is the Thrift Institutions Restructuring Act. Section 313 of Title III allows any Federal Home Loan Bank Board member to elect conversion to a federal savings and loan or a federal savings bank. 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1497.

The Depository Institutions Act "broaden(s) the real estate lending authority of national banks, and permit(s) state chartered lending institutions to make the same reverse mortgage loans that are authorized for federally-chartered lenders." National Center for Home Equity Conversion, 1 HOME EQUITY NEWS 1 (Oct. 1982) (copy on file at U.C. Davis Law Review office).

Although national banks do not have express authority to make reverse mortgage loans, they currently may offer RAMs under regulations permitting nonconforming loans "if the total unpaid amount loaned . . . does not exceed 10 per centum of the amount that a national banking association may invest in real estate loans." 12 U.S.C. § 371(f) (1976). Section 371 is amended by Title IV of the new Depository Institutions Act, which delineates the type of real estate loans national banks may offer in the future. Under Title IV § 403(a), national banks have greater real estate lending authority:

Any national banking association may make, arrange, purchase, or sell loans or extensions of credit secured by liens or interests in real estate, subject to such terms, conditions and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation.

1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1510-11. This section takes effect 180 days from the date of enactment. *Id.* at 1511.

Title VIII, the Alternative Mortgage Transaction Parity Act, authorizes state chartered lending institutions to offer alternative mortgage financing on an equal footing with federally chartered lenders. Specifically, Title VIII § 802(b) eliminates the

industry to experiment with and develop RAMs.<sup>44</sup> However, in California, state savings and loan associations lack express statutory authority to provide reverse mortgages.<sup>45</sup> California state banks also lack reverse mortgage authority.<sup>46</sup> Although the first California institution has

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discriminatory impact that alternative mortgage regulations have upon nonfederally chartered lenders, and "provide(s) them with parity with federally chartered institutions." *Id.* at 1545.

In addition, state restrictions on alternative mortgage transactions are preempted by federal law (subject to a three-year state override) under Title VIII § 804(c): "An alternative mortgage transaction may be made . . . in accordance with this section, notwithstanding any State constitution, law, or regulation." *Id.* at 1547. However, this preemption would have little practical impact on California's already nonrestrictive approach to RAMs and alternative mortgage instruments.

<sup>44</sup> The Federal Home Loan Bank Board, which regulates the savings and loan industry, first issued regulations on reverse annuity mortgages effective January 1, 1979. 12 C.F.R. § 545.6-4(c)(3)(xiii) (1982) sets forth disclosure requirements, including: "Inclusion of a statement that such mortgages have tax and estate-planning consequences and may effect levels of, or eligibility for, *certain government benefits*, grants or pensions, and that applicants are advised to explore these matters with appropriate authorities." (emphasis added).

<sup>45</sup> CAL. FIN. CODE § 7153.9 (West Supp. 1982) (repealed) empowered the state savings and loan commissioner to issue regulations allowing savings and loan associations to experiment with innovative instruments such as RAMs on a limited basis, and placed a "high priority on the protection of the consumer." The regulations promulgated pursuant to Section 7153.9 are found in CAL. ADMIN. CODE tit. 10, § 178.4(d) (1981). The regulations prohibit aggregate loans from exceeding 10% of each institution's assets. Other specific industry provisions for RAM loans include:

(3) Annuities paid to borrowers may either be for life or for a specified term. Annuity contracts with life insurance companies may call for immediate payment or may defer payment for a specified number of years. If deferred, the association may make payments on an annuity to the borrower as loan advances during the deferral period, provided that the maximum loan balance reached at the end of the deferral period does not exceed 95 percent of the initial property value at the end of the deferral period;

(4) If an annuity is purchased from an insurance company, the annuity contract will provide that the insurance company is authorized to make interest payments on the loan directly to the association; and

(5) Full disclosure is made to the borrower regarding the gross and net annuity he will receive, and the amount of the debt that will be collected on his death or on the prior sale of the property. Where the debt rises over time, the borrower will be given the complete monthly debt schedule.

CAL. ADMIN. CODE tit. 10 § 178.4(d) (1981).

<sup>46</sup> CAL. FIN. CODE § 1237 (West Supp. 1982) (repealed) empowered the superintendent of banks to permit the banking industry to make loans not authorized under existing law. The aggregate of such outstanding loans could not exceed 10% of assets. The Code delineated the objective of the legislation:

expressed interest,<sup>47</sup> neither California state banks nor state savings and loan associations currently have RAM loans outstanding.<sup>48</sup>

Coordinating SSI eligibility rules and benefit levels with RAM loans is critical for the poor elderly wishing to liquidate the home investment. Intended expansion of the RAM Program throughout California<sup>49</sup> increases the likelihood that future RAM clients will be SSI recipients.<sup>50</sup>

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(b) The rules and regulations of the superintendent shall be designed to permit limited experimentation to furnish valuable experience and information to the superintendent, the banking industry, and to the public . . . and to permit banks to operate selected pilot projects on a limited basis. The pilot projects . . . shall place a high priority on protection of the consumer. . . . The regulations shall also contain a provision requiring that full disclosure be made to potential applicants, of, among other things, the nature and effect of the alternative mortgage payment instrument, the payment due each month of the payment term, and all costs or savings attributed to the alternative mortgage instrument.

*Id.*

<sup>47</sup> Telephone interview with B. Belling, Deputy Director, RAM Program (Apr. 11, 1983).

<sup>48</sup> The 29 RAM Program loans completed as of October 1982 were made either by a federal savings and loan or by a national bank. (One federal savings and loan and three national banks have participated in the program.) With statewide program expansion, new lender commitment is anticipated. Letter from K. Kenny, RAM Program Counselor (Oct. 25, 1982) (copy on file at U.C. Davis Law Review office).

The average age of the RAM Program participants is 75 for males, 62 for females. The average term of the loan is seven years. The average value of the homes securing the RAM loans is a staggering \$200,000. Kenny, note 29 *supra*. Compare Marin County's program with Buffalo Home Equity Living Plans (HELP), in which the average home is valued at \$20,000. Despite the overall lower socio-economic base of the Buffalo residents, none of the eight HELP clients to date have been SSI recipients. Letter from D. Guillaume, Director, HELP (July 8, 1982) (copy on file at U.C. Davis Law Review office).

<sup>49</sup> In September 1982, the San Francisco Development Fund began expanding its RAM Program to selected nonprofit agencies in the following California locations: San Diego, Oakland, Garden Grove, North Hollywood, Orange County, San Mateo County, Alameda County, Sonoma County, Napa County. RAM-PAGES, RAM PROGRAM NEWSLETTER at 3 (Summer 1982).

<sup>50</sup> In Marin County, California, site of the RAM Program, only 6% of the elderly population receive SSI compared to 16% statewide. B. Harootyan, CALIFORNIA RAM CONFERENCE REPORT, at 2 (May 18, 1982) (Copy on file at U.C. Davis Law Review office). One commentator has noted that:

[L]ow income individuals and families seem to be relatively advantaged as candidates for RAMs. . . . We have seen previously that lower income individuals tend to have lower net equity. However, it is also true that lower income elderly homeowners tend to have greater probability of being single and a greater probability of being older. Both of these differences favor the lower income owner with respect to the potential RAM annuity

Unfortunately, the economic benefits to the individual from a RAM loan may be nullified by a significant cash penalty under current law.

Appropriate regulation of RAMs may promote independent living, reduce spending for SSI, and inject a large source of private capital into the economy. Moreover, such a regulation may facilitate informed consumer choice,<sup>51</sup> insure predictable results for lenders, and provide guidance for agency personnel determining eligibility. Without specific regulations defining home equity income, the viability of the RAM Program for SSI recipients remains unclear. Therefore, an analysis of the operation and application of SSI in relation to RAM proceeds is necessary.

## II. THE OPERATION AND APPLICATION OF SSI

### A. Administrative and Legislative Interpretations

The Social Security Act<sup>52</sup> includes some of the most intricate legislation ever drafted by Congress.<sup>53</sup> Subchapter XVI<sup>54</sup> of the Social Security Act<sup>55</sup> created SSI,<sup>56</sup> the nationwide cash grant program financed

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(since they produce shorter household life expectancy). On balance, these factors outweigh the net equity disadvantages for many low income homeowners.

Jacobs, note 2 *supra*, at 31.

<sup>51</sup> The California Legislature recently amended CAL. PROB. CODE § 700.1 (West Supp. 1982) to cover circumstances in which a deceased person has received, or may have received health care under MediCal. The heirs, executor, administrator, or persons in possession of any property of the decedent under this statute, are directed to give the Director of Health Services notice of the death within 90 days. The Director then has four months after notice of death is given to pursue a claim against the deceased's estate. This statute may in effect force the sale of the home in order to satisfy the claim of the Director of Health Services against the estate. Since the home could not be passed on to an heir or a devisee, home equity conversion might be a more attractive option to a consumer than the forced sale of his home.

<sup>52</sup> See note 5 and accompanying text *supra*.

<sup>53</sup> In *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981), the Supreme Court observed that the Social Security Act is among the most intricate ever drafted. "Its Byzantine construction," as Judge Friendly has observed, makes the Act "almost unintelligible to the uninitiated." *Id.* at 43, citing *Friendman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977).

<sup>54</sup> See note 4 and accompanying text *supra*.

<sup>55</sup> See note 5 and accompanying text *supra*.

<sup>56</sup> See note 4 and accompanying text *supra*.

through the United States Treasury.<sup>57</sup> The purpose of the program<sup>58</sup> is to insure a minimum level of income<sup>59</sup> to eligible<sup>60</sup> senior citizens.<sup>61</sup>

SSI entitles elderly persons below a certain resource<sup>62</sup> and income

<sup>57</sup> 20 C.F.R. § 416.110 (1982).

<sup>58</sup> *Id.* § 416.110 states: "The basic purpose underlying the supplemental security income program is to assure a minimal level of income for people who are 65 or over . . . and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level."

<sup>59</sup> The minimum level of income is provided for by statute. 42 U.S.C. § 1382(b)(1), (2) (1976):

- (1) The benefit under this subchapter for an individual who does not have an eligible spouse shall be payable at the rate of \$1,752 . . . reduced by the amount of income, not excluded pursuant to [42 U.S.C. § 1382a(b) (1976)] of such individual and spouse.
- (2) The benefit under this subchapter for an individual who has an eligible spouse shall be payable at the rate of \$2,628 . . . reduced by the amount of income, not excluded pursuant to [42 U.S.C. § 1382a(b) (1976)] of such individual and spouse.

42 U.S.C. § 1382f (1976) provides for cost of living adjustments in benefits. Increases are published in the Federal Register. 20 C.F.R. § 416.110(f) (1982) sets forth state options to provide additional payments to SSI recipients.

<sup>60</sup> 20 C.F.R. § 416.202 (1982) states:

You are eligible for SSI benefits if you meet all the following requirements:

- (a) You are —
  - (1) Aged 65 or older . . .
  - (2) Blind . . .
  - (3) Disabled . . .
- (b) You are a resident of the United States (§ 416.1602), and —
  - (1) A citizen or a national of the United States (§ 416.1603);
  - (2) An alien lawfully admitted for permanent residence in the United States (§ 416.1604); or
  - (3) An alien permanently residing in the United States under color of law (§ 416.1606);
- (c) You do not have more income than is permitted . . .
- (d) You do not have more resources than are permitted . . .
- (e) You file an application for SSI benefits.

<sup>61</sup> 42 U.S.C. § 1382c(a)(1)(A) (1976) defines "aged" for the purposes of the act as individuals who have attained a minimum age of 65. SSI also provides payments to the blind and disabled. Section 1382c(a)(2) & (3)(A) (1976) defines "blindness" and "disability" for SSI eligibility purposes.

<sup>62</sup> See 42 U.S.C. § 1382(a)(1)(B), (2)(B); 1382(g) (1976). Individuals deemed to meet the resource test are those who do not have an eligible spouse and whose nonexempt resources do not exceed \$1500 for a single individual, or combined resources of \$2250 for an individual living with a spouse.

level<sup>63</sup> to supplemental cash payments<sup>64</sup> from the federal government. Congress created specific income and resource exemptions<sup>65</sup> to determine SSI eligibility. For example, the home is excluded from resource computation.<sup>66</sup> RAM loans present problems, however, because they provide regular and prolonged income from the exempt home. Hence, SSI income and resource eligibility may be affected when these proceeds are received.

The Secretary of Health and Human Services (the Secretary)<sup>67</sup> has primary responsibility for the Act's interpretation.<sup>68</sup> The Secretary's regulations defining income and resources suggest how RAM proceeds may be analyzed for SSI eligibility purposes. However, the existing regulations<sup>69</sup> are not dispositive, because they classify only traditional<sup>70</sup>

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<sup>63</sup> 42 U.S.C. § 1382(a)(1)(A), (2)(A); 1382(h) (1976). Individuals deemed to meet the income test are those who do not have an eligible spouse and whose nonexempt income does not exceed \$1752 per year for a single individual, or combined income of \$2628 for an individual living with a spouse. Both of these amounts are adjusted for cost of living increases in benefits.

<sup>64</sup> See note 59 and accompanying text *supra*. 42 U.S.C. § 1382a (1976 & Supp. IV 1980) provides the exemptions from income computation. 20 C.F.R. § 416.1103 (1982) provides additional exclusions from income computation. 42 U.S.C. § 1382b (1976 & Supp. IV 1980) provide exemptions from resource computation. 20 C.F.R. § 416.1210 (1982) elaborates on the home exemption and provides additional exclusions from resource computation.

<sup>65</sup> See note 64 and accompanying text *supra*.

<sup>66</sup> 42 U.S.C. § 1382b(a)(1) (1976) excludes the home from resource computation. 20 C.F.R. § 416.1210 (1982) also excludes the home from resource computation: "A home . . . is any shelter in which the individual (and spouse, if any) has ownership interest and which is used by the individual (and spouse, if any) as the principal place of residence." It includes any appertaining land and related outbuildings, necessary to the home's operation. *But see* 20 C.F.R. § 416.1212(a)(1) (1982). This section states that:

Prior to October 1976, a home is excluded in determining the resources of an individual (and spouse if any) to the extent its current market value does not exceed \$25,000 (\$35,000 in Alaska or Hawaii). Where the current market value of the home exceeds \$25,000 (\$35,000 in Alaska or Hawaii), only the excess is counted toward the resource limitation as defined in § 416.1205.

<sup>67</sup> The Secretary of Health and Human Services at the time of this writing is Margaret Heckler. She is the named defendant when suits are brought against the Secretary of Health and Human Services. Her successor will be substituted as a defendant pursuant to FED. R. APP. P. 43(c)(1) when appropriate.

<sup>68</sup> In *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981) the Supreme Court stated: "Perhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Id.* at 43, *citing* *Batterton v. Francis*, 432 U.S. 416, 425 (1977).

<sup>69</sup> 20 C.F.R. §§ 416.101-416.2119 (1982).

<sup>70</sup> As used in this Comment, traditional income sources are those included in both 42

income sources. In classifying proceeds from nontraditional income sources such as RAMs, the regulations serve only as guidelines to interpretation.

### 1. Income

Statutes set the minimum level of SSI benefits.<sup>71</sup> Benefits are reduced<sup>72</sup> by the amount of "countable income"<sup>73</sup> that an individual receives. Countable income includes both earned<sup>74</sup> and unearned<sup>75</sup> receipts, with certain narrow exceptions.<sup>76</sup> Legislation<sup>77</sup> further

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U.S.C. § 1382a (1976 & Supp. IV 1980) and 20 C.F.R. §§ 416.1100-416.1124 (1982).

<sup>71</sup> See note 59 and accompanying text *supra*.

<sup>72</sup> 20 C.F.R. § 416.410 (1982).

<sup>73</sup> 20 C.F.R. §§ 416.1100-416.1124 (1982).

<sup>74</sup> 42 U.S.C. § 1382a (1976 & Supp. IV 1980) states that for purposes of the Act, countable income means both earned and unearned receipts. The statute explains that earned income means only wages, net earnings from self-employment, a refund of federal income taxes, and remuneration received from services performed in a sheltered workshop.

<sup>75</sup> *Id.* The statute further explains that unearned income means support and maintenance received in cash or in kind; any payments received as an annuity, pension, retirement, or disability benefits, including: veterans' compensation and pensions, workers' compensation payments, old-age, survivors', and disability insurance benefits, railroad retirement, annuities and pensions, and unemployment insurance benefits; prizes and awards; the proceeds of any life insurance policy to the extent that they exceed the amount expended by the beneficiary for purposes of the insured individual's last illness and burial or \$1500, whichever is less; gifts (cash or otherwise), support and alimony payments, and inheritances; and rents, dividends, interest, and royalties. *Id.*

<sup>76</sup> 42 U.S.C. § 1382a(b) (1976 & Supp. IV 1980) includes the following exemptions from income computation:

- (1) Earned income of a child attending school;
- (2) The first \$240 per year other than income which is paid under a state program established prior to July 1, 1973;
- (3) The total unearned income that is received too infrequently or irregularly to be included;
- (4) Certain monies received under the Act if such individual is blind;
- (5) Any amount received from any public agency as a return or refund of property taxes, or of taxes paid on food;
- (6) Assistance based on need and furnished by any state or local government;
- (7) Grant or scholarship money received to pay tuition costs at any educational institution;
- (8) Home produce utilized by a household for its consumption;
- (9) One-third of child support received;
- (10) Any amounts received for foster care;
- (11) Assistance received under the Disaster Relief Act;
- (12) Interest income received on assistance funds.

<sup>77</sup> See 42 U.S.C. § 1382a (1976 & Supp. IV 1980).

subclassifies receipts depending on whether the income is "in cash"<sup>78</sup> or "in kind."<sup>79</sup>

Regulations promulgated by the Secretary define income as anything which can be used for food, clothing, or shelter.<sup>80</sup> Annuities may be included, and labeled as unearned income.<sup>81</sup> Therefore, RAMs which utilize annuities<sup>82</sup> may be considered income to the SSI recipient. However, since the regulations define annuities as related to prior work or service,<sup>83</sup> and because RAMs are not based on prior work or service, they might not be included under the regulations as income.

Proceeds from the sale or exchange of property are not considered income.<sup>84</sup> The regulations classify such receipts as a resource<sup>85</sup> which has changed form.<sup>86</sup> Loan proceeds are also exempt from income computation under SSI regulations.<sup>87</sup> Applying these administrative guidelines, SSI income eligibility should not be affected by a RAM.

There are no uniform and predictable answers regarding the treatment of RAM receipts for SSI eligibility. Traditional income classifications regard these proceeds as annuities, loans, or conversions of one's own property. Although an annuity could be treated as income, a loan or a conversion of one's own property should not be so considered. A regulation is necessary to clarify the treatment of RAMs and to establish uniform and consistent guidelines for consumers, lending institutions and agency personnel.

## 2. Resources

Resources are assets which individuals own and can convert to cash for their support and maintenance.<sup>88</sup> Persons who have nonex-

<sup>78</sup> 42 U.S.C. § 1382a(a)(2) (1976).

<sup>79</sup> *Id.* See also notes 139, 146 and accompanying text *infra*.

<sup>80</sup> 20 C.F.R. § 416.1102 (1982).

<sup>81</sup> 20 C.F.R. § 416.1121(a) (1982).

<sup>82</sup> See note 40 and accompanying text *supra*.

<sup>83</sup> 20 C.F.R. § 416.1121(a) (1982).

<sup>84</sup> 20 C.F.R. § 416.1103(c) (1982).

<sup>85</sup> See note 88 and accompanying text *infra*.

<sup>86</sup> 20 C.F.R. § 416.1103(c) (1982).

<sup>87</sup> 20 C.F.R. § 416.1103(f) (1982) states that money borrowed or received as repayment of a loan is not income.

<sup>88</sup> 20 C.F.R. § 416.1201(a) (1982) states:

[R]esources mean cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource. If the property right cannot be liquidated, the



empt<sup>89</sup> resources exceeding certain limits are not eligible for SSI benefits.<sup>90</sup> The home is an exempt resource, regardless of its value.<sup>91</sup>

When an individual sells a home and converts it to cash, SSI regulations provide that reinvestment in another home within three months will exempt the cash received from income computation.<sup>92</sup> Under this analysis proceeds from the converted home are treated as a resource if not reinvested. Although it appears that this regulation could apply to RAM proceeds, title to the home must pass before the regulation is effective.<sup>93</sup> Because title does not pass under a RAM,<sup>94</sup> the status of such a loan is uncertain. The mere formality of passage of title, however, should not determine substantive rights.

Statutes<sup>95</sup> and regulations<sup>96</sup> are silent regarding the status of loan proceeds for SSI eligibility purposes. However, the Social Security Claims Manual<sup>97</sup> and a Social Security Ruling<sup>98</sup> clarify the Secretary's position on loans. Both authorities state that the proceeds of a loan requiring repayment become a nonexempt resource if retained beyond

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property will not be considered a resource of the individual (or spouse).

<sup>89</sup> 20 C.F.R. § 416.1205-1266 (1982) specifies exempt resources for SSI purposes.

<sup>90</sup> 20 C.F.R. § 416.1205 (1982) provides that an individual without an eligible spouse will be considered eligible for SSI if his nonexcludable resources do not exceed \$1500 and all other eligibility requirements are met. An individual who is living with either an eligible or ineligible spouse will be considered eligible if the couple's nonexempt resources do not exceed \$2250 and all other eligibility requirements are met.

<sup>91</sup> See note 66 and accompanying text *supra*.

<sup>92</sup> 20 C.F.R. § 416.1212(d) (1982) states:

The proceeds from the sale of a home which is excluded from the individual's resources will also be excluded from resources to the extent they are intended to be used and are, in fact, used to purchase another home, which is similarly excluded, within 3 months of the date of receipt of the proceeds.

<sup>93</sup> *Id.*

<sup>94</sup> See note 28 and accompanying text *supra*.

<sup>95</sup> See 42 U.S.C. §§ 1381-1382f (1976 & Supp. IV 1980).

<sup>96</sup> See 20 C.F.R. §§ 416.101-416.2119 (1982).

<sup>97</sup> See CLAIMS MANUAL, note 19 *supra*. See *Schweiker v. Hansen*, 450 U.S. 785, 795 (1981). In *Hansen*, a Social Security field representative's failure to comply with the Manual in advising plaintiff to file a written application for benefits resulted in the plaintiff being denied a period of retroactive benefits. In a *per curiam* decision the Supreme Court held that the Claims Manual, an internal handbook designed for local offices, had no legally binding force, and the claims representative's errors fell short of conduct which would raise questions of estoppel. *Id.* at 790. In his dissent, Justice Marshall, joined by Justice Brennan, questioned the use of summary reversal in light of the claims representative's misconduct, which they felt might be sufficient to estop the government. *Id.* at 791 (Marshall, J., dissenting).

<sup>98</sup> Soc. Security Rul. 78-26, note 18 *supra*.

the quarter of receipt.<sup>99</sup> If this interpretation were to apply to RAMs, an individual, by spending the proceeds during that quarter, could reduce her resources to an amount below the allowable limit. Consequently, RAMs could avoid inclusion as a resource.

Current resource regulations fail to classify RAM proceeds. Using traditional resource classifications, these proceeds may be regarded as either a loan or a conversion of one's home. Conversion of a home becomes a resource if not reinvested in another home within three months. However, according to the Secretary's own interpretation, a loan is not considered a resource if spent within the quarter of receipt. A regulation which specifically and clearly treats RAM proceeds would provide a consistent and predictable outcome for SSI resource eligibility purposes.

### B. Case Law

Cases that classify nontraditional payments have resulted in unfavorable treatment of SSI recipients. In *Randall v. Califano*,<sup>100</sup> a federal district court examined nontraditional payments to determine SSI eligibility. In *Randall*, members of the Hoopa Indian tribe received cash payments<sup>101</sup> from the sale of reservation timber. Nineteen members of the tribe concurrently received SSI payments. The Secretary of Health, Education, and Welfare notified the plaintiffs that payments from the timber sale resulted in overpayment of SSI benefits.<sup>102</sup> The court, reviewing the Secretary's finding, held that the timber proceeds were both unearned income and a resource.<sup>103</sup>

In *Randall*, plaintiffs relied on SSI regulations which classified tradi-

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<sup>99</sup> See Soc. Security Rul. 78-26, note 18 *supra*, and CLAIMS MANUAL, note 19 *supra*.

<sup>100</sup> 500 F. Supp. 691 (N.D. Cal. 1980).

<sup>101</sup> *Id.* at 692. The payments were in amount of \$1156.00 for each plaintiff, except for one plaintiff who received \$653.73.

<sup>102</sup> *Id.* at 692. 20 C.F.R. § 416.537(a) (1982) states: "Overpayment means payment of more than the amount due for any period." 20 C.F.R. § 416.550 (1982) provides that an overpayment can be waived when:

- (a) The overpaid individual was without fault in connection with an overpayment, and
- (b) Adjustment of recovery would either:
  - 1) Defeat the purpose of Title XVI;
  - 2) Be against equity or good conscience, or
  - 3) Impede effective or efficient administration of Title XVI due to the small amount involved.

See also notes 8-10 and accompanying text *supra*. HEW is now known as the Department of Health and Human Services (HHS). 21 U.S.C.A. § 35 (West Supp. 1982).

<sup>103</sup> *Randall v. Califano*, 500 F. Supp. 691, 696 (N.D. Cal. 1980).

tional income sources<sup>104</sup> and gave Indian tribes deferential treatment.<sup>105</sup> The court reasoned that since the basic purpose of SSI was to provide a minimum level of income, cash proceeds should be included in SSI eligibility determinations<sup>106</sup> absent explicit exemption. The tribe's SSI recipients were thus assessed an overpayment.<sup>107</sup>

*Randall* is significant in two respects. First, it highlights how statutes and regulations, absent explicit resource or income exemption, yield to the chief purpose of the program: to insure a minimum level of income for basic needs.<sup>108</sup> Additionally, *Randall* shows that the regulations which treat SSI income and resource eligibility are inadequate to classify nontraditional payments.

Arguably, the result reached in *Randall* may be applied to RAMs. RAM payments may fulfill the primary purpose of SSI in a manner similar to timber proceeds<sup>109</sup> since cash proceeds are made available to meet basic needs.<sup>110</sup> In addition, current regulations which address traditional payments are only tangentially relevant to both timber and RAM proceeds. In *Randall*, these two factors combined to produce results unfavorable to SSI recipients.<sup>111</sup> Without an appropriate specific regulation, elderly homeowners may suffer similar harsh consequences upon receipt of RAM proceeds.

*Beatty v. Schweiker*<sup>112</sup> suggests similar consequences. In *Beatty*, the plaintiff challenged the Secretary of Health and Human Services' practice of including lump sum retroactive SSI benefits<sup>113</sup> in resource com-

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<sup>104</sup> 20 C.F.R. § 416.1103(c) (1982) provides: "Receipts from the sale, exchange, or replacement of a resource are not income but are resources that have changed their form . . . Example: If you sell your automobile it is not income; it is another form of a resource."

<sup>105</sup> *Randall v. Califano*, 500 F. Supp. 691, 694 (N.D. Cal. 1980). 20 C.F.R. § 416.1236(a)(3) (1982) provides that for the purposes of § 416.1210(j), payments or benefits provided under a federal statute (other than Title XVI of the Social Security Act), which are excluded from resources, include certain per capita judgment payments to Indians under the provisions of 25 U.S.C. § 1407 (1976).

<sup>106</sup> *Randall v. Califano*, 500 F. Supp. 691, 696 (N.D. Cal. 1980).

<sup>107</sup> *Id.* at 696. See note 102 *supra*.

<sup>108</sup> See note 58 and accompanying text *supra*.

<sup>109</sup> *Randall v. Califano*, 500 F. Supp. 691, 692 (N.D. Cal. 1980).

<sup>110</sup> *Id.* at 692.

<sup>111</sup> *Id.*

<sup>112</sup> 678 F.2d 359 (3d Cir. 1982).

<sup>113</sup> *Id.* at 360. The Secretary contended that when an SSI recipient receives retroactive SSI benefits the payments are excluded as resources for two quarters following receipt. The rationale is that the two-quarter grace period allows an SSI recipient time to reduce resources, a significant portion of which would be spent to repay debts incurred during the period benefits were wrongfully denied.

putation<sup>114</sup> to determine SSI eligibility. The Secretary interpreted the proceeds as resources if kept for two quarters beyond receipt.<sup>115</sup> Following this determination the Secretary terminated plaintiff's benefits. The Third Circuit Court of Appeals upheld the Secretary's decision as consistent with the statutory scheme of SSI and not clearly erroneous.<sup>116</sup>

Under *Beatty's* two-step analysis, the first inquiry is whether labeling RAM proceeds as income or as a resource is inconsistent with the SSI provisions.<sup>117</sup> Like lump sum SSI payments, reverse annuity disbursements allow an individual to maintain a minimum standard of living by expending the proceeds for basic needs. In this respect, treating RAM proceeds as either income or as a resource for SSI eligibility would be consistent with the statutory scheme.<sup>118</sup>

The second inquiry under *Beatty* is whether the Secretary's interpretation of a regulation is clearly erroneous.<sup>119</sup> The *Beatty* court recognized the inequity under the facts of that case,<sup>120</sup> but felt compelled to uphold the Secretary under the applicable standard of review. The plaintiff was not receiving current benefits because of a lump sum payment for past due benefits.<sup>121</sup> In cases involving RAMs the situation could be characterized as similarly inequitable. Individuals who do not liquidate their home investment enjoy the exemption regardless of the home's value,<sup>122</sup> but those who do convert their homes to cash would not enjoy the same exemption, and may be harshly penalized.<sup>123</sup>

The *Beatty* court's analysis and conclusion is important in the context of RAMs. If SSI regulations fail to exempt RAMs in computing benefits, the two-step analysis could lead to a similar reduction, termination, or overpayment of SSI benefits.<sup>124</sup> The lack of regulatory standards for RAM proceeds leaves the SSI recipient in a precarious position.

The courts give great deference to regulations promulgated by the Secretary of Health and Human Services.<sup>125</sup> This judicial approach can

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<sup>114</sup> See note 90 and accompanying text *supra*.

<sup>115</sup> See note 113 and accompanying text *supra*.

<sup>116</sup> *Beatty v. Schweiker*, 678 F.2d 359, 364 (3d Cir. 1982).

<sup>117</sup> *Id.* at 361-62.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 364.

<sup>121</sup> *Id.*

<sup>122</sup> See note 66 and accompanying text *supra*.

<sup>123</sup> See note 14 and accompanying text *supra*.

<sup>124</sup> See notes 8-10 and accompanying text *supra*.

<sup>125</sup> The court in *Beatty v. Schweiker*, 678 F.2d 359, 360 (3d Cir. 1982), stated:

produce both negative and positive results for SSI recipients. In *Schweiker v. Gray Panthers*,<sup>126</sup> the United States Supreme Court reviewed the Secretary's exercise of authority in promulgating regulations deeming income<sup>127</sup> for Medicaid<sup>128</sup> eligibility purposes. Plaintiffs were institutionalized individuals residing in states which had not enlarged Medicaid eligibility<sup>129</sup> to SSI levels. They alleged that regulations treating separated spouses as a single economic unit without a factual determination were arbitrary and capricious, and inconsistent with other provisions of Medicaid.<sup>130</sup>

Although the Supreme Court sympathized with those with minimal resources, the majority<sup>131</sup> held that the primary responsibility for interpreting the Act rests with the Secretary.<sup>132</sup> In holding the regulation valid, the majority found that the Secretary properly exercised the authority delegated to him by Congress to define income for Medicaid.<sup>133</sup> Furthermore, the majority cited legislative history<sup>134</sup> which supported deeming of income as consistent with other provisions of the Act.

*Gray Panthers* illustrates several important principles. As a preliminary matter, the case indicates Congress' broad delegation of authority

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In deciding the legality of the Secretary's practice, this court does not substitute its judgment for that of the Secretary's. We accord considerable deference to the Secretary's interpretation of the SSI statute. . . . We also accord great deference to the interpretation of administrative regulations by the officials responsible for their implementation . . . . Indeed, we will uphold the Secretary's interpretation of the regulations unless it is plainly erroneous or inconsistent with the regulation[s].

<sup>126</sup> 453 U.S. 34, 56 (1981).

<sup>127</sup> 20 C.F.R. § 416.1160(a)(2) (1982) explains that the term "deeming" identifies the process of considering another person's income to be available to the SSI recipient.

<sup>128</sup> Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396m (1976 & Supp. IV 1980) (commonly referred to as Medicaid).

<sup>129</sup> See generally 42 U.S.C. § 1396a(f) (1976). This statute sets forth two options available to states who provide Medicaid coverage. States can either provide Medicaid coverage for all those eligible for SSI, or limit their assistance to those eligible for the particular state's plan in effect on January 1, 1972.

<sup>130</sup> *Schweiker v. Gray Panthers*, 453 U.S. 34, 40-41 (1981).

<sup>131</sup> Justice Powell wrote the majority opinion, in which Chief Justice Burger, and Justices Stewart, White, Blackmun and Rehnquist joined. Justice Stevens filed a dissenting opinion in which Justices Brennan and Marshall joined. The dissent argued that the Secretary had failed to consider all the relevant factors, as required in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). *Gray Panthers*, 453 U.S. at 52.

<sup>132</sup> *Gray Panthers*, 453 U.S. at 44, citing *Batterton v. Francis*, 432 U.S. 416, 425 (1977).

<sup>133</sup> 453 U.S. at 49, 50.

<sup>134</sup> *Id.* at 44-45, 48.

to the Secretary.<sup>135</sup> Additionally, the Supreme Court confirmed the standard of review used by the courts when the Secretary has promulgated a regulation. A court's task is limited to insuring that the Secretary did not exceed his statutory authority<sup>136</sup> and that the regulation is not arbitrary and capricious.<sup>137</sup> Finally, *Gray Panthers* affirmed that the Secretary's proper exercise of delegated authority is entitled to legislative effect.<sup>138</sup> Consequently, the opportunity exists for the Secretary to stimulate expansion of RAMs by promulgating a definitive regulation.

Case law demonstrates several important issues regarding the effect of RAM proceeds on SSI eligibility. First, consumer reliance may be misplaced because nontraditional proceeds which fulfill the purpose of SSI may be classified differently from traditional income. Additionally, case law illustrates how legislative and administrative silence affords the Secretary broad authority to interpret SSI eligibility standards.<sup>139</sup> Finally, the Supreme Court has stressed the deference given to the Secretary's interpretations:<sup>140</sup> his regulations are given legislative effect. These factors combine to produce dangers to the SSI recipient who receives a RAM loan. On the other hand, an appropriate regulation encouraging the use of RAMs would provide an opportunity for uniform, predictable, and equitable results, thus benefiting consumers, lending institutions, and agency personnel. The model regulation proposed in the following section attempts to effectuate governmental and individual interests, and thereby encourage the use of RAMs by SSI recipients.

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<sup>135</sup> *Id.* at 44.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981); *Beatty v. Schweiker*, 678 F.2d 360 (3d Cir. 1980). See also the Secretary's interpretation of 20 C.F.R. 416.1125(d) (1981) on in-kind contributions. These regulations characterizing income have been upheld. *Young v. Schweiker*, 680 F.2d 680, 683 (9th Cir. 1982); *Nunemaker v. Harris*, 679 F.2d 328, 336 (3d Cir. 1982); *Usher v. Schweiker*, 666 F.2d 652, 662 (1st Cir. 1981); *Kimmes v. Harris*, 647 F.2d 1028, 1034 (10th Cir. 1981), *cert. denied*, 454 U.S. 898 (1981); *Antonioli v. Harris*, 624 F.2d 78, 81 (9th Cir. 1980). *But see Jackson v. Schweiker*, 683 F.2d 1076, 1086 (7th Cir. 1982) (the same interpretation of the Secretary's regulation governing the imputation of unearned income was struck down as inconsistent with the basic regulations requiring, as a condition of imputation, actual availability of income to meet basic needs).

<sup>140</sup> See notes 125, 139 and accompanying text *supra*.

## III. MODEL REGULATION

This Comment proposes a model regulation to address the inadequacy of current law relating to RAM loans and SSI eligibility. The model regulation suggests a one-third reduction<sup>141</sup> of SSI benefits when RAM payments are made to SSI recipients. Usually, receipt of income by SSI recipients results in a dollar for dollar reduction of benefits.<sup>142</sup> Presently, the one-third reduction rule<sup>143</sup> is applied in analogous federal housing and maintenance regulations. This reduction occurs when an SSI recipient receives in-kind income<sup>144</sup> by living in the household of a person who provides food and shelter for less than fair market value.<sup>145</sup> The one-third reduction rule, as used in existing regulations, is designed for administrative convenience.<sup>146</sup> However, the one-third rule has been criticized for discouraging aid to elderly persons by friends and families, and for unfairly penalizing individuals who receive less than one-third of the benefit rate in in-kind income.<sup>147</sup>

A one-third reduction rule applied to RAM payments, however, would produce favorable results. General application of the rule would increase disposable income among the elderly. Federal spending for SSI would decrease as a result of the reduced benefits paid to those who convert home equity to cash. Therefore, the one-third valuation approach is compatible with the policy objectives of reduced federal

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<sup>141</sup> The one-third reduction is modeled after 20 C.F.R. § 416.1131 (1982), which states:

(a) Instead of determining the actual dollar value of in-kind support and maintenance, we reduce the Federal benefit rate by one-third if you (or you and your eligible spouse) —

(1) Live in another person's household . . . for a full calendar month except for temporary absences, . . . and

(2) Receive both food and shelter from the person in whose household you are living . . . .

See note 143 and accompanying text *infra*.

<sup>142</sup> See 42 U.S.C. § 1382(b)(1), (2) (1976).

<sup>143</sup> 20 C.F.R. § 416.1131 (1982) is commonly referred to as the one-third reduction rule. This Comment also uses this terminology.

<sup>144</sup> 20 C.F.R. § 416.1131(a)(2) (1982) states that both food and shelter from the person in whose household the SSI recipient is living must be received for the one-third reduction rule to apply. In other instances a dollar for dollar reduction in benefits occurs. 42 U.S.C. § 1382(b)(1), (2) (1976).

<sup>145</sup> 20 C.F.R. § 416.1130(b) (1982) states that paying the amount charged under a business agreement is not considered in-kind income.

<sup>146</sup> Goodell, *SSI Treatment of In-Kind Income — The One-Third Reduction Rule*, 65 CORNELL L. REV. 909, 911 (1980).

<sup>147</sup> *Id.* at 921, 922.

spending and improved general welfare for the nation's elderly.

The model regulation facilitates informed choice by RAM borrowers, insures predictable results for lending institutions, and provides guidance for agency personnel who determine SSI eligibility. The model regulation would also further social and economic incentives designed to assist seniors to remain in their homes. In addition, public funds may be saved through the realization of income from a traditionally exempt resource and the injection of previously untapped funds into the economy. Thus, the model regulation would advance both the government's and the individual's interests by encouraging utilization of RAMs.

Statutes, regulations, rulings, and the Social Security Claims Manual give no definitive answer to the classification of proceeds received from RAMs. Case law demonstrates that the failure to classify RAM proceeds places SSI recipients in a precarious position. Courts look to the Secretary to interpret income and resource<sup>148</sup> eligibility criteria. The Secretary could interpret RAM proceeds as being contrary to the basic purpose of SSI,<sup>149</sup> and not explicitly exempt from resource and income computation. The result would be a reduction, termination, or overpayment<sup>150</sup> of SSI benefits to otherwise eligible individuals.

Both policy and practical considerations, however, support the expansion of home equity conversion programs. Social and economic objectives realized by RAMs include supplementing disposable retirement income and promoting independent living of the elderly. The use of RAMs by SSI recipients may also reduce the strain on public assistance programs.<sup>151</sup>

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<sup>148</sup> See notes 125, 139 and accompanying text *supra*.

<sup>149</sup> See note 58 and accompanying text *supra*.

<sup>150</sup> See notes 8-10 and accompanying text *supra*.

<sup>151</sup> The need and cost of social services for SSI recipients presents a controversial policy issue that has sparked debate regarding 'the Graying of America' (NEWSWEEK, Feb. 28, 1977) and current fiscal problems plaguing Social Security. Some claim that today's elderly are better off than ever before, and are the "wealthiest, best fed, best housed, healthiest, most self-reliant older population in our history." *E.g.*, Cal. Comm'n on Aging, 8 SENIOR ADVOC. NO. 7, at 1 (July 1982), citing 1981 WHITE HOUSE CONFERENCE REPORT, 1981 White House Conference on Aging (Nov. 30, 1981); see also Address by President Reagan, 1981 WHITE HOUSE CONFERENCE REPORT, VOL. 2, at 57, 1981 WHITE HOUSE CONFERENCE ON AGING.

Some scholars assert that the financial plight of elderly Americans is more myth than reality, in light of the generous array of social services currently provided. *E.g.*, Gilbert, *Plight of Universal Social Services*, 1 J. POL'Y ANALYSIS & MGMT. 301 (Summer 1982). Others, using strict statistical measures of poverty, try to prove by cash income alone that most senior citizens live at subsistence levels and are dependent on public



The model regulation sets forth measurable and uniform standards for determining benefits.<sup>152</sup> Thus, senior citizens would be able to make an informed choice when considering a RAM loan. Under the model regulation the eligibility requirements and the Federal minimum income level regarding home equity conversion proceeds would be identical throughout the fifty States and the District of Columbia.<sup>153</sup> Finally, the proposed regulation reflects the recognition that SSI payments should be made under conditions that are protective of "people's personal dignity,"<sup>154</sup> and this concern would be carried out in determining each person's benefits.

#### MODEL REGULATION

##### *Valuation of Home Equity Conversion Proceeds Obtained Through Reverse Annuity Mortgages*

###### §1. *Valuation Formula*

(a) The Social Security Administration's valuation of home equity conversion proceeds into periodic cash payments when a reverse annuity mortgage is utilized is as follows:

(1) Instead of determining the actual dollar value of the periodic payments received pursuant to a reverse annuity mortgage, the Social Security Administration will reduce the federal benefit rate by one-third.

(2) The one-third reduction is a flat reduction of the recipient's federal benefit rate. The Social Security Administration applies appropriate exclusions under the Act and its regulations, to any earned or unearned income or resources received.<sup>155</sup>

###### § 2. *Definitions*

(a) "*Conversion of home equity*" describes the process of converting the value of the home, less any mortgage or other lien secured by the

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assistance. *E.g.*, Pepper, *Foreword*, 32 HASTINGS L.J. 1099 (1981) (Chairperson of House Select Committee on Aging). For arguments against the notion that cash income alone accurately portrays poverty levels, see Sowell, note 24 *supra*.

For a general discussion of the magnitude of these divergent viewpoints, see Rother & Edwards, *Federal Policy Can No Longer Neglect Older Workers*, 6 GENERATIONS 16 (Summer 1982); *The Graying of America*, NEWSWEEK, Feb. 28, 1977, at 50.

<sup>152</sup> Modeled after 20 C.F.R. § 416.110 (1982).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Modeled after 20 C.F.R. § 416.1131 (1982).

home, into cash without relinquishing occupancy rights.<sup>156</sup>

(b) "*Periodic payments*" are receipts in any calendar quarter on a regular or irregular basis.

(c) "*Reverse annuity mortgage*" describes a deferred payment or interest-only loan, or a series of such loans for which a home is pledged as security.<sup>157</sup>

(d) "*Federal benefit rate*" describes the monthly or quarterly payment rate for an individual or couple.<sup>158</sup>

(e) "*Exclusions*" include all those set forth under income and resource exceptions of the Act, and regulations promulgated under it.<sup>159</sup>

(f) "*Earned income*" means the receipt by an individual of any property or service which he can apply, either directly or by sale or conversion to meet his basic needs.<sup>160</sup>

(g) "*Unearned income*" is all income that is not earned income.<sup>161</sup>

(h) "*Resources*" means cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for support and maintenance.<sup>162</sup>

## CONCLUSION

This Comment has examined the effect of income from home equity conversion proceeds on SSI eligibility. Many low-income elderly receiving SSI are house-rich and cash-poor. These individuals may supplement their incomes through RAMs while retaining home ownership, use, and possession.

At present the law does not address the effect of RAM proceeds on SSI eligibility. Likewise, legislative and administrative guidelines fail to provide reliable resource and income criteria for RAM loan recipients. Case law further demonstrates the dangers of statutory and regulatory silence on treatment of nontraditional cash payments.

The proposed model regulation would overcome the deficiency in the present law by reducing the federal benefit rate when RAM proceeds are received. By applying the one-third valuation formula, the proposed

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<sup>156</sup> UNLOCKING HOME EQUITY, note 27 *supra*, at 277.

<sup>157</sup> *Id.* at 288.

<sup>158</sup> Modeled after 20 C.F.R. § 416.120(c)(1) (1982).

<sup>159</sup> Appropriate exclusions include those currently under 42 U.S.C. §§ 1382a, 1382b(a)(2)(3)(b), 1382b(a)(c) (1976 & Supp. IV 1980) and any subsequent modifications of the Act.

<sup>160</sup> Modeled after 20 C.F.R. § 416.1102 (1982).

<sup>161</sup> Modeled after 20 C.F.R. § 416.1120 (1982).

<sup>162</sup> Modeled after 20 C.F.R. § 416.1110 (1982).

regulation would stimulate expansion of home equity conversion plans. Application of the one-third reduction rule presents a workable compromise between government and individual interests.

The model regulation allows senior citizens to supplement their income through RAMs and preserve the benefits of home ownership. This approach would save public funds by utilization of the home, traditionally an exempt resource, while augmenting the elderly's disposable income. The policy underlying the model regulation seeks to stimulate both social and economic responses to the needs of an aging society.

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