

MEMORANDUM

TO: NAA Members

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RE: Legislative and Regulatory Update

DATE: October 20, 2010

This report describes legislative and regulatory actions and other initiatives undertaken by the NAA/NMHC Joint Legislative Staff on behalf of the apartment industry since its last report, dated September 1, 2010. If you have questions or comments, or would like additional information on any item, please call the staff person responsible for the subject matter at 202/974-2300.

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CONGRESSIONAL OUTLOOK

Congress recessed in late-September and will return after the November 2 elections for a “lame duck” session. The first order of business will most likely come shortly before December 3 when a temporary Continuing Resolution to keep government operations from expiring will be extended for a week or two while legislators try to resolve tax and other budget issues before closing the 111th Congress. Our prediction at this point is that Congress will most likely extend the so-called Bush tax cuts for a year or two (including the tax break for those earning over \$250,000, a capital gains tax rate of 15 percent, and modification of the Alternative Minimum Tax. Congress will also probably extend expiring tax provisions (such as the R&D credit and numerous other credits and provisions without paying for them. This means that the debate over Carried Interest would carry on into the future and not be changed as of this year.

TOP PRIORITY ISSUES

- **Carried Interest** (*Staff: Matthew Berger*).

- *Quick Summary*

- The Senate failed to pass a tax extenders bill, partially paid for with a tax increase on carried interest, before its summer recess. The House passed a scaled-down version of the tax extenders bill (H.R. 4213) on May 28. Under the House bill, 50 percent of carried interest would be taxed at ordinary rates until January 1, 2013, at which time 75 percent of carried interest would be taxed at ordinary income tax rates. A modified version was included in the Senate bill that taxed carried interest on a 75/25 basis, with assets held more than 5 years taxed on a 50-50 basis.

Background

After failing to secure the votes needed to pass a tax extenders package (H.R. 4213) before the August recess, Senate leaders have said they hope to consider the measure this fall. The package is partially paid for by increasing the tax rate on "carried interest" or a developer's "promote." The House passed its tax extenders bill (H.R. 4213), with a carried interest tax increase, in late May.

On June 24, the Senate failed for a third time to secure the 60 votes needed to move the measure forward, even after scaling the package down from adding roughly \$100 billion to the deficit to just \$35 billion. As part of those changes, Senator Max Baucus (D-MT) twice modified the carried interest proposal to try to make it more palatable to real estate partnerships.

NAA/NMHC have mounted an aggressive campaign to oppose the tax law change, educating lawmakers about the unintended consequences it would have, including stifling the nascent economic recovery and exacerbating the nation's affordable housing shortage. A special NMHC Carried Interest Task Force led by Tom Moran of Moran & Company and Jeff Stack of SARES•REGIS raised funds to hire the tax lobbying firm Washington Counsel to support our efforts. It also funded several full-page ads describing why changing the tax nature of carried interest was a "job killer." The ads ran in Roll Call and Politico, two of the most widely read publications on Capitol Hill. In addition, NAA/NMHC members conducted an extensive phone call campaign to key Senate and House offices expressing opposition to the provision. These efforts, along with extensive lobbying by other real estate trade associations and many affected interests, have helped stall the proposal.

- **Government-Sponsored Enterprises (GSEs) Reform** (*Staff: David Cardwell and Lisa Blackwell*).

Quick Summary

- NAA/NMHC submitted written comments to the Treasury Department in response to their request for public comment on the future of housing finance.
- NMHC President Doug Bibby participated in an August 17 White House conference on the future of housing finance.
- House Financial Services Committee has held two hearings on housing finance reform. NAA/NMHC testified at the first. Committee Chairman Barney Frank (D-MA) has indicated that he will hold additional hearings in the fall.
- Congress included a provision in the financial regulatory reform bill (P.L. 111-203) requiring the Obama Administration to issue a proposal on revamping the GSEs by January 31, 2011.

Background

Lawmakers have begun what is likely to be a lengthy effort to determine the future role of the government in housing finance and the restructuring or replacement of Fannie Mae and Freddie Mac. NAA/NMHC are actively engaged on the issue to ensure that the industry's unique needs are considered in the deliberations.

On July 21, NAA/NMHC and the American Seniors Housing Association (ASHA) submitted extensive comments to the Treasury Department and HUD on the future of the housing finance system. Our comments respond to a request for public input published in the Federal Register in April. In our response, NAA/NMHC/ASHA urged policymakers to undertake a deliberate, thoughtful and inclusive transition and highlighted the fact that unlike single-family lending, the GSEs' multifamily lending was well underwritten and did not contribute to the housing crisis. In addition to answering the seven questions posed by Treasury/HUD, we also provided an overview outlining nine key principles for the transition from the current GSEs to any new system.

On August 17, NMHC President Doug Bibby represented NAA/NMHC at a high-level invitation only White House conference—the first of at least three meetings—on the future of housing finance. The half-day session featured a diverse group of stakeholders gathered to begin deliberations on how to reform Fannie Mae and Freddie Mac. The meeting was co-hosted by Treasury Secretary Timothy Geithner and HUD Secretary Shaun Donovan and included senior staff of the Treasury Department, HUD and the National Economic Council. We used this conference as an opportunity to reiterate our key messages to Congress:

- The GSEs' multifamily business has performed excellently with default rates below one percent—a stark contrast to their single-family business.
- Because of the liquidity provided by the GSEs, the apartment industry has been able to produce more than 10 million units of housing that's affordable to the workforce in the past 15 years, much of it without any direct federal subsidies.

- Our country is increasingly relying on rental housing because of changing demographics, but apartment loans are much more complicated than single-family loans, and history has shown that private capital alone cannot meet our industry's needs. Especially during the lengthy transition to a new housing finance system, there must be an explicit federally backed credit facility for multifamily to have any hope of meeting our future housing demand.

In an indication that our lobbying efforts to date are making a difference, a common theme in the panel discussions was that this isn't just about ownership; it's also about rental housing. A number of panelists also reiterated NAA/NMHC's calls for a more balanced housing policy.

Committee Chairman Barney Frank (D-MA) has indicated that he will hold additional hearings on the topic this fall. Notably, the financial regulatory reform bill (P.L. 111-203) signed into law on July 21 requires the Obama Administration to issue a proposal on revamping U.S. housing finance by January 31, 2011.

NAA/NMHC have been active on this issue since the GSEs were put into conservatorship back in 2008. On March 23, NAA/NMHC testified before the House Financial Services Committee on housing finance reform. We have also been actively educating policymakers through meetings with senior officials at the Treasury Department and HUD, as well as key lawmakers.

On September 15, NAA/NMHC is scheduled to meet with Treasury Department Undersecretary for Domestic Finance Jeffrey A. Goldstein to continue the discussion about the role of the government and the GSEs in providing mortgage capital to the multifamily industry. We are also meeting with the Mortgage Credit Group of the Center for American Progress, which has a policy advisor role to the Obama Administration on housing finance reform. Additionally, we have been asked to testify before the Senate Banking Committee on September 15 on the issue of covered bonds.

- **Energy Legislation** (*Staff: Eileen Lee and Paula Cino*).

Quick Summary

- The House passed a comprehensive energy bill in June 2009. This May, Senators John Kerry (D-MA) and Joseph Lieberman (I-CT) introduced a discussion draft of their long-awaited climate change bill, but the Senate has reached an impasse and is unlikely to pass a comprehensive bill this year.

Background

The Senate has reached an impasse over sweeping energy and climate change legislation and is unlikely to muster the votes for even a modest energy package before the mid-term election in November. Several far-reaching measures addressing carbon caps, energy production and building and transportation efficiency, among other issues, have failed to achieve broad support, forcing Senate leaders to refocus on a small, targeted energy bill. NAA/NMHC's primary concerns in energy legislation are onerous building energy codes and mandatory building labeling language.

The House passed an extensive energy and climate package last June (H.R. 2454), but the Senate wasn't able to come to a consensus on a package. A much-anticipated compromise proposal released in May by Senators John Kerry (D-MA) and Joseph Lieberman (I-CT) was scaled back in the face of waning support to limit carbon emissions from the utility sector only. That effort stalled in July when Senate Majority Leader Harry Reid (D-NV) proposed a narrow energy bill, principally focused on oil spill and drilling issues. That measure also was unable to secure the 60 votes needed to pass. Even without election pressures, numerous controversial provisions and economic concerns work against passage of a significant energy and climate bill this year.

Importantly, the NAA/NMHC-opposed provisions enjoy bipartisan support, so they could be enacted separately even in the absence of a comprehensive energy bill. NAA/NMHC will continue to educate lawmakers about the need for building efficiency incentives instead of one-size-fits-all energy performance mandates.

- **Card Check Legislation and Labor Policy** (*Staff: Betsy Feigin Befus*).

Quick Summary

- Prospects for passage of a "card check" bill in 2010 have dimmed significantly, although it remains a priority for the unions.

Background

The outlook on the controversial Employee Free Choice Act (EFCA) (S. 560, H.R. 1409) has further dimmed for this Congress, but the “card check” bill remains a priority for unions. On August 4, President Obama said during remarks before the AFL-CIO’s executive committee that his Administration will “keep on pushing” for passage. Further acknowledging his labor ties, Obama thanked the union for its part in pushing health care legislation through Congress and indicated that he plans to participate in a Labor Day event with AFL-CIO leader Richard Trumka. Meanwhile, the Service Employees International Union (SEIU)’s CEO recently said she considers EFCA a “major goal,” but acknowledged that the Senate lacks the 60 votes needed to overcome a Republican-led filibuster.

A variety of factors have combined to seemingly kill the measure for this year, including Senator Scott Brown’s (R-MA) special election win, significant concerns about the proposed legislation among Senate Democrats (including opposition from Senator Blanche Lincoln (D-AR)) heading into the November mid-term elections and the continued fallout from the economic recession. Democratic leaders, however, have not publicly ruled out a lame-duck attempt to pass the proposal once Congress returns to Washington after the November elections.

- **Estate Tax** (*Staff: Matthew Berger*).

Quick Summary

- A one-year scheduled repeal of the estate tax (and stepped-up basis rules) went into effect on January 1 after lawmakers failed to reach a compromise on estate tax reform before year’s end. To date, efforts to develop a bipartisan compromise to prevent a reversion to the 2001 law (\$1 million exemption, 55 percent tax rate, stepped-up basis) have been elusive.
- NAA/NMHC continue to urge lawmakers to retain stepped-up basis in any final estate tax reform.

Background

Despite promising fast action on a bill to retroactively restore the estate tax, lawmakers have failed to take action on the issue. Last December, the House of Representatives passed legislation (H.R. 4154) to permanently extend the 2009 estate tax law while preserving stepped-up basis rules. The Joint Committee on Taxation estimated the legislation would cost \$233.6 billion over 10 years. The legislation did not include any offsetting tax increases but instead was paired with language that would have imposed statutory “pay as you go” budget rules on Congress or other actions. President Obama also supported such action in his FY 2010 budget recommendations, although the House did not adopt his proposal to change to the allowable valuation methods for property transfers.

The Senate has still not taken up the House-passed legislation. Supporters of more generous estate tax relief apparently felt that allowing the estate tax to expire (and rollover basis rules to go into effect) on January 1 would give them more leverage to force a more generous compromise in early 2010. The Senate is on record as approving a non-binding budget amendment in April 2009 that would have continued the estate tax at a lower 35 percent maximum rate with an increased \$5 million exemption level. As the 2010 legislative year goes on, it becomes more of a question as to who has “leverage” in the debate.

At present, there are four possible outcomes for 2011 and beyond:

- Reverting to the 2001 law (\$1 million exemption, 55 percent tax rate, stepped-up basis);
- Freezing the 2009 law (\$3.5 million exemption, 45 percent rate, stepped-up basis);
- Enacting a compromise, i.e., \$5 million exemption, 35 percent rate, stepped-up basis;
- Enacting an alternative compromise, i.e., \$5 million exemption, 35 percent rate, stepped-up basis, *but* heirs could not re-depreciate the property.

It is our conclusion that option two or three would be preferable for multifamily owners. It is not possible to predict the outcome of the debate at this time, though a resolution could be included with legislation addressing the expiring 2001 and 2003 tax cuts.

- **Credit Card Merchant Fees** (*Staff: David Cardwell*).

Quick Summary

- Legislation has passed that should make it easier for apartment firms to automate rent payment.

Background

The financial regulatory reform measure (P.L. 111-203) enacted on July 21 includes a provision allowing bank regulators to establish "reasonable" interchange fees for debit and credit card transactions. The law, which has to be implemented by regulations, allows apartment firms to pass these "swipe fees" on to residents and to set different rents and fees for cash, debit card, automated check handling (ACH) and credit card transactions within the same payment channel.

Until now, firms had to process credit card payments through one portal and cash/ACH payments through another because existing laws prevent them from charging different fees for debit/credit transactions and cash/check payments when made on the same portal. The change should make rent automation easier and more transparent for residents, and less costly and more effective for apartment owners. The new consumer protection regulator within the Federal Reserve will release the regulations next spring, but credit card networks may begin modifying their requirements sooner because the new law specifically bans practices such as merchants charging one price for credit/debit transactions and a different price for cash transactions through the same payment channel.

ADDITIONAL ISSUES

CAPITAL MARKETS

- **FHA Multifamily Programs: Shutdown Averted** (*Staff: David Cardwell*). Quick action by NAA/NMHC and an industry coalition has helped avert a potential shutdown of the FHA multifamily loan program. In June, FHA announced that it was close to exhausting its \$15 billion in multifamily credit subsidy for FY 2010, which would have caused the program to stop issuing commitments until the next fiscal year starts on October 1. The program has experienced dramatic increases in application volume as other credit sources remain sidelined after the global financial crisis. On August 4—just two days before it was set to adjourn until mid-September—the Senate passed by unanimous consent an emergency standalone bill (P.L. 111-228) providing an additional \$5 billion in credit authority. The House passed an identical bill on July 28, just prior to its summer recess. President Obama signed the measure into law on August 11. As a result, the FHA multifamily programs are expected to have enough credit subsidy to continue issuing commitments without interruption.
- **Financial Regulatory Reform** (*Staff: David Cardwell*). Comprehensive financial regulatory reform legislation (P.L. 111-203) was signed into law on July 21. NAA/NMHC won victories on some key issues that had threatened to disrupt the industry's access to capital.
 - *Securitization/Risk Retention Requirements*. The commercial real estate industry secured a significant victory when conferees agreed to retain (with minor modification) an amendment offered by Senator Mike Crapo (R-ID) that allows regulators to consider "third-party (B-piece) investors" as a means to satisfy new "skin-in-the-game" provisions that require originators and issuers of asset-backed (mortgage) securities (ABS) to retain five percent on their books. As originally written, the Senate bill did not allow for different assets to be treated differently, but NAA/NMHC and others successfully argued that commercial mortgage-backed securities (CMBS) should be treated differently than other ABS because they have subordinate investors (B-piece buyers) who underwrite the investment and purchase the first-loss position. Without this change, CMBS lenders would have been required to increase their capital set asides, which would have increased the cost of and reduced access to CMBS capital.

The final bill directs the Federal Reserve Board and other financial regulators to study the impact of the risk-retention rules and the new accounting rules (Financial Accounting Standards 166 and 167) on credit availability and to recommend legislative and regulatory changes to improve capital availability if necessary. That work is currently underway. Both provisions should help support the resurgence of the CMBS market.

- *"End-Users" of Derivatives Regulations*. NAA/NMHC and others also successfully excluded commercial "end users" of derivatives—including apartment firms—from central clearing requirements, including new margin and registration requirements. The final package only applies these provisions to "financial firms," excluding firms that use swaps to hedge interest-rate risk. The measure does authorize regulators to impose initial and variation margins on these uncleared trades, however. Federal regulators will begin writing the regulations required to define key terms and implement the law. NAA/NMHC will re-

main engaged in that process with our partners in the Coalition for Derivatives End-Users to ensure that they do not materially change the bill's impact on end users.

Attention now turns to the rulemaking process. Independent analysis of the measure finds that it directs federal agencies to issue nearly 200 rules to implement the law and gives them the authority to act on up to 350 provisions. By contrast, CongressDaily reports that the 2002 Sarbanes-Oxley corporate governance law had 16 rulemakings. The risk retention requirements and the derivatives provisions are among the areas where regulators will have the greatest influence. For that reason, NAA/NMHC will continue to closely follow the implementation of the law and will work with regulators to ensure that the apartment industry's unique needs are fully understood.

- **FHA Multifamily: Loan Limits** (*Staff: David Cardwell and Lisa Blackwell*). NAA/NMHC continue to urge the Senate to pass legislation that would increase the FHA per-unit loan limits for multifamily loans in properties with elevators. The current loan limits have limited higher-density development to fewer than seven percent of all FHA multifamily construction loans over the past seven years. Only 31 of 478 new FHA construction projects have been for apartment buildings/communities that require elevators. The House has passed FHA loan limit legislation twice. On September 16, 2009 it passed the FHA Multifamily Loan Limit Adjustment Act of 2009 (H.R. 3527); on June 10, it passed a single-family FHA Reform bill (H.R. 5072) that also included the multifamily elevator building loan limit increase.
- **FHA Multifamily: Underwriting** (*Staff: David Cardwell*). On July 6, HUD issued guidance (Mortgage Letter 2010-21) to its FHA multifamily mortgage lenders that will increase underwriting, loan processing and other application requirements for FHA multifamily rental programs. Among other things, FHA's revised underwriting standards will raise debt service coverage ratios, lower loan-to-value and loan-to-cost ratios, increase project reserves and sponsor equity investment and limit sponsor cash out. Subsidized affordable housing properties will have lower ratios than market-rate properties. HUD will also increase documentation on property and borrower history and creditworthiness.

The new requirements for Section 221(d)(4) take effect on September 6 for new applications, and will go into effect in early October for complete new applications for direct firm commitment, and in early November for projects with outstanding invitation letters, or such shorter time as provided in the outstanding invitation letter. For Section 223(f) the changes take effect on September 6 for any use of application fees not submitted before that time. NAA/NMHC provided extensive comments seeking to limit the impact and asking for a reasonable transition period, arguing that these are the most extensive underwriting changes to the program in decades and come at a time when FHA's multifamily program is seeing historic demand for government-insured mortgages.

- **Federal Loan Guarantees for CRE** (*Staff: David Cardwell*). Legislation that would allow the U.S. Treasury to guarantee new loans on commercial real estate projects has been introduced in the House. The measure (H.R. 5816) would provide up to \$25 billion in guarantees to provide more liquidity to the still-struggling commercial real estate sector.

The bill is targeted at smaller CRE owners who lack access to any capital, primarily because CMBS and bank mortgage debt are not available. Loans up to 10 years would be available to current (no delinquent principal and interest payments) commercial properties. REO properties with loans originated within 180 days would also be eligible. Under the measure, the Treasury Department would guarantee bonds backed by small-balance (less than \$10 million) loans and would collect fees of 2% of the underlying loan.

NAA/NMHC support the measure, as it would add liquidity to the commercial and multifamily real estate industry. The provision would also allow smaller and regional banks to move existing REO from their balance sheets through newly originated loans. There is no companion legislation in the Senate at this time, but it is expected to be introduced when the Senate returns from its August recess. The outlook for passage is unclear given the short legislative calendar and mounting concerns over deficit spending.

- **Covered Bonds** (*Staff: David Cardwell*). The House Financial Services Committee is currently considering legislation (H.R. 5823) designed to create the framework for a more robust covered bonds market in the U.S. Covered bonds are a \$3 trillion marketplace in Europe and have been identified as a source of additional liquidity for U.S. real estate markets. NAA/NMHC submitted a letter expressing our support for the measure, but noted that covered bonds are not a replacement for the current flow of capital provided by the GSEs, FHA, banks, life insurance companies or private-label commercial mortgage-backed securities. As a

follow-up, NAA/NMHC have been asked by the Senate Banking Committee to testify on September 15 about covered bonds.

- **Foreign Investment in U.S. Commercial Real Estate** (*Staff: Matthew Berger*). Prior to adjourning for its August recess, the House passed legislation (H.R. 5901) designed to bring new capital into distressed commercial real estate markets. The bill would double to 10 percent the amount a foreign investor can own of a publicly traded real estate investment trust (REIT) before triggering onerous reporting and tax provisions of the Foreign Investment in Real Estate Tax Act of 1980. NAA/NMHC actively support the measure; it is unclear at this point when the Senate will consider the bill.

TAX

- **Small Business Legislation** (*Staff: Matthew Berger*). On September 27, President signed the small business bill (PL 111-240) into law. This legislation, among other things, would extend the special 50% bonus depreciation allowance through 2010; increase Section 179 small business expensing up to \$500,000 (from \$250,000) for 2010 and 2011; and allow a five-year carryback of general business tax credits generated in 2010, including the Low-Income Housing Tax Credit, instead of the one year allowed under current law.
- **Tax Rates** (*Staff: Matthew Berger*). Lawmakers are under pressure to address the expiring 2001 and 2003 tax cuts. Democrats and Republicans are at odds over whether to extend them for everyone or only for individuals earning \$200,000 or less (\$250,000 for married couples.) The Obama Administration has further proposed that higher-income taxpayers see capital gains and dividend tax rates rise from 15% to 20%. It is unclear at this point how a final compromise will be constituted, but many observers contend no solution is likely until November at the earliest. If such a tax bill does move, some key Senators would also use it to address estate taxes.
- **Tax Extenders** (*Staff: Matthew Berger*). A number of tax incentives of interest to apartment firms expired at the end of the year when the Senate failed to pass a tax extenders bill. (The House passed a pared-down version of its tax extenders bill (H.R. 4213) on May 28.) They include the Tax Credit Exchange Program (TCEP) for states that participate in the Low-Income Housing Tax Credit (LIHTC) program, the new markets tax credit, the credit for construction of new energy-efficient homes (Section 45L) and the immediate expensing of "brownfields" environmental remediation costs (Section 198). The Senate failed repeatedly to pass a bill before the August recess but has said it will try again in the fall. Unfortunately, the measure is partially paid for with an NAA/NMHC-opposed change in the tax treatment of carried interest.
- **Net Operating Losses** (*Staff: Matthew Berger*). On August 20, the IRS issued guidance (Notice 2010-58) regarding the expanded net operating loss (NOL) carryback provisions enacted in the Worker, Homeownership, and Business Assistance Act of 2009 (P.L. 111-92) and the American Recovery and Reinvestment Act (P.L. 111-5). The legislation allows taxpayers to carry back losses for up to five years, versus the two generally allowed, to claim immediate tax refunds based on income generated in prior profitable years. The Worker, Homeownership, and Business Assistance Act of 2009 allows taxpayers to carry back losses incurred in either 2008 or 2009 (but not both years) for up to five years, but limits the loss in the fifth preceding year to 50 percent of the taxpayer's income in that year. Meanwhile, the American Recovery and Reinvestment Act enables small businesses with gross annual receipts of \$15 million or less to carry back their 2008 losses for five years with no limitation on the amount of income that may be offset during the fifth preceding year. The IRS' guidance is available at www.irs.gov/pub/irs-drop/n-10-58.pdf.
- **Health Care: Business Tax Increases** (*Staff: Jim Arbury*). The sweeping health care legislation signed into law in March (P.L. 111-148 and P.L. 111-152) included tax provisions that will impact the apartment industry, including an increase in Medicare payroll taxes, employer fines for failing to provide health insurance and a tax credit for small businesses to provide coverage to employees, among other things. NAA/NMHC have prepared a summary of tax law changes due to health care reform, available at <http://tinyurl.com/4td5kr>.
- **Low-Income Housing Tax Credit**. See "Affordable Housing and Housing Policy" below.

ENVIRONMENT

- **Bed Bugs** (*Staff: Eileen Lee*). The re-emergence of bed bugs (*Cimex lectularius*) throughout the United States is of increasing concern to owners and managers of all property types. Scientists have posited theories about the resurgence of this age-old pest, but at present there are no easy answers for how to control the problem.

NAA/NMHC have asked Congress to direct the Department of Housing and Urban Development (HUD) to develop best practices to guide the efforts of property owners to deal with bed bugs in light of a new New York State law that requires lessors of New York City property (<http://bit.ly/NYCbedbuglaw>) to disclose to prospective lessees whether there has been any bed bug activity on the property within the past year.

Subsequently, Senator Charles Schumer (D-NY) sent a letter to HUD, the Environmental Protection Agency (EPA) and Health and Human Services asking for an interagency task force “to investigate and resolve the bed bug infestations that have infiltrated our homes, commercial real estate and hospitals.”

In response to the escalating problem of bed bugs, EPA and the Centers for Disease Control recently released a joint statement on bed bug control (<http://bit.ly/BedBugControl>). While explaining that infestations are extremely difficult to treat and chemical interventions are limited, the document states “(b)ed bug control is most effective when an IPM (integrated pest management) approach is implemented with diligent participation by the residents. ...A comprehensive IPM program to control bed bugs may include a number of methods such as: using monitoring devices, removing clutter where bed bugs can hide, applying heat treatment, vacuuming, sealing cracks and crevices to remove hiding places, using non-chemical pesticides (such as diatomaceous earth) and judicious use of effective pesticides. ...Intervention is most effective when populations are low.”

NAA/NMHC will continue to advocate for a comprehensive federal research program directed at eliminating this pest as well as the development of educational materials to help property owners communicate the shared responsibility between property managers and residents for an IPM program to be effective.

- **Energy Incentives** (*Staff: Eileen Lee*). Efforts to enact a rebate and technical assistance program for commercial property owners who make energy-efficiency improvements were derailed when the House version of the legislation added a provision requiring that the work be done by contractors following federal Davis-Bacon prevailing wage requirements. The original legislation (S. 3079/H.R. 5476), known as Building STAR, was supported by NAA/NMHC and a coalition of other organizations. Among other things, the measure would create a new two-year program providing rebates to property owners for qualifying energy-efficiency retrofit measures.

Although we initially submitted testimony in support of the Senate bill when the Senate Energy Committee held a hearing on it, in a more recent letter to lawmakers, we objected to the Davis-Bacon requirements, noting that they will undermine the job creation, energy efficiency and environmental benefits of the Building STAR program by making it more difficult for companies to participate. Earlier this year, the Government Accountability Office (GAO) identified comparable requirements as one of the reasons for delayed disbursements in the federal stimulus bill (H.R. 1). We will continue to urge lawmakers to remove the wage provisions. While Congress struggles to position itself on the side of creating jobs, the few remaining legislative days before the election coupled with rising concerns over increased deficit spending make it highly unlikely that this bill will move.

- **PACE Energy-Saving Loans** (*Staff: Eileen Lee and Paula Cino*). The Federal Housing Finance Agency (FHFA) released guidance on July 6 that severely limits the ability of multifamily properties to use Property Assessed Clean Energy (PACE) loans to finance energy-efficiency retrofits of existing buildings. Under the PACE program, participating jurisdictions use municipal bonds proceeds to fund energy upgrade loans to property owners. The loans are repaid through an additional assessment on the borrower’s property tax bill.

As the GSEs’ regulator, FHFA objects to the fact that most PACE debt acquires a senior lien over existing mortgages. The guidance essentially prohibits the GSEs from purchasing mortgages subject to PACE financing. FHFA is also requiring the GSEs to refine their policies for all borrowers in jurisdictions with PACE programs, including adjusting loan-to-value ratios, requiring additional loan covenants and tightening debt-to-income ratios. As a result, most jurisdictions have suspended their PACE initiatives. Representative Mike Thompson (D-CA) is pursuing legislation to reverse the FHFA policy, and California has filed a federal law-

suit to overturn it. However, the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency have subsequently echoed the concerns raised by FHFA and have issued an alert to banks to mitigate the risks posed by PACE loans. Given the limitations of the PACE program, Fannie Mae has convened a Green Rental Task Force to better understand existing energy-efficiency programs and to explore new possibilities in green and energy retrofit financing. NAA/NMHC participate in the task force.

- **Green Building Legislation** (*Staff: Eileen Lee*). NAA/NMHC continue to urge passage of bipartisan legislation that promotes sustainability and energy-efficiency practices in HUD-assisted multifamily housing. The GREEN (Green Resources for Energy Efficient Neighborhoods) Act (H.R. 2336) passed the House Financial Services Committee on April 22 and would provide incentives for new and existing structures financed by HUD that meet or exceed minimum energy-efficiency standards established in the bill. It also authorizes (but doesn't fund) a four-year, 50,000-unit demonstration program of building rehabilitation strategies and energy-efficient technologies. NAA/NMHC staff worked closely with the sponsor of the legislation, Representative Ed Perlmutter (D-CO), to tailor language regarding green appraisals. As a result of our efforts, a future rulemaking on how appraisals will value energy efficiency and other green features will permit stakeholders to offer suggestions on how such features should be evaluated.

H.R. 2336 also directs the Comptroller General to conduct an analysis of whether certain provisions of the current building energy code pose an obstacle to deploying distributive energy generation technology and water efficiency measures in federally assisted multifamily housing. An earlier version of the bill passed the full House in 2008 and again in 2009 as part of climate change legislation (H.R. 2454) and is expected to pass again. Senate passage is unclear at this time.

- **Green Building Standards** (*Staff: Eileen Lee and Paula Cino*). Two new green building standards have been released this year. In January, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) published a new green building standard (Standard 189.1) covering new and substantially renovated commercial buildings, including multifamily properties over three stories. Standard 189.1 represents a significant departure from existing green building programs and standards such as the National Green Building Standard (NGBS) and the LEED rating systems because it does not allow users the flexibility of selecting from a menu of sustainable practices. Instead, all of 189.1's provisions are mandatory and regulate a broad spectrum of building practices including energy and water efficiency, site sustainability, indoor air quality, materials and resource conservation and building operations. As a development committee member, NAA/NMHC successfully removed the most onerous provisions from draft versions, however, the standard still requires the use of products and technologies not used and unproven in the multifamily sector. More information is available at www.ashrae.org/publications/page/927.

The International Code Council (ICC) has also released a draft of its new International Green Construction Code (IGCC), the first model code for green buildings. The IGCC was designed to be compatible with the widely adopted ICC family of codes and standards, including the NGBS. Importantly, the IGCC directs most residential projects, including multifamily buildings three stories or less, to comply with the NGBS. Multifamily buildings four stories or more have the choice of either following the new IGCC provisions or complying with the NGBS.

The IGCC provides apartment firms with a complete toolbox of green building guidelines, while increasing the visibility and credibility of the NGBS. However, building owners and developers are cautioned that the code is still in draft form and has not been fully vetted through the code development process. Since official publication of the IGCC is not expected before 2012, firms should be alert for jurisdictions considering the premature adoption of draft versions. An additional concern is the fact that the IGCC allows jurisdictions to wholly substitute the IGCC's requirements with ASHRAE 189.1's provisions as an alternative compliance option. NAA/NMHC will continue to support the development of the IGCC and its reference to the NGBS and will provide further guidance for apartment firms facing adoption of the ASHRAE 189.1 standard. The IGCC draft is available at <http://bit.ly/9MsaWd>.

- **Lead-Based Paint: Renovation, Repair and Painting (RRP) Rule** (*Staff: Eileen Lee*). The EPA announced on June 18 that it will delay enforcement of parts of its lead-based paint Renovation, Repair and Painting (RRP) rule. Specifically, EPA extended the deadline for workers to sign up for a lead-safe training class to September 30. Training must be completed by December 31. EPA will also not take enforcement actions for violations of the rule's firm certification requirement until October 1. NAA/NMHC had earlier asked EPA for an enforcement delay and an extension of the compliance assistance period, citing issues with the required training material among other things. Importantly, EPA is not delaying enforcement ac-

tions for those found to be in non-compliance with the rule's lead-safe work practice requirements. EPA says it "will continue to enforce the work practice requirements in the rule which protect children and reduce lead exposure." On August 23, EPA's Office of Enforcement and Compliance Assurance issued a Consolidated Enforcement Response and Penalty Policy for the RRP rule. The document provides information on the factors federal enforcement officials will take into account in assessing civil administrative penalties for violations of various provisions of the RRP rule. Individual fines under the RRP can be \$37,500 and multiple violation fines can be substantially larger. A copy of the document is available at <http://tiny.cc/fy7ys>.

In addition, EPA has amended the RRP with new requirements (75 FR 24802) that went into effect on July 6. The change requires renovation firms (including property maintenance staff) "to provide a copy of the records demonstrating compliance with the training and work practice requirements of the RRP rule to the owners and, if different, the occupant of the building being renovated or the operator of the child-occupied facility. The amendment also requires that if a firm chooses to use a laboratory analysis of dust wipes (i.e., dust clearance testing) instead of using the simple "Swiffer" cleaning verification test after a renovation project, then the lab test results must be provided to both the occupant of the unit that was tested and to the owner of the building. Finally, the amendment makes minor modifications to the certification, accreditation and state authorization process. NAA/NMHC have prepared a memo outlining in additional detail the changes of interest to apartment firms. It is available with other guidance material on NAA's web site at <http://tinyurl.com/4td5kr>.

Separately, EPA has published a series of proposed amendments to the RRP rule. One proposal (75 FR 25038) would require the use of dust wipe testing instead of the "Swiffer" test for certain types of renovation projects. It also seeks to extend the RRP work practice requirements to the disturbance of any painted surface. A separate proposal (75 FR 24848) would extend the RRP lead-safe work practices to commercial buildings. NAA/NMHC submitted comments on the proposal. We noted that the Agency has no data justifying this costly and technically difficult-to-implement amendment to the RRP rule and that it has seriously underestimated the costs of compliance. We also point out that the proposed rule wrongly treats all RRP activities as if they were abatement jobs, despite Congressional intent that they be treated differently. In doing so, the proposal would create perverse disincentives that might discourage owners from maintaining their properties. Finally, we ask EPA to postpone enforcing the RRP rule until cost-effective field tests are available to detect lead on all surfaces so owners can determine whether they need to comply with the RRP rules. A copy of our letter is available at <http://tinyurl.com/4td5kr>.

- **Stormwater Management on Existing Properties** (*Staff: Eileen Lee and Paula Cino*) NAA/NMHC have secured a victory in our efforts to block EPA from conducting a survey that would require selected owners of existing properties to provide information on their stormwater management practices and detailed financing information. EPA announced the proposed survey (75 FR 25852) on May 6 in advance of its plans to issue new and significantly expanded stormwater management rules.

NAA/NMHC and a coalition of other groups argued that the mandatory survey was unduly burdensome and flawed in its methodology. We also argued that EPA improperly relied on authority under Section 308 of the Clean Water Act (CWA) to issue the survey and mistakenly categorized all building owners and developers as owners and operators of "point sources" of pollution. On July 22, the Office of Management and Budget (OMB) used its authority under the Paperwork Reduction Act to halt the survey, concluding that EPA's questionnaire was onerous and of questionable practical utility. OMB required EPA to streamline and clarify the survey to address industry and OMB concerns before proceeding.

The EPA is acting under a consent agreement with environmental interests to regulate stormwater runoff from developed land and has established an aggressive timetable for completing a rule. The Agency is expected to administer the revised survey in early September and release a proposed rule later this year. NAA/NMHC will continue to monitor EPA's data collection activities and its efforts to enact rules impacting apartment firms under the CWA.

PROPERTY OPERATIONS

- **Fair Housing Accessibility** (*Staff: Jeanne McGlynn Delgado*). In June, The Blanck Group, a recognized leader in the disability community for their expertise in disability law and policy, issued a report titled *Accessibility Standards for Multifamily Housing: Report on Approaches with Focus on Slope, Reach, Tolerance and Measurement*. After a lengthy process of research and analysis covering available settlement agreements, relevant administrative and court decisions, design studies and member focus groups, the report identifies the most critical design elements for developers and challenges the current standards as the only

means of achieving compliance in these areas. The areas for study and analysis included: (1) running and cross slopes; (2) reach ranges relative to environmental controls; (3) centering in kitchens and bathrooms; and (4) methods of measurement.

The Blanck Group worked in collaboration with their partners at the Center for Universal Design, a national research information and technical assistance center that develops, promotes and evaluates accessible universal design in housing, buildings and outdoor and urban environments. The report's overall findings call into question the state of the science in the area of accessibility standards development. Their review and analysis support and recommend alternatives to current standards, notably the use of tolerances in lieu of strict measurement protocols as defined in various safe harbors. NAA/NMHC are hopeful that the findings of this report will be helpful to member companies who are currently in litigation and/or settlement negotiations. The full report, which was supported by NAA/NMHC, is available at <http://tinyurl.com/4td5kr>.

- **ADA Regulations** (*Staff: Jeanne McGlynn Delgado*). The Department of Justice (DOJ) has released updated Americans with Disabilities Act (ADA) accessibility regulations, which apply to commercial buildings and privately owned facilities opened to the public. In apartment properties, that generally includes leasing offices, parking areas, restrooms and entrances and routes to these public areas. This is the first comprehensive revision since the ADA was passed two decades ago, and although many of the changes are substantial, most do not apply to apartments. Key changes include revised reach ranges and pathway running and cross slopes. A side reach range for environmental controls must now be no higher than 48 inches versus 54 inches in the 1991 standard. The lower reach range must now be no lower than 15 inches versus the previous nine inches. Pathway running slopes are limited to 1:20 and cross slopes to 1:48 for walking surfaces. Both of these changes are consistent with design and construction elements of the Fair Housing Act and are therefore familiar to the industry.

For newly constructed properties or alterations, the DOJ regulations allow covered entities the choice of following the updated rules or the original standards during the first 18 months of implementation. After that, only the 2010 standards will be permitted. If a property has been altered in accordance with the 1991 standards, there are no requirements to retrofit such elements to reflect the incremental changes in the 2010 standards. NAA/NMHC will continue to analyze the new standards for apartment industry-specific applications and update members as needed. A summary of the changes is available at <http://bit.ly/bnYZ5P>.

- **National Flood Insurance Program (NFIP)** (*Staff: Jeanne McGlynn Delgado*). Before recessing on September 30, Congress extended the National Flood Insurance Program (NFIP) through September 30, 2011. This once again gives Congress time to work on a more permanent fix and make needed amendments that we support.

LABOR AND EMPLOYMENT POLICY

- **Worker Classification** (*Staff: Betsy Feigin Befus*). The Obama Administration has taken steps to increase its efforts to identify employers that incorrectly treat “nonexempt” employees as “exempt” or improperly designate “employees” as “independent contractors” under the Fair Labor Standards Act and the Internal Revenue Code. President Obama’s proposed FY 2011 budget for the Department of Labor (DOL) calls for greater funding dedicated to the Wage and Hour Division for Fair Labor Standards Act (FLSA) enforcement. The Internal Revenue Service has also launched a misclassification initiative that is expected to include as many as 6,000 random employer audits over several years.

IMMIGRATION POLICY

- **Comprehensive Reform Legislation** (*Staff: Betsy Feigin Befus*). The issue of immigration reform briefly reasserted itself on the Congressional agenda following Arizona’s controversial immigration law and comments by Senate Majority Leader Harry Reid (D-NV) that he would move immigration reform this year. However, it seems increasingly unlikely that Congress will take up the issue this year. In April, Senate Democrats released “conceptual” immigration reform outline, although no bill has been introduced. Along with Senator Reid, Senators Charles Schumer (D-NY), Robert Menendez (D-NJ) and Dianne Feinstein (D-CA) are leading the campaign in support of the proposal, which was primarily drafted by Schumer with Senator Lindsey Graham (R-SC).

Senator Graham has since pulled back from the partnership, and it is unclear whether supporters can recruit a Republican champion, which seems essential for consideration of a bill. In an apparent effort to facilitate bipartisanship, President Obama met with Senate Republicans on May 25 and announced supplemental

funds to the FY 2010 budget for border enforcement activities, including deploying 1,200 National Guard troops to the southern Arizona border. Democrats have not given up on courting back Senator Graham and have reportedly reached out to Senator Scott Brown (R-MA).

Importantly, the conceptual outline states that federal law will preempt all state and local immigration or employment verification laws. This is important to apartment companies that could find themselves subject to a patchwork of state and local laws forcing firms to verify the legal status of their residents or establish other quasi-enforcement obligations for apartment owners. The plan also calls for biometric Social Security cards to verify the legal status of workers and imposes severe penalties for businesses that knowingly employ illegal workers once the new system is implemented.

In the House, Representative Solomon Ortiz (D-TX) introduced the Comprehensive Immigration Reform for America's Security and Prosperity Act (H.R. 4321) on December 15, 2009. The bill has garnered support from 102 co-sponsors, adding additional supporters as recently as this summer, but House Democrats have stated that they will not consider a bill until the Senate acts. The measure covers most key elements of comprehensive reform, but has been criticized by business groups because, among other things, it proposes a federal commission to determine employment needs and does not include a new guest worker program.

NAA/NMHC continue to be involved in the immigration reform debate. Apartment owners are particularly concerned about the failure of Congress to enact comprehensive legislation because federal inaction has encouraged state and local governments to pass draconian measures that, if enforced, would require apartment owners to act as de facto immigration enforcers. Some of these laws would even bar apartment owners from renting to undocumented individuals and require them to screen all prospective or even current residents for their immigration status.

AFFORDABLE HOUSING AND HOUSING POLICY

- **Forced Foreclosure** (*Staff: Lisa Blackwell and David Cardwell*). NAA/NMHC have successfully turned back a proposal that would have allowed the government to prematurely force "at risk" apartment properties into bankruptcy without the consent of the owner in order to convert them into affordable housing. After extensive dialogue between NAA/NMHC and Congress, an alternative proposal was enacted in July as part of the financial regulatory reform measure (P.L. 111-203). The revised measure directs HUD to develop a program to provide new equity to "at-risk" multifamily properties and to create long-term sustainable financing programs for such properties based on current rental income and operating and replacement reserves. Importantly, the measure specifies that any transfer of at-risk properties requires the agreement of the owners.
- **Low-Income Housing Tax Credit (LIHTC) Program** (*Staff: Matthew Berger*). Legislation has been introduced in both houses of Congress (H.R. 4109/S. 3141) that would allow LIHTCs to be "carried back" five years in an effort to stimulate investor interest in the tax credits. Allowing the credit to be used to offset prior tax liabilities over five years, instead of one year as under current law, the carryback proposal would enable investors to immediately realize value in LIHTC investments by applying unused credits to prior years' tax liability. Such a change would make LIHTCs attractive to a larger pool of investors. NAA/NMHC and a broad coalition of organizations have pushed for the carryback proposal as one of three critical steps required to bolster the struggling LIHTC program. We continue to tell Congress that all three of the elements (a five-year carryback, a one-year extension of the Tax Credit Exchange Program [TCEP] and changes to encourage investment in the LIHTC program by certain pass-through entities) are critical to achieving recovery in the LIHTC program.
- **LIHTC: Escrow Requirements** (*Staff: Matthew Berger*). On August 23, HUD issued final regulations implementing a provision in the Housing and Economic Recovery Act of 2008 (P.L. 110-289) prohibiting the Department from requiring that tax credit proceeds be escrowed to assure project completion in order to receive a HUD-insured mortgage. The ban applies to the Low-Income Housing Tax Credits (LIHTCs), historic tax credits and new markets tax credits. The change addresses concerns that mandated escrowing inhibited the building of new LIHTC projects and forced many developers to seek bridge loans until escrowed funds were released. Notably, HUD may continue to require escrows of funds for other purposes, including for working capital. The final rule is available at <http://edocket.access.gpo.gov/2010/pdf/2010-20630.pdf>.

- **Section 8 Program/"Tenant Protections"** (*Staff: Lisa Blackwell*). NAA/NMHC continue to oppose Section 8 reform legislation (H.R. 3045), although the measure has been bogged down in the House. The bill, which passed a key House committee last July, makes numerous program changes that NAA/NMHC have long supported, including streamlining the inspection process, establishing a more reliable annual funding formula and providing for additional vouchers in FY 2010. However, it also includes a provision we oppose that would make permanent a temporary law that requires the "immediate successor in interest" of a foreclosed property to assume any existing Section 8 Housing Assistance Payment contracts and allows Section 8 renters to remain in place for the term of the lease. In related news, the financial regulatory reform law (P.L. 111-203) extended these protections through 2014. They were originally scheduled to sunset at the end of 2012. The full House has yet to pass the Section 8 legislation, and no companion measure has been introduced in the Senate.
- **Housing Preservation Legislation** (*Staff: Lisa Blackwell*). On July 28, the House Financial Services Committee passed affordable housing preservation legislation (H.R. 4868). Among other things, the bill would require assisted property owners to give state housing agencies the opportunity to purchase property from an owner who wishes to sell their property (as originally drafted, this provision allowed HUD the first right of refusal to purchase a property). Although we support many of the bill's provisions, NAA/NMHC continue to oppose the overall bill because of the "first right of refusal" language. We believe preservation is best achieved through voluntary incentives. It is unclear whether the full House will take up the measure after its summer recess. No comparable bill has been introduced in the Senate.
- **FHA Single-Family Downpayment Requirements** (*Staff: Lisa Blackwell*). The single-family meltdown is also causing FHA to reconsider its downpayment requirements. On July 15, HUD issued a proposal in the Federal Register (75 FR 41217) that would require 10% downpayments for new borrowers with credit scores between 500 and 580. Borrowers with credit scores below 500 will no longer qualify. Borrowers with credit scores over 580 will continue to qualify for a 3.5% downpayment. NAA/NMHC welcome FHA's actions to tighten its single-family underwriting criteria as a necessary step to preventing unsustainable homeownership. In related news, Census data released this week report that the homeownership rate has fallen to its 1999 level of 66.9%, down from a peak of 69.2% in 2004.

BUILDING CODES

- **2012 International Codes** (*Staff: Ron Nickson*). The International Code Council (ICC) has completely revamped the procedures used to develop the model building codes. Instead of doing two complete code change cycles in a three-year period, they now have just one cycle every three years. The transition to the new procedures means that there was only one opportunity (June 1, 2009) to submit code change proposals for the 2012 edition of the ICC codes.

Proposals being considered for the 2012 codes were accepted at preliminary hearings last November and then divided into two subsequent hearings. The Group A hearings were held May 15-23 in Dallas and took final action on all changes being considered for the ICC building code, fire code, fuel gas code, mechanical code, plumbing code, wildland-urban interface code, existing building code and residential code.

Group B hearings will be held in Charlotte, October 23-November 1 and will finalize all the proposed changes to the energy code, property maintenance code, zoning code and administrative provisions. The final 2012 ICC codes will be available for adoption February-March of 2012.

The following is a summary of key issues of interest to apartment firms (as well as condos and student housing classified as R-2 occupancies) from the recently completed Group A hearings.

- *Changes benefitting the apartment industry:*
 - Removed the two-hour firewall requirement for single-exit buildings and increased the travel distance to 125 feet;
 - Allow for the installation of fire extinguishers in dwelling units to meet the requirement for fire extinguishers in common areas;
 - Clarified when smoke alarms are required in existing properties;
 - Clarified the installation of wiring for visible alarms;
 - Clarified when fire alarms are required in existing properties; and
 - Allow wireless smoke alarms as an alternative to hard-wired alarms.

- *New requirements for apartment (and other R-2) units:*
 - Type B (fair housing) dwelling units now required for all Level III alterations;
 - High-rise buildings must now post a detailed building information card in building fire command center;
 - Emergency responder radio repeaters now required if local emergency responder radio signal is blocked by building construction (generally applies to steel-frame or reinforced concrete buildings);
 - Carbon monoxide detectors now required in new and existing apartment buildings with fuel-fired appliances;
 - High-rise buildings must have two fire service access elevators (original proposal would have required three);
 - Locking caps now required on all accessible A/C refrigerant lines; and
 - Requirements were established for installing and maintaining roof gardens.

- *Adverse changes defeated:*
 - Requiring automatic smoke detection in R-2 college and university buildings;
 - Requiring automatic smoke detection in all apartment buildings;
 - Requiring video surveillance in exit ways on every fifth floor of high-rise buildings;
 - Not allowing any wood-frame construction;
 - Reducing the allowable stories by one for R occupancies (apartments) of Type IIB and IIIB construction;
 - Prohibiting an extra story with the installation of a building sprinkler system;
 - Disallowing an increase in building height with installation of NFPA 13 sprinkler system;
 - Increasing the fire separation between R occupancies and other occupancies by one hour;
 - Requiring exposed outer surface of fire-rated walls to be non-combustible;
 - Prohibiting electric resistance heating (electric backup on heat pumps);
 - Requiring all units that should have been (but are not) Type B (fair housing) dwelling units to be brought into compliance with the Type B requirements;
 - Requiring heat detection above all non-metallic (NM) cable, electrical boxes and raceways;
 - Reducing the allowable dryer vent duct length from 35 to 25 feet; and
 - Increasing the firewall requirement from one hour to two hours in sprinklered townhouses. (The one-hour provision was added during the last cycle based on a proposal by and testimony of an NMHC member.)