

MEMORANDUM

TO: NAA/NMHC Members

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RE: Legislative and Regulatory Update

DATE: October 13, 2011

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 6, 2011. 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

All eyes in Washington continue to be focused on the 12-member Joint Select Committee on Deficit Reduction. Established as part of legislation to increase the nation's debt ceiling and equally divided between Democratic and Republican members, the Committee is charged with finding an additional \$1.5 trillion in budgetary savings by November 23. If the members of the Committee are able to reach an agreement, the House and Senate must consider the package by an up or down vote by December 23. Across-the-board spending cuts will be triggered if the Committee fails to move forward with a plan.

Much of the Committee's focus will be on identifying additional spending reductions, though revenues will undoubtedly be a key subject of discussion. While many observers believe wholesale tax reform will be difficult to achieve in the remaining time that the Committee has to complete its work, NAA/NMHC are working diligently to ensure any tax reform effort does not disadvantage real estate relative to other industries. We will also oppose changes to the tax treatment of carried interest as well as any moves to eliminate the Low-Income Housing Tax Credit.

Apart from the Joint Select Committee on Deficit Reduction, a top priority for NAA/NMHC this Congress remains ensuring a stable flow of capital to the apartment sector as lawmakers continue work on phasing out Fannie Mae and Freddie Mac. Our lobbying team is active. And while legislation has not yet made it to the floor of either the House or the Senate, hearings have been held in both and several piecemeal bills have passed a House Financial Services subcommittee. That said, no one expects comprehensive GSE reform legislation to pass this year.

TOP PRIORITY ISSUES

- **Lead-Based Paint Test** (*Staff: Eileen Lee*). In a big victory for the apartment industry, on July 15 the Environmental Protection Agency (EPA) rejected its own proposed rule that would have mandated additional responsibilities for property owners and managers under the Lead Renovation, Repair and Painting (RRP) rule. The proposal would have required on-site maintenance staff and third-party contractors who engage in activities that disturb surfaces that may contain lead to replace simple post-renovation field tests with more expensive requirements to submit dust samples to an EPA-accredited lab for lead testing.

In comments on the original proposal, NAA/NMHC argued that the existing lead-safe work practices and detailed clean-up requirements, which went into effect in 2010, are sufficient. EPA's own studies concurred, and the Agency has thus allowed the existing field test protocol to remain in place. More information, including an NAA/NMHC RRP guidance document, is available at <http://tinyurl.com/4td5kr>.

Also, on July 12 the House Appropriations Committee passed an amendment to H.R. 2584 that would prohibit EPA from enforcing the RRP rule until the Agency has certified the accuracy of commercially available test kits that can be used to reliably ascertain the presence of lead on various coated surfaces on job sites. EPA's original estimates to comply with the RRP rule relied heavily on the availability of low-cost and accurate field tests that workers could use to determine whether a specific repair/renovation job would trigger the rule. EPA's research, however, finds that currently available test kits significantly err on the side of false positives; that is, they wrongly detect lead levels below the legal threshold and result in more jobs being unnecessarily subjected to the costs of the RRP rule. Despite promises to the contrary, the Agency has not been able to certify any widely available accurate test kits. This failure prompted lawmakers to act. The next step is for the full House to consider the appropriations bill, and then it must be voted on by the Senate.

- **Rental Housing Promotion** (*Staff: Kim Duty and Michael Tucker*). NAA/NMHC are working extensively with the media to capitalize on the new appreciation for rental housing. On June 14, NMHC President Doug Bibby appeared on CNN in a feature titled "Renting: The New American Dream." In the piece Bibby says, "We're seeing lots of people opting not to buy right now, even though they can afford it, because some are betting on housing prices falling further. There are some predictions they will fall more." There are others, Bibby said, who appreciate the freedom renting gives them to move during a recession. The segment, which was part of CNN's "Smart, the New Rich" show, points out that homeownership is now at the level it was in 1998. It also includes an interview of a "renter by choice" who lives in a Bozzuto Communities property in Baltimore, MD. He discussed the financial and lifestyle reasons why he prefers renting.

We also produced a new pro-apartment ad with the theme "Sometimes Living the Dream Means Rethinking It." The ad uses visuals contrasting suburban sprawl with a pedestrian-friendly apartment community to show how the American Dream is changing as a result of changing demographics and new consumer thinking following the single-family bust. Freed to choose housing that best suits their lifestyles, millions are choosing an apartment. The ad argues for a balanced housing policy that gives Americans the options they want. NAA/NMHC ran the ad in publications targeting members of Congress and are making it available in different sizes for member firms that would like to use it. Visit <http://tinyurl.com/4td5kr> for more information.

- **Carried Interest** (*Staff: Matthew Berger*). The commercial real estate industry secured a victory when the debt limit bill enacted in early August omitted a tax increase on carried interest. NAA/NMHC and a coalition of organizations had mounted an aggressive public relations campaign to oppose such a change after it was mentioned early in the negotiations by President Obama. Through media outreach and a coordinated advertising campaign in publications targeting Capitol Hill, we made the case that raising taxes on carried interest isn't just a Wall Street issue and would have a serious detrimental impact on Main Street. (For more information, visit <http://tinyurl.com/4td5kr>.)

The threat of a future tax increase is far from over, however. The debt limit legislation created a deficit reduction panel of 12 members of Congress, which is charged with identifying \$1.5 trillion in deficit reduction

by Thanksgiving. Taxes, including carried interest, may again be on the table, particularly as President Obama proposed increasing taxes applicable to carried interest as part of his tax reform proposal submitted to Congress in September. If the panel embraces the carried interest proposal, the threat would be even more serious than in the past because, under the terms of the legislation, if seven of the 12 panel members agree on the package of recommendations it would move through the House and Senate under a fast-track procedure that would prevent it from being amended or altered. NAA/NMHC and our real estate partners will continue to make the case that a carried interest increase would harm our economic recovery and the production of affordable housing.

- **Government Sponsored Enterprises (GSE) Reform** (*Staff: David Cardwell, Lisa Blackwell and Jeanne McGlynn Delgado*). After a burst of activity this spring, action on housing finance reform has taken a back seat to the pressing issues of raising the debt limit and addressing the national debt. The House Financial Services Committee has passed 14 piecemeal bills that address targeted elements of winding down the GSEs; eight on April 6 (H.R. 1224, H.R. 1221, H.R. 31, H.R. 1223, H.R. 1222, H.R. 1225, H.R. 1226 and H.R. 1227) and six more on July 12 (H.R. 463, H.R. 2436, H.R. 2441, H.R. 2440, H.R. 2462, and H.R. 2439).

Although the bills largely address problems in the GSEs' single-family businesses rather than their multifamily operations, NAA/NMHC are actively working with lawmakers to prevent unintended consequences that could negatively impact multifamily liquidity. While several of the targeted bills may ultimately win passage by the full House, they will face an uphill battle in the Senate, where there is considerable resistance to many of the measures. In addition to the individual, smaller bills, the committee may also consider a larger, more comprehensive GSE reform bill (H.R. 1182) introduced by Rep. Jeb Hensarling (R-TX), that would completely privatize the housing finance system over the next five years.

There are also two bipartisan bills pending in the House. The first, (H.R. 1859), sponsored by Rep. John Campbell (R-CA) and Rep. Gary Peters (D-MI) would wind down the GSEs over five years and create five chartered entities to issue mortgage bonds backed by an explicit government guarantee. The guarantee would not, however, apply to the issuers. The second (H.R. 2413), sponsored by Reps. Gary Miller (R-CA) and Carolyn McCarthy (D-NY), would merge Fannie Mae and Freddie Mac into a single, government-held corporation. The merged company would be authorized to purchase mortgages and sell them to investors as government-backed securities. The nonprofit entity would have no shareholders. Neither bill has been considered at this point.

The Senate has held 10 hearings in 2011 on the various aspects of the housing crisis and the future of housing finance reform. While Senators John McCain (R-AZ) and Orrin Hatch (R-UT) introduced a bill (S. 693) to privatize or wind down Fannie Mae and Freddie Mac over the next five years, it has not received a hearing or been given much consideration. On May 26, NAA/NMHC testified before the Senate Banking Committee on what works in the existing housing finance system—namely the multifamily programs. Our testimony explained that the GSEs' multifamily programs were not part of the meltdown and are not broken. It warned lawmakers that without a federal credit backstop the apartment industry cannot meet the nation's current or future housing needs.

While lawmakers and Obama Administration officials develop their plans for the GSEs, the Administration has ensured that the entities will have unlimited federal financial support through December 31, 2012.

NAA/NMHC continue our aggressive lobbying and public relations campaigns to urge lawmakers to “do no harm” to multifamily as they seek to prevent a recurrence of the single-family meltdown. On May 3, The Wall Street Journal published a letter to the editor from NMHC Chairman Peter Donovan explaining that a private-market only solution is impractical for rental housing and will have serious detrimental consequences for the 17 million Americans who rely on it. A comparable op-ed was sent to local apartment associations around the country and has been printed in several papers. NAA/NMHC also joined a coalition of 17 real estate organizations in running a full-page ad in National Journal magazine outlining a set of principles for GSE and multifamily financing reform. While emphasizing the need to attract private money back to mortgage finance markets, the coalition also said “an appropriate and clearly defined role for the government is essential to preserving financial stability.”

CAPITAL MARKETS

- **FHA Multifamily Backlog** (*Staff: David Cardwell*). NAA/NMHC continue to work with HUD to seek ways to clear its backlog of multifamily mortgage insurance applications. On October 13, NAA/NMHC held its third meeting this year with HUD Secretary Shaun Donovan to press for improvements in FHA's loan processing procedures. We stressed the need for better communication and more transparency on the status of existing loan applications, many on which have been languishing in field offices for over 12 months. We also pressed for greater delegation to field offices and asked that the threshold for requiring headquarter's approval be limited to loans that are \$35 million or greater.

HUD is currently rolling out enhanced application processing procedures to all of its field offices after a nine-month pilot program in Fort Worth, TX and Baltimore, MD. The new procedures are based on recommendations by a consulting firm engaged by HUD and focus on pre-application and early application review and underwriting. The changes will not change the information required from borrowers. The Department also reports its central loan committee is becoming more efficient, more approvals are being done via electronic review and that the rejection level is less than 10 percent and declining.

The October 13 meeting follows earlier meetings this summer with Acting FHA Commissioner Carole Galante. NAA/NMHC also testified on this issue on May 25 before a key subcommittee of the House Financial Services Committee. Our witness, Peter Evans, a partner at Chicago-based Moran & Company, told lawmakers that HUD's failure to keep pace with the volume of multifamily mortgage applications is exacerbating the nation's shortage of workforce housing, jeopardizing the thousands of jobs created by new apartment construction and reducing the new revenues the program could be generating for the federal government. We will urge HUD to not only improve the process for future loan applications but to more aggressively deal with the backlog of existing applications.

- **FHA's Multifamily Accelerated Processing Guide** (*Staff: David Cardwell*). On August 18, HUD/FHA published the much-anticipated update to the Multifamily Accelerated Processing (MAP) Guide, their policies and procedures document that outlines the requirements for obtaining FHA financing. The updated guide essentially consolidates changes made through Housing Notices and Mortgagee Letters since 2002, including the new loan closing documents issued earlier this year.

Following its release, the Department received hundreds of technical comments urging clarifications and corrections to the guide. At the urging of NAA/NMHC and others, HUD has delayed the effective date of the guide from September 18 to November 1 to allow the Department time to revise it to incorporate priority recommendations. They have also agreed to continue to work with the industry on an ongoing basis to turn the guide into a dynamic policy document that is routinely updated. The guide is available at <http://1.usa.gov/pLmJrZ>.

- **Federal Sales of Foreclosed Houses** (*Staff: David Cardwell*). On August 10, the Obama Administration issued a Request for Information (RFI) seeking private-sector solutions to help dispose of the current and future single-family real estate owned (REO) inventory of Fannie Mae, Freddie Mac and FHA. As of July 1, the federal government owned approximately 250,000 houses. The RFI asks for comments on possible sales, joint ventures or other strategies.

Through this effort, the Administration hopes to maximize the economic value of its REO inventory more effectively than individual house sales by pooling properties geographically and putting them under the management of a third party, a joint venture or some other structure that has the technical and financial ability to respond to local economic and real estate conditions. Notably, the RFI explicitly says that where feasible and appropriate, these REO properties could be converted to rental housing. The most likely scenarios involve allowing investors and nonprofits to purchase bulk properties if they agree to rent them out for some period of time.

Another option would see investors entering into joint ventures with the GSEs to invest in a pool of foreclosed houses. Investors and the government would split rehab costs and rental revenues and the proceeds from eventual sales. Property management would be outsourced to one or more private firms. Because the Administration is not asking for comments on a specific program but simply soliciting ideas from a

wide range of market participants, NAA/NMHC will not be submitting comments but encourage members interested in this as a possible business venture to submit comments directly by the September 15 deadline. To help inform proposals, HUD created a web-based mapping tool (<http://1.usa.gov/rkYdUe>) to display the location of all foreclosed properties owned by Fannie Mae, Freddie Mac and FHA. More information is available at <http://tinyurl.com/4td5kr>.

- **CMBS Risk Retention Rules** (*Staff: David Cardwell*). NAA/NMHC have submitted comments on proposed risk retention rules for the securitized market. The rules implement key sections of last year's Dodd-Frank financial reform law (P.L. 111-203), including a provision requiring securitizers to retain 5 percent of the credit risk for new securities. Our comments touched on several areas where the proposal has the potential to adversely affect the availability and pricing of credit. We stress the importance of aligning the interests of borrowers and investors in the servicing function, explaining how the existing servicing arrangements have often failed to serve borrowers.

We also urged regulators to allow more commercial real estate-based mortgages to be exempt from risk retention requirements, noting our sector's historically strong loan payment performance. And we provided input on ways to implement the Dodd-Frank Act provisions that would allow the subordinated investor (i.e., the B-piece buyer) to meet the risk retention requirements. We noted that the proposed rule creates disincentives that could reduce the participation of B-piece buyers and adversely affect transaction pricing. Our full comments are available at <http://tinyurl.com/4td5kr>. Final regulations must be approved by six different regulators before being enacted.

- **Covered Bonds** (*Staff: David Cardwell*). Legislation to create a covered bonds market in the U.S. moved forward on June 22, when the House Financial Services Committee passed a bill (H.R. 940) that would create a covered bond market in the United States by a wide, bipartisan margin. H.R. 940 limits issuer lending volumes by requiring them to hold loans on their balance sheets, retain capital reserves in case of losses and requires issuers to be responsible for losses. The legislation also directs the regulator to establish limits on the amount of covered bonds an institution can issue based on the amount of total assets in their portfolio. Comparable legislation has not been introduced in the Senate; however, Senator Charles Schumer (D-NY) has indicated interest in introducing a covered bonds bill. Last fall, NAA/NMHC testified before the Senate Banking Committee explaining that while covered bonds could be a supplemental liquidity source, they are unlikely to provide the capacity, flexibility or pricing superiority necessary to adequately replace any of the U.S.'s traditional sources of multifamily mortgage credit. We reiterated our support for the legislation in a May 2 letter to Congress. Additional information on covered bonds, including an NMHC white paper, is available at <http://tinyurl.com/4td5kr>.
- **Financial Regulatory Reform: End-Users of Swaps and Other Derivatives** (*Staff: David Cardwell*). NAA/NMHC and a coalition of organizations submitted comments in July to the Treasury, FHFA, FDIC and the Federal Reserve regarding proposed new derivatives regulations that could limit the ability of real estate owners, operators and developers to use low-cost, customized over-the-counter derivatives to manage business and interest rate risk. We noted concerns over a proposed requirement that all end-users enter into credit support agreements with their counterparties. We also objected to the significant limitations the proposal would place on the types of assets that would be acceptable to meet the collateral requirements established by those credit support agreements.

TAX AND ACCOUNTING

- **Tax Reform** (*Staff: Matthew Berger*). The issue of tax reform took on a new priority as a result of this summer's debt ceiling debate. While the final deal failed to produce a comprehensive tax reform plan, it increased pressure on lawmakers to consider tax reform this year by creating a Congressional commission charged with developing a plan to reduce the deficit by up to an additional \$1.5 trillion. Their recommendations are due November 23. Before the summer wrangling, both the Republican-controlled House Ways and Means Committee and the Democratic-led Senate Finance Committee held several hearings on various aspects of the tax code to prepare for a possible reform effort.

While this signals bipartisan interest in moving tax reform, and although there is general agreement that our tax code needs to be less complex and offer lower tax rates, it is unclear whether any legislation can be enacted before the 2012 election because there is little agreement on how to accomplish that objective. Many Republicans, for example, would only favor tax reform that is revenue neutral and does not increase the ag-

gregate tax burden. On the other hand, President Obama has expressed a preference for a reformed tax system that generates more revenue than is being collected today.

Regardless of whether reform efforts are undertaken under regular order or as part of the deficit reduction recommendations, they will be further complicated by disagreements over which current-law credits and deductions to retain. Strong support for keeping deductions for mortgage interest, charitable giving and state and local taxes are expected to emerge. However, retaining these provisions will mean that overall tax rates cannot be lowered as much. Despite this disagreement, the 112th Congress will have to begin addressing these fundamental issues before adjourning next year given that Alternative Minimum Tax (AMT) relief expires at the end of 2011, and the Bush-era tax cuts lapse at the end of 2012.

NAA/NMHC will be active participants in the debate, urging lawmakers not to implement reforms that disadvantage apartment owners and renters relative to other asset classes or eliminate the Low-Income Housing Tax Credit (LIHTC) program. We will also urge them to reject proposals to reduce corporate tax rates at the expense of partnerships, which are a common form of organization for multifamily firms, and pay taxes at individual rates.

- **Homeownership Tax Incentives** (*Staff: Matthew Berger*). In the latest of a series of Congressional hearings on tax reform, on October 6, the Senate Finance Committee held a hearing focused on homeownership incentives. Although participants generally cautioned against making changes to the mortgage interest deduction (MID) before the housing market stabilizes, and some urged leaving the current law in place permanently, several Senators and witnesses offered proposals to ultimately scale it back.

Dr. Karl Case, a senior fellow at Harvard University's Joint Center for Housing Studies, advised lawmakers to phase out both the mortgage interest and property tax deductions once the housing market is restored to health and GSE reform is completed. Richard Green of the University of Southern California argued that Congress should phase out the MID over 10 years once prices stabilize to encourage owners to both buy smaller houses and repay mortgages more quickly. He suggested replacing it with a refundable tax credit to direct a greater portion of the subsidy toward lower-income borrowers.

Former Senator John Breaux (D-LA) reminded members that the 2005 Mack-Breaux Commission established by former President George W. Bush proposed turning the MID into a 15 percent tax credit limited to \$412,500 in mortgage indebtedness. According to a [report](#) issued in advance of the hearing by the Joint Committee on Taxation, in 2009, 36.5 million households claimed \$420.8 billion in itemized deductions for mortgage interest. Many tax reform advocates have argued that savings from reducing the MID could be used to lower overall tax rates.

The hearing was held as part of a larger Congressional effort to examine different areas of the tax code to inform future efforts at comprehensive tax reform. A video of the hearing, lawmaker statements and complete witness testimony can be accessed at <http://1.usa.gov/nj7KrR>.

- **SEC Registration Requirement** (*Staff: Matthew Berger*). On June 22, the Securities and Exchange Commission (SEC) adopted final rules implementing a provision in the 2010 Dodd-Frank financial reform law (P.L. 111-203) requiring certain advisors that provide advice with respect to real estate and real estate-related investments to register as an investment advisor with the SEC or one or more states. Importantly, the final rules postpone the compliance date from July 21, 2011 to March 31, 2012. (Generally, an investment advisor must register with the SEC if it has more than \$110 million in assets under management (an advisor that has less than \$110 million in assets under management generally must register with one or more state regulators rather than with the SEC.)

In related news, on June 22, the House Financial Services Committee approved a bill (H.R. 1082) that would exempt private equity funds from having to comply with the registration requirements. NAA/NMHC are working closely with the committee to ensure that Congressional intent to apply the exemption to private real estate investment funds is clear to regulators.

- **Lease Accounting Rules** (*Staff: Matthew Berger*). The Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) continue to work on proposed lease accounting rules (<http://bit.ly/dRPqG>) that would have far-ranging consequences on apartment firms. Under current law, leases are reflected on balance sheets as income is received. Under the new proposed rules, for the first time, leases lasting longer than 12 months (including optional renewal periods) would have to be placed on

the balance sheet upon inception. If enacted, this change could have an enormous impact on how multi-family firms account for leases. First and foremost, they would have to modify their lease management software to facilitate new accounting treatment. Second, firms would have to decide whether to use two different standards--one for leases under a year and one for longer-term leases. NAA/NMHC are closely monitoring FASB/IASB's action in this area.

Although the rules were originally set to be finalized in June, this is now unlikely to occur before 2013 at the earliest. On July 21, FASB/IASB agreed to reopen the comment period on their latest proposal, which includes changes made to their original August 2010 draft. A revised draft for comment is expected to be released during the first quarter of 2012. Importantly, although the Securities and Exchange Commission (SEC) generally relies on FASB--a non-governmental body--to set accounting standards, the SEC is the final arbiter of any rules.

- **Estate Tax** (*Staff: Matthew Berger*). NAA/NMHC also continue to monitor the estate tax issue. Legislation (P.L. 111-312) enacted last year included a two-year solution for the estate tax that retains stepped-up basis rules, a top priority for NAA/NMHC. Under P.L. 111-312, the estate tax is set at a \$5 million exemption and a 35 percent tax rate for 2011 and 2012. Although the immediate pressure for Congress to reach an accord on a long-term estate tax has been diminished, it is expected that Congress will continue to debate the issue during the 112th Congress. President Obama's FY 2012 budget proposes to reduce the estate tax exemption to \$3.5 million and to raise the top tax rate to 45 percent beginning in 2013.

PROPERTY OPERATIONS

- **National Flood Insurance Program (NFIP)** (*Staff: Jeanne McGlynn Delgado*). NAA/NMHC scored a legislative victory in July when the U.S. House of Representatives passed legislation (H.R. 1309) to reauthorize the National Flood Insurance Program for five years through September 30, 2016. The program has been operating on short-term extensions since 2008, causing uncertainty for the property owners who rely on this coverage.

The bill also takes steps to reduce its \$18 billion debt by phasing in actuarial rates for certain properties. Apartment policyholders who currently receive a subsidized rate are not among those properties identified to move to full-risk rates. Other important provisions include increasing coverage limits, which are currently capped at \$250,000 for apartment properties, and indexing them to inflation. During floor debate of the bill, two NAA/NMHC-opposed amendments were rejected. The first would have struck the new business interruption coverage and cost of living expenses provisions from the bill. The second amendment would have terminated the program in its entirety by January 2012. Finally, the amended bill includes a provision to ensure that apartment renters are informed of the availability of content coverage through the NFIP. The Senate marked up a draft bill introduced by Senator Tim Johnson (D-SD) on September 8 that contains many of the same provisions as the House bill and is supported by NAA/NMHC. However, given the September 30 expiration of the program,

Given the September 30 expiration of the program, Congress granted another short-term extension of it through November 18. Whether the Senate can complete its bill and reconcile it with the House before the next deadline is uncertain. NAA/NMHC will continue to advocate for final passage of the legislation.

- **Pool/Spa Drain Recall** (*Staff: Jeanne McGlynn Delgado*). On September 28, the Consumer Product Safety Commission (CPSC) revoked their interpretation of "unblockable drain" for purposes of complying with the requirements of the Virginia Graeme Baker Pool and Spa Safety Act (VGBA). Some apartment pool operators may be impacted by this new interpretation. The VGBA requires pool operators to install new anti-entrapment drain covers in all public pools. When a pool has a single main drain, other than an "unblockable drain," the law requires additional layers of protection such as an automatic pump shut-off or a gravity drainage system. Prior to this change, the CPSC in some cases permitted the use of large drain covers installed on small single main drains to satisfy the requirements, which eliminated the need for secondary anti-entrapment devices. This vote reverses this position; Staff Technical Guidance will be amended to state, "placing a removable unblockable drain cover over a blockable drain shall not constitute an unblockable drain."

The revised CPSC guidance will define unblockable to mean a "suction outlet, including the sump, that has a perforated (open) area that cannot be shadowed by the area of the 18" x 23" Body Blocking Element of ASME/ANSI A112.19.8-2007, and that the rated flow through any portion of the remaining open area cannot

create a suction force in excess of the removal force values in table 1 of that Standard.” The Commission does not anticipate enforcing this change before May 28, 2012 and will seek comments from pool operators regarding their ability to come into compliance by this date. Comments are due December 12. NAA/NMHC will continue to monitor, assess member impact and submit comments to ensure enough time is granted to make appropriate changes.

- **Credit Score Disclosure** (*Staff: Jeanne McGlynn Delgado*). NAA/NMHC have issued a new members-only guidance document to help member firms understand new “credit score” disclosure requirements that went into effect on July 21. Because of a provision in last year’s Dodd-Frank Wall Street Reform law (P.L. 111-203), a firm using a “credit score” in the rental screening process that takes an adverse action against a rental applicant may have a new disclosure obligation. Apartment firms (or their resident screening service providers) that use a credit score and take an adverse action must comply with this new notice requirement. Importantly, firms that do not use a credit score as defined, but use a scoring model specific to the rental decision (i.e., one not used in the loan process), may not face additional notice obligations. NAA/NMHC’s guidance as well as a webinar on the issue are available at <http://tinyurl.com/4td5kr>.
- **Privacy Legislation** (*Staff: Jeanne McGlynn Delgado and Amy Beranek*). NAA/NMHC are closely monitoring privacy legislation that could impact apartment firms. On July 21, a House subcommittee marked up a data breach notification bill (H.R. 2577) that would require businesses that collect personally identifiable information to implement security practices to protect this information. “Personally identifiable information” includes full name and a combination of other data elements, such as Social Security number, driver’s license number and other information typically sought during the rental application process. This bill would also create a national standard to require businesses to notify consumers of data breaches within 48 hours. A separate bill (H.R. 1528) would require businesses to disclose to consumers how their personal information is being collected, stored and used. Businesses would also be required to obtain “opt-in” consent to disclose the information to a third party. The Senate Judiciary Committee marked up two data breach notification bills with similar provisions (S. 1150 and S. 1408) during the week of September 15. It is unclear whether these or other data breach and data privacy legislation will be enacted during this Congress.
- **Credit and Debit Card Rules** (*Staff: David Cardwell*). NAA/NMHC continue to follow regulatory action to implement a provision in last year’s Dodd-Frank law (P.L. 111-203) that would lower the fees banks and card networks can charge for debit card transactions. Under the final rule issued June 29, the maximum permissible interchange fee that an issuer may receive for an electronic debit transaction will be the sum of 21 cents per transaction and five basis points multiplied by the value of the transaction. (For example, the debit card fee for a \$1,500 rent transaction would be 96 cents based on the formula $\$0.21 + \$0.75 (\$1,500 \times .05 = .75)$). Additionally, the Federal Reserve is permitting a \$0.01 additional fraud detection fee for banks that can certify they have policies and procedures to prevent fraud. This provision regarding debit card interchange fees is effective on October 1.

ENERGY

- **Energy Legislation** (*Staff: Eileen Lee and Paula Cino*). Energy issues continue to be a focus of Congressional attention. On July 14, a Senate committee approved an energy efficiency bill (S. 1000) with several provisions of interest to apartment firms. Thanks to strong advocacy by NAA/NMHC and other real estate associations, the measure encourages improvements in building energy performance through provisions such as a loan guarantee program to assist property owners in financing energy efficiency upgrades in existing buildings. Significantly, the authors of the bill, Senators Jeanne Shaheen (D-NH) and Rob Portman (R-OH), substantially modified language regarding building energy code metrics that passed the House in 2009, which was strongly opposed by NAA/NMHC and other real estate trade associations, although the revised provisions remain problematic.

Prior legislative efforts would have required the Department of Energy (DOE) to adopt arbitrary code efficiency levels that were up to 50 percent more stringent than current code levels. S. 1000 instead requires DOE to establish building efficiency targets and develop building codes accordingly. While NAA/NMHC believe that this language provides flexibility in establishing target performance levels, we remain concerned that an expanded role for the federal government in the building code arena will undermine the existing code development process and state-level code enforcement. Importantly, the bill specifically requires DOE to consider the cost effectiveness of new efficiency mandates. Language was also removed that would have established a “zero-net energy” building performance goal by 2030. It is unclear whether the measure can move through the Senate and House given competing priorities and budget concerns. NAA/NMHC are ac-

tively working with Congress to develop energy performance metrics that are technically and economically achievable on multifamily properties.

- **Building Performance Standards** (*Staff: Eileen Lee and Paula Cino*). EPA has announced an ENERGY STAR rating for multifamily high-rise buildings; prior ratings were for low-rise properties only. The designation may be applied to new and substantially renovated properties that meet specific criteria, notably that they are designed to be at least 15 percent more energy efficient than the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standard 90.1-2007. The program differs significantly from the ENERGY STAR rating system that is available to commercial properties. There are two paths to earning the ENERGY STAR designation: developers may choose a prescriptive package developed by EPA or a customized approach using ASHRAE-approved energy modeling software. Additional information is available at <http://1.usa.gov/r0L9uK>.

In related news, ASHRAE has signed a Memorandum of Understanding (MOU) with DOE affirming the organizations' shared commitment to advancing building energy efficiency. Among other things, the MOU says the organizations will "collaborate on the accelerated development and distribution of advanced energy design guidance publications, such as 50 percent Advanced Energy Design Guides, which can be utilized as an alternative to the prescriptive path in Standard 90.1-2013, for a more sustainable built environment."

As noted above, legislative proposals that mandate a 50 percent improvement over specific code levels have been controversial, as they are generally thought to be technically infeasible and cost prohibitive as a baseline code matter. Such high performance metrics are not required for buildings that receive the highest green ratings under various voluntary programs like LEED and will prove problematic as a code requirement. Equally troubling in this agreement is the circumvention of typical code and legislative processes implied by the terms of this agreement.

- **Building Labeling** (*Staff: Eileen Lee and Paula Cino*). The White House is seeking to advance significant energy policy initiatives, including building labeling provisions, through executive action rather than the legislative process. On August 8, the Department of Energy (DOE) announced a new program, the National Asset Rating Program for Commercial Buildings (AR Program), to rate new and existing buildings on their expected energy performance. While voluntary energy efficiency and benchmarking programs like EPA's ENERGY STAR are generally designed as energy management tools, the AR Program is specifically designed to impact valuation and transactional decisions.

In a letter submitted to DOE on September 22, NAA/NMHC questioned the market need for another energy measurement program, when numerous well-established governmental and private sector programs already exist, such as EPA's Energy Star. Instead, we suggest that reinvestment in existing programs is a "more effective and resource-efficient path to achieving" energy efficiency goals. In a positive move, DOE has indicated its intention to develop the AR Program in stages and phase-in various building types. As proposed, multifamily properties would not be included in the initial program, but DOE is committed to expanding the program throughout the real estate sector. NAA/NMHC will continue to educate the Administration about the unique characteristics of the apartment sector and the need for carefully tailored industry metrics.

- **LEED Class Action Lawsuit** (*Staff: Eileen Lee and Paula Cino*). On August 15, a New York federal court dismissed the class action lawsuit filed against the U.S. Green Building Council (USGBC). The suit alleged that the USGBC concealed data showing poor energy performance by some LEED-certified buildings and deceived consumers, building professionals and jurisdictions by advertising that LEED certification results in reduced building energy consumption. It also claims LEED unfairly placed non-LEED practitioners at a competitive disadvantage. The dismissal hinged on technical grounds, however, and not on the merit of the claim, with the court finding that the plaintiffs lacked standing to sue. Despite the dismissal, the lawsuit illustrates the growing concerns over unsubstantiated green claims as well as green building performance problems.
- **PACE Loan Lawsuit** (*Staff: Eileen Lee and Paula Cino*). On August 26, a California federal court ruled that the Federal Housing Finance Agency (FHFA) must complete a rulemaking regarding its position on a once-popular finance mechanism for energy efficiency retrofits of existing buildings, known as Property Assessed Clean Energy (PACE) loans. The lawsuit concerns FHFA guidance released in July 2010 that served to severely limit the use of PACE loans and stated that these loans present "significant safety and soundness concerns" for mortgage holders and create undue risk in the case of default. Most jurisdictions suspended their PACE programs in response. However, despite this court ruling, the FHFA guidance remains in effect.

ENVIRONMENT

- **Bed Bugs: Guidance** (*Staff: Eileen Lee*). NAA/NMHC continue to tackle the issue of bed bugs, which has received increasing media attention. On August 19, HUD issued guidelines on preventing and controlling bed bugs in HUD-insured and HUD-assisted properties. In addition to identifying best practices regarding integrated pest management (IPM), it also details the rights and responsibilities of HUD, owners/managers and residents with regard to bed bug treatments.

The document leaves many questions unanswered and makes assumptions that may not reflect market realities. NAA/NMHC have requested a meeting with HUD to seek clarification of the guidelines.

Among the key provisions:

- Owners/managers may not deny residency to an applicant based on prior exposure to bed bugs.
- Residents cannot be charged the cost of bed bug treatment; owners must cover those expenses.
- Owners are not required to reimburse residents for any additional expenses related to an infestation, such as purchasing new furniture or clothing or other cleaning services. (This does not prevent them from seeking such reimbursements through the courts or under various state and local statutory authorities, however.)
- Owners are not required to relocate residents unless treatment renders the unit uninhabitable.
- The document provides a timetable under which owners are required, where possible, to inspect (within 3 days) and begin treatment (within 5 days).
- Residents are expected to cooperate with treatment plans, but the document does provide owners with remedies if they do not.
- The document suggests possible funding assistance for owners via replacement reserves and budget line items but says requests for rent increases should be part of an ongoing pest prevention program.

The full guidance and a more detailed summary are available at <http://tinyurl.com/4td5kr>. NAA/NMHC have also signed onto a letter that represents the consensus position of a wide spectrum of housing providers in regard to the deficiencies of the housing notice and have asked that the notice be rescinded.

Earlier this year, NAA/NMHC participated in a National Bed Bug Summit sponsored by the Environmental Protection Agency (EPA). Unfortunately, the private market is not likely to develop a new bed bug pesticide in the near future. Scientists at an EPA forum held last year explained that it takes roughly 10 years and \$200 million in research and testing to bring a new chemical to market. Bed bugs are not a priority for pesticide firms because the market for residential pesticides used indoors is exceedingly small compared to that of other pesticide products, such as those used in agriculture. NAA joined the American Hotel and Lodging Association and BOMA International in sponsoring a bed bug webinar presented by Orkin. Experts discussed a range of topics that included litigation, human resources and risk management. For additional information and materials, see <http://tinyurl.com/62a15lp>.

- **Bed Bugs: Legislation** (*Staff: Eileen Lee*). Comprehensive bed bug legislation (H.R.967) has been introduced in the House that would fund more federal research on bed bugs and pesticides that can eradicate them and create a federal bed bug task force. It also seeks to have bed bugs classified as a “vector” (potentially capable of transmitting disease) under existing federal legislation. While the bill goes a long way toward addressing the unmet research needs posed by the escalating bed bug problem, the unintended consequences of labeling these insects as “vectors” i.e., organisms that transmit disease, is of significant concern. No research to date has established this connection. And the consequence of labeling a bed bug infestation as a known health threat raises concerns with regard to a property being in compliance with health and safety requirements under various programs, including the Low Income Housing Tax Credit. As advocated by NAA/NMHC, it addresses the problem of ineffective and possibly dangerous bed bug treatments being marketed to the public by requiring manufacturers that label pesticides as controlling a public health pest to submit data proving the product’s efficacy. The measure directs the Agriculture Department to coordinate with the EPA to expedite approval of pesticides identified through the research grants that the bill funds. It also funds demonstration projects for certain housing authorities to supplement ongoing bed bug prevention and mitigation activities.
- **Clean Water Act (CWA)** (*Staff: Eileen Lee and Paula Cino*). On July 12, the House Appropriations Committee approved a provision in the FY 2012 EPA spending bill that would block the Agency from issuing new wetlands guidance that would subject more land to federal control. EPA and the U.S. Army Corps of Engi-

neers previously jointly issued a proposed guidance that establishes their regulatory philosophy for permitting decisions, enforcement and jurisdictional determinations related to the Clean Water Act. This latest guidance supersedes earlier guidance issued in 2003 and 2008 that have been the source of ongoing litigation. The new policy is strongly opposed by diverse industry stakeholders, and 170 members of Congress signed a letter cautioning that such guidance should not act as a substitute for an official rulemaking.

At issue is what waters are subject to regulation as wetlands under the scope of the CWA. Following Supreme Court rulings raising the question, Congress has unsuccessfully sought to clarify the issue primarily by expanding the definition to include "all waters of the U.S." The lack of legislative and regulatory certainty concerning the extent of CWA jurisdiction has spurred the Supreme Court to consider another CWA compliance case next term. In *Sackett v. EPA*, EPA ordered property owners to complete an onerous restoration of an active building site to its original condition after determining it was a protected wetland, despite having no direct hydrological connection to a body of water. The Court will decide whether such an owner has a Constitutionally protected right to demand judicial review of these determinations under the CWA. NAA and NMHC have each joined with affected industry stakeholders to submit amicus briefs supporting the property owners in this case.

NAA/NMHC and others oppose a broad expansion of federal jurisdiction, citing the fact that states are in a better position to impose additional regulations on "critical" waters. On July 13, the House passed a measure supporting this position, the Clean Water Cooperative Federalism Act of 2011 (H.R. 2018). Sponsored by Representatives John Mica (R-FL) and Nick Rahall (D-WV), the bill vests final decisions under the CWA with the states. Without legislative action, property owners and developers remain trapped in a system that requires one-off review by federal agencies of any development that could potentially be determined to contain a wetland.

In another CWA matter, EPA has announced it is postponing the release of its proposed significantly expanded rules for stormwater management. The proposed rules were expected in September, but the Agency pushed back their release until at least December. EPA currently regulates stormwater through a variety of means, including permits for properties under construction, but the new rules would extend regulation beyond the construction period and impact ongoing building operations and maintenance. EPA has indicated that such regulation would, at a minimum, include new project design and performance standards for stormwater discharges, which could require the use of green infrastructure and low-impact development techniques, such as a 50-percent reduction in impervious surfaces, green roofs and increased on-site water retention. NAA/NMHC have raised concerns about the process EPA used to develop the new rules. Of note, EPA was forced to revise a data collection survey issued in the fall of 2010 after NAA/NMHC advocacy led to a ruling by the Office of Management and Budget that a prior version was onerous and of questionable practical utility.

- **Regulatory Reform** (*Staff: Eileen Lee*). As part of an initiative to reduce costs and compliance burdens on businesses, on August 23, the White House identified several regulations it says can and will be streamlined without compromising regulatory efficacy. It estimates the effort will save \$10 billion over the next five years. Of interest to the apartment industry is EPA's decision, announced in July, not to adopt additional post-renovation requirements following renovation, repair and painting activities on certain pre-1978 properties. EPA calculates that had it gone forward with the proposed rule, property owners and third-party contractors would have incurred an increased regulatory burden of up to \$300 million annually.

EPA has indicated that it will undertake a formal rulemaking aimed at streamlining safe drinking water regulations, which, among other things, currently require some public water suppliers (including certain property owners that bill separately for water) to provide disclosures and take remedial action if water quality measures indicate excessive levels of lead and other hazards. The Agency will also propose improvements to rules governing the certification and training of pesticide applicators to streamline the certification process and increase worker protections. EPA says it will also revise various rules under the Clean Water Act. Unfortunately, the stormwater rules for existing properties that are currently under development and opposed by NAA/NMHC were not on the list of those slated for revision. We will continue to work with EPA as these rulemakings move forward to represent the apartment sector.

LABOR AND EMPLOYMENT POLICY

- **Union Elections** (*Staff: Betsy Feigin Befus*). In late June, the National Labor Relations Board (NLRB) published a proposal to modify current rules for union organizing campaigns (76 FR 36812). The proposed changes would accelerate the process for conducting secret ballot elections that determine union representation by reducing the time period between filing a petition to hold an election and the election itself. The current average timeframe is more than 30 days, but the NLRB proposal could reduce that time period to as little as 10 days, depriving an employer of its opportunity to communicate with employees in advance of an election.

According to the NLRB, the proposed changes would “streamline” the election process and reduce litigation. This proposal is part of a series of recent attempts to achieve some of the goals of the failed Employee Free Choice Act (“card check” legislation) through the regulatory process. NAA/NMHC are following this issue closely and, as part of the Coalition for a Democratic Workplace (CDW), have voiced opposition to the proposed rule in letters to key House members. We also questioned the NLRB’s new requirement for employers to post a detailed notice about the National Labor Relations Act and unionization. The “poster rule,” originally set to go into effect November 14, was delayed until January 31, 2012, in response to concerns raised by the business community about the poster’s biased language favoring unions and the Board’s legal authority to promulgate the rule. According to the NLRB, the rule’s implementation was delayed to allow further education and outreach to employers, particularly with regard to the Board’s jurisdiction and confusion among businesses about whether they are covered by the requirement. The National Association of Manufacturers, with the CDW and the U.S. Chamber of Commerce, filed separate legal challenges to the poster rule that seek to block its implementation.

Relatedly, NAA/NMHC joined CDW in comments to the U.S. Department of Labor (DOL) opposing DOL’s proposed “persuader” rule (76 FR 36178) that would require lawyers, labor relations consultants and even trade associations to report certain activities that may “persuade” or influence an employee’s decision to unionize or engage in collective bargaining. The proposal could create a chilling effect that would interfere with an employer’s ability to access expert guidance on labor relations issues.

Although the Employee Free Choice Act is dead in this Congress, owing to the Republican majority in the House, the secret ballot issue in union elections remains active, and some states have new laws intended to protect employee privacy in union elections. On May 6, the NLRB initiated a legal challenge to block an amendment to Arizona’s constitution that protects a worker’s right to a secret ballot. On October 13, the U.S. District Court for Arizona denied the state’s motion to dismiss the NLRB’s complaint, allowing the case to proceed. According to the NLRB’s complaint, the amendment violates federal law because it actually requires secret ballots, while federal law allows both secret ballots and authorization cards or “card checks.” (See www.ca9.uscourts.gov/datastore/opinions/2010/12/22/06-56306.pdf.) The NLRB is also considering legal challenges to similar laws in South Carolina, South Dakota and Utah.

On September 15, the House approved the “Protecting Jobs from Government Interference Act” (H.R. 2587), which would amend the National Labor Relations Act to limit the NLRB’s authority to interfere with an employer’s ability to implement certain internal operating decisions. Importantly, the bill would apply to NLRB complaints that have not yet reached final adjudication, including the recent complaint against Boeing arising out of that company’s decision to operate a non-unionized plant in South Carolina instead of a unionized location in Washington State. Final passage of the proposed legislation, which was reported by the House Committee on Education and the Workforce in July, is extremely unlikely during this Congress owing to strong opposition by Senate Democrats.

- **Worker Classification** (*Staff: Betsy Feigin Befus*). The U.S. Department of Labor’s (DOL) Wage and Hour Division, which is responsible for administering and enforcing federal standards for employee compensation, continues its enforcement initiative against employers that do not comply with rules for worker classification and compensation under the Fair Labor Standards Act (FLSA). Incorrect worker classification not only has compensation implications under the FLSA’s minimum wage and overtime provisions, but also significant tax implications for employers and workers. On September 19, DOL signed a memorandum of understanding with the Internal Revenue Service (IRS) to “improve departmental efforts to end the business practice of misclassifying employees.” The agreement allows DOL to share information and coordinate enforcement activities with the IRS.

On April 8, Senator Sherrod Brown (D-OH) introduced a bill (S. 770) that would, among other things, impose penalties against employers that misclassify workers or fail to comply with new notice and recordkeeping

requirements. The measure would also formalize coordination between DOL and the IRS for enforcement purposes and authorize compliance audits that target industries “with frequent incidence of misclassifying employees as non-employees, as determined by the Secretary of Labor.”

- **Employee Background Screening** (*Staff: Betsy Feigin Befus*). The Equal Employment Opportunity Commission (EEOC) is re-examining its rules for how employers consider the criminal records of job applicants and some current employees. The EEOC has not yet published a specific proposal to amend existing rules but, during an open meeting of the Commission held July 26, EEOC Chair Jacqueline A. Berrien expressed concern that criminal background screening may discriminate against some groups protected by federal civil rights laws enforced by the agency. NAA/NMHC are urging the EEOC to retain its current rules and refrain from limiting an employer’s ability to conduct neutrally-applied criminal background checks that are job-related and consistent with business necessity. We have explained in letters to the EEOC that considering criminal records can help apartment companies make informed employment decisions that protect both workplaces and residents.

The EEOC has indicated concern about employment screening beyond the consideration of criminal records, including consumer reports, which the Commission considers a potential barrier to employment. Relatedly, legislation (H.R. 321) has been introduced in the House to amend the Fair Credit Reporting Act to restrict the use of consumer reports in most employment decisions, but the bill has not been considered.

IMMIGRATION POLICY

- **U.S. Immigration and Customs Enforcement (ICE) Audits** (*Staff: Betsy Feigin Befus*). In June, as part of the Administration’s enforcement effort against businesses that hire undocumented workers, ICE issued Notices of Inspection to 1,000 employers in 17 industries that it considers part of the nation’s “critical infrastructure and key resources,” including construction and financial services. The notices direct employers to produce hiring records and I-9 forms in just three days. This was the latest in a series of large-scale audit notices from ICE. Unlike notices randomly sent in February to businesses of all sizes without regard to industry sector, the June notices not only targeted specific industries, they also responded to tips and leads. The audits cover current and recently separated employees and may include an entire staff or just a sampling of a business’s workers. The latest enforcement initiative is a reminder to apartment firms to strengthen their compliance practices by reviewing current legal requirements and providing appropriate training for those involved in the company’s hiring process. The Obama Administration’s FY 2012 budget proposal would provide \$5.8 billion for ICE, about one percent more than its present funding, which amounts to 10 percent of the Department of Homeland Security’s total budget.
- **E-Verify** (*Staff: Betsy Feigin Befus*). On May 26, the U.S. Supreme Court upheld a 2007 Arizona immigration law that requires employers to verify the legal status of their workers using the federal government’s voluntary E-Verify program and permits the state to revoke operating licenses from businesses that knowingly hire employees who are unauthorized to work in the United States. The law had been contested by the U.S. Chamber of Commerce and others who argued that federal immigration law, which makes the E-Verify program voluntary except for companies that work on federal contracts, preempted Arizona’s statute. Opponents also argued that although federal immigration policy allows states to enact licensing rules, Arizona’s law is invalid because it revokes but does not grant licenses, making the law an impermissible employer sanction rather than an actual licensing system.

The ruling will likely encourage additional efforts to mandate employer participation in E-Verify and punish employers for hiring illegal workers (see below). On June 6, in light of its decision in the Arizona case, the Supreme Court ordered the U.S. Court of Appeals for the Third Circuit to reconsider its 2010 ruling that blocked a Hazleton, PA, ordinance that would fine apartment operators for renting to undocumented individuals and revoke business licenses from employers that hire them. On August 5, the Appeals Court vacated its earlier ruling. The Hazleton ordinance remains on hold pending further review.

Meanwhile, on September 21, the House Judiciary Committee approved the “Legal Workforce Act of 2011” (H.R. 2885), which would require all employers to use the federal government’s E-Verify program to confirm the employment eligibility of new hires. Under current law, federal contractors must use E-Verify, and some states require most other employers to use the system. The bill also reduces the number of identification documents an employer can accept when using E-Verify, eliminates the current I-9 verification program and increases employer penalties. Final passage of the measure is uncertain; even if it is approved by the full House, it is opposed by Senate Democrats.

- **Legislation** (*Staff: Betsy Feigin Befus*). On June 22, Senator Robert Menendez (D-NJ) introduced the “Comprehensive Immigration Reform Act of 2011” (S. 1258). Passage of the bill is unlikely, however, since no action has been taken in the Senate, and the Republican-led House is maintaining an enforcement-only approach. On August 18, the Administration announced a plan for “prosecutorial discretion” that will allow the federal government to close deportation cases according to specific factors determined by a working group that includes the Department of Justice and Department of Homeland Security. President Obama has reiterated his support for comprehensive legislation but has blamed Congress for failing to enact meaningful reform.

Absent federal legislation, states continue to pursue their own remedies. In Alabama, a federal judge has granted a preliminary injunction that blocks enforcement of parts of that state’s immigration law (Ala. Laws Act 2011-535) already on hold, including the law’s provisions that would punish rental property owners for “harboring” illegal immigrants. On September 28, U.S. District Judge Sharon Lovelace Blackburn ruled that neither Congress nor the U.S. Supreme Court has defined “harboring,” but federal law nonetheless pre-empts Section 13 of Alabama’s statute, making it unenforceable (*U.S. v. Bentley*, 5:11-cv-2746, U.S. District Court, Northern District of Alabama (Birmingham)). Importantly, the judge noted that federal law explicitly and implicitly permits property owners to provide rental housing to individuals without legal documentation, rejecting Alabama’s argument that merely providing rental housing to someone known or reasonably believed to be an illegal alien—without more—constitutes “harboring.”

AFFORDABLE HOUSING AND HOUSING POLICY

- **Section 8 Vouchers: Reform Efforts** (*Staff: Lisa Blackwell*). Lawmakers have been considering Section 8 reform legislation for nearly a decade. On October 13, the House Financial Services Committee held a hearing on draft reform legislation. The not-yet-introduced bill makes numerous program changes supported by NAA/NMHC to improve the efficiency of the program. A prior draft released in June included an NAA/NMHC-advocated provision that would have eliminated multiple inspections of units that have already been inspected for FHA financing or participation in the Low-Income Housing Tax Credit and other assisted housing programs. The most recent draft, however, limits the inspection language to housing agencies that agree to participate in a government demonstration program. In a letter to lawmakers, we strongly recommended that they reinstate earlier legislative language, noting that previous versions of Section 8 reform legislation were estimated to save the government nearly \$1 billion. We will continue to urge Congress to reform the Section 8 program so that renting to a voucher holder (from the owner’s perspective) is comparable to renting to an unsubsidized renter.
- **Section 8: Fair Market Rents** (*Staff: Lisa Blackwell*). HUD has issued its proposed FY 2012 Fair Market Rents (FMRs), and as a result of a new methodology and the impact of the recession, there are very large changes in FMRs in almost all areas. Specifically, HUD is using the new five-year 2005-2009 data from the American Community Survey. This is the first time five-year estimates have been available. However, because it is based on data ending in 2009, a weak recessionary year, it has resulted in artificially low rents in many areas. According to one estimate, the FY 2012 FMRs are lower than FY 2011 rents in approximately 70 percent of U.S. counties. A number of metro areas also record double-digit increases. The changes are particularly extreme in areas with relatively small populations.

While the methodology used by HUD for the new FMRs appears to be sound, and the move to more accurate five-year estimates is encouraged, the wide variations in rents from one year to another will have an adverse effect on many local housing agencies and private property owners that participate in the Section 8 program. NAA/NMHC and a coalition of organizations are preparing comments to seek ways to mitigate the impact of moving to the new data source.

- **Federal Affordable Housing Programs** (*Staff: Lisa Blackwell*). The Administration is continuing its efforts to streamline existing federal affordable housing programs (e.g., Section 8, LIHTC, rural housing subsidies, etc). NAA/NMHC participated in a White House conference on the topic on July 27 during which HUD, USDA and the Treasury Department discussed two new pilot programs designed to reduce the regulatory burdens associated with owning and developing affordable rental housing. The first targets property inspections and would streamline them to eliminate the duplicative inspections and multiple physical inspection standards properties must now comply with. The second would address the problem of subsidy layering structures that require repeated reviews to ensure a community’s subsidies do not exceed its costs.

- **Rent Control** (*Staff: Lisa Blackwell and Betsy Feigin Befus*). New York State passed a bill on June 24 that extended New York City's rent regulations for four years. Current rules, in place since 1993, allow apartment owners to deregulate unoccupied rent-stabilized apartments into regular market-rate apartments if the resident's annual income tops \$175,000 for two years and the rent is above \$2,000 a month. The new regulations increase the resident annual income cap to \$200,000 and the maximum monthly rent to \$2,500. The new regulation also prohibits owners from receiving more than one vacancy bonus per year and alters the method for calculating and verifying improvements for individual apartments. It is believed that these changes will keep approximately 100,000 units within the rent regulation system over the next three years.
- **Low-Income Housing Tax Credit** (*Staff: Matthew Berger*). NAA/NMHC are urging Congress to protect the LIHTC program as it considers comprehensive tax reform and resist calls to eliminate it in search of a more simplified tax code. In addition, we are also urging lawmakers to make several targeted changes to improve the program's effectiveness. We are calling on them to make the flat 9-percent credit permanent and allow the 4-percent credit to finance acquisitions in addition to new construction and substantially rehabilitated properties. We are expressing support for a proposal in the FY 2012 Obama Administration budget that would allow projects to elect an average-income criteria and make it more feasible to do mixed-income housing in tax credit properties. We are also calling on them to extend through 2012 the placed-in-service date for Gulf Opportunity (GO) Zone LIHTC projects.

BUILDING CODES

- **ICC's New Code-Revision Process** (*Staff: Ron Nickson*). The International Code Council (ICC) has revamped its process for updating the 15 codes it publishes, beginning with the 2015 codes. In the past, all the codes were updated on the same schedule, and each update involved two rounds of hearings. Now the codes will be divided into two groups and put on alternate-year cycles. Importantly, there will be one round of hearings each.

Group A codes, which include the building, mechanical and plumbing codes, will have code development hearings in April 2012 and will be finalized in October 2012, even though they won't be published until 2015. Proposed changes are due January 3, 2012. Group B codes, which include the residential, green building, fire, energy, existing building and property maintenance codes, will be considered in April 2013 and finalized in October 2013. Members interested in submitting changes for the Group A codes should forward their proposals to NAA/NMHC's Ron Nickson (rnickson@nmhc.org) by December 15.

ICC has also created four new Code Action Committees (CACs) to allow members more input into the code development process. Recommendations from these four new CACs will have a major influence on the final actions taken during the code development process. NAA/NMHC have a direct role in the three CACs that most directly affect the apartment industry. Nickson has been selected to serve on the Sustainability, Energy and High-Performance Building CAC. NMHC consultant Marshall Klein will serve on the Building CAC, and NMHC consultant Jeff Shapiro will work on the Fire CAC.

In related news, NAA/NMHC have prepared documents summarizing some important changes in the 2009 and 2012 editions of the International Building Code (IBC) and the International Fire Code (IFC) that affect future projects (and existing buildings) in areas where the 2009 or 2012 editions of the Codes have been, or will be, adopted. The guidance is available at <http://tinyurl.com/4td5kr>.

- **National Green Building Standard (NGBS)** (*Staff: Paula Cino and Ron Nickson*). Work is underway on the next edition of the National Green Building Standard (ICC 700-2008), and NAA/NMHC have been selected to serve on the new NGBS development committee. NAA/NMHC's Director of Energy and Environmental Policy, Paula Cino, is chairing the committee's Multifamily Task Group. The development of the NGBS was a top priority for NAA/NMHC. First published in 2009, the NGBS is the only code-based green building program for residential construction and provides an alternative to non-standardized green rating systems such as LEED. Prior to the NGBS, apartment firms considering building green had to follow guidelines designed for either high-rise commercial properties or single-family houses. It is the only residential green building program based on input from the apartment industry. The NGBS recently achieved a significant milestone by surpassing 2,500 project certifications nationwide. That included 62 multifamily projects, totaling more than 1,800 apartment units.
- **ICC International Green Construction Code** (*Staff: Ron Nickson and Paula Cino*). NAA/NMHC have learned that some localities are adopting a draft version (Public Version 2) of the International Code Coun-

cil's (ICC) new International Green Construction Code (IgCC), even though the code will not be completed until the ICC final action hearings in November. Publication of the final code is not expected until March 2012. Of significant concern, this version does not include an exemption for multifamily properties that was incorporated in earlier drafts. The exemption, which allowed multifamily properties to comply with the National Green Building Standard in lieu of the IgCC, was eliminated by the ICC Board of Directors late last year. Although NAA/NMHC have petitioned the ICC to restore the multifamily exemption as approved by the code committee, the Board has not yet addressed our concerns. Multifamily firms should be aware of this situation, should their locality adopt the IgCC. NAA/NMHC have submitted a proposal on this issue for consideration at the November hearings. In addition to the different technical issues for green construction contained in the NGBS and the IgCC, the two codes also have different formats. While the NGBS allows the developer to decide which level they want to build to (Bronze, Silver, Gold or Emerald), the IgCC requires the local adopting authority to decide what will be mandatory for their jurisdiction during the adoption process. As a result, compliance in each jurisdiction will be different.