NMHC and NAA Legislative and Regulatory Report

March 2014

The National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA) Legislative and Regulatory Report is a government affairs update on the issues that NMHC/NAA are currently advocating for on behalf of members. Specifically, this report provides a detailed update on key issues outlined in the larger 2014 NMHC/NAA policy priorities document, including housing finance reform, immigration reform, flood and terrorism insurance, tax reform, environmental and energy issues, and more.

Capital Markets

Housing Finance Reform and Congressional Action

Key Action: NMHC/NAA continue to work with Congress on legislation to establish housing finance reform that will preserve the liquidity to the apartment sector provided by Fannie Mae's and Freddie Mac's multifamily programs.

The Senate Banking Committee continues to craft a housing finance reform proposal with the hope of moving to a mark-up of legislation in the next 60 days. NMHC/NAA are working with key senators and policy staff charged with the multifamily provisions of the bill. We are encouraged by the response and direction that the committee is taking, but until the legislation is made public we will continue to watch and follow this issue carefully.

In the House, after eight months of silence, Democrats on the Financial Services Committee are working on alternative legislation to the Protecting American Taxpayers and Homeowners (PATH) Act passed out of the committee in June 2013. NMHC/NAA have provided detailed comments on a draft of a multifamily stand-alone bill, which could be included in legislation being developed by Ranking Member Maxine Waters (D-CA). Other options are also being considered, and we anticipate that several alternatives to the PATH Act will be offered in the coming months.

NMHC/NAA remain cautiously optimistic overall as the recent efforts in both the Senate and House include a government credit guarantee for investors in multifamily mortgage-backed securities and recognize the unique characteristics of the multifamily business.

Housing Finance Reform and FHFA Action

<u>Key Action:</u> NMHC/NAA are actively recommending, along with a coalition of real estate and financial trade groups, that Federal Housing Finance Agency (FHFA) Director Mel Watt recognize the important and unique financing needs of the multifamily industry as he moves forward with policies impacting Fannie Mae and Freddie Mac.

NMHC/NAA, along with the other coalition groups, have called on recently confirmed FHFA Director Watt to take a strategic approach in providing guidance on Fannie Mae and Freddie Mac's multifamily activities to support private capital markets and ensure that liquidity is available in all markets and for all borrowers. In letters to Director Watt, NMHC/NAA has outlined concerns over actions taken to limit the multifamily origination activities of Fannie Mae and Freddie Mac by 10 percent, which has created inconsistency in lending activities. We have emphasized that their decline in overall market share has more to do with increased lending by other sources than the FHFA origination reduction requirement.

The coalition emphasized that FHFA must focus on building an even stronger foundation for a stable and resilient housing finance system that continues to attract significant private capital, while ensuring an appropriate government guarantee. The coalition letter highlights the need for Fannie Mae and Freddie Mac to continue to address the important financing needs of a range of multifamily property types and geographic markets, including providing support to secondary, tertiary and affordable rental markets.

FHA Servicing Guide Revision Process

<u>Key Action:</u> NMHC/NAA have engaged a Federal Housing Administration (FHA) Working Group, composed of NMHC members that are both mortgage servicers and owners, to assist in our review process.

FHA is updating the HUD 4350.1 Multifamily Guide Book that covers mortgage servicing activities. Many of the activities impact property owners such as release of reserves, inspections, performance audits, delinquency and default administration, and other related activities. The FHA Office of Multifamily Asset Management is issuing chapters weekly with staggered review deadlines. Handbook chapters in the proposed update/rewrite include: *Commercial and Ground Leases*; *Tax Credits and Subsidy Layering*; *Insurance and Loss*; and *Subordinate Debt*. FHA anticipates issuing a final guidebook during the fourth quarter (July-Sept. 2014) of the federal calendar.

Basel III International Capital Accord

<u>Key Action:</u> In a Jan. 30 letter to regulators, NMHC/NAA, along with several key real estate groups, provided comments on Basel III's liquidity capital ratio provisions.

As part of the Basel III international capital accord, U.S. regulators, the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and Federal Reserve are in the final stages of establishing capital standards to ensure banks remain well capitalized and can respond to their liabilities. One provision that recently has been a focus of regulators and the multifamily real estate industry is the liquidity capital ratio (LCR) that banks must maintain on a routine basis. The new standards proposed by the regulators could limit construction lending and credit facilities used by developers and owners. The rule, as proposed, would require the full amount of a loan to be held as a liability on a bank balance sheet before funds are released or drawn by the borrower.

The submitted letter called on the regulators to make allowances to account for only money that is drawn down on secured credit accounts such as construction loans and credit facilities. NMHC/NAA participated in a follow-up meeting on Feb. 25 with the regulators. We are now preparing information about special purpose entities (SPEs) to better define how SPEs are common construction borrowers and investment entities as opposed to entities that serve broader off-balance sheet activities as currently defined in the LCR rule. Additionally, we will be providing a reporting requirement on construction draws that could be applied to regional and large banking institutions.

Immigration, Employment and Labor

Immigration Reform

Key Action: NMHC/NAA continue to highlight to policymakers recent reports that immigration reform similar to the Senate-passed "Gang of Eight" bill would result in important gains for the American economy and real estate industry.

House Republicans announced a highly anticipated principles document on Jan. 30 outlining the philosophy behind their approach to immigration reform in the coming year. The principles represent the first step forward from House Republican leadership regarding the comprehensive immigration reform debate. Many elements of the principles speak to aspects of the Senate immigration bill passed last year, leading some to believe the door is open to negotiation between the two chambers. In the days since the release, members have held private cross-party, cross-chamber conversations, and President Obama and leading Democrats have signaled measured support for the document, further raising hopes for action this year.

On the judicial front, the Supreme Court recently rejected appeals from towns in Pennsylvania and Texas regarding laws seeking to prevent landlords from renting to undocumented immigrants. Local laws similar to those proposed in Texas and Pennsylvania are precisely why comprehensive immigration reform at the federal level is so critical to the apartment industry.

Criminal Background Checks in Employment

Key Action: NMHC/NAA are part of a cross-industry coalition that monitors relevant developments and considers potential advocacy efforts as they relate to criminal background checks.

On Feb. 20, the U.S. Commission on Civil Rights released a report on the U.S. Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on the use of criminal background checks by employers in hiring and other employment decisions. The Commission, which held a hearing on the guidance last year, does not have enforcement authority, and the report does not contain formal conclusions or recommendations. Employers—including apartment companies—continue to analyze the EEOC Guidance and consider its application. The guidance, issued in April 2012, does not expressly prohibit an employer from requiring a job applicant or an employee to agree to a criminal background check, nor does it bar an employer from making decisions based on criminal history.

The guidance, purportedly aimed at EEOC enforcement divisions rather than directed at employers, limits how criminal histories may be used and encourages individual consideration rather than blanket policies by employers. Relatedly, the EEOC has asked a judge to dismiss a lawsuit filed in Nov. 2013 by the State of Texas challenging the guidance. The Texas lawsuit argues that the EEOC actually issued a regulation, not "guidance," without legal authority granted by Congress or in compliance with regulatory procedures. Texas also asserts the right to bar convicted felons from state employment, and challenges the disparate impact theory under Title VII of the Civil Rights Act as unconstitutional.

Housing Policy

Privatized Military Housing

Key Action: NMHC/NAA spoke out against Basic Allowance for Housing (BAH) cuts at an Appropriations Subcommittee hearing on Feb. 26 on the "Quality of Life in the Military."

Defense Department (DoD) Secretary Chuck Hagel announced a Fiscal Year 2015 budget proposal on Feb. 24 that raises significant concerns for our military and their families. Specifically, the DoD has proposed a five percent reduction to the BAH, a core military benefit that compensates service members for their housing costs.

The BAH provides critical funding stability for the Military Housing Privatization Initiative, which has successfully transitioned a large portion of severely deficient government-run housing into high-quality privately owned and operated properties. Any BAH reduction would also reduce the income stream for these projects and jeopardize the continued success of the program.

The DoD proposal faces significant obstacles. NMHC/NAA, service member and veterans associations, and other industry advocates have raised concerns for months leading up to the release of the proposed cuts to military pay and benefits. So far Congress has been unwilling to enact changes that impact military compensation, and is unlikely to until a comprehensive military compensation and benefits review currently underway is completed. Those findings are scheduled to be released next February.

Omnibus Spending Bill

Key Action: NMHC/NAA efforts in support of regulatory relief for HUD affordable housing programs, and increasing the credit authority for FHA's multifamily programs, both yielded positive results in the FY 2014 Omnibus Spending Bill.

The Omnibus Appropriations Bill signed into law on Jan. 17 contained a number of significant provisions for the multifamily industry, including funding for HUD rental programs and significant provisions to streamline inspection and rent calculation procedures. Tenant Based Rental Assistance and Project Based Rental Assistance saw a sizeable increase in funding from the amount mandated under the "sequester." HUD was also provided a $75 million backstop for potential shortfalls in the voucher program, further easing concerns about payment interruptions in the coming year.

FHA's multifamily programs received an additional $5 billion in credit authority, bringing the total to $30 billion this fiscal year, and likely eliminating concerns about another business interruption in FY 2014. Public Housing Authorities were also provided with regulatory flexibility in relationship to property inspections, utility allowance calculations and adjusted rent calculations.

Business and Property Operations

Flood Insurance

Key Action: Flood insurance bills were recently passed in the Senate and House that address key affordability and mapping concerns. NMHC/NAA issued letters of support to both chambers for the measures.

The Biggert-Waters Flood Insurance Reform Act was enacted by Congress in 2012 with overwhelming support. The goal was to create long-term financial solvency for a program that is currently $24 billion in debt. The efforts to achieve this focus primarily on increasing rates to reflect true cost. However, implementation of rate increases has challenged current and future affordability and valuation of properties. Evidence to-date has largely been limited to the single family market, but it is expected to similarly impact the multifamily industry under certain circumstances. The 2012 Act would immediately move property owners to actuarial rates upon the sale of a property and ultimately lower property values.

Given the unintended consequences of the Biggert-Waters Flood Insurance Reform Act, both the House and Senate passed proposals to provide relief to property owners that delay and/or repeal rate increases. On March 3, the House passed H.R. 3370 that, among other things, restores prior "grandfathering" of properties. This will continue to permit property owners to pay rates associated with the original risk zone rather than updated flood risk zones. It also slows the rate at which subsidized rates must increase after a property's sale. The Senate also passed a bill on Jan. 30 that effectively delays many of the rate increases for four years so that the Federal Emergency Management Agency can complete an affordability study that they are currently conducting.

There appears to be general agreement on both of these provisions, and NMHC/NAA expect a bill will be sent to the President for his signature in the near future.

Terrorism Insurance

Key Action: NMHC/NAA and our policyholder partners in the Coalition to Insure Against Terrorism are actively advocating for a program extension.

With the expiration of the Terrorism Risk Insurance Program looming at the end of the year, the Senate Banking Committee held a hearing on Feb. 25 on reauthorizing the program. Host Hotels & Resorts testified on behalf of the Coalition to Insure Against Terrorism at the hearing. Bipartisan legislation has been introduced in the House, but similar legislation has yet to be introduced in the Senate.

This program is critical to multifamily owners and developers because terrorism insurance coverage is required by lenders. If the program is allowed to expire, borrowers will be in technical default of their loan and will most certainly face other economic uncertainties. Without an extension, insurance carriers will begin to issue notices to policyholders that terrorism coverage will not be provided after this year.

USPS Mail Delivery

<u>Key Action:</u> NMHC/NAA met with staff on the Senate Committee on Homeland Security and Government Affairs to discuss issues of concern to the rental apartment industry related to mail delivery, particularly conversion to alternative modes of delivery for existing addresses.

Congress is debating legislation to improve the U.S. Postal Service's (USPS) operations and financial outlook. Proposals in the House and Senate differ, but both would strengthen existing USPS policy favoring centralized and curbside mail delivery service for both residential and commercial addresses, including apartment communities. On Feb. 6, the Senate Committee on Homeland Security and Governmental Affairs approved S. 1486, the Postal Reform Act of 2014, which calls for district postal offices to identify candidates for voluntary conversion based on a number of factors that may affect the feasibility of centralized or curbside delivery to a specific property or address. The bill provides that the USPS will consider input from property owners, postal customers and state and local governments.

Relatedly, on July 24, 2013, the House Oversight and Government Reform Committee passed a reform bill, H.R. 2748, which would mandate converting 30 million addresses currently receiving mail delivery to the door to centralized delivery by 2022. Both bills would phase out residential and commercial door delivery to new addresses subject to certain exceptions.

Meanwhile, on Feb. 18 of this year the USPS Office of the Inspector General released "What America Wants and Needs from the Postal Service," a focus group report based on 101 individual participants from 67 zip codes. "Moving the delivery location was a polarizing topic," according to the report, referring to discussions on door, curbside and centralized delivery. Democrats and Republicans in the House and Senate agree that legislation is needed to address the worsening financial crisis facing USPS, but disagreement over some critical reforms remains, and the outlook for action is unclear.

Wireless Signal Boosters

<u>Key Action:</u> NMHC/NAA are gathering information to assess wireless connectivity problems and determine a strategy to help apartment owners address signal gaps in their buildings.

As apartment resident expectations for reliable wireless coverage continue to grow along with the rapidly rising use of smartphones, tablets and other data-consuming devices, the availability of affordable solutions for connectivity gaps has become a challenge for apartment owners. Energy-efficient building materials and design techniques may exacerbate the problem. A "signal booster" device serving as an antenna to enhance coverage in poor-reception areas is one potential solution. However, in an apartment community, proper installation for signal boosters may be not be feasible and the need for multiple boosters can create interference problems for both consumers and cellular service providers. As an alternative, a coordinated installation of signal boosters may address connectivity problems without causing interference. But installation and registration procedures for "consumer" and "industrial" signal boosters, regulated by the Federal Communications Commission, are unclear so this limits the potential usefulness of the devices.

Energy and Environment

Energy Legislation

Key Action: NMHC/NAA are working to ensure that energy measures moving through Congress promote building energy-efficiency, without imposing burdensome building codes or building energy rating programs.

Both the House and Senate are considering bipartisan legislation that aims to improve energy efficiency in residential and commercial buildings. Earlier this month, the House passed a narrow measure largely focused on boosting the energy performance of federal buildings. However, the bill also included a real estate industry-supported provision enhancing the federal Energy Star program.

The legislation also included a building energy benchmarking provision that raises concerns for the apartment industry. While the bill does not create mandates for the private sector, it empowers the Department of Energy (DOE) to study and otherwise expand support for building benchmarking and energy performance labeling. We oppose legislative and regulatory efforts to establish a building rating system that would grade buildings on their energy-efficiency and publically disclose that information, namely the proposed DOE Asset Rating Program. Building energy labels raise valuation concerns and transactional uncertainty, especially since the accuracy of these labels is not proven in the apartment sector.

The Senate introduced a broader energy package, which improves significantly upon legislation considered in previous years. While the current measure eliminates provisions that would force the use of costly new building codes, it reinforces a problematic system of code-development activity by the federal government. Diverse real estate stakeholders have long-been concerned by the lack of transparency and aggressive code advocacy activities of the DOE, and we are pursuing changes that would compel the DOE to economically justify their code activity, publically vet their code proposals and collaborate with all stakeholders. The Senate measure also includes the House-passed provisions.

Congress has repeatedly voiced support for acting on energy-efficiency legislation, yet it remains unclear whether the House and Senate can agree on an energy package given the political landscape of an election year.

Better Buildings Challenge

Key Action: NMHC/NAA have urged policymakers to find a way around the legal and technical obstacles that prevent utilities from making utility data available to property owners.

NMHC/NAA members participated in a White House event Dec. 3 announcing an expansion of the Better Buildings Challenge to multifamily housing. Specifically, the Department of Energy (DOE) and HUD are partnering with both market rate and affordable housing owners, as well as housing agencies, to cut energy waste and help families save on their utility bills. The expansion of the challenge involves 50 multifamily partners, including numerous NMHC/NAA members that have committed to cutting their energy use by 20 percent in 10 years.

An obstacle to participating in the challenge is the lack of accurate, whole building utility data. The Obama Administration has indicated its support for policies that encourage the sharing of aggregated whole building data. A bill passed by the House on March 4 would require DOE to study the impediments to data sharing. A similar measure has been introduced in the Senate.

National Green Building Standard

<u>Key Action:</u> NMHC/NAA are participating in the revision of the National Green Building Standard (NGBS), and ensuring that apartment firms have a choice of green building programs when faced with mandatory green building requirements.

Development of the next version of the NGBS is set to begin this spring. It is the only green building program designed for all types of residential construction. We oppose mandatory green building requirements, but where enacted, the NGBS is the most appropriate standard for apartment properties. However, we support flexibility in choice of green building programs, based on the marketplace and individual project needs.

Lead-Based Paint

<u>Key Action:</u> NMHC/NAA joined other stakeholders in objecting to the focus and design of the Environmental Protection Agency's (EPA) proposed lead survey, stating in a letter that the agency should adhere to Congressional direction that requires them to first study whether a threat is posed.

The EPA is continuing its efforts to regulate workers and work practices that may disturb potential lead in public and commercial buildings regardless of a property's age, use of the building or presence of children. EPA is seeking approval from the White House Office of Management and Budget for a survey of maintenance practices that would be provided to just over 10,000 individuals, including building owners, managers, tenants or contractors. Apartments built after 1978 could potentially be included in any future regulation. However, the agency lacks the authority to issue regulations without first demonstrating a hazard. EPA has failed to undertake the research required to characterize the presence and condition of lead in public and commercial buildings. The agency is continuing its efforts to regulate workers and work practices that may disturb potential lead in public and commercial buildings regardless of a property's age, use of the building or presence of children.

The NMHC/NAA letter with stakeholders reminded EPA that it should indeed conduct research into this matter but that the research question they have posed, as well as the methodology, is deeply flawed. The agency has been sued by a collation of advocacy groups who have demanded that EPA proceed with a rulemaking and the agency has indicated that it will issue a proposed rule by 2015.

It is important to note that EPA denied a petition filed by a coalition of environmental organizations that asked EPA to conduct an investigation into record keeping and testing of potential lead-based paint on renovations in public and commercial properties. In denying the petition, EPA stated the agency is "already working with the Occupational Safety and Health Administration (OSHA) to determine the availability of lead sampling and exposure data in OSHA enforcement records…This approach will allow EPA to collect and assess the utility of available OSHA records identified by the petitioners, as well as collect other, potentially relevant information, without being limited in scope to 'health and safety studies' under TSCA section 8(d)." This is concerning because OSHA has several standards that apply to work that disturb lead and OSHA work practices are not triggered by date of construction but by job type and whether workers will be expose to lead beyond Permissible Exposure Limits.

Tax Policy

House Tax Reform Proposal

Key Action: NMHC/NAA continue to remain actively engaged in the tax reform effort with the understanding that House Ways and Means Committee Chairman Camp's tax proposal is a starting point for future reform discussions.

House Ways and Means Committee Chairman Dave Camp (R-MI) unveiled a sweeping tax reform proposal on Feb. 26. Camp emphasized that taxpayers would receive lower tax rates along with a simpler, fairer code that would boost the economy. Although the House and Senate are not expected to advance comprehensive legislation this year, Camp's tax reform proposal may be the subject of Ways and Means Committee hearings.

For the multifamily industry, an area that could be of significant concern is that the proposal would extend to 40 years, from 27.5 years, the depreciation period for apartment buildings placed in service beginning in 2017. In addition, depreciation recapture would be taxed at ordinary income rates of up to 35 percent, as opposed to today's 25 percent rate, for sales after 2014. The multifamily industry can, however, also claim significant victories. In particular, the proposal retains capital gains tax treatment for a carried interest applicable to multifamily real estate.

Senate Tax Reform Proposal

Key Action: NMHC/NAA are working to ensure that Senate Finance Committee Chairman Wyden, and members of the Committee, reexamine former Chairman Baucus' proposals as part of any tax reform legislation.

NMHC/NAA objected to former Senate Finance Committee Chairman Max Baucus's (D-MT) proposals, which included extending depreciation periods for multifamily buildings to 43 years (as opposed to today's 27.5 years), increasing tax depreciation recapture at ordinary income rates of up to 39.6 percent (instead of 25 percent) and eliminating 1031 like-kind exchanges that allow the exchange of one business, or investment asset, for another. New Committee Chairman Ron Wyden (D-OR) has indicated that his first order of business when it comes to taxes will be to extend provisions that expired at the end of last year.

Tax Extenders Legislation

Key Action: NMHC/NAA are focused on outlining the scope of support for energy-efficient incentives and on drawing additional support for an extension of the deduction.

Senate Majority Leader Harry Reid (D-NV) is suggesting that the Senate may take up a tax extenders package this spring. NMHC/NAA are actively urging lawmakers to extend the Section 179D and 45L energy-efficient tax incentives set to expire at the end of the year, as well as the flat 9 percent Low-Income Housing Tax Credit.

On the House side, Ways and Means Committee Chairman Dave Camp (R-MI) remains keenly focused on tax reform, leaving uncertain prospects for tax extenders legislation.

Building Codes

Accessibility and Usable Buildings and Facilities Standard (ANSI A117.1)

Key Action: NMHC/NAA are working to ensure apartment firms have clear and cost-effective guidance for accessible design and construction.

Multifamily property owners and managers have obligations under both the Americans with Disabilities Act and the Fair Housing Act to include accessible design features in covered apartment communities. However, apartment firms face compliance challenges due to confusing and limited design and construction guidance. Additionally, there is continuing pressure to expand accessibility requirements through building codes. The ANSI A117.1 accessibility standard, used as the reference for accessible design in the national model codes, is undergoing a major revision that could change the basic requirements for accessible apartment design including clear floor space, turning circles and reach ranges.

The revision process was originally timed to allow for inclusion of the new standard in the 2015 International Code Council (ICC) codes, but development delays will postpone their inclusion until the 2018 ICC codes. Major changes which impact virtually every part of the standard include changing the clear floor space from 30" x 48" to 30" x 54", the turning circle from 60" to 66" and redefining the requirements for reach ranges. The changes when referenced in the ICC Codes will apply to all new construction. The major concern at this time is the application to existing buildings, existing buildings undergoing renovations and other levels of work being performed. The major question now being discussed concerns scoping (where required), which in the past has been included in the building code with the standard being limited to technical requirements. During the upcoming June meeting, committee members will be discussing proposals to add scoping to the standard.

ICC's Final Action Hearings for the 2015 Model Building Codes

Key Action: Throughout the code development process, NMHC/NAA worked with code consultants and collaborated with other industry representatives to improve existing code provisions and oppose unnecessary escalations in construction costs.

The International Code Council (ICC) held the final action hearings for several of the 2015 national model building codes in Oct. 2013. NMHC/NAA's efforts in this round of code development focused primarily on the energy, fire, property maintenance, existing building and residential codes. Our participation resulted in a number of hearing decisions favorable to multifamily firms and resulted in the disapproval of numerous proposals that would have had a negative impact on the apartment industry.

The action taken during the Oct. 2014 final code hearings will be included in the 2015 ICC codes. For more information on NMHC/NAA code activities, and the ICC code development process, visit www.nmhc.org/goto/ICC-Codes.

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