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# Legislative & Regulatory Priorities

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NATIONAL APARTMENT ASSOCIATION  
NATIONAL MULTI HOUSING COUNCIL

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Joint Legislative Program



# NAA/NMHC JOINT LEGISLATIVE PROGRAM

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AVANATH CAPITAL PARTNERS

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VICE PRESIDENT, BUILDING CODES

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VICE PRESIDENT OF RESEARCH AND CHIEF ECONOMIST

---

## NAA/NMHC Joint Legislative Program

1850 M St. NW

Suite 540

Washington, DC 20036

202/974-2300

Fax 202/775-0112

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# THE NAA/NMHC JOINT LEGISLATIVE PROGRAM

## A Unified Voice for the Apartment Sector

In a unique relationship, the National Apartment Association (NAA) and the National Multi Housing Council (NMHC) have joined forces for more than a decade to form a Joint Legislative Program. This partnership creates a clear, consistent voice for the apartment industry on Capitol Hill.

The NAA/NMHC Joint Legislative Program ensures that apartment firms are able to engage government officials in constructive, ongoing dialogues and participate in policy decisions affecting their ability to provide housing to millions of Americans.

Additionally, the Joint Legislative Program, in concert with 12 other national real estate organizations, is actively involved with the Congressional Real Estate Caucus (CREC) on Capitol Hill.

The Joint Legislative Program will remain the vanguard of bringing key issues before legislators and regulators in the ongoing debate over the federal government's role in supporting apartment living.

### **The National Apartment Association**

The National Apartment Association (NAA), based in Arlington, VA, is the leading advocate for quality rental housing. NAA is a federation of nearly 200 state and local affiliated associations representing more than 53,502 members responsible for more than 6.5 million apartment homes nationwide. It is the largest broad-based organization dedicated solely to rental housing. NAA members include apartment owners, management executives, developers, builders, investors, property managers, leasing consultants, maintenance personnel, suppliers and related business professionals throughout the United States and Canada. NAA strives to provide a wealth of information through advocacy, research, technology, education and strategic partnerships. NAA provides six national designation programs; publishes units magazine and other industry publications; holds an annual Education Conference and Exposition; and promotes industry professionalism.

### **The National Multi Housing Council**

For more than 30 years, the National Multi Housing Council (NMHC) has provided strategic leadership to the apartment industry. Based in Washington, D.C., NMHC represents the largest and most prominent firms in the apartment industry, including owners, developers, managers, lenders and brokers. The Council benefits from a focused agenda and a membership that includes the principal officers of the most distinguished real estate organizations in the United States. With its joint legislative partner, the National Apartment Association, NMHC serves as the apartment industry's primary advocate on legislative and regulatory matters, such as housing policy, finance, tax, technology, property management, environmental issues and building codes. In addition to providing leadership on public policy issues, NMHC is acknowledged as the preeminent source of apartment-related information. The Council conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living.

### **The Congressional Real Estate Caucus**

The Congressional Real Estate Caucus (CREC) was formed in May 1998 at the Real Estate Summit on Capitol Hill organized by the NAA/NMHC Joint Legislative Staff. Representatives Michael Turner (R-OH) and Richard Neal (D-MA), the former mayor of Springfield, Mass., serve as co-chairs. A Senate Real Estate Caucus has been formed with Senators Benjamin L. Cardin (D-MD) and Johnny Isakson (R-GA) serving as co-chairs. The CREC is endorsed by national real estate groups representing 2 million members and companies that own, build, manage and finance real estate. CREC serves as a forum for members of Congress and real estate professionals to discuss federal policy and its impact on the nation's real estate industry.

CREC seeks to ensure implementation of federal policies that further real estate's contributions to national, state and local economies. Real estate accounts for a quarter of every tax dollar, constitutes half the nation's domestic investment and is responsible for 12 percent of the nation's gross domestic product and an estimated 8.9 million jobs. Thus, protecting and promoting a healthy real estate sector can only serve to strengthen the nation's economy.

# WHY AMERICA NEEDS A MORE BALANCED HOUSING POLICY

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America's housing policy is at a crossroads. For decades, the federal government has pursued a "homeownership at any cost" housing policy, ignoring the growing disconnect between the country's housing needs and its housing policy. In the process, many people were enticed into houses they could not afford, which in turn helped fuel a housing bubble that ultimately burst and caused a global economic crisis.

The nation is now paying the price for that misguided policy and learning firsthand that there is such a thing as too much homeownership and that aggressively pushing homeownership was not only disastrous for the hardworking families lured into unsustainable homeownership, but also for our local communities and our national economy.

The ensuing single-family meltdown reverberated through the economy, taking down the entire U.S. financial system and causing a global economic crisis. If there is a silver lining in this situation, it is the opportunity we now have to learn from our mistakes and rethink our housing policy. Housing our diverse nation means having a vibrant rental market along with a functioning ownership market. It's time we adopt a balanced housing policy that doesn't measure success solely by how much homeownership exists.

## **America Needs Apartments**

For many of America's most pressing challenges, from suburban sprawl to affordable housing, apartments are a much better solution. Apartments help create stronger and healthier communities by offering enough housing for the workers that businesses need, by reducing the cost of providing public services like water, sewer and roads and by creating vibrant live/work/play neighborhoods. They will help us house our booming population without giving up all our green space and adding to pollution and traffic congestion.

America is increasingly relying on rental apartments to house our citizens. The largest generation of children currently under the age of 20 in the history of the U.S. will be entering the housing market in the next few years and the number of seniors who can no longer maintain a house will begin to skyrocket. In addition, the foreclosure crisis has increased the demand for affordable rental housing.

## **America Wants Apartments**

Not only are apartments needed, fortunately, a growing number of Americans desire them. For generations, married couples with children dominated housing markets. But today those families make up less than 25 percent of American households. In their place are young professionals, empty-nesters and single parents who want the conveniences, amenities, shorter commutes and financial freedom that apartment living gives them.

## **The New American Housing Policy**

The National Apartment Association (NAA) and the National Multi Housing Council have joined together to advocate for a more balanced housing policy. We call on lawmakers to policies that respect the rights of individuals to choose housing that best meets their financial and lifestyle needs. NAA/NMHC urge decision makers at all levels of government to work with the apartment industry to craft a smarter housing policy that:

- Assures that everyone has access to decent and affordable housing, regardless of his or her housing choice;
- Respects the rights of individuals to choose the housing that best meets their financial and lifestyle needs without disadvantaging, financially or otherwise, those who choose apartment living;
- Promotes healthy and livable communities by encouraging responsible land use and promoting the production of all types of housing;
- Recognizes that all decent housing, including apartments, and all citizens, including renters, make positive economic, political and social contributions to their communities; and
- Balances the expected benefits of regulations with their costs to minimize the impact on housing affordability.

We call on lawmakers to reject proposals for new homeownership subsidies, including homebuyer tax credits and other ill-advised subsidies that only threaten to reflate the single-family housing bubble.

# AFFORDABLE HOUSING SOLUTIONS

The 2002 Millennial Housing Commission report identified affordability as the “single greatest housing challenge facing the nation.” Unfortunately, little progress has been made on the affordability crisis in the intervening years. If anything, the problem has gotten worse, trapping a growing number of working families who used to be able to count on the availability of safe, decent housing. According to Harvard University, 35 million households spend 30 percent or more of their income on housing, a common definition of affordability. To find affordable housing, many workers are being pushed farther and farther from their jobs, something that is no longer tenable in this era of high fuel costs.

In a perfectly functioning market, housing providers would simply increase production to meet this tremendous demand. But housing is not a perfectly functioning market. Regulatory barriers as well as high land and construction costs and local impact fees make it virtually impossible for the private sector to build, rehabilitate and operate apartments at rents that are affordable to many workers in any mid- to large-size metro area.

Ultimately there will be no single solution to this problem. We need to harness the power of the private sector to produce and preserve affordable housing. To do that, we need to eliminate regulatory barriers and outdated zoning and land-use policies, enact market-based density bonuses, and restore much-needed balance to our national housing policy.

## ISSUES

### An Unbalanced National Housing Policy

For decades, the federal government has put too much emphasis on owning a house. We are now paying a very dear price for this “homeownership at any cost” housing policy. It is time to restore balance to our housing policy, acknowledging the important role rental housing plays in creating healthy communities. Apartments are uniquely qualified to solve our affordability problems. Not only do they provide homes within reach of our workforce, they also use municipal infrastructure more efficiently, help preserve green space, and reduce auto traffic and air pollution. Nationally, the U.S. can save over \$100 billion in infrastructure costs over 25 years by growing compactly, money that can be used by localities to solve their housing challenges.

**Action Requested:** The meltdown in the housing market has opened the eyes of many policymakers in Congress and at the state and local levels. As a result, the Housing Stimulus Law passed in July 2009 had a good balance between incentives for ownership and incentives for rental housing. We need to ensure that future housing legislation is similarly balanced. For example, Congress should enact pending legislation that would increase the loan limits for FHA-insured new construction multifamily loans to

enable the program to work in higher-cost urban areas where demand for affordable housing outstrips supply.

### Outdated Zoning and Land-Use Policies

Many local zoning regulations predate World War II and actually require low-density development with singular uses. But demographics are changing; no longer does everyone seek a single-family house in the suburbs. According to the Urban Land Institute, “for the first time, there are more single-person households (26.4 percent) than married-couple-with-children households (23.3 percent)” and, “The groups growing the fastest, people in their mid-20s and empty nesters in their 50s, are the groups most likely to look for an alternative to low-density, single-family housing.”

In fact, Professor Chris Nelson at the University of Utah’s College of Architecture and Planning modeled future demand for various types of housing and he predicts that there could be a surplus of 22 million large-lot houses (built on more than one-sixth of an acre) within 20 years—that’s roughly 40 percent of the large-lot houses in existence today.

**Action Requested:** Reform local zoning and land-use policies to allow for higher population densities as well as to permit mixed-use development. Local governments must recognize that many citizens prefer rental housing and allow zoning regulations to reflect this preference.

### Inadequate Density Bonuses

Density bonuses allow developers to build more units on a given site than local zoning regulations would normally allow. In theory, this brings down the per-unit cost of each unit so the developer can make some portion of the units in the property more affordable. But in practice, density bonuses are rarely sufficient to cover the cost of the affordable units.

The longer density bonuses are used in a jurisdiction, the less effective they become. There are two reasons for this. First, they typically do not keep up with land and construction costs. Second, once density bonuses are written into a jurisdiction’s zoning law, land sellers take them into consideration when calculating the value of a parcel of land. They know how many units a developer can build including the density bonus and they base their sales prices on that calculation. More units means a higher sales price. So the bonus that was meant to help offset high land costs is now pushing land costs even higher and wiping out the value of the bonus.

**Action Requested:** Density bonuses need to be reevaluated regularly and readjusted based on current economic conditions in order to maintain their value. And when they are included as

a part of an inclusionary zoning policy, there should be some flexibility to allow developers to build affordable units elsewhere or to pay a fee into an affordable housing fund. But the single most important step a municipality can take is to provide additional tax abatement to the density bonus units to make them affordable.

### **NIMBYism**

Community involvement in the development process is a good thing, but too often neighborhood activists aren't interested in improving a development proposal; their ultimate goal is to push affordable housing out of their neighborhood. So we applaud HUD's efforts to reform regulatory barriers to affordable housing.

**Action Requested:** Educate local elected officials about the benefits of rental housing, more compact development and mixed-use development so they will have the knowledge and the courage to stand up to NIMBY activists who oppose new apartment construction for their own narrow self-interests.

### **Section 8 Program**

For decades, Section 8 vouchers have provided housing assistance to struggling families. But the program has been plagued with inefficiencies and onerous bureaucratic requirements that discouraged private owners from accepting Section 8 vouchers. If the housing needs of America's low- and moderate-income families are going to be met, it is imperative that we improve the Section 8 program.

**Action Requested:** Section 8 must be reformed to be more "transparent" so that the cost of renting to voucher-holding residents is comparable to the cost of serving unsubsidized residents. Duplicative regulatory requirements should be eliminated. The funding mechanism should be based on leasing and costs from the most recent 12 months, and participation should be voluntary, not mandatory. Also, as lawmakers continue to seek solutions to the foreclosure crisis, they should not make permanent temporary provisions that require the new owner of a foreclosed property to be subjected to the Section 8 contract of the prior owner. Such action would discourage investment in rental housing at a time when the nation's demand for rental housing outstrips supply and is rising as a result of the recession.

### **Exit Tax**

Under current tax law, when owners/investors sell a property, they have to pay capital gains tax and depreciation recapture taxes on any gain. Many properties cannot generate a high enough sales price to cover these "exit taxes." This places properties with lesser economic value at risk of deterioration because the owners have no incentive to invest additional funds in a property with little or no cash flow. As a result, many owners simply opt to hold on to the properties until their death, at which point no taxes will be assessed on the depreciated gain (and the possible capital gain above that) because the property's basis will be "stepped-up" to the current market value.

**Action Requested:** Congress needs to approve legislation to preserve affordable housing by providing broad exit tax relief to owners of apartment properties who transfer their properties to new owners who have the capital for and the commitment to renovation and modernization.

### **Capital Gains/Depreciation Recapture**

In 1997, when Congress reduced the maximum tax rate on long-term capital gains to 20 percent (for assets held more than 12 months), it imposed a 25 percent depreciation recapture rate on the portion of the gain assigned to the depreciable portion of a property. Thereafter, the capital gains tax rate was further reduced to 15 percent (through 2010), but the depreciation recapture rate was left unchanged. Imposing such a high depreciation recapture tax on apartment properties that have been depreciated from original cost fails to recognize the unique nature of commercial real estate property. It also discriminates against real estate in favor of other asset classes.

In 1999, Congress approved a tax bill that reduced both the capital gains and the depreciation recapture rate, but the measure was vetoed. More recently, in January 2004, the Treasury Department recommended simplification of the calculation of capital gains depreciation recapture on certain types of assets, including real estate, by eliminating the special 25 percent rate and replacing it with a new "blended" rate based on a combination of ordinary income and capital gains tax rates.

**Action Requested:** NAA/NMHC urge Congress to repeal the 25 percent depreciation recapture rule established in 1997.

NAA/NMHC continue to advocate for a more balanced housing policy that effectively addresses our nation's most pressing housing needs, and one that explicitly recognizes the importance of apartments in the nation's future growth plans. We oppose efforts to direct even more of our limited federal housing resources toward homeownership at the expense of critical rental housing programs.

## ISSUES

### Barriers to Multifamily Development

Apartments are a vital, but often overlooked, part of the community development toolbox. They are more compact and less sprawling so they use municipal infrastructure more efficiently and preserve greenspace. They create vibrant, walkable neighborhoods, which helps reduce auto traffic and air pollution. They provide homes within reach of municipal employees, such as police officers, teachers and nurses. And they improve economic prosperity by providing much-needed housing for the employees local businesses need. If the United States is serious about wanting to change the future and create healthier and stronger communities in this country, Americans have to think about apartments in a more positive way.

The U.S. population is growing faster than many people realize. By 2030 there will be 94 million more people in the country than there were in 2000 and this does not include people who have lost their homes to the current foreclosure crisis in the single-family housing market. All of these people need somewhere to live, somewhere to work and somewhere to shop. The only way communities can accommodate this kind of population growth without sacrificing quality of life is to embrace higher-density, mixed-use development that integrates homes, schools, shopping, jobs and entertainment into our neighborhoods. High-quality apartments are an important part of this future growth plan.

Unfortunately, many Americans oppose apartment construction because of outdated fears about rental housing. Local governments, eager to retain the support of voters, erect barriers to apartments. Even worse, many of the country's zoning laws are more than 50 years old and actually prohibit the kind of vibrant, walkable communities that citizens today want.

NAA/NMHC's outreach, seeking a more level playing field between rental housing and homeownership, has produced numerous successes, including the U.S. Department of Housing and Urban Development's (HUD) effort to remove barriers to multifamily housing through its Regulatory Barriers Clearinghouse.

**Action Requested:** NAA/NMHC strongly support legislation to fund research, identify model programs, analyze the

environmental, economic and social benefits of a balanced approach to housing and revise outdated laws that increase the cost of providing affordable housing.

### Rent Control

NAA/NMHC encourage affordable housing production and voucher assistance rather than rent control to address our affordable housing challenges. Forbes magazine lists rent control as one of the 10 worst economic ideas of the 20th century, saying: "Here we have a policy initiative that has done huge damage to cities around the globe. It is very hard today to find an economist supporting rent control."

"(M)ost of the benefits produced by rent controls aid moderate-, middle- and upper-income households, rather than the poor households they may have been adopted to help," concludes Anthony Downs of the Brookings Institution in his definitive academic research work, *A Reevaluation of Residential Rent Controls*. HUD concurs: "The benefits of rent control are poorly targeted. . . Significant numbers of well-to-do renters live in rent-controlled apartments and enjoy substantial benefits, while many lower-income renters receive little or no benefit." The Advisory Commission on Regulatory Barriers to Affordable Housing, a blue-ribbon panel of experts, wrote: "As a means of redistributing income to the poor. . . rent control is extraordinarily inefficient, if not counterproductive."

**Action Requested:** NAA/NMHC urge Congress and the states to provide sufficient incentives and to remove unnecessary and costly barriers to developing affordable housing, thus relieving the critical shortage of rental housing.

### Homeownership Incentives

NAA/NMHC recognize the importance of homeownership to America; however, the dangerous disconnect between housing policy and housing needs has led our entire nation into a financial crisis because of the foreclosures in the single-family market. Mayors and congressional commissions agree that our top housing priority should be creating more rental housing, yet every year more of our limited resources are diverted to homeownership at the expense of other critical housing needs. NAA/NMHC believe that a "homeownership above all else and at any cost" policy is unwise and has proved to precipitate the biggest financial crisis since the Great Depression. Trying to create a nation of too many homeowners has ultimately harmed not only many of those owners, but also our local communities.

Rising foreclosures not only hurt working families, they also hit local communities hard. When families default and abandon their houses, property values decline and neighborhoods can spiral downward. Cities, counties and towns lose tax revenue and incur

higher costs associated with vandalism and other social problems. The conventional wisdom that home ownership is good for owners and their communities is coming under intense scrutiny in the press as the subprime meltdown spreads.

As Congress works to correct the current foreclosure crisis and stop sliding house prices, we urge you to act carefully and reject proposals that do more harm than good. Some are calling extension of the homebuyer tax credits, legislation reinstating seller-financed downpayments and a federally financed interest rate buydown, lawmakers should understand that these actions may very well lead to future bailouts. They are a short-sighted prop for the for-sale housing market—the very sector of our economy that helped trigger this global economic crisis with artificially low interest rates, easy credit and extreme overbuilding.

It has been estimated that the homebuyer tax credit is costing U.S. taxpayers an estimated \$42,000 for every incremental single-family home sale. Returning to an era in which homebuyers are given a mortgage with no money down is one of the key factors that led to the current housing crisis.

Congress should take all reasonable steps to help those who are in houses facing foreclosure. Lawmakers should direct their efforts to measures that get these loans restructured. Beyond that, if Congress wants to shore up the economy, it should enact proven economic stimulus policies, such as investment incentives for business, investing in our national infrastructure, extending unemployment benefits, issuing general aid to state governments and enacting meaningful energy-efficiency tax incentives for commercial real estate.

**Action Requested:** NAA/NMHC urge Congress to fully consider the nation’s most pressing housing needs and the needs of working families before advancing any additional homeownership incentives. We urge you to oppose additional homeownership tax incentives, to oppose extension of the existing homebuyer tax credit, and to continue the ban on seller-assisted downpayments. We encourage you to enact economic stimulus policies that encourage investment in our nation’s infrastructure and industrial sectors. Finally, we support the concept of voluntary restructuring of mortgages so that Americans can stay in their homes.

### Section 8 Voucher Reform

Since the 1970s, the Section 8 housing choice voucher program has provided subsidized rents for low-income families in private rental housing. The program has been successful because it allows families to choose their housing and helps reduce the concentration of poverty.

Owners who participate in the program must sign a three-way lease with the resident and the housing authority, and they are subject to (often cumbersome) program restrictions, such as repetitive unit inspections, tenant eligibility certification and other regulatory paperwork. The program has also been plagued with inefficiencies and volatile funding. As a result, it generally costs more for an owner to rent to a Section 8 voucher holder than it does to rent to a market-rate renter.

Recognizing the regulatory burden the program places on private owners, Congress specifically made participation in the program voluntary. However, at the state and federal level, efforts have been undertaken to make it illegal for a private owner to refuse to rent to a Section 8 voucher holder.

The most recent action came on May 20, 2009, when President Obama signed mortgage reform and foreclosure prevention legislation (P.L. 111-22) that included provisions protecting households who rent a property facing foreclosure. Among other things, the law requires the “immediate successor in interest” of a foreclosed property to assume any existing Section 8 housing assistance payment contracts and to allow Section 8 renters to remain in place for the term of the lease.

The renter protection provisions in P.L. 111-22 expire (“sunset”) at the end of 2012. Legislation passed by the House Financial Services Committee (the Section 8 Voucher Reform Act of 2009 (SEVRA), H.R. 3045) would both eliminate the 2012 sunset date and expand the law to require an entity that buys a property from the “immediate successor” to also assume any existing Section 8 housing assistance payment contracts and to keep the voucher holders in place until the end of their lease.

**Action Requested:** NAA/NMHC strongly support the Section 8 housing choice voucher program, which has long served as America’s primary rental subsidy program. The program can be one of the most effective means of addressing the need for affordable housing; however, its potential has been constrained because of its burdensome regulatory requirements, including duplicative inspection standards that discourage private owners from accepting vouchers. A flawed and unreliable funding system has also undermined private sector confidence in the program. We urge lawmakers to reform the program, to put in place a reliable funding formula and to reject efforts to mandate private owner participation in the program. To that end, we support the reform provisions of H.R. 3045.

However, we oppose legislation that would force subsequent owners who acquire a foreclosed private apartment property to assume the prior owner’s Section 8 voucher housing assistance payment contract as H.R. 3045 does. These provisions effectively mandate voucher participation. While superficially appealing, such mandates are ultimately self-defeating as they greatly diminish private investment in affordable housing and reduce the supply. Increased participation should occur because the program has been reformed and renting to a Section 8 voucher holder (from the owner’s perspective) is comparable to renting to an unsubsidized renter.

We also oppose provisions in H.R. 3045 that would make permanent the temporary renter protection provisions enacted in P.L. 111-22. Imposing additional constraints on the apartment sector, it will deter private investment in affordable rental housing at a time when demand for affordable housing is increasing. Moreover, such action is unnecessary, because Section 8 voucher renters do not lose their subsidy as a result of a foreclosure.

**Military Housing**

NAA/NMHC continues its strong support of the successful privatization of military housing.

Military housing under privatization has reduced inadequate housing stock replacing it with modern and family friendly homes. This housing increased the quality of life for military families which has directly supported military readiness and retention.

**Action Requested:** NAA/NMHC urge Congress to continue to support programs that will create public/private partnerships, as well as private housing initiatives for U.S. military service members. NAA/NMHC also request that federal laws, regulations or additional requirements that might deter such housing from being developed be eliminated. NAA/NMHC will continue to work with military housing leaders to identify those conflicts in an effort to make a more positive impact on the quality of life for military families.

The apartment industry, like other commercial real estate sectors, continues to suffer as a result of the still-impaired capital markets. The commercial mortgage-backed securities (CMBS) market has been shut down since late 2007, and several of the industry's traditional capital sources have completely exited the market, including banks, life insurance companies and pension funds.

## ISSUES

### Restoring the Capital Markets

The liquidity crisis threatens to cause a wave of unnecessary bankruptcies and a serious shortage of housing in the coming years. Nearly one-third of Americans rent their homes, and over 14 percent live in a multifamily rental apartment.

- Most of the attention paid to the mortgage crisis has been on how to reform the single-family housing finance system, but the apartment sector relies on the same federal institutions and agencies—Fannie Mae, Freddie Mac and the Federal Housing Administration—to ensure liquidity. Policymakers must recognize the important differences between single-family financing and multifamily financing and take steps to ensure an adequate supply of capital to the multifamily sector as well. The lack of capital threatens the viability of the apartment sector at a time when demand for rental housing is growing.
  - ▶ An estimated \$30-\$40 billion in multifamily mortgages will mature and have to be refinanced in the next two years. With credit markets virtually collapsed, however, thousands of those otherwise performing properties could go into foreclosure or bankruptcy if owners are unable to get new loans.
  - ▶ Capital for new apartment construction has all but disappeared even though demand for affordable rental housing far exceeds the supply.
  - ▶ The frozen capital markets have squashed apartment transactions. Property sales were down by 67 percent as of the third quarter of 2009, and with buyers on the sidelines, property values fell by 30-40 percent.
  - ▶ The lack of capital is also preventing property owners from tapping into their equity to keep their properties from falling into disrepair.
- The reverberations of this hopefully temporary credit crunch will be felt for years to come unless policymakers continue to take steps to free up the commercial credit markets because America will increasingly rely on rental apartments to house our citizens.

- ▶ The largest generation of children currently under the age of 20 in the history of the U.S. will be entering the housing market in the next few years and the number of seniors who can no longer maintain a house will begin to skyrocket. In addition, the foreclosure crisis has increased the demand for affordable rental housing. Without federal action, however, the apartment industry cannot meet this demand.
- ▶ Not only do apartments offer housing to a wide range of households, because of their compact nature, their efficient use of existing infrastructure and their transit-oriented locations, they can also help us meet critical national goals like reducing greenhouse gasses, growing more sustainably and creating mixed-use, pedestrian-friendly communities.

- Fortunately, the multifamily foreclosure story is very different from the single-family story. The apartment sector is the only residential real estate sector that did not overbuild, and unlike in the single-family market, overall loan performance in the \$2 trillion multifamily sector remains healthy.
  - ▶ With widespread media coverage of worsening multifamily CMBS default rates, it is important to understand that CMBS represent just 12.5 percent of \$904 billion of multifamily loans outstanding. The vast majority of multifamily mortgages are held by commercial banks (23.5 percent) and the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac (34.1 percent).
  - ▶ Default rates for these mortgages remain low. Less than one percent (0.62%) of Fannie Mae's multifamily portfolio is seriously delinquent as of the fourth quarter of 2009. For Freddie Mac, the number is even smaller: 0.12 percent. Bank and CMBS multifamily loan performance is not as strong at 3.8 percent and 6.2 percent, respectively.

While federal officials have taken many steps to revitalize the capital markets, more is needed to return the apartment industry to health so it can meet the nation's future demand for rental housing.

In 2010, lawmakers are expected to enact comprehensive financial regulatory reform. The Administration and Congress will also begin the process of establishing a new secondary mortgage market to deal with the nearly \$5.4 trillion in outstanding residential and multifamily mortgage debt held by Fannie Mae and Freddie Mac. Both of these initiatives could have unintended negative consequences on the rental housing industry if the unique needs of the sector are not thoughtfully and deliberately considered.

The single-family housing meltdown confirms that homeownership alone is not sufficient to meet our housing and community needs. We need a more balanced housing policy—and that policy needs to begin with ensuring a consistent and abundant flow of capital to rental housing.

**Action Requested:** We strongly urge federal officials to take the following actions to preserve liquidity to the apartment industry:

### 1. Restore Investor Confidence in the CMBS Market to Revitalize the Market

Thanks to the federal Term Asset-Backed Loan Facility (TALF) program, the CMBS market is showing early signs of return. However, this tenuous comeback needs additional federal support to ensure it will last.

Lawmakers should update credit agency guidelines to support transparency in underwriting. As they work to reform the financial sector, they should resist calls to create a separate classification for CMBS, as such action would have a chilling impact. They should also not require additional credit support for CMBS, as sufficient credit is already provided by subordinate buyers and lenders.

### 2. Retain Fannie Mae and Freddie Mac as Liquidity Backstop to the Apartment Industry

As Congress undertakes reform of the government-sponsored enterprises Fannie Mae and Freddie Mac, they should make it a priority to ensure that current multifamily lending programs are preserved in any new structure.

In addition, the Federal Housing Finance Agency should exempt multifamily loans from the GSEs' mortgage portfolio limits through December 31, 2012 or until a new secondary market structure for multifamily loans is operational, whichever comes first. Based on Fannie Mae's and Freddie Mac's strong multifamily loan portfolio performance, exempting these loans will have virtually no impact on the overall portfolio risk of the two GSEs.

### 3. Facilitate Prudent Multifamily Mortgage Workouts

Banking regulators have issued regulatory guidance making it easier for banks to work out troubled multifamily mortgages, but Congress and banking regulators should continue to ensure that banks have flexibility to extend otherwise performing multifamily mortgages, including the use of covered bonds, as appropriate, to support mortgage financing for multifamily and commercial real estate.

### **Future of the Multifamily Secondary Market: Fannie Mae and Freddie Mac**

The apartment industry has coped with a capital crisis since the fourth quarter of 2008. Even with improving access to capital from

other sources, Fannie Mae and Freddie Mac have been the most consistent and primary source of permanent debt financing for apartment owners, accounting for approximately 90 percent of the funds provided to multifamily borrowers over the past year and virtually all non-construction-related capital.

All other market sources of funds (banks, insurance companies, pension funds and Wall Street) have been sidelined and the FHA is being stretched, as FHA-insured loans are the only source of construction financing and higher-leverage long-term mortgage financing for multifamily developers and owners.

As the Administration and Congress begin the process of establishing a new secondary mortgage market system and regulatory oversight for the government sponsored enterprises (GSEs), lawmakers should understand the unique needs of the multifamily sector and take steps to ensure that they do not restrict the supply of multifamily capital as they reform the single-family financing process. This is critical, as the industry will heavily rely on Fannie Mae and Freddie Mac to help refinance the estimated \$30-\$40 billion in multifamily mortgages that will mature in the next two years. Without this liquidity backstop, the risk of foreclosure (and bankruptcy) of otherwise performing loans is significant.

The lack of capital threatens the viability of the apartment sector at a time when America will increasingly rely on rental apartments to house our citizens. The largest generation of children currently under the age of 20 in the history of the U.S. will be entering the housing market in the next few years, and the number of seniors who can no longer maintain a house will begin to skyrocket. In addition, the foreclosure crisis has increased the demand for affordable rental housing. Yet, capital for new apartment construction has all but disappeared and new construction has virtually halted.

Fortunately, the multifamily foreclosure story is very different from the single-family story. The apartment sector is the only residential real estate sector that did not overbuild, and unlike in the single-family market, overall loan performance in the \$2 trillion multifamily sector remains healthy. Default rates for GSE mortgages remain low. Less than one percent (0.62%) of the Fannie Mae multifamily portfolio is seriously delinquent as of the fourth quarter of 2009. For Freddie Mac, the number is even smaller: 0.12 percent.

**Action Requested:** As lawmakers embark on efforts to restructure the GSEs and the secondary market for housing, we strongly urge them to take the following actions to preserve liquidity to the apartment industry:

1. Make the preservation of multifamily lending programs a priority. Apartments are a critical component of the nation's housing market, and it is appropriate for the government to provide an effective financing system to ensure the nation's housing needs are met.

2. Preserve the ability of the GSEs to offer both portfolio lending and securitized lending programs. While there has been recent movement toward securitizing the GSEs' multifamily mortgages, the market continues to require a portfolio lending option due to the industry's unique loan terms and requirements. A portfolio program is also more prudent for the GSEs as the enterprises need the ability to retain whole mortgages in certain cases and, in certain cases, need to season loans before securitizing them.

3. Multifamily loans should be exempt from GSE mortgage portfolio limits through December 31, 2012 or until a new secondary market structure for multifamily loans is operational. (Beginning in 2010, Fannie Mae and Freddie Mac are required to shrink their retained mortgage portfolios, with a goal of reducing their nearly \$1 trillion mortgage portfolios to \$250 billion by 2020.) Based on Fannie Mae's and Freddie Mac's strong multifamily loan portfolio performance, exempting these loans will have virtually no impact on the overall portfolio risk of the two GSEs.

The single-family housing meltdown confirms that the continued push for homeownership ignores the need for a more balanced housing policy—and that policy needs to begin with ensuring a consistent and abundant flow of capital to rental housing.

Federal tax policy should reflect the economic nature of investments in the financing of real estate and discourage laws causing an outflow of capital from real estate to other investments or distortions in the flow of capital to selective real estate sectors.

## ISSUES

### Carried Interest

In 2007, the House of Representatives attempted to rein in the high-flying hedge fund managers by proposing to eliminate capital gains treatment of carried interest (H.R. 2834 and H.R. 3996) and taxing it as regular income instead. This would amount to a 133 percent tax increase. (A carried interest is a particular type of an interest in the capital gain of the partnership when it sells its property that is typically granted to the general partner by the limited partners.) The proposed change in the taxation of carried interest would impose the most sweeping and potentially most disruptive new tax on real estate since the Tax Reform Act of 1986, which contained the passive loss limitation rules.

While the original focus of this tax change was the Wall Street hedge funds, the version of the legislation passed by the House would have affected a number of industries, including real estate. Some estimates indicated that approximately one-quarter of the legislation's impact would have been on the real estate industry alone.

Current tax law, which treats carried interest as a capital gain, is the proper treatment of this income because carried interest represents a return on an underlying long-term capital asset, as well as risk and entrepreneurial activity. Extending ordinary income treatment to this revenue is inappropriate. In addition, any fees that a general partner receives that represents payment for operations and management activities are already properly taxed as ordinary income.

Not only is such a tax law change inappropriate, it will also have numerous unintended consequences, including exacerbating the nation's affordable housing shortage. If enacted, changes in the taxation of carried interests could affect whether a new development is financially viable. It will be particularly damaging to properties located in under-developed areas and could prevent much of the proposed new affordable housing from being built.

Finally, some in Congress see the tax revenue generated by the carried interest proposal as a way to offset the cost of other tax changes, such as changes in the alternative minimum tax. Enacting a bad tax law, such as carried interest, merely to gain revenue to make other tax changes, is not an appropriate view of tax policy, which demands that each tax proposal be judged on its individual merits.

**Action Requested:** NAA/NMHC strongly oppose proposals to change the current law governing the tax treatment of carried

interests. A carried interest or "promote," which has been a fundamental part of real estate investment partnerships for decades, is an interest in the long-term capital gain of the partnership when it sells its property. Investing partners grant this interest to the general partners as an incentive for increasing the value of the underlying asset. The distribution of funds when a partnership is terminated come from the sale of capital assets, making capital gains, which recognizes the long-term nature of real estate investing, the proper tax treatment for carried interests.

### Federal Estate Tax

In 2001, Congress enacted legislation (P.L. 107-16) that phased out the estate tax over 2001-2009, repealed it in 2010, but then, because of Senate procedural rules, reinstates it in 2011 at the 2001 low exemption levels and high tax rates.

This convoluted scenario is acceptable to neither estate tax proponents nor opponents. Permanently repealing the estate tax would decrease tax revenues by over \$520 billion, making it unlikely in light of the current deficit. However, a large and bipartisan group of lawmakers find the prospect of allowing the estate tax to revert in 2011 to higher tax rates and lower exemptions unacceptable. It is expected that some compromise legislation will be enacted in early 2010.

There are three key elements to any estate tax proposal: (1) the exemption level; (2) the estate tax rate; and (3) the basis rules. While all three elements are important for all types of estates, estates with significant amounts of depreciable real property are especially concerned with how various types of basis rules may affect them.

- **Exemption Levels:** The estate tax exemption level is, in simplified terms, the amount that a donor may leave to an heir without incurring any federal estate tax liability. Exemption levels are \$3.5 million in 2009, unlimited in 2010, and then revert to \$1 million in 2011.

- **Tax Rates:** The estate tax rate is the tax rate that will apply to the amount of an estate that exceeds the exemption level. The maximum rate will be 45 percent in 2009, zero in 2010 and 55 percent (plus an additional five percent surtax applicable to some estates) in 2011 and thereafter.

- **Basis Rules:** The basis rules determine the tax basis of inherited property. There are generally two different types of basis rules—stepped-up basis and rollover basis. With a stepped-up basis, the tax basis of inherited property is reset to reflect the fair market value of the property at the time of the inheritance. By contrast, under rollover basis, the tax basis of the inherited properties is the same for heirs as it was for the donor (i.e., the heir "steps into the shoes" of the donor with regard to tax basis). This includes any decreases in tax basis to reflect depreciation allowances claimed by the donor in prior years.

Stepped-up basis is the rule for all years except 2010 when the estate tax is repealed. In 2010, rollover basis rules will subject sales of inherited appreciated assets above a \$1.3 million threshold to capital gains tax. (Property worth up to \$3 million transferred to a spouse is exempted.) The tax basis of inherited property subjected to capital gains tax will be the adjusted basis of the decedent or the fair market value of the property at the time of death, whichever is less.

### The Importance of Stepped-Up Basis

Retaining a stepped-up basis rule is important for estates that contain significant amounts of depreciated real property. Under a roll-over basis rule, the tax basis of inherited property can be quite low if the property was purchased long ago and if it has been depreciated over a number of years. For estates containing commercial real estate, this scenario creates two major disadvantages when compared to a stepped-up basis system. First, if the heir sells the property, they will likely face higher capital gains taxes (including recapture taxes). Second, the heir will have a lower basis for purposes of determining any future tax depreciation deductions.

Repealing stepped-up basis not only harms heirs of commercial property, it can also have the unintended consequence of exacerbating the nation's affordable housing shortage. Consider the not uncommon example of heirs who receive an apartment property that rents to low- and moderate-income households. The property has no basis and sizeable debt. If the heirs want to sell the property, they will face a depreciation recapture tax of 25 percent and a capital gains tax of 15 percent on any remaining gain, which is often more than the likely sales price of the property. Knowing that the property is likely worth less than the tax bill, the heirs will also be discouraged from investing further capital to maintain it. As a result, the property will remain "frozen" and may deteriorate to the point that it is lost to the affordable housing stock.

### Preferred Outcome

The scheduled 2010 change in the stepped-up basis rules will often result in heirs of commercial properties avoiding the estate tax only to find they owe substantial capital gains and recapture taxes. Accordingly, estates that contain real property could often suffer more under full estate tax repeal than they would if the estate tax were preserved.

**Action Requested:** NAA/NMHC are extremely disappointed that Congress was unable to enact compromise legislation in 2009 that would have avoided the implementation of the rollover basis regime on January 1, 2010 and encourages Congress to enact such legislation as quickly as possible in early 2010.

In addition, NAA/NMHC encourage Congress, once such legislation is enacted, to allow executors of estates where the decedent died while rollover basis rules applied to choose whether to apply the original 2010 law (rollover basis with limited

step-up and a zero percent estate tax rate) or the compromise 2010 legislation (which would presumably allow full stepped-up basis combined with an estate tax rate in the 35-55 percent range) to the estate's assets.

### Alternative Minimum Tax/Tax Reform

Major tax reform is unlikely in 2010 because continued economic distress may convince Congressional leaders that the time is not ripe for large-scale policy changes this year. However, some decisions will need to be made in 2010 as a large number of tax law changes first enacted in 2001 and 2003 are scheduled to expire at the end of 2010. If the 2001 and 2003 tax changes are allowed to expire as required by current law, American corporate and individual taxpayers will see a tax increase in excess of \$130 billion in 2011 alone—with this tax increase approaching over \$300 billion annually by 2019. Those scheduled tax increases are in addition to the continually growing reach of the individual alternative minimum tax (AMT), which is estimated to affect almost 35 million taxpayers by 2011 if no permanent changes are made prior to that year.

**Action Requested:** NAA/NMHC urge the Administration and Congress to undertake tax reform initiatives carefully and to evaluate the practical implications of any changes in the taxation of real estate and rental housing on national housing policies. Congress should refrain from modifying the tax laws to increase the tax burdens on, or otherwise disadvantage, owners and renters of multifamily housing relative to other real estate and other asset classes.

### Like-Kind Exchanges

Section 1031 of the Internal Revenue Code allows owners of commercial real estate to exchange properties without setting off a taxable event. Such tax-deferred exchanges enable an orderly flow of property ownership. Congress and the Internal Revenue Service (IRS) are reviewing several aspects of like-kind exchanges as well as developments in the tenant-in-common marketplace.

**Action Requested:** Congress and the IRS should not alter the present like-kind exchange rules. Proposals to revise or restrict like-kind exchanges may have a significantly harmful effect on the value and trading of property.

### Low-Income Housing Tax Credit

The Low-Income Housing Tax Credit (LIHTC) program has a long history of generating the capital needed to produce low-income housing, and it has enjoyed broad bipartisan support in the Congress. However, the program has become a collateral victim of the banking and mortgage crisis.

Investment in housing tax credits has decreased dramatically. With many of the largest investors, including Fannie Mae and Freddie Mac, withdrawing from the program, the price for tax credits has plummeted, leaving developers and state agencies with

projects that are not financially viable. The department of Housing and Urban Development (HUD) estimates that as many as 1,000 LIHTC projects (containing nearly 150,000 units of housing) are stalled across the country because of the plummeting value of tax credits.

Congress has taken some steps to bolster the beleaguered program, but more action is necessary. In February 2009, Congress enacted two programs as part of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) to temporarily assist the LIHTC program: the Tax Credit Assistance Program (TCAP) and the Tax Credit Exchange Program (TCEP). TCAP provided \$2.25 billion in grants to state tax credit allocating agencies for capital investments (i.e., “gap financing”) in LIHTC projects. TCEP was designed to help stalled LIHTC programs move forward. It allowed states to exchange up to 40 percent of their 2009 LIHTC allocation (plus any remaining 2008 allocations) for cash grants from the Treasury Department. (Treasury has extended the time that a state can keep disbursing funds for eligible projects through December 31, 2011, provided that the project is at least 30 percent complete by the end of 2010.)

While these two provisions are an important step toward infusing capital into the program, we continue to advocate for a number of other largely temporary changes intended to restore liquidity to the program.

More than 150 cross-industry organizations have joined forces through the Affordable Rental Housing ACTION. (A Call To Invest in Our Neighborhoods) to reinvigorate the tax credit market.

ACTION has identified a three-prong legislative proposal that would jump start the program—resulting in an additional 138,000 affordable apartments being constructed or preserved, 160,000 more jobs created or saved, \$12 billion in additional local income generated, state and local revenues increased by \$1.2 billion and federal revenues increased by \$3.4 billion.

**Action Requested:** We urge Congress to enact the following legislative changes to help ensure the future viability of the LIHTC program.

- Extend the Tax Credit Exchange Program for another year to maintain the development pipeline in 2010. It should also be modified to include the four percent housing credits that accompany tax-exempt multifamily housing bonds.
- Increase the credit carryback from one to five years to stimulate LIHTC investment demand. By allowing the credit to be used to offset prior tax liabilities over five years, instead of one year as under current law, the carryback proposal would allow investors to immediately realize value in LIHTC investments by applying unused credits to prior years’ tax liability. Such a change would make LIHTCs attractive to a larger pool of investors.
- Broaden the investor base by allowing some S corporations, LLCs and closely held C corporations to offset revenue with housing credit tax benefits.

# ENERGY AND ENVIRONMENTAL POLICY

As interest in energy efficiency and sustainability gains greater public and industry attention, Congress is poised to consider sweeping energy and climate change legislation.

## ISSUES

### Building Energy and Efficiency

While improving the energy performance of the apartment sector is a shared goal, we caution that a one-size-fits-all legislative approach requiring buildings to meet a certain energy performance level is not only unworkable, it will also have the direct consequence of exacerbating the shortage of safe, affordable apartment housing. A more effective approach is to provide incentives and funding for energy efficiency programs that will spur the renovation of older, inefficient buildings, will create jobs for the construction and manufacturing industries and will help apartment residents manage energy costs.

NAA/NMHC also encourage policymakers to consider all avenues for achieving sustainability in the residential sector, not only issues related to building shell and mechanical systems governed by building codes. Density, proximity to mass transportation, resource conservation from electricity, to water and materials and rigorous operations and maintenance practices are all significant indicators of building sustainability.

To the extent that lawmakers seek to establish performance benchmarks for apartment properties, we believe the ANSI-approved National Green Building Standard (NGBS) is the most appropriate standard for residential construction. The NGBS was developed by a diverse group of stakeholders that included state and local building code officials, representatives of the U.S. Green Building Council, real estate industry representatives, product manufacturers and other experts in green building and energy efficiency. Moreover, the standard, which covers multifamily, single-family and mixed-use development; is the only standard written to be seamlessly incorporated into existing building codes, and it has followed the strict standard-setting procedures established by the American National Standards Institute.

NAA/NMHC support a comprehensive national energy policy that incorporates energy efficiency, sustainable land use, transportation and long-term fuel production.

- We believe that economic recovery and job creation programs targeting energy consumption in the residential sector should include multifamily properties, given that energy improvements to apartments can generate significant energy savings and impact a large number of households.
- We support the research and development of energy efficient and conservation-minded building technologies paired with incentives to spur adoption within the building sector.
- We oppose policies that seek to attach arbitrary energy

efficiency or green building targets to building codes or federal housing programs that have not been found to be economically sound and technically feasible.

- We support the extension and expansion of existing energy efficiency tax incentives for new buildings and encourage the development of new incentives that recognize the unique efficiency and affordability benefits of multifamily construction and rehabilitation.
- We support the development of innovative financing mechanisms to spur energy efficiency in new and existing multifamily buildings including a national cap and trade emission policy that recognizes the contribution made by improvements in building energy efficiency in the overall reduction in energy generation levels by the utility industry and awards emissions credits to property owners.

### Unrealistic Code Mandates

While improving the energy performance of the apartment sector Both the House and Senate bills would unravel the existing process for developing and adopting building energy codes and impose new federal requirements for stringency and enforcement. The measures also undermine the regional flexibility of the current code system.

The House bill directs the Secretary of Energy to establish a National Energy Efficiency Building Code that is 30 percent more efficient than the 2004 version of ASHRAE Standard 90.1 and the IECC 2006 by 2010. By 2014, the national code is required to be 50 percent stricter than the baseline codes. Senate bill 1462 contains comparable but slightly less onerous building codes language, while S. 1733/CEJAP removes all efficiency targets and timelines and leaves those decisions to an EPA rulemaking. State and local governments must adopt and enforce codes that meet or exceed the efficiency levels of the national code. The codes would apply to all buildings built or substantially rehabilitated after the enactment of the legislation.

However, this approach has serious limitations. First, according to NAA/NMHC-commissioned research, a one-size-fits-all approach to building energy performance fails to account for regional climate characteristics that heavily influence energy consumption. In some regions of the country, the energy performance targets are unachievable with current technology and in other climate zones, achieving these performance levels will require the use of technology that is unaffordable in terms of the overall cost of construction.

Moreover, using building codes to achieve conservation goals is a flawed policy in the residential sector because most energy used in apartments falls outside the scope of these codes. Primarily, the building codes referenced by the legislation only cover the building envelope and HVAC systems. To meet the energy performance levels

identified in the legislation, however, other facets that are outside of the scope of the codes must be counted, issues such as lighting, hot water heating and other appliances. By excluding these items, the code targets put extreme pressure on building owners to invest in expensive upgrades without significantly improving overall building energy performance.

### **Federal Cause of Action Against Property Owners**

In addition to unrealistic energy efficiency targets, the House bill would federalize building code enforcement and create a federal cause of action for non-compliance with energy codes. (Neither Senate bill provides for federal enforcement or penalties for non-compliance.) As introduced, the bill would have made it unlawful to occupy, permit to occupy or convey a building that cannot or does not comply with the new codes. Builders and property owners found in violation would be subject to daily-accruing penalties and federal courts could rescind sales transactions of non-compliant properties. If enacted, these penalties would have a chilling effect on the development and transfer of properties across the real estate spectrum.

### **Building Energy Usage Labeling Requirements**

Both the Senate and the House have introduced energy labeling provisions that would develop energy performance labels to be used in building valuation and transactions. While we have long encouraged the expansion of voluntary energy efficiency rating programs like Energy Star, we caution lawmakers against any program that will impose undue costs or hamper real estate transactions. Before moving forward with labeling programs, Congress needs to consider that there is no Energy Star or other benchmarking system for multifamily properties comparable to those available in the single-family and commercial building sectors.

NAA/NMHC oppose passage of Title 2, Section 201 of H.R. 2454 or similar legislation because, in its current form, it would mandate unattainable standards by any practical definition and exacerbate the shortage of quality, affordable housing stock at a time when families and the economy are struggling.

Instead, we support the creation of meaningful financial incentives that can spur the adoption of energy efficiency technologies and practices in new and existing buildings. Favorable tax treatment, including an enhanced depreciation schedule for certain building systems, an expansion of the new homes tax credit to include high-rise multifamily and an increase in the financial incentive offered for improvements in commercial buildings, would assist many property owners who do not have the resources to make capital investments to improve the energy performance of their assets. This is even more important as the current financial crisis impacts property values and makes it more difficult for owners to access capital.

### **Wetlands and Clean Water Act**

The 1972 Clean Water Act (CWA) created a comprehensive

regulatory system at both the federal and local level for protecting water by creating state water quality standards (that may exceed federal requirements for sensitive or threatened waters) and requiring developers who disturb wetlands to receive a federal permit.

A series of Supreme Court decisions involving the extent of federal jurisdiction of the CWA have created confusion for federal regulators and the regulated community, however.

In 2001, the Supreme Court struck down the “migratory bird rule” which federal regulators had been using to extend CWA jurisdiction to all waters, including isolated and adjacent wetlands, under the assumption that waterfowl could potentially alight in these waters. (*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, et al., 531 U.S. 159 (2001)) (SWANCC).

Subsequently, the EPA issued an advanced notice of proposed rulemaking which stated that “SWANCC eliminates CWA jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting jurisdiction is the actual or potential use of the waters as a habitat for migratory birds.” The Agency sought comments about jurisdiction specifically in regard to wetlands that were adjacent to or a tributary of navigable waters.

In another decision in the consolidated cases of *Rapanos v. United States* (126 S.Ct. 2208 (2006)) and *Carabell v. US Army Corps of Engineers*, the Court rejected the notion that the CWA was limited to navigable waters and observed that cases of jurisdiction under the Act would need to be determined on a case by case basis until such time as clear Agency regulations were issued.

The federal agencies have chosen not to promulgate new regulations and a coalition of interests has sought to advance legislation that would strike the term “navigable” from the CWA as a way to clarify the scope of the CWA. In our opinion, striking the term “navigable” will create a host of additional problems and result in an increase in lawsuits and exacerbate the protracted delays in obtaining permits under the Act.

**Action Requested:** The apartment industry supports the protection of water resources under the Clean Water Act, but opposes the expansion of federal jurisdiction beyond those that are navigable to include all waters of the United States. Regulation of non-navigable waters is currently the domain of state and local policymakers, and we believe that state and local regulators are in the best position to apply more stringent criteria for the management of water resources that may require specific, heightened intervention for maintaining high water quality standards.

### **Lead-Based Paint**

Although blood lead levels continue to decline across the population as a consequence of federal and state actions to limit exposure to lead hazards, there is a movement to lower the permissible concentration of lead in coated surfaces on pre-1978 residential properties.

**There are currently two definitions of lead-based paint:**

- The Lead-Based Paint Poison Protection Act (LBPPPA) and the U.S. Consumer Product Safety Commission (CPSC) set the permissible limit for lead in paint manufacturing at 600 parts per million (ppm) or 0.06 percent lead by weight. Paint manufactured after 1978 must meet this standard and any paint containing this threshold or greater is considered lead-based paint. Lead-based paints are no longer permitted to be sold for residential applications but are still manufactured for certain other purposes.
- Under the Residential Lead-Based Paint Hazard Reduction Act, known as “Title X”, the U.S. Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD) define lead-based paint in pre-1978 properties as painted or coated surfaces containing lead levels equal to or greater than 1.0 mg/cm<sup>2</sup> when measured by field X-Ray Fluorescence (XRF) analyzers or 0.5 percent by weight (5,000 ppm) when analyzed by certain laboratory tests.

The advocacy community asserts that there is no safe level of lead in the human body and, as such, all potential lead hazard sources should be eliminated. On October 6, 2009, EPA published a notice saying it had been petitioned by a coalition of organizations to tighten the definition of dust lead levels (the levels of lead in house dust on floors and window sills), reduce the permissible levels of lead and modify the definition of lead-based paint to be paint that has 600 ppm of lead, instead of the 5,000 ppm standard used now.

The practical effect of changing the definition of lead-based paint would be to invalidate hundreds of millions of dollars’ worth of testing that has been performed in multifamily properties based on the current definition. Because paint test results are reported in a qualitative way (e.g., below 5,000 ppm) rather than a quantitative way (e.g., 590 ppm), it is not likely that existing reports would be able to be reinterpreted, even by a certified lead testing professional. Instead, new tests would likely be required with the outcome being that a certain number of properties that met the former threshold of 5,000 ppm may fall short of the lower 600 ppm threshold. In addition, this change is likely to pose other potential liability concerns for property owners.

**Action Requested:** The apartment industry has worked with Congress and federal agencies charged with implementing Title X (the Residential Lead-Based Paint Hazard Reduction Act) since the law was enacted in 1993. While the law did not require testing of paint on pre-1978 properties in general (it did require that federally assisted properties perform lead hazard inspections), many apartment property owners voluntarily hired state-certified inspectors to perform expensive testing and in some cases pursued remodeling activities in accordance with HUD guidelines. We strongly oppose efforts to redefine lead in paint for the purpose of compliance with Title X. The EPA has failed to demonstrate a public health reason for this change, which would impose a severe and disproportionate economic burden on millions of pre-1978 apartment homes.

Apartment management is affected by numerous government regulations and actions. Government action or inaction on key issues can adversely affect apartment operating costs, increase liability or create legal ambiguity relative to property management. Although many important decisions affecting both large and small stakeholders in the residential property management industry are matters of state law, federal legislation and regulations can significantly affect day-to-day operations for market-rate and subsidized apartments alike.

## ISSUES

### Employee Free Choice Act/Union “Card Check” Bill

As private sector union membership has decreased to single digits, unions have sought a Congressional fix that would restore their political influence and replenish their coffers. Their “solution” is the EFCA. This onerous measure would effectively eliminate federally supervised secret ballot elections and impose undue burdens on the collective bargaining process to the detriment of workers and businesses alike. Across industry sectors, small and large employers are extremely concerned about how the proposed legislation could impact their strategic decision making and economic viability.

#### Card Check

Card Check, the EFCA’s most well-known provision, would do away with secret ballots and require an employer to recognize a union when a majority of employees simply sign union authorization cards without a federally supervised election. The results of card check votes would be known to employers, employees and union organizers, rendering the process inherently vulnerable to coercion and fraud.

#### Mandatory Arbitration

Under the EFCA, an outside arbitrator—without a direct interest or expertise in the business—could decide binding contract terms covering key aspects of employment. The EFCA would allow mandatory arbitration just 120 days after a card check victory and union certification: Collective bargaining would begin within just 10 days of union certification and, if a first contract is not reached in 90 days, mediation rights would be triggered.

#### One-Sided Penalties

The National Labor Relations Act (NLRA) was intended to offer remedial relief to encourage compliance with the law. For example, the National Labor Relations Board may order an employer to reinstate an employee, compensate an employee with back pay or even reimburse a union for bargaining expenses. But the EFCA would, for the first time, allow penalties for unfair labor

practices, but only against employers. The EFCA would change the nature of the NLRA by authorizing penalties up to \$20,000 **per violation** against employers—not unions—during organizing campaigns and/or prior to a first contract.

**Action Requested:** NAA/NMHC strongly oppose the Employee Free Choice Act and urge Congress to reject the bill as an ill-conceived proposal that would disproportionately increase the political power of unions at considerable cost to employees and businesses during a sustained period of economic hardship and job loss.

As it is proposed, the EFCA, also known as the “Card Check” bill, would destroy the legal framework that is necessary to balance a company’s productivity and efficiency goals with a union’s objective to gain representation and put in place a collective bargaining agreement. The bill would compromise employee privacy, render meaningless the collective bargaining process and threaten penalties against employers—but not unions—for violating the law. We strongly urge members of Congress to oppose the bill.

### Forced Foreclosure: The Multifamily Apartment Sector

As the commercial real estate sector experiences increasing rates of mortgage default, lawmakers have expressed a desire to protect the residents of distressed apartment buildings. Early efforts included a proposal that would have allowed the government to prematurely force “at risk” apartment properties into bankruptcy without the consent of the owner in order to convert them into affordable housing. Lawmakers also continue to seek to mandate a variety of “renter protection” measures, including some ill-advised notification requirements.

#### Forced Foreclosure

The back-door effort to convert market-rate apartments into affordable housing would place financing of all multifamily properties at much greater risk by enabling the federal government to swoop in and foreclose on a property in the absence of any clearly defined guidelines. Such a draconian measure goes far beyond the controversial single-family mortgage cramdown legislation and could create such uncertainty among multifamily lenders that no loans would be made.

Moreover, this kind of federal intervention circumvents the normal processes owners and lenders undertake to resolve financing issues and address property concerns. To the extent that government action is needed to help manage, restructure or liquidate troubled assets, those actions should be undertaken via new commercial real estate financing programs offered under the Term Asset-Backed Loan Facility (TALF) or efforts created by the U.S. Department of Housing and Urban Development.

Such government assistance programs should be carefully targeted to avoid further distressing the capital markets and wasting taxpayer dollars. They should also not compete with private sector equity investors, but should attract investment capital to areas currently not served by private investors. Finally, they should not support the transfer or taking of a property without the consent of both the property owner and lender.

### Resident Notification Proposals

While we understand the desire of lawmakers to ensure apartment residents are protected in the foreclosure process, early proposals requiring apartment owners to notify current or prospective renters whenever a property is in default or foreclosure would do more damage than good. Importantly, the proposal was not limited to monetary defaults, and thus would include non-monetary defaults—which are often quickly remedied.

By failing to distinguish between single-family foreclosures, which are almost always a result of insufficient financial resources, and multifamily foreclosures, which are often temporary and for non-monetary issues, such as the failure to properly record a new insurance policy, such a requirement would unduly alarm apartment residents.

This alarm is not only unfortunate, but also unnecessary because unlike renters of single-family houses and condos, apartment renters are already protected by state laws in the event of a foreclosure and state laws ensure an orderly transfer of ownership in the case of an apartment property foreclosure. When a five-plus-unit property goes into foreclosure, the renters are not evicted. State laws require the new owner to honor the existing leases on a property. State and local health and safety codes also mandate enforcement of standards and lenders and investors also step in if a property is not being physically maintained. Therefore, the proposal amendment would unnecessarily frighten residents, often for no legitimate reason if the cause of the notification is a non-monetary technical default.

Beyond its negative impact on the residents, however, the proposal could actually trigger a foreclosure or create financial stress on a property by discouraging existing residents from renewing their leases and prospective residents from signing a lease.

Some form of renter protection may indeed be needed for the glut of single-family houses and condos currently being rented out. But extending those protections to the nation's more than 600,000 apartment properties (defined as properties with 5+ units) will not help renters. Instead, they will needlessly alarm them and could lead to a self-fulfilling prophecy of pushing an otherwise healthy property into bankruptcy.

**Action Requested:** Given that multifamily apartments are not the source of the foreclosure and eviction Congress should exclude properties with five or more units from any forced foreclosure or notice legislation. Instead of “forcing” properties into foreclosure, the financial regulatory reform bill directs HUD to develop a

program to protect residents of selected at-risk multifamily properties by providing new equity to address deferred property issues and establishing long-term sustainable financing for such properties based on current rental income and operating and replacement reserves. Importantly, the measure specifies that any transfer of at-risk properties requires the agreement of owners.

### Immigration Reform

For more than a decade, a broad coalition of business leaders, labor advocates and other groups concerned with the economic and workforce implications of our nation's immigration policies have advocated reform. In recent years, the issue has moved to center stage in Congress and has gained a high level of public attention.

In June 2007, a bipartisan bill intricately negotiated by 12 senators fell short of the 60 votes needed to end debate in the Senate. Unable to pass a comprehensive immigration reform bill, Congress has considered piecemeal measures that have primarily focused on enforcement issues, including bills that address E-Verify, the federal government's employment verification program.

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

Immigration policy and enforcement are federal responsibilities with national security and economic implications that should be handled by the federal government. Therefore, reform legislation must include a preemption provision reserving for the federal government—not state and local governments—the exclusive authority to create immigration policy.

**Action Requested:** Federal immigration policy must be reformed to strengthen the American economy while discouraging illegal immigration and enhancing national security. Meaningful reform must include the following components:

1. A federally administered employment verification system that accurately and efficiently confirms an individual's legal status to work in the U.S.;
2. A rational approach to documenting the estimated more than 12 million individuals that currently reside in this country without proper documentation;
3. A responsive guest worker program that would allow certain employers to hire qualified foreign individuals when other workers are unavailable;
4. An improved border protection system; and
5. A federal preemption that expressly reserves for the federal government the authority to create and implement immigration policy, including state and local measures that deal with residential leases and employment screening.

NAA/NMHC also oppose efforts to make the E-Verify system mandatory without first ensuring the program's accuracy. In its current form, the E-Verify program does nothing to ensure the authenticity of the documents employees use to establish their identity and is inherently vulnerable to fraud.

### Accessibility

When Congress amended the Fair Housing Act in 1988 to make it unlawful to discriminate against any person on the basis of handicap, it defined "discrimination" to include the failure to design and construct certain covered multifamily dwellings in such a manner that they are accessible and usable by handicapped persons. Many NAA/NMHC members have been challenged with lawsuits over their alleged failure to comply with the accessibility requirements of the law.

Given the complexity of building construction coupled with vague and limited guidance provided by the federal government, many property owners misunderstood their obligations and now find themselves potentially out of compliance. Disability advocates and the federal government continue to turn up the heat to enforce these requirements on the apartment industry. NAA/NMHC support the industry in its legal challenges through "friend of the court" briefs when appropriate and most important, we have been working to identify and create educational opportunities to help the industry comply with the often ambiguous provisions of the law. We also seek a long-term solution to help mitigate the threat of litigation. This combined educational and advocacy initiative is being developed with the help of legal and building industry expertise.

NAA/NMHC will continue to educate policymakers and regulators about the ongoing efforts to combat discrimination in housing, especially for the disabled.

**Action Requested:** Policymakers and regulators need to know the challenges facing the multifamily housing industry as it seeks to comply with interpretations of law that often present difficult targets because of numerous revisions. We also urge HUD to reject requests for establishment of an independent fair housing enforcement agency.

### Fair Housing Act Protected Classes/Source of Income

The Fair Housing Act makes it illegal to make housing decisions based on one of seven protected classes: race, color, sex, national origin, religion, handicap and familial status. These protections were first put into law in 1968 and then strengthened in 1988 by making families with children and those with disabilities a protected class. While the federal law sets the minimum protections, states and localities can expand the number of protected classes. Many jurisdictions, for instance, have made marital status and sexual orientation local protected classes. In recent years, largely in an effort to address the affordable housing shortage, several states and localities have made source of income a protected class. This is generally defined to include any lawful

source of income including government assistance, alimony, child support or other compensation or benefit. It also includes Section 8 housing subsidies.

Where these laws exist, rental providers may not refuse to rent to a person with a Section 8 voucher merely because the person participates in the Section 8 program. While no law states that participation in the Section 8 voucher program is mandatory, some advocates are interpreting this protection as a prohibition against denying any Section 8 voucher holder residency. Allegations of discrimination have been brought against apartment owners who reject applicants who are Section 8 voucher holder regardless of the owner's reason for the denial. Fair housing advocates have urged Congress to initiate a systematic examination of the Fair Housing Act and evaluate the need to amend to add source of income as a protected class.

Apartment owners make resident selection decisions without regard for race, color, sex, national origin, religion, handicap, familial status and any other protected classes as defined by their state or local law. In source of income jurisdictions, rental professionals apply the same screening criteria and credit requirements on applicants regardless of their participation in the Section 8 or other federal subsidy program. Such protections should not be interpreted to compel a property owner to contract with the federal government via participation in the Section 8 program. Recognizing the regulatory burden the program places on private owners, Congress specifically made participation in the program voluntary.

**Action Requested:** Mandating participation is ultimately self-defeating as it greatly diminishes private investment in affordable housing and reduces the supply. Increased participation should occur because the program has been reformed and renting to a Section 8 voucher holder (from the owner's perspective) is comparable to renting to an unsubsidized renter.

### Telecommunications Policy

NAA/NMHC strongly favor a robust, competitive telecommunications industry that reliably and cost-effectively meets the needs of apartment residents. Federal telecommunications policy should be based primarily on a free and open market philosophy, without legal restrictions and/or governmental interference that impair the management of an apartment property.

Telecommunications services are in great demand, and today's apartment residents require newer, faster and more sophisticated telecommunications capabilities. Therefore, apartment owners rely on advanced telecom systems and services to satisfy residents' needs and to establish an edge in the highly competitive multifamily marketplace. Those needs can only be met when telecommunications providers compete in a freely operating market without restrictions on freely negotiated contracts between apartment owners and service providers. Such competition has spurred the development of new technologies and higher quality service.

New technology such as Fiber to the Premises (FTTP), Voice Over Internet Protocol (VOIP), Wireless (WiFi), and Broadband over Powerlines (BPL) have changed the way voice, video and data services are provided to apartment properties. At the same time, the Incumbent Local Exchange Carriers are still responsible for providing Carrier of Last Resort service for land-line phone system hook-up. As a result, some telecom providers have sought permission at both the state and federal levels to bypass the traditional negotiations for service that must take place between property owners and providers and gain mandatory access to multifamily properties for provision of any or all types of service.

Efforts by federal and state governments to mandate access to various telecommunications technologies, presumably in the interest of individuals who reside in apartments, more often than not result in less competition, higher prices, and decreased service standards and product offerings because the larger companies eventually prevail in the tight multifamily market and drive out competitors. Moreover, many apartment communities can only support one type of voice, video or data service because of the unique economy of scale in the multifamily sector. A misguided effort to increase competition by banning various types of exclusive agreements will unfortunately result in less competition and higher costs for residents, especially in moderate-income apartment communities. In addition, forced acceptance of particular technologies that may soon become obsolete could impose further costs and disruption to apartment owners and residents.

Despite NAA/NMHC's strong effort against federal regulation, the Federal Communications Commission (FCC) has retroactively banned the enforcement of exclusive building access clauses in agreements between apartment owners and many video service providers. NAA/NMHC have filed an appeal of the FCC ban in federal district court on the grounds that the FCC lacks the requisite legal authority to regulate in this area, and that their decision was based on incomplete market data and erroneous assumptions about the multifamily video market. The FCC has also sought to regulate exclusive marketing agreements and bulk billing arrangements under the erroneous belief that this will encourage market competition and broadband deployment.

**Action Requested:** Members of Congress should reject efforts by telecommunications providers who seek legislation that grants them special access privileges to private property. The FCC should refrain from regulating in this area because it lacks legal authority to do so, and there is insufficient market evidence warranting federal intervention.

### **National Flood Insurance Program**

The National Flood Insurance Program was created to: provide insurance coverage to residential and commercial properties; provide for flood plain management; and identify and map the nation's flood plains in Flood Insurance Rate Maps (FIRMs).

The program was not designed to be taxpayer-funded; instead,

the operating expenses and insurance claims are paid out of insurance premiums collected. Up until 2004, the program remained financially sound; it used its borrowing authority three times, but paid the Treasury back with interest.

However, major disasters and hurricanes in 2004 and 2005 caused the NFIP to assume \$18 billion in debt. Now, the future financial stability and overall program structure of the NFIP is questionable. According to the Government Accountability Office, the program is not actuarially sound due to the number of policyholders who pay subsidized rates and the large number of repetitive-loss properties (those with two or more losses in a 10-year period) in the NFIP portfolio.

Another problem is that a large number of property owners located in flood plains do not purchase coverage despite a mandatory purchase requirement. This has contributed to the program's deficit.

Congress is now faced with reforming the NFIP to return it to some semblance of self-sufficiency. High on the list of reforms is phasing out subsidized rates for non-primary houses or vacation properties. Legislative proposals also include updating maps of 100-year flood plains, increasing coverage limits, adding business interruption coverage and the highly controversial addition of optional wind damage coverage.

Congressional efforts in 2009 to overhaul the NFIP were not successful. The current program, which had been set to expire in 2008, has been extended several times since then due to the inability of the House and Senate to find common ground on a reform bill.

**Action Requested:** NAA/NMHC support the reauthorization of the National Flood Insurance Program through 2013. We also support reform measures such as increasing limits to place it on par with commercial properties and offering business interruption coverage. Properties built before their community's flood insurance rate maps were completed, known as pre-FIRM buildings, should continue to be insurable at below-market rates. If these rates increase, operating costs for many of the already-short supply of multifamily properties serving affordable housing needs will also increase.

### **Catastrophic Property Insurance**

Since the hurricanes of 2005, insurance affordability and availability has been the recurring theme on state and federal legislative agendas. Congress has been evaluating the federal and private sector role in insuring for natural catastrophes and the public policy options for revising these roles. While natural catastrophic disasters occur infrequently, they will become a greater challenge going forward and given the increases in development, losses are expected to escalate. Property owners with catastrophic exposure such as severe wind and earthquakes experienced significant cost increases and reduced policy limits in the aftermath of the 2005 hurricane season. Experts predict that in the foreseeable future policyholders can expect to see a stabilization

of market conditions at the current high cost levels. It is estimated that catastrophic losses will double every decade or so due to growing residential and commercial density and more expensive buildings.

Since then, revised models that more accurately reflect property values and risk as well as rating agencies revising their criteria to more closely scrutinize exposures in catastrophe-prone areas and the backing off of reinsurers in the market have all led to higher prices and limited capacity. While there are strategies that policyholders should employ to manage the impacts of hardening markets, many believe there is also a role for the federal government to play to ensure adequate capacity in times of severe weather events such as earthquakes and hurricanes that cannot be accommodated by the private market alone.

Several pieces of legislation were introduced in the 110th Congress to address the property insurance crisis but none were enacted given the complexity of the issue and mixed support for a federal versus market-based solution to these challenges.

**Action Requested:** Congress has an obligation to hold hearings, assess the market conditions and take steps to enact a reasonable legislative solution that will ensure that policyholders can obtain affordable and adequate coverage when the private market is not able to accommodate them. Full consideration should be given to such proposals as: (1) the establishment of a Commission on Natural Catastrophe Risk Management to fully assess the problem and recommend action; (2) a low-interest federal loan program for states impacted by severe natural disasters; (3) reinsurance for state catastrophic funds and; (4) pooling of risk that can be transferred to the private market through the use of catastrophic bonds. It is likely that relief will not come from any one proposal but from a patchwork of legislative proposals.

### Homeland Security

NAA/NMHC strongly support ongoing efforts to enhance homeland security while taking appropriate measures to ensure such actions do not unnecessarily interrupt or significantly burden the business operations of the apartment industry. In the post-September 11 world, the business community, including the apartment industry, is being confronted with what seems like daily doses of new government initiatives to protect the country against terrorism. Apartment firms now screen residents and employees against terrorist lists and report large cash transactions to federal counter-terrorism officials. They are also complying with enhanced lease termination rights enacted in 2003 for deploying service members.

On August 3, 2007, President Bush signed into law legislation implementing the remaining recommendations of the 9/11 Commission (P.L. 110-53). Among other things, the law calls on the U.S. Department of Homeland Security (DHS) to work with the private sector to develop preparedness best practices and to create a voluntary private sector preparedness accreditation and certification program.

**Action Requested:** NAA/NMHC support a voluntary approach since it would be difficult for any single standard to adequately

address the diverse range of property types, locations and security risks in the private sector. It is far more rational to encourage a voluntary approach to instituting emergency preparedness plans and to tailor each plan to the specific business needs and capacities of the firm. We will continue to work with other real estate trade associations to coordinate efforts to improve the communications from the U.S. Department of Homeland Security on threats and warnings as well as policy and planning activities.

### Translation Requirements

NAA/NMHC strongly support federal efforts to ensure that persons with limited English proficiency (LEP) have access to federal housing programs. However, we believe that HUD should provide translation and oral interpretation services directly to the LEP population and assume responsibility for the associated costs, ensuring accuracy of translated documents and ensuring the competency of interpreters. It is a waste of resources to require thousands of housing providers to undertake the duplicative effort of translating dozens of documents into numerous languages.

On January 22, 2007, the U.S. Department of Housing and Urban Development (HUD) issued guidance clarifying the obligation of property owners who receive any federal assistance to accommodate people with limited English proficiency (LEP). The guidelines went into effect on March 7, 2007.

The rules, which we continue to strenuously oppose, effectively require covered owners to translate a broad array of “vital” documents in multiple languages, such as resident applications, leases, lease attachment applications, facility rules, facility regulations, termination/eviction notices and more. They also require verbal translations of these documents for those who do not read in their native language. The final HUD guidance is intended to comply with a 2000 Executive Order noting the need for federal agencies to comply with Title VI of the 1964 Civil Rights Act by ensuring that people with LEP have meaningful access to their programs and activities.

HUD’s attempt to shift responsibility for translating documents to owners is impractical and expensive and threatens the uniform system of HUD-adopted model lease forms by requiring owners to create their own translations of them. Furthermore, HUD should bear the burden of translating basic program documents, since HUD created many of these “model” documents in the first place. Also, private owners should not be responsible for assuring competency of translators and interpreters.

**Action Requested:** We urge Congress to provide adequate funding to HUD to maintain the LEP program. A court ruling in a NAA/NMHC-filed lawsuit held that HUD’s LEP Guidance is a non-binding, malleable standard that imposes no requirements on housing providers. While this ruling prevents HUD from pursuing enforcement actions based solely on the guidance, legislative language is still necessary to clarify that HUD is responsible for providing translations. We have called on HUD to revise its proposed implementation by recognizing that it is the

responsibility of the government to implement an LEP program and we urge Congress to see that HUD does not impose an unfunded federal mandate on apartment owners. We urge legislation that requires HUD to translate both its own official vital documents and selected non-HUD property documents into any language the Department identifies as necessary, and to provide a HUD-funded and HUD-administered toll-free telephone number for oral interpretation needs.

The model building codes and standards developed by the International Code Council (ICC), the National Fire Protection Association (NFPA) and the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) provide a uniform basis for code enforcement across the country.

The complete set of codes developed by the International Code Council is particularly important. The ICC codes—and the references they include to standards developed by the other groups—provide the apartment industry with a uniform and consistent basis for construction nationwide. They allow the industry to build accessible and affordable housing cost-effectively, without any reduction in the basic requirement for life safety.

These standards are developed at the national level and then adopted and enforced at the local level. NAA/NMHC strongly support the local adoption of the ICC's set of codes. The mixing and matching of different codes—such as if a locality adopts the ICC's International Building Code (IBC) but then adopts the NFPA's Uniform Fire Code (NFPA 1) instead of the ICC's International Fire Code—creates situations in which the provisions from one code contradict the provisions of another. In addition to creating confusion in the enforcement process, this mixing of different codes developed by different organizations usually means designing to the most restrictive provision, which results in unnecessary increases in construction costs.

The model building codes and standards developed by the International Code Council (ICC), the National Fire Protection Association (NFPA) and the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) provide a uniform basis for code enforcement across the country.

NAA/NMHC are actively involved in model code/standard writing efforts to ensure that the multifamily industry's interests are considered and that proposed changes to the codes and standards do not unnecessarily increase the cost of housing.

Working in the arena of national model building codes and standards development is a multi-year effort. The codes are updated on a three-year cycle, which means our work in any given year is for a code that will not be published for up to three more years.

For that reason, NAA/NMHC, with the help of consultants, is always working on two distinct horizons. On the short-term horizon, we review proposed code changes, collect evidence to support or oppose them and work behind the scenes to secure the necessary votes in our favor. On the long-term horizon, we are continuously educating key stakeholders of our positions to head off potentially negative code changes before they acquire momentum.

**Action Requested:** NAA/NMHC strongly urge local jurisdictions to adopt the full package of ICC construction codes without local amendments. NAA/NMHC further urge localities not to mix and match codes, such as adopting the ICC's International Building Code (IBC) but then adopting the NFPA Uniform Fire Code (NFPA

1) instead of the ICC's International Fire Code.

NAA/NMHC also urge local jurisdictions not to adopt the NFPA Life Safety Code (NFPA 101) for anything other than medical occupancies, because that code has requirements for existing apartments that are not aligned with the requirements in the IBC. Local jurisdictions are also urged to adopt the ICC codes and the National Electrical Code without any local amendments restricting the use of Nonmetallic Sheathed wiring.

## Accessibility

NAA/NMHC support accessible building code provisions that are compatible with the provisions of the Americans with Disabilities Act and the Fair Housing Act. NAA/NMHC support the 10 “safe harbor” design standards designated by HUD. HUD's acceptance of the ICC/ANSI A117.1 accessibility standard and the IBC as a safe harbor under HUD's Fair Housing Act Accessibility Guidelines is a major step forward in the development of a single set of national accessibility standards. NAA/NMHC also support the efforts of the United States Access Board (a federal agency committed to accessible design) to align the federal accessibility provisions with those contained in the model codes. We further encourage the Access Board to accept the ANSI A117.1-2003 Standard on Accessible and Usable Buildings and Facilities as the basis for accessibility technical requirements.

**Action Requested:** NAA/NMHC support the adoption of the accessibility provisions in the 2006 ICC codes.

## World Trade Center Disaster

NAA/NMHC support changes to the model codes that address technical issues identified in the National Institute of Standards and Technology's (NIST) investigation of the September 11, 2001, collapse of the World Trade Center. NAA/NMHC oppose any modifications intended to require high-rise buildings to be designed to withstand the impact of a very large, fuel-loaded airplane flying into the side of the building.

NIST's Final Report on the Collapse of the World Trade Center Towers, concerning the attack on the World Trade Center Towers on September 11, included 30 recommendations on items that NIST was concerned about in the design, construction and operation of very tall buildings. These recommendations are now being studied by a variety of groups responsible for the development of codes and standards that form the basis for the code provisions that establish the minimum building code requirements.

**Action Requested:** support changes in the national codes to address issues identified during the NIST investigations. However, our members oppose any proposed changes to requirements at the local level that have not been thoroughly discussed, acted on and approved at the national level during the rigorous model code development process.

## STATE DISTRIBUTION OF APARTMENT RENTERS IN 2008 (buildings with 5 or more apartments)

STATE	TOTAL RESIDENTS (IN THOUSANDS)	APARTMENT RESIDENTS (IN THOUSANDS)	SHARE OF STATE POPULATION	NUMBER OF OCCUPIED APARTMENTS (IN THOUSANDS)	NUMBER OF OCCUPIED APARTMENTS, 2000 (IN THOUSANDS)	CHANGE IN APARTMENTS SINCE 2000 (IN THOUSANDS)
Alabama	4,662	292	7%	155	152	3
Alaska	686	49	8%	26	28	-2
Arizona	6,500	659	10%	294	305	-12
Arkansas	2,855	180	6%	93	76	17
California	36,757	5,761	16%	2,420	2,408	13
Colorado	4,939	568	12%	295	274	21
Connecticut	3,501	331	10%	179	181	-2
Delaware	873	82	9%	38	37	1
District of Columbia	592	181	33%	99	104	-5
Florida	18,328	1,919	11%	925	887	38
Georgia	9,686	958	10%	436	388	48
Hawaii	1,288	178	14%	79	78	1
Idaho	1,524	75	5%	38	32	5
Illinois	12,902	1,263	10%	674	741	-67
Indiana	6,377	490	8%	274	257	16
Iowa	3,003	233	8%	139	119	19
Kansas	2,802	197	7%	115	106	9
Kentucky	4,269	278	7%	156	150	5
Louisiana	4,411	252	6%	132	155	-23
Maine	1,316	79	6%	51	46	5
Maryland	5,634	691	13%	347	340	6
Massachusetts	6,498	700	11%	389	414	-26
Michigan	10,003	735	8%	430	451	-20
Minnesota	5,220	505	10%	309	300	9
Mississippi	2,939	178	6%	84	74	10
Missouri	5,912	367	6%	217	216	1
Montana	967	55	6%	34	26	7
Nebraska	1,783	149	9%	96	90	6
Nevada	2,600	363	14%	168	154	14
New Hampshire	1,316	110	8%	61	63	-1
New Jersey	8,683	1,015	12%	508	507	1
New Mexico	1,984	125	6%	66	62	4
New York	19,490	4,373	23%	1,945	2,010	-65
North Carolina	9,222	687	8%	365	293	72
North Dakota	641	80	13%	53	44	9
Ohio	11,486	919	8%	538	564	-26
Oklahoma	3,642	245	7%	138	131	7
Oregon	3,790	387	11%	210	199	10
Pennsylvania	12,448	791	6%	495	494	0
Rhode Island	1,051	91	9%	58	61	-3
South Carolina	4,480	293	7%	145	119	26
South Dakota	804	65	8%	39	35	4
Tennessee	6,215	460	8%	244	243	1
Texas	24,327	3,039	13%	1,410	1,305	105
Utah	2,736	221	8%	92	80	12
Vermont	621	31	5%	19	20	-1
Virginia	7,769	808	11%	406	384	22
Washington	6,549	767	12%	423	384	39
West Virginia	1,814	783	4%	52	45	7
Wisconsin	5,628	460	9%	289	280	9
Wyoming	533	23	5%	14	14	0
<b>Total</b>	<b>304,060</b>	<b>32,841</b>	<b>11%</b>	<b>16,258</b>	<b>15,929</b>	<b>329</b>

Source: Census 2000 and 2008 American Community Survey. For more information about these data sources, please visit [www.census.gov](http://www.census.gov).  
Updated 12/31/2009

## STATE DISTRIBUTION OF NEW APARTMENT CONSTRUCTION IN 2008

Year-to-Date as of November 2009) (5+ units in structure; includes units for owner occupancy)

STATE	NUMBER OF APARTMENTS	TOTAL VALUE (THOUSANDS OF DOLLARS)
Alabama	2,803	\$185,513
Alaska	169	\$17,293
Arizona	1,029	\$109,624
Arkansas	1,930	\$99,087
California	7,248	\$962,262
Colorado	1,503	\$145,209
Connecticut	1,074	\$83,269
Delaware	371	\$23,256
District of Columbia	889	\$95,882
Florida	6,688	\$651,395
Georgia	2,329	\$7190,057
Hawaii	532	\$196,422
Idaho	376	\$35,681
Illinois	1,954	\$287,263
Indiana	1,968	\$150,642
Iowa	1,213	\$109,644
Kansas	2,088	\$144,645
Kentucky	836	\$39,774
Louisiana	1,020	\$62,027
Maine	122	\$8,692
Maryland	2,136	\$426,612
Massachusetts	1,704	\$203,112
Michigan	418	\$35,627
Minnesota	2,003	\$192,069
Mississippi	892	\$52,452
Missouri	1,512	\$101,641
Montana	209	\$21,253
Nebraska	346	\$26,557
Nevada	1,918	\$136,732
New Hampshire	330	\$26,326
New Jersey	3,754	\$509,586
New Mexico	438	\$27,490
New York	5,467	\$589,180
North Carolina	8,079	\$524,208
North Dakota	1,154	\$66,130
Ohio	1,898	\$101,353
Oklahoma	962	\$67,638
Oregon	1,626	\$162,881
Pennsylvania	2,037	\$162,236
Rhode Island	116	\$10,018
South Carolina	1,830	\$153,816
South Dakota	801	\$56,215
Tennessee	2,188	\$165,486
Texas	14,356	\$1,057,864
Utah	3,106	\$287,373
Vermont	213	\$14,501
Virginia	4,156	\$273,543
Washington	2,656	\$276,714
West Virginia	216	\$11,244
Wisconsin	2,001	\$146,674
Wyoming	2539	\$37,792
<b>Totals</b>	<b>105,203</b>	<b>\$9,521,960</b>

Source: www.census.gov/const/C40/Table2/t2yu200911.txt; www.census.gov/const/C40/Table2/t2yv200911.txt  
Updated 12/31/2009

## CHARACTERISTICS OF APARTMENT HOUSEHOLDS AND ALL U.S. HOUSEHOLDS IN 2007 (in thousands)

	ALL APARTMENTS	NEW APTS. (Built 1990-2007)	TOTAL HOUSEHOLDS (Renters and Owners)
<b>TOTAL HOUSEHOLDS</b>	<b>15,223</b>	<b>2,444</b>	<b>110,719</b>
<b>Age of Householder</b>			
<30	31%	34%	13%
30-44	29%	29%	28%
45-64	24%	16%	37%
65+	17%	22%	21%
Median Age	39	36	48
Mean Age	44	44	50
<b>Household Type (%)</b>			
Single Male	24%	21%	12%
Single Female	25%	29%	16%
Husband w/ Wife Only	8%	13%	22%
Husband/Wife/Kid(s)	9%	8%	25%
Single Parent	12%	11%	9%
Other	21%	19%	16%
<b>Household Members (%)</b>			
1	49%	49%	27%
2	27%	31%	33%
3	12%	11%	16%
4+	12%	9%	24%
Mean Number	2	2	2.5
<b>Children (under age 18)</b>			
Mean number	0.4	0.3	0.6
% Households with one or more	22%	19%	31%
<b>Household Income (% distribution)</b>			
Less than \$20,000	38%	33%	19%
\$20,000 - \$34,999	25%	24%	19%
\$35,000 - \$49,999	14%	14%	14%
\$50,000 - \$74,999	13%	15%	18%
\$75,000 +	10%	14%	30%
Mean Income	\$35,308	\$42,316	\$65,500
Median Income	\$25,500	\$30,000	\$47,000
<b>Household Income of "Market Rate" Renters</b>			
Mean Income	\$40,407	\$44,642	n/a
Median Income	\$30,000	\$32,493	n/a
<b>Hispanic Householders</b>			
Hispanic	19%	11%	11%
Non-Hispanic	81%	89%	89%
<b>Motor Vehicles</b>			
Mean # per Household	1.1	1.2	1.9
% Households with one or more	74%	84%	92%

Notes: All statistics are NMHC tabulations from the U.S. Census Bureau's 2007 American Housing Survey. The estimates are based on a nationally representative sample of 39,107 occupied housing units, of which are in structures with 5 or more units and 1,221 are newly built apartments, where newly built is defined as those built after 1989. Because of the relatively small number of newly built apartments in the sample, small differences between the estimated characteristics of these residents and others may be attributable to sampling error and should be interpreted cautiously. "Market Rate" apartments are those privately owned units whose residents reported that no government subsidy is received. Results in this table will differ from those of other national surveys because of differences in survey timing, question wording and sampling. Updated 2008

**PERCENT DISTRIBUTION OF \$911.6 BILLION IN MULTIFAMILY MORTGAGE CREDIT OUTSTANDING IN 2009 (Third Quarter)**

Commercial Banks	24%
Savings Institutions	7%
Life Insurance Companies	6%
Fannie Mae	13%
Freddie Mac	8%

**Mortgage Securities**

Ginnie Mae	4%
Fannie Mae	11%
Freddie Mac	1%
CMBS	13%
Individual and others	13%

Source: Federal Reserve Board  
Updated 12/31/2009

**FEDERALLY ASSISTED RENTAL HOUSING: 2009**

**NUMBER OF HOUSING UNITS**

Tenant Based Voucher	1,912,551
HOME Rental Units Completed	19,098
CDBG Rental Units Rehabilitated	20,097
Section 236 program	176,770

Sources: <http://www.hud.gov/offices/cfo/reports/2009section2.pdf>  
<https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>  
Updated 1/4/2009

**RENTER OCCUPIED HOUSING U.S. HOUSEHOLDS: RENTERS & OWNERS**

TYPE OF HOUSEHOLD	NO. OF HOUSEHOLDS (IN THOUSANDS)	% OF U.S. TOTAL	NO. OF RESIDENTS (IN THOUSANDS)
Renter Occupied Housing	37,469	32%	88,558
Owner Occupied Housing	79,350	68%	210,548
<b>TOTAL</b>	<b>116,819</b>	<b>100%</b>	<b>299,106</b>

Source: NMHC tabulations of 2009 Current Population Survey, Annual Social & Economic Supplement, U.S. Census Bureau (<http://www.census.gov/cps>)  
Updated 9/11/2009

**APARTMENT CONSTRUCTION IN 2009 (through November 2009)**

Apartments Authorized for Construction ..... 105,203  
(5+ units in structure; includes units for owner occupancy)

Source: [www.census.gov/const/C40/Table2/t2yu200911.txt](http://www.census.gov/const/C40/Table2/t2yu200911.txt)

Value of Apartments Authorized (in thousands): ..... \$9,521,960

Source: [www.census.gov/const/C40/Table2/t2yv200911.txt](http://www.census.gov/const/C40/Table2/t2yv200911.txt)

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**4300 Wilson Blvd.  
Suite 400  
Arlington, VA 22203  
703/518-6141  
Fax 703/248-9440  
[www.naahq.org](http://www.naahq.org)  
[information@naahq.org](mailto:information@naahq.org)**



**1850 M St. NW  
Suite 540  
Washington, DC 20036  
202/974-2300  
Fax 202/775-0112  
[www.nmhc.org](http://www.nmhc.org)  
[info@nmhc.org](mailto:info@nmhc.org)**

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