



July 31, 2023

Federal Housing Finance Agency
Office of Multifamily Analytics and Policy
400 7th Street SW, 9th Floor
Washington, D.C. 20219

Re: Tenant Protections for Enterprise-Backed Multifamily Properties Request for Input

To Whom It May Concern:

On behalf of the nearly 100,000 combined members of the National Multifamily Housing Council (“NMHC”)¹ and the National Apartment Association (“NAA”),² we submit these comments in response to the Federal Housing Finance Agency’s (“FHFA”) request for input (“RFI”)³ with respect to contemplated tenant protections for Enterprise-backed multifamily properties. We are committed to addressing the nation’s pressing housing needs; however, we face serious obstacles in addressing rising housing costs and delivering much-needed supply. We therefore urge you to consider the impacts of any requirements on Enterprise-backed financing on housing production and affordability.

Over one-third of Americans rent their housing and 38.9 million of them live in multifamily apartment homes consisting of five or more units. For more than 26 years, NMHC and NAA have partnered to provide a single voice for America’s apartment industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management and finance. NMHC represents the principal officers of the apartment industry’s largest and most prominent firms. As a federation of 141 state and local affiliates, NAA encompasses over 92,000 members representing more than 11.8 million apartment homes globally.

NMHC and NAA appreciate FHFA’s recognition of the importance of the multifamily housing market, particularly with respect to the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac,” and collectively with Fannie

¹ Based in Washington, D.C., NMHC is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, who help create thriving communities by providing apartment homes for 38.9 million Americans, contributing \$3.4 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living.

² NAA serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 141 state and local affiliates, NAA encompasses over 95,000 members representing more than 11.6 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity and innovation.

³ Tenant Protections For Enterprise-Backed Multifamily Properties Request for Information – May 2023, <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Multifamily-Tenant-Protections-RFI.pdf> (“RFI”).

Mae, the “Enterprises”). First and foremost, there are already existing state and local laws addressing tenant protections that cannot and should not be duplicated at the federal level. Additionally, as FHFA contemplates proposing requirements on Enterprise-backed multifamily properties related to so-called tenant protections, we strongly urge FHFA to remain cognizant of its limited statutory authority in this area. Instead, it must focus on real solutions for housing affordability. Federal proposals like these, while well-intended, would only serve to add confusion for residents facing financial hardship and exacerbate the current affordable housing crisis nationwide. Accordingly, we are offering several solutions and guiding principles that FHFA should consider when addressing the root cause of the nation’s affordability challenges: a woeful lack of supply of affordable housing units.

Relevant pieces of data and numerous studies indicate that imposing additional layers of federal regulation on top of existing federal, state and local regulations is not a solution to the affordable housing crisis. Doing so would certainly only serve to increase market uncertainty, discourage use of Enterprise-backed financing and disincentivize investment in affordable housing, thereby making the current crisis worse. Instead, solutions must focus on expanding housing supply and removing the true barriers to developing and preserving affordable housing.

(I) Housing Supply and Affordability are the Key Issues That Must Be Addressed:

NMHC and NAA are committed to addressing housing equity, affordability and access, and we appreciate FHFA’s dedication to these shared goals. To that end, NMHC and NAA are deeply concerned that the RFI overlooks the most pressing issue impacting the nation’s affordable housing market: the lack of adequate supply at all price points and the costs and barriers to the development and preservation of the existing affordable stock. The country faces a nationwide housing affordability challenge and a historic demand for rental housing.⁴ Beginning in the mid - 2000s, the nation experienced the greatest renter wave in its history as the number of households who rent rose by more than 7 million.⁵ Fueled by this extraordinary demand for apartment homes, NMHC and NAA recently conducted research finding that 4.3 million new apartment homes need to be built by 2035 to meet the nation’s demand for rental housing.⁶ This includes an existing shortage of 600,000 apartments stemming from underbuilding, due in large part to the 2008 financial crisis.

Underproduction of housing has translated to higher housing costs and has resulted in a consequential loss of 4.7 million affordable housing units (those with rents less than \$1,000 per month) from 2015-2020.⁷ In addition, the total share of cost-burdened apartment households (those paying more than 30 percent of their income on housing) has increased steadily over several decades, reaching 57.6 percent in 2021.⁸ During this same period, the total share of

⁴ Hoyt Advisory Services, “Estimating the Total U.S. Demand for Rental Housing by 2035.” (2022), <https://www.weareapartments.org>; NMHC Quick Facts, <https://www.nmhc.org/research-insight/quick-facts-figures/>.

⁵ U.S. Census Bureau, Various Surveys.

⁶ See Hoyt Advisory Services.

⁷ American Housing Survey, U.S. Census Bureau, “NMHC tabulations of 1985 American Housing Survey microdata.” (2021).

⁸ *Id.*

severely cost-burdened apartment households (those paying more than half of their income on housing) increased from 20.9 to 31.0 percent.⁹

Our data indicates that the primary and uniform solution to the nation's affordable housing crisis is to expand the supply of affordable housing, including multifamily housing. Unfortunately, our government has not invested sufficiently in creating the affordable housing stock we need as a country. Currently, only 1 in 4 households that qualify for federally subsidized housing receives assistance.¹⁰ As a result, the vast majority of affordable rental housing is provided by private housing operators and developers. Accordingly, incentivizing the private sector to invest in and develop more multifamily housing is the most effective way for FHFA and the Enterprises to meet their overall goals of providing more affordable housing to all Americans. Creating additional layers of federal regulations will deter the capital investment needed to support private efforts to build more housing, ultimately resulting in more housing scarcity and eventually higher rents. Instead, FHFA and the Enterprises should focus on formulating policy initiatives that would result in more liquidity being available at competitive prices to enable the expansion of affordable housing supply, particularly multifamily housing.

New federal requirements for Enterprise-backed multifamily homes, which may contradict existing state and local requirements that apply to all rental units in a given jurisdiction, will lead to decreased private sector investment in the development of housing stock if there is a discernible impact on the already-limited return on investment and the long-term viability of the applicable property. Borrowers will simply seek financing elsewhere or decide not to invest in the multifamily market, which would be gravely detrimental to FHFA's and the Enterprises' collective affordable housing goals. In addition, the higher cost of capital will result in increased costs and, in turn, increased rents.

(II) Multifamily Housing Market Success Depends on Reliable Capital:

The public purpose of a federally-supported secondary market for multifamily housing should be squarely focused on the creation and sustainability of critical market liquidity, and not on specific mandates related to housing operations and management. We caution FHFA against efforts that stray from this critical mission. However well-intentioned such efforts may be, they will have significant adverse and unintended consequences that will undermine our shared goals of expanding affordable housing opportunities.

The industry currently faces significant challenges to new apartment construction, development, preservation and renovation. Many factors influence the ability for apartment providers to meet the nation's demand for rental housing, but the availability of consistently reliable and competitively priced capital is essential. The nation's affordability goals depend on the availability of capital from a variety of sources, such as the Enterprises, banks, life insurance companies, pension funds, equity investors and others. However, the Enterprises play a crucial role in making sure that sufficient housing is available at all price points and in all markets,

⁹ *Id.*

¹⁰ Erika C. Poethig, "One in four: America's housing assistance lottery." (May 2014); <https://www.urban.org/urban-wire/one-four-americas-housing-assistance-lottery#:~:text=Today%2C%20only%2024%20percent%20of,wins%20the%20housing%20assistance%20lottery.>

including urban, rural and smaller secondary and tertiary markets that may not meet the credit or return standards required by many private capital debt providers.

The Enterprises' multifamily programs adhere to a business model that includes prudent underwriting standards, sound credit policy, effective third-party assessment procedures, risk-sharing and retention strategies, effective loan portfolio management and standardized mortgage documentation and execution. These programs have aided in the production of millions of market-rate workforce housing units without direct federal appropriations and with sustained liquidity in all economic climates, while ensuring the safety and soundness of their loans and securities. As a result of the liquidity provided by the Enterprises, the United States has the highest quality housing and most stable rental housing sector in the world.

(III) FHFA Should Focus on Liquidity, Not New Mandates:

A mission focused on ensuring market liquidity has allowed the Enterprises to achieve and maintain a sterling performance record in the multifamily sector. This stems from the ability to build a balanced book of business, including unsubsidized properties, as well as deeply targeted affordable housing properties, which have leveraged limited, federal assistance programs, such as Section 8 and the Low-Income Housing Tax Credit. Just as critical, the Enterprises' multifamily programs, through their broad platforms, have been able to provide capital for properties located in markets that do not meet the credit or return standards required by many private capital debt providers. Not only does a broad multifamily lending platform help the Enterprises manage risk, but it also ensures that there is a sufficient supply of liquidity in severe market downturns.

New requirements or restrictions attached to Enterprise-backed financing can interfere with the applicable programs' competitiveness and reliability, and ultimately, result in limitations on the markets or properties served by the Enterprises. This undermines the critical public policy mission they have historically served. Failure to ensure sufficient liquidity for all types of apartments will have an unfortunate spillover effect that could prove extremely harmful for America's renters.

(IV) The Proposals Contemplated Under the RFI Are Misguided and Will Negatively Impact FHFA's and the Enterprises' Goals to Boost Affordable Housing:

(A) State and Local Laws and Regulations Already Address these Issues and Duplicating them Does More Harm than Good.

State and local laws and regulations already address the issues under consideration in the RFI. Additional FHFA mandates would create unnecessary and confusing duplication, disincentivize housing providers and developers from participating in the affordable housing market and create operational distinctions between Enterprise-backed and non-Enterprise-backed properties in the same jurisdiction.

Under the RFI, and as part of previous discourse from FHFA and/or the Enterprises, it is evident that policymakers are considering several misguided proposals related to the relationship between owners and operators of Enterprise-backed multifamily buildings and their residents. Below, we provide key data and other information that FHFA and the Enterprises should take into consideration when considering the effectiveness of certain proposals. Key points of data and

historical trends strongly indicate that the following proposals contemplated under the RFI should not be enacted and, if so enacted, would materially hurt the FHFA's overall goal of increasing affordable housing opportunities nationwide.

Broadly speaking, FHFA's and the Enterprises' consideration of adding layers of federal regulation to the already-regulated federal, state and local-level rental housing system is causing significant concern in the multifamily capital markets at a time when the need for more resources to increase housing supply has never been greater. The scope of existing laws and regulations touches on every aspect of the multifamily housing operations, including but not limited to:

- Federal fair housing laws and regulations, including the Fair Housing Act, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973 (for federal funding recipients) and Title VI of the Civil Rights Act (also for federal funding recipients). These existing protections broadly mandate that, among other requirements, approaches to admissions and occupancy are not discriminatory and that housing is available and accessible for persons with disabilities.
- Federal credit and debt collection requirements. The Fair Credit Reporting Act includes required disclosures for applicants. The Fair Debt Collection Practices Act applies to housing providers as well.
- State and local laws govern the landlord-tenant relationship, including the application process, rent payment and nonpayment, the end of tenancies and evictions and everything in between. They often include additional fair housing protections.
- Federally assisted housing like Section 8, public housing and the Low Income Housing Tax Credit Program are subject to specific regulations governing criminal background checks, notices of eviction, lease content, and other components of application/admission, occupancy and termination. These programs already create additional protections for the lowest income households who are most in need of support. New Enterprise-wide requirements, which would also apply to market rate properties where residents have existing economic and other resources, would be unnecessary and deter investment in new and existing housing.

Further, past precedent makes it clear that there are boundaries to federal intervention into the rental housing market. Over decades, policymakers, as well as courts looking at preemption questions, have found local solutions and jurisprudence to be the most appropriate means of ensuring that rules and regulations in the housing space are tailored to specific market needs. Additional federal requirements can circumvent or, in some cases, conflict with the lease agreements or other applicable agreements between residents and housing providers. In fact, the courts have addressed and limited the federal government's role in regulating non-federal rental housing and left this matter to the states and localities.

State and local laws can meaningfully protect renters' rights and existing protections may, for example, include requirements to be notified of a rent increase or a change in the lease contract that may result from the sale, closure or foreclosure of their apartment community and the right to cure lease violations prior to an eviction. The Enterprises already have the authority to enforce

compliance with these requirements, given that all Enterprise multifamily documents have broad representations, warrants and loan covenants that require borrower and servicer compliance with all state and local laws. Recently, Freddie Mac published a white paper that surveyed statewide tenant protection laws across all fifty states.¹¹

This paper provides a basis for the Enterprises and FHFA to understand the extensive state and local regulatory frameworks in place with respect to tenant protections. Issuance of this paper was a promising first step; however, we respectfully suggest that the Enterprises undertake a review of the existing federal, state and local laws in place to understand the nuances and market impacts that, in some cases, are already negatively affecting market participants before attempting to impose new mandatory federal requirements.

(B) Rent Control

Rent stabilization, rental price regulation or rent control by any other name is a failed economic and housing policy that exacerbates the kinds of housing affordability challenges it purports to solve. FHFA and the Enterprises should recognize the damaging impacts of rent control to the long-term sustainability of the multifamily housing market and to low-income residents in underserved communities and avoid any such requirements in Enterprise-backed products.

This assertion is demonstrated by relevant facts and studies undertaken in states and localities where rent control rules are in place. In a study done by NMHC and the National Association of Home Builders (NAHB), 87.5 percent of developers indicated that they avoid working in jurisdictions with rent control entirely.¹² This results in the opposite outcome from what policymakers intended when creating rent control instead of affordable housing being available in these areas, they are avoided entirely.

Similarly, from December 2022 to February 2023, NAA commissioned interviews with housing providers and developers from three different markets impacted by rent control policies and proposals: (i) St. Paul, Minnesota; (ii) Santa Ana/Santa Barbara, California; and (iii) Portland/Eugene, Oregon.¹³ The interviewees ranged from large firms operating thousands of units and having properties across the country to small mom-and-pop businesses with a handful of units and, often, invested in real estate as part of a retirement plan or as a second source of income.¹⁴ In addition, this research was supplemented with an online public opinion poll of over 1,000 respondents, across the United States in February 2023, in which the poll questions focused on housing availability, residential construction and policy perspectives. NAA's research identified troubling findings related to the impacts of rent control regulations on the applicable localities:¹⁵

¹¹ <https://mf.freddiemac.com/research/insight/national-survey-tenant-protections>.

¹² National Multifamily Housing Council and National Association of Home Builders, "Regulation: 40.6 Percent of the Cost of Multifamily Development." (2022), <https://www.nmhc.org/research-insight/research-report/nmhc-nahb-cost-of-regulations-report/>.

¹³ National Apartment Association, "Examining the Unintended Consequences of Rent Control Policies in Cities Across America." (March 2023), <https://www.naahq.org/examining-unintended-consequences-rent-control-policies-cities-across-america>.

¹⁴ *Id.*

¹⁵ *Id.*

- *Over 70 percent of housing providers say rent control impacts their investment and development plans, including, but not limited to, reducing investments, shifting plans to other markets and canceling plans altogether.*
- *75 percent of Americans want policies that increase funding for local programs by attracting more residential and commercial development. However, rent control drives away investments and reduces potential tax revenue contributed by rental housing providers. Two-thirds of housing providers said they would absolutely not consider investing in markets with strict rent control policies.*
- *With rent control in effect, housing providers are faced with the difficult financial strain of absorbing essential maintenance costs and are forced to reduce investments in improvements and nonessential maintenance. As a result, 54 percent said they expect to or would consider selling some assets at a loss due to the financial burdens of rent control policies.*

The facts and decades of research indicate that rent control stifles housing investments across markets, particularly in underserved communities and ultimately hurts low-income communities and communities of color in their quest for affordable housing and/or home ownership. NMHC and NAA strongly urge FHFA and the Enterprises to take rent control proposals off the table as they consider tenant proposals under the RFI.

As more fully described above, rent control neither produces outcomes favorable to the classes of residents FHFA is seeking to protect, nor does it allow FHFA to satisfy its overall goal of boosting affordable housing opportunities. FHFA and the Enterprises must consider that rent control may appear to be a politically expedient solution for some localities, but in reality, it results in a reduction of the available supply of rental housing in a community.¹⁶ In fact, rent control has proven to push housing providers out of applicable markets to the detriment of the communities that so desperately need more affordable housing units, impeding any new units being built, while effectively assuring that old units are left open to deterioration or lack of investment.¹⁷

In a February 2022 study commissioned by NMHC, only 27 percent of firms surveyed said that they would be willing to keep their current, or add new investments, in rent-controlled markets.¹⁸ In a San Francisco case study, the National Bureau of Economic Research (NBER) found that landlords subject to rent control “reduced rental housing supply by 15 percent, causing a 5.1 percent city-wide rent increase.”¹⁹

¹⁶ NMHC, “The Impacts of Rent Control: A Research Review and Synthesis.” (May 2018), <https://www.nmhc.org/research-insight/research-report/the-impacts-of-rent-control-a-research-review-and-synthesis/>.

¹⁷ *Id.*

¹⁸ NMHC, “Quarterly Survey of Apartment Market Conditions.” (January 2022), <https://www.nmhc.org/news/press-release/2022/january-apartment-market-conditions-show-improvement/>.

¹⁹ Diamond et al, “The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco.” (2017), https://www.nber.org/system/files/working_papers/w24181/w24181.pdf.

It is imperative that FHFA and the Enterprises keep these realities in mind when considering rent control policies.

(C) Section 8 Housing Choice Voucher (“HCV”) Program:

NMHC and NAA were pleased to see Fannie Mae launch a pilot in North Carolina and Texas incentivizing borrowers to participate in the Section HCV program.²⁰ Our long-held position has been that the Section 8 HCV program has the potential to be the nation’s most effective affordable housing and community development tool. However, the program’s potential success is limited by too many inefficient and duplicative requirements, which discourage private providers from accepting vouchers, among other negative consequences. Examples of such ineffective requirements include, but are not limited to, delayed renter approval processes; repetitive unit inspections; resident eligibility certification; other administrative burdens not required in the standard leasing transaction and regulatory paperwork; and rents that do not keep up with market rates. As a result, the Department of Housing and Urban Development (“HUD”) reports that between 2009 and 2016, the number of unique landlords participating in the HCV program declined by 80,000.²¹

Meanwhile, a 2018 HUD-sponsored study reported that 68 percent of non-participating owners had accepted vouchers at one point, but decided to stop. The researchers found that these housing providers were mostly motivated to leave because of the time and costs associated with the inspection process, a lack of support from the local public housing agency and the burdensome paperwork and bureaucracy required.²² Instead of seeking to add layers of federal regulations on top of the existing set of federal, state and local requirements in the multifamily housing market, NMHC and NAA urge FHFA and the Enterprises to work with other policymakers and Congress to continue to identify ways to incentivize additional voluntary private participation in the HCV program.

NMHC and NAA, together with our partners and other stakeholders, support the Choice in Affordable Housing Act, bipartisan legislation that authorizes and directs additional resources to attract and retain property owners in the HCV program. Specifically, this bill enables voucher administrators to provide signing bonuses to property owners in low-poverty areas, helps with security deposits, reduces inspection delays and expands the use of neighborhood-specific data to set rental subsidies. NMHC and NAA urge FHFA to consider these types of initiatives as policymakers and regulators consider additional ways for the Enterprises to increase voluntary acceptance of housing choice vouchers.

²⁰ “Fannie Mae Introduces Expanded Housing Choice Initiative to Increase Access to Affordable Housing for Voucher Holders.” (April 2022), <https://www.fanniemae.com/newsroom/fannie-mae-news/expanded-housing-choice-initiative>.

²¹ HUD, “Message From PD&R Senior Leadership – Landlords.” (2018), <https://www.huduser.gov/portal/periodicals/em/winter19/highlight1.html>.

²² The Poverty and Inequality Research Lab at Johns Hopkins University, “Urban Landlords and the Housing Choice Voucher Program - A Research Report.” (2018), <https://www.huduser.gov/portal/publications/UrbanLandlords.html>.

(D) Evictions

NMHC and NAA fully recognize that the act of an eviction is an unwanted and difficult experience for all parties involved. The pandemic highlighted housing providers' efforts to utilize all available resources and be as flexible as their circumstances allow to help their residents avoid eviction and remain stably housed. Yet, the eviction process is critical for resolving housing disputes and for housing providers to legally recover possession of their property when a renter does not comply with their lease obligations. Accordingly, eviction is often the last resort of a housing provider in the event that a lease agreement or corresponding document has been breached and all other remedies have been exhausted. While eviction is most often discussed in terms of non-payment of rent, other prevalent reasons for eviction include fraud during the application process, criminal activities and other lease violations.

Property owners, large and small, often seek to mitigate evictions, most often by working with affected residents on payment plans and connecting them with social services. However, without adequate resources to operate a property due to resident non-payment, housing providers are unable to make needed investments, thus negatively impacting all of the residents in the applicable building and community at large.

NMHC and NAA members cite several issues related to evictions from a policy perspective, including, but not limited to, the impact of the prolonged federal eviction moratorium, just cause eviction mandates and other existing state and local restrictions thereof. Notably, the Coronavirus Aid, Relief, and Economic Security Act's ("CARES Act") 30-day notice to vacate requirement has put an administrative and financial strain on property owners' operations. The eviction process has become increasingly complex and can be particularly challenging given the diversity of jurisdictional requirements and processes that govern evictions. Undue delays and uncertainty create serious impediments for property owners who are unable to collect rent or re-lease abandoned housing units, particularly smaller property owners who rely on consistent rental payments to meet their own financial obligations.

We strongly encourage federal policymakers to focus on efforts that address the root causes of eviction, as it is often a symptom of financial distress or other factors impacting the household. Given the complex nature of the causes of eviction and housing policies at the state and local level, a one-size-fits-all federal approach is not effective. The appropriate federal role in evictions is to leverage federal dollars to help at-risk residents avoid eviction in the first place, such as rental assistance and increasing federal subsidy programs. Efforts that would change the eviction process or restrict the use of eviction could have unintended consequences that hurt the very renters that policymakers are trying to serve. Lastly, such proposals create greater market uncertainty and disincentivize investors and housing providers from participating in the multifamily market.

(E) Application of Manufactured Housing Community ("MHC") Loan Tenant Protections to Multifamily Housing

The RFI discusses the potential application of existing tenant protections in the MHC space to the multifamily housing market. For example, the RFI notes that in 2022, "FHFA sought stakeholder

feedback on tenant site lease protections for residents of Manufactured Housing Communities (MHCs). Typically, residents of MHCs own their homes and lease the pad on which they are sited. The feedback obtained provided important input on how the Enterprises can balance providing appropriate borrower and tenant protections in a way that is operationally feasible for both the Enterprises and their counterparties.”²³

NMHC and NAA recognize that FHFA has previously sought stakeholder feedback on tenant protections in the MHC space. However, FHFA’s effort to link MHC with the multifamily housing market is both misguided from a policy perspective and not statutorily authorized. There are fundamental differences between the MHC market and the multifamily market. For example, the ownership structure of Manufactured Housing Community (MHCs) is very different than that of housing units. This is why manufactured housing is generally covered by separate and distinct, state landlord and tenant laws applicable only to manufactured housing. In addition, MHCs are one of the three specified underserved markets identified in the Safety and Soundness Act for which the Enterprises are required to comply with a duty to serve. There is direct congressional authorization for the Enterprises to enact rules and regulations that advance MHCs to comply with the duty to serve obligations.

There is no corresponding express congressional authorization or directive for the Enterprises to enact a similar regulatory framework in the multifamily housing market. In fact, Congress’ decision to only list three specified markets instead of including more broad categories indicates Congress’ express legislative intent that the duty to serve obligations are only applicable to the specified categories of markets. Accordingly, FHFA’s consideration of applying MHC rules and standards to Enterprise-backed multifamily loans and housing units lacks statutory authority, which would only result in imposing further legal uncertainty into the multifamily housing market.

(F) Direct the Enterprises to Create New Program Offerings

We reiterate our appreciation for FHFA’s role in directing the focus of the Enterprises to think creatively of ways to expand their programmatic offerings to address rental housing affordability. For example, Fannie Mae’s Sponsor-Initiated Affordability (“SIA”) and Freddie Mac’s Tenant Advancement Commitment (“TAC”) programs represent important ways the Enterprises can offer incentives to create or maintain affordable units, particularly in the multifamily housing market. We urge FHFA and the Enterprises to consider additional means in which the SIA and TAC programs can be made more user-friendly and effective for all stakeholders. Instead of imposing additional mandates that are duplicative of existing state and local regulations, FHFA and the Enterprises should focus on strengthening existing programs offered by the Enterprises and making them more user-friendly and effective. To that end, we offer the following points of consideration as FHFA reviews public input submitted in response to the RFI:

- FHFA and the Enterprises should consider developing a catalogue or other consolidated resource containing information on communities that are meeting FHFA’s and the Enterprises shared goals related to affordable housing. It would be helpful for our members to see which innovative policies and programs are being used by other market

²³ The RFI at 4.

participants in communities across the country to successfully accomplish our shared goals of expanding affordable housing.

- Our members cite hundreds of examples in multiple locations where affordable housing is being developed and preserved through a combination of federal, state and local financing tools. We urge FHFA and the Enterprises to consider consolidating this information and providing a resource for the public that identifies and categorizes such information so that other stakeholders in the multifamily housing industry can utilize these tools to advance our shared goals of expanding affordable housing.
- Developing and preserving affordable housing requires layered financing that carries with it multiple regulatory agreements and requirements. We urge the Enterprises to consider additional means that would streamline these complicated processes and assist our members in navigating the complex web of various regulatory requirements.
- The Enterprises should continue to focus on resident-centric programs and pilots that produce great outcomes for residents such as Fannie Mae's positive rent payment reporting program or Freddie Mac's teaming with ESUSU to help support residents.
- Creating additional incentives in the TAC and SIA programs could attract more developers to participate thereof.

We appreciate and recognize the underlying concerns behind the issuance of the White House Resident-Centered Housing Challenge and the broader blueprint for a Renters Bill of Rights. However, the data indicates many of the proposed solutions in such frameworks would be detrimental to our shared goals of expanding affordable housing opportunities nationwide. Instead, the Administration would be better served by focusing on its Housing Supply Action Plan to expand affordable housing supply and address the true barriers to meeting this goal, which include, but are not limited to, exclusionary zoning, excessive permitting and approval processes, environmental review requirements, high fees and assessments imposed on developers, and most notably, the lack of incentives for the further development of multifamily housing.

(V) FHFA and the Enterprises Lack Direct Statutory Authority to Implement the Types of Tenant Rules Contemplated Under the RFI:

FHFA and the Enterprises serve an important role in ensuring capital liquidity across markets and stabilization of the nation's mortgage finance systems. FHFA was established as an independent federal agency by Congress in 2008 for the express purpose of regulating the Enterprises, among other entities in the housing space. Pursuant to the terms of FHFA's conservatorship of the Enterprises, all actions taken by the Enterprises related to new activities and/or products, subject to certain exceptions, are subject to the FHFA's final approval.²⁴ The RFI notes that the Enterprises have the shared purposes of providing stability in the secondary residential mortgage market and taking actions that increase the liquidity utilized within the mortgage market, including the distribution of investment capital for residential mortgage, among other things.²⁵ The actions and

²⁴ 12 C.F.R. § 1253.4(a)-(b); The RFI at 2.

²⁵ The RFI at 2; 12 U.S.C. § 4511(b); 12 U.S.C. § 1716, et seq. and 12 U.S.C. § 1451, et seq.

responsibilities of the Enterprises are tethered to the furtherance of capital liquidity and market stabilization goals. Therefore, there is no clear authority for FHFA or the Enterprises to implement specific tenant protections as neither the Statutory nor Regulatory Activities outlined in applicable guidelines provide that tenant protections may be implemented by the Enterprises.

(A) Safety and Soundness Responsibilities Conflict with Certain Tenant Proposals Set Forth Under the RFI.

While neither FHFA nor the Enterprises have specific congressional authority to enact the breadth of tenant protections contemplated in the RFI, FHFA and the Enterprises do have certain express, statutory obligations that must be considered before undertaking any activity. FHFA is the steward of safety and soundness requirements for the Enterprises, which are explicitly tied to liquidity and investment goals. Not only is this authority limited, but these responsibilities preclude FHFA and Enterprise efforts that would jeopardize the performance of the Enterprises or their ability to fulfill these goals, including the implementation of tenant protections that cause disinvestment or damage loan performance.

The RFI describes FHFA's oversight responsibilities over the Enterprises' duty to serve obligations pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by Section 1129 of the Housing and Economic Recovery Act of 2008, (as amended, the "Safety and Soundness Act"). Under the Safety and Soundness Act, Congress explicitly established a duty for the Enterprises to serve three underserved markets: (i) manufactured housing, (ii) affordable housing preservation for low- and moderate-income families and (iii) rural markets.²⁶ FHFA's implementing regulations for such duty to serve obligations make expressly clear that the duty to serve constitutes an affirmative duty on the part of the Enterprises to increase the liquidity of mortgage investments and enhance the distribution of investment capital available for mortgage financing in such markets.²⁷ Generally, the Enterprises are each required to formulate an Underserved Markets Plan that sets forth the activities proposed by the applicable entity for purposes of complying with the duty to serve obligations, in each case subject to public input processes and FHFA approval, as applicable.

In fact, 12 U.S.C. 4565(b) expressly sets forth the guidelines that the Enterprises are required to comply with in satisfying the duty to serve obligations, including, as follows:

1. Design programs and products that facilitate the use of assistance provided by the Federal Government and State and local governments; and
2. Take affirmative steps to—
 - i. assist primary lenders to make housing credit available in areas with concentrations of low-income and minority families, and
 - ii. assist insured depository institutions to meet their obligations under the Community Reinvestment Act of 1977 [12 U.S.C. 2901 et seq.],

²⁶ The RFI at 4; 12 U.S.C. § 4565.

²⁷ 12 U.S.C. § 4565(a)(1); 12 C.F.R. Part 1282 Subpart C.

which shall include developing appropriate and prudent underwriting standards, business practices, repurchase requirements, pricing, fees and procedures.

The duty to serve is both narrow in scope and specific that (a) it is focused on loans (e.g., offerings and servicing), and (b) explicitly focused on the three categories of underserved markets identified in the statute and regulations. Despite these key limitations on the scope of the duty to serve obligations of the Enterprises, the RFI goes beyond such scope by claiming:

“The Enterprises have a responsibility to not only ensure liquidity is available for affordable rental housing, but also to address challenges faced by tenants and property owners in the multifamily housing market. For example, the Enterprises’ charter acts require the Enterprises, as part of their annual housing reports, to assess their underwriting standards, policies, and business practices that affect low- and moderate-income families or cause racial disparities, including how their activities support the objectives of comprehensive housing affordability strategies under related statutes.”²⁸

Despite the virtue of such goals, nowhere in the RFI does FHFA point to a specific source of legal authority conferred to it by Congress that would allow it to enact the types of proposals related to residents in Enterprise-backed multifamily properties discussed in the RFI, including, but not limited to, rent control or stabilization, changes to source of income fair housing requirements or other operational practices, requiring lease renewals or specific circumstances for eviction, or lengthening the notice period or lease termination. Tenant protections similar to those FHFA seeks to promulgate have traditionally been provided by the state and local governments. In fact, the example that FHFA points to above with respect to the Enterprises’ responsibility to residents and property in the multifamily housing market merely constitutes a vague reference to the Enterprises’ charter that urges assessments of their policies and impacts on low- and moderate-income families or that cause racial disparities. To the contrary, the plain text of the underlying statute(s) and corresponding regulations demonstrate that FHFA’s statutory authority in this context is limited to loans within the three specified underserved markets. Therefore, it is incorrect to assert that the Enterprises have a responsibility “to address challenges faced by tenants and property owners in the multifamily housing market” as the RFI claims. In effect, these proposals would create an outcome in which FHFA takes actions that harm the entire purpose behind its creation and the creation of the Enterprises.

Even in the absence of an explicit congressional directive, the Safety and Soundness Act expressly sets forth various mechanisms for the Enterprises’ implementation of duty to serve activities with corresponding administrative processes²⁹ The sweeping changes discussed in this proposal would have a major impact on multifamily housing providers, and a process that considers the feedback

²⁸ The RFI at 2.

²⁹ These include Statutory Activities, Regulatory Activities and Additional Activities. Statutory Activities are specific programs for which the Enterprises are required to create loan products and underwriting guidelines to address the affordable housing preservation underserved market. 24 C.F.R. 1282.33(c), Manufactured Housing Market; 24 C.F.R. 1282.34(d), Affordable Housing Preservation Market; 24 C.F.R. 1282.35(c), Rural Markets. Regulatory Activities are implemented through an APA process of notice and comment rulemaking. Additional Activities are expected to “facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families” within the three specified underserved markets.

of all stakeholders is critically important. Any changes or requirements FHFA may recommend pursuant to the RFI should therefore follow the APA rulemaking process.

However, we do not believe the proposals under consideration by FHFA related to tenant protections in Enterprise-backed multifamily properties comply with the regulatory definitions and processes for enactments of Statutory Activities, Regulatory Activities or Additional Activities because of the massive impacts these policies would have on the multifamily market and related secondary mortgage market, which the Enterprises are expected to maintain and foster over time. These proposals would result in FHFA acting in a manner that contravenes the entire purpose behind its creation and the creation of the Enterprises. If FHFA and/or the Enterprises seek to apply these proposals to all products and multifamily related services, the scope of affected products and services would go far beyond the specified underserved markets to which the duty of serve obligations apply, and in doing so, they would be acting without any required congressional authorization or directive.

Moreover, the consequences of such broad application would undoubtedly negatively impact the multifamily and related secondary mortgage market in several ways, including, but not limited to, disinvestment in affordable housing, increased operational confusion, reduced property revenue and increased expenses or uncollected debt and an overall decrease in borrower interest and willingness to use Enterprise products. In fact, according to preliminary results from a survey conducted from July 11-21, 2023 by NAA, over 78 percent of housing providers who use or plan to use Enterprise-backed financing would be discouraged from using Enterprise products if renter protections were imposed.³⁰ Further, over 40 percent of those housing providers expect that finding other avenues of financing would increase their financing costs by between 11 and 30 percent. These are important considerations for FHFA to take into account as the nation faces an affordable housing crisis, which would be further exacerbated by overbroad and duplicative regulations.

Accordingly, not only would FHFA and the Enterprises be acting in the absence of, and potentially in contravention of, the strict parameters set forth in the applicable authorizing statute, but also, the consequences of the proposals would result in undermining the financial markets that the Enterprises are required to uphold. These actions would result in the devaluing of the collateral guaranteed by the Enterprises, lessening of the stability of the secondary mortgage market, and lessening of the liquidity that borrowers seek to access for multifamily mortgages, all of which would undermine the express terms of the Enterprises' charter and applicable statute passed by Congress. NMHC and NAA strongly believe that the duty to serve obligations to which the Enterprises are subject to have a clear purpose of enabling an increase in housing supply by providing loans to borrowers in underserved markets, particularly those markets identified in the regulations. It is imperative they do so without enacting additional rules and requirements applicable to the occupancy of such units by residents that would materially threaten the validity of such housing and future borrower interest in building housing in such markets.

We urge FHFA and the Enterprises to be mindful of the limitations on the duty to serve obligations and ensure that they do not go beyond the authority granted to them by Congress and, in doing so,

³⁰ See NAA Examining the Unintended Consequences of Rent Control Policies in Cities Across America, <https://www.naahq.org/examining-unintended-consequences-rent-control-policies-cities-across-america>

make policy choices that would have far-reaching negative consequences on the markets that are supposed to be upheld by the Enterprises.

NMHC and NAA strongly believe that FHFA's and the Enterprises' statutory authority is limited in this space because Congress expressly narrowed the scope of the duty to serve specific obligations to the secondary market, and provided that the overall goal of the Enterprises activities should be to ensure the stabilization of the secondary mortgage market and increase the liquidity that borrowers seek to access for residential mortgages. The proposed tenant rules under the RFI go beyond the statutory authority of FHFA and Enterprises, and therefore, will create consequences that undermine the core missions of FHFA and the Enterprises.

(VI) The Proposals Contemplated Under the RFI Implicate Several Legal and Procedural Issues That Would Undermine FHFA's and the Enterprises' Mission:

There are also several other concerns about the legality of FHFA's contemplated rules. For example, there is no legal authority to preempt state landlord-tenant laws without express authority from Congress. Under decades-long established Supreme Court precedent, the federal government is empowered to preempt state laws in limited circumstances; specifically, the preemption is found to have been a "clear and manifest purpose of Congress".³¹ In fact, the Supreme Court in 2021, under *Alabama Associates of Realtors v. U.S. Department of Health and Human Services*, overturned the federal eviction moratorium put in place during the COVID-19 pandemic on the basis that there was no express congressional intent for the federal government to preempt state landlord-tenant laws.³² Specifically, the Court noted, "...*The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship. See Lindsey v. Normet*, 405 U. S. 56, 68-69, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972). "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *United States Forest Service v. Cowpasture River Preservation Assn.*, 590 U. S. ___, ___ - ___, 140 S. Ct. 1837, 207 L. Ed. 2d 186, 204 (2020)."³³ Further, the Court also noted, "It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. *But our system does not permit agencies to act unlawfully even in pursuit of desirable ends. Cf. Youngstown Sheet & Tube*

³¹ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("Our answer to that question must be guided by two cornerstones of our pre-emption jurisprudence. First, [1] "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996); see *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947))."); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute."')

³² *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

³³ *Id.*

Co. v. Sawyer, 343 U. S. 579, 582, 585-586, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (concluding that even the Government’s belief that its action “was necessary to avert a national catastrophe” could not overcome a lack of congressional authorization). It is up to Congress, not the CDC, to decide whether the public interest merits further action here.”³⁴

This principle clearly indicates that there must be express congressional authorization for FHFA and/or the Enterprises to enact new regulatory frameworks that directly or indirectly preempt an area that is within the domain of state law: the landlord-resident relationship. As more fully described above, neither the Safety and Soundness Act nor the terms of the Enterprises’ charter express congressional intent to authorize the Enterprises to promulgate regulations that would directly or indirectly preempt state laws regarding the landlord-tenant relationship. For example, while certain parties point to the 30-day notice to vacate requirement for federally subsidized and/or backed projects and loans as an example of action FHFA could undertake, that requirement flowed from a direct congressional directive set forth under the CARES Act. While we do not agree with the Administration’s interpretation of the CARES Act and believe the Administration has exceeded its authority, it holds that neither FHFA nor the Enterprises in the RFI or elsewhere have been able to point to a corresponding express congressional directive that would authorize additional federal requirements preempting state landlord-tenant laws.

In addition, there are concerns that it would be an unconstitutional taking under the Fifth Amendment for contracts and loan documents that have already been contracted between multiple parties without adequate compensation or financial incentives to constitute. Retroactive implementation of the proposed tenant rules under the RFI without adequate compensation or an opt-in voluntary mechanism may be seen by courts as the taking of private property rights (e.g., the right to evict residents, establish rents and use the property in a manner that was contracted) that were agreed to by the parties subject to an applicable contract.

Lastly, the new or even retroactive imposition of the proposed tenant rules may also result in changing the economic terms underlying the loan or adding additional liability or risk on the part of the borrower who has received funds from the Enterprises. For example, new eviction restrictions could create significant delays in lease terminations for nonpayment of rent, which in turn increases the time in which a resident resides in a unit without paying rent. This has a reasonable chance of running afoul of the terms of the Enterprises’ form loan documents, which require borrowers to comply with Enterprise requirements, but at the same time, also contain provisions saying that borrowers are not required to take actions that would significantly change the economic terms of the loans. For example, the Fannie Mae Multifamily Loan and Security Agreement (Non-Recourse)³⁵ provides: “Borrower shall, subject to Section 5.02(d) below, take all reasonable actions necessary to comply with the requirements of Lender to enable Lender to sell any MBS backed by the Mortgage Loan...”³⁶ and shall further “comply with the reasonable requirements of Lender or any Investor of the Mortgage Loan...[to] (A) enable Lender to sell the

³⁴ *Id.* at 2490.

³⁵ Fannie Mae Form 6001.NR (12-22), available at <https://multifamily.fanniemae.com/communications-documents-forms/loan-documents>.

³⁶ *Id.* at Section 5.02(b)(3).

Mortgage Loan or participation interests therein to such Investor.”³⁷ Notwithstanding such requirements, the Agreement explicitly provides:

Nothing in Section 5.02(b) and Section 5.02(c) shall require Borrower to do any further act that has the effect of:

(1) changing the economic terms of the Mortgage Loan set forth in the related commitment letter between Borrower and Lender;

(2) imposing on Borrower or Guarantor greater personal liability under the Loan Documents than that set forth in the related commitment letter between Borrower and Lender; or

(3) materially changing the rights and obligations of Borrower or Guarantor under the commitment letter.³⁸

Given the importance of projected rental amounts and unit turnover to the underwriting of multifamily loans backed by the Enterprises, if the proposed tenant rules are applied either retroactively to existing loans therefore materially altering the economic terms of the loan and/or the obligations of the borrower, or to new loans backed by the Enterprises, the applicable borrower may have a basis for legal recourse against the applicable Enterprise and/or will be subject to additional levels of liability and risk.

In addition to the statutory concerns outlined previously, there are significant Constitutional questions related to the Fifth Amendment’s due process and takings clauses related to the retroactive and prospective implementation of the new tenant rules. We urge FHFA and the Enterprises to consider these important legal questions and impacts from both policy and legal perspectives before proceeding with the rulemaking process in this area.

(VII) Conclusion:

NMHC and NAA appreciate the opportunity to provide a response to FHFA’s RFI on contemplated tenant protections for Enterprise-backed multifamily properties. As always, we remain committed to working with federal regulators, the Administration and policymakers in Congress to address our shared goal of expanding affordable housing opportunities nationwide.

That said, we remain concerned that the proposals contemplated under the RFI would harm renters and housing providers by significantly altering the parties’ responsibilities under lease contracts and unnecessarily adding more complexity to the already complicated federal, state and local compliance responsibilities of housing providers. These proposals will have a devastating impact on our members’ ability to leverage the financing needed to build multifamily housing by disincentivizing housing providers from entering or remaining as participants in the multifamily housing market. FHFA also does not have the legal authority to move forward with its ideas.

³⁷ Fannie Mae Form 6001.NR at Section 5.02(c).

³⁸ *Id.* at Section 5.02(d).

To ensure that the nation has its much-needed housing supply, it is critical that multifamily housing continue to be viewed as a sound investment. Implementing added federal housing provider and resident requirements is already having a chilling impact on investors. Instead of imposing additional federal regulations, we recommend that FHFA focus on ways that the Enterprises can incentivize the private sector to generate more housing. Accordingly, we hope that FHFA and the Enterprises will take the multitude of policy suggestions we have offered in this comment letter under consideration to ensure that the multifamily housing market remains strong, particularly in this difficult time of high inflation and increased interest rates. We have also joined a letter endorsed by a diverse coalition of other national organizations which further articulates these and other policy solutions in response to the RFI. As FHFA and the Enterprises consider various proposals, NMHC and NAA stand ready to work with FHFA, the Enterprises, the White House, Congress and other stakeholders to further these efforts in an effective manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon Wilson Géo".

Sharon Wilson Géo
President
National Multifamily Housing Council

A handwritten signature in black ink, appearing to read "Bob Pinnegar".

Bob Pinnegar
President and Chief Executive Officer
National Apartment Association