Federal Housing Finance Agency -- Duty to Serve Listening Session

Affordable Housing Preservation

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Thank you for convening this session.

My name is Robert Rozen. I am an affordable housing policy attorney who has worked on the Low-Income Housing Tax Credit program since its creation in 1986. I represent a number of nonprofits organizations that raise capital for investment in the Housing Credit program.

For the last several years, a number of affordable housing advocacy organizations have been working in a coalition to prevent two notable abuses in the program that undermine the long-term affordability and preservation of Housing Credit property.

I am referring to the Qualified Contract provision that enables owners to terminate income and rent affordability restrictions at the end of the 15-year compliance period, and the right of first refusal provision that permits nonprofits to acquire full ownership of Housing Credit property at a limited price at the end of the 15-year compliance period.

Qualified Contracts. As you know, the Qualified Contracts provision in the Housing CreditLIHTC program is a loophole that has caused the loss of approximately 10,000 units of affordable housing annually for the last several years. As a result of the efforts of our coalition, and the strong support of the National Council of State Housing Agencies, we have succeeded in changing policies at the overwhelming majority of state housing finance agencies to prevent owners from having the right to go through the Qualified Contract process. However, not all states have adopted this requirement, fewer with regard to 4% bond deals. More importantly, owners of properties financed in the past before a state changed its Qualified Contract policy, are able to terminate their affordability requirements.

They are able to convert an already scarce resource – affordable housing – to market rate rents even after receiving generous production subsidies from the federal government. This is a very unfortunate situation that exacerbates an existing affordable housing crisis. We simply do not have enough affordable housing units in this country and it is our view that the federal government should not continue to favor properties that have used the QC loophole with additional federal subsidies by permitting them to obtain mortgage debt supported by the GSEs.

No one suggests that the GSEs are bad actors engaging in policies that undermine the preservation of affordable housing financed through the LIHTC. But the LIHTC program confronts significant preservation issues and the GSEs can use their market position, especially on the debt side to help preserve this housing.

Last year, 15 national affordable housing organizations wrote a letter to the FHFA urging you to implement policies on both the debt and equity side to constrain GSE activity by among other things, to:

1. Prohibit GSEs from acquiring multifamily loans on Housing Credit properties unless the owner has agreed to waive its Qualified Contract rights.
2. Prohibit GSEs from acquiring multifamily loans on properties financed with Housing Credits where an owner has taken the property through the Qualified Contract process and terminated the rent and income limitations on the property.

We appreciate that the FHFA has already identified the QC loophole as an issue that should be addressed. We applaud the action you took last year to respond to another of our requests; to prohibit the GSEs from investing in any Housing Credit deal where the owner has a right to early termination of the affordability requirements through the Qualified Contract process. This not only prevents the GSE from being passive contributors to this problem, but it sends a powerful message to the affordable housing industry more broadly.

Now we ask that you take the next step to address GSE activity on the debt side – which would have a much greater market impact. We have also made requests to HUD and the Rural Housing Service to limit access to their affordable housing debt products for QC eligible properties.

In its proposed plan, Freddie Mac says:

*In 2025, Freddie Mac will further examine what opportunities we might have for appropriately limiting use of the QC provision in the context of loans purchased by Freddie Mac.*

I applaud Freddie Mac for focusing on this issue, and while I recognize that fully understanding the market impact is a necessary consideration, it nevertheless seems like the issue is being punted down the road for interminable delay while existing incentives remain in force to provide debt financing to owners who benefit from this loophole.

We are half way through 2024 on an issue that 15 national organizations raised to FHFA in a letter in July of 2023 at which time it became known to the GSEs. Freddie Mac’s commitment in 2025 to “examine what opportunities” it might have to “for appropriately limiting the use of the QC provision” puts this matter off too far into the future.

We hope FHFA can move more expeditiously to address this issue.

At its core, our policy ask is very simple:  though its programs to support housing, the federal government should not make it easy, should not indirectly facilitate, the business of companies that have abused a loophole in the Housing Credit program to raise rents on those in need.

I also want to touch on the nonprofit right of first refusal issue. This is a program abuse whereby some investors have refused to recognize the negotiated for rights of nonprofits to acquire full ownership of the property after year 15. They have held up their anticipated exits in return for cash payments not contemplated in the partnership agreement, taking funds out of the property, out of the nonprofit, and caused higher debt and rents on the property.

This is a clear program abuse that nonprofit affordable housing providers are attempting to remedy through litigation, legislation, regulatory guidance and changes to future partnership agreements. This has been slow and tough going and meanwhile the abuses continue.

Freddie Mac mentions this issue in its current Duty to Serve plan but unfortunately not in its proposed plan for 2025-2027.

While we appreciate Freddie Mac’s focus on this issue, again, much more can be done. Freddie Mac’s current commitment appears to be to include language in its LIHTC partnership agreements “ to prohibit the LP interest from being sold to a party that has a history of attempting to frustrate the effect of Section 42(i)(7) ROFRs.” While welcome, much more can be done to protect the interests of nonprofits. Every LIHTC partnership that Freddie Mac and

Fannie Mae provides equity financing to should include language in the partnership agreement that ensures the ability of nonprofits to exercise their ROFR. A number of Housing Credit allocators – most notably Virginia and the New York City Agency for Housing Preservation and Development – require the inclusion of robust language ensuring the ability of nonprofits to exercise their ROFR rights 15 years down the road. Fannie Mae and Freddie Mac should be required to use similar language in their equity investment agreements.

I recognize that Fannie Mae and Freddie Mac have a different approach to investing in LIHTC deals with Fannie Mae much more oriented toward multi-investor funds while Freddie Mac invests as a single investor. That obviously gives Freddie Mac greater latitude to insist on ROFR language that protects the interest of nonprofits. Nevertheless, we believe that Fannie Mae can also exercise leverage in multi-investor funds to insist on appropriate ROFR language to protect nonprofits. If investors in New York City LIHTC deals are required to agree to such language, there should be no major obstacle for Fannie Mae’s co-investors in other parts of the country also agreeing to such language if insisted on by Fannie Mae.

These are important affordable housing preservation issues that I hope you will followup on. Thank you for this opportunity to present my views.