

July 28, 2023

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

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

Dear FHFA:

Thank you for the opportunity to provide input on protections for tenants in Enterprise-backed multifamily properties. Regional Housing Legal Services (RHLS) is a nonprofit law firm providing free legal assistance to nonprofit organizations that develop affordable housing or engage in other community development activities that benefit low-income people throughout Pennsylvania. RHLS provides transactional legal services to approximately 60 community-based organizations each year, and has assisted in the completion of development projects worth \$1.6 billion. Although RHLS represents some tenant organizations, nearly all of our clients are nonprofit, community-based owners of rental housing. While RHLS does not provide direct representation in eviction proceedings, we do provide advice and counsel to both our landlord and tenant-association clients with respect to eviction law and procedure.

RHLS also engages in policy analysis and advocacy that focuses on critical housing, economic development, neighborhood revitalization, and utility issues for the benefit of lower income Pennsylvanians. Our work gives us a unique perspective on the issues facing low income tenants and nonprofit housing providers. From that perspective we offer the following responses to selected questions.

To begin, we submit an overarching observation: The Enterprise-backed secondary mortgage market is designed as a public benefit to ensure adequate resources for lending, including mortgages on multifamily properties. As such, Enterprise-backed lending should benefit the whole public, i. e., benefits should accrue to the residents of those multifamily properties as well as the owners. We very much appreciate FHFA's thoughtful questions and request for public input on how the Agency can better ensure fair access to and enjoyment of Enterprise-backed multifamily housing by all tenants.

Access to Housing

Question B-1: How might the Enterprises address barriers to multifamily tenants' access to housing?

As more fully described below, it is important that current practices by owners and managers (collectively, "landlords") regarding access to available units be examined for their utility and unintended consequences. Are fees related to actual costs? Are application questions, such as those concerning criminal history, predictive of good tenancy? Do practices have a disparate impact on protected classes? Too often, application and screening requirements serve only to frustrate qualified tenants without decreasing the landlord's risk.

In addition to our answers to the questions below, we offer the following recommendations:

- FHFA should prohibit criminal background checks until an applicant is otherwise approved, since the evidence does not support fears that people with criminal histories pose a greater risk than members of the general public.¹ Limit the use of background checks to convictions (not arrests) within the past five years and limit the basis for denials to crimes that are relevant to the applicant's suitability as a tenant. Owners should be required to offer applicants an opportunity to explain the circumstances of their conviction and rehabilitation following the crime.
- FHFA should prohibit the denial of rental applications based on eviction history if the eviction court action was appealed, dismissed, or withdrawn; if judgment was entered in favor of the applicant; or if judgment was entered against the applicant five or more years before the current application was submitted.
- FHFA should limit application fees to amounts reasonably necessary to cover actual costs. In addition, FHFA should provide landlords with a list of acceptable and unacceptable fees. It is becoming common practice for landlords to impose a whole host of fees for activities or items that are part of the normal course of business. Examples include "processing fees", "administrative fees", and "convenience fees" for paying rent online even when the landlord allows no other method of payment.²

Question B-2: What actions should the Enterprises take, if any, to ensure universal acceptance of sources of income at Enterprise-backed multifamily properties?

- FHFA should mandate non-discrimination based on legitimate source of income. There is no evidence to support some landlords' perception that recipients of housing assistance are

¹ U. S. Department of Housing and Urban Development, "Tenant Screening With Criminal Background Checks: Predictions And Perceptions Are Not Causality", May 2022, <https://www.huduser.gov/portal/pdredge/pdr-edge-fm-asst-sec-051722.html>.

² National Consumer Law Center, "Too Damn High: How Junk Fees Add to Skyrocketing Rents", March 2023, <https://www.nclc.org/resources/too-damn-high-how-junk-fees-add-to-skyrocketing-rents/>.

riskier tenants.³ What the evidence does show is that discrimination against voucher holders disproportionately impacts people of color and families with children. Sixty-seven percent of Housing Choice Voucher (HCV) holders are non-white,⁴ which means the majority of households impacted by SOI discrimination are people of color or members of other protected classes. (Women comprise 64% of HCV holders and 18% are people with disabilities.)⁵ FHFA should ensure nondiscrimination, whether based on SOI or, even indirectly, race or familial status. Moreover, FHFA policies should work in support of other federal programs and policies to expand the availability of affordable homes. Enterprise-backed properties should be required to accept all legitimate sources of income and especially federally issued income supports, such as Housing Choice Vouchers.

Question B-3: What actions should the Enterprises take in support of existing federal fair housing laws, including protections related to familial status, accessibility, and design and construction standards?

- FHFA should require all leases for Enterprise-backed properties to state in plain language the landlord's obligations not to discriminate under the Fair Housing, including a list of all protected classes.
- The lease should plainly state the rights and duties of the parties regarding reasonable accommodations and the mechanism the landlord has established for receiving reasonable accommodation requests.
- FHFA should prohibit source of income discrimination, as noted in B-2, above.
- Criminal background checks, discussed in B-1, may also have a discriminatory impact in violation of the Fair Housing Act given the disproportionate number of Black and Brown people in the criminal justice system. The Departments of Housing and Urban Development (HUD) and Justice (DOJ) advise all landlords against blanket bans on people with criminal histories.⁶
- The use of eviction histories, discussed in B-1, has a disparate impact on protected classes, including people of color and families with children.⁷

³ Tighe, J. R., et al, "Source of Income Discrimination and Fair Housing Policy", October 2016, <https://journals.sagepub.com/doi/full/10.1177/0885412216670603>.

⁴ Center for Budget and Policy Priorities, " Basics: Section 8 Project-Based Rental Assistance", <https://www.cbpp.org/research/housing/section-8-project-based-rental-assistance>.

⁵ Ibid.

⁶ Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, April 2016, <https://www.fairhousingnc.org/wp-content/uploads/2016/04/HUD-Guidance-on-Criminal-Records-2016.pdf>; HUD Secretary Fudge Memo, "Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs", April 2022, <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>.

⁷ Hepburn, P., et al, "Racial and Gender Disparities among Evicted Americans", December 2020, <https://evictionlab.org/demographics-of-eviction/>; Hepburn, P. et al, "Racial and Gender Disparities among Evicted Americans", December 2020, <https://evictionlab.org/demographics-of-eviction/>.

Question B-4: Are there areas of the lease application process or tenant documentation requirements that could be streamlined? Would those changes benefit multifamily tenants, landlords, or both? Please explain and include examples of existing best practices, if applicable.

- FHFA should mandate acceptance of tenant-provided credit reports (good for 30 days). This will benefit applicants who are currently forced to pay for credit reports, background checks, and processing fees at every property where they apply for housing. In addition to benefitting applicants, this practice will streamline the process for landlords who will have one less chore to complete.

C. Access to Information

Question C-1: What information do multifamily tenants need to make well-informed decisions about applying for and leasing apartments? Do multifamily tenants have access to the information they need to make well-informed decisions? If not, please explain and identify specific gaps. What are potential solutions for increasing access to information? What are the associated challenges? Please include any best practices for providing “all-in” rental costs, utility cost responsibilities, and tenant amenity information.

- Leases should clearly indicate that the property is Enterprise-backed and, therefore, provides certain tenant protection. Those protections should be specified in plain language in a lease addendum.
- Landlords should be required to disclose their admissions criteria in writing prior to accepting any application or application fee.

Question C-3: What role might the Enterprises play to enable multifamily tenants and landlords to be well-informed of their rights, to exercise their rights effectively, and fully meet their responsibilities? How could FHFA support efforts to collect, disseminate, and use this information?

- FHFA should design and require the use of a lease addendum that clearly spells out the tenant’s rights.
- In the event of an eviction or other matter before the court, landlords should be required to notify tenants and the court that the property is Enterprise-backed.

Question C-6: Should landlords provide a written notice to prospective tenants that their lease application has been rejected, including a description of the reasons for rejection? What are the potential benefits and challenges of delivering such notices? If a written notice is provided, what information should it include?

- FHFA should mandate that landlords provide a notice of rejection with the reasons clearly stated. A rejection notice lets the applicant know they need to look elsewhere and can

allow a tenant to find out if the landlord rejected them based on erroneous information or for illegal reasons. The notice should also include the right to provide additional documentation.

D. Tenant Housing Stability

Question D-1: Have any eviction prevention programs or policies (either voluntary or required) improved the housing stability of multifamily tenants? Please describe those programs and policies, how performance was measured, and please share any data or evidence on performance, if possible.

We strongly urge FHFA to require landlord participation in eviction diversion programs where they exist and mandate that landlords help tenants obtain emergency rental assistance where it is available. These programs are a win-win, preventing all of the negative consequences of evictions to tenants and reducing landlord costs. For documentation of the positive impact of eviction diversion programs see:

- The Housing Alliance of Pennsylvania's Eviction Prevention Resource Library, <https://housingalliancepa.org/eviction-prevention-resource-library/>
- Regional Housing Legal Services' "Best Practices in Eviction Diversion Programs", <https://www.rhls.org/2020/12/now-available-best-practices-in-eviction-diversion-programs-report/>
- Urban Institute's "Diverting Eviction-Related Cases Away from Courts", <https://www.urban.org/research/publication/diverting-eviction-related-cases-away-courts>

Question D-2: How can the owners and managers of Enterprise-backed multifamily properties reduce evictions and improve housing stability of tenants? What role can the Enterprises play in promoting housing stability of tenants at Enterprise-backed multifamily properties?

- As noted above, FHFA should require landlords to participate in eviction diversion and emergency rental assistance programs where they exist.
- FHFA should institute a "good cause" or "just cause" policy for evictions. "Good cause" means that tenants can only be evicted for repeated or substantial lease violations, including nonpayment of rent. Good cause requirements are part of the public housing, Department of Agriculture (USDA) multifamily housing, and Low Income Housing Tax Credit programs and have been for many years. Since failure to pay rent is a legitimate cause for eviction, these policies affect relatively few disputes. The real value of good cause protections is in providing assurance that the tenant cannot be evicted (without cause) at the end of a lease term. End of lease term evictions are often used for retaliatory evictions of tenants who complain about code violations and as a way of replacing lower income tenants with those who can pay significantly higher rents. In order to ensure housing stability, a good cause requirement is necessary.

- FHFA should mandate that leases include tenants' right to cure defaults similar to the USDA requirement that landlords document provision of a notice to the tenant of the lease violation and providing a right to cure.⁸
- FHFA should prohibit retaliation against tenants for tenant complaints about needed repairs or rules, for organizing, or for exercising any other rights.

Question D-5: Should the Enterprises define housing safety and if so, how?

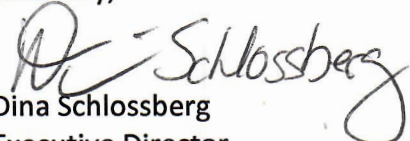
- FHFA should apply the Housing Quality Standard (HQS) used for HUD-assisted properties and require periodic inspections of Enterprise-backed units.

Question D-7: Should the Enterprises require borrower compliance with ongoing property maintenance after an initial inspection? What is a reasonable timeframe to provide unit maintenance and repairs?

- Best practices in rental inspections have inspections every three years for well-performing properties and more often for those that repeatedly fail to meet HQS. The inspections may be conducted in coordination with or by local housing inspectors or inspectors affiliated with housing subsidy programs.

We applaud FHFA for embarking on the road to enhancing tenant rights in Enterprise-backed multifamily housing. We appreciate the opportunity to offer comments and are available to provide any help we can.

Sincerely,


Dina Schlossberg
Executive Director

⁸ 7 C.F.R. § 3560.159(a)