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July 31, 2023

The Honorable Sandra L. Thompson
Director
Federal Housing Finance Agency
400 Seventh Street SW
Washington, DC 20024

RE: Tenant Protections for Enterprise-Backed Multifamily Properties

Dear Director Thompson:

The Credit Union National Association (CUNA) represents America's credit unions and their more than 135 million members. On behalf of our members, we are writing in response to the Federal Housing Finance Agency's (FHFA) Tenant Protections For Enterprise-Backed Multifamily Properties Request for Input (RFI).[1]

Background

There are some existing tenant protections that may apply to Enterprise-backed multifamily properties. In general, these protections are either authorized by statute or contract. An example of a statutory protection is the requirement to provide advance notice of at least 30 days to a tenant before requiring that tenant to vacate an Enterprise-backed multifamily rental.[2] Other statutory protections under state law are described in a white paper that was published in the first quarter of 2023 by Freddie Mac.[3] The Survey categorized state law tenant protections into five different buckets:

- Tenant screening issues arising out of the application process such as source of income protections;
- Rent issues, including those related to late payments, maximum rent increases, fees, and security deposits;
- Habitability issues and retaliation against tenants;
- Pre-eviction protections such as notices of breach and rights to cure; and

[1] https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Multifamily-Tenant-Protections-RFI.pdf.
[2] 15 U.S.C. § 9058(c). This requirement was codified by section 4024 of the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act.
[3] Freddie Mac, A National Survey of Tenant Protections Under State Landlord Tenant Acts (Jan. 2023), *available at* https://mf.freddiemac.com/docs/tenant-protections-white-paper.pdf (Survey).

- Eviction procedural protections like the right to counsel in an eviction or required diversion programs.

Freddie Mac's Survey suggests that there is significant variance in many tenant protections authorized by state law.

Contractual protections at Enterprise-backed properties include the site lease protections for residents that owners of Manufactured Housing Communities (MHC) must agree to in order to obtain Enterprise-backed financing.[4] Other examples of contractually bargained for tenant protections for Enterprise-backed multifamily properties involve incentivizing borrowers to agree to certain protections such as preserving affordable rent for the duration of the loan term.[5]

FHFA issued the RFI to collect data and information from multifamily stakeholders about the challenges that tenants experience at multifamily properties.[6] The RFI also includes specific questions about how tenant protections might impact multifamily lenders, servicers, borrowers, and the safety and soundness of the Enterprises. While Fannie Mae and Freddie Mac (collectively the Enterprises) inject liquidity into the multifamily housing market, they neither originate multifamily loans nor manage multifamily housing properties that secure the loans they acquire.[7] The RFI acknowledges that the Enterprises may be limited in their ability to effect certain changes in the rental market because of their roles in the secondary market, and notes the importance of commenters considering the Enterprises' place in the multifamily and housing markets when responding to the RFI.

Existing Tenant Protections Primarily Governed by State and Local Law

CUNA recognizes the importance of examining the multifamily housing market and analyzing how applying tenant protections to Enterprise-backed multifamily properties may impact tenants and all stakeholders, the affordable rental housing market, and the liquidity provided by the Enterprises. Approximately 35 percent of the United States lives in rental housing.[8] Data indicates that in 2019 around 25 percent of the renter households in the United States paid at least half of

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[4] MHC owners agree to "renewable lease terms, advance notice of rental payment increases or sale of a manufacture housing community, and rights regarding the sale of their manufactured homes" RFI, *supra* note 1, at 4 (footnote omitted). Although some state laws provide for MHC site lease protections.

[5] *See* Freddie Mac, Tenant Advancement Commitment, *available at* https://mf.freddiemac.com/docs/product/tenant_advancement_commitment.pdf (providing mission pricing benefits in exchange for creation and preservation of affordable rent levels on a percentage of set-aside units over the entire term); Fannie Mae, Workforce Housing: Sponsor-Initiated Affordability, *available at* https://multifamily.fanniemae.com/media/16271/display (offering competitive loan pricing and flexibility in loan terms (e.g., 5-30 years) and underwriting criteria in exchange for set-aside of certain percentage of units—minimum of 20 percent—be affordable at 80 percent of Area Median Income (AMI)).

[6] RFI, *supra* note 1, at 1.

[7] *Id.* at 3.

[8] White House Domestic Policy Council and National Economic Council, Blueprint for a Renters Bill of Rights (Jan. 2023) at 4, *available at* https://www.whitehouse.gov/wp-content/uploads/2023/01/White-House-Blueprint-for-a-Renters-Bill-of-Rights.pdf (The Blueprint).

their earnings toward rent, and rents increased almost 26 percent nationally during the COVID-19 pandemic.[9] Moreover, the Enterprises' loan purchase activities in the multifamily market are concentrated in mission-driven activities, including loans related to affordable, rural, and manufactured housing.[10] For 2022, 68 percent of Fannie Mae's multifamily purchases and 69 percent of Freddie Mac's multifamily purchases were classified as mission-driven.[11] Consequently, any changes to the Enterprises' multifamily programs could impact both the liquidity for affordable rental and multifamily housing and the level of affordable rental and multifamily housing throughout the United States.

Any review of tenant protections must begin with state and local law because those laws generally govern the relationships between multifamily property owners and their tenants.[12] The level of tenant protections offered by state and local law can vary from jurisdiction to jurisdiction. Unlike the 30-day notice to vacate requirement built into the CARES Act, Federal law does not generally appear to provide the Enterprises with the statutory authority to unilaterally require many of the tenant protections discussed in the RFI or the Survey. Without that statutory authority, the Enterprises may have to bargain with multifamily borrowers to implement tenant protections through the loan agreement, like what the Enterprises currently do for the MHC site lease protections and the voluntary preservation of affordable rents discussed above.

Additional Research Needed to Assess Potential Effects of Tenant Protections on Liquidity in the Multifamily Market

An important consideration is how applying tenant protections to Enterprise-backed multifamily properties may affect the liquidity in the multifamily market. The charters for both Fannie Mae and Freddie Mac provide that they were created "to provide liquidity, stability and affordability to the mortgage market."[13] In other words, how might secondary market investors respond to stronger, more robust tenant protections for Enterprise-backed multifamily properties?

Recently published research examined the strength of tenant protections in the United States and how that may have affected the price that a multifamily investor seeking to purchase a multifamily

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[9] *Id.* at 5.
[10] *See* FHFA, 2022 Housing Mission Report (Apr. 2023) at 26, *available at* https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA-2022-Mission-Report.pdf (2022 Housing Mission Report) (noting that "50 percent of multifamily loan purchases be mission-driven . . . and 25 percent be affordable at or below 60 percent of AMI."). *See also* FHFA, 2022 Conservatorship Scorecard, Appendix A: Multifamily Definitions, *available at* https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/2022-Appendix-A-10132021.pdf (describing when a multifamily loan would be classified as mission-driven for purposes of the 2022 Scorecard).
[11] *See* 2022 Housing Mission Report, *supra* note 10, at 27.
[12] *See* Survey, *supra* note 5, at 3 ("The landlord tenant relationship is primarily governed by state law and typically addressed in a state's Landlord Tenant Act.").
[13] FHFA, About Fannie Mae & Freddie Mac, *available at* https://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae---Freddie-Mac.aspx; 12 U.S.C. § 1716; 12 U.S.C. § 1451 note.

property was willing to pay for a property.[14] McCollum and Milcheva developed a metric that measured tenant protections at the state-level and looked at how the initial capitalization rate, annual net operating income (NOI), and loan delinquencies varied by state.[15] They reviewed loan-level and property-level information for non-agency and non-Enterprise multifamily loans securitized into commercial mortgage-backed securities (CMBS) from 2000-2016.[16] Their research demonstrated that multifamily properties in states with more robust tenant protections were associated with lower capitalization rates and higher NOI, including higher growth of NOI.[17] For background, the capitalization rate is the ratio of the NOI to purchase price and "measures a property's yield, the annual return in the form of (rental) income generated by the investment."[18]

McCollum and Milcheva concluded that investors may be willing to pay more for multifamily properties in states with strong tenant protections because the investors perceive those properties as lower risk.[19] Their analysis suggested that the lower capitalization rate combined with the higher NOI was because of a lower risk of cash flow instability in areas with stronger tenant protections and high demand for multifamily properties in those areas.[20]

More research in this area is necessary to ascertain how tenant protections may impact liquidity in the multifamily market. McCollum and Milcheva noted that research regarding whether tenant protections adversely impact landlords "is still in its infancy."[21] Further research is needed to examine whether the metrics observed by McCollum and Milcheva show the same relationship to strong tenant protections when looking at Enterprise-backed multifamily properties as their research only looked at non-agency and non-Enterprise multifamily properties. Likewise, additional research would ideally help clarify whether the level of secondary market investment and the underwriting of multifamily loans follow their observations or whether other observations or conclusions can be drawn from the existing data. For example, additional research may illuminate whether differences between Enterprise-backed multifamily properties and the CMBS properties studied by McCollum and Milcheva might lead to different outcomes.

The potential impact of tenant protections on liquidity in the multifamily market is also important to understand, given the rising rate environment and higher costs for labor and materials. Affordable housing developers have voiced concerns that the current rate environment combined

[14] Meagan McCollum & Stanimira Milcheva, How 'bad' is renter protection for institutional investment in multifamily housing?, Journal of Housing Economics (2023), *available at* https://doi.org/10.1016/j.jhe.2022.101912.
[15] *Id.* at 4.
[16] *Id.* at 12.
[17] *Id.* at 30.
[18] Darryl E. Getter, Multifamily Housing Finance and Selected Policy Issues (Aug. 2020) at 3 (CRS Report No. R46480), *available at* https://crsreports.congress.gov/product/pdf/R/R46480/2.
[19] McCollum & Milcheva, *supra* note 14, at 30.
[20] *Ibid.*
[21] *Id.* at 29.

with the effect of inflation on their costs could lead to a substantial decrease in the supply of affordable housing in 2025 or 2026.[22]

Potential Effects of Reduced Expected Rental Income on Multifamily Default Risk

How multifamily lenders evaluate creditworthiness and how that determination might be affected by tenant protections is relevant to this discussion. One metric multifamily lenders use to evaluate creditworthiness is the debt service coverage ratio, (DCSR), "which is the annual net operating income divided by total debt service (principal and interest)."[23] Credit unions have noted that tenant protections, including eviction moratoria, can negatively impact expected rental income stream (i.e., NOI) and present an elevated default risk when evaluated through the DSCR lens. This could ultimately lead to a lower level of funding for multifamily borrowers, exacerbating the effects of the rising rate environment and increased costs.

Research Needed to Assess What Effects Certain Tenant Protections Have Upon Protecting Tenants and Stability in the Multifamily Market

As discussed in Freddie Mac's Survey, existing laws provide for a wide range of tenant protections depending on where a multifamily property is located.[24] And conventional ways of evaluating the strengthening of tenants' rights and protections is that it is a zero-sum game pitting tenants on one side versus all other parties.[25] The COVID-19 pandemic and the government responses, which included, among other things, tenant protections like eviction moratoria and a federal Emergency Rental Assistance (ERA) program,[26] have provided researchers with data that may help to evaluate how effective some of the measures were at reducing evictions.[27] Hepburn et al. found that "[s]trong state and local eviction moratoria significantly reduced eviction filings relative to historical averages."[28] But they could not identity which of the COVID-19 policies (e.g., eviction restrictions/moratoria, stimulus payments, ERA payments, etc.) in isolation were most effective at reducing a tenant's risk of eviction.[29] Further research is required to determine whether the data

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[22] *See* Kriston Capps, Developers Forecast Major Affordable Housing Drought in 2025 (July 19, 2023), *available at* https://www.bloomberg.com/news/articles/2023-07-19/affordable-housing-shortage-looms-amid-inflation-high-construction-costs (describing how the rate environment, higher costs, and need for additional funds to finish existing projects have delayed affordable housing rental projects and led some developers to foresee a reduction in supply in 2025 or 2026).
[23] Getter, *supra* note 18, at 7.
[24] *See* Survey, *supra* note 3.
[25] *See* McCollum & Milcheva, *supra* note 14, at 2-3 ("The conventional wisdom has been that, while larger protection of tenants' rights is 'good' for tenants, it is 'bad' for landlords and investors in this sector").
[26] Congress created the ERA "to help cover the unmet rent and utility expenses of low-income households affected by the economic consequences of the COVID-19 pandemic." Grant A. Driessen et al., Pandemic Relief: The Emergency Rental Assistance Program (Jan. 2023) at 1 (CRS Report No. R46688), *available at* https://crsreports.congress.gov/product/pdf/R/R46688.
[27] *See* Peter Hepburn et al., Protecting the Most Vulnerable: Policy Response and Eviction Filing Patterns During the COVID-19 Pandemic, RSF: The Russell Sage Found. J. of the Soc. Scis. May 2023, 9 (3) 186-207, *available at* https://doi.org/10.7758/RSF.2023.9.3.08.
[28] *Id.* at 201.
[29] *Id.* at 203.

exists to make such a conclusion. For example, if it is determined that tenant protections that affect the eviction process like moratoria, diversion programs, or rights to counsel provide most of the reduction in eviction risk, there are other factors that may need to be addressed to the extent that limiting eviction could reduce the supply or quality of multifamily rentals available in the market.[30]

Housing Choice Voucher Expanded Acceptance

Fannie Mae's Expanded Housing Choice pilot program, which incentivizes multifamily property owners to accept Department of Housing and Urban Development Housing Choice Vouchers (HCVs) to pay part of a tenant's rent, could offer more lessons about the effectiveness and feasibility of rolling out the incentive to a larger footprint—currently, the pilot is running in Texas and North Carolina.[31] We encourage FHFA and the Enterprises to examine the feedback received from stakeholders about the lessons learned from the pilot and engage with the public before making any decisions about whether to expand or curtail the program. Stakeholder feedback and public engagement can provide insightful data about the program's effectiveness in relation to its burdens and costs, permitting FHFA and the Enterprises to make a better, more informed decision.

Conclusion

Thank you for this opportunity to provide input on the Tenant Protections For Enterprise-Backed Multifamily Properties Request for Input. If you have questions or if we can be of any assistance, please do not hesitate to contact me at (202) 603-1985 or dpark@cuna.coop.

Sincerely,

David Park

David Park
Senior Director of Advocacy & Counsel

[30] *See* Dean Corbae et al., Equilibrium Evictions, Fed. Reserve Bank of Kan. City, Research Working Paper no. 23-03 at 35, April 2023, *available at* https://doi.org/10.18651/RWP2023-03 ("The model illustrates that there can be important unintended consequences of eviction moratoriums emanating from the supply side of the rental market; eviction restrictions to keep people in rentals, even if ex-post socially optimal, result in lower supply of both vacancies and quality of rentals. Policymakers who wish to reduce evictions for at-risk renters without distorting the supply of housing (either quality or quantity) should instead subsidize the rent of unemployed tenants by paying the landlord directly.").

[31] *See* RFI, *supra* note 1, at 5-6 (explaining the Expanded Housing Choice program).