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

Submitted electronically at <https://www.fhfa.gov/AboutUs/Contact/Pages/Request-for-Information-Form.aspx>

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

Thank you for the opportunity to submit comments in response to the Request for Input (RFI) on issues faced by tenants in multifamily properties, and on any opportunities and potential impacts associated with requiring or encouraging specific tenant protections at multifamily properties backed by Fannie Mae and Freddie Mac (the Enterprises). People of color are more likely to be renters<sup>1</sup> due to our nation's history of discriminatory housing policies and financial exclusion. Renters of color, women, families with children, and people with children are especially vulnerable to landlord abuses, including discriminatory behavior, unjust evictions, and subpar housing conditions. The Federal Housing Finance Agency (FHFA) is in a unique position to ensure the Enterprises implement solutions to these harms by promoting stronger tenant protections that better safeguard the fairness, availability, affordability, and stability of rental housing opportunities.

Founded in 1988, the National Fair Housing Alliance® (NFHA™) is the country's only national civil rights organization dedicated solely to eliminating all forms of housing and lending discrimination and ensure equal opportunities for all people. As the trade association for over 170 fair housing and justice-centered organizations and individuals throughout the U.S. and its territories, NFHA works to dismantle longstanding barriers to equity and build diverse, inclusive, well-resourced communities.

NFHA will focus its comments on Questions B-2 and B-3. Question B-2 asks: What actions should the Enterprises take, if any, to ensure universal acceptance of sources of income at Enterprise-backed multifamily properties? Question B-3 focuses on: 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?

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<sup>1</sup> See Joint Center for Housing Studies of Harvard University, *America's Rental Housing: 2022*, 4, available at [https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_Americas\\_Rental\\_Housing\\_2022.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2022.pdf).

NFHA appreciates the opportunity to comment on these important issues and believes the RFI responses below will help inform the critical work of FHFA in these areas.

## **I. Universal Acceptance of Housing Choice Vouchers and Other Sources of Income**

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

Housing discrimination based on source income, including the use of Housing Choice Vouchers and other forms of government assistance, remains a significant barrier to housing opportunity in the United States. We applaud FHFA's request for information on how it can do its part to expand the acceptance of vouchers and provide greater access to rental opportunities. The Enterprises maintain an important role in the financing of multi-family housing, with private landlords benefiting from the liquidity the Enterprises provide in the multi-family rental market. FHFA has made efforts to expand the financing of affordable housing, including through increasing activities with mission-driven properties and housing accessible for people with disabilities.<sup>2</sup>

While these improvements in the Enterprises' multi-family portfolios are welcome steps, FHFA could do more to ensure that they meet the greatest needs of the nation's lowest-income renters. The nation's lowest-income renters often require the use of housing vouchers, Social Security Disability Insurance, or other sources of lawful income to pay rent. Currently, there is no requirement for multi-family rental owners receiving Enterprise financing to accept all forms of lawful income from new applicants and no protections in place to ensure that existing renters do not face eviction when attempting to pay rent using a government source of income. Such requirements would greatly improve the Enterprises' ability to fully serve communities and renters with the greatest needs.

NFHA recommends that FHFA:

- Require multifamily owners receiving Enterprise financing to accept all housing vouchers, Social Security Disability Insurance, government income assistance, and other lawful sources of income as rental payment.
- Put in place eviction protections for existing residents of Enterprise-financed multi-family units that attempt to pay rent with any housing voucher, government income assistance, and other sources of income.

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<sup>2</sup> See FHFA, News Release, "FHFA Announces 2022 Multifamily Loan Purchase Caps for Fannie Mae and Freddie Mac," Oct. 13, 2021, available at <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-2022-Multifamily-Loan-Purchase-Caps-for-Fannie-Mae-and-Freddie-Mac.aspx>.

## II. Actions in Support of Existing Federal Fair Housing Laws

*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?*

### A. Accessibility and Design and Construction Standards

Current census data show high percentages of persons with mobility, vision, and hearing disabilities. Data from the 2021 American Community Survey (ACS) highlights the importance of FHFA adopting and enforcing nondiscrimination strategies to assist people with disabilities. The ACS estimates that, in 2021, 13% of the civilian noninstitutionalized population—42,485,034 individuals—had at least one disability. Of these, approximately 48%, or 20,435,576 individuals, had ambulatory difficulty; 38.9%, or 16,529,501 individuals, had cognitive difficulty; 27.4%, or 11,642,464 individuals, had hearing difficulty; and 19%, or 8,054,084 individuals, had vision difficulty. Almost half of persons over the age of seventy-five live with a disability. Other estimates are even higher. For example, the CDC estimates that up to 27% of adults in the United States live with some type of disability, and that one in six children have one or more developmental disabilities or delays.

Despite the high number of people with disabilities living in the United States, a national study found that “less than five percent [of housing] is accessible for individuals with moderate mobility difficulties and less than one percent of housing is accessible for wheelchair users.”<sup>3</sup>

Lack of accessible units has a significant impact on people with disabilities. It restricts the freedom of people with disabilities to be independent and live in the most integrated settings. Accessible housing is also increasingly important for an aging population.<sup>4</sup>

#### 1. FHFA Should Require Enterprise-Supported Housing Providers to Certify Compliance with Design and Construction Standards

The Fair Housing Act establishes design and construction requirements for multifamily housing built for first occupancy after March 13, 1991. The law requires that certain multifamily dwellings be designed and constructed to include certain features of accessible design. The Fair Housing Act requires that newly constructed multifamily housing contain seven elements of accessible design: accessible building entrance on an accessible route; accessible and usable public and common use areas; usable doors; accessible route into and through the covered dwelling unit; light switches, electrical outlets, thermostats and other environmental controls in accessible locations; reinforced walls for grab bars; and usable kitchens and bathrooms.<sup>5</sup>

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<sup>3</sup> Accessibility Of America’s Housing Stock: Analysis Of The 2011 American Housing Survey (AHS), U.S. DEP’T OF HOUS. AND URB. DEV. OFFICE OF POL’Y DEV. AND RSCH. (2016), at 2.

<sup>4</sup> *Id.*

<sup>5</sup> See 42 U.S.C. § 3604(f)(3).

NFHA and its members have found significant non-compliance with the Fair Housing Act's design and construction requirements, requiring it and its members to take enforcement actions against designers and developers.<sup>6</sup>

FHFA should consider requiring Enterprise-backed multifamily housing providers to certify compliance with Fair Housing Act's design and construction standard.

## **2. FHFA Should Require a Percentage of Enterprise-Backed Multifamily Housing Be Highly Accessible**

The U.S. Department of Housing & Urban Development (HUD) has required housing built using HUD funds make 5%, or occasionally, 10% of multifamily units to be highly accessible under the Uniform Federal Accessibility Standard (UFAS) to people with physical disabilities and 2% of units for people with hearing or vision impairments.<sup>7</sup> FHFA should consider imposing a similar requirement on multifamily housing with loans that have been purchased or securitized by an Enterprise. This recommendation will expand the availability of more new accessible housing across communities. Accessible units should be available in all unit sizes and types of housing. FHFA should identify housing required to be accessible and make available to the public a listing of the accessible units. This would allow people with disabilities to locate multifamily units that have the specific accessible features that they need.

## **3. FHFA Should Require that Multifamily Housing with Loans Assisted by the Enterprises Adopt Reasonable Accommodation and Modification Policies and Practices**

The Fair Housing Act provides that a failure to make a reasonable accommodation or a reasonable modification are types of disability discrimination prohibited under fair housing laws. A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with disabilities to have an equal opportunity to use and enjoy a dwelling.<sup>8</sup> Examples of reasonable accommodations include requests for parking closer to a unit, near an entrance or an elevator, requests to excuse late payments due to when disability-related income is received and requests to be relocated to a unit or floor that is accessible. NFHA members receive an extremely high number of complaints regarding the failure to grant reasonable accommodation requests.

Reasonable modifications are structural changes to the inside or outside of housing and to common and public use areas. A failure to make a reasonable modification is a refusal to permit modifications of existing premises occupied or to be occupied by people with disabilities if such modifications may be necessary to afford such person full enjoyment of the premises.<sup>9</sup> Under the

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<sup>6</sup> See, e.g. *National Fair Housing Alliance v. A.G. Spanos Constr. Co., Inc.*, No. C 07-3255-SBA (N.D. Cal.) For complaint, settlement and other information, see <https://www.relmanlaw.com/cases-spanos>.

<sup>7</sup> 24 C.F.R. § 8.22.

<sup>8</sup> 42 U.S.C. § 3604(f)(3)(B).

<sup>9</sup> 42 U.S.C. § 3604(f)(3)(A).

Fair Housing Act, people with disabilities must pay for the costs of reasonable modifications. Examples of reasonable modifications include the installation of a ramp into a building, lowering the entry threshold of a unit, or the installation of grab bars in a bathroom.

FHFA should require all Enterprise-backed multifamily housing to have a reasonable accommodation and modification policy. The reasonable accommodation and modification policy should contain several critical elements:

- Specify that a delay in responding to a reasonable accommodation or modification request amounts to a denial.
- Require that if a reasonable accommodation or modification is an undue hardship or fundamental alteration, a multifamily housing provider must engage in an interactive process.
- Provide examples of the most common reasonable accommodations, including live-in aides, assistance animals, and accessible parking.
- Require that multifamily housing providers provide structural modifications as reasonable modifications at their own expense and promptly.

## **B. FHFA Should Require that Enterprise-Backed Housing Providers Adopt Criminal History Policies Consistent with the Fair Housing Act**

### **1. Black and Latino Renters Are Disproportionately Affected by Criminal History Screening**

Black and Latino renters bear a disproportionate brunt of tenant screening based on criminal history. Racial disparities in the criminal legal system are well-established, persistent, and widely known. As HUD has explained, “African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.”<sup>10</sup> Black people account for approximately 27 percent of all arrests, despite representing only 13 percent of the population.<sup>11</sup> This is partially due to people of color being targeted more often than White peers for arrests and “stop and frisks,” and receiving harsher treatments than similarly situated White offenders.<sup>12</sup> One study, for example, found that Black residents were arrested seven times more

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<sup>10</sup> Office of General Counsel, U.S. Dep’t of Hous. and Urban Dev., *Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, 2 (Apr. 4, 2016), available at [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) (“2016 HUD Guidance”).

<sup>11</sup> See Susan Nembhard and Lily Robin, *Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*, The Urban Institute, 4 (August 2021), available at <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf> (citing United States Census Bureau, *QuickFacts population estimates* (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219>; United States Dep’t of Justice, *Crime in the United States, Table 43A: Arrests by Race and Ethnicity*, Federal Bureau of Investigation Uniform Crime Reporting Program (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43>).

<sup>12</sup> See Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 Ind. L.J. 421, 426 (2018), available at <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11290&context=ilj>.

often compared to White residents for opioid related offenses, even though drug offenses are committed at roughly equal rates across races.<sup>13</sup>

Higher arrest rates for Black people lead to higher incarceration rates. Nationally, Black individuals are more than five times as likely to be incarcerated as White individuals, and Latinos are more than twice as likely to be incarcerated as White individuals.<sup>14</sup> These disparities are even more stark in several states. For example, in California, Connecticut, Iowa, Maine, Minnesota, New Jersey, and Wisconsin, Black individuals are nine times more likely to be incarcerated than White individuals.<sup>15</sup> More than half the prison population is Black in twelve states: Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia.<sup>16</sup> At the national level, about 65 percent of the formerly incarcerated population in the United States is Black or Latino.<sup>17</sup>

## **2. The Use of Criminal Records Severely and Unfairly Restricts the Availability of Housing for Tenants of Color**

TransUnion has reported survey data showing that 90 percent of housing providers conduct criminal background checks.<sup>18</sup> Eligibility criteria and screening procedures that landlords use to evaluate tenants can vary and have an adverse impact on tenants of color.<sup>19</sup> Regardless of the nature of the offense or how policies are applied, the use of criminal records in housing decisions severely restrict and often serve as an absolute bar for adequate and safe housing, especially for underserved populations.<sup>20</sup> Some landlords have instituted blanket policies that prohibit prospective tenants with prior felony charges from occupying their property, despite many felony charges being non-violent and often unrelated to whether a prospective tenant poses a risk.<sup>21</sup> At least some policies go even further, functionally banning applicants with any kind of criminal history regardless of the severity of past criminal behavior, time elapsed since the conviction, or evidence of rehabilitation.<sup>22</sup> Others ban prospective tenants based merely on arrest records, even

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<sup>13</sup> Thomas McBrien, Ben Winters, Enid Zhou et. al., *Screened & Scored in the District of Columbia*, Electronic Privacy Information Center (“EPIC”) 15 (November 2022), available at <https://epic.org/wp-content/uploads/2022/11/EPIC-Screened-in-DC-Report.pdf>.

<sup>14</sup> E. Ann Carson, U.S. Dep’t of Justice, *Prisoners in 2020 – Statistical Tables*, Bureau of Justice Statistics (Dec.2021), available at <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

<sup>15</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, 5 (Oct. 13, 2021), available at <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/>.

<sup>16</sup> *Id.*

<sup>17</sup> Carson, *supra* note 11, at 19.

<sup>18</sup> See TransUnion, *TransUnion Independent Landlord Survey Insights* (Aug. 7, 2017), available at <https://www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page>.

<sup>19</sup> Anna Reosti, *Tenant Screening and Fair Housing in the Information Age*, University of Washington, 27-29 (2018), available at [https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/42546/Reosti\\_washington\\_0250E\\_18778.pdf?sequence=1&isAllowed=y](https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/42546/Reosti_washington_0250E_18778.pdf?sequence=1&isAllowed=y).

<sup>20</sup> See Schneider, *supra* note 10.

<sup>21</sup> Sarah Carthen Watson, *Excluded and Evicted: The Impact of Mass Incarceration on Access to Housing for Black and Latinx Tenants*, 29 J. Affordable Housing & Community Dev. L. 503, 507 (2021).

<sup>22</sup> *Id.* at 506.

if the arrest did not result in an actual conviction.<sup>23</sup> For example, a company that manages the application and selection process for affordable housing units in more than 100 developments in New York City screens out justice-involved individuals at the pre-application phase, without any individualized assessment.<sup>24</sup> Moreover, criminal records—typically ones provided by tenant screening companies—are notoriously outdated, inaccurate, and incomplete, often failing to disclose the full circumstances of a criminal record, such as whether charges were ultimately dismissed or dropped.<sup>25</sup>

While criminal background checks are often conducted in the name of public safety, there is little supportable evidence that a person’s criminal background can predict whether or not they will be a successful tenant.<sup>26</sup> Indeed, studies have shown that overly restrictive housing policies that prevent the reintegration of persons with criminal records increase the risk of recidivism and harm public safety.<sup>27</sup> Similarly, restrictive housing policies also increase the risk of homelessness and thereby the risk of subsequent reincarceration.<sup>28</sup> Safe, affordable, and accessible housing is critical to the successful reentry of formerly incarcerated individuals back into society. Yet, individuals with criminal records—disproportionately persons of color—are routinely denied housing opportunities.<sup>29</sup>

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<sup>23</sup> See, e.g., *Connecticut Fair Hous. Ctr.*, 478 F. Supp. 3d at 274. (“CrimSAFE then applies the leasing criteria chosen by the housing provider from the menu offered by CrimSAFE to any records found and informs the housing provider whether ‘disqualifying’ records are found. . . . Disqualifying records consist of both convictions and other charges, including arrests which have not led to a conviction.”).

<sup>24</sup> See Complaint, *Fortune Society, Inc. v. iAfford NY LLC*, No. 1:22-cv-06584,

[https://www.reلمانlaw.com/media/cases/1353\\_iAfford%20%20filed%20and%20stamped%20complaint.pdf](https://www.reلمانlaw.com/media/cases/1353_iAfford%20%20filed%20and%20stamped%20complaint.pdf).

<sup>25</sup> See Shivangi Bhatia, *To "Otherwise Make Unavailable": Tenant Screening Companies' Liability Under the Fair Housing Act's Disparate Impact Theory*, 88 *Fordham L. Rev.* 2551, 2582 (2020) (“criminal and eviction histories are typically outdated and inaccurate and do not paint a full picture of a prospective tenant . . . report presents information that is twenty to thirty years old or a conviction that a court ultimately dismissed because the charge against the tenant was unfounded.”), available at

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5689&context=flr>.

<sup>26</sup> See 2016 HUD Guidance, *supra* note 10 (stating generalizations that *any* arrest or conviction record indicate heightened risk is unsupported); see also Schneider, *supra* note 12, at 421; Tran-Leung, *supra* note **Error! Bookmark not defined.**, at 22.

<sup>27</sup> See Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *The Shiver Center on Poverty Law*, viii (Feb. 2015), available at [www.povertylaw.org/wp-content/uploads/2019/09/WDM-D-final.pdf](http://www.povertylaw.org/wp-content/uploads/2019/09/WDM-D-final.pdf); see also Schneider, *supra* note.

<sup>28</sup> *Id.*

<sup>29</sup> Tom Stanley-Becker, *Breaking the Cycle of Homelessness and Incarceration: Prisoner Reentry, Racial Justice, and Fair Chance Housing Policy*, 7 *U. Pa. J.L. & Pub. Aff.* 257, 269–70 (2022), available at <https://scholarship.law.upenn.edu/ilpa/vol7/iss2/2/>; see also, Lake, *supra* note **Error! Bookmark not defined.** (estimating more than “1,300 criminal record-related barriers to housing” at the state and local level).

### 3. Criminal History Screening May Violate the Fair Housing Act

Coupling the overreliance on criminal history in tenant screening with well-known disparities in the criminal legal system drives a significant disparate impact on renters of color.<sup>30</sup> For this reason, screening prospective tenants based on criminal history likely violates the Fair Housing Act, at least where applicants are screened based on arrest records, and where housing providers impose blanket exclusions for any criminal conviction.

In 2016, HUD stated that “a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.”<sup>31</sup> HUD made it clear that “excluding individuals because of one or more prior arrests (without conviction) cannot satisfy [the housing provider’s] burden of showing” that a policy or practice is necessary for protecting the safety of residents and/or property.<sup>32</sup> Because arrest records are not proof of criminal wrongdoing, and are often inaccurate or incomplete, they are not a “reliable basis upon which to assess potential risk.”<sup>33</sup> HUD also cautioned housing providers against imposing a “blanket prohibition on any person with any conviction record—no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then.”<sup>34</sup> In 2022, HUD issued a second memorandum further clarifying and reenforcing its 2016 guidance, and suggesting that private housing providers similarly avoid screening for criminal history.<sup>35</sup> Nevertheless, a continuous stream of enforcement actions demonstrates that housing providers continue to rely on tenant screening services to deny access to rental housing based on blanket criminal history exclusions. While HUD’s guidance is a critical step forward, more can and should be done to minimize the harms done by tenant screening for criminal history.

### 4. FHFA Should Require that Enterprise-Backed Housing Providers Adopt the Following Framework for Screening Based on Criminal History

NFHA recommends that FHFA require that Enterprise-backed housing providers apply the following framework any time a housing provider seeks to screen prospective tenants based on criminal history:

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<sup>30</sup> Stanley-Becker, *supra* note 27, at 269 (“...people with criminal records--whether convictions for felonies or arrests for minor offenses--face discrimination in the private rental market, if not outright exclusion ... not just immediately upon release from incarceration but long after imprisonment ends”); See Tran-Leung *supra* note 11; See 2016 HUD Guidance *supra* note 10.

<sup>31</sup> See 2016 HUD Guidance, *supra* note 8, at 10.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> *Id.*

<sup>35</sup> HUD, *Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (June 10, 2022), available at

<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>. (“2022 HUD Guidance”).



- First, housing providers should avoid reliance on criminal background history given the significant likelihood of unjustified and unnecessary disparities and inaccuracies.
- Second, if a housing provider decides to rely on criminal background history, the housing provider should—prior to the collection of any application fees—first screen for basic financial eligibility (e.g., sufficient income to pay rent), and then conduct a criminal history screening only after determining that the applicant is eligible and notifying the applicant that a check for criminal records will be conducted. Notices should include a detailed explanation of the criteria used as a basis for the tenant screening report.
- Third, the criminal history review should only screen for criteria for which the landlord and screening company have non-speculative, documented evidence that the particular criteria being used are actually necessary to further a legitimate business interest. Such criteria would necessarily exclude arrests and misdemeanors and account for the nature, severity, and recency of any conviction.
- Fourth, any applicant that would otherwise be denied based on the criteria chosen by the housing provider must be given the opportunity for an “individualized assessment” of relevant mitigating information beyond that contained in the criminal record. Such evidence might include: the facts or circumstances surrounding the criminal conduct, the age of the individual at the time of the conduct, evidence that the individual has maintained a good tenant history, evidence of rehabilitation efforts, and any other mitigating circumstances.

### **C. FHFA Should Require that Enterprise-Backed Landlords Adopt Reasonable Occupancy Limitations**

In 1988, concerns about discrimination against families with children prompted Congress to amend the Fair Housing Act to add familial status as a protected class. Familial status means the presence of a minor child in a household.<sup>36</sup> The protections against familial status discrimination cover many different forms of discrimination. Before such protections were in place, landlords or property managers barred children younger than 18 years of age or restricted the number of children permitted in housing.<sup>37</sup> A study found that more than one-fourth of the nation’s rental housing units barred children younger than 18 years old.<sup>38</sup>

Occupancy limitations are limits on the number of people that can occupy housing. Restrictive residential occupancy limitations were one of the housing problems that Congress specifically targeted in the enactment of the 1988 amendments to the Fair Housing Act<sup>39</sup> and continue to

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<sup>36</sup> See 42 U.S.C. § 3602(k).

<sup>37</sup> Mary Colten & Robert Marans, *Restrictive Rental Practices and Their Impact on Families*, Population Research and Policy Review 1 (1): 43–58 (1982).

<sup>38</sup> Robert Marans, et al, *Restrictive Rental Practices Affecting Families With Children*. U.S. Department of Housing and Urban Development (1980).

<sup>39</sup> Tim Iglesias, *Moving Beyond Two-Person-Per-Bedroom: Revitalizing Application of the Fair Housing Act to Private Residential Occupancy Standard*, 28 Ga. St. U.L. Rev. 619, 629 (2012).

limit housing choice for families with children. A recent HUD study found that families with children were steered toward larger units, increasing costs and limiting availability for families with children.<sup>40</sup>

The study found that occupancy limitations of two persons per bedroom affect the housing choice available to families with children because they may prevent consideration of smaller units that might still be acceptably sized from the family's point of view.<sup>41</sup> Two person per bedroom occupancy limitations impose unfair and often illegal restrictions on the housing choice of families with children.<sup>42</sup> California has effectively applied a two-person-per-bedroom plus one additional person occupancy limitation for many years.

NFHA recommends that FHFA require enterprise-backed multifamily providers to adopt occupancy limitations less restrictive than two persons per bedroom.

#### **D. FHFA Should Require Enterprise-Backed Multifamily Housing Providers to Report Findings of Discrimination and Actions Taken in Response**

If a court or an agency of the United States or a state government has found that an enterprise-backed housing provider has violated the Fair Housing Act or other federal, state or local fair housing laws, FHFA should require the housing provider to submit documentation related to the underlying judicial or administrative finding and the affirmative measures that the housing provider has taken in response to address the findings.

#### **E. FHFA's Evaluation of Enterprise Activities Should Align with the Fair Housing Act's Requirement to Affirmatively Further Fair Housing**

NFHA encourages FHFA to consider protections for tenants in Enterprise-financed rental housing not just based on the tenants' protected class status, as described above, but also to consider what additional measures FHFA might institute that would address its obligation to affirmatively further fair housing (AFFH). The Fair Housing Act mandates that "all federal agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter..."<sup>43</sup>

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<sup>40</sup> Urban Institute, *Discrimination against Families with Children in the Rental Housing Market: Findings of the Pilot Study* at iii, U.S. Dep't of Hous. & Urban Dev. (2016).

<sup>41</sup> *Id.*

<sup>42</sup> See Iglesias, *supra* note 36.

<sup>43</sup> 42 U.S.C. 3908(d).

HUD has defined AFFH as follows:

*Affirmatively furthering fair housing* means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation, eliminate inequities in housing and related community assets, and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, reduce or end significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into well-resourced areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws and requirements. The duty to affirmatively further fair housing extends to all of a program participant's activities, services, and programs relating to housing and community development; it extends beyond a program participant's duty to comply with Federal civil rights laws and requires a program participant to take actions, make investments, and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.<sup>44</sup>

While this definition is crafted in language appropriate for participants in HUD's programs, the concepts apply just as well to FHFA and the Enterprises, which must take *meaningful actions, make investments, and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.*

Embodied in this definition is a two-pronged approach: on the one hand, developing affordable housing in well-resourced communities with limited affordable housing opportunities, and on the other hand, developing mixed-income housing in less well-resourced communities, while taking measures to avoid displacement of existing residents and investing in resources and amenities those communities may currently lack.

The Enterprises can facilitate development that promotes this two-pronged approach through the financing they provide for rental properties that accomplish these goals. A precedent for this approach already exists in the "residential economic diversity" provisions of FHFA's Duty to Serve (DTS) regulation.<sup>45</sup> Under the DTS regulation, the Enterprises can receive additional credit for qualifying DTS activities that either finance affordable housing in areas designated by HUD as difficult to develop (generally, high-cost areas) or that finance mixed-income housing in areas of concentrated poverty.

To be most effective for maximizing the fair housing benefits for tenants, three key modifications to the DTS residential economic diversity approach are needed.

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<sup>44</sup> 24 CFR § 5.151, Affirmatively Further Fair Housing: Definitions.

<sup>45</sup> 12 CFR § 1282.32, Underserved Markets Plan.

- The first is the geographic scope of eligible areas. For well-resourced areas in which credit would be given for financing affordable housing, the DTS rule adopts HUD’s definition of difficult to develop areas (DDAs). This definition incorporates both a cost assessment (high-cost areas) and a cap on the population that can be included (with an aggregate total of no more than 20 percent of the U.S. population). The second part of that definition eliminates from eligibility many areas that would otherwise meet the DDA definition. For the purposes at hand, there is no need to use a population cap on the number of areas that can be considered eligible, and eliminating the cap expands the number of areas in which the Enterprises’ financing could have beneficial impact. FHFA should maintain the provision that allows state-designated DDAs to be eligible, and that incorporates a poverty threshold to ensure that otherwise eligible DDAs are not high poverty areas.
- Second, the DTS provisions limit the analysis – both for high-cost areas and for areas of concentrated poverty – to cost and income considerations. From a fair housing perspective, that approach has significant limitations, as cost and income are not the only barriers for tenants. These cost considerations should be overlaid with an analysis of protected class characteristics, particularly race, national origin, gender, familial status and disability. In determining whether a particular property may advance fair housing goals, it is important to understand the racial and ethnic composition of the neighborhood, the extent to which units serve people with disabilities (as discussed in more detail above) and the extent to which units may be sized to meet the needs of families with children (I.e., have 2, 3 or more bedrooms).
- Finally, the likelihood that the activities of the Enterprises in providing financing for rental properties that advance fair housing goals will have meaningful impact on the market would be increased if they offered preferential pricing for the loans on such properties. This would be consistent with the provision in their charters that mandates the Enterprises support the mortgage market in low- and moderate-income, inner-city, and other underserved areas, even if the return on those mortgages is less than for other mortgages.

Adoption of this kind of AFFH analysis and incentives will help to expand the number and location of units available and affordable to tenants in properties financed through the Enterprises and would be an important addition to a suite of protections for tenants in those properties. NFHA encourages FHFA to adopt this approach.

## **Conclusion**

NFHA appreciates the opportunity to provide its comments to the Request for Input and looks forward to engaging FHFA on these important matters. For questions, please reach out to Nikitra Bailey at [NBailey@nationalfairhousing.org](mailto:NBailey@nationalfairhousing.org), Scott Chang at [SChang@nationalfairhousing.org](mailto:SChang@nationalfairhousing.org), Debby Goldberg at [DGoldberg@nationalfairhousing.org](mailto:DGoldberg@nationalfairhousing.org), or Jorge Andres Soto at [JSoto@nationalfairhousing.org](mailto:JSoto@nationalfairhousing.org).