NMHC NATIONAL MULTIFAMILY HOUSING COUNCIL
NAA NATIONAL APARTMENT ASSOCIATION

May 11, 2023

Clinton Jones, General Counsel
Attention: Comments/RIN 2590-AB27
Federal Housing Finance Agency
400 Seventh Street SW
Washington, DC 20219

Re: Enterprise Regulatory Capital Framework – Commingled Securities, Multifamily Government Subsidy, Derivatives, and Other Enhancements (RIN-2590-AB27)

Submitted electronically via http://www.regulations.gov.

Dear Mr. Jones,

On behalf of the National Multifamily Housing Council ("NMHC") and the National Apartment Association ("NAA") (the "Associations") and their members – owners, managers, developers, and financiers in the nation's multifamily housing industry, we provide these comments in response to the Federal Housing Finance Agency's ("FHFA") Notice of Proposed Rulemaking ("NPRM"), dated as of March 13, 2023, entitled, "Enterprise Regulatory Capital Framework—Commingled Securities, Multifamily Government Subsidy, Derivatives, and Other Enhancements",[1] which seeks to amend certain provisions in the Enterprise Regulatory Capital Framework ("ERCF") for the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac", and collectively with Fannie Mae, the "Enterprises"). Specifically, the NPRM proposes to modify existing regulations with respect to guarantees on commingled securities, multifamily mortgage exposures secured by government-subsidized properties, derivatives and cleared transactions, and credit scores, among other things.[2]

The Associations appreciate and commend the FHFA's ongoing commitment to ensure that the ERCF is appropriately utilized and applied by all stakeholders to further important housing and community development goals nationwide. In particular, and as more fully described in this comment letter, the Associations applaud the FHFA for amending the originally proposed ERCF in recent years to better reflect certain concerns raised by the Associations and other multifamily housing stakeholders. That said, the Associations believe that further amendments can and should be made to the ERCF to (i) better utilize multifamily housing as an important part of the Biden Administration's focus on solving the affordable housing crisis nationwide, and in particular, (ii) enable owners, managers, developers, and financiers in the multifamily housing industry to more effectively and efficiently engage in the development of affordable multifamily housing. Accordingly, the Associations respectfully suggest certain recommendations previously offered

[1] 12 CFR Part 1240 (the "NPRM").
[2] NPRM at 15306.

during prior public comment periods related to the ERCF, as well as additional ideas for FHFA's consideration, as it further updates ERCF during this public comment period going forward.

(I) Background:

NMHC and NAA represent the nation's leading firms participating in the multifamily rental housing industry. NMHC represents the principal officers of the apartment industry's largest and most prominent firms. The NAA is the trade association for owners and managers of rental housing. The NAA is comprised of 141 affiliated apartment associations and encompasses over 95,000 members, representing more than 11.6 million rental homes throughout the United States, Canada, and the United Kingdom. These combined memberships engage in all aspects of the apartment industry, including ownership, development, management, and finance. NLHA is a vital and effective advocate for nearly 450 member organizations, including developers, owners, managers, public housing authorities, nonprofit sponsors and syndicators involved in government-related rental housing.

The Associations recognize and appreciate that the FHFA is no stranger to the affordable housing crisis facing communities around the country. Each year, more and more Americans are unable to afford rental payments for their homes due to the lack of supply, barriers to development, and regulatory burdens. In fact, the total share of cost-burdened households (those paying more than 30 percent of their income on housing) increased steadily from 28 percent in 1985 to 36.9 percent in 2021 and is growing, while others have been priced out of their applicable communities altogether.[3] Further, NMHC's January 2023 Quarterly Survey of Apartment Market Conditions[4] indicate the following troubling statistics:

- More than three-quarters of respondents (82 percent) reported declining sales volumes from three months prior;
- Nearly two-thirds (63 percent) indicated equity financing was less available; and
- Fully 60 percent said it was a worse time for mortgage borrowing compared to three months earlier.

In addition, according to research released by NMHC and the National Association of Home Builders ("NAHB"), regulatory, administrative, and political hurdles at all levels of government can account for an average of 40.6 percent of multifamily development costs further impacting affordability.[5] This NMHC-NAHB research clearly demonstrates that over regulation at the local, state, and federal levels ultimately impose costly requirements on housing developers and other market participants, all of which ultimately forces housing costs to rise. As such, the Associations urge FHFA to (i) strongly consider the regulatory burdens imposed by the ERCF in the context of

[3] NMHC tabulations of 1985 American Housing Survey microdata, U.S. Census Bureau; 2021 American Housing Survey, U.S. Census Bureau.
[4] https://www.nmhc.org/research-insight/quarterly-survey/2023/nmhc-quarterly-survey-of-apartment-conditions-january-2023/
[5] National Association of Home Builders and National Multifamily Housing Council, Regulation: 40.6 Percent of the Cost of Multifamily Development, https://www.nmhc.org/globalassets/research--insight/research-reports/cost-of-regulations/2022-nahb-nmhc-cost-of-regulations-report.pdf

significant existing regulatory and administrative burdens faced by multifamily housing market participants, and in particular, (ii) focus on ways to materially reduce such burdens.

With respect to ERCF, the Associations reiterate their position from prior comment letters submitted to FHFA that they support a robust, rational, and transparent capital framework that will not only allow the Enterprises to serve their housing mission, but also protect taxpayers from future bailouts. Accordingly, the Associations have taken the opportunity to engage with FHFA during prior rulemaking public periods by submitting comments in response to the (i) original capital framework rule on Nov. 16, 2018[6];(ii) reproposal of the original framework on August 31, 2020;[7] and (iii) amendments to the ERCF – Prescribed Leverage Buffer Amount ("PLBA") and Credit Risk Transfer ("CRT") proposed rule on November 26, 2021.[8]

In prior rulemakings, the Associations have provided a number of recommendations with respect to better incorporating multifamily housing into the ERCF, some of which have been addressed. During the 2021 rulemaking, for example, the Associations agreed with FHFA when it described the prior PLBA as, "...a leverage ratio that exceeds risk-based capital requirements throughout the economic cycle could lead to undesirable outcomes at the Enterprises, including promoting risk-taking and creating disincentives for CRT and other forms of risk transfer."[9] Accordingly, the Associations supported FHFA's change to the calculation of PLBA to serve as a credible backstop to the risk-based capital requirements of the Enterprises, and in particular, help multifamily housing market participants who work with the Enterprises as part of their day to day business.

In addition, the Associations were pleased to see the 2021 rulemaking address another concern raised by the Associations that remains relevant to the multifamily housing industry. The 2021 rulemaking lowered the prudential floor for capital for retained risk after CRT from a minimum of 10 percent to 5 percent.[10] That said, the Associations continue to believe that a blanket CRT prudential floor without additional nuance that takes into account the more robust multifamily CRT, as opposed to the single-family CRT, is misguided and ignores the unique multifamily risk management characteristics of the Enterprises' multifamily business models. In fact, the Associations reiterate the following position from their 2021 comment letter submitted to FHFA:

> "*Even at a 5 percent CRT floor for multifamily mortgage exposures it still may change the Enterprises' risk management policies and procedures and their business models. FHFA should conduct an impact analysis to determine the [Proposed Rule]'s impact on the Enterprises' business models and require the Enterprises to provide an evaluation of the potential impact on how they manage*

---

[6] NMHC Comment Letter, available at https://www.nmhc.org/contentassets/6124463c5c504187b860cee8671d8242/enterprise-capital-requirements---comment-letter.pdf (November 16, 2018).
[7] NMHC Comment Letter, available at https://www.nmhc.org/globalassets/advocacy/comment-letters/2020/nmhc-naa-enterprise-capital-requirements-comment-letter-8.31.20.pdf (August 31, 2020).
[8] https://www.nmhc.org/globalassets/advocacy/comment-letters/2021/nmhc-naa-comment-letter-rin-2590-ab17-final.pdf (November 26, 2021)
[9] Federal Register 12 CFR Part 1240 RIN 2590-AB17 p 11
[10] *Id.*

their existing CRT programs. It is important to note that the existing multifamily CRT programs used by each Enterprise are well developed, vetted and resulted in no cost to taxpayers during the 2008 financial crisis. Should the CRT floor result in a change on the use of CRT for multifamily mortgage exposures, current and future involvement of the private market in CRT will be curtailed and the Enterprises are likely to experience a significant increase in risk."

While this is an example of how FHFA has taken into account certain multifamily housing considerations in prior rulemakings that amended the ERCF, much more remains to be done to ensure that ERCF adequately bolsters multifamily housing, and in doing so, addresses the affordable housing crisis nationwide. The Associations continue to be supportive of the ERCF that ensures each Enterprise operates in a safe and sound manner, and in doing so, facilitates fulfillment of their statutory mission to provide stability and ongoing assistance to the secondary mortgage market across good and bad economic cycles.[11] A key means by which FHFA can materially improve the ERCF is by addressing the structural weaknesses that fail to take into account the strong potential of multifamily housing as a tool in the FHFA and Enterprises' collective arsenal to meaningfully address the housing crisis.

As such, the Associations applaud FHFA for its willingness to seek public input with respect to much-needed amendments to the ERCF and urge FHFA to consider additional suggestions offered in this comment letter that would help various stakeholders in the housing industry overcome regulatory and other administrative burdens in their day-to-day business operations.

(II) Comments on the NPRM: Certain ERCF Amendments Related to Multifamily Housing Will Benefit the Nation's Housing Market; However, More Can and Should Be Done:

NPRM's Inclusion of Certain-Multifamily Housing Facets:

The Associations appreciate the NPRM's inclusion of certain nuances that reflect the more robust and well-developed multifamily housing CRT and other features as part of the Enterprises' involvement in the multifamily housing space. For example, as the NPRM notes, "The methodology for calculating multifamily credit risk weights in the ERCF does not differentiate between multifamily mortgage exposures secured by properties with a government subsidy and by properties without a government subsidy".[12] This lack of differentiation was seen as a significant omission given that the ERCF's predecessor programs, the Conservatorship Capital Framework and the FHFA's 2018 notice of proposed rulemaking on Enterprise Capital Requirements, each contained such differentiation via application of a multifamily risk multiplier.[13] Accordingly, the Associations appreciate that the NPRM proposes to introduce a risk multiplier equal to 0.6 for any multifamily mortgage exposures secured by one or more properties each with at least one applicable government subsidy, subject to certain affordability criteria.[14]

---

[11] 85 Fed. Reg. at 39275.
[12] NPRM at 15309.
[13] *Id.*
[14] *Id.*

While this proposal is a good first step, the Associations caution FHFA that the affordability and other eligibility criteria for application of the 0.6 risk multiplier may be too restrictive. For example, the applicable government subsidies would be limited to the following three primary subsidy programs: (i) LIHTC, (ii) Section 8 project-based rental assistance, and (iii) state and local affordable housing programs that require the provision of affordable housing for the life of the loan.[15] In addition, a multifamily mortgage exposure meeting the collateral criteria would qualify for the 0.6 risk multiplier if an applicable Enterprise can verify that the applicable property securing the exposure has at least 20 percent of its units restricted as affordable units, where the affordability restriction means less than or equal to 80 percent of AMI.[16]

Specifically, the NPRM notes, "For a multifamily mortgage exposure to qualify for the government subsidy multiplier, the properties securing the exposure must have significant, long term, and continuous government subsidies. LIHTC and project-based Section 8 programs meet these criteria, so to ensure alignment in this regard, the proposed rule would require that qualifying state and local affordable housing programs require affordable housing to be provided for the life of the loan."[17] As more fully described below, the Associations urge FHFA to clarify the proposed alignment between state and local affordable housing programs and LIHTC and Section 8 programs.. For example, today, the Enterprises have programs that would fit the criteria suggested for the minimum qualifying metrics of at least 20 percent of the units restricted at or below 80 percent of AMI and that run for the entire life of the loan. Fannie Mae's Sponsor-Initiated Affordability (SIA) and Freddie Mac's Tenant Advancement Commitment (TAC) both fit the criteria required to qualify for this lower risk multiplier.

The LIHTC and PBV programs have both been around for many years and have proven track records of exceptionally low defaults given the significant financial impact to a borrower who fails to comply with the resident restrictions on income. Some state and/or local programs, as well as the SIA and TAC programs, have shorter records of performance. As asked in the NPRM, these facts warrant an evaluation of a tiered approach to applying the risk multiplier. The Associations urge FHFA and/or the Enterprises to conduct an impact analysis to determine the NPRM's impact on a tiered approach for the risk multiplier given the varied history of the suggested eligible programs. In the current era of high regulatory burdens coupled together with high inflation and rising housing costs, the FHFA and the Enterprises should collectively seek to increase regulatory flexibility while decreasing regulatory burdens and impacts. The Associations urge FHFA to broaden such eligibility and affordability criteria to ensure more multifamily housing stakeholders and/or programs offered by the Enterprises, as applicable are eligible for a lower risk multiplier. Broadening the eligibility and evaluating the implementation of a tiered approach with respect to the proposed multifamily risk multiplier will help both multifamily housing participants as well as FHFA and the Enterprises meet shared goals of promoting affordable housing and community development nationwide.

---

[15] *Id.*
[16] *Id.*
[17] *Id*. 15309-15310.

Additional Multifamily Housing-Focused Policy Recommendations FHFA Should Incorporate into ERCF Going Forward:

In previous comment letters, the Associations set forth the following three principles with which the FHFA should adhere as it amends the ERCF going forward:

1. Consistency with maintaining an explicit federal guarantee for multifamily mortgage-backed securities.

2. Recognition of the unique multifamily risk management characteristics of the Enterprises' multifamily businesses, which differ from their single-family businesses.

3. Maintenance of the differences between the risk-sharing executions of each Enterprise without advantaging one Enterprise over the other.

The Associations believe that the ERCF as it relates to the Enterprises' multifamily programs and/or new programs should be designed in such a way as to better include multifamily housing as a key component thereof. Further support of multifamily housing market participants and multifamily housing programs would undoubtedly boost the supply of affordable housing nationwide, and in doing so, materially address the affordable housing crisis. Accordingly, with the above guiding principles, the Associations urge the FHFA to consider implementation of the following recommendations:

1. **Pro-Cyclicality of the Multifamily Housing Market**: The NPRM provides a single-family countercyclical adjustment by requiring an Enterprise to apply the first single family countercyclical adjustment simultaneously with the first property adjustment.[18] The NPRM notes, "This modification would reduce the volatility in the capital requirement for a single-family mortgage exposure over the first six months after origination and mitigate the incentive for the Enterprises to delay acquiring credit protection."[19] While this adjustment is beneficial for the single-family housing market, the NPRM proposes no such adjustment for multifamily housing, which is at odds with FHFA's goals of using all tools, including multifamily housing, at its disposal to address the housing crisis. In addition, FHFA should provide further context regarding the data used by the FHFA with respect to such proposals. Without more context as to the related-property and other data, it is near-impossible for private industry to provide more substantive input. That said, as the Associations noted in prior comment letters, one helpful solution that would bolster multifamily housing is to eliminate the use of FHFA's U.S. all-transactions house price index so that countercyclical adjustments are made only when the value of the Enterprise's portfolio increases or decreases by a certain percentage. In addition, the Associations reiterate their recommendations that FHFA consider (i) eliminating the use of mark-to-market-loan-to-value ("MTMLTV") in exchange for the loan-to-value ratio at the time of origination; and (ii) cap mark-to-market values or permit decreases in mark to market values to limit pro-cyclicality in the multifamily housing market.

[18] NPRM at 15314.
[19] *Id*.

2. **<u>Impacts of Lookup Grid and Risk Multiplier on Affordable and Workforce Housing Markets</u>**: As more fully described above, the Associations appreciate the NPRM's proposal to introduce a risk multiplier equal to 0.6 for any multifamily mortgage exposures secured by one or more properties each with at least one applicable government subsidy, subject to certain affordability criteria.[20] However, the Associations caution that lookup grids and risk multipliers applicable to multifamily mortgage exposure have the potential to negatively impact the Enterprises' affordable and workforce housing ("WFH") initiatives, which are key to the Enterprises' statutory mission and business models. The treatment of multifamily mortgage exposures with higher mark-to-market-loan-to-value MTMLTV and lower debt-service-coverage ("DSC") ratios will result in a significant amount of capital held against WFH. Therefore, while the NPRM is a step in the right direction, the Associations recommend that the FHFA and/or Enterprises take steps to study the impact of this proposal on the market for WFH, and fully address any negative impacts on the development and investments in multifamily housing.

3. **<u>Inconsistent Treatment of Multifamily and Single-Family Housing</u>**: The FHFA's rulemaking related to ERCF requires greater capital for multifamily exposures than for comparable single-family exposures. As the Associations noted in a prior comment letter submitted to FHFA,

   "*The Proposed Rule fails to address the pro-cyclicality of multifamily mortgage exposures, despite creating countercyclical adjustments for single-family exposures. If adopted without change, the Proposed Rule would require additional capital to be held against multifamily exposures as compared to single-family exposures. Although this would diminish the availability and cost of multifamily housing, the Proposed Rule does not provide any explanation or justification for this difference in treatment*."

Going forward, the FHFA must address the inconsistent treatment of multifamily and single-family housing as they relate to ERCF and the Enterprises' broader initiatives. ERCF should reflect the unique characteristics and risks applicable to multifamily housing. Neither a "one size fits all" nor a singular focus on single-family housing is an appropriate approach for FHFA to take in this respect. Further, FHFA should provide additional information, including the data and analytical review process taken, with respect to its determinations regarding risk capital treatment for single-family housing vs. multifamily housing.

(III) <u>Conclusion</u>:

The Associations continue to believe ERCF is an important means for FHFA and the Enterprises to serve their housing missions, while also protecting taxpayers from bailouts. However, ERCF needs to be rational, robust, transparent, and most of all, applicable and beneficial to all forms of housing, ranging from multifamily housing to single-family housing. The NPRM's focus on single-family housing, other than in the context of the proposed risk multiplier for certain multifamily properties, is problematic for a number of reasons, not the least of which is that this

---

[20] NPRM at 15309.

approach risks failing to benefit the strong potential that multifamily housing development has to solve the affordable housing crisis nationwide.

In closing, the Associations urge FHFA to consider the recommendations outlined in this comment letter as well as other policy solutions that would effectively and efficiently incorporate multifamily housing into their various programs and initiatives. The Associations stand ready to work with FHFA, the Enterprises, Congress, the Administration, and any other stakeholder to meet these shared goals.

Thank you for your attention to these concerns.

Sincerely,

Robert Pinnegar
President & CEO
National Apartment Association

Sharon Wilson Géno
President
National Multifamily Housing Council