

WASHINGTON UPDATE



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ENERGY AND SUSTAINABILITY

EPA Launches ENERGY STAR Performance Tracking Tool for Multifamily

As reported in the March 19 AIMS Washington Update, the U.S. Environmental Protection Agency has launched a multifamily version of its ENERGY STAR Portfolio Manager. The online energy performance tracking tool allows building owners and operators to measure and manage their buildings' energy consumption.

A comparable tool has existed for the office sector for more than a decade, and NAA/NMHC have been urging EPA to release a multifamily-specific version for years. The tool will allow apartment owners to assess their portfolios' energy performance, identify under-performing buildings, set investment priorities to make targeted energy efficiency improvements and earn recognition for achievements.

Using Portfolio Manager, apartment firms can enter building square footage and whole-community energy and water data, as well as optional building attributes, to benchmark performance. The tool automatically uses this information to calculate useful metrics such as energy and water consumption and costs (both per square foot and in total); greenhouse gas emissions associated with the community's energy consumption; and weather-normalized energy intensity. Using this information, multifamily housing owners and operators can prioritize improvement opportunities and track efficiency improvements over time.

NAA/NMHC strongly encourage multifamily firms to take advantage of the Portfolio Manager program because robust participation will provide the basis for the development of an ENERGY STAR rating for multifamily properties. This is increasingly important as Congress considers mandatory energy performance labeling requirements for commercial and residential properties.

We are concerned that mandatory labeling requirements without the existence of a fully vetted ENERGY STAR labeling program for multifamily could discourage investment in the sector. (For more on energy/climate change legislation being circulated in Congress, see the April 6 AIMS Washington Update.)

To learn more about the ENERGY STAR Portfolio Manager, [click here](#).

Stimulus Legislation Provides "Green" Money for Multifamily

The \$787 billion economic stimulus bill (P.L. 111-5) signed into law in

February provides a significant amount of money for energy-efficient incentives in the apartment sector. While certain funds have been earmarked for providers of assisted and low-income housing, state and local policymakers have discretion to use other funds to create grants, loans and other incentive programs to stimulate energy efficiency upgrades in privately-held property.

The U.S. Department of Energy's (DOE) Energy Efficiency Block Grant Program, created in 2007 to provide grants to state and local governments but never funded, was given \$3.2 billion. While instructions for applying for the grants have not yet been released, DOE has produced an online map showing how much money states and cities will receive. Member firms interested in participating in the resulting state and local programs can use the allocation map as a starting point for conversations with the appropriate officials.

Another \$3.1 billion was set aside for the State Energy Program, which offers grants for state government and energy technology research and development programs.

For affordable properties, an additional \$2.3 billion will be distributed through a competitive bidding process to make energy-efficient renovations and retrofits of Section 8 and other HUD-subsidized units. Funding for the federal weatherization program was increased from \$400 million to \$5 billion, the eligibility requirements were expanded to allow families up to 200 percent of the poverty level to participate, and the per-unit cap on assistance was increased from \$2,500 to \$6,500.

In addition, program changes were implemented to make it easier for apartment properties to participate, which help owners conduct energy performance audits and rehab existing properties. EPA Guidance on the revisions was released on March 12 and is available [here](#).

IMMIGRATION

Lawsuit Against Apartment Owner Dismissed

The apartment industry won a significant victory last week when a federal judge dismissed a lawsuit against a New Jersey apartment owner for allegedly harboring undocumented immigrants by renting apartments to them (*DelRio-Mocci et al. v. Connolly Properties, Inc.*, U.S. Dist. Court N.J., CA 08-2753 (April 9, 2009)).

The lawsuit was initiated by the Federation for American Immigration Reform, a group championing stricter immigration laws, on behalf of several former residents. They accused the apartment owner of recruiting low-income immigrants and steering them, by immigration status, race and source of income, to dilapidated properties when it was unable to lease apartments to legal residents. The group alleged that the owner carried out a "scheme" that violated the Racketeer Influenced and Corrupt Organizations (RICO) Act, the federal anti-conspiracy law intended to combat organized crime.

The judge ruled that "renting an apartment to an alien does not amount to harboring." He indicated that proving illegal racketeering would require proof that an owner knew about or recklessly disregarded a renter's illegal status and concealed, harbored, or shielded that person from detection.

NAA/NMHC have followed the case, which may continue if the dismissal is appealed, as just one example of how several anti-immigration groups and local governments have sought to make apartment owners "immigration police" by attempting to penalize them for renting to undocumented immigrants.

Obama Says Immigration Reform Still a Priority

The issue of immigration reform resurfaced last week after President Obama signaled his willingness to pursue comprehensive reform this year. Obama promised to take on immigration reform during his campaign, but many observers believed that congressional action might be postponed because of the recession or other controversial priorities such as health care reform.

Responding to such fears, on April 9, White House Press Secretary Robert Gibbs announced that Obama is committed to starting the comprehensive immigration overhaul process this year. Administration officials acknowledge, however, that the prospect of actually enacting legislation this year is unlikely. Moving comprehensive reform seems unlikely without a member of Congress to lead the effort. No clear champion for reform has emerged since 2007 when Congress last addressed the issue.

Gibbs said Obama would deal with stakeholders and lawmakers to "figure out the best strategy moving forward" and that any solution would not only have to address border security but also the 12 million illegal immigrants already in the country.

Giving a boost to the President's efforts, on Tuesday, two major labor federations agreed for the first time to work together to support an overhaul of the immigration system. When Congress last considered comprehensive immigration reform in 2007, the labor groups were divided.

The new accord outlined by the AFL-CIO and rival Change to Win endorses legalizing the status of undocumented immigrants already in the U.S. and opposes any large new program to bring in temporary foreign workers. The two groups say that they are open to changing the existing temporary worker system to provide temporary visas to foreign workers based on labor market demand.

Key business groups continue to press for a more robust temporary worker program, however, and they say that the AFL-CIO/Change to Win proposal, which would create an independent commission to assess labor demand, would fall short of meeting employer needs.

CAPITAL AND INVESTMENT MARKETS

FASB Issues Three Positions to Improve Transparency and Capital Access

On April 9, 2009, the Financial Services Accounting Board (FASB) issued final guidance on two proposals related to mark-to-market accounting, and one associated with accounting for impaired securities, such as mortgage-backed securities.

These actions follow a Congressional hearing on March 12 during which

lawmakers threatened to enact legislation to amend mark-to-market accounting standards if FASB did not take action.

On April 2, FASB approved highly controversial proposed guidance on FAS 157-4 allowing companies to exercise more judgment in determining if a market for an asset is active and if a transaction is "distressed."

On April 9, the board issued as final the following three staff positions (FSPs):

- FAS 157-4, Determining Fair Value When the Volume and Level of Activity for the Asset or Liability Have Significantly Decreased and Identifying Transactions That Are Not Orderly,
- FAS 107-1 and APB 28-1, Interim Disclosures About Fair Value of Financial Instruments,
- FAS 115-2 and FAS 124-2, Recognition and Presentation of Other-Than-Temporary Impairments.

The new FAS 157-4 staff position alters the proposed guidance to respond to feedback from security analysts and investor groups and discards a presumption of a distressed transaction in an inactive market.

All actions become effective June 1, 2009, but entities may adopt the guidance early for the interim and annual periods ending after March 15, 2009.

The FSPs are part of the broader efforts by FASB and international regulators to bring stability and transparency to banks' balance sheet accounting and are designed to boost investor confidence in the sector.

While it is unclear whether FASB's changes and clarifications will truly help restore liquidity and capital flows, NAA/NMHC support the moves as justified by the unprecedented capital crisis that has gripped the world. More information on each of the three staff positions is available on the [FASB Web site](#).

New Report Promotes U.S. Apartments to Foreign Investors

Apartments have a long track record of producing the highest risk-adjusted investment returns compared to other property types. Yet our sector remains overlooked by foreign capital.

Perhaps the biggest obstacle we face in attracting foreign capital is the fact that many foreign investors assume our apartment market is like theirs—a highly regulated sector that produces inferior returns, lacks professional management firms and is more likely to be comprised of subsidized stock.

A new report by NMHC, titled *A Case for Investing in U.S. Apartments*, is working to change that.

Commissioned from Torto Wheaton Research, the report is designed to help foreign investors better understand the benefits of investing in U.S. apartments. It highlights the key factors that make U.S. apartments a highly liquid asset class with stable cash flows, abundant debt financing and unique diversification benefits.

NMHC is making the report freely available to the industry so they can help

educate their foreign contacts. The report is available on the [NMHC Web site](#).

WETLANDS

Clean Water Act Legislation Re-Introduced

NAA/NMHC-opposed legislation that would greatly expand the scope of the Clean Water Act (CWA) has been reintroduced in the Senate. Current law limits federal jurisdiction to navigable waters, however, the issue remains controversial after a 2006 Supreme Court decision ruled that the federal government lacked authority to regulate as wetlands certain properties that are not connected to navigable waters (*Rapanos v. United States*, 2006 WL 1667087 (U.S.)).

The Clean Water Restoration Act (S. 787) would give EPA jurisdiction over all waters in the country regardless of their navigability. Comparable legislation was introduced in both houses in the last Congress but did not pass. On the campaign trail, President Obama affirmed the importance of the CWA but did not take a position on the pending legislation.

On April 8, Obama's EPA Administrator Lisa Jackson said she believes a legislative fix is necessary to clarify the agency's jurisdiction over water. Although she declined to express support for one approach over another, she said she believes the "country benefits from something broader rather than narrow." We will continue to warn legislators of the potential negative consequences embodied in the "blunt force" legislative approach adopted by S. 787.

NAA/NMHC Joint Legislative Program

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