

The material in this Second Annual Report is based upon information gathered from reports prepared by the Government Affairs staffs of the Apartment and Office Building Association, the Building Owners and Managers Association, the National Apartment Association and the National Multi-Housing Council.

I. PROPERTY MANAGEMENT:

A. Fair Housing Efforts Described:

1. Resident Screening Guidance Issued:

HUD has issued guidance addressing resident screening, property rules, and the eviction of problem residents in the post-September 11 environment. The document notes that asking applicants to provide documentation of their citizenship or immigration status during the screening process would not violate the Fair Housing Act. It also emphasizes that, "while landlords must be responsive to resident complaints, they should be careful to take action against residents only on the basis of legitimate property management concerns." This guidance document is posted at www.hud.gov/offices/ftheo/library/sept11.cfm.

2. Hispanic and Latino Outreach Developed:

NAA/NMHC is pursuing efforts with HUD, the National Hispanic Radio Network, and the National Association of Hispanic Real Estate Professionals on an initiative to reach out to Hispanic and Latino renters. The partnership, formally spelled out in a Memo of Understanding (MOU), will provide consumer education to Hispanic and Latino renters and will help combat discrimination against them. The MOU notes that these groups tend to rent in a greater percentage and will grow faster than the population as a whole representing a significant marketing opportunity for the apartment industry.

As part of this initiative, NAA/NMHC have pledged to conduct a series of "leadership workshops" to promote best practices that create rental opportunities for Hispanics and Latinos, including effective advertising and marketing, apartment design and resident services. NAA/NMHC will also help develop and disseminate consumer education materials that increase the Fair Housing Act protections. For Rent magazine recently made available a Spanish-language publication. The MOU is available at www.naahq.org/govern_affairs/

3. Translation Requirements:

On December 19, 2003, HUD published guidance for property owners who receive any federal assistance clarifying their obligations to accommodate people with limited English proficiency (LEP). Concerns over HUD's requirement that apartment owners translate into a foreign language at least two vital resident documents have arisen, since compliance with HUD's two-document translation mandate may trigger the legal expectation that the owner provide all documents, especially eviction notices, in that language. Although unintended, the effect of the requirement could be burdensome to housing providers. NAA/NMHC are working with a coalition of real estate groups to seek clarification on this matter. NAA/NMHC comments to HUD are available at www.naahq.org/govern_affairs/

B. Barriers to Development/Anti-NIMBYism Tools:

In addition to opposing the present tilted nature of our nation's housing policy in favor of home ownership, NAA/NMHC are also working to overcome common myths about apartments that lead to NIMBYism. They are currently working with the Urban Land Institute (ULI) and a professional communications firm to create a scripted PowerPoint presentation that members can use to help educate local elected officials and opinion leaders about the importance of density in creating high quality of life communities. The presentation will be accompanied by a printed booklet discussing the myths about density. This new tool will complement existing tools, which include:

- **Creating Successful Communities: A New Housing Paradigm.** A four-color brochure that refutes the lingering stereotypes policymakers (and the public) have about apartments. To help NAA/NMHC members successfully use the brochure in zoning battles and advocacy efforts, additional talking points and a direct mail letter have been posted at www.naahq.org. Bulk orders can be placed with NAA by calling 703/518-6141.
- **From NIMBY to Good Neighbors: Recent Studies Reinforce that Apartments are Good for a Community.** This White Paper, issued in August 2003, collects and distills four national studies that contradict current conventional wisdom. It also finds that apartment properties often cause surrounding property values to increase, not decrease. See www.naahq.org/govern_affairs/.
- **The Case for Multifamily Housing.** With encouragement and support from NAA/NMHC, the Urban Land Institute has updated its 1992 brochure, titled *The Case for Multifamily Housing*. The new version provides factual information on the advantages of higher density housing, as well as providing another valuable tool in the apartment industry's anti-NIMBYism arsenal.

The NAA also is working with a consultant to develop a model ordinance and guidelines for state and local associations when they are faced with governmental actions to enact impact fee legislation.

C. Accessible Design and Construction Court Decision Handed Down:

On August 25, 2004, the U.S. Court of Appeals for the Sixth Circuit (*U. S. v. Edward Rose & Sons*, Nos. 03-1316/1418, 384 F.3d 258; 2004 U.S. App. LEXIS 18009; 2004 FED App. 0279P (6th Cir.), March 10, 2004, August 25, 2004) decided against an apartment owner in a case concerning a controversial U.S. Department of Justice (DOJ) interpretation of the Fair Housing Act's (FHA) requirements for accessible entrances. In this case, the government alleged the apartments in question were in violation of the disability portions of the Fair Housing Act because the "primary route" to the apartments was not accessible, even though an alternative route was available. The case involved an appeal of a lower federal district court in Michigan, which also had decided in favor of DOJ (Case No. 02-73518, February 21, 2003, D. MI). In a friend of the court brief, NAA/NMHC argued that nothing in the Act, or in HUD's 1991 regulations implementing the Act, requires a property's accessible entrance be the 'primary' entrance. We further noted that Congress, when it passed the Fair Housing Amendments Act in 1988, only intended to place "modest" accessibility requirements on covered multifamily dwellings. DOJ's interpretation goes far beyond a "modest" requirement.

In this most recent decision, while the Appeals Court also ruled in favor of DOJ, that latter ruling, however, was far more limited than the lower court ruling. The Appeals Court held that because the two apartments share the stair landing, the landing qualifies as a "common area" that must be accessible. This precedent is troubling since a broader definition of common area could drive slightly broader accessibility requirements. NAA/NMHC have filed another friend of the court brief arguing against unwarranted expansions of the FHA and in support of the apartment owner's appeal for consideration by the full Sixth Circuit Appeals Court (the August 25 decision was rendered by a panel of only three judges).

D. Bankruptcy Reform Legislation Fails:

Once again, Congress has been unsuccessful in its efforts to reform the U.S. Bankruptcy Code. The House managed to pass its version of bankruptcy reform (H.R. 975) early last year, but the Senate was less inclined to take it up. The House attempted to force a Senate vote by attaching H.R. 975 to the Farm Bankruptcy Act, a "must pass" bill to extend that program for one year. The intent was to force a conference and move the comprehensive bankruptcy reform bill toward final passage. H.R. 975 included an NAA/NMHC-sought provision (section 311) that closes the loophole in the U.S. Bankruptcy Code that currently allows renters to abuse the system and live rent-free. In addition, Section 311 would permit rental housing providers to reclaim their property more quickly from residents filing for bankruptcy where the provider obtained a judgment for possession of the property or where the resident recently damaged the property or used illegal drugs. No further action is expected in 2004.

E. New Privacy Regulations/Fair Credit Reporting Act (FCRA) Compliance Requirements:

Apartment firms should be aware of their compliance requirements under a recent extension of the Fair Credit Reporting Act (FCRA) (P.L. 108-159). NAA/NMHC have prepared a White Paper detailing the Act's provisions, which significantly impact apartment firms' customer response and resident screening programs. See www.naahq.org/govern_affairs/.

F. Consumer Report Data Destruction Policies To Be Clarified:

On April 16, 2004, the Federal Trade Commission (FTC) published a proposed rule seeking public comment on the proper disposal of consumer report information and records under the Fair and Accurate Credit Transactions Act (FACTA) and the Fair Credit Reporting Act (FCRA). The proposed rule is designed to reduce the risk of consumer fraud, including identity theft, created by improper disposal of any record that is, or is derived from, a consumer report. It requires that any person that possesses or maintains covered consumer information "take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal." In our comments on the rule, NAA/NMHC urged the FTC to adopt a final rule that allows creates a flexible standard and minimizes the burdens on smaller business. No final rule has been released yet.

G. Do Not Call/Do Not Fax Rules Status:

1. Telemarketing Sales Rule Implemented :

Apartment firms are advised that recent changes in communications law may affect their marketing activities. On January 29, 2003, the Federal Trade Commission (FTC) issued regulations (68 FR 4580) that, among other things, established a national Do Not Call (DNC) Registry. More than 64 million phone numbers have been added to the Registry since it opened in June 2003. NAA/NMHC guidance on complying with the new regulations is posted at www.naahq.org/govern_affairs/. On March 23, the FTC amended the rule and now requires firms to "scrub" their telemarketing sales call lists against the DNC Registry every 31 days instead of every three months. NAA/NMHC's comments, urging a reasonable implementation period, are posted at www.naahq.org/govern_affairs/. A copy of the amended rule is available at www.ftc.gov/os/2004/03/trs31dayfrn.pdf.

The FTC is also considering increasing the fees firms pay to access the DNC Registry by 80 percent. With fewer firms paying to access the DNC Registry than expected, the FTC is experiencing significant revenue shortfalls. The FCC has the authority to change the fee structure in order to recoup its full costs in implementing and enforcing the DNC rule, which is estimated at \$18 billion for 2004. NAA/NMHC have submitted comments expressing great concern over the proposed fee increase, particularly because of, its negative impact on small businesses. NAA/NMHC urged the FTC to initiate a thorough analysis to ascertain the reason for the shortfall also suggested they include in their analysis alternative revenue sources to offset the shortfall. Those comments are available at www.naahq.org/govern_affairs/.

2. Telephone Consumer Protection Act (TCPA) -Do Not Fax Rule Implementation Delayed:

NAA/NMHC continue to fight against implementation of a new federal rule that would require firms to obtain written approval from a recipient before sending a commercial fax. In response to our vigorous opposition, on October 1, 2003, the Federal Communications Commission (FCC) agreed to delay the effective date of the new law until June 30, 2005, The FCC previously stayed the written consent requirement until January 1, 2005, but it had begun implementing a part of the law that requires firms to have a current existing business relationship (EBR) with the recipient before sending a fax. The law says EBRs only exist for three months after a consumer makes an application or inquiry of the firm or 18 months after an actual transaction occurs. On October 3, 2003, however, the FCC also delayed implementation of the time-limited EBR requirement. Therefore, until June 30, 2005, firms may send commercial faxes to anyone with whom they have done business in the past, regardless of when the customer interaction occurred. Firms should note, however, that they cannot send blast fax marketing to any customer unless they already have an existing business relationship with that person. NAA/NMHC is urging Congress to pass legislation repealing the "written consent" requirement.

The U.S. House of Representatives has already passed a bill (H.R. 4600) that would reinstate current law, which permits sending a commercial fax if the sender has an existing business relationship with the fax recipient, or is simply responding to a request for information. Before Congress adjourned for the election, NAA/NMHC were vigorously urging the passage of the Senate version of the bill (S. 2603), however a last-minute objection from Senator Barbara Boxer (D-CA) stalled any further action in this Congress. Senator Boxer has stated that she objects to the bill on the erroneous presumption that it would allow businesses to purchase fax lists from third-party vendors and fax commercial material to all the numbers on that list. Additional guidance on the rule is posted on NAA's web site at www.naahq.org/govern_affairs/.

3. Anti-Spam Legislation Implemented:

Since January 1, 2004, the FTC has begun to enforce legislation (P.L. 108-187) banning deceptive unsolicited e-mails and creating criminal penalties for violating the law. An NAA/NMHC White Paper providing detailed compliance information is posted at www.naahq.org/govern_affairs/. Congress also directed the FTC to study and report on the feasibility of creating and implementing a national "Do Not Spam" registry similar to the Do Not Call registry. In response to opposition from NAA/NMHC and other industry groups, on June 15 the FTC told Congress that an e-mail registry would fail to reduce spam and could be used by spammers to harvest e-mail addresses. Our comments opposing a national registry are at www.naahq.org/govern_affairs/.

H. Insurance Programs Issues:

1. Insurance Reform - Liability Risk Retention Act Under Consideration:

NAA/NMHC, BOMA and others are urging Congress to expand the Liability Risk Retention Act to allow risk retention and purchasing groups. Current law restricts such activities. Staff of the House Committee on Financial Services has agreed to address the issue at future hearings, but no date has been scheduled. Interest in private purchasing groups has increased as commercial insurance costs have skyrocketed, especially property insurance. Expansion of the Liability Risk Retention Act would promote choice, competition, and lower rates in the commercial insurance market by reducing administrative costs for apartment owners and other businesses that self-fund their property insurance programs.

2. Terrorism Insurance Extended:

In response to intense lobbying efforts by the Coalition to Insure Against Terrorism (CIAT), of which NAA/NMHC and BOMA are members, on June 18 U.S. Treasury Secretary John Snow announced that he would extend through 2005 the "make available" provision of the Terrorism Risk Insurance Act (TRIA) that requires companies to make terrorism insurance available on the same terms and conditions that they offer property and casualty coverage. Meanwhile, Congress recessed on October 11 without acting on legislation to extend the entire program beyond its 2005 sunset date. Negotiations to bring the bill to the floor of the U.S. House of Representatives broke off when House leaders tried to reduce the extension from two years to only six months. Passage of this critical legislation is a priority for NAA/NMHC when the 109th Congress convenes in January.

3. Flood Insurance Extension Approved:

On June 30, President Bush signed the National Flood Insurance Reform Act of 2004 (PL 108-264) into law, renewing the program for another five years and eliminating the possibility that apartment properties required to carry flood insurance could end up being in non-monetary default if the flood insurance program were suspended. All substantive changes in the law were designed to reduce coverage for single-family properties that suffer repeat damage and do not affect multifamily owners.

I. Premises Security; 9/11 Commission Report Issued:

The 9/11 Commission released its long-awaited report on July 22. Among other things, the report says that the private sector remains largely unprepared for a terrorist attack. To address the problem, the Commission endorsed the national standard for private preparedness developed by the National Fire Protection Association (NFPA 1600) and recommended by the American National Standards Institute (ANSI), and it urged the Department of Homeland Security to promote its adoption. Specifically, the Commission report "encourage[s] the insurance and credit-rating industries to look closely at a company's compliance with the ANSI standard in assessing its insurabil-

ity and creditworthiness." It also says that "compliance with the standard should define the standard of care owed by a company to its employees and the public for legal purposes." The standard is available at www.nfpa.org/PDF/nfpa1600.pdf. At this point, adherence to NFPA 1600 is voluntary and not mandatory. We believe that it should be voluntary and will keep members of Congress apprised of this. At the same time, members should review how their properties compares to the standards laid out in NFPA 1600. \

(AOBA members were recently provided an AOBA Information Alert on this subject that may be found in the Resource Center of the AOBA web site).

It should be noted that the 9/11 Commission recommendations do not carry the force of law. Just prior to adjournment, both Houses of Congress passed legislation to implement the Commission's recommendations, including the private sector preparedness provisions. However, negotiators were unable to resolve differences between the two bills, and it is unclear whether they will be able to during the lame duck session.

J. Mailbox Design and Retrofitting Rule To Be Issued:

Following more than a year of negotiations, NAA/NMHC won a huge victory for the property management industry by convincing the U.S. Postal Service (USPS) to abandon a proposal that would have required apartment and office owners to retrofit their existing mailboxes to comply with new USPS multi-unit building mailbox design standards. As a result, the new standard (69 FR 171), published on September 3, applies only to newly-constructed buildings and buildings that undergo a "substantial renovation" involving structural alterations to the mailbox area. Buildings that undergo only minor renovations may still install replacement mailboxes that conform to the old requirements as long as they upgrade the locks. USPS also agreed to NAA/NMHC's and BOMA's proposals to exempt buildings with fewer than four units and to allow for a two-year phase-in period for new buildings. Note that some key information on compliance for apartment managers only appears in the proposed version of the rule.

K. Student Housing Mail Delivery Problems Arise:

NAA/NMHC have learned that some local postmasters are refusing to provide traditional mail delivery to private apartment communities that cater to students. Instead, they are dropping mail at the front desk and requiring the owner/manager to sort, distribute and forward the mail to residents. NAA/NMHC believe that USPS regulations pertaining to student housing are unjustifiable in many cases, and that they are applied inconsistently. USPS has argued that traditional delivery to such communities is cost prohibitive primarily because of the highly transient nature of student populations. NAA/NMHC have met with USPS officials to discuss this issue and clarify USPS policy on student housing, including how the organization plans to implement its student housing regulations going forward. Another meeting will be scheduled in the near future.

L. Class Action Lawsuits Reform Delayed:

Despite repeated assurances by Senate Majority Leader Bill Frist (R-TN) that the Senate would consider class action reform legislation (S. 2062 and H.R. 1115) this year, Congress will adjourn without approving the bill. Shortly after the Senate fell one vote short of the 60 needed to bring the measure to the floor last November, Senate Republicans and several Democrats agreed to a compromise bill that was expected to be considered in January 2004. The bill did not actually come to the Senate floor until July 6, however, and it died when Senate Democrats, including those who had previously agreed to the compromise, opposed a motion to end a filibuster. The House passed its version of the bill back on June 12, 2003. That, legislation, a priority for NAA/NMHC, would have: (1) provided for judicial review and approval of non-cash settlements; (2) limited attorneys' fees; (3) prohibited settlement agreements that provided class members near the presiding court with larger payments; and prohibited settlements that would grant a greater share of an award to a class representative.

M. Revised Overtime Pay Regulations Implemented:

(AOBA staff has prepared a comprehensive paper to "Explain and Answer Questions About the New Federal Overtime Regulations: 'Fair Pay' or 'Foul Play'?" This document can be found in the Resources Center on the AOBA web site).

Controversial new regulations regulating overtime pay went into effect on August 23, The new rules create three tests to determine whether an employee must be paid overtime. They include: 1) a salary and duties test, 2) a salary basis test, and 3) a duties test. Generally, if an employee earns less than \$455 per week, or \$23,660 annually, he or she is "nonexempt" and thus eligible to earn overtime pay. Employees who earn more than the minimum threshold may also be eligible for overtime pay depending on their duties. (The regulations are available at www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm.)

Critics on Capitol Hill and the labor unions continue to pursue legislative action to overturn or limit the regulations, but it is unlikely that the new rules will be struck, On October 10, the Senate passed a bill (S. 2975) that would rescind provisions in the rule that take away workers' eligibility to earn overtime pay, but the House is not expected to take action on the measure. Both the House- and Senate-passed versions of the unfinished DOL appropriations bill include amendments that deny funding for most enforcement measures of the new laws, but the White House has threatened to veto any legislation obstructing the new regulations. The issue is expected to come up when Congress returns after the election to complete its funding bills.

N. Electronic Employment Verification Forms enacted:

On October 11, 2004, Congress approved a measure (H.R. 4306) that will make it easier for employers, including apartment firms, to complete and store federally-required employment verification forms known as the I-9. The I-9 form is used to verify an employee's legal status to work in the United States. The legislation will allow, but not require, employers to use an electronic version of the I-9 form and permit electronic signatures on the form, thereby facilitating on-line completion. The law will become effective by next April. In addition, existing paper I-9's may be transferred to an electronic format.

II. MULTI-FAMILY HOUSING AND FINANCE:

A. Federal Housing Administration (FHA) Multifamily Insurance Program Revisions:

1. Lower-Floater Multifamily Tax-Exempt Bond Proposal:

After NAA/NMHC submitted comments to HUD saying that the changes it proposed fell short of providing a competitive market program to provide long-term floating rate credit enhancement for tax-exempt bonds used to finance new apartment construction, NAA/NMHC has begun a dialogue with HUD's Deputy Assistant Secretary for Multifamily Housing, Stillman Knight, regarding the creation of an improved lower-floater tax-exempt bond insurance product.

2. FHA Multifamily Insurance Premium Reduction:

On October 1, 2004, the mortgage insurance premium for for-profit developers seeking insured loans pay under the Section 221(d) (4) program was reduced by five basis points, and now stands at 45 basis points, the lowest premium in the program's history. This reduction is for-profit developers only and is the third reduction in as many years. The 221(d) (4) program provides long-term mortgage financing (up to 40 years) with competitive rates. Loans are often issued in conjunction with GNMA-issued securities.

B. New Affordable Housing Goals Set For Fannie Mae and Freddie Mac:

On May 3, 2004, HUD published proposed new affordable housing goals for Fannie Mae and Freddie Mac that would significantly increase the two companies' targets to purchase home mortgages and rental housing for very low-, low-, and moderate-income families. HUD has established these new tougher affordable housing targets in an effort to get the two companies to lead the market in financing affordable housing. On June 28, NAA/NMHC submitted detailed comments to HUD that, among other things, asks the Department to defer final action on the goals until a more in-depth and thoughtful review is undertaken of their potential impact on the capital markets. NAA/NMHC expressed serious concerns that the proposed goals could literally force the GSEs to bid aggressively for the vast majority of multifamily loans, crowding out other private players and creating unintended consequences, including higher defaults and ultimately greater losses.

C. Section 8 Housing Voucher Program Changes:

1. FY 2004 Funding Crisis:

In April, 2004, HUD retroactively changed the way it funds Section 8 voucher renewals, leaving an unknown number of public housing authorities (PHA) without enough money to pay for their existing vouchers. Since then, NAA/NMHC and others have had some success in solving the potentially devastating funding crisis; however, the program continues to run into roadblocks. On May 20, HUD announced it would restore nearly \$160 million to 379 PHAs that successfully appealed their Annual Adjustment Factor (AAF) to help close funding shortfalls in FY 2004. Despite the additional funding, there are reports that some PHAs are missing their monthly payments to owners and, in some cases, are terminating contracts only to renew them at a rate that forces the resident to pay more FY 2004 and FY 2005 will continue.

2. FY 2005 Funding Set:

At the same time that housing advocates and PHAs are struggling to solve the current fiscal year shortfalls; they are also working to protect funding for the program in FY 2005. On July 22, the House Appropriations Committee approved a bill that would increase Section 8 voucher funding nearly \$1.5 billion over the Administration's request and \$582 million over the FY 2004 budget. NAA/NMHC and others successfully argued that the President's original budget proposal threatened to dramatically under-fund and dangerously revamp the Section 8 program. In a victory for housing providers, the House also rejected the Administration's Flexible Voucher Program proposal that would have created a state-run block grant program.

While the gap in funding has been resolved, the bill does include troubling language making funding budget-based instead of unit-based. This approach could result in a replay of the funding crisis that began on April 22. The Senate version increased Section 8 funding nearly \$2.25 billion over the Administration's request and approximately \$1.4 billion over the FY 2004 amount. The HUD appropriations bill is likely to be wrapped up into an omnibus funding bill covering all the incomplete appropriations bills during the post-election legislative session.

3. Fair Market Rent Plan Defeated:

In a significant victory for NAA/NMHC, on September 28, the Bush Administration backed away from a plan to implement dramatically revised Fair Market Rents (FMR) for the Section 8 voucher program. On August 6, HUD published FY 2005 FMRs that varied widely from the current FMRs and would have forced many low-income families to pay higher rents or find substandard housing.

In its August 6 notice, HUD indicated that the proposed FY 2005 FMRs were adjusted to incorporate: (1) 2000 Census data; and (2) new definitions of Metropolitan Statistical Areas (MSAs) by the Office of Management and Budget (OMB). But using the new OMB area definitions caused the rents to differ radically from the previous year's FMRs. Generally, it led to decreased rents in urban areas and increased rents in suburban areas. Housing advocates, including NAA/NMHC, urged HUD to reconsider. After receiving more than 370 comments, most of them against the proposal, HUD revised the FY 2005 FMR—which went into effect on October 1—to use the 2000 Census data, as required by Congress, but not the new OMB definitions.

According to HUD, the revised FY 2005 FMRs will stay the same or increase in 80 percent of the FMR areas containing 61 percent of voucher holders. The new rent levels are available at www.huduser.org/datasets/FMR/FMR2005F/index.html. Apartment firms should note, however, that HUD could not complete its random digit dialing surveys, which it uses to adjust local rents, in at least 29 communities by October 1. HUD has extended the public comment period on the FY 2005 FMRs until November 5 and plans to issue "revised final FMRs" in the future. NAA/NMHC submitted extensive comments on the FY 2005 FMRs.

4. Low-Income Housing Tax Credit (LIHTC) Utility Adjustments:

For the past year, NAA/NMHC have led a coalition of organizations lobbying the Internal Revenue Service (IRS) to allow alternative methods for establishing utility allowances for low-income housing tax credit (LIHTC) projects. IRS rules require tax credit rents to include a utility allowance for resident-paid utilities, however, the methods currently used to estimate the utility cost tend to overestimate resident utility costs. This, in turn, reduces the gross rent

received by owners. The two methods allowed now are either (1) local public housing authority (PHA) utility estimates or, (2) local utility company cost estimates. The PHA allowances, which are based on older public housing properties, have little correlation with utility costs for newer, more energy efficient tax credit properties, and utility company data typically are very difficult to obtain. After an exhaustive evaluation of all the alternative methods and practices available to estimate utility costs, a proposal to expand the allowable methods is being finalized and will be submitted to the IRS next month. The IRS has previously indicated a willingness to make changes to the utility allowance calculation.

5. Housing Bond Modernization Act Defeated:

An effort to amend the rules for mortgage revenue bonds, including tax-exempt multifamily housing bonds, was defeated when Congress dropped the provisions from the JOBS Act (H.R. 4520). The change would have repealed the 10-year rule for these bonds for one year.

III. ENVIRONMENT:

A. Water Issues:

1. Water Conservation Study Released:

In August, a new national study estimating the water savings potential of billing residents directly for their water usage was released. The three-year effort was jointly funded by NAA/NMHC, the U.S. Environmental Protection Agency (EPA), the American Water Works Association and several water utility companies. It found that direct metering could reduce annual water consumption by an average of 15 percent. This latest research supports the apartment industry's long-held contention that unbundling water charges from rent gives consumers an important signal about the price of water, which encourages them to conserve. It also makes them more likely to promptly report leaks and other maintenance issues to the property owners. According to the report, "direct metering and billing of water for apartment residents encourages water efficiency and promotes a water billing system as transparent as other utilities like gas and electricity, phone and cable, whereby residents pay for what they use." Currently, 85 percent of apartment properties do not bill separately for water, suggesting enormous conservation potential if utilities provide property owners with incentives to implement direct billing programs and upgrade their plumbing fixtures instead of building new capacity in their water and sewer systems.

In addition to recommending the installation of water submeters on apartment properties, the report also recognizes the value of water-efficient plumbing fixtures and suggests that properties built prior to 1995 be retrofitted with water-efficient fixtures before undertaking a water billing program. It also calls on policymakers to establish incentive programs to facilitate the acquisition of these fixtures.

The report further recommends that EPA cease to apply certain federal Safe Drinking Water Act (SDWA) requirements to apartment properties that bill their residents separately for water, since billing has no impact on drinking water quality. The practice of using an allocation formula (based on the unit's square footage, number of taps, etc.) instead of a submeter to estimate water consumption for each apartment unit was not found in this study to have a statistically significant impact on water consumption.

Study authors acknowledge, however, that their research focused primarily on properties in the Southwest, and that they might have documented more water savings from allocation billing if they had been able to study more buildings on the East Coast where it is often impractical to retrofit older properties with individual water meters. This finding directly contradicts the finding of an earlier study conducted by Industrial Economics which showed that alternative (non-metered) water billing properties use between six and 27 percent less water than properties where water is simply included in the rent. It is important to remember that not only are submeters impractical in many older properties, some areas of the country actually prohibit Point of Sale meters, so water allocation may be the only bridge to resident billing.

2. Safe Drinking Water Act (SDWA) Policy Questioned:

In August, the EPA responded to a petition filed by an NAA/NMHC-led coalition of real estate interests and the U.S. Chamber of Commerce under the Data Quality Act challenging EPA policy that only properties that allocate water usage instead of installing direct metering are exempt from the SDWA requirements. (In December 2003, EPA issued a memorandum to its regional offices noting that directly-metered apartments are exempt from the duplicative SDWA requirements, but it failed to extend the exemption to properties that use a ratio utility billing system (RUBS) or other allocation billing systems.) EPA asserted that this was based on the fact that other billing systems had not been found to demonstrate a conservation effect.

The NAA/NMHC petition challenged EPA's authority to regulate on the basis of water savings as opposed to water quality under the SDWA. It also sought to clarify the Agency's position with regard to those properties that use RUBS in total or in part to determine water charges to residents. The Agency replied that it may have overlooked certain relevant facts in issuing its memorandum for comment. The NAA/NMHC has requested a meeting with the Assistant EPA Administrator to discuss this issue.

In addition, the Manufactured Housing Institute has filed a lawsuit alleging that EPA exceeded its authority under the SDWA in adopting a position which exempted one property type (multifamily) from the Act while requiring other property types (manufactured housing communities) to engage in expensive testing and monitoring for the same type of water billing activity involving water metering. EPA has said in its brief to the court that this memorandum is not intended to be construed as policy and that decisions about whether to treat properties that bill separately for water as "consecutive water suppliers" rests squarely with the states. Briefs have been filed with the court and oral arguments in the matter are expected to be heard in February 2005. EPA's memorandum and further information are available at www.naahq.org/govern_affairs/.

3. Water Quality Act Enforcement Questioned:

EPA's inspector general has been asked to investigate whether the Agency is adequately enforcing drinking water standards after an October 5 Washington Post article ("Lead Levels in Water Misrepresented Across U.S.") reported that drinking water utilities across the country are manipulating water quality testing data. The article comes after months of Congressional attention to the high levels of lead in Washington, DC's tap water. Investigators at the newspaper identified 65 large water systems whose reported lead levels were near or above the federal limit of 15 parts per billion. Using EPA data, the newspaper identified 274 utilities serving 11.5 million people that have reported unsafe lead levels since 2000 and charged the EPA with consistently overlooking violations of the Safe Drinking Water Act. The most frequently cited problems exist under the Lead and Copper Rule of 1991, which requires water utilities to reduce the corrosiveness of water to minimize the leaching of lead and copper from service lines. If more than 10 percent of the homes monitored have lead levels higher than 15 parts per billion, the utility must take action, including replacing lead service lines.

EPA will continue to be on the hot seat answering questions on this issue, and Congress is expected to consider several legislative measures next year limiting the percentage of lead allowed in brass plumbing fixtures and mandating the replacement of lead service lines under certain circumstances. The National Sanitary Foundation says it is acceptable for brass plumbing fixtures to contain a small percentage of lead.

4. Construction Site Runoff Rule in Wetlands Areas Found Adequate:

After two years of effort by NAA/NMHC, EPA announced on April 1 that existing regulations are sufficient to control construction site runoff and thus no additional regulation is needed at this time to maintain high water quality standards. Apartment owners and developers potentially faced additional compliance costs of up to \$4,800 per acre if the regulation had moved forward as proposed. This reasonable regulatory outcome was threatened on September 7 when the Attorneys' General of New York and Connecticut filed suit in the U.S. Court of Appeals for the 2nd Circuit. The one-paragraph "petition for review" did not detail the legal basis for the states' challenge nor the specific relief that the states would be seeking. Earlier, the Sierra Club announced that it would challenge the Agency's decision; however, no lawsuit has yet been filed. NAA/NMHC will continue to monitor developments and make a decision as to whether to file an amicus brief in support of the Agency position.

B. Mold Studies, Legislation and Guidance Presented:

(AOBA staff has prepared a "Compendium of Information, Rules and Guidelines on Mold-related Issues" for AOBA member reference. This comprehensive document can be found in the Resource Center on the AOBA web site).

1. Health Effects Research.

The Institute of Medicine (part of the National Academy of Sciences) recently concluded a comprehensive study of available international scientific and medical literature on the health risks associated with damp indoor environments. The results of that two-year study were released on May 25 at a press conference in Washington, DC. Even though the report rejects the most sensational mold-related health claims, it echoes NAA/NMHC's long-held advice to property owners to deal promptly and effectively with moisture intrusion. The report finds that excessive indoor dampness is problematic although "there is insufficient information on which to base quantitative recommendations for either the appropriate level of dampness reduction or the "safe" level of exposure to dampness-related agents between mold in indoor environments and any particular health risk."

The report additionally notes that the air in excessively damp buildings contains a number of chemicals (from degraded materials) and biological elements such as dust mites, bacteria and cockroaches in addition to mold. All of these compounds provoke an allergic response in sensitive individuals. While citing evidence of an "association" between exposure to mold in damp indoor environments and upper respiratory tract symptoms such as coughing, wheezing and asthma symptoms and hypersensitivity pneumonitis in "sensitized" persons, the report found inadequate evidence to support associations with other health risks often claimed by litigants, including the development of asthma, fatigue, shortness of breath, skin symptoms, cancer, immune diseases, and cognitive/neurological dysfunction.

In those recommendations specifically directed towards the building sciences, the report calls upon the Department of Housing and Urban Development (HUD) "or another appropriate government agency with responsibility for building issues to provide support for the development and dissemination of consensus guidelines on building design, construction, operation, and maintenance for prevention of dampness problems." Additionally, the report calls upon government and private entities with building design, construction, and management interests to provide support for research projects that educate building professionals (architects, builders, facility managers and maintenance staff, code officials and insurers) on the prevention of dampness problems.

3. Federal Mold Legislation Possible Next Year:

The issue of indoor air quality continues to be a major concern among public health policy makers and as such is likely to be the subject of hearings in the next congress. A bill (H.R. 1268), that addressed various aspects of the mold crisis, was reintroduced in this Congress but saw no action this year.

4. NAA/NMHC Guidance Documents Available:

A model Operations and Maintenance (O&M) Plan for Mold and Moisture Control is available to members. It has been hailed by insurers and lenders as one of the best sources available of operational practices related to mold. NAA/NMHC also have produced a video offering on-site staff, including maintenance technicians, practical information on dealing with moisture and mold issues. These products are available via NAA's web site at www.naahq.org/govern_affairs/

5. EPA Voluntary Training Question:

NAA/NMHC recently submitted comments to EPA on the beta version of a voluntary, on-line mold-training course that the Agency has developed for public health professionals and remediation workers. The training tool is based on EPA's document, *Mold Remediation in Schools and Commercial Buildings*. NAA/NMHC and BOMA applauded the idea but questioned the usefulness of using the same resource tool for physicians and maintenance workers. NAA/NMHC also asked EPA to address the fact that individuals who choose to take this course will not be "certified" by EPA. This lack of quality assurance among remediation service providers is an ongoing problem for the real estate industry.

6. EPA Spanish Version Mold Guide Available:

The EPA also has issued a Spanish language version of a consumer-oriented pamphlet titled "A Brief Guide to Mold, Moisture, and Your Home." (See www.epa.gov/mold). Property owners may wish to consider adding this publication to their move-in packets and providing it to on-site staff. Additional information is available at www.naahq.org/govern_affairs.

7. OSHA Guidance Documents Available:

The Occupational Safety and Health Administration (OSHA) has released a nonbinding, advisory guidance document titled "A Brief Guide to Mold in the Workplace." This informational document, which specifically references NAA and NMHC in its Mold Resources List, discusses how to prevent indoor mold growth and how to protect workers involved in the prevention and cleanup of molds. The bulletin, which is not a standard or a regulation, includes checklists, mold prevention tips and mold remediation guidelines. It also addresses personal protective equipment, sampling methods, and remediation equipment. It is available at www.osha.gov/dts/shib/shib101003.html.

8. Transaction Mold Screen Task Force Continues:

NAA/NMHC and BOMA continue to participate in a Mold Task Force, hosted by the well-respected standards-setting organization ASTM, as it works to produce a Standard Guide for Mold in Commercial Buildings: Transaction Screen Process (Standard Guide). When published, ASTM's guide should provide the general parameters for conducting a screen, as part of the due diligence process of a real estate transaction, for "readily observable mold." An edited version of the guidance document has been re-worked version and voted on, although results of the vote have not been released.

C. Methamphetamine:

1. Guidance Documents Available:

Apartment owners are increasingly confronted with illegal drug manufacturing labs producing methamphetamine (crystal meth). Several bills were introduced in Congress to deal with various aspects of this national problem, but none saw any legislative action. Various state legislatures are also considering laws that would make apartment owners/managers responsible for the cost of municipal fees and other expenses associated with the cleanup of apartments where crystal meth has been manufactured. NAA/NMHC have prepared legislative talking points as well as a resource guide for property owners who discover an illegal lab operating on their property. The NAA/NMHC White Paper entitled "Cleaning Up Clandestine Crystal Methamphetamine Labs in Apartments" discusses how various states are addressing this issue, including typical cleanup procedures. It also provides information on identification of possible drug labs and considerations for the selection of a decontamination contractor. Both documents are available at www.naahq.org/govern_affairs/.

2. Federal Legislation Introduced:

Although several bills dealing with the cleanup of methamphetamine production, sites were introduced in this Congress, none were passed. As a testament to the seriousness of this problem, Congress included funding (\$55 million in the Senate version; \$60 million in the House version) in the Department of Justice (DOJ) appropriation to support the Community Oriented Policing Services and its investigation of certain "hotspots" where the drug is produced. The DOJ appropriation bill has not been completed yet, and it is doubtful what action it will see when Congress returns.

D. Lead-Based Paint:

(AOBA staff has prepared a "Compendium of Information, Rules and Guidelines On Lead-Based Paint-related Issues." This comprehensive document can be found in the Resource Center on the AOBA web site).

1. Enforcement Efforts Underway:

Members are advised that EPA and HUD continue to "test" property owner compliance with lead-based paint disclosure regulations (Title X; 42 USC 4801) that have been in effect since 1996. For more information, see the NAA/NMHC White Paper "Self-Audits and Disclosure Under the Residential Lead-Based Paint Hazard Reduction Act" at www.naahq.org/govern_affairs/.

2. Work Practice Regulations Proposed:

NAA/NMHC continue to work with EPA to develop a proposed regulation regarding lead-based paint worker training, acceptable work practices and testing. NAA/NMHC have been meeting with the Agency and participating in workshops to develop this regulation since early 2002. EPA staff is in the process of developing a new "voluntary" approach to this rule. In the interim, the Agency is encouraging remodeling and renovation professionals to voluntarily complete the training course that EPA developed. Information on this course is available at www.epa.gov/lead/traincert.htm.

E. Green Buildings.

1. Research Study: The National Center for Housing and the Environment

(NCHE has published a new paper that helps communities develop and maintain comprehensive information on local land use and housing markets. "Monitoring Land and Housing Markets: An Essential Tool for Smart Growth," reinforces the notion that land monitoring is an important tool for planners and policymakers when planning for future growth. The paper is posted at www.nahq.org/govern_affairs/.

2. National Conference: NAA/NMHC and BOMA recently participated in a roundtable conference on sustainable development and green building sponsored by the Urban Land Institute (ULI). Discussion focused on why the market has been slow to demand green building and how to quantify the real costs and benefits of sustainable growth and green building. Among the roundtable's goals were: (1) sharing knowledge and creating dialogue among clearly identified organizations with an interest in sustainable development and green building; (2) developing consensus on key issues; and (3) creating a public awareness plan. NAA/NMHC and BOMA will continue to participate in this working group.

F. Endangered Species Act Legislation and Rules Under Consideration:

1. Reform Legislation Stalled for Year:

In late July, the House Committee on Resources approved legislation (H.R. 1662) to reform the Endangered Species Act (ESA). This bill addresses the use of science to underpin decisions about designations of critical habitat for threatened species. While it will not be voted out of the House this year, this bill signals an important movement in the long-polarized debate on this bedrock environmental statute. NAA/NMHC and BOMA will continue to urge Congress to amend the ESA to resolve discrepancies regarding critical habitat designations and to improve the reliability of the data used to make endangered listing decisions.

2. Permit Revocation Rule Pending:

At the urging of NAA/NMHC, BOMA and several other real estate groups, the U.S. Fish and Wildlife Service (FWS) has taken steps to preserve its "no surprises" policy on endangered species after a court decision struck down the "Permit Revocation Rule." Under the no surprises policy, a private water resources used by endangered or threatened species. Once a plan is accepted, this legally binding agreement prevents the government from demanding further dedications of land, water or money even if the health of the protected species is declining. In exchange for adopting these plans the government issues landowners "incidental take" permits that allow them to develop the property.

Following a request for information by the Fish and Wildlife Service on the Endangered Species Act's "no surprises" rule and related permit revocation rule, NAA/NMHC and BOMA joined with several other real estate trade associations in filing comments on July 26. The FWS was seeking information on the permit revocation rule in an effort to preserve the legal integrity of the no surprises policy. The "no surprises" policy has been generally applauded by property developers who have found that a clear agreement on habitat preservation plans and related permit issues is preferable to an in perpetuity negotiation which can be reopened at any time in the course of the project.

G. New Brownfields Rule Proposed:

EPA has issued a proposed rule (69 FR 165) spelling out what steps certain property owners must take to protect themselves from being held liable for cleaning up hazardous contaminations caused by prior owners. The pro-

posed rule expands the "innocent landowner" defense created by landmark brownfields reform legislation signed into law in 2002 by adding "bona fide prospective purchasers" and "contiguous property owners" to the types of owners that can seek liability protection. The rule specifies what due diligence these parties must take before acquiring properties with actual or perceived contamination to avoid being held liable for the cleanup under the Superfund law. Under the proposal, owners would have to hire an environmental professional to conduct the appropriate inquiries and document the findings in a written report. The proposal was negotiated by the EPA and 25 organizations representing local, state and federal environmental agencies, commercial real estate firms, lenders and home builders, as well as environmental and community groups. The proposed rule represents a hard-won compromise among the interested parties and is a significant improvement over the status quo.

H. Asbestos Trust Fund Legislation Stalled:

Senator Tom Daschle's (D-SD) latest proposal to create an Asbestos Trust Fund was rejected by Senate Majority Leader Bill Frist (R-Tenn.) for allowing "thousands of [asbestos-related] cases" to continue in the court system. The proposal would have allowed all claimants whose trial dates were within 60 days of enactment of legislation creating a trust fund to continue with their cases instead of receiving compensation from the fund. Tens of billions of dollars have already been paid out as compensation for asbestos claims with dozens of affected companies filing for bankruptcy.

IV. TAX POLICY:

(ABOA staff has prepared a comprehensive report on "IRS Rulings and Notices Affecting the Property Management Industry" which have been issued during 2004. That document can be found in the Resources Center on the AOBA web site).

Prior to recessing for the elections, Congress approved two significant tax bills containing provisions affecting apartment owners: the "Working Families Tax Relief Act of 2004" and the American Jobs Creation Act of 2004." NAA/NMHC and BOMA are pleased with both bills, not only for the real estate-related provisions they include, but also for the ones they exclude.

A. Federal Tax Legislation Enacted:

1. Working Families Tax Relief Act of 2004 (P.L. 108-311):

This bill, signed into law on October 4, contains \$146 billion in tax cuts for individuals and businesses. Specifically, the law extends several individual tax reductions that were due to expire or be reduced in 2005, including: the \$1,000 child tax credit; the 10-percent income tax bracket (adjusted for inflation); and two marriage tax penalty relief measures. Of interest to apartment and commercial office firms, the law also restored, and extended through December 31, 2005, a law that allows property owners to immediately expense the costs of "brownfields" environmental remediation. NAA/NMHC and BOMA strongly supported the extension. The measure also contains several clarifications of items of interest to the real estate industry, such as expanding real estate investment trust (REIT) dividends that qualify for the new 15 percent maximum rate.

2. American Jobs Creation Act of 2004 (H.R. 4520):

The most significant corporate tax legislation in almost two decades was signed into law on October 22. The measure contains an estimated \$140 billion in tax breaks for business coupled with provisions to address highly-publicized and abusive tax shelters. The bill was originally drafted to repeal a \$5 billion annual subsidy ruled illegal by the World Trade Organization, and replaces it with a nine percent tax deduction for domestic manufacturing activity. The new deduction for manufacturers (broadly defined) reduces the corporate income tax rate from 30 to 32 percent. Of particular interest to real estate providers are provisions that:

- extend "small business" expensing to allow companies to expense up to \$100,000 of new investments through 2007;
- reduce the depreciation period for restaurants and leasehold improvements from 39 years to 15 years;
- for 2004 and 2005, allow taxpayers to deduct state and local sales taxes from their federal tax liability, instead of state income taxes; and

- reform and simplify S Corporations, including increasing the permissible number of shareholders from 75 to 100 and treating all members of a family as one shareholder.

The measure also includes technical and “housekeeping” provisions pertaining to REITs, e.g., modifications to the tax withholding rules for foreign investment in public REITs and the safe harbor rules for timber REITs; clarification of the permissibility of REIT loans to subsidiaries in the ordinary course of business and that rents received from taxable subsidiaries are “good rent” under the REIT income tests. It also includes many revenue-raisers (from fiscal years 2005 through 2014), including some provisions affecting the treatment of partnership basis adjustments. Also significant is that the final tax bill does not include an NAA/NMHC-opposed homeownership incentive that was originally included in the Senate version of the bill. The provision would have unwisely allowed taxpayers below a certain income level to deduct the cost of private mortgage insurance (PMI) premiums from their income taxes. The House of Representatives objected to this provision, and it was dropped from the final bill for the second time in two years.

V. BUILDING CODES

A. “Stay” Imposed on Enforcement of Recent ICC Sprinkler Interpretation:

On August 23, NAA/NMHC and BOMA successfully blocked implementation of a new International Code Council (ICC) interpretation of the code provisions governing the NFPA 13R sprinkler systems (commonly used in apartment buildings up to four stories in height). The ICC interpretation, which was effective immediately, counted the basement as one of the stories in a building and, therefore ruled that such buildings were effectively five stories high and had to upgrade to the more expensive NFPA 13 sprinkler system.

The NFPA 13 sprinkler system essentially doubles the number of sprinkler heads needed by requiring sprinkler protection systems in attics and concealed spaces (floors and ceilings). In cold climates, additional costs are incurred to protect the attic sprinklers from freezing. If implemented, the ICC interpretation would have impacted every multifamily project under construction as well as those in the design and approval process. NAA/NMHC estimate that it would have cost the apartment industry alone approximately \$120 million. After NAA/NMHC appealed the interpretation, the ICC issued an immediate 30-day stay. That stay was subsequently revised to run until the appeal is resolved. The ICC has removed the interpretation from its web site.

B. Building Code Adoption/Endorsement Issues:

1. “Mix and Match” Code Adoptions Should Be Rejected:

NAA/NMHC and BOMA continue to strongly support local adoption of the International Code Council (ICC) set of building codes and urge members to actively follow local code adoption activities. Members should be particularly alarmed when local officials “mix and match” and adopt individual codes from different organizations, such as the ICC building code and the National Fire Protection Association’s (NFPA) fire code. Among other things, this mixing can create serious jurisdictional confusion between building officials and fire officials. The ICC codes have clear lines of authority. During construction, the International Building Code (IBC) serves as the design tool and is under the authority of building officials, but once a building is completed and occupied, it comes under the jurisdiction of the International Fire Code (IFC), which is primarily enforced by fire officials. This coordination does not exist, however, if a local area adopts the IBC and the NFPA Uniform Fire Code (NFPA 1).

There is one exception to the warning against mixed code adoptions. There do not seem to be any major conflicts if a locality adopts the Uniform Plumbing Code (UPC) and Uniform Mechanical Code (UMC) in place of the International Plumbing Code (IPC) and International Mechanical Code (IMC). Before the IBC, the UPC and UMC were used for years in the west as a companion to the Uniform Building Code, one of the legacy ICC codes. The UPC and UMC may require things to be done differently, but they do not appear to have any major conflicts with the requirements in the IBC.

2. Warning on NFPA 101:

Members should also oppose any local effort to adopt the NFPA Life Safety Code (NFPA 101). NFPA 101 has been used to govern the design of medical buildings for years, but recently, some local jurisdictions have adopted

the NFPA 101 and expanded it to other occupancies, such as apartments and commercial office buildings. This can cause serious problems because the code has several provisions for existing buildings and could require apartments and office buildings to retrofit sprinklers and comply with new alarm and voice notification requirements. Given the NFPA 101's longstanding connection with medical facilities, members should not lobby against adoption of the code, but they should work to limit its application to medical buildings.

C. NFPA 5000 Building Standard and Construction Code.

NFPA is currently working on an updated version of its NFPA 5000 building code. Code changes are currently being considered with final action on the 2006 NFPA 5000 expected in June 2005. NAA/NMHC and BOMA continue to oppose the local adoption of the NFPA code over the IBC. Although the updated version has resolved some of our concerns, NAA/NMHC and BOMA have major issues concerning conflicts and permissive language that have not been addressed. Therefore, the code remains unenforceable, unusable and technically unsound.

D. ICC Code Activities.

NAA/NMHC and BOMA are optimistic that the recurring battle to allow the use of NM cable in taller buildings has finally been resolved. After years of advocacy by NAA/NMHC and BOMA, the ICC code no longer has any height restrictions on NM cable (previously it was only allowed in buildings with three stories or fewer). In past years, that change has been attacked repeatedly by opponents, but in the recent completed 2004 ICC code development cycle, only minor opposition was raised.

Meanwhile, BOMA and NAA/NMHC are preparing for the 2005 code development hearings. In August, BOMA and NAA/NMHC submitted several code proposals for consideration in 2005. They include clarifications of the provisions surrounding the use of the NFPA 13R sprinkler system, incorporating provisions for venting of bathrooms, kitchens and dryers using sub-ducts, clarification on NFPA 13R sprinkler design options, and a proposal to move all of the provisions in the ICC Electrical Code (ICCEC), including the NM cable provisions, into the IBC. The first round of hearings will be held in Cincinnati from February 21 to March 4, 2005, followed by the final hearings, where the decisions on the 2006 ICC codes will be made, in Detroit during September 25-29, 2005.

E. NFPA National Electrical Code (NEC) Activities:

Opposition to the expanded use of NM cable in the NEC also appears to have dissipated. (See "ICC Code Activities" above.) No proposals were heard in the latest round of code hearings to remove the 2003 NEC provisions allowing NM cable in buildings up to five stories, and there were no challenges during the final code meetings. Thus, the property management industries' long-advocated NM cable provisions will remain in the 2005 NEC, and it appears that they are now accepted as a core element of the code.

F. American Society of Heating Refrigerating and Air-Conditioning Engineers (ASHRAE):

ASHRAE has approved for publication updated versions of its energy standards—ASHRAE 90.1 covering apartments with four or more stories and ASHRAE 90.2 covering apartments with three or fewer stories. The new versions update technical requirements, but do not make any major changes. Both codes do now incorporate the new eight-zone map, though, and ASHRAE 90.2 has been simplified, having replaced the complicated equations and figures of prior versions with tables listing specific requirements for each zone.

ASHRAE is already working on major changes for the next edition of ASHRAE 90.1. New requirements will be based on equipment downsizing, window performance will be based on new window technologies, and serious consideration is being given to a proposal to require a complete air-barrier in the building envelope.

NAA/NMHC and BOMA have raised a list of concerns about the air-barrier proposal and the implications it may have on moisture condensation within the wall and ceiling cavities. In addition, they are working with the committee to resolve issues concerning ventilation requirements and the impact the air-barrier will have on the operation of bathroom, kitchen and dryer exhaust fans. They also have also questioned the claim that the change will produce energy savings of 40-50 percent.

VI. ENERGY, TELECOMMUNICATIONS , TRANSPORTATION AND ELECTRIC UTILITIES:

A. Transportation Act Reauthorization Given Another Temporary Extension:

The House and Senate both passed an eight month extension of highway legislation in September to keep transportation programs funded at their current levels through Memorial Day of 2005. This signals lawmakers' expectations that a six-year surface transportation bill is not close enough to an agreement to finish before the lame duck session.. There are reports that two Senate holdouts are preventing conferees from reporting the bill. Senator James Inhofe (R-OK) and Rep. Don Young (R-AK), leaders of the conference, both claim the extension won't preclude them from trying to get a bill passed during a lame duck session in December. This eight month extension is the sixth extension of transportation programs since the previous authorization bill expired in September 2003.

B. Telecommunications Rules Litigated and Proposed:

1. Recent Court Decision:

On August 27, the U.S. Court of Appeals for the 10th Circuit issued a significant victory for property owners which makes it easier for owners to invite competitive cable providers to service their properties. *Time Warner Entertainment Co. LP v. Everest Midwest Licensee, LLC*, No. 03-3005, F.3d 1039, 2004 U.S. App., WL 1909461, August 27, 2004.) The ruling concerns the FCC "home run" wiring rule. Home run wiring is the cable into an apartment that takes service from the minimum point of entry into the building up to approximately 12 inches outside of the individual units. The federal home run wiring rule allows a building owner to require a cable operator to remove, abandon or sell home run wiring when the cable firm no longer has a legally enforceable right to maintain the wiring in the building. Owners can elect to apply this rule on a building-by-building basis or a unit-by-unit basis. In this latest ruling, the appeals court held that unless the contract between a property owner and a cable provider explicitly prohibits it, owners can require an existing cable provider to give a competitor access to the home run wiring to units where residents are not currently subscribing to the incumbent's service. This makes it possible for property owners to allow competitive cable providers to service their properties without having to install new home run wiring.

While the opinion is only legally binding in the 10th Circuit, it is significant because it is the highest court to address the issue to date. In light of this ruling, cable operators can be expected to try to negotiate language in access agreements giving them the specific right to maintain unused home run wiring on a property. Additional information on the ruling, which was supported by an NAA/NMHC friend of the court brief, and is being appealed, is available at www.naahq.org/govern_affairs/.

2. Wiring Regulations To Be Considered by FCC:

The FCC is seeking comments on a new rulemaking. Specifically, it would like to hear further arguments why wiring located behind sheetrock should be considered not easily accessible by providers exiting a property who may wish to remove the wiring. This comes in response to a legal case in which various telecom providers prevailed in court on the issue of accessibility saying that it was easy to remove. Property owners feel otherwise, and we will be submitting comments as part of the Real Access Alliance

C. Federal Energy Policy Legislation Stalled:

Election-year politics have stymied attempts to pass a comprehensive energy bill (H.R. 6) that would address both supply and reliability. Although last-minute attempts were made to attach the real estate industry's strongly supported energy efficiency tax incentives to a "must do" trade-related tax bill (H.R. 4520), this effort was also blocked. (See "Tax" section below.) The only energy measure that made it into the final bill was a price support for the producers of ethanol. Projected prices for fuel and heating will serve to keep this issue on the Congressional radar screen however, and some of the iconic political issues like whether or not to permit drilling in the Arctic National Wildlife Reserve will also re-surface.

D. Federal Electric Deregulation and Electric Reliability Standards Concerns:

Election year politics and continuing dissatisfaction with state electric deregulation also have delayed any further consideration of federal national electric deregulation policy; however, widespread regional electric power black-outs of a few years ago created great concerns over the problems of electric power reliability. As a conse-

quence of those blackouts, the U. S. and Canadian governments established the Joint U. S.-Canada Power System Outage Task Force, to develop, among other things, recommendations for assuring electric reliability in both countries. Recommendations of that Task Force were incorporated in the Electric Reliability Act of 2004, (S. 2236) which was introduced in the U.S. Senate by Senator Cantwell (D- WA) on March 25, 2004. That bill (unlike H.R. 6 above) provides important stand-alone legislation authorizing the Federal Energy Regulatory Commission and the North American Reliability Council to develop and enforce mandatory electric reliability standards. To date, the Senate has given no further consideration to this bill, other than referral to Committee.

VII. CONGRESSIONAL AFFAIRS:

A. Congressional Real Estate Caucus.

NAA/NMHC and BOMA will continue to work with the other 13 National Real Estate Organizations (NREO) to expand the bipartisan Congressional Real Estate Caucus (CREC) in the 109th Congress.

The CREC brings members of Congress and real estate professionals together to discuss the impact of federal policy on the nation's real estate industry. Co-chaired by Representative Richard Neal (D-MA) and Representative Phil English (R-PA), the CREC currently has 94 members. A complete list of members is available at www.naaHQ.org/govern_affairs/.

B. 2004 Election Analysis and Legislative Analysis for 2005:

After a long political campaign season, Republicans were able to solidify their majority in Washington this month, keeping control of the White House and strengthening their numbers in both the Senate and the House of Representatives. Senate Republicans gained four seats, expanding their majority from the razor-thin majority of 51 seats in the 108th Congress to a more comfortable 55 seat majority in the 109th Congress. However, as many of the Senate seats lost by the Democrats were held by conservative Democrats with a history of compromising on legislative issues with Republicans, it is unclear if the gains made by the Republicans will translate to easier passage of Republican initiatives. House Republicans also picked up a number of seats to strengthen their hold on the other side of the Capitol.

The Republican sweep comes at an important time in the nation's history as the next four years will most likely see continued military action in Iraq, other major foreign policy initiatives, new nominees for the Supreme Court, including possibly a Chief Justice, and a number of tax and social security reforms. The changed political climate in Washington, hopefully, will put some of the property management industry's top issues back into the legislative spotlight.