PRRAC

Poverty & Race Research Action Council

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By Electronic Mail to Grace.F.Robertson@irs.gov

Grace Robertson, C2-422
Internal Revenue Service
5000 Ellin Road
Lanham, MD 20706

Re: Draft Audit Technique Guide, IRC §42, Low-Income Housing Credit

Dear Ms. Robertson:

Please accept this letter as the comments of the Poverty & Race Research Action Council concerning the draft Audit Technique Guide for the Low-Income Housing Tax Credit authorized by Section 42 of the Internal Revenue Code. We appreciate the opportunity to offer our views of about fair housing and civil rights implicated by the draft.

PRRAC is a civil rights policy organization with the primary missions of connecting social scientists with advocates working on race and poverty issues, and of promoting a research-based advocacy strategy on issues of structural racial inequality. An important focus of PRRAC's work is the obligation of all federal agencies administering housing and urban development programs to affirmatively further the purposes of the Fair Housing Act (also known as Title VIII) as expressed in 42 U.S.C. §3608(d) and Executive Order 12892. Within that context, we are particularly concerned about the LIHTC program, the nation's largest source of financing for affordable housing. For nearly a decade, PRRAC has devoted significant resources to examining civil rights outcomes in the program and advocating for administrative changes that will further, rather than impede, the goals of Title VIII.[1]

[1] Some of PRRAC's publications include *Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans* (Jill Khadduri, February 2013), *Opportunity and Location in Federally Subsidized Housing Programs: A New Look at HUD's Site & Neighborhood Standard As Applied to the Low Income Housing Tax Credit* (October 2011), *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program, An Updated Fifty-State Review of LIHTC "Qualified Allocation Plans"* (October 2008, with the Lawyers' Committee for Civil Rights Under Law; and *Are States Using the Low Income Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* (Jill Khadduri, Larry Buron, and Carissa Climaco, sponsored by PRRAC and the National Fair Housing Alliance, 2007).

1. The Statutory Duty to Further Fair Housing.

The statutory duty to further fair housing imposed on federal agencies includes several important elements: federal agencies must not discriminate in their administration of housing and urban development programs; federal agencies must not permit subrecipients, grantees and state and local instrumentalities under their oversight to engage in discrimination; federal agencies must evaluate the civil rights effect of funding and administrative decisions; and federal agencies must take affirmative steps so that over time patterns of residential segregation are dismantled and open housing markets are established.[2] The duty to further fair housing in part fulfills the congressional mandate that LIHTC selection criteria include the goal of "broad geographic distribution" of assisted units. To the extent that effectuating the duty is attentive to conditions of racial concentration and inequity, it is also consistent with the requirement that project selection criteria include consideration of "tenant populations with special housing needs," including minority households. See Section 42(m)(1)(C)(v) and House Report 101-247 (September 20, 1989).

In past correspondence with the Department of Treasury, PRRAC and other civil rights groups provided a detailed explanation of how the duty to further fair housing applies to the role of the Internal Revenue Service as the federal agency with supervisory authority over the LIHTC program and the activities of state credit agencies. The correspondence expressed concern about the Service's inattention to civil right considerations in the LIHTC program.[3]

Our concerns are substantial. The establishment and perpetuation of racial segregation in state allocations of tax credits continues to be a source of legal dispute. As you may know, a federal district court in Texas ruled in 2012 that the state credit agency's administration of LIHTC perpetuated racial segregation in Dallas, in violation of the Fair Housing Act's prohibition on actions with a discriminatory effect. Similar allegations about allocations of credits in Maryland led to the 2011 filing of an administrative complaint under Title VIII against the State of Maryland and the Maryland Department of Housing and Community Development. The complaint asserts that the state agency also violated the duty to further fair housing under the Fair Housing Act. In 2004, a New Jersey court held that the state's housing credit agency was obliged to further fair housing under Title VIII, and ultimately concluded that the state's qualified allocation plan complied with that responsibility by appropriately balancing allocation decisions between projects located racially segregated neighborhoods and non-minority areas.[4]

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[2] *See, e.g., NAACP, Boston Chapter v. Sec'y U.S. Dept. of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987).

[3] A copy of our letter to Dr. Michael Stegman is enclosed for your information.

[4] *See Inclusive Communities Project v. Texas Dep't of Housing and Comm. Affairs*, 860 F. Supp. 2d 312 (N.D. Texas 2012), *Inclusive Communities Project v. Texas Dep't of Housing and Comm. Affairs*, Order No. 12-11211 (March 24, 2014) (5th Cir.)(adopting the discriminatory effects standard issued by HUD in 24 C.F.R. § 100.500); *Baltimore Regional Housing Corporation v. State of Maryland and Maryland Dept. of Housing and Comm. Dev.* (administrative complaint filed with U.S. Department of Housing and Urban Development, August 2011).

The conditions that led to these disputes exist in the LIHTC program throughout the United States. The comments that follow are addressed to the ways in which PRRAC believes the Audit Guide can be improved with respect to the Service's obligation to address those conditions by furthering the purposes of the Fair Housing Act.

2. State Agency Responsibilities.

The description of state housing agency responsibilities in Chapter 1 lacks any discussion about when or how the Service will audit credit agencies for compliance with their duties under Section 42 or how the IRS will carry out, devolve to the agencies and enforce the responsibility to further fair housing. The omission of these matters is glaring in light of the corresponding absence of any guidance in IRS rules about how credit agencies should implement the project selection criteria and preferences required by Section 42(m). See 26 C.F.R. §1.42-17(a)(2), reserving any rules about selection criteria.

The Audit Guide should expand the scope of audit activities to include state housing agency compliance with Section 42, IRS regulations and civil rights laws. It must express the Service's requirements for state agency exercise of responsibility in the following areas:

- The Audit Guide should instruct the state agencies that project selection criteria must include an evaluation of the extent to which allocation decisions perpetuate, exacerbate or dismantle residential segregation. The Guide must explicitly say that allocation decisions should be based on a goal of establishing truly open housing markets and "broad geographic distribution" of units supported by LIHTC.

- The Audit Guide must provide guidelines for QAP in implementing the selection preference for development activities in qualified census tracts that are part of comprehensive community revitalization plans, as set forth in Section 42(m)(1)(B)(ii)(III). The guidance must include standards assuring that LIHTC development in QCT does not result in racial and economic isolation, and does result in significant investment in the quality of non-housing amenities, including education, transportation, employment, and access to commercial and retail services such as shopping and grocery stores.

- The Audit Guide must require states to comply with the data submission requirements of 42 U.S.C. §1434z-8.

- The Audit Guide must state the state agency obligation to comply with fair housing and civil rights laws in the administration of the LIHTC program. At minimum, those laws include the non-discrimination provisions of the Fair Housing Act and the duty to further fair housing under 42 U.S.C. §3608. They also include Title II of the Americans with Disabilities Act, which prohibits

disability discrimination and requires architectural access in state and local public service programs, such as the LIHTC program.[5]

3. Pre-contact Analysis and Audit Techniques: Affirmative Fair Housing Marketing, Tenant Selection Plans, Waiting Lists and Resident Characteristics.

Chapter 13 of the Service's *Guide for Completing Form 8823* emphasizes that compliance with the general public use rule of 26 C.F.R. §1.42-9 means that LIHTC owners must carry out leasing and occupancy activities in a "manner consistent with housing policy governing nondiscrimination" expressed in part in Handbook 4350.3 maintained by the U.S. Department of Housing and Urban Development. The Handbook 4350.3 requires each project to:

- Carry out an affirmative fair housing marketing plan under which an owner "must affirmatively market their units to those least likely to apply" in order to "to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, handicap, familial status or national origin." See Handbook 4350.3, par. 4-12 and 24 C.F.R. §200.610.

- Implement a written tenant selection plan that among other elements permits selection preferences consistent with fair housing and civil rights laws, includes occupancy standards consistent with Title VIII requirements, incorporates policies to comply with the Fair Housing Act, Section 504 of the 1973 Rehabilitation Act and Title VI of the 1964 Civil Rights Act, incorporates procedures for complying with the safeguards of the Violence Against Women Act (now applicable to LIHTC properties under the provisions of Title VI of Public Law 113-4[6]), and applicant screening standards that are consistent with fair housing and civil rights laws. See Handbook 4350.3, chapter 4, section 1.

- Develop waiting list procedures that assure fair admission to a project in ways that are consistent with fair housing and civil rights laws. See Handbook 4350.3, chapter 4, sections 3 and 4.

- Gather and maintain on a voluntary basis information about the racial, ethnic and disability characteristics of applicants and residents in a manner similar to the information required by 42 U.S.C. §1437z-8 for LIHTC properties. Handbook 4350.3, par. 2-11.A.2.

[5] *See Independent Housing Services of San Francisco v. Fillmore Center Assoc.*, 840 F. Supp. 1328 (N.D. Cal. 1993).
[6] Pub. L. 113-4, §601(a) (March 7, 2013), 127 Stat. 102, codified at 42 U.S.C. §14043e-11(a)(3)(J).

- Post the fair housing poster required by HUD Title VIII rules on project signage and in property management offices. See 24 C.F.R. Part 110 and Handbook 4350.3, par. 2-5.E and 4-12.G.

The pre-contact document request criteria in chapter 2 and the audit technique and interview standards in chapter 3 should instruct auditors to gather and review these records. On-site inspections should include a determination of whether the fair housing poster is properly displayed. They should assess the availability of dwelling units and common area amenities accessible to people with disabilities in the manner required by Section 13-1 of the *Guide for Completing Form 8823*. In considering owner compliance with the Vacant Unit Rule and General Public Use Rule as described in chapter 12, auditors should also be directed to review owner affirmative fair housing marketing, tenant selection and waiting list practices.

4. The General Public Use Rule and Disparate Impact.

PRRAC strongly disagrees with the statement in Chapter 12 of the Audit Guide saying that a "taxpayer is compliant with the General Public Use Rule" when the LIHTC "housing is likely to be used (exclusively or predominantly) by a specific group not otherwise allowable under IRC §42(g)(9), *but there is no evidence that the taxpayer is intentionally targeting the group or engaging in exclusionary rental practices*." (Emphasis added.)

The Service has so far not issued guidance on the "clarification" of the General Public Use Rule in I.R.C. §42(g)(9), leading to confusion about its meaning. See page 12-1 of the *Guide for Completing Form 8823.* Beyond this concern, the statement in the Audit Guide holding owners harmless for patterns of exclusion, steering and segregation in the absence of intent disregards the fact that the Fair Housing Act prohibits not just intentional discrimination, but also acts and practices that appear to be unintentional but result in a discriminatory effect. The civil rights prohibition on disparate impact is codified in the HUD fair housing regulations that are incorporated by reference in 26 C.F.R. 1.42-9. See 24 C.F.R. §100.500. It is a concept expressed in Handbook 4530.3. See Handbook 4350.3, par 2-18.C, 2.27.D (selection preferences) and 6-9.A (house rules). Auditors must be instructed to take action when confronted with information that a LIHTC property is occupied exclusively or predominantly by one racial or ethnic group, or to the exclusion of people with disabilities, or to the exclusion of groups that are or ought to be the subject of an affirmative fair housing marketing plan. PRRAC urges you to expand on the audit techniques on page 12-35 of the Audit Guide to include such circumstances and to modify the statement on page 12-33 so that it states that an owner is non-compliant with IRS requirements when there is evidence of improper targeting, with or without evidence of intent.

5. The Americans with Disabilities Act, Supportive Services for People with Significant Disabilities, Eligible Basis, the Applicable Fraction and the General Public Use Rule.

PRRAC is also concerned about the Audit Guide's treatment of long term supportive services for people with significant disabilities and people who receive supportive services in connection with housing for chronically homeless individuals. We support

and endorse the comments of the Technical Assistance Collaborative and the Consortium for Citizens with Disabilities addressed to those matters. The comments in this section of our letter are intended to complement the TAC and CCD comments.

The Audit Guide's discussion of eligible basis, the applicable fraction and the general public use rule create a presumption that housing does not qualify for the credit where "nursing, medical, or psychiatric services" are offered to people with significant disabilities, where referrals to the housing are made by specific service providers, and where the housing includes special structural adaptations that meet the needs of people with disabilities. With the reforms worked by the Americans with Disabilities Act and the Supreme Court decision in *Olmstead v. L.C.* (discussed in the TAC and CCD comments), it is no longer the case that the mere presence of such services, structural features and referral mechanisms means that a dwelling is not a residential unit. Indeed, several programs administered by HUD, such as the Section 811 Project Rental Assistance program and the Section 8 Project-Based Voucher program are specifically intended to be used in conjunction with LIHTC to facilitate the development of precisely this form of permanent supportive housing.

HUD, the Department of Justice and the federal Center for Medicaid and Medicare services have all adopted policies that focus not on the nature or extent of supportive services, but rather the terms, conditions and features of the housing in order to define the concept of an integrated, community based setting. We especially draw your attention to the comprehensive regulation recently issued by CMS that defines a "home and community-based setting." *See* 79 Fed. Reg. 2947, 3030 (January 16, 2014) in this regard. Without reciting every aspect of the rule in our comments, we ask you to note that such settings are defined as a dwelling rented by an individual under a lease with all the protections of landlord-tenant law, where a person has privacy, is entitled to exercise autonomy in all aspects of life (including in the selection of and participation in supportive services), is not isolated from employment, social interaction and other elements of community life, and is not an institution like a nursing home or hospital.[7]

We support TAC and CCD's request that the Audit Guide be modified to reflect the policies of other federal agencies by removing the references to the nature and extent of supportive services as factors that may disqualify units for the housing credit, and to replace those concepts with references to the features of permanent, integrated supportive housing as factors that make units eligible for the credit.

6. Conclusion

Thank you for the opportunity to submit these comments. We look forward to seeing a revised version of the Audit Guide that more adequately fulfills the Internal Revenue Service's duty to further the purposed of the Fair Housing Act.

[7] HUD and DOJ take similar approaches in explaining the meaning of integrated settings for people with disabilities under the ADA. *See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* (June 22, 2011) and *Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead.*

Yours truly,

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