

April 23, 2013

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Re: Potential Areas for Civil Rights Advancement by the LIHTC/MOU Group

Dear Assistant Attorney General Perez, Assistant Secretary Trasviña, and Dr. Stegman:

Thank you for meeting with us to begin a conversation about specific ways that the Memorandum of Understanding group can advance civil rights within the LIHTC program. We look forward to continuing discussions about these important topics in the near future. We are writing to emphasize and provide more detail regarding a number of the issues we raised at the meeting. We hope this will provide a foundation for further discussions.

I. Data collection & availability

A. Statutorily required data. The public availability of full LIHTC tenant data is a threshold issue for fair housing enforcement (including Section 8 voucher discrimination) and for civil rights practitioners seeking to identify where improved policies are needed. The collection and publication of this data is required by statute: the Housing and Economic Recovery Act of 2008 amended the United States Housing Act of 1937 to require that, at least annually, State Housing Finance Agencies provide to HUD and HUD make publicly available data regarding the race, ethnicity, family composition, age, income, use of rental assistance, disability status, and monthly rental payments for households residing in all properties receiving Low-Income Housing Tax Credits. 42 U.S.C. § 1437z-8.¹

¹ “Collection of Information on Tenants in Tax Credit Projects,” provides that each state agency administering LIHTC “shall furnish to the Secretary of Housing and Urban Development, not less than annually, information concerning the race, ethnicity, family composition, age, income, use of rental assistance under section 8(o) of the United States Housing Act of 1937 or other similar assistance, disability status, and monthly rental payments of households residing in each property receiving such credits through such agency. ... The Secretary shall establish

We recommend that fulfillment of this statutory obligation be an immediate priority and urge MOU members to investigate mechanisms or incentives to ensure that state finance agencies submit the required data.² In addition, the MOU process presents an opportunity for HUD, DOJ, and Treasury to create a procedure for the ongoing use of this data to monitor whether tenants are in fact accessing high-opportunity, integrated communities, to monitor discrimination against voucher holders, and to trigger fair housing enforcement.

B. Applicant data. Although Congress has not specifically required HUD to collect LIHTC applicant data as it has resident data, this data is no less crucial to assessing fair housing compliance. Data on the applicant pool is important, for example, to show whom fair housing marketing has reached (in other words, whether it has been successfully “affirmative” in yielding applicants representative of region-wide demographics) and whether tenant selection procedures draw equitably from the applicant group (an analysis which can often reveal the presence of specific discriminatory selection practices). We recommend that the MOU group examine sources of authority for imposing such data requirements—for example, as authorized by HUD’s or Treasury’s statutory nondiscrimination and AFFH mandates.³

C. Improving the existing LIHTC database. In addition to the lack of tenant-level data, there continue to be gaps in the project-level data already collected by HUD and made available through the LIHTC Database. The information in this database is submitted voluntarily by state housing finance agencies (HFAs), but these submissions are incomplete, with many projects unreported or missing data on key characteristics such as location type.⁴ We recommend that HUD follow GAO’s recommendations to “evaluate options for improving the completeness of HUD’s LIHTC Database, including following up on data anomalies and enhancing the role of HUD’s contractor in data collection and quality control; and ...take additional steps to improve the data.”⁵

II. Tenant selection and marketing

A. Affirmative marketing and nondiscriminatory tenant selection. Affirmative marketing is another key aspect of fair housing implementation. HUD currently has affirmative marketing requirements intended to help prospective tenants overcome informational disparities and make integrative moves. HUD’s regulation provides that “Each applicant for participation...shall

standards and definitions ... provide States with technical assistance in establishing systems to compile and submit such information, and, in coordination with other Federal agencies administering housing programs, establish procedures to minimize duplicative reporting requirements for properties assisted under multiple housing programs...[and] shall, not less than annually, compile and make publicly available the information ...”

² The form currently in use by HUD expires in May 2013: HUD LIHTC Tenant Data Collection Form, www.hud.gov/offices/adm/hudclips/forms/files/52697.pdf. A request for renewal approval of the form is pending with the Office of Management and Budget. 78 Fed. Reg. 16227 (March 14, 2013).

³ HUD has previously noted that it is without statutory authority to require data on LIHTC tenant applicants in addition to residents. Docket No. FR-5298-N-02 at 9611 (March 3, 2012), www.gpo.gov/fdsys/pkg/FR-2010-03-03/pdf/2010-4386.pdf. We urge HUD to reconsider this stance in light of data’s crucial role in assessing fair housing, including AFFH, compliance.

⁴ See Low-Income Housing Tax Credits: Agencies Implemented Changes Enacted in 2008, but Project Data Collection Could Be Improved, GAO-13-66 (Dec. 6 2012), www.gao.gov/products/GAO-13-66.

⁵ *Id.*

pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions.” 24 C.F.R. § 200.610 (directly applicable to FHA programs and incorporated by other programs). The LIHTC program would benefit from the incorporation of similar affirmative marketing requirements—with all developments required to submit a marketing plan, as well as a tenant selection plan. We note that the IRS *Guide for Completing Form 8823* already encourages tax credit owners to engage in marketing activities as part of the general public use requirement and in order to assure compliance with the so-called “vacant unit rule.” Treasury might incorporate HUD’s marketing regulation into this guidance and work with the MOU group to develop other relevant guidance specific to the LIHTC program.⁶ This would also encourage uniform practices across the program because many LIHTC properties also have HUD subsidies and are subject to HUD AFHM rules.

B. Other clarifications to the General Public Use Rule

The GPU rule is LIHTC’s nondiscrimination regulation, which incorporates HUD rules by reference but offers little clarity about which rules, in particular, it contemplates.⁷ MOU members might coordinate to produce meaningful, more specific GPU guidance.

Disparate impact: The MOU group has the opportunity to draw upon its collective expertise to develop GPU guidance that explicitly emphasizes the Fair Housing Act’s protections from practices with discriminatory effects (such as the use of local residency preferences).⁸

Integrated supportive housing: Many, if not most states look to the LIHTC and other mainstream affordable housing programs to create permanent supportive housing for people with significant disabilities in furtherance of their responsibilities under the Americans with Disabilities Act and the Supreme Court decision in *Olmstead v. L.C.* The importance of the housing credit to permanent supportive housing was most recently expressed in the amendments to the federal enabling statute for the Section 811 program of Supportive Housing for People with Disabilities, which created a project rental assistance demonstration program administered by HUD that explicitly links Section 811 permanent supportive housing to the LIHTC and similar programs.⁹

⁶ See *Guide for Completing Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition*, chapters 12 and 15. See also PRRAC, “Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs” (December 2012), available at www.prrac.org/full_text.php?item_id=13706&newsletter_id=0&header=Current%20Projects.

⁷ “If a residential rental unit in a building is not for use by the general public, the unit is not eligible for a [section 42](#) credit. A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 C.F.R. subtitle A and chapters I through XX). See HUD Handbook 4350.3 (or its successor).” 26 C.F.R. § 1.42-9.

⁸ Residency preferences are the most egregious example of a number of admissions and waitlist management practices that have an (unnecessarily) discriminatory impact. See PRRAC, “Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs” (December 2012), available at www.prrac.org/full_text.php?item_id=13706&newsletter_id=0&header=Current%20Projects.

⁹ Some judicial decisions say that state housing activities carried out with funding similar to the LIHTC, like tax exempt bond financing, are subject to Title II of the ADA. Amendments made by HERA to Section 42 also clarified the meaning the general public use rule by adding 26 U.S.C.A. § 42(g)(9), which states that “A project does not fail

III. Siting incentives and standards

Siting standards (or regional allocation principles that emphasize residential integration) are crucial to ensure that family LIHTC developments are sited in a more geographically balanced manner, to avoid perpetuating segregation and to create access to high-opportunity communities. We recommend that the MOU group explore ways to ensure that LIHTC siting is incentivized in a manner that will “affirmatively further fair housing,” as well as targeting fair housing enforcement at barriers to developing LIHTC fair housing integrative, higher-opportunity areas.

A. *Qualified Census Tracts and Difficult to Development Areas: Small Area FMRs.* The tax code provides that developments in designated “difficult development areas” (DDAs) or designated “Qualified Census Tracts” (QCTs) are eligible for a basis boost; it requires HUD to designate QCTs and DDAs and defines them as follows:

The term “qualified census tract” means any census tract which is designated by the Secretary of Housing and Urban Development and, for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent.... 26 U.S.C. § 42(d)(5)(B)(ii).

The term “difficult development areas” means any area designated by the Secretary of Housing and Urban Development as an area which has high construction, land, and utility costs relative to area median gross income. 26 U.S.C. § 42(d)(5)(B)(iii).

The procedures the Secretary uses to designate these areas currently do not reflect HUD’s other statutory directives, in particular its AFFH obligation. Rather, HUD bases its designation of these areas on formulas that fail to incorporate fair housing considerations. This means that absent fair housing standards to ensure better distribution, QCT designations, for example, enhance the financial incentives to develop in low-opportunity neighborhoods. We recommend that HUD find ways to incorporate clear fair housing standards in the designation of QCT in DDA that would result in the award of a significant portion of basis boosts to developments in high-opportunity or gentrifying neighborhoods, particularly with regard to new construction. HUD could, for example, adopt the small area fair market rent methodology for DDA designations that was under consideration in 2011.¹⁰

to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants--(A) with special needs, (B) who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group, or (C) who are involved in artistic or literary activities.” There is no IRS guidance on how the ADA and the clarification to the general public use rule affect the ability of state credit agencies to finance integrated permanent supportive housing with LIHTC. The absence of guidance has two effects. It impedes the development of community-based living options for people with significant disabilities who need and desire affordable housing linked to long term community supports. It also sometimes results in disability discrimination, where, for example, people who may qualify to live in a LIHTC-financed permanent supportive housing unit are excluded because they are a person with a type of disability (like a mental illness) the owner or sponsor does not desire to serve.

¹⁰ See 77 Fed. Reg. 59629 (September 28, 2012).

B. Barriers to High-Opportunity Siting. LIHTC developers often encounter barriers to siting affordable housing in high-opportunity areas, such as local approval requirements¹¹ and exclusionary zoning practices. The DOJ Civil Rights Division has already begun to address these barriers (for example, in the Waukesha case). We recommend that the MOU group examine ways these barriers can be addressed, including through increased enforcement activity.

Thank you for the opportunity to offer this additional detail for the MOU group's consideration. We hope that this document will be a starting point for further discussions, and we would be happy to provide additional analysis as needed. Also, please let us know if the MOU group would be available to meet again in June or July to continue this dialogue (for followup, please contact Phil Tegeler, ptegeler@prrac.org or 202-360-3906). We look forward to hearing from you.

Respectfully,

Lawyers' Committee for Civil Rights Under Law

NAACP Legal Defense and Educational Fund, Inc.

National Fair Housing Alliance

Poverty & Race Research Action Council

Fair Share Housing Center of New Jersey

Inclusive Communities Project

¹¹ See Jill Khadduri, *Creating Balance in the Allocations of LIHTC Developments* (Feb. 2013) at 17, *available at* www.prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf.