

# Massachusetts Law Reform Institute

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**Transmitted by fax (202-283-2516) and mail**

March 30, 2004

Internal Revenue Service  
Attn: Grace Robertson, C9-466  
5000 Ellin Road  
Lanham, MD 20706

**Re: Comments on Draft Guide for Completing Form 8823 (LIHTC Report of Noncompliance), Chapter 11**

Dear Ms. Robertson:

We are writing on behalf of the undersigned organizations that represent the interests of low income families and individuals who reside or seek to reside in Low Income Housing Tax Credit (LIHTC) properties. We comment specifically on Chapter 11 of the Draft Guide (concerning violations of the Fair Housing Act). We have not reviewed other sections of the Draft Guide and offer no comments except as to Chapter 11.

## Legal Background

The background for our comments is our understanding that the Fair Housing Act applies directly to the Department of Treasury, to all state Housing Finance Agencies (HFAs) that administer the LIHTC program, and to all owners and managers of tax credit properties. The Department is required to “affirmatively further [fair housing]” as set out in 42 U.S.C. § 3608(d), and in Executive Order 12892 (Jan. 17, 1994). The duty to “affirmatively further fair housing” requires the Department and state HFAs to closely monitor tax credit properties for discriminatory practices; it also requires the Department and state HFAs to affirmatively promote non-discrimination and racial integration in other ways, including but not limited to analyzing the racial concentration effects of LIHTC siting and adopting procedures to avoid perpetuating racial segregation in the program. *See Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970). The duty to affirmatively further fair housing is also delegated to state HFAs and owners by I.R.S. regulation 26 CFR § 1.42-9, which incorporates HUD non-discrimination and site selection rules. LIHTC owners and HFAs are also covered by Title VI of the Civil Rights Act of 1964, and its implementing regulations, which forbid discrimination based on race, color or national origin, either by intent or as a result of a seemingly neutral policy or practice. HUD's Title VI regulations, like the Fair Housing Act, also obligate HFAs and tax credit owners to administer their programs affirmatively to overcome conditions of discrimination and take other steps to accomplish the purposes of Title VI.

Our comments do not address all of these important legal issues, because the Draft Guide is limited to monitoring of discrimination by current tax credit properties. The issues of project siting to promote integration, the content of state Qualified Allocation Plans, and other procedures of state HFAs are beyond the scope of these comments. We urge the Department, however, to consider these larger issues, because we believe that many state HFAs are not complying with their statutory duty to affirmatively further fair housing. We would like to address these issues with the Department at a later time.

### Comments on Chapter 11

We believe that the current draft of Chapter 11 is seriously deficient in its failure to explain clearly the broad scope of owners' fair housing obligations, in the lack of documentation required (which will leave monitoring agencies without the information they need to certify compliance), and in its omission of key obligations to persons with disabilities and persons with limited English proficiency.

1. Providing more explicit fair housing guidance: The current draft of Chapter 11 gives owners almost no notice of their Fair Housing and Title VI obligations. This lack of information places both owners and state HFAs in legal jeopardy. The chapter should be revised to comprehensively list and explain each civil rights obligation applicable to LIHTC properties, including but not limited to non-discrimination by race, national origin, ethnicity, sex, familial status, disability, and source of income; the owner's duty to affirmatively market LIHTC units; and accommodations for victims of domestic violence and persons with limited-English proficiency.

2. Enhanced documentation from owners: State HFAs do not have meaningful information with which to assess owner compliance with these requirements. Owners should be required to submit basic fair housing information to the monitoring agency:

a. Racial and ethnic data: Basic data must be provided by owners of tax credit properties about the racial demographics of building occupants, applicants, and neighborhood in order to assess compliance with fair housing requirements. Data also is needed regarding the language preference of applicants and tenants who are limited-English proficient. The Department cannot engage in a meaningful review of compliance without this information. Owners should provide, and state HFAs should maintain, at least the following data:

-Overall breakdown of race/ethnicity/national origin of residents and applicants to the property (see, for example, HUD forms HUD-27061 & HUD-27061-H)

-Race/ethnicity/national origin of census tract & census block where the property is located

-Primary language of limited-English proficient tenants

-whether the project is family or elderly housing (or other specialized type of housing)

b. Data on Section 8 voucher admissions and occupancy: 26 USC § 42(h)(6)(iv) prohibits discrimination against Section 8 voucher holders in LIHTC properties. Basic data on Section 8 admissions and occupancy are crucial to assess owner compliance with this requirement. Owners should be required to report the number and percent of Section 8 voucher holders residing in the property.

c. Documentation of affirmative marketing efforts: Title VIII and its accompanying regulations, which are incorporated by reference in 26 CFR § 1.42-9 and Form 8823, require owners to affirmatively market LIHTC units to those groups least likely to apply. See 24 CFR § 200.600-640. Owners in predominantly white communities should be required to maintain and submit evidence that they have aggressively marketed units in nearby minority communities (equivalent data should be reported for projects in predominantly minority communities) or it will not be possible to assess compliance with these requirements.

d. Reporting of discrimination complaints: The current draft of Chapter 11 requires reporting only of fair housing lawsuits filed by the Department of Justice, and cause findings in HUD or state equivalent agencies. It is unclear why this limitation is included, as DOJ fair housing lawsuits account for only a tiny fraction of meritorious fair housing complaints, and the vast majority of administrative complaints are resolved long before a “cause finding” can be made (indeed, the most egregious discrimination cases are often settled the most quickly). Meaningful assessment of FHA compliance will be completely inhibited unless owners are required to report *all* fair housing actions and administrative complaints filed against them (including settled cases), along with a copy of the complaint, and the status or disposition of each claim. Tax credit sanctions must be imposed where there is any violation of civil rights obligations.

e. Disclosure of potentially discriminatory admissions practices: Owners should disclose any geographic based admissions preferences, along with racial and ethnic data on the preference area as compared to the larger housing market area.

3. Disability: The draft Chapter 11 is seriously lacking in guidance about how to deal with issues confronting people with disabilities. Several key issues have been omitted and should be included.

a. Guidance that tells state Housing Finance Agencies that if a property fails to comply with the Fair Housing Act's design and construction requirements the following steps at a minimum must be taken: (i) the property must have an independent assessment made of

the full scope of all design and construction violations; (ii) the property must provide a comprehensive time line for full correction of all violations, consistent with remedial actions approved in consent decrees approved by HUD or the United States Department of Justice, regardless of whether or not a complaint has been filed, and (iii) absent compliance with these requirements, IRS reporting must be conducted.

b. Chapter 11 should provide detailed guidance and examples about compliance with the Fair Housing Act provisions that require that housing providers make reasonable accommodations that will permit persons with disabilities to benefit from the housing, permit reasonable modifications to the premises, and in general not discriminate against persons with disabilities. See generally HUD Notice Housing 01-02, extended by HUD Notice Housing 2003-10. Handicap discrimination represents the highest number of discrimination complaints filed over the past three years with HUD and an area where there is significant confusion among housing managers.

4. Ensuring access for limited-English proficient (LEP) tenants and applicants: The Department of Treasury, HUD and DOJ each have published “guidances” informing all entities that receive federal funding either directly or indirectly from each agency of their obligations under Executive Order 13166 and Title VI of the Civil Rights Act of 1964 to provide meaningful access to Limited English Proficient (LEP) persons. The Department of Treasury guidance, published on March 7, 2001, was “effective immediately.” 66 Fed. Reg. 13829 (March 7, 2001) (Guidance of Federal Financial Assistance Recipients on the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons). The DOJ and HUD LEP Guidance Notices were published in 2002 and 2003. See 67 Fed. Reg. 41455 (June 18, 2002) (DOJ); 68 Fed. Reg. 70967 (December 19, 2003) (HUD). See also “Language Assistance Self-Assessment and Planning Tool for Recipients of Federal Financial Assistance” ([www.lep.gov/selfassesstool.htm](http://www.lep.gov/selfassesstool.htm)). It is critical that the Department remind recipients of their LEP obligations by alerting them to the Treasury, HUD and DOJ LEP guidances. The Department should further emphasize that the DOT and HUD guidances set forth the guidelines for evaluating a fair housing complaint relating to LEP access issues. Finally, recipients should know that all parts of a recipient’s operations are covered by the guidances even if only one part receives federal funding.

### Conclusion

We hope that the Department will carefully consider these recommendations. There is increasing scrutiny of the fair housing performance of LIHTC properties across the country, and the Treasury Department should take a lead role in explaining to owners the scope of their fair housing obligations.

This letter has covered some of the basic fair housing issues not included in Chapter 11 of the Draft Guide. There are of course many other issues affecting the health and well being of low income tenants that are beyond the scope of this letter, including legal requirements protecting

tenants from lead paint exposure, good cause eviction protections for tenants of LIHTC properties, and other issues. We hope that these issues also are carefully reviewed by the Department before the Draft Guide is issued, and that the Department consistently solicits the views of tenant organizations and other advocacy groups working with low income tenants.

Respectfully Submitted,

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