

April 15, 2015

Senate Finance Committee
Working Group on Community Development & Infrastructure
219 Dirksen Senate Office Building
Washington, DC 20510
CommunityDevelopment@finance.senate.gov

Re: Fair Housing Comments to Working Group on Community Development & Infrastructure, responding to Treasury Department proposals on the Low Income Housing Tax Credit

Dear members of the Committee,

We are writing in response to the Committee's invitation for comments and input on tax reform issues. Our comments refer specifically to two proposals advanced by the Department of Treasury for the Low Income Housing Tax Credit program, to expand the priority for "Qualified Census Tracts" and to add a priority for "Preservation" in the LIHTC statute.¹ In our view, these proposals will likely increase racial and economic segregation in the LIHTC program, reflecting a disregard by the Department of Treasury of its civil rights obligations under the Fair Housing Act and Title VI of the Civil Rights Act of 1964. The Department has an affirmative duty to foster residential racial integration through its programs, in addition to an obligation to ensure that it and recipients of its assistance do not engage in discrimination.² We urge the Committee to reject these specific proposals and to encourage the Department to take a more affirmative stance on fair housing and civil rights issues within its jurisdiction.

LIHTC and Fair Housing

The Treasury Department has been repeatedly criticized, in academic literature³ and by civil rights advocates⁴ for its failure to adopt any Title VI and Title VIII regulations or guidance covering the Low Income Housing Tax Credit, our nation's largest low income

¹ See "General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals (Released February 2015), at pp. 70-71, available at <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf>.

² 42 U.S.C. §3608.

³ See, e.g., Myron Orfield, "Racial Integration and Community Revitalization: Applying The Fair Housing Act to the Low Income Housing Tax Credit," *Vanderbilt Law Review*, November 2005 (8 Vand. L. Rev. 1747); J. William Callison, "Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit," 19 *S. Cal. J. L. & Soc. Just.* 213 (Spring 2010); Elizabeth K. Julian, "Community Revitalization, Civil Rights, and the Low Income Housing Tax Credit Program," 38 *Carolina Plan.* 25 (2013); Casey Dawkins, "The Spatial Pattern of Low Income Housing Tax Credit Properties: Implications for Fair Housing and Poverty Deconcentration Policies," 79 *J. Am. Plan. Ass'n* 222 (2013).

⁴ See, e.g., Letter to Treasury Department urging release of Title VI regulations for LIHTC program (June 2012) available at www.prrac.org/pdf/Title_VI_and_LIHTC_6-29-12.pdf; Letter to Treasury Department urging release of Title VIII guidance and regulations for LIHTC program (May 2012), available at www.prrac.org/pdf/Letter_to_Michael_Stegman_re_fair_housing_regs_5-15-12.pdf.

housing development program. Instead, in the absence of guidance, the Department has permitted the development of a patchwork of plans that have often focused development in higher poverty, racially and ethnically segregated neighborhoods near lower performing schools.⁵

The Treasury Department's LIHTC proposals

1. The Department's proposal to remove the current statutory population cap for Qualified Census Tracts (QCTs) would allow the U.S. Department of Housing & Urban Development to designate as a QCT any census tract that meets the current statutory criteria of a poverty rate of at least 25 percent or 50 percent or more of households with an income less than 60 percent of AMI. Currently, the aggregate population of census tracts designated as QCTs cannot exceed 20 percent of any metropolitan area's population. In contrast, current law limits higher income Difficult to Develop Areas (DDAs) to 20 percent of the census tracts in *all* metropolitan areas in the aggregate. The proposed change would apply to buildings that receive allocations of LIHTCs or volume cap after the date of enactment. State Qualified Allocation Plans (QAPs) are also required to provide an incentive to proposed developments that are in QCTs and would contribute to a concerted community revitalization plan.

Eliminating the cap would increase the number of eligible tracts in MSAs that already have the highest number of eligible QCTs. This expansion is also likely to be limited to a few of the larger MSAs where the 20% cap comes into play. This would likely increase the number of units in high poverty neighborhoods with significant levels of subsidized housing by enabling a broader range of proposed developments to qualify for incentive points for developments in QCTs, thus enhancing the competitiveness of those proposals in relation to proposed developments in high opportunity areas. Rather than expanding opportunity, this proposal could have the effect of exacerbating an imbalance in existing law, which limits the use of LIHTC in lower poverty census tracts and outside the central city. Several states are now working to balance the priority for community development in QCTs with the equally powerful priority to promote fair housing choices in high opportunity communities.⁶ These states should not be further constrained in their positive efforts by an additional federal requirement targeting the poorest neighborhoods.

2. The Department's proposal to add the preservation of federally assisted affordable housing as an eleventh selection criterion that state QAPs must include is unnecessary. The vast majority of state QAPs already have a preservation priority.⁷ Some state QAPs

⁵ See Ingrid Gould Ellen and Keren Mertens Horn, "Do Federally Assisted Households Have Access to High Performing Public Schools?" (PRRAC, November 2012), available at www.prrac.org/pdf/PRRACHousingLocation&Schools.pdf; Jill Khadduri et al, Are States Using the Low Income Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods? (PRRAC and the National Fair Housing Alliance, 2007), available at www.prrac.org/pdf/LIHTC_report_2006.pdf

⁶ See, for example, state Qualified Allocation Plans in New Jersey, Texas, Massachusetts, and Pennsylvania.

⁷ See www.nhtinc.org/state_and_local_preservation_resources.php#national

carefully target the use of the 4% LIHTC in connection with tax-exempt bond financing to preservation activities, which allows the credit agency to prioritize the use of 9% LIHTC for new construction in areas of opportunity.⁸ Preservation as a new federal priority would disturb such creative and carefully calibrated approaches to the use of the tax credit. It would also draw limited development funds away from projects in high opportunity, low poverty areas, since the majority of units that qualify for preservation are in high poverty and racially concentrated census tracts with significant existing levels of subsidized housing.

Preservation is one of many valuable uses of LIHTC funds, but it makes more sense to leave the decision about the balance of preservation and new development to state officials who understand local housing markets and demographics (and the pressing need for new affordable housing in areas of opportunity), rather than to impose the priority across the board.

Prioritizing Fair Housing and Opportunity in the LIHTC Program

The Low Income Tax Credit is a crucially important federal housing program, but it should be doing more to leverage access to opportunity for low income families and children. A recent national study of the LIHTC program found that the typical family LIHTC development was located near an elementary school with a 67% poverty rate and ranked at the 31st percentile of overall student performance in the state. 23% of LIHTC family units were estimated to be near schools at the lowest 10% of all schools in the state.⁹

Rather than adopting new provisions that will limit choice and opportunity in the LIHTC program, Congress should expand the ability of developers to access higher cost areas. This goal can be accomplished in part by either eliminating the limitation on the designation of DDAs in 26 U.S.C. §42(d)(5)(B)(iii)(II) or at the least by putting this provision on a par with the current provisions for capping the number of QCTs within individual metropolitan areas. In either case, we urge you to reject the proposal to expand the number of QCTs in the manner proposed by the Treasury Department. We also ask that Section 42 be amended to direct the Treasury Department to take steps to implement current civil rights and fair housing laws in the LIHTC program,¹⁰ and to incentivize the development of LIHTC developments in low poverty, high performing school zones.

Thank you for your consideration of our views.

⁸ See, e.g., Commonwealth of Massachusetts 2015 Qualified Allocation Plan.

⁹ See Ingrid Gould Ellen and Keren Mertens Horn, *supra* note 5.

¹⁰ To encourage Treasury Department compliance with Title VI of the Civil Rights Act of 1964, a simple step would be to clarify that the large annual subsidies allocated by the LIHTC constitute “federal financial assistance.” For recommendations on guidance needed under Title VIII of the Civil Rights Act of 1968, see “Letter to Treasury Department urging release of Title VIII guidance and regulations for LIHTC program” (May 2012), available at www.prrac.org/pdf/Letter_to_Michael_Stegman_re_fair_housing_regs_5-15-12.pdf.

Respectfully submitted,

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