NATIONAL HOUSING LAW PROJECT
advancing housing justice

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September 3, 2010

Gerald Shields
Internal Revenue Service
Room 6411
1111 Constitution Avenue, NW
Washington, D.C. 20224

Re: Proposed Collection; Comment Request for Regulation Project, PS-78-91; PS-50-92; and REG-114664-97; 75 Fed. Reg. 38874 (July 6, 2010)

Dear Mr. Shields:

The National Housing Law Project (NHLP) and the undersigned signatories submit the following comments on the Internal Revenue Services's (IRS) Proposed Information Collection for its Regulation Project. Our comments focus on the existing regulations regarding compliance monitoring of the Low Income Housing Tax Credit (LIHTC) program, 26 C.F.R. §1.42-5 and the Qualified Allocation Plan, 26 C.F.R. §1.42-17.

We have identified three issues that are necessary for the proper performance of the functions of the agency, and have significant practical utility. These three areas are: 1) Section 8 Voucher and other discrimination; 2) good cause eviction; and 3) the consequences of noncompliance.

Civil Rights Compliance

The absence of clear direction by the Internal Revenue Service regarding how the program should be operated to comply with Title VI and with the Fair Housing Act, 42 U.S.C. 3601 (especially the mandate to affirmatively further fair housing under 42 U.S.C. 3608) is a source of significant concern.

Section 8 Voucher Discrimination

Discrimination against Section 8 voucher holders is prohibited under 26 U.S.C. §42(h)(6)(B)(iv). Section 1.42-5(c)(1)(xi) of Title 26 of the Code of Federal Regulations states that an owner must certify that it complied with this anti-discrimination provision for the preceding 12 months. Since the regulations were last updated, Congress has mandated, in Section 2835(d) of H.R. 3221, the Housing and Economic Recovery Act of 2008, that owners collect civil rights related data, including the number of voucher holders residing in each project. This recently required data collection provides an opportunity, for the first time, to effectively monitor a project's compliance with the anti-discrimination statute.

The compliance monitoring regulations should be amended to ensure that the wealth of new data available regarding Section 8 voucher usage in a project will be utilized as a tool to monitor compliance and ensure non-discrimination. Accordingly, 26 C.F.R. §1.42-5(c)(1)(xi) should be amended to state in addition to certifying compliance with the Section 8 voucher anti-discrimination provision, the project owner will provide, to the Agency, the number of Section 8 voucher holders residing in the project. Further, the regulations relating to review, at 26 C.F.R. 1.42-59(c)(2) should be amended to state that if a project does not have at least a certain percentage of its units leased to voucher holders, it will trigger a closer review of whether or not discrimination, including practices that serve as de facto barriers to voucher utilization, is occurring. For example, the Agency could set a standard that if less than 20% of units are leased to voucher holders, further review of potential discrimination will occur. The Agency could potentially work with the Department of Housing and Urban Development (HUD) under the parameters of the Memorandum of Understanding (MOU) regarding fair housing enforcement between the Department of the Treasury, HUD, and the Department of Justice, in order to review compliance on this issue.

Civil Rights

As noted, the IRS has an obligation to affirmatively further fair housing. Its regulations should reflect this. In 26 C.F.R. §1.42-17, the regulations should add that in order for a qualified allocation to be approved, it will take into account not only whether the plan and the administration of the plan will comply with the Fair Housing Act, 42 U.S.C. § 3604 through § 3607, but also whether the approval of the plan will approve a course of action that would limit the supply of genuinely open housing or whether the approval of the plan will increase the supply of genuinely open housing as required by 42 U.S.C. § 3608(d). For more detailed information, please refer to the petition for rulemaking sent from Daniel & Beshara, P.C. to the Commissioner of the Internal Revenue Service on March 12, 2008, available at http://www.prrac.org/pdf/IRS_Petition_for_Rulemaking.pdf and Poverty & Race Research Action Council and Lawyers Committee for Civil Rights Under Law, *Building Opportunity: Civil Rights Best Practices in the Low Income Housing tax Credit Program*, December 2008, available at http://www.prrac.org/pdf/2008-Best-Practices-final.pdf.

Further, the regulations at 26 C.F.R. §1.42-5(c) should require that each project owner report information regarding race, ethnicity, disability, and other civil rights data, which they are already required to collect. Any review of compliance must review this data to ensure that program is fulfilling its obligations to affirmatively further fair housing.

Good Cause Eviction

Section 42(h)(6)(B)(i) of the Internal Revenue Code forbids "eviction or the termination of tenancy (other than for good cause) of an existing tenant of any low-income unit . . ." This section, as well as similar statutory language, has been interpreted to mean that a housing provider cannot remove a tenant from a unit without good cause, whether during the term of the lease, or at the expiration of a lease term.

However, in the 2009 revision of the Form 8823 Compliance Monitoring Guide, page 26-4 contains the following paragraph:

> *A lease to rent low-income housing is a contract. A lease contract expires at the end of the time period specified in the lease. At that time, the tenant surrenders the low income housing unit to the owner and the owner accepts it back. The owner and tenant may renew the contract

> (or enter into a new contract), thereby allowing the tenant to continue occupying the low-income unit, but the owner is not obligated to renew a lease or enter into a new one, and failure to do so does not, per se, constitute an eviction without good cause. However, the owner must be prepared to demonstrate if challenged in state court that the nonrenewal of a lease is not a "termination of tenancy" for other than good cause under IRC §42. The owner must provide the tenant with timely notice that the lease will not be renewed as required under state law.*

The phrase "eviction or the termination of the tenancy" is a term of art that has been used across housing programs. For example, in the tenant-based Section 8 voucher program, landlords had been prohibited by statute from terminating the tenancy without good cause, either during the term of the lease, or at its expiration. The language used by Congress to create such protections in 1981stated that "the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause . . . ." However, in 1998, Congress responded to landlord pressure to eliminate the protections at lease expiration by inserting the words "shall provide that during the term of the lease" directly before its good cause eviction protection. See Pub. L. No. 105-276, §545(a), 112 Stat. 2518, codified at 42 U.S.C.A. §1437f(o)(7)(C). Congress clearly viewed the language "shall not terminate the tenancy" as applying during lease expiration and that to eliminate that protection, it had to specify that the statute's provision only applied during the lease term. In addition to the pre-QWHRA voucher program language, many other housing programs employ the same language prohibiting terminating a tenancy without cause. See 42 U.S.C. §1437d(l)(public housing statute using "termination of tenancy" language to require good cause eviction, including at expiration of lease); 12 U.S.C. A. §1715z-1b(b)(3) (prohibiting eviction without cause including at expiration of lease for project with HUD-subsidized mortgages, Section 8 project-based assistance, or enhanced vouchers). Congress understood "termination of tenancy" to cover both evictions during the lease term as well as at expiration of the lease when it created this provision for the LIHTC program.

Additionally, if Congress had only intended the good cause eviction protections to apply to evictions based upon breach of a lease during its term, the language "or the termination of tenancy" would be rendered moot. The statute cannot be read in that manner. Further, the IRS Revenue Ruling 2004-82, addressed the good cause issue and explained that Congress intended the protections in Section 42(h)(6)(B)(i) to apply throughout a project's extended use period, as well as three years after termination of the extended use period. This protection, which ensures that low-income tenants will be able to remain in LIHTC housing, has been interpreted to include both to evictions based upon breach of a lease during its term and expiration of the lease; to conclude otherwise would contravene Congress' directive and intent, as well as the common understanding of the provisions.

The language in the recently revised Form 8823 Compliance Monitoring Guide is confusing at best. Several tenants have faced lease non-renewal notices that state no cause for eviction. Given the scope of the problem, the compliance monitoring regulations should ensure some mechanism by which the Agency reviews whether or not leases are being terminated without cause, including at renewal. At minimum, this should include a certification that the owner has not evicted anyone without cause, including at lease nonrenewal.

Consequences of Noncompliance

Congress created the Low Income Housing Tax Credit program to provide long-term affordable housing. In doing so, it developed a structure by which the value of its investment would be realized

through use restrictions and protected for the full extended use term through the specified enforcement scheme. That enforcement scheme includes recapture of the credits and a restrictive covenant on the property enforceable by both States and beneficiaries.

In two situations, Congress has provided for early termination of an extended use period. These two exceptions — foreclosure and the failure to find a qualified buyer — are exhaustive and exclusive, designed to attract necessary supplemental debt capital and to ensure competent ownership when tax benefits have been extracted. The statute specifies that the extended use period "shall terminate" on the date of foreclosure "or" if no qualified buyer is found when an owner opts out after the 14th year of the compliance period. 26 USC § 42(h)(6)(E)(i).

The Mitchell-Danforth Tax Force on the Low-Income Housing Tax Credit stated that in order to maintain long-term affordability: "The allocating agency should be required to establish a form of regulatory agreement or other legal impediment that would make it impossible for an owner to convert the property to other than low income use during the compliance period." Report of the Mitchell-Danforth Task Force on the Low-Income Housing Tax Credit, prepared for Senator George J. Mitchell and Senator John C. Danforth at 18 (1989). At least one state has attempted to terminate a property from the LIHTC program for noncompliance during the initial compliance period. Allowing such a potential windfall for property owners flies in the face of Congressional intent in creating this affordable housing program. As the Mitchell-Danforth Task Force suggested, legal impediments to conversion must ensure LIHTC projects remain affordable for their full use restricted period. In order to clarify this issue, the regulations should state where a project is found in non-compliance, the state housing finance agency will report that is has used all tools available to it to enforce compliance, such as enforcing restrictive covenants and other state law mechanisms. Further, the regulations should make clear that termination of a property for noncompliance is only permissible in the two situations that Congress has allowed for.

Conclusion

Compliance monitoring is vital to ensuring that LIHTC properties are providing, for the long-term, safe and decent affordable housing that is accessible to low-income families from all backgrounds. While the three items highlighted here are not an exhaustive list of the factors that must be monitored to ensure that the program meets its promised potential of providing such affordable housing, they represent significant issues that low-income tenants are currently facing with regard to maintaining and retaining such housing. In order to guarantee that all LIHTC projects are complying with the rules designed to make them affordable and accessible, the regulations should be amended to reflect a more close and effective monitoring of discrimination against Section 8 voucher holders, evictions without cause, and termination of properties from the program.

Thank you for considering these comments. Please feel free to contact Navneet Grewal, NHLP Staff Attorney, at 510-251-9400x3102 or <ngrewal@nhlp.org> if you have any further questions.

Sincerely,

/s/Navneet Grewal
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