May 5, 2009

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 7<sup>th</sup> Street, SW, Room 10276
Washington, DC 20410-0500

Re: Comments on Low-Income Housing Tax Credit (LIHTC) Tenant Data Collection and Data Collection Methodology, Docket No. FR-5298-N-01

Dear colleagues,

We are writing in regard to the Notice set out in 74 Fed. Reg. 14149 (Monday, March 30, 2009), seeking comment on anticipated regulations to implement Section 2835(d) of H.R. 3221, the Housing and Economic Recovery Act of 2008, which requires collection by state housing finance agencies (HFAs), of civil rights related occupancy data for each LIHTC development in the U.S., and public availability of such data on an ongoing basis.

The LIHTC data collection requirements in HR 3221 are long overdue, and will help the Treasury Department and state HFAs to implement their duty to affirmatively further fair housing under the Fair Housing Act, 42 U.S.C §3608. Such data will permit officials to understand the civil rights impact of the program and to assess whether the siting and occupancy practices of tax credit developments have contributed to or ameliorated patterns of metropolitan segregation. In this light, it is crucial that the data be collected as quickly and as comprehensively as possible, and that it be collected and made available to the public at the project level, so an assessment can be made of the degree of racial/ethnic segregation between projects and project locations — to better guide future affirmative marketing, education, and enforcement efforts. In support of the very clear mandates of the statute itself, we recommend the following steps, which are also consistent with the duty to affirmatively further fair housing:

• HUD should require occupancy data for Section 8 voucher holders (including the number of voucher holders residing at each development) to be separately collected and broken out in timely annual reports. The clear intention of Congress in including this requirement was to assess the degree of compliance with 26 U.S.C. § 42(h)(6)(B)(iv) (requirement of non-discrimination against Section 8 voucher holders), and HUD should not permit owners or state HFAs to merge reporting of Section 8 recipients with reporting of "other similar assistance." Thus, if several types of tenant based assistance are present in a development, they should be separately reported.

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<sup>&</sup>lt;sup>1</sup> See generally, *Shannon v HUD*, 436 F.2d 809 (3rd Cir. 1970).

- The Act's requirement of reporting on family status of occupants should also include a designation for each development as "family" or "elderly" or "other" development. Using the proposed data collection regarding occupants of LIHTC housing to collect such information will greatly assist in assessing the role of exclusionary land use requirements on LIHTC development. HUD's LIHTC project data base only includes this information for projects placed in service in 2003 and after, making it difficult to accurately map the geographic distribution of LIHTC developments in relation to high quality schools, jobs, recreation, and other geographically-based opportunities relevant to families.
- In regard to the version of the tenant data collection form that HUD circulated for informal comment, the questions the form asks about disability are unnecessarily detailed, and could lead to violations of the Fair Housing Act, which forbids inquiries about the existence, nature, and severity of disability unless directly related to eligibility for housing or eligibility for a particular unit within a housing development. As an alternative, we suggest the approach used by HUD in the HUD-50058 form, used to gather information about family characteristics in the public housing and Section 8 Housing Choice Voucher programs. The 50058 asks if a household member is a "person with disabilities" within the definition used by HUD for admission to assisted housing. It also asks if the family has requested accessibility features in their unit, if the unit offers accessibility features, and whether the unit is partially or fully accessible.
- In order to assess the degree of compliance with affirmative marketing requirements that accompany the affirmative fair housing obligation, and to assess the possible impact of residency preferences and other discriminatory practices, HUD should also require collection of racial/ethnic data on <u>applicants</u> to each LIHTC development. This would involve coordinating the data required under HERA with the data collection currently done by hand for applicants, as required under Title VI and Section 504.
- Collection of racial, ethnic and other demographic data should specifically track developments funded through the tax credit exchange program funded through the American Recovery and Reinvestment Act of 2009 (ARRA), as well as developments funded through the HOME tax credit assistance program under division A, title XII of ARRA.
- To accompany the initial release of this data, HUD should contract with reputable and independent research organizations to analyze the civil rights performance of LIHTC state agencies and project developers/managers. Such an

<sup>&</sup>lt;sup>2</sup> A person with disabilities has one or more of the following: (a) a disability as defined in Section 223 of the Social Security Act, (b) a physical, mental, or emotional impairment which is expected to be of long-continued and indefinite duration, substantially impedes his or her ability to live independently, and is of such a nature that such ability could be improved by more suitable housing conditions, or (c) a developmental disability as defined in Section 102 of the Developmental Disabilities Assistance and Bill of Rights Act. The definition also includes persons who have the acquired immune deficiency syndrome (AIDS) or any condition that arises from the etiologic agent for AIDS.

assessment can identify possible patterns of segregation and exclusion for further investigation by the Office of Fair Housing and Equal Opportunity. Several of the undersigned organizations have begun this research with the limited data available, and have developed considerable insight on this question.<sup>3</sup> We would be happy to meet with the Department to suggest the types of research questions that would assist civil rights monitoring and compliance.

The longstanding failure to collect racial and ethnic data in the LIHTC program has been a legitimate source of criticism of the program.<sup>4</sup> The 2008 statute and these anticipated regulations represent a major step forward in conforming the LIHTC program to fair housing requirements. We urge the Department to make these requirements as robust and transparent as possible, to enhance civil rights compliance in this important federal housing program.

Please let us know if we can be of any further assistance.

Sincerely,

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<sup>&</sup>lt;sup>3</sup> See, e.g., Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program (Poverty & Race Research Action Council and the Lawyers' Committee for Civil Rights Under Law, October 2008) and Jill Khadduri et al, Are States Using the Low Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods? (Poverty & Race Research Action Council and the National Fair Housing Alliance, 2006).

<sup>&</sup>lt;sup>4</sup> See, e.g., Florence Wagman Roisman, "Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws" 52 *Miami Law Review* 101 (1998); Myron Orfield, Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit, 58 *Vanderbilt Law Review* 1747 (2005).