November 25, 2015

Deputy Secretary Sarah Bloom Raskin
U.S. Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, DC 20220

Re: follow up from November 4, 2015 meeting on LIHTC reform

Dear Deputy Secretary Raskin,

Thank you and your colleagues for the opportunity to meet earlier this month to discuss the need for civil rights guidelines and protections in the Low Income Housing Tax Credit (LIHTC) program. LIHTC is the largest affordable housing development program in the country, and it is critical that it be operated in a fair and non-discriminatory manner, and one that expands access to opportunity for occupants of LIHTC units. Doing so is also consistent with the Department's responsibilities under Sec. 3608 (d) of the federal Fair Housing Act to "administer all programs and activities related to housing and urban development in a manner affirmatively to further the purposes of this chapter." The absence of civil rights guidance, oversight and enforcement is a long-standing gap in the administration of the LIHTC program, and we appreciate your interest in taking steps to address this gap. We are writing to provide additional detail on the issues we discussed at the meeting and look forward to discussing these matters further with your staff.

1. Importance of including LIHTC in the new Title VI rule

We consider the inclusion of LIHTC in Treasury's Title VI rule to be a matter of preeminent importance, and refer you to the comment letter we submitted on the proposed rule[1] for further details.

2. Implementing the Treasury Department's obligations under the "affirmatively furthering fair housing" provision of the Fair Housing Act (42 USC §3608) as applied to the LIHTC program

a) QAP Guidance for more balanced siting of LIHTC family developments in opportunity areas:

The Department of Housing & Urban Development has evolved detailed fair housing siting standards for new construction, rehabilitation, and public housing redevelopment.[2] The Department of Treasury can adopt similar requirements, or alternatively issue guidance to state Housing Finance Agencies (HFAs) encouraging greater balance in locations of family LIHTC housing outside of high poverty areas and areas of minority concentration, and specific changes/best practices in existing Qualified Allocation Plans (QAPs) to promote these outcomes. Some key recommendations along these lines, drawn in part from the recent HUD study we

[1] www.prrac.org/pdf/Civil_rights_groups_Title_VI_Treasury_comments_9-10-15.pdf.
[2] For an overview of these requirements and for recommendations on LIHTC practice, see "Opportunity and Location in Federally Subsidized Housing Programs: A New Look at HUD's Site & Neighborhood Standard As Applied to the Low Income Housing Tax Credit" (October 2011), available at www.prrac.org/pdf/OpportunityandLocationOctober2011.pdf.

discussed at the meeting,[3] include requiring as part of each allocating agency's QAP that the agency:

• Assess the distribution of existing LIHTC-funded units generally, and specifically units serving families and people with disabilities, particularly in metropolitan areas, and whether that distribution affirmatively furthers fair housing. In doing so, the QAP should specifically examine whether the existing distribution of LIHTC-funded units, including for families and people with disabilities, is overconcentrated in racially or ethnically concentrated areas of poverty as compared to the distribution of housing stock in the jurisdiction and region more generally, and whether the existing distribution of LIHTC-funded units, including housing for families and people with disabilities, is underconcentrated in areas of high access to opportunity as compared to the overall housing stock. The terms "racially or ethnically concentrated areas of poverty" and "access to opportunity" are key elements of the Affirmatively Furthering Fair Housing rule recently adopted by HUD, 80 Fed. Reg. 42,272. "Access to opportunity" has particular meanings in the context of that rule for the protected classes of families with children and people with disabilities. In addition to the broad metrics of opportunity, program participants are directed to consider, for these two protected classes respectively, "access to high-performing schools" and "access to accessible housing and housing in the most integrated setting appropriate to an individual's needs as required under Federal civil rights law, including disability-related services that an individual needs to live in such housing." Id. at 42,337, 42,354. Any analysis of opportunity in the LIHTC program should similarly both look at broad metrics of opportunity and the specific opportunities available to families and people with disabilities, in a way that incorporates factors of particular importance to those protected classes.

• To the degree that LIHTC units, including units specifically designed for families and people with disabilities, are disproportionately overconcentrated in racially or ethnically concentrated areas of poverty and/or underconcentrated in areas with access to opportunity, the QAP should include a plan, including appropriate changes to the method by which the QAP allocates credits, to remediate such disproportionate funding going forward.

• As discussed further below, this requirement should also be integrated with a requirement that LIHTC funds that continue to go into racially or ethnically concentrated areas of poverty are done so in areas of emerging opportunity (gentrification) or in lower-opportunity areas where there is a bona fide "*concerted community revitalization plan*," consistent with the LIHTC statute. It is critical to understand this requirement as a part of the overall structure of LIHTC implementation, but not as a substitute for also providing access to areas of opportunity, particularly for families and people with disabilities, especially when LIHTC allocation has historically not provided such access.

[3] Effect of QAP Incentives on the Location of LIHTC Properties, by Ingrid Ellen et al (HUD, April 2015) www.huduser.gov/portal//publications/pdf/QAP_incentive_mdrt.pdf

b) Eliminating local approval and contribution provisions in QAPs:

One of the most egregious barriers to greater geographic balance in the LIHTC program is the practice by some states to include local municipal contribution to or approval of a development as either a threshold requirement or part of the point system in the QAP. To the extent this exceeds the requirement of the LIHTC statute,[4] we think it would be appropriate to issue separate guidance strongly discouraging this practice.

c) Affirmative marketing and nondiscriminatory tenant selection:

Affirmative marketing is a 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 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.

Treasury might, for example, incorporate HUD's marketing regulation into its interpretation of the General Public Use rule and develop relevant guidance specific to the LIHTC program.[5] The GPU rule incorporates HUD rules by reference but currently offers little clarity about which rules, in particular, it contemplates.[6] GPU guidance should also explicitly emphasize the Fair Housing Act's protections from practices with discriminatory effects (such as the use of local residency preferences).[7]

d) Guidance on disability discrimination:

Since the 1999 U.S. Supreme Court's *Olmstead vs. L.C.* decision, in which the Supreme Court ruled that the unjustified segregation of people with disabilities in institutional settings constitutes discrimination in violation of Title II of the Americans with Disabilities Act (ADA), states have been increasingly developing permanent supportive housing (PSH). PSH provides decent, safe, affordable, and accessible permanent housing, along with the voluntary, community-based long term care services and supports that people with disabilities need and want, to live successfully in the community. Three federal agencies, including the Department of Housing and Urban Development, the Department of Health and Human Services (and its

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[4] See 26 U.S.C. §42 (m)(1)(A)(ii).

[5] *See* PRRAC, "Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs" (December 2012), *available at* www.prrac.org/pdf/affirmativemarketing.pdf.

[6] "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.

[7] 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/pdf/affirmativemarketing.pdf.

Centers for Medicare and Medicaid Services) and the Department of Justice have adopted comprehensive policies intended to facilitate the development of PSH to meet Olmstead requirements[8]. The LIHTC Program has been a primary driver of affordable housing development during this period of expansive PSH development, and many states have developed PSH using the LIHTC Program.[9]

The target populations for these PSH programs are persons with significant disabilities who are eligible for Medicaid or state funded long term support services. These include people with significant physical, cognitive and/or behavioral health disabilities. Some of these individuals receive nursing, medical, or psychiatric services on regular or frequent intervals in their apartment from mobile community-based service providers selected by the PSH tenant under Medicaid 'choice of provider' requirements. With the combination of affordable housing created through the LIHTC Program and state or federally funded long term support services, these individuals are able to choose to live in the community as envisioned under *Olmstead*.

IRS policies expressed in the 8823 Compliance Guide for state credit agencies and in the more recent version of the Section 42 Audit Guide disqualify housing linked to frequent nursing and psychiatric services as LIHTC units, either as non-residential transient housing or as a violation of the general public use rule. Cautious developers, investors and credit agencies continue to raise questions about the policies. The policies also tend to conflict with private letter rulings in individual cases involving supportive housing with intensive, community-based long term care services. They also conflict with the clarification to the general public use rule made part of Section 42 in the Housing and Economic Recovery Act of 2008. The change made by HERA says, "A project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants (A) with special needs [or] (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." People with significant disabilities needing and wanting PSH meet these standards. The IRS has yet to issue guidance on this clarification to the general public use rule. Issuance of that guidance could address the ambiguities and questions that can impede the development of PSH with LIHTC.

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[8]See: http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf; http://www.ada.gov/olmstead/q&a_olmstead.htm; http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/hcbs-setting-fact-sheet.pdf.

[9]Examples include: Louisiana Housing Corporation's threshold QAP requirements and incentives for development of PSH in the aftermath of Hurricane Katrina which has facilitated the development of PSH in over 1,000 LIHTC financed units; development by the Pennsylvania Housing Finance Agency of an estimated 250 units of integrated PSH using the LIHTC ; financing for more than 2,400 PSH Units through the North Carolina Housing Finance Agency LIHTC Program; in 2004, NCHFA made the PSH set-aside a mandatory requirement for all LIHTC-financed properties. For more information, *see* http://www.tacinc.org/knowledge-resources/publications/issue-briefs/louisiana-permanent-supportive-housing-brief and http://www.tacinc.org/knowledge-resources/publications/reports/creating-new-integrated-permanent-supportive-housing-opportunities-for-eli-households-a-vision-for-the-future-of-the-national-housing-trust-fund.

3. Fair housing-related guidance to enforce provisions of the LIHTC statute

a) Procedures to audit, investigate, and address complaints regarding discrimination against Section 8 Housing Choice Voucher families in LIHTC developments:

The Memorandum of Understanding executed in 2000 by the United States Departments of Treasury, Housing and Urban Development and Justice recognizes that individuals holding Section 8 vouchers experience unlawful barriers to occupancy of Low Income Housing Tax Credit properties, and pledges the cooperation of the agencies to identify and remove those barriers. These barriers continue to exist despite the statutory prohibition on owners' refusal to lease to holder of a Section 8 voucher because of the status of a prospective tenant as a voucher holder, which must be incorporated in the owner's extended low-income housing commitment. 42 U.S.C. Section (h)(6)(B)(iv). We therefore urge the Department to provide additional guidance to owners and state agencies, and otherwise take the following steps to assure compliance with the law:

- The Department should advise states that the form "Owners Certification of Continuing Program Compliance," used by state agencies must require the owner to certify that the owner is in substantive compliance with the statute and the extended use agreement (and not just that an extended use agreement is in place that includes the language required by Section (h)(6)(B)(iv)).

- The Department should clarify that state agencies are responsible for monitoring owners' substantive compliance with the statutory prohibition as part of their normal review and monitoring process (e.g. through site visits, desk audits and file reviews), and for reporting identified noncompliance with provisions of Section 42. These procedures should be included in the monitoring provisions of the state agencies' Qualified Allocation Plans.

- The Department should also require the monitoring provisions of Qualified Allocation Plans to include a process for receiving and further investigating reports of non-compliance from applicants, tenants, and other persons with pertinent information regarding an owner's possible unlawful refusal to lease to prospective tenant(s) because of their status as a voucher holder(s).

- Currently, the Department's Form 8823, *Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition* is silent regarding non-compliance with the substantive requirements of 42 U.S.C. Section (h)(6)(B)(iv). The checkbox for Item 11k says only "Owner failed to execute and record extended-use agreement within time prescribed by section 42(h)(6)(j). The Department should amend Form 8823 to include: "Owner refused to lease to prospective tenant(s) because of their status as a voucher holder" (or similar language).

b) Assisting HUD in state compliance with 2008 Congressional requirement of full demographic data on LIHTC developments:

Civil rights oversight of the LIHTC program is impossible without comprehensive and publicly available demographic data at the project level. Such data was required by Congress in the

Housing and Economic Recovery Act of 2008,[10] but compliance by states and local housing managers has been weak and incomplete. As reflected in the most recent HUD report, "Understanding Whom the LIHTC Program Serves: Tenants in LIHTC Units as of December 31, 2012,"[11] there are still gross gaps across the states in data on racial demographics, Housing Choice Voucher occupancy, and other key reporting areas. We recognize that direct collection of this data is a HUD responsibility but we believe that the Treasury Department also has a responsibility, as administrator of the LIHTC program and given its duty to affirmatively furthering fair housing, to strongly direct state Housing Finance Agencies and owners/managers of LIHTC properties to comply with the law. The Department can also direct those HFAs with weak performance records (as indicated in the HUD report) to take advantage of the technical assistance resources that have been offered by HUD.

c) Guidance on definition of "concerted community revitalization plan" in the Qualified Census Tract (QCT) provision of the tax code:

The April 7, 2015 HUD report, *Effect of QAP Incentives on the Location of LIHTC Properties*,[12] criticizes of the lack of guidance concerning the LIHTC statutory provision that preference be given to developments located in qualified census tracts (QCTs) that contribute to a concerted community revitalization plan. The report notes that the community revitalization provision has been interpreted so flexibly as to be meaningless. The result has been that states often are prioritizing areas of concentration of poverty with little attention paid to plans to improve the neighborhood.

The Department of Treasury has never provided a definition for a community revitalization plan nor any guidance as to what constitutes such a plan, leaving states with broad discretion in determining what would count as such a plan. The HUD report includes a review of the QAPs from twenty states and a similar review was done in 2013 in a report by Jill Khadduri entitled "*Creating Balance in the Locations of LIHTC Developments.*"[13] These reports found that most states either provide no definition of what constitutes a concerted community revitalization plan or provide a very limited definition which has no standards for "community revitalization," demonstrating the need for Treasury to do so.

The Khadduri study makes recommendations for factors that should be considered for such a definition, as follows: an assessment of the current condition of the neighborhood; a description of the plans for overcoming the neighborhood's problems; and a description of the resources that are being devoted or will be devoted to the revitalization effort (other than local government financial support for the LIHTC property itself). Recent QAPs adopted by a few states – Pennsylvania, Ohio, and Illinois – include more robust definitions of concerted community revitalization plans. Some of the issues these definitions address include the geographic scope of the area that is subject to the plan, the amount of non-LIHTC public and private investment provided for in the plan, and the inclusion of strategies for dealing with non-housing barriers to opportunity in areas such as employment, education, and environmental health. Treasury should

[10] 42 U.S.C. § 1437z-8.
[11] HUD Office of Policy Development and Research, December 2014, available at www.huduser.gov/portal/publications/pdf/2012-LIHTC-Tenant-Data-Report-508.pdf.
[12] www.huduser.gov/portal//publications/pdf/QAP_incentive_mdrt.pdf.
[13] www.prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf.

consider this information when developing guidance on the subject of concerted community revitalization plans.

4. Civil rights and fair housing training: In addition to issuing guidance or taking other actions to address the fair housing issues described here, and in order to ensure that such guidance is implemented effectively, we recommend that Treasury provide training to those responsible for ensuring compliance with LIHTC obligations. That would include staff at the IRS, state housing finance agencies or other state agencies that administer the tax credit at the state level, and any outside contractors that states may hire to conduct compliance reviews. Such training would help ensure that responsible staff understand the substance of the fair housing-related guidance or regulatory changes that Treasury implements and what steps they must take to determine compliance.

5. Building housing policy and fair housing capacity at the Department of Treasury: As the agency responsible for administering the nation's largest affordable housing development program, it is critical that Treasury have high level career staff with expertise in both housing policy generally and fair housing policy specifically. In the recent past, Dr. Michael Stegman filled this role as an advisor to the Secretary, and Buzz Roberts brought some of this expertise to the career staff. Both have now left the Department, and the result is an alarming gap in critical expertise. In order to ensure that the Department can move forward successfully as the administrator of a major federal housing program, we urge you to bring in some high level career staff who have this kind of knowledge and background.

Thank you for the opportunity to continue this discussion. We will be in touch with your staff to discuss next steps.

Sincerely,

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