

7-1-1998

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Florence Wagman Roisman

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Recommended Citation

Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. Miami L. Rev. 1011 (1998)

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Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws

FLORENCE WAGMAN ROISMAN*

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I. INTRODUCTION

The Low Income Housing Tax Credit ("LIHTC") program is "cur-

* Associate Professor of Law, Indiana University School of Law-Indianapolis. Much of the groundwork for this article was laid by Jarrett Tomás Barrios and Laura Lazarus, when they were students at the Georgetown University Law Center. I thank them and also: Robert Schwemm and James Kushner, whose work has been the foundation for those of us who work on housing discrimination issues; Richard Gervase, for insisting that I write about the Low Income Housing Tax Credit; Michelle Adams, Michael M. Daniel, Richard Gervase, Joseph Guggenheim, Tracy Kaye, James Kushner, Laura Lazarus, Janet Ellen Stearns, and the wisest of all housing gurus, Arnold C. Sternberg, for very helpful criticism of drafts of this article; Lorena Bray, Victoria Deak, Dilip Petigara, and Regina DeAngelis for able research assistance; Maureen F. McGovern, Melody Morris, and Loretta Moses, for invaluable assistance in producing the article; and Enza Klotzbucher and others on the staff of the Widener University School of Law Library, including Patrick Charles, now Reference Librarian at Creighton University School of Law, for extraordinary reference and research assistance. Research for this article began with a 1996 Summer Research Grant from the Widener University School of Law, for which I am grateful. This article was written almost entirely at the Indiana University School of Law at Indianapolis. I thank my colleagues and students there for a supportive and stimulating environment. The paper was presented at the February, 1998, Fair Housing conference sponsored by the *University of Miami Law Review*. I benefitted from the conference participants' contributions and appreciate all the hard work of the *University of Miami Law Review* Editorial Board.

rently the largest federal program to fund the development and rehabilitation of housing for low-income households."¹ From the initiation of the program in 1987 through 1994, almost 500,000 units were placed in service.² With the withdrawal of federal support for most other subsidized housing development programs, the LIHTC program stands as essentially "the only game in town."³ This most substantial federal subsidized housing program is administered by the Department of the Treasury ("the Treasury") through state and local housing credit agencies and operates at a great cost to federal taxpayers.⁴

Despite massive governmental involvement, the LIHTC program operates without effective regard to civil rights laws, due primarily to the fact that the Treasury and state and local agencies have failed to impose meaningful bars to discrimination. The Treasury and state and local agencies administering the LIHTC lack information regarding the extent of discrimination or segregation in the program. What little information is available suggests that tax credit developments are racially segregated, and that developments serving minorities may be unequal to those serving whites. Moreover, the Treasury fails to even refer to the need to prevent segregation. The federal housing programs which began in the 1930's have effectively imposed and enhanced racial segregation,⁵

1. See GENERAL ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM Sec. 2 (March 1997) [hereinafter GAO REPORT]; see also ABT ASSOC. INC., DEVELOPMENT AND ANALYSIS OF THE NATIONAL LOW-INCOME HOUSING TAX CREDIT DATABASE: FINAL REPORT 1-2 (July 1, 1996) [hereinafter ABT REPORT]: ("The LIHTC has become the principal mechanism for supporting the production of new and rehabilitated rental housing for low-income households.")

2. See ABT REPORT, *supra* note 1, at 1-3 and 1-4, Exhibit 1-1 (estimating that in the six initial years of the program, 1987-1992, approximately 314,625 low-income units were placed in service and an additional 118,000 units were provided from 1992-1994). Compare GAO REPORT, *supra* note 1, at 32 (estimating that 172,151 units were placed in service from 1992 to 1994) with E & Y KENNETH LEVENTHAL REAL ESTATE GROUP, NATIONAL COUNCIL OF STATE HOUSING AGENCIES, THE LOW-INCOME HOUSING TAX CREDIT: FIRST DECADE, 42 (1997) [hereinafter NCSHA REPORT] (stating that almost 900,000 units have been "created" or rehabilitated, which may not necessarily mean that they have been placed in service). It is not clear whether the GAO estimate of 172,151 is for precisely the same period as that for which Abt estimates 118,000.

3. See 24 C.F.R. § 81 (1998) (explaining that the LIHTC program is "the only major Federal assistance program . . . that is currently active" for funding new or rehabilitated subsidized housing units); NCSHA REPORT, *supra* note 2, at 54 (HUD "continuously and steadily disappear[s] from its mission of producing new affordable multifamily housing . . . [T]he housing credit . . . has become the dominant source, indeed almost the exclusive source" of capital for financing affordable housing).

4. See GAO REPORT, *supra* note 1, at 2 ("If all the credits authorized over a 10-year period were awarded by the states to completed housing projects and used by investors, the annual cost would be over \$3 billion").

5. See CHARLES ABRAMS, FORBIDDEN NEIGHBORS 227-43 (1955); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203-30 (1985); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 51-54 (1993); Florence Wagman Roisman, *The Lessons of American Apartheid*:

causing "lasting damage."⁶ The LIHTC program seems now to be repeating those past errors.

Although all federal agencies have been under a statutory mandate since 1968 "affirmatively to further" non-discrimination and desegregation,⁷ "as new housing programs have evolved, successive administrations . . . have repeatedly missed opportunities to combat discrimination."⁸ Perhaps the most blatant of the federal shortcomings is the failure of the nation's largest subsidized housing program to secure information about its compliance with civil rights laws and to act effectively to prevent discrimination and segregation.

This article considers the civil rights obligations of the Treasury Department and recommends actions necessary to satisfy them. Part II describes the LIHTC program. Part III reviews the various civil rights laws relating to the program and considers what obligations the federal Fair Housing Act imposes on the Treasury in particular. Part IV suggests amendments to the Treasury's LIHTC regulations in order to implement the Treasury's civil rights obligations.

II. THE LOW INCOME HOUSING TAX CREDIT PROGRAM

The 1986 Tax Reform Act created the LIHTC program.⁹ Congress

The Necessity and Means of Promoting Residential Racial Integration, 81 IOWA L. REV. 479, 489-92 (1995) (addressing the federal government's role in creating and maintaining residential racial segregation); Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 434-47 (1996) (depicting the history of segregation in federal programs); Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351, 1356-60 (1995).

6. See JACKSON, *supra* note 5, at 217; Arnold R. Hirsch, *With or Without Jim Crow: Black Residential Segregation in the United States*, in URBAN POLICY IN TWENTIETH-CENTURY AMERICA 65-66, 91-92 (Arnold R. Hirsch & Raymond A. Mohl eds., 1993) ("Competing, prior, and contradictory government policies have already accelerated the separation of the races and frozen the pattern in concrete."); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 18 (1995) ("lasting impact" of FHA discrimination). For a discussion of the harm resulting from discrimination and segregation, see JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* (1995); MASSEY & DENTON, *supra* note 5, at 148-85; Roisman, *Lessons of AMERICAN APARTHEID*, *supra* note 5, at 506-12 (discussing the costs and benefits of integration); Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. (1997) (discussing the costs of segregation to suburbs); Scott A. Bolens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 STAN. L. & POL'Y REV. 11, 15 (1997) (discussing the importance of desegregation).

7. See 42 U.S.C. § 3608(d), (e)(5) (1998); see *infra* notes 77-120 and accompanying text.

8. Roberta Achtenberg, Keynote Address, *Shaping American Communities: Segregation, Housing & The Urban Poor*, 143 U. PA. L. REV. 1191, 1193 (1995).

9. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189-208.

modified the program several times, most recently in the Omnibus Budget Reconciliation Act of 1993.¹⁰

The LIHTC program allows owners of residential rental property to claim tax credits, usually for ten years, for 30% to 70% of the present value of new and substantially rehabilitated housing developments.¹¹ In general, a project qualifies for the credit only if, for a period of 15 years, the property owner rents at least 20% of the units to households with incomes at or below 50% of the area median gross income ("AMGI"), or the property owner rents at least 40% of the units to households with incomes at or below 60% of AMGI.¹²

The LIHTC program requires substantial state or local government action. The credit must be "allocated pursuant to a qualified allocation plan ["QAP"] of the housing credit agency which [QAP] is approved by the governmental unit . . . of which such agency is a part."¹³ In addition, the "chief executive officer . . . of the local jurisdiction within which the building is located" must have been offered "a reasonable opportunity to comment on the project."¹⁴

The "primary source of equity financing for tax credit projects" is private investors, who usually are recruited by syndicators.¹⁵ The investors' incentive is the expectation that for ten years they will "receive tax credits and other tax benefits, such as business loss deductions, that they

10. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1002(l), 102 Stat. 3373-382; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7108, 103 Stat. 2306-322; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 1170, 104 Stat. 1388-505, 507; Tax Extension Act of 1991, Pub. L. No. 102-227, § 107, 105 Stat. 1687; Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13142, 107 Stat. 437-40 (codified as amended at 26 U.S.C. § 42 (1994)). The legislative history of the original act is described in Janet Stearns, *The Low Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203, 208-10 (1988). For a thoughtful discussion of the purpose, structure, and history of the program, see Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low Income Housing Credit*, 38 VILL. L. REV. 871, 877-84 (1993).

11. See 26 U.S.C. § 42(b) (1994); GAO REPORT, *supra* note 1, at 26. The applicable credit percentage depends upon the type of LIHTC development: acquisition of existing projects, rehabilitation, or new construction. See 26 U.S.C. § 42(b).

12. See 26 U.S.C. § 42(g)(1)-(g)(8) (1994). See also GAO REPORT, *supra* note 1, at 25. The incomes are to be adjusted for family size. *Id.* The number of these so-called "low-income units" is important because the amount of the tax credit depends in part upon the number of "low-income units" in the building as a percentage of the total number of units, or the floor space of "low-income units" as a percentage of the total floor space in the building. See Difficult Development Areas, 60 Fed. Reg. 48,340 (1995).

Although the program is supposed to encourage mixed income housing, the program "unduly encourages projects where 100% of the units are tax credit-eligible." JOSEPH GUGGENHEIM, *TAX CREDITS FOR LOW INCOME HOUSING: OPPORTUNITIES FOR DEVELOPERS, NON-PROFITS, AND COMMUNITIES UNDER PERMANENT TAX ACT PROVISIONS* at 137 (9th ed. 1996).

13. 26 U.S.C. § 42(m)(1)(A)(i) (1994).

14. 26 U.S.C. § 42(m)(1)(A)(ii) (1994).

15. GAO REPORT, *supra* note 1, at 27.

can use to offset the taxes they owe on other income.”¹⁶

LIHTC developments must be subject to a fifteen-year extended low-income use agreement.¹⁷ If property on which a low-income housing credit is claimed ceases to qualify as low-income rental housing or is disposed of before the end of the fifteen-year credit compliance period, a portion of the credit may be recaptured.¹⁸

LIHTC units are rent-restricted. If the credit is to be maintained, gross rent, including an allowance for utilities, cannot exceed 30% of the tenant's imputed income limitation (i.e., 50% or 60% of AMGI).¹⁹ The rent may in fact be more than 30% of the tenant's actual income.

The tax credit statute mandates that preference be given to “projects serving the lowest income tenants . . . for the longest periods of time.”²⁰ The LIHTC program has been justified and described as serving very poor people.²¹ In fact, however, the preference is not honored²² and the

16. *Id.* at 27-28. For a discussion of the LIHTC's attraction for equity investors, see the NCSHA REPORT, *supra* note 2, at 9-10.

17. 26 U.S.C. § 42 (h)(6)(A) and (D) (1994).

18. 26 U.S.C. §§ 42 (h)(6)(B), (D)(ii)(II), 42 (i)(1) (1994). The NCSHA REPORT asserts that many states have required longer “lock-in” periods and that the average requirement may now be forty-two years. See NCSHA REPORT, *supra* note 2, at 61. See also Guggenheim, *supra* note 12, at 27 (extended low-income use agreements).

19. 26 U.S.C. § 42(g)(2) (1994); GAO REPORT, *supra* note 1, at 25. For an illustration of this rent computation, see NCSHA REPORT, *supra* note 2, at 5.

20. 26 U.S.C. § 42(m)(1)(B)(ii) (1994).

21. See, e.g., STAFF OF THE JOINT COMM. ON TAXATION, 100TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 at 152 (Comm. Print 1987) [hereinafter GENERAL EXPLANATION] (asserting that past tax preferences “failed to guarantee that affordable housing would be provided to the most needy low-income individuals”); Earl C. Brewer, Jr. & Thomas L. Kirkpatrick, *The Low-Income Rental Housing Credit: The Last of the Investment Tax Credits*, 16 J. REAL ESTATE TAX’N 233, 245 (1989) (the program is to provide “housing for the needy and homeless”).

22. As the GAO Report indicates, state agencies use a variety of definitions and ranking techniques and exercise considerable discretion in selecting among applicants, so that the projects that are funded are not necessarily those that serve the lowest-income people for the longest periods of time.

Definitions of “low-income” vary. For example, GAO reports that “North Carolina targeted its allocation to renters with incomes between 51% and 60% of their area's median income. North Carolina's consolidated plan specified that renters with incomes between 0% and 50% of their area's median income would not be served through the tax credit program.” GAO REPORT, *supra* note 1, at 61. Texas targeted its tax credits at households with incomes between 31% and 50% of AMI. *Id.* Many allocation plans treated this and other preferences as selection criteria that could be outweighed by other factors. *Id.* at 63.

Very low income residents, those with incomes below 30% of median, also are discouraged by “up-front fees” and minimum income requirements. A survey in Washington State revealed that tax credit developments imposed minimum income requirements and charged fees as high as \$400, not necessarily refundable, as damage deposits, application fees, credit check fees, and first or last month's rent. SEATTLE DISPLACEMENT COALITION, THE WASHINGTON STATE LOW INCOME HOUSING TAX CREDIT PROGRAM: DOES THE PROGRAM TRULY SERVE THE NEEDS OF LOW INCOME PEOPLE AND PEOPLE OF COLOR? at 2-3 (1996) [hereinafter WASH. REPORT]. To enforce the statutory preference for lowest income tenants, the Treasury should define “lowest income” as

tax credit subsidy alone reduces rents only to a moderate level. Unless households have additional subsidies, they can afford tax credit units only if their incomes exceed 30% of area median income.²³

In addition to the tax credit itself, most tax credit projects also involve other subsidies.²⁴ Some LIHTC residents have a particular form of subsidy, Section 8 certificates or vouchers, with which tenants pay 30% of their household income and the Department of Housing and Urban Development ("HUD") pays the difference between the tenant contribution and a fair market rent or payment standard.²⁵

GAO reported that the households which "received rental assistance generally had much lower incomes than those who did not" and

zero income, and should require that QAPs establish the preferences as threshold requirements and assure that political decisions do not allow deviations from the standards. See GAO REPORT, *supra* note 1, at 63.

23. See Kathryn P. Nelson, *Whose Shortage of Affordable Housing?*, 5 HOUSING POL'Y DEBATE 401, 402 (1994) ("Unless they have additional subsidies, LIHTC occupants must have incomes between 40 and 60 % of the median to avoid severe rent burdens, and research shows that families who occupy such units do have incomes in that range."). The NCSHA Report criticizes the Nelson point but misrepresents it as characterizing LIHTC resident income as 50-60% of AMI. See NCSHA REPORT, *supra* note 2, at 9 & n.1. In fact, the NCSHA Report's sample agrees with Nelson, showing that tenants without rental subsidies (69% of the sample) averaged 45% of median income. *Id.* at 7, 67. See also GUGGENHEIM, *supra* note 12, at 37 (Most projects without additional aid serve moderate, not low, income persons). GAO estimated that LIHTC households without rental assistance had average incomes of \$16,700, about 32% of national median income. See GAO REPORT, *supra* note 1, at 6-7. (The national median income in 1996 was \$51,518 for a family of four. U.S. Census Bureau, <<http://www.census.gov/hhes/income/4person.html>>). These estimates are based on information provided to GAO by project managers of tax credit projects. See GAO REPORT, *supra* note 1, at 38. GAO also estimated that, for the units placed in service from 1992 through 1994, about 75% of the resident households had incomes at or below 50% of area median income. *Id.* at 6. The NCSHA Report's sample households had incomes averaging 38% of median income. See NCSHA REPORT, *supra* note 2, at 7, 67. That survey was of more than 110 properties comprising more than 10,000 units placed in service from 1992 to 1994. *Id.* at 67.

24. See GAO REPORT, *supra* note 1, at 40, 6 & 13 (estimating that 71% of the households in units placed in service between 1992 and 1994 benefit from some additional subsidy, "such as rental assistance, other government loans, loan subsidies or grants"); Nelson, *supra* note 23, at 411 ("More than three-fifths of LIHTC projects received an additional federal, state, or local subsidy.") Federal subsidies include the rural programs and HUD's HOME, CDBG, and HOPE (Housing Opportunities Made Equal, Community Development Block Grant, and Housing Opportunities for People Everywhere) programs. See GUGGENHEIM, *supra* note 12, at 109-12. State or local subsidies to LIHTC developments include taxable bond financing, bridge financing, subordinate financing, mortgage interest subsidies, operating subsidies, rental subsidies, equity financing, real estate tax abatements, and state low-income housing tax credits. See Frank A. Racaniello, *Extending the Low-Income Housing Tax Credit: An Empirical Analysis*, 22 RUTGERS L. J. 753, 760 (1991); Jarrett Tomás Barrios, *Government Fair Housing Obligations Administering the Low-Income Housing Tax Credit* 13-14 (May 15, 1994) (unpublished Georgetown University Law Center seminar paper on file with author); NCSHA REPORT, *supra* note 2, at 25. Note, however, that a project earns a higher credit (70% of present value) if it is financed without a federal subsidy, and only 30% of present value if it has a federal subsidy such as a HUD loan or tax exempt bond financing. 26 U.S.C. § 42 (h)(4) (1994).

25. 42 U.S.C. §§ 1437(f), (o) (1994).

that “without this rental assistance, these households might not have been able to have afforded to live in their units.”²⁶ GAO estimated that households with rental assistance had annual incomes averaging \$7,860.²⁷ The NCSHA study reports that 31% of tax credit residents have Section 8 existing housing vouchers and that these residents have average incomes of about \$9,250 and average 23% of median income.²⁸ The NCSHA Report declares that Section 8 recipients in tax credit units “are more likely [than other Section 8 recipients] to be working families.”²⁹

As originally enacted, the LIHTC statute allowed the housing credit agencies vast discretion in the administration of the credit,³⁰ but Congress later amended the statute to set certain priorities for its use. In 1989, Congress added the mandate that the state or local allocating agency must develop a QAP.³¹ With respect to each QAP, Congress set four requirements: (1) each QAP must identify selection criteria, “appropriate to local conditions,” by which to choose among projects;³² (2) each QAP’s selection criteria must include some that have been specified by Congress;³³ (3) each QAP must give preference to projects serving the lowest income tenants for the longest periods of time;³⁴ and

26. GAO REPORT, *supra* note 1, at 37.

27. *Id.* at 6-7.

28. NCSHA REPORT, *supra* note 2, at 67. It seems that “vouchers” is meant to include Section 8 certificates. However, it is not clear why the \$9,250 figure is so much higher than GAO’s estimate of \$7,860 for tax credit residents with rental assistance.

29. *Id.* at 67. “According to HUD, the income of a typical Section 8 recipient nationwide is 18% of median (or about \$7,250 annually for a family of four), an income . . . below that of a full time wage-earner.” *Id.* Both the \$9,250 and \$7,250 figures are higher than the incomes of those who rely on Temporary Assistance to Needy Families. The higher incomes of the Section 8/LIHTC residents suggest that these may be full-time workers or aged couples. See TRACY L. KAUFMAN, NATIONAL LOW INCOME HOUSING COALITION, OUT-OF-REACH: RENTAL HOUSING AT WHAT COST? 77 (1997) (finding median SSI income for an aged couple living independently is \$705 monthly; for an aged individual, \$470 monthly; median 1997 TANF grant for a three-person household is \$377 monthly). Finally, according to the NCSHA Report, “Housing Credit apartments are occupied, in the main, by working families.” NCSHA REPORT, *supra* note 2, at 71. (The NCSHA Report nonetheless found 124 Single Room Occupancy projects containing 8639 units, which presumably were occupied by very low income people. *Id.* at 50).

30. Thomas R. Wechter & Daniel L. Kraus, *The Internal Revenue Code’s Housing Program*, § 42, 44 TAX LAW. 375, 385 (1991) (“As originally enacted, the low-income housing tax credit provisions provided no guidance to the housing credit agencies with respect to the administration of the credit.”).

31. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2319 (1989) (codified at 26 U.S.C. § 42(o)(1)(B) (1994)).

32. 26 U.S.C. § 42(m)(1)(B)(i) (1994).

33. 26 U.S.C. § 42(m)(1)(c) (1994). These selection criteria are: “project location,” “housing needs characteristics,” “project characteristics,” “sponsor characteristics,” “participation of local tax-exempt organizations,” “tenant populations with special housing needs,” and “public housing waiting lists.” *Id.*

34. 26 U.S.C. § 42(m)(1)(B)(ii) (1994); see *supra* note 22.

(4) each QAP must specify a procedure for monitoring compliance with these provisions and for notifying the Internal Revenue Service ("IRS") of noncompliance.³⁵ As commentators have recognized, Congress' 1989 amendment of the statute meant that, "to some extent, Congress has substituted its judgment for that of the state housing credit agencies in enumerating the selection criteria and priorities to be taken into consideration in allocating the credit."³⁶ However, as GAO has noted, while "the Code specifically directs the agencies to include seven 'selection criteria' in their allocation plans[,] the Code does not define these criteria or provide any guidance for their use."³⁷ For example, the Code requires that each QAP's selection criteria include "project location" and "tenant populations with special housing needs,"³⁸ but does not tell an allocating agency what to do about these subjects. Moreover, the Treasury's regulations provide no further guidance on these standards. Also in 1989, Congress amended the statute to encourage developers to locate projects in certain areas³⁹ by providing a 30% increase in eligible basis for "any building located in a qualified census tract or difficult development area"⁴⁰

In addition to requiring a monitoring procedure, Congress imposed reporting requirements on both the agencies and the developers. Each housing credit agency is required to submit to the Secretary of the Treasury an annual report specifying the amount of housing credit allocated, identifying the recipient buildings and developers, and providing "such

35. 26 U.S.C. § 42(m)(1)(B)(iii) (1994).

36. Wechter & Kraus, *supra* note 30, at 385-86.

37. GAO REPORT, *supra* note 1, at 55.

38. 26 U.S.C. § 42(m)(1)(c) (1994).

39. See Wechter & Kraus, *supra* note 30, at 392.

40. See also 26 U.S.C. § 42(d)(5)(C)(i)(I) (1994). "Since the LIHTC is a function of basis, virtually all the important issues devolve into questions of 'eligible basis.'" Edwin B. Schuck, *The Low-Income Housing Tax Credit for New Construction: Eligible Basis and Planning Possibilities*, 48 TAX LAW. 321, 322 (1995). For an outline of the method of calculating the credit, see NCSHA REPORT, *supra* note 2, at 6.

A "qualified census tract" ("QCT") is one designated by the Secretary of Housing and Urban Development ("HUD") in which 50% or more of the households have incomes less than 60% of AMGI. See 26 U.S.C. § 42(d)(5)(c)(ii)(I) (1994); 60 Fed. Reg. 21,246 (1995). HUD has reported that "Qualified Census Tracts will not be redesignated until year 2000 census data become available." 60 Fed. Reg. at 21,246. Difficult development areas ("DDAs") are those designated by HUD as areas with high construction, land, and utility costs relative to area median gross income. 26 U.S.C. § 42(d)(5)(c)(iii) (1994). As with Qualified Census Tracts, "all designated Difficult Development Areas in MSAs/PMSAs may not contain more than 20% of the aggregate population of all MSAs/PMSAs, and all designated areas not in metropolitan areas may not contain more than 20% of the aggregate population of all non-metropolitan counties." HUD, Statutorily Mandated Designation of Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986, Part IV, 60 Fed. Reg. 48,340, 48,341 (1995); 26 U.S.C. § 42(d)(5)(C)(iii)(II) (1994).

other information as the Secretary may require.”⁴¹ Furthermore, after the close of each building’s first taxable year, each developer must submit to the Secretary a certification setting forth certain specified information and “such other information as the Secretary may require.”⁴² Congress also authorized the Secretary to require developers to submit annual reports containing “such information as the Secretary may require.”⁴³ Yet, despite the provisions for agency reports to the Treasury, the Treasury lacks data showing the total numbers of LIHTC units completed, project location, or occupant characteristics, other than income and family size.⁴⁴

For the GAO study, tax credit project managers were asked to provide information about the residents. On the basis of this information, GAO estimated that:

- most of the households served were small: 67% included one or two people; the average household had 2.2 persons;⁴⁵
- 82% of the LIHTC units had two or fewer bedrooms;⁴⁶
- 26% of the units were intended primarily to serve the elderly, and about 5% were for persons “with special needs,” including people with disabilities and previously homeless people;⁴⁷
- 64% of the households were headed by women; and
- 53% of the heads of households were white, 33% black, 11% Hispanic, and 3.5 “of other races.”⁴⁸

ABT, GAO and NCSHA have issued estimates with respect to project location. These reports suggest that more than half of the tax credit units are in central cities and that these are more often rehabilitated than newly constructed. Furthermore, these units are reported to be in census tracts that are identifiably “minority” and also are areas of concentrated poverty. Even in the suburbs, almost half of the tax credit units are located in high-poverty areas, and 20% of the units are in census tracts with more than 50% minority population.⁴⁹ This suggests that our major

41. 26 U.S.C. § 42(l)(3)(c) (1994).

42. 26 U.S.C. § 42(l)(1)(E) (1994).

43. 26 U.S.C. § 42(l)(2)(c) (1994).

44. ABT and GAO note the “lack of centralized data [] on the tax credit program. . . .” GAO REPORT, *supra* note 1, at 31. ABT reports that “information on the number of units actually developed is difficult to assemble. Given the decentralized nature of the program, there is no single federal source of information on tax credit production.” ABT Report, *supra* note 1, at 1-2. While “states are required to report on tax credit projects to the IRS, . . . these data are not available for analysis due to the confidentiality of tax-related submissions.” *Id.* at n.6. See also GAO REPORT, *supra* note 1, at 32.

45. GAO REPORT, *supra* note 1, at 42.

46. *Id.* at 45.

47. *Id.* at 43.

48. *Id.* at 43.

49. ABT REPORT, *supra* note 1, at 4-16.

contemporary housing subsidy program is producing separate and unequal housing.

The estimates with respect to location show that more than half—54%—of the LIHTC units are in central cities, with “LIHTC units more likely than other types of rental housing to be located in central cities,”⁵⁰ while 26% of the tax credit units are in the suburbs.⁵¹ The remaining units—almost 20%—are in rural areas.⁵²

Most of the central city LIHTC units—73.9%—are in census tracts with more than 50% low-income households; and 48% of the units are in tracts with more than 50% minority population.⁵³ Thirty-four percent of all tax credit units are in areas with more than 50% minority population.⁵⁴ ABT estimated that about 37% of the units placed in service between 1992 and 1994 are located in DDAs and QCTs.⁵⁵ NCSHA reports that 39% of all properties involved rehabilitation.⁵⁶ Thus, it

50. *Id.* at 4-7 (estimating that 54% of tax credit units are in central cities.). *Cf.* Connie H. Casey, *Characteristics of HUD-Assisted Renters and Their Units in 1989* at 14 (HUD OPDR March 1992) (estimating that 55% of Federal Housing Administration (“FHA”) -assisted units are in central cities). The ABT findings are consistent with GAO’s estimate for the units placed in service from 1992 through 1994: based on reports from tax credit project managers, GAO estimated that 48% of the units were in “urban areas.” GAO REPORT, *supra* note 1, at 44. The NCSHA Report states that 54% of all LIHTC projects are in central cities. NCSHA REPORT, *supra* note 2, at 39. That would mean that more than 54% of the LIHTC units are in central cities. *Id.* at 16. The report apparently treats “urban areas” and “central cities” as identical. The picture accords with what knowledgeable observers had predicted. *See, e.g.,* Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 403 (1994) (“much of this [LIHTC] housing [is] certain to be in distressed inner-city areas.”).

51. *See* ABT REPORT, *supra* note 1, at 4-7 (estimating for 1992-1994); *see also* NCSHA REPORT, *supra* note 2, at 16 (finding that 26% of tax credit units are in the suburbs). By comparison, 33% of FHA-assisted units are in the suburbs. *See* Casey, *supra* note 50, at 14.

52. ABT REPORT, *supra* note 1, at 4-7 (estimating that for 1992-1994, 19.5% of tax credit units were in non-metropolitan areas). GAO reports that “almost one-third of the tax credit properties placed in service between 1992 and 1994 were financed by RHS [Rural Housing Service] mortgages.” GAO REPORT, *supra* note 1, at 41. Since this estimate is expressed in terms of “properties,” not units, the generally smaller size of RHS developments would explain why 1/3 of the properties, but only 1/5 of the units, are in non-metropolitan areas. The NCSHA Report states that 20% of the units, but 30% of the projects, are in rural areas, “indicating that rural projects tend to have smaller unit counts.” NCSHA REPORT, *supra* note 2, at 16. The percentage of tax credit units in non-metropolitan areas is higher than the percentage of FHA units in non-metropolitan areas: compare 19.5% for the tax credit units with 13% for the FHA units. Casey, *supra* note 50, at 14.

53. ABT REPORT, *supra* note 1, at 4-16.

54. *Id.* at 4-15 to 4-17. Only 18% of all U.S. tracts have this characteristic. *Id.* Twenty-two percent of the LIHTC central city units are in census tracts with more than 20% female-headed households, although only 5% of all U.S. census tracts have this characteristic. *Id.*

55. *Id.* at 4-10.

56. NCSHA REPORT, *supra* note 2, at 42. Wholly apart from civil rights concerns, the great extent of rehabilitation raises questions about the cost-effectiveness of the LIHTC program, as one of the justifications for the program is that it “build[s] new affordable housing and add[s] to the overall supply.” *Id.* at 63, 64 & 66.

appears that at least one-third of the tax credit allocations rehabilitate inner-city housing for minorities in minority, high-poverty neighborhoods.⁵⁷

Indeed, the NCSHA report indicates that the tax credits in inner cities may be being used to bail out projects subsidized under other programs: a number of states have used the housing credit to transfer project-based Section 8 properties to non-profit owners; others use the credits in workouts of troubled properties.⁵⁸ The NCSHA Report also predicts that the LIHTC will be used to "write down the debt" of existing subsidized projects, notably "properties whose operating costs are higher than local market rents, or rural elderly high-rise properties."⁵⁹ Finally, the NCSHA report also predicts that the tax credit will be used for privatization of HOPE VI projects.⁶⁰

Even in the non-central city but metro areas—i.e., the suburbs—48% of the LIHTC units were in tracts with over 50% low-income households,⁶¹ while only "about 29% of all U.S. Census tracts contained over 50% low-income households in 1990."⁶² In comparison to the central city units, the "metro"—suburban—units are in census tracts that have fewer poor households, fewer minorities, fewer female-headed households, and more homeowners.⁶³ Nonetheless, 20% of the suburban tax credit units are located in neighborhoods with more than 50% minority population.⁶⁴

It is likely that many of the tax credit developments are providing segregated housing, i.e., housing that is racially or ethnically identifiable. Since one-third of all LIHTC units, and 48% of those in central cities, are in tracts with more than 50% minority population,⁶⁵ the existing method of site selection does not seem to be promoting racial integration, unless the LIHTC residents in the minority tracts are not

57. "The Housing Credit is routinely used for new construction of suburban or rural apartments" and other uses. NCSHA REPORT, *supra* note 2, at 59.

58. *Id.* at 54-55. The credit has "been used as a workout device for HUD properties, usually in conjunction with a transfer of troubled or aging HUD properties to new ownership." *Id.* at 55.

59. *Id.* at 55. The reference is to Section 8 project-based developments. NCSHA reports that this use is "speculative, but there can be no doubt that communities will consider using the housing credit to protect their investment in good properties." *Id.* The NCSHA Report also refers to the use of tax credits for "preservation of potential economic conversions." *Id.* at 54-55. Without offering authority, the Report describes the credit as "a resource magnet in urban revitalization, attracting . . . HOME, CDBG and HOPE VI funding as part of a community reinvestment strategy." *Id.* at 42.

60. *Id.* at 55-56.

61. ABT REPORT, *supra* note 1, at 4-16.

62. *Id.* at 4-15.

63. *Id.* at 4-16.

64. *Id.*

65. *Id.* at 4-15 to 4-16.

minorities and the LIHTC residents in the predominantly white suburbs are people of color.⁶⁶ However, an experienced observer of the LIHTC program, Joseph Guggenheim, suggests that "left to their own devices, most projects tend to be occupied by one ethnic or racial group."⁶⁷ He adds that "in order to comply with the spirit of the fair housing law, owners need to take affirmative steps to market available units to all ethnic and racial groups in the area."⁶⁸ As indicated below, not only the spirit but also the language of the Fair Housing Act imposes that requirement.

III. THE CIVIL RIGHTS LAWS AND THE LIHTC PROGRAM

Although the LIHTC program is subject to federal, state and local constitutional, statutory, and regulatory civil rights requirements, and affects state and local agencies and private developers, this article focuses only on the obligations imposed by federal law on the Treasury Department. Further, the article addresses discrimination and segregation solely on the basis of race, color, or national origin, rather than discrimination and segregation on other bases.⁶⁹

66. The LIHTC market may be segmented on another dimension, with profit-oriented developers outside the cities (in predominantly white areas) and non-profit developers in the cities (in predominantly minority areas). This was presented as fact in a discussion of corporate motivation for investing in tax credit funds and projects. Peter Lampert, Senior Tax Counsel for the Federal Home Loan Mortgage Corporation, observed that "[i]f the corporation desires to maximize return, it will likely invest in for-profit syndicators with affordable housing projects located in the suburbs. Alternatively, if it desires to assist in targeting affordable housing where the need is greatest, it will invest with nonprofit syndicators in blighted inner-city areas." Peter M. Lampert, *Corporate Investment in the Low-Income Housing Tax Credit*, 79 J. TAX'N 344, 344 (1993). Lampert further explains that "most of the projects of the nonprofits . . . are developed in neighborhoods where social problems may depress market values." *Id.* at 347.

67. GUGGENHEIM, *supra* note 12, at 137. Economic integration may be served, since 48% of all LIHTC units, and 73.9% of LIHTC central city units, are in low-income neighborhoods. This would be true only if the residents of these LIHTC developments are not those who also have Section 8 certificates or vouchers. See *supra* notes 23-28 and accompanying text.

68. *Id.*

69. The term "race" is used despite the difficulties of defining the term. See, e.g., RACE AND OTHER MISADVENTURES: ESSAYS IN HONOR OF ASHLEY MONTAGU IN HIS NINETIETH YEAR (Larry T. Reynolds and Leonard Lieberman, eds., 1996); IVAN HANNAFORD, RACE: THE HISTORY OF AN IDEA IN THE WEST (1996); F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (1993).

What we know about the LIHTC program suggests that other kinds of discrimination and segregation warrant consideration. The predominance of small units and small households raises questions about familial status discrimination: the Treasury's obligation "affirmatively to further" non-discrimination against and integration of families with children does not seem to be advanced by a program that produces very few units with more than two bedrooms and serves an average household of 2.2 persons. See GAO REPORT, *supra* note 1, at 42; cf. *DeBolt v. Espy*, 47 F.3d 777 (6th Cir. 1995) (finding inadequate standing for challenge to Department of Agriculture's emphasis on small units). Additionally, because the states in their consolidated plans have identified 67% of the needy population as large families, this allocation does not seem to satisfy the Internal Revenue Code's requirement of selection criteria "appropriate to local conditions."

The Treasury's civil rights obligations have four principal sources: the Fifth Amendment to the Constitution, Title VI of the Civil Rights Act of 1964,⁷⁰ the United States Housing Act,⁷¹ and Title VIII of the Civil Rights Act of 1968.⁷² The LIHTC statute itself has only one provision with explicit civil rights content, § 42(h)(6)(B)(iv), which directs that no tax credit shall be allowed absent an agreement between the taxpayer and the housing credit agency which prohibits a refusal to lease to a Section 8 certificate or voucher holder because of such Section 8 status. In addition, there is one Treasury Department LIHTC civil rights regulation, 26 C.F.R. § 1.42-9(a), which mandates compliance with HUD directives.

The Fifth Amendment forbids intentional discrimination on the basis of race, ethnicity, or other "suspect" characteristics, except where the government can demonstrate a compelling interest in pursuing the discriminatory conduct.⁷³ Title VI of the 1964 Civil Rights Act prohib-

26 U.S.C. § 42(m)(1)(B)(I) (1994). On an even more fundamental level, tax credit projects may simply unlawfully discriminate against families with children. See Wash. Report, *supra* note 20, at 2-3 (In 1992, 7% of the projects *not* identified as senior projects reported that they do not accept children—this almost four years after the 1988 amendment to Title VIII made such discrimination unlawful.)

GAO's report that 5% of the units are for persons "with special needs, including but not limited to people with disabilities" raises questions about discrimination on the basis of handicap and possible non-compliance with the Americans with Disabilities Act. See GAO REPORT, *supra* note 1, at 43; 42 U.S.C. § 12101 (1994). Additionally, the NCSHA Report says that forty-four of forty-eight state housing credit agencies "target" special tenant groups, including persons with various disabilities. NCSHA REPORT, *supra* note 2, at 40. This raises concern that these states may be encouraging the development of segregated facilities for people with disabilities.

70. 42 U.S.C. § 2000d (1994).

71. 42 U.S.C. § 1441 (1994).

72. 42 U.S.C. § 4601 (1994). There also are pertinent Executive Orders: Exec. Order No. 11063, 3 C.F.R. 652 (1959-1963), *reprinted in* 42 U.S.C. § 1982 (1994); Exec. Order No. 12892, 3 C.F.R. 849 (1995), *reprinted in* 42 U.S.C. § 1982 (1994). The latter creates the President's Fair Housing Council, of which the Secretary of the Treasury is a member. § 3-301.

73. See *Adarand v. Peña*, 515 U.S. 200, 227 (1995) (holding strict scrutiny is required for racial classifications); *Washington v. Davis*, 426 U.S. 229, 239-41 (1976) (holding that challenge to facially neutral law must show intent to discriminate as a law or official act cannot be found to be unconstitutional solely because it has a racially disparate impact); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (*Arlington Heights I*) (same, with respect to housing discrimination); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the equal protection safeguards imposed on state governments through the Fourteenth Amendment are applicable to the federal government through the Due Process Clause of the Fifth Amendment).

The Treasury's role in the LIHTC program can amount to intentional discrimination if the program is operated in a racially discriminatory way, and Treasury deliberately keeps itself in ignorance of the racially discriminatory aspects of the program or otherwise participates in them. In addition, where the federal government intentionally has imposed discrimination in other programs, redressing that discrimination may require that Treasury's housing programs be used to make the victims of the discrimination whole.

While there is little law regarding the extent to which one agency's programs may be used to remedy another agency's illegal conduct, it has become almost commonplace to use newer HUD

its discrimination "under any program or activity receiving Federal financial assistance."⁷⁴ The United States Housing Act provides that HUD and "any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, or duties . . . in such manner as will encourage and assist . . . the development of well-planned, integrated, residential neighborhoods."⁷⁵ In leading cases, several courts of appeals and district courts have held that the provisions of § 1441 are

programs to redress discrimination in older programs (e.g., using Section 8 to remedy discrimination in public housing, a method the Supreme Court has endorsed in *Hills v. Gautreaux*, 425 U.S. 284, 303-05 (1976)). There are at least twelve other housing mobility programs that use Section 8 certificates and vouchers to remedy discrimination and segregation in public housing. See MARGERY AUSTIN TURNER AND KALE WILLIAMS, *HOUSING MOBILITY: REALIZING THE PROMISE* 11-12 (1998). Cf. *Gautreaux v. Romney*, 457 F.2d 124, 132-34 (7th Cir. 1972) (holding that funding for model cities cannot be used to redress public housing violations). However, it is unclear how the federal government's division into separate departments immunizes one department's activities from judicial (or other) compulsion to participate in remedying unconstitutional conduct by another department.

74. 42 U.S.C. § 2000d (1994): "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* While the question has not been raised or resolved, it seems that the provision of tax credits constitutes "federal financial assistance" within the meaning of Title VI. Title VI provides that any "contract of insurance or guaranty" would be excluded from its coverage, but "other forms of federal assistance" are included. The definition of "other government assistance" in various HUD statutes specifically includes "credit, tax benefit, or any other form of direct or indirect assistance." Section 102(b)(1) of the HUD Reform Act of 1989; § 911 of the Housing & Comm. Dev. Act of 1992 and its 1994 amendment, regarding subsidy layering requirements. Indeed, Section 911 of the 1992 Housing and Community Development Act explicitly includes the LIHTC. 42 U.S.C. § 3545 (1994). Under the HUD regulations implementing Title VI, which Treasury regulations make pertinent to the LIHTC program (26 C.F.R. § 1.42-9(a) (1998), "federal financial assistance" includes "any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance." 24 C.F.R. § 1.2(e) (1998). On the other hand, GAO reported that "tax credits are not considered as federal financial assistance under Office of Management and Budget implementing guidance" and that therefore, "unlike most programs operated by state and local governments that receive federal financial assistance, the low-income housing tax credit program operations are not subject to independent audits under the Single Audit Act. . . ." GAO REPORT, *supra* note 1, at 11.

It is unclear whether Title VI is enforceable by a private plaintiff against a federal agency. Several courts have held HUD liable to private plaintiffs for violating Title VI. See, e.g., *Gautreaux v. Romney*, 448 F.2d 731, 738 (7th Cir. 1971). However, a 1983 Supreme Court decision left that issue in doubt. See *Guardians Ass'n v. Civil Service Comm'n. of New York City*, 463 U.S. 582, 593-97 (1983). See also *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 928 (3d Cir. 1997), *vacated*, 119 S. Ct. 22 (1998) (explaining that the Supreme Court established a private right of action under § 601 for intentional discrimination in *Alexander v. Choate*, 469 U.S. 287, 293 (1985)); *Latinos Unidos de Chelsea v. HUD*, 799 F.2d 774, 783 n.17 (1st Cir. 1986) (avoiding this "difficult question"). See generally ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 29.2, at 29-2 to 29-3 (1983). While intentional discrimination is required to establish a violation of Title VI, the HUD regulations establish liability for conduct with discriminatory effect. See 24 C.F.R. § 1.4(b)(2)(i) (1998).

75. 42 U.S.C. § 1441 (1994).

mandatory, and that actions taken without consideration of them, or inconsistent with them, cannot stand.⁷⁶

The fundamental source of civil rights obligations imposed on the Treasury Department's administration of the LIHTC program is Title VIII of the 1968 Civil Rights Act. In particular, the Act directs that:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary [of HUD] to further such purposes.⁷⁷

This provision extends to all federal agencies the same duty as is imposed on the Secretary of HUD: to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of Title VIII.⁷⁸ The statute imposes on the Treasury the obligation to administer the LIHTC program "in a manner affirmatively to further the purposes of" Title VIII.⁷⁹

There are two sources of law with respect to the nature of a federal department's duty under § 3608 "affirmatively to further" the purposes and policies of Title VIII. One source is the caselaw developed under § 3608(e)(5), as both courts and commentators agree that the obligations of §§3608(d) and (e)(5) are identical.⁸⁰ The second source is HUD's regulations. While HUD has not promulgated regulations interpreting the "affirmatively further" obligation, it has promulgated regulations explaining Title VIII duties in general, as well as HUD's own responsibilities in the administration of HUD's housing programs. These regulations provide a guide to the nature of the Treasury's obligations in

76. See *Kirby v. U.S.*, 675 F.2d 60, 68 (3d Cir. 1982); *U.S. v. Winthrop Towers*, 628 F.2d 1028, 1036 (7th Cir. 1980); *Pennsylvania v. Lynn*, 501 F.2d 848, 861 (D.C. Cir. 1973). See also National Housing Law Project, *HUD Housing Programs: Tenants' Rights* § 16.5.3 (2d ed. 1994).

77. 42 U.S.C. § 3608(d) (1994). Before the Fair Housing Amendments Act of 1988, this section was § 808(c), and is so referred to in pre-1988 court decisions.

78. 42 U.S.C. § 3608(e)(5) (1994). No one has suggested any distinction between the "purposes" language of § 3608(d) and the "policies" language of § 3608(e)(5). The cases and commentary uniformly treat the obligations as identical. See *Jones v. Office of Comptroller of the Currency*, 983 F. Supp. 197, 204 (D.D.C. 1997) (applying § 3608(d) to the OCC, relying on cases involving § 3608(e)); *Jorman v. Veterans' Administration*, 579 F. Supp. 1407, 1416 (N.D. Ill. 1984) (applying the section to the VA and distinguishing *Camden v. Plotkin*, 466 F. Supp. 44 (D. N.J. 1978), which held that then § 3608(c), now § 3608(d), did not apply to the Census Bureau only because there was "no allegation of direct involvement . . . in a housing project").

79. That the provision of low-income housing tax credits is a program or activity seems clear. See *Alexander v. HUD*, 441 U.S. 39, 64-64 (1979). See also 29 U.S.C. § 794(b)(1)(A) (1994) (§ 508 of the Rehabilitation Act, defining program or activity).

80. See SCHWEMM, *supra* note 74, at § 21.1 ("all federal departments and agencies are subject to the commands of § 3608").

administering the LIHTC program.⁸¹ Moreover, the Treasury regulation, 26 C.F.R. § 1.42-9(a), makes HUD rules applicable to the tax credit program.

A. *The Caselaw's Explication of the Duty
"Affirmatively to Further" Title VIII*

The caselaw teaches that the "purposes" and "policies" of Title VIII are dual: to eschew discrimination and to promote integration.⁸² Each federal agency has a hierarchy of obligations. First, Title VIII directs that the federal agency must not itself "engage [] in discriminatory conduct. . . ."⁸³ Second, the agency must not "fund a grantee who is engaged in such discriminatory conduct with the purpose of furthering

81. Some of HUD's regulations, including those governing the administration of the Federal Housing Administration programs, represent HUD's interpretation of its obligations under Executive Order 11063 and Title VI as well as Title VIII. But the requirements of Executive Order 11063, *supra* note 72, and Title VI are encompassed by the obligation "affirmatively to further the policies" of Title VIII. "Title VIII's § 3608 contains an even clearer mandate to HUD and other federal agencies to administer their programs affirmatively to further fair housing and integration See SCHWEMM, *supra* note 74, at 29-4.

The most pertinent HUD regulations are 24 C.F.R. Part 200, Subparts I, M and N (1998) (Nondiscrimination and Fair Housing, Affirmative Fair Housing Marketing, and Project Selection Criteria for the FHA-Assisted Housing Programs) (1998) and 24 C.F.R. Part 121, Collection of Data (1998).

82. See *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 211 (1972). See also SCHWEMM, *supra* note 74 at §§2.3, 7.2(2), and cases there cited. While

the nature of the duties imposed by § 3608(e)(5) is not spelled out in the statute, and there was virtually no legislative debate regarding this question . . . a number of courts have agreed that the affirmative duties imposed by § 3608 are designed to further the goal of integration and are not limited merely to banning discrimination in federally assisted housing. This view finds support in the overall legislative history of Title VIII.

Id. at § 21.1, pp. 21-4, 21-7-8.

While the cases acknowledge the dual goals, they also recognize that the goals sometimes conflict. In these situations, the caselaw suggests that discrimination that advances integration is permitted, if at all, only where it is temporary, provides additional access for minorities, and is based on a history of discrimination. See *U.S. v. Starrett City Associates*, 840 F.2d 1096, 1101-102 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988) ("Congress saw the nondiscrimination policy as the means to effect the antisegregation-integration policy. . . . While quotas promote Title VIII's integration policy, they contravene its antidiscrimination policy, bringing the dual goals of the Act into conflict."); *Burney v. Housing Authority*, 551 F. Supp. 746, 770 (W.D. Pa. 1982); Rodney A. Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's*, 58 S. CAL. L. REV. 947, 1004 ("Congress perceived antisegregation and antidiscrimination to be complementary goals."); cf. *Otero v. NYC Housing Authority*, 484 F.2d 1122, 1133-134 (2d Cir. 1973); *Larkin v. State of Michigan*, 883 F. Supp. 172 (E.D. Mich. 1994), *aff'd*, 89 F.3d 285 (6th Cir. 1996); *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 713 F. Supp. 1068, 1180 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992).

83. *NAACP, Boston Chapter v. Secretary of Housing and Urban Development*, 817 F.2d 149, 154 (1st Cir. 1987).

the grantee's discrimination."⁸⁴ So much the agencies themselves concede.⁸⁵ In addition, the cases hold, as then-Judge, now Justice, Breyer explained, that § 3608 imposes "an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others)."⁸⁶ Title VIII prohibits not only intentional discrimination, but also action that has a discriminatory effect.⁸⁷ And § 3608 requires the agency to take "affirmative action" both to stop discrimination and to desegregate housing.

In *Shannon v. HUD*,⁸⁸ the Third Circuit reviewed the "progression in the thinking of Congress" with respect to the civil rights obligations of federal agencies.⁸⁹ According to the court, the 1949 Housing Act might have permitted the Secretary of HUD to "act neutrally on the issue of racial segregation."⁹⁰ By 1968, however, with most federally subsidized housing still segregated, "Congress adopted § 3608 to require HUD and other federal agencies to adopt a more aggressive approach in the effort to end segregation in federally assisted housing."⁹¹

The Third Circuit's reasoning was endorsed in *NAACP, Boston Chapter v. HUD*. In this case, the First Circuit explicitly rejected the argument that §3608(e)(5) imposes "only an obligation not to discriminate," and that an agency violates Title VIII "only when [it] engages in discriminatory conduct or when it funds a grantee who is engaged in such discriminatory conduct with the purpose of furthering the grantee's discrimination."⁹² "The history of Title VIII," the court said, "suggests that its framers meant to do more than simply restate HUD's existing

84. *Id.*

85. *Id.*

86. *Id.* at 155.

87. Most courts that have considered the question have reached this conclusion. See, e.g., *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988) (per curiam). See also SCHWEMM, *supra* note 74, at §10.4(1) (especially notes 113.1 and 108.1, pp. 10-24 and 10-23, respectively).

88. 436 F.2d 809 (3d Cir. 1970).

89. *Id.* at 816.

90. *Id.* at 816.

91. SCHWEMM, *supra* note 74, at 21-5. In a later case, the Third Circuit affirmed a district court finding that legislative statements, including those of Senator Mondale, the primary sponsor of the 1968 Act, "make it clear that Congress was well aware of governmental action contrary to previous legislative prohibitions of racial discrimination in housing Therefore, in an effort to end segregation . . . Congress enacted 3608(e)(5), requiring affirmative action . . . to cure this widespread problem." *Resident Advisory Board v. Rizzo*, 425 F. Supp. 987, 1014-15 (E.D. Pa. 1976), *aff'd as modified*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). See also SCHWEMM, *supra* note 74, at § 21.2, 21-5 ("The history does show . . . that § 3608 was seen as a way of buttressing existing legal resources in order to mount a stronger attack on the widespread problem of segregation in public housing.").

92. *NAACP, Boston Chapter*, 817 F.2d at 154.

legal obligations.”⁹³ Furthermore, the First Circuit said, “as a matter of language and of logic, a statute that instructs an agency ‘affirmatively to further’ a national policy of nondiscrimination would seem to impose an obligation to do more than simply not discriminate itself.”⁹⁴ Judge Breyer, writing for the court, emphasized that Title VIII addressed not only discrimination, but also segregation. The statute’s “supporters,” he wrote, “saw the ending of discrimination as a means toward truly opening the nation’s housing stock to persons of every race and creed.”⁹⁵ The First Circuit found in Title VIII “an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”⁹⁶

The First Circuit held that § 3608 requires that the federal agency must “consider [the] effect [of a grant] on the racial and socio-economic composition of the surrounding area” and that “the need for such consideration itself implies, at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply.”⁹⁷

The First Circuit held HUD liable for “failure, over time, to take seriously its minimal Title VIII obligation to evaluate alternative courses of action in light of their effect upon open housing.”⁹⁸ It held HUD liable not for something it did but for not doing what it was obliged to do, for accepting only cosmetic, ineffectual fair housing efforts by the City of Boston and for not having “used . . . its immense leverage” under the UDAG program “to provide adequate desegregated housing. . . .”⁹⁹ The court said that the plaintiffs were claiming “the right to HUD’s help in achieving open housing,”¹⁰⁰ a right that the First Circuit held “was viewed as important by the Congress that passed Title VIII.”¹⁰¹

The obligations imposed on HUD by § 3608(e)(5) are imposed on the Treasury by § 3608(d). Like HUD, the Treasury is required to use its authority over the allocating agencies and the developers “to assist in ending discrimination and segregation, to the point where the supply of

93. *Id.*

94. *Id.*

95. SCHWEMM, *supra* note 74, at § 21.1 pp. 21-4 (citing *Clients Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983)); *see also* *Young v. Pierce*, 628 F. Supp. 1037, 1056 (E.D. Tex. 1985).

96. *NAACP, Boston Chapter*, 817 F.2d at 155.

97. *Id.* at 156.

98. *Id.* at 157.

99. *Id.* at 156.

100. *Id.* at 157.

101. SCHWEMM, *supra* note 74, at 21-25.

genuinely open housing increases.”¹⁰²

B. *The Regulations’ Explication of the Duty
“Affirmatively to Further” Title VIII*

In addition to caselaw, HUD’s regulations are a second source of authority to define the Treasury’s obligations under § 3608. HUD is the agency to which Congress has assigned “authority and responsibility for administering” Title VIII.¹⁰³ The Secretary of HUD is authorized to make rules to “carry out” Title VIII.¹⁰⁴ HUD’s administrative interpretation of the statute is “entitled to great weight.”¹⁰⁵ Moreover, a Treasury regulation provides that eligibility for the LIHTC requires that “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”¹⁰⁶ The regulation provides:

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). A copy of HUD Handbook 4350.3 may be requested by writing to: HUD, Directives Distribution Section, room B-100, 451 7th Street, S.W., Washington, DC 20410.¹⁰⁷

102. *NAACP, Boston Chapter*, 817 F. 2d at 155.

103. 42 U.S.C. § 3608(a) (1994); see *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979).

104. 42 U.S.C. § 3614(a) (1994).

105. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 204, 210 (1972); see *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984); *NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287, 300-01 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993) (enforcing HUD’s regulations because “courts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules”); SCHWEMM, *supra* note 74, at § 7.2(4).

106. 26 C.F.R. § 1.42-9(a)(1998). The Treasury has explained this regulation as an implementation of the “legislative history” of Section 42. In 1989, an IRS Notice said:

The legislative history of Section 42 . . . provides that “Residential rental units must be for use by the *general public*.” . . . Regulations will provide that the term “for use by the general public” shall be determined in a manner consistent with HUD housing policy governing nondiscrimination as evidenced by HUD rules and regulations. See Handbook 4350.3 Accordingly, owners of residential rental units that give preferences to certain classes of tenants . . . will not violate the general public use requirement if such preferences would not violate any policy governing nondiscrimination expressed in the HUD handbook. [IRS Notice 89-6, 1989-1 C.B.625, 626-7 (1989)].

107. 59 Fed. Reg. 10067, 10073, 26 C.F.R. § 1.42-9(a) (1998). The Treasury regulation refers to subtitle A and Chapters I through XX of 24 C.F.R. This comprises almost the entire 7 volumes of title 24 of the Code of Federal Regulations. Subtitle A alone is more than 800 pages long, encompassing Parts 0-92. Chapters I through XX of Subtitle B include Parts 100 through 3500,

The Treasury regulation is a welcome recognition of the pertinence of fair housing law to the LIHTC program. The Treasury regulation does, however, require improvement. It omits any reference to the governing statutes, including Title VIII. It refers only to "non-discrimination," not mentioning Title VIII's other purpose, to create "truly integrated and balanced living patterns."¹⁰⁸ Furthermore, it does not tailor the HUD requirements specifically to the tax credit program.

The reference to the HUD handbook is problematic. The handbook is long¹⁰⁹ and replete with items not suitable to the LIHTC program.¹¹⁰ Moreover, since the handbook is not binding of its own force, it is doubtful that the handbook assumes the force of law because it is referred to in a regulation.¹¹¹

Part IV draws on the caselaw, HUD regulations, and other standards to suggest changes to the Treasury's regulations to implement more precisely the Department's obligations under Title VIII and the LIHTC statute.¹¹²

almost 2 inches thick, consisting of hundreds of pages, not consecutively numbered, from Volume 1 to Volume 7 of title 24 of C.F.R.

The handbook is entitled "Occupancy Requirements of Subsidized Multifamily Housing Programs." The Treasury regulation's instruction about how to secure the HUD handbook is not effective. After making two such requests to no avail, the author of this article secured a copy of the handbook only by making a personal request of a HUD deputy assistant secretary.

108. *Trafficante v. Metropolitan Life Ins. Company*, 409 U.S. 205, 211 (1995) (quoting the remarks of Sen. Mondale, 114 Cong. Rec. 3422 (1968)).

109. It comprises some two inches of material, not cumulatively paginated.

110. The handbook does not list the LIHTC program as one to which any portion of the handbook applies. See ¶ 1-2, "Programs Subject to this Handbook."

111. See *Chrysler v. Brown*, 441 U.S. 281 (1979); *Brown v. Lynn*, 392 F. Supp. 559 (N.D. Ill. 1975).

112. The obligation of the Treasury and the state agencies to obey Title VIII would not be affected by any reluctance on the part of developers to comply with these requirements. It is worth noting, however, that the tax credit program is so popular with investors that there is no reason to fear that the enforcement of these statutory requirements would reduce production of tax credit developments. The NCSHA Report notes the "ferocious competition" for tax credit allocations: the allocating agencies receive an average of \$3 in applications for every \$1 they have to allocate. NCSHA REPORT, *supra* note 2, at 3, 12. Indeed, NCSHA refers to "greater HFA leverage" after 1994. *Id.* at 27.

Under Treasury regulation 1.42-9(a), developers are not entitled to tax credits if they are not complying with the HUD rules or regulations "governing nondiscrimination." Therefore, many of the suggestions that follow would only provide specific focus on obligations already imposed by reference. The specificity and focus are important, however. Developers are required to comply with all Treasury regulations in order to retain their tax credits, both under the federal program and under any state tax credit program, as in California. When Treasury regulations are not clear, developers risk losing their tax credits. Developers' best interests are served by clear Treasury regulations that define as precisely as possible the obligations of developers—and housing credit agencies—under the LIHTC program.

IV. THE TREASURY'S OBLIGATIONS UNDER TITLE VIII AND THE TAX CREDIT STATUTE

The Treasury's obligations derive from the substantive provisions of Title VIII, notably 42 U.S.C. §§ 3604, 3605, and 3608. The Treasury may not in any way "make unavailable" a dwelling to any person, or discriminate with respect to terms, conditions, privileges, services, or facilities, because of race, color, national origin, or other protected status.¹¹³ The authoritative decisions hold that Title VIII is violated by actions or omissions with disparate impact,¹¹⁴ and define such impact as any action or omission that, among other tests, perpetuates segregation in a community.¹¹⁵ The Treasury, therefore, may not act or omit to act when the act or omission has the effect of making housing unavailable to minorities or perpetuating segregation in a community.

The Treasury's duty under § 3608 is "affirmatively to further" non-discrimination and integration. Treasury must "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."¹¹⁶ Moreover, the Treasury's affirmative duty under § 3608 is to "consider [the] effect [of its actions] on the racial and socio-economic composition of the surrounding area" and "to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of conduct that would increase that supply."¹¹⁷

To satisfy these requirements, the Treasury should amend its regulations in at least three ways:

A. Treasury regulations should acknowledge the authority of Title VIII, as well as HUD's Title VIII regulations, and the tax credit statute's non-discrimination requirements;

B. Treasury regulations should specify what housing credit agencies must do to satisfy civil rights obligations; and

C. Treasury regulations should specify what tax credit developers must do to satisfy civil rights obligations.

113. 42 U.S.C. § 3604(a), (b), (f) (1994).

114. See *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1293 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) [*Arlington Heights II*]; *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), aff'd in part, 488 U.S. 15 (1988) (per curiam); see also SCHWEMM, *supra* note 74, § 10.4.

115. See *Arlington Heights II*, 558 F.2d at 1288-91; *Huntington*, 844 F.2d at 937-38; see also SCHWEMM, *supra* note 74, § 10.4(2)(c).

116. *NAACP, Boston Chapter v. Secretary of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987) (regarding HUD).

117. *Id.* at 156.

A. *Treasury Regulations Should Acknowledge the Authority of Title VIII, as well as HUD's Title VIII Regulations, and the Tax Credit Statute's Non-Discrimination Requirements*

The Treasury should amend its LIHTC regulations to specify that all housing provided under the LIHTC is subject to the provisions of Title VIII as well as the HUD regulations implementing it. The LIHTC regulations should be amended to direct that every housing credit agency and every developer must comply not only with HUD regulations implementing Title VIII, but also with the statute itself.¹¹⁸

The Treasury regulations should explain that their authority is not simply legislative history requiring that LIHTC units be "for use by the general public," but also Title VIII, and the Treasury's statutory obligation "affirmatively to further" the purposes of Title VIII.

The restatement of the statutory obligation is a common provision in regulations, even when a regulation implements one discrete statute. This restatement does not change or add anything to the state of the law, but could have a considerable practical effect, especially for the LIHTC regulation and the Title VIII obligations. Since the obligations come from an entirely different statute, it is likely that many people who are experts about § 42 of the Internal Revenue Code are not familiar with the provisions of Title VIII. The Treasury regulations should clarify both the obligation itself and the fact that a developer's failure to comply with Title VIII is a basis for loss of the tax credit. The Treasury's obligation "affirmatively to further the purposes" of Title VIII includes the obligation to state that Title VIII applies to the LIHTC program.¹¹⁹

Treasury regulations also should define as a prohibited discriminatory act any "refusal to lease" a tax credit unit to a Section 8 certificate or voucher holder "because of the status of the prospective tenant as such a holder." This would implement 26 U.S.C. § 42(h)(6)(B)(iv), which provides that no credit shall be allowed absent an agreement between the taxpayer and the housing credit agency which prohibits such a refusal to lease to a Section 8 certificate or voucher holder. The statutory requirement should be incorporated in the regulation.¹²⁰

118. This article focuses on the Treasury's obligations under Title VIII, which generally includes obligations imposed by Title VI. *See supra* note 81. The article does not consider obligations that may be imposed by Title VI alone. The current Treasury regulation makes HUD's Title VI regulations—and HUD regulations issued under all civil rights laws—applicable to determine eligibility for the tax credit. When the Treasury revises its regulations, it should consider the applicability of the other statutes, and their implementing regulations, as well as Title VIII and the Title VIII regulations, which last is all that this article considers.

119. *See Barrios, supra* note 24, at 23 (the first of the Treasury's violations of Title VIII is "the failure of the Service to explicitly state its commitment to the Fair Housing Act").

120. Although 26 U.S.C. § 42(h)(6)(B)(iv) was added to the IRC in 1993 (P.L. 103-669 (H.R.

Treasury regulations also should acknowledge and re-state the Treasury's own obligations under Title VIII, including its affirmative obligation to further the purposes of Title VIII. Details of this obligation are discussed in the following sections.

*B. Treasury Regulations Should Specify What Housing Credit
Agencies Themselves Must Do to Satisfy
Civil Rights Obligations*

The Treasury's requirements for the housing credit agencies should address both general housing credit agency activities and, in particular, how housing credit agencies are to take civil rights concerns into account in allocating the tax credit.

1. THE GENERAL OBLIGATIONS OF THE HOUSING CREDIT AGENCIES

a. Treasury regulations should require that the housing credit agencies certify that they are in compliance with Title VIII and the HUD regulations, and that they will affirmatively further the purposes of Title VIII. Such certifications are not unusual: they are required now of state and local government agencies that receive funding under other programs.¹²¹

b. The IRC requires allocating agencies to define their housing priorities, but gives little guidance as to how to achieve this.¹²² Treasury regulations should require that non-discrimination and desegregation be clearly identified as priority goals for the housing credit agencies. Agencies identify housing needs primarily in terms of existing problems and populations to be served.¹²³ Discrimination and segregation are not identified as existing problems.¹²⁴ The LIHTC program will not solve

2264, 107 Stat. 312)), a 1996 study reported that 11% of the surveyed tax credit developments in Washington State revealed that they do not accept Section 8 tenants. WASH. REPORT, *supra* note 22, at 2-3.

121. See, e.g., 24 C.F.R. § 91.325(a)(1) (1998). "Each State is required to submit a certification that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the State, take appropriate actions to overcome the effects of any impediments . . . , and maintain records reflecting the analysis and actions." See also 24 C.F.R. § 91.225(a)(1) (1998) (imposing the same requirement for local governments). Moreover, Executive Order 12892 directs that "the head of each executive agency shall . . . require that all persons or other entities who are applicants for, or participants in, or who are supervised or regulated under, agency programs and activities relating to housing . . . shall comply with this order." 3 C.F.R. 849 (1995), *reprinted in* 42 U.S.C. § 1982 (1994).

122. See GAO REPORT, *supra* note 1, at 55-56.

123. *Id.* at 56. Most states now define their housing priorities for the LIHTC program by reference to the consolidated plans that HUD requires for several of its programs, including CDBG and the HOME Investment Partnership programs. *Id.* at 55.

124.

The most frequently cited problems were excessive rent burdens (89 percent),

the problems of discrimination and segregation unless the agency identifies them as issues requiring attention and solution. Each state may define discrimination and segregation issues differently, but the Treasury should require at a minimum that each state credit agency address the problems.¹²⁵

c. Treasury regulations should require that housing credit agencies establish procedures for enforcing the prohibition against discrimination on the basis of §8 status. These agencies must advise LIHTC occupants and potential occupants of this prohibition; in addition, the agencies must provide a complaint mechanism for enforcing the prohibition. The agency also must advise LIHTC occupants and potential occupants of both Title VIII's protections and the ways in which the protections are enforced.

d. Treasury regulations should require that the housing credit agencies assess and oversee the implementation of developers' affirmative marketing plans. These plans must address both initial rent-up and filling vacancies to encourage unsegregated occupancy of tax credit developments.¹²⁶

followed by substandard housing (72 percent), a lack of housing (59 percent), deteriorated neighborhood (52 percent), and excessive concentrations of very low-income housing (30 percent). Translated into solutions, these include needs for less expensive housing, community revitalization, and mixed-income development.

GAO REPORT, *supra* note 1, at 56. Seventy-eight percent of the agencies also identified strong need for subsidized housing in rural areas. "The populations most frequently identified as needing housing were the elderly (70 percent); and persons with special needs, including those who are handicapped, disabled, or homeless or have AIDS (63 percent)." *Id.* at 56.

Agencies could use the consolidated plan to identify civil rights concerns. The goals of the consolidated plan, as defined by HUD, include increasing the availability of decent housing "particularly to . . . disadvantaged minorities without discrimination" and other civil rights objectives. 24 C.F.R. § 91.1(a)(1)(i)-(iii) (1998). The consolidated plan must specifically assess whether "any racial or ethnic group has disproportionately greater need." 24 C.F.R. § 91.205(b)(2) (1998). Further, it "must identify . . . any areas . . . with concentrations of racial/ethnic minorities." 24 C.F.R. § 91.210(a) (1998). *See also* 24 C.F.R. § 91.315(k) (1998) (noting that the consolidated plan must describe the strategy to coordinate the LIHTC with development of housing affordable to low- and moderate-income persons). Integration of the tax credit program into a coordinated state housing strategy would be very salutary. *See* Peter W. Salsich, Jr., *Urban Housing: A Strategic Role for the States*, 12 YALE L. & POL'Y REV. 93, 117 (1994) (urging coordinated state housing strategy incorporating LIHTC and mortgage revenue bond financing).

125. At least one state housing credit agency—Michigan's—now acknowledges an obligation to promote fair housing. Michigan Housing Development Authority 1998 QAP at 9 ("The Fair Housing Act prohibits discrimination in the sale, rental, financing, or other services related to housing on the basis of race, color, religion, sex, handicap, familial status, or national origin. Under the act, the Authority has a duty to administer programs which affirmatively advance fair housing.") Connecticut's Housing Finance Authority implicitly acknowledges such an obligation by imposing on developers the "threshold" requirement that they "must be committed to undertake strong affirmative measures to ensure that the activity funded promotes regional economic, social and racial integration and the integration of persons with disabilities." Connecticut Housing Finance Authority Low-Income Housing Tax Credit Program 8 (QAP 1998).

126. "Affirmative marketing" is "the energetic effort to break down racial barriers, [not] create

The HUD regulations, which the Treasury has made applicable to the tax credit program, require that HUD-assisted housing be marketed "affirmatively as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of race, color, religion, sex, handicap, familial status or national origin."¹²⁷ LIHTC projects with Department of Agriculture or HUD assistance expressly are required to pursue affirmative fair housing marketing.¹²⁸ State housing finance agencies that participate in the risk-sharing program for insured multi-family project loans must review and approve Affirmative Fair Housing Marketing Plans ("AFHMPs").¹²⁹ Several state agencies have expressly imposed on all tax credit developers an obligation to develop and implement affirmative fair housing marketing plans.¹³⁰ The Treasury should

new ones;" it requires "aggressive public relations work espousing the principle of neutral equality of opportunity." Smolla, *supra* note 82, at 1005-06. See also Michelle Adams, *The Last Wave of Affirmative Action*, 1998 Wis. L. Rev. — (forthcoming 1998).

127. 24 C.F.R. § 200.610 (1998). Each HUD-assisted housing provider is required to "pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions." *Id.* See generally 24 C.F.R. Part 200 SubPart M (200.600 *et seq.*) (1998); 24 C.F.R. Part 108 (1998) (Compliance Procedures for Affirmative Fair Housing Marketing); 12 U.S.C. § 1715z-1a(d)(9) (1994) (AFHMP for troubled multi-family housing projects).

128. 7 C.F.R. §§ 1901.203 (Dept. of Agriculture), 1944.164 (farm labor housing) (1998); 7 C.F.R. § 1944.266 (congregate housing); 24 C.F.R. §§ 280.25(a) (1998) (Nehemiah), 572.405(b) (HOPE 3), 700.175(d)(2) (1998) (congregate housing), 850.151(g) (1998) (§8/§202), 880.601(a)(2) (1998) (§ 8 New Construction) 884.214(a) (§ 8/515); 886.105(f) (HUD-insured and HUD-held mortgages), 886.313(b) (disposition); 886.321(a) (same), (b) (same), 891.155(a) (elderly & handicapped), 891.400(a)(2) (same), 891.600(a)(2) (same), 891.740(a)(2) (non-elderly handicapped), 904.104(a)(2) (turnkey), 906.20 (homeownership) (1998).

129. 24 C.F.R. §§ 266.215(a) (1998), 266.300(b)(4) (1998), 266.305(b)(4) (1998), 266.420(b)(7) (1998), 266.505(b)(8) (1998).

130. See, e.g., the 1998 QAPs for Connecticut, Massachusetts, Michigan, and New Jersey. Connecticut has a general requirement that each sponsor "must agree to comply with all affirmative fair marketing . . . requirements." Conn. Housing Finance Authority, Low-Income Housing Tax Credit Program QAP 8 (1998). New Jersey is a touch more specific:

NJHMFA encourages all owners/developers to affirmatively market their projects. For projects over 25 units, applicants shall submit an Affirmative Fair Housing Marketing Plan, which, in short, documents how the project will be marketed to those people who are least likely to apply. For instance, if the proposed development is located in an area predominantly populated by Caucasians, outreach should be directed to non-Caucasians. Conversely, if the population is predominantly African American, outreach should be directed to non-African American groups. At the time the units are placed in service, the developer and rental agent shall certify that the project was affirmatively marketed.

N.J. Housing & Mortgage Finance Agency 21 (QAP Draft 1998).

[Massachusetts] requires developers to establish affirmative action goals for the percent of minority participation in each project. Developers and management agents must establish effective marketing plans to reach the identified minority groups.

If a tax credit project is located in a predominantly white neighborhood in the City of Boston . . . the affirmative fair marketing plan shall have the percentage

expressly require that all credit agencies do so.

Many of the requirements imposed by the HUD regulation easily apply to the LIHTC program. This includes requirements that there be an affirmative fair housing marketing plan available for public inspection,¹³¹ that developers prominently display an approved Fair Housing poster that includes an approved Equal Housing Opportunity logo or slogan,¹³² that developers "instruct all employees and agents in writing and orally on the policy of nondiscrimination and fair housing,"¹³³ that all

goals for occupancy of the low income units which reflect the racial composition of the City of Boston as determined in the most recent U.S. Census. As of the date of the issuance of this allocation plan, these percentages are as follows:

- 59.0% White
- 12.8% Black
- 10.8% Hispanic
- 3% Native American
- 5.2% Asian/Pacific Island
- 1.0% Other.

Mass. Dept. of Housing & Community Dev. 38-39 (QAP February 1998 Draft).

Michigan provides that

[a]pplications that include a formal Affirmative Fair Housing Marketing Plan may be eligible to receive points. This plan is designed to assure that persons who are members of racial or ethnic groups (who would not otherwise apply for occupancy in a housing project because of existing neighborhood racial or ethnic patterns, site locations, or other factors) are made aware of the available housing, feel welcome to apply for the housing, and have the opportunity to rent the housing.

The Affirmative Fair Housing Marketing Plan (AFHMP) shall at a minimum address the following issues:

- Identification of the target population (racial or ethnic group(s)) least likely to apply to the project within the market area.
- Identification of concrete and credible outreach efforts including a budget designed to carry out the AFHMP.
- Identification of what positions within the management company will carry the responsibility to implement the AFHMP.
- Description of the level of minority employment within the management agency, and what are the company's fair housing, equal employment policies.
- Description of what the management company's previous experience has been in implementing AFHMPs. . . .

An application can earn up to 5 points for such a plan. State of Michigan QAP 9 (1998).

The State of Washington requires an affirmative marketing plan that "must contain explicit assurances" that, among other things, "the project will seek to have a resident population that represents the diversity of the local community." Wash. State Hsg. Finance Cmsn. LIHTC Program Guidelines 98-99 (Rev. Feb. 28, 1997).

It is noteworthy that even agencies that do not require affirmative marketing of units do require or encourage set-asides for minority- or women-owned businesses. *See, e.g.,* Alabama QAP 16 (QAP Draft 1997).

131. 24 C.F.R. § 200.625 (1998). The HUD regulation provides for HUD approval. The Treasury and HUD might agree that HUD should assume responsibility for approving the AFHM plans of tax credit sponsors and for assuring compliance with AFHM plans under 24 C.F.R. Part 108 (1998).

132. 24 C.F.R. § 200.620(e) and (f) (1998).

133. 24 C.F.R. § 200.620(c) (1998).

advertising include Equal Housing Opportunity statements and, if persons are depicted, the advertisement must depict "persons of majority and minority groups, including both sexes,"¹³⁴ and that the owner "maintain a nondiscriminatory housing policy in recruiting from both minority and majority groups, including both sexes and the handicapped, for staff engaged in the sale or rental of properties."¹³⁵

Two provisions of the HUD regulations would require adjustment for the LIHTC program. Section 200.620(a) requires that the owner "specifically solicit eligible . . . tenants" referred by a HUD area or insuring office. While such persons are entitled to equal consideration by a tax credit sponsor, there is no particular reason to justify a requirement that such persons be "specifically solicit[ed]."

Also, one sentence of § 200.620(a) seems inappropriate for tax credit developments; indeed, it seems inappropriate for the HUD-FHA developments to which it applies. The sentence specifies that an AFHMP "shall typically involve publicizing [availability of units] to minority persons . . . through . . . minority publications or other minority [media] outlets" This requirement is based on the assumption that the development is located in a non-minority neighborhood.

The information available suggests, however, that this assumption is not very accurate for either the FHA or tax credit projects. As 34% of the tax credit units are in areas with more than 50% minority populations, and some additional units are in tracts with substantial (but less than 50%) minority population, a special emphasis on attracting minority residents would be peculiarly inappropriate; indeed, probably unlawful. Further, because the tax credit statute favors sites in minority neighborhoods, the duty to promote integration would require that for those projects an affirmative effort be made to market the projects to persons not of those minority groups. The more appropriate standard would require affirmative marketing to those persons not likely to apply without special attention.

The AFHM plans alone, however, will not achieve desegregated housing. These plans have not been successful for the HUD programs, and there is no reason to believe that the plans will be any more successful for the LIHTC program. The HUD AFHM regulations not only are weak, but also have not been enforced.¹³⁶ The Treasury should, therefore, strengthen the HUD AFHM regulations, and require housing credit

134. 24 C.F.R. § 200.620(a) (1998).

135. 24 C.F.R. § 200.620(b) (1998).

136. See Laura Lazarus, *Affirmative Fair Housing Marketing Regulations: HUD's Failed Attempt to Implement a Good Idea* (Geo. U. L. Ctr. seminar paper, 1993, on file with the author) (reviewing HUD and independent studies that "confirm that the regulations have had minimal impact on opening up housing opportunities" (*Id.* at 47); John M. Goering, *Introduction, Racial*

agencies to establish procedures for the enforcement of these requirements.¹³⁷ As part of the improvement, the Treasury should require that the housing developers specifically and regularly invite applications from all those on waiting lists for subsidized housing and any housing mobility programs.¹³⁸

e. Treasury regulations should require that the housing credit agencies collect, assess, and report information about the racial, ethnic, and other protected statuses of residents of LIHTC developments.

LIHTC developers now are obligated to collect and maintain such data. This is explicitly required of the LIHTC projects that have Department of Agriculture¹³⁹ or HUD assistance.¹⁴⁰ LIHTC developments that

Desegregation and Federal Housing Policies, in *HOUSING DESEGREGATION AND FEDERAL POLICY* 202 (John M. Goering ed. 1986).

137. For suggestions about improvements, see Laura Lazarus, *supra* note 136, and the studies on which it is based: LEONARD S. RUBINOWITZ ET AL., *AFFIRMATIVE MARKETING OF FEDERALLY ASSISTED HOUSING: IMPLEMENTATION IN THE CHICAGO METROPOLITAN AREA* (Study by the Urban-Suburban Investment Study Group, 1974); HUD OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY, *AN ASSESSMENT OF THE MULTIFAMILY AFFIRMATIVE FAIR HOUSING MARKETING PROGRAM* (1990); HUD OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY, *AN ASSESSMENT OF THE AFFIRMATIVE MARKETING REVIEW PROCESS ON THE RENTAL REHABILITATION PROGRAM* (1985); OFFICE OF MANAGEMENT AND BUDGET, *EVALUATION OF THE EFFECTIVENESS OF THE AFFIRMATIVE FAIR HOUSING MARKETING PLAN* (1982). Improved AFHMP regulations would recognize that not all residents are either black or white; in fact, there are different groups of minorities.

138. There are now 54 assisted housing mobility programs in 33 different metropolitan areas; these offer an excellent opportunity to desegregate by race, ethnicity, and economics. MARGERY AUSTIN TURNER & KALE WILLIAMS, *HOUSING MOBILITY: REALIZING THE PROMISE* at 2 (1998) (Report from the Second National Conference on Assisted Housing Mobility).

139. Thirty-five percent of LIHTC projects (26% of LIHTC units) are financed by the Department of Agriculture. ABT REPORT, *supra* note 1, at 3-5. This may understate such financing. *Id.* at 2-9. Many LIHTC projects also have CDBG, HOPE, HOME, or other HUD funding. See *supra* note 24. Developers of these projects are required to collect racial and ethnic data about applicants and beneficiaries. See also 42 U.S.C. § 3608(e)(2)(a) (1994) (Secretary of Housing and Urban Development required to collect and report such data at least annually); 42 U.S.C. § 3608(a) (1996) (same; Sec. of Agriculture as well); 7 C.F.R. §§ 15.5(b), 1901.202 (g), 1944.266 (1997). In 1994, what had been the Farmers Home Administration (FmHA) in the U.S. Department of Agriculture was eliminated, and its functions transferred to the Rural Housing and Community Development Service (RHCDS). USDA, Secretary's Memorandum 1010-1 (Oct. 20, 1994). See NATIONAL HOUSING LAW PROJECT RHCDS (FmHA) Housing Programs: Tenants' and Purchasers' Rights §1.3 (2d ed. 1995).

140. Sponsors must maintain current data on the race and ethnicity of applicants for and beneficiaries of HUD programs. See 24 C.F.R. § 1.61(b) (1998) (Title VI enforcement); 24 C.F.R. § (7)(i)(A) (1997) (HOME program); 24 C.F.R. § 107.30(a) (1998) (E.O. 11063); 24 C.F.R. § 202.12(8) (1998) (mortgage & loan insurance programs); 24 C.F.R. § 202.20(h) (1998) (mortgage and loan insurance programs); 24 C.F.R. § 280.25(a)(2) (1998) (Nehemiah program); 24 C.F.R. § 291.440 (1998) (single-family disposition); 24 C.F.R. § 511.73(a) (1998) (Rental Rehabilitation); 24 C.F.R. § 570.490(a) (1998) (CDBG); 24 C.F.R. § 570.506(g)(2) (1998) (same); 24 C.F.R. § 572.405(c) (1998) (HOPE 3); 24 C.F.R. § 574.425(b) (1998) (same); 24 C.F.R. § 574.500(b)(4) (1998) (HOPWA); 24 C.F.R. § 700.175(d)(3) (1998) (congregate housing); 24 C.F.R. § 880.603(b)(3) (1998); (202/§ 8); 24 C.F.R. § 881.603 (1998); 24 C.F.R. § 882.406(f)(3) (1998) (Section 8 Mod. Rehab); 24 C.F.R. § 882.514(a)(3) (1998) (same); 24

do not have Agriculture or HUD assistance are bound to collect and maintain such information because the Treasury has made compliance with the HUD regulations a condition of eligibility for the tax credit.

f. Treasury regulations should require that the housing credit agencies train developers about their civil rights obligations,¹⁴¹ monitor developers' compliance with those obligations,¹⁴² and act to promote unsegregated occupancy of tax credit developments.

Since the housing credit agencies themselves have an obligation

C.F.R. § 884.214(b)(5) (1998) (§ 515 § 8); 24 C.F.R. § 886.321(b)(5) (1997) (Section 8 disposition of HUD-owned projects); 24 C.F.R. § 891.410(f) (1997) (Supportive Housing); 24 C.F.R. § 891.610(f) (1998) (§ 202/ Section 8); 24 C.F.R. § 891.750(b)(4) (1997) (non-elderly handicapped); 24 C.F.R. § 950.3011(d)(1) (1997) (Indian Housing/FSS); 24 C.F.R. § 982.158(f)(1) (1998) (Section 8 existing); 24 C.F.R. § 984.201(d)(1) (1997) (Section 8/FSS). See also 42 U.S.C. §§ 3608(e)(2)(a), (e)(6) (1994) (Secretary of HUD required to collect and report such data at least annually).

Similar requirements are imposed, under Title VI, on most federal agencies. See 15 C.F.R. § 8.7(b) (1998) (Commerce); 22 C.F.R. § 141.5(b) (1998) (State); 28 C.F.R. § 42.106(b) (1998) (Justice); 29 C.F.R. § 31.5(b) (1998) (Labor); 32 C.F.R. § 195.7(b) (1998) (Defense); 34 C.F.R. § 100.6(b) (1998) (Education); 38 C.F.R. § 18.6(b) (1998) (Veterans Affairs); 40 C.F.R. § 7.85(a)(2) (1998) (EPA); 43 C.F.R. § 17.5(b) (1998) (Interior); 45 C.F.R. § 80.6(b) (1998) (HHS); 45 C.F.R. § 1203.6(b) (1998) (Corporation for National and Community Service); 49 C.F.R. § 21.9(b) (1998) (Transportation).

141. GAO states that, even without IRS requirements,

45 allocating agencies reported that they either provide project owners and managers with optional training on compliance or require such training. Forty-eight allocating agencies also provided compliance manuals that set out tax rules with which a project must comply. All allocating agencies reported providing either manuals or training, or both, to project owners and managers.

GAO REPORT, *supra* note 1, at 107. This should include civil rights requirements.

142. Wisely, the LIHTC program does not rest on data collection and certifications; the statute includes a requirement that the housing credit agencies actively monitor the developers. Credit agencies are required to review all of the certifications made by the owners to determine that there is compliance with the requirements of the tax credit program. In addition, credit agencies must establish a review procedure that contains at least one "of [three monitoring] requirements." GUGGENHEIM, *supra* note 12, at 75-76. Agencies may engage outside contractors and may charge compliance monitoring fees to be paid by the owners of tax credit properties. *Id.* at 74. "[T]here are five key aspects of the monitoring requirement: record keeping and record retention; certification; review of submitted documents or on-site review; the right to conduct an in-depth inspection; and notification of non-compliance." *Id.* Under 26 U.S.C. § 42(1)(3), the state agencies are required to submit annual reports. State agencies must report buildings in noncompliance to the Service. That the current compliance monitoring requirements are not adequate has been recognized by the National Council of State Housing Agencies, the organization of agencies that administer the LIHTC program, NCSHA's June 1992 Standards for State Tax Credit Administration acknowledge that "IRS compliance monitoring rules are inadequate to prevent the abuse and physical deterioration that have plagued many subsidized housing projects and to ensure that the projects continue to benefit low income tenants." NCSHA Standards of State Tax Credit Administration, reproduced in GUGGENHEIM, *supra* note 12, Appendix 29 at 346, 353. NCSHA recommends enhanced monitoring. This monitoring should be extended to the civil rights requirements.

These are the minimum requirements; housing credit agencies "can adopt stricter monitoring requirements or procedures if they wish." GUGGENHEIM, *supra* note 12, at 74.

"affirmatively to further" fair housing, they must do more than mandate processes (such as affirmative marketing plans and linkages to public housing, Section 8, and mobility programs). The housing credit agencies must also train and monitor the developers to be sure that the processes are being followed and to determine whether the methods are resulting in desegregated occupancy. The developers' annual reports on occupancy must be reviewed to determine which developments might warrant additional attention. This monitoring must include fair housing audits, to assure non-discrimination under Title VIII and for Section 8 certificate and voucher holders.¹⁴³ When the audits or occupancy data suggest a possible civil rights violation, the housing credit agency must refer the matter to the Treasury and to HUD's Office of Fair Housing and Equal Opportunity.¹⁴⁴

Treasury regulations also should require the housing credit agencies to maintain a database of all LIHTC units. There should be a single site at which potential renters and agencies assisting potential renters can learn of LIHTC housing opportunities.¹⁴⁵ The housing credit agencies themselves should establish liaisons with public housing, Section 8, and mobility programs affirmatively to promote the integration of subsidized tenants in tax credit developments.¹⁴⁶ In some circumstances, it may be appropriate for the agency to establish specific goals for integrated

143. Random auditing should be performed by contract with a fair housing group experienced in the use of testing. See Veronica M. Reed, *Fair Housing Enforcement: Is the Current System Adequate?*, in *RESIDENTIAL APARTHEID: THE AMERICAN LEGACY* 222-23 (Robert D. Bullard et al. eds., 1994). (Compare the Office of the Comptroller of the Currency, which has an "apparently respectable history in the area of monitoring banks for compliance with the Fair Housing Act." *Jones v. Off. of the Comptroller of the Currency*, 983 F. Supp. 197, 204 (D.D.C. 1997). OCC has "developed guidelines for detecting unlawful discriminatory practices . . . by national banks" and "conducts periodic examinations of all institutions that it supervises . . . to determine whether unlawful discrimination has occurred." *Id.* at 204 n.10. The OCC uses "matched pair testing to detect possible lending discrimination at the preapplication stage of the credit process and has encouraged self-testing by national banks." *Id.*

144. I am indebted to Joseph Guggenheim for the suggestion that monitoring results be reported to HUD. Referrals to the Department of Justice and the Civil Rights Commission may also be appropriate. Such outcome-oriented regulation has been praised by the NCSHA Report as one of the great virtues of the LIHTC program. See NCSHA REPORT, *supra* note 2, at 59 ("Many HUD programs use process-oriented regulation, where the owner/manager is judged on adherence to a specific protocol rather than achievement of desired objectives. By contrast, the Housing Credit specifies outcomes. . . . The result is better compliance with less of an administrative burden on both the regulated and the regulations.").

145. The difficulty of finding out about housing opportunities can be especially frustrating for minority, lower-income, and Section 8 tenants. See Fred Freiberg, *Promoting Residential Integration: The Role of Private Fair Housing Groups*, in *HOUSING MARKETS AND RESIDENTIAL MOBILITY* 231 (G. Thomas Kingsley & Margery Austin Turner eds., 1993).

146. In Wisconsin, for example, up to 15% of the state's tax credit allocation was designated for projects certified by a housing counseling and recruitment center. *Id.* at 231 (describing settlement of metropolitan school desegregation case). See also Florence Wagman Roisman, *The Role of the State, The Necessity of Race-Conscious Remedies, and Other Lessons From the*

occupancy.¹⁴⁷

2. THE OBLIGATIONS OF THE HOUSING CREDIT AGENCIES IN ALLOCATING TAX CREDITS

a. Treasury regulations should require housing credit agencies to disqualify developers who have violated fair housing laws. An application should be absolutely rejected if any of the following is found:

1. There is a pending civil rights suit against the applicant instituted by the Department of Justice.

2. There is an outstanding finding of noncompliance with any civil rights statute, Executive Order, or regulation as a result of formal administrative proceedings, unless the applicant is operating under a HUD approved compliance agreement designed to correct the area of noncompliance, or is currently negotiating such an agreement with HUD.

3. There is an unresolved Secretarial charge of discrimination against the applicant issued under section 810(g) of the Fair Housing Act, as implemented by 24 C.F.R. § 103.400.

4. There has been an adjudication of a civil rights violation in a civil action brought against the applicant by a private individual, unless the applicant is operating in compliance with a court order designed to correct the area of noncompliance, or the applicant has discharged any responsibility arising from such litigation.¹⁴⁸

Mount Laurel Study, 127 SETON HALL L. REV. 101, 129-30 (1997) (recommending coordination of New Jersey's LIHTC program with the *Mount Laurel* and state subsidy programs).

147. Occupancy goals are appropriate where a history of past discrimination has been shown. The Massachusetts occupancy goals (*see supra* note 130) presumably are derived from the consent decree in NAACP, Boston Chapter v. Kemp, 721 F. Supp. 361, 371-72 (D. Mass. 1989), which requires that all Boston area HUD affirmative fair housing marketing plans shall have as their goal and measure of success the achievement of "a racial composition in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the racial composition of the City [of Boston] as a whole." *See* Raso v. Lago, 135 F.3d 11 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 44 (1998) (discussing the consent decree and upholding the use of the AFHMP even against a claim of preference by urban renewal displacees). The Massachusetts QAP represents an extension of the remedy to the state's use of other federal programs. This is justifiable in terms of the state's own responsibility for past discrimination. *See* U.S. v. City of Yonkers, 96 F.3d 600, 621-23 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 2479 (1997) (mem.) (state liability for housing segregation); U.S. v. Yonkers Bd. of Educ., 992 F. Supp. 672, 676 (S.D.N.Y. 1998) ("unremitting failure on the part of the [state agency] to remedy the segregative condition in the [city] housing market to which the [state agency] contributed" and the indivisibility of the federal responsibility). Occupancy goals also may be appropriate to achieve the "compelling interest" of residential desegregation. *See* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 111 (1979) ("there can be no question about the importance" to a community of "promoting stable, racially integrated housing.'). *See also* 42 U.S.C. § 1441 (1994), discussed *supra* at 614-15. For the "compelling interest" in desegregating housing, *see supra*, notes 5 and 6.

148. These are the standards that govern HUD's selection of applicants for funding under the HOPE VI program. *See* 62 Fed. Reg. 18242, 18248 (April 14, 1997). I am indebted to Richard Gervase for calling them to my attention and suggesting their pertinence to tax credit applications.

In considering applications for allocations of the tax credit, housing credit agencies should review developers' submissions and should request reviews by HUD's Office of Fair Housing and Equal Opportunity, by the Civil Rights Division of the U.S. Department of Justice, and by State and local fair housing enforcement agencies.

b. Treasury regulations should mandate the housing credit agencies to establish as a threshold requirement that each project "affirmatively further" fair housing. The Treasury should require that each housing credit agency map all of its existing LIHTC projects, noting the racial, ethnic, and economic characteristics of each location and of the residents at each location.¹⁴⁹ Against that background, the Treasury should require the agency to assess each application to determine the extent to which the new proposal "affirmatively furthers" fair housing.

Treasury regulations should require the housing credit agencies to assure that equivalent facilities and services are being offered to different groups of residents, e.g., that new construction as well as rehabilitation is available in minority neighborhoods and that multi-bedroom units are generally available.

The Treasury may elect to exercise considerable discretion, or to allow the housing credit agencies to exercise considerable discretion, in defining what "affirmatively furthering fair housing" means with respect to site selection. The current standard, developed by caselaw and embodied in HUD's regulations, is that "the site must not be located in an area of minority concentration" unless certain exceptions have been satisfied.¹⁵⁰ This standard has been variously criticized both for depriv-

149. The mapping would be facilitated by the geo-coded database established by HUD.

150. See 24 C.F.R. § 941.202(b) (1998) (public housing). A site for new construction must not be located in an "area of minority concentration" or "a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area." 24 C.F.R. § 941.202(c)(1)-(2) (1998). The exceptions are provided in § 941.202(c)(1)(i) (1998): the prohibition against construction in an area of minority concentration applies

unless (A) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (B) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. An "overriding need" may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national origin renders sites outside areas of minority concentration unavailable.

24 C.F.R. § 941.202(c)(1)(1) (1998). The site also "must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons." 24 C.F.R. § 941.202(d) (1998).

Similar standards are imposed for Supportive Housing for the Elderly and Persons with Disabilities (24 C.F.R. §891.125) (1997) and for the Section 8 Project-Based Certificate Program (24 C.F.R. §983.6). No "statute, regulation, or policy . . . defines 'area of minority concentration' or 'racially mixed area.'" *Glendale Neighborhood Ass'n v. Greensboro Hous. Auth.*, 956 F. Supp.

ing minority areas of housing¹⁵¹ and for allowing the exceptions to swallow the rule, so that assisted housing continues to be sited in minority areas.¹⁵²

It seems clear, however, that site selection has not been effected in accordance with this standard. Housing credit agencies do not refer to the standard in their QAPs, and do not invite developers to address the question of the exceptions to the standard. The ABT, GAO and NCSHA reports all indicate that a substantial percentage of the tax credit units are in fact in areas of minority concentration. There may be reasons why, in particular circumstances, tax credit developments should be sited in areas of minority concentration. Professors Calmore and Adams make powerful arguments for improving housing in those areas.¹⁵³ Moreover, it is sometimes possible that a site in a minority concentrated area may attract non-minority as well as minority residents.¹⁵⁴ Furthermore, the tax credit statute itself encourages developers to apply for allocations for qualified census tracts and difficult development areas, which are likely to be areas of minority concentration. Such siting may be justifiable, but it should not be effected without any consideration of the harm that may result from it and alternatives that might do more to encourage residential integration.

The Treasury does not need to adhere to one fixed rule to govern these choices in all circumstances. But the Treasury must establish the requirement that housing credit agencies take this fundamental issue into account when making allocation decisions. The Treasury may not stand silent and allow the housing credit agencies to allocate billions of dollars in federal financing without considering the fair housing implications of these allocations.

The caselaw which has interpreted HUD's § 3608 duties clearly

1270, 1280 (M.D.N.C. 1996). For a history of the standards, see Michael Vernarelli, *Where Should HUD Locate Assisted Housing?: The Evolution of Fair Housing Policy*, in HOUSING DESEGREGATION AND FEDERAL POLICY 214-234 (John M. Goering ed., 1986).

151. See John O. Calmore, *Fair Housing vs. Fair Housing: The Problems with Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7 (1980) (deleterious impact of HUD's regulations on minority communities).

152. See Roisman, *Intentional Racial Discrimination*, *supra* note 5, 143 U. PA. L. REV. at 1371; Philip D. Tegler, *Housing Segregation and Local Discretion*, 3 BKLYN. J. OF L. & POLICY 209, 225-27 (1994).

153. See Calmore, *supra* note 151; John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-The Future Essay*, 71 N.C.L. REV. 1487 (1993); John O. Calmore, *To Make Wrong Right: The Necessary and Proper Aspirations of Fair Housing*, in THE STATE OF BLACK AMERICA 1989 (National Urban League; Janet DeWart, ed.) 77; Michelle Adams, *supra* note 5.

154. See, e.g., Martha Mahoney, *Law and Social Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1289 (1990) (describing public housing projects on valuable land, close to downtown New Orleans).

requires that the Treasury, too, must have an institutionalized method of taking into account the racial and economic characteristics of the neighborhood and a set of standards for deciding which sites are preferable, to satisfy the Treasury's obligation affirmatively to promote racial and ethnic integration as well as to eschew discrimination.¹⁵⁵

The initial statement of the duty to collect and consider such information was announced by the Third Circuit in 1970 in *Shannon v. HUD*.¹⁵⁶ *Shannon* held that under the national housing policy and the Fair Housing Act, the federal "[a]gency must utilize some institutionalized method whereby, in considering site selection . . . , it has before it the relevant racial and socio-economic information necessary . . . to make an informed decision on the effects of site selection . . . on racial concentration."¹⁵⁷ Several courts of appeals have agreed with *Shannon*'s statement of HUD's duty to take racial, ethnic, and economic segregation into account,¹⁵⁸ and have upheld HUD's regulations as

155. The courts recognize that the agency is not always obligated to prefer desegregation: "there will be instances where a pressing case may be made for the rebuilding of a racial ghetto." *Shannon v. HUD*, 436 F.2d 804, 822 (3d Cir. 1970). What the courts do require is "that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration." *Id.*

156. *Id.* at 821.

157. *Id.* *Shannon* also held that "increase or maintenance of racial concentration is prima facie . . . at variance with the national housing policy." *Id.* "The essence of the procedural point in *Shannon* is simply that HUD's opinion must be informed on matters affecting its § 3608(e)(5)" duty. SCHWEMM, *supra* note 74, at 21-13. *Shannon* has been "cited with approval by the Supreme Court . . . in both *Trafficante* and *Bellwood*." *Id.* at 21-21.

158. *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982) ("As part of HUD's duty under the Fair Housing Act, an approved housing project must not be located in an area of undue minority concentration, which would have the effect of perpetuating racial segregation."); *Otero v. NYCHA*, 484 F.2d 1122, 1133-34 (2d Cir. 1973):

[t]he affirmative duty . . . also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."

see id. (holding this duty applies also to the NYCHA and may justify disregarding commitment to priority rehousing for displacees); *see Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *see also Jones v. HUD*, 390 F. Supp. 579, 590 (E.D. La. 1974); *Blackshear Residents Org. v. Housing Authority of City of Austin*, 347 F. Supp. 1138, 1145-49 (W.D. Tex. 1971); SCHWEMM, *supra* note 74, at 21-11. In *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1535 (11th Cir. 1984), the court acknowledged that § 3608(d) was enacted

[b]ecause federal housing administrators had traditionally given little consideration to the impact of their decisions on the racial or socio-economic composition of a given neighborhood . . . The bill's sponsors sought to remedy this bureaucratic myopia by requiring federal housing administrators to take account of the effect of their funding decisions upon the racial and socio-economic composition of affected areas.

substantially complying with the statutory obligations.¹⁵⁹ Most recently, this position was endorsed in *NAACP, Boston Chapter v. Secretary*,¹⁶⁰ wherein the court held that § 3608 imposes a duty (there, on HUD) to “consider [the effect] [of agency action] on the racial and socio-economic composition of the surrounding area.”¹⁶¹

While most of these cases involved HUD, the courts have recognized that the standards of § 3608 are the same for other agencies.¹⁶² To the extent that § 3608(e) requires that HUD take racial and socio-economic data into account, the substantially identical language of § 3608(d) requires that the Treasury provide that racial and socio-economic concentration be taken into account.¹⁶³ Furthermore, since the

159. HUD's site selection regulations were developed to comply with *Shannon* and “have been held to ‘substantially comply’ with ‘the mandate of Title VIII and the other statutes that impose an affirmative duty to integrate on HUD.’” SCHWEMM, *supra* note 74, at 21-11. “HUD's [site and neighborhood standards] regulations substantially comply with this mandate” *Alschuler*, 686 F.2d at 482; *see also* Bus. Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 869-70 (3d Cir. 1981); *South East Chicago Cmsn. v. HUD*, 488 F.2d 1119 (7th Cir. 1973); *Jones v. Tully*, 378 F. Supp. 286, 292 (E.D. N.Y. 1974), *aff'd sub nom. Jones v. Meade*, 510 F.2d 961 (2d Cir. 1975); *Glendale Neighborhood Ass'n v. Greensboro Housing Auth.*, 956 F. Supp. 1270, 1277 (M.D.N.C. 1996) (HUD's regulations implement statutory duty affirmatively to promote racial integration).

160. 817 F.2d at 149.

161. *Id.* at 156.

162. *See, e.g., Evans v. Lynn*, 537 F.2d 571, 578 (2d Cir. 1975) (holding plaintiffs have standing to challenge the “allocation of funds . . . which contributes to the perpetuation of [segregated] living patterns”). The Sixth Circuit's decision in *Madison-Hughes v. Shalala*, 80 F.3d 1121 (6th Cir. 1996), is not to the contrary. In *Madison-Hughes*, plaintiffs complained that HHS violated Title VI by not collecting specified data respecting race and national origin. The Sixth Circuit affirmed a dismissal for lack of jurisdiction, holding that judicial review was precluded by 5 U.S.C. § 701. (Technically, the dismissal should have been not for want of jurisdiction but for want of a cause of action under the APA.)

There are two critical differences between *Madison-Hughes* and the LIHTC program. First, HHS did collect some racial data; the complaint was about the quality and timing of the data, not about a complete abdication of responsibility to collect data. As the court said, plaintiffs complained “about the level of enforcement and monitoring by the agency,” not that HHS “has completely abdicated its duty to monitor noncompliance and collect data sufficient to ensure enforcement of Title VI.” *Id.* at 1131. Even the court in *Madison-Hughes* suggested that there might be review of such a failure to act. The Treasury, by contrast, collects and maintains no racial data whatsoever. Second, the legal standards upon which plaintiffs relied in *Madison-Hughes* were only Title VI and its implementing regulations; plaintiffs could place no reliance upon such specific standards as § 3608. The regulation in *Madison-Hughes* has “further qualifying language [stating that the agency should] to the fullest extent practicable seek the cooperation of recipients in obtaining compliance. Based on the use of such qualifying phrases, we believe 45 C.F.R. § 80.6(b) commits the collection of data to agency discretion, rather than mandating specific requirements.” *Id.* at 1126. Indeed, one of the cases that the *Madison-Hughes* court distinguished, *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), was more like a § 3608 situation, for it involved a statute that allowed a waiver only if specified statutory purposes would be served.

163. As Barrios concluded, “courts have held this collection of racial data in an institutionalized fashion to be required of HUD under Section 3608 and the APA, where it is ‘necessary to make an informed decision as to whether the proposed site will further integration.’ The Service has never collected racial data, nor required the state agencies to collect it. Thus, it is

Treasury regulation makes the LIHTC program subject to HUD regulations, this is the standard that now governs the tax credit program.

The Treasury's statutory duty is to "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."¹⁶⁴ The agency is required "to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply."¹⁶⁵ Accordingly, the Treasury's role in the LIHTC selection process is to set for the allocating agencies site-selection standards that satisfy this mandate.

It may be that the best resolution would be for the Treasury to direct the housing credit agencies to adopt the resolution provided by HUD for the HOPE VI program. HUD requires that, in selecting those sites, the public agency may, at its election, comply with either the public housing site and neighborhood standards or with standards provided in the HOPE VI document. The HOPE VI standards recite that

the fundamental goal of HUD's fair housing policy is to make full and free housing choice a reality, so that households of all races can freely decide between minority and white neighborhoods, when minority neighborhoods are no longer deprived of essential public and private resources, and when stable, racially mixed neighborhoods are available as a meaningful choice for all.¹⁶⁶

To make that "full and free housing choice a reality," sites are to be "selected so as to advance two complimentary goals:

(i) expand assisted housing opportunities in non-minority neighborhoods, opening up choices throughout the metropolitan area for all assisted households; and

impossible for the Service to perform even the most minimal of fair housing duties. . . ." Barrios, *supra* note 24, at 23.

164. *NAACP, Boston Chapter*, 817 F.2d at 155. HUD must "affirmatively . . . promote racial integration" and it has an "affirmative duty to avoid segregation." *Glendale Neighborhood Ass'n v. Greensboro Housing Auth.*, 956 F. Supp 1270, 1276 (M.D.N.C. 1996); "HUD [has a] statutory duty to integrate," *King v. Harris*, 464 F. Supp. 827, 839 (E.D.N.Y.), *aff'd sub nom.* *King v. Faymor Dev. Co.*, 614 F.2d 1288 (2d Cir. 1979), vacated on other grounds, 446 U.S. 905 (1980).

165. *NAACP, Boston Chapter*, 817 F.2d at 156. The substantive standards regarding economic concentration may be different in the LIHTC program because of the tax credit legislation's specific preference for DDAs and QCTs. The data in the Abt report strongly suggest that the incentive system has been effective in influencing the locations of tax credit projects: almost 37% of the projects and units were located in either Difficult Development Areas or Qualified Census Tracts. *ABT REPORT*, *supra* note 1, at 4-10. In 1992-94, 36.6% of units in this data set were in either DDAS or QCTs. In 1992, 26.8% of the tax credit units were in QCTs. *Id.* at 4-10. The data also suggest that, in other respects, leaving locational decisions primarily to developers may not effectively serve national housing goals.

166. HUD FY 1997 Revitalization Grant Agreement 14 (available from author). For this point, too, I am indebted to Richard Gervase.

(ii) reinvest in minority neighborhoods, improving the quality and affordability of housing there to represent a real choice for assisted households."¹⁶⁷ Whether it adopts this or another standard, the Treasury must assure that civil rights concerns are taken into account by housing credit agencies in allocating the tax credit.

C. Treasury Regulations Should Specify What Tax Credit Developers Must Do to Satisfy Civil Rights Obligations

1. Treasury regulations should require each developer to certify annually that:

a. it is in compliance with Title VIII, HUD and Treasury civil rights regulations, and all other federal, state, and local civil rights laws;¹⁶⁸

b. it has trained its staff about these civil rights requirements;¹⁶⁹

c. it advises applicants and residents of their fair housing rights and the ways in which they can seek redress for perceived violations, including violations of the prohibition against discrimination on the basis of § 8 status;¹⁷⁰ and

d. no fair housing complaints have been filed against it or any associated person or entity or explain any that have.

167. *Id.*

168. Washington State requires an Affirmative Marketing Plan which includes "explicit assurances" that, *inter alia*, "the Project will be operated, maintained, and rented" consistent with civil rights laws, including Titles VIII and VI, and "in a manner that does not discriminate" on the basis of race, creed, color, sex, national origin, familial status, religion, marital status, age, disability, or source of income. WSHFC Program Guidelines 99 (Rev. Feb. 28, 1997).

169. Compare the Office of the Comptroller of the Currency, which conducts fair lending seminars and "participates in banking industry education efforts through conferences and other events and publication of papers and issuances, regarding fair lending to examiners and banks." *Jones v. Office of the Comptroller of the Currency*, 983 F. Supp. 197, 204 n.10 (D.D.C. 1997).

170. To assure that affected persons are advised of their rights and of the ways in which they can assert these rights, the Treasury can adapt HUD's Title VI regulations, especially 24 C.F.R. § 1.6(d) (1998).

The Treasury should improve upon HUD's information-forcing regulation by being specific about the ways in which the rights should be explained. Videos should be used as well as print, for the many people who cannot read. "A 1992 survey by the U.S. Department of Education's National Center for Education Statistics estimated that about 21% of the adult population—more than 40 million Americans over the age of 16—had only rudimentary reading and writing skills." National Center for Education Statistics, 1992 National Adult Literacy survey, <<http://nces.ed.gov/nadlits/overview.html>>. The video and other information should be provided not only at rental offices but at other sites, such as public assistance offices, frequented by those who might otherwise be discouraged from applying for tax credit units. The Treasury's LIHTC regulation should require that participants, beneficiaries, applicants and other interested persons be advised of their right to file administrative complaints, to elect to have the Department of Justice pursue their claims, or to bring their own suits. See 24 C.F.R. Part 103 (1998). In addition, it should make clear the advantage of advising the credit agency of the problems so that the developer may be faced with the loss of the tax credit.

Each developer must be required to maintain and implement an affirmative fair housing marketing plan and explain how it will affirmatively further fair housing. The Treasury may define furthering fair housing as either providing housing opportunities to victims of past discrimination or segregation or offering opportunities for integrated living.

2. Treasury regulations should require all applicants for the credit to describe the racial and ethnic characteristics of the area in which the project will be located.

3. Treasury regulations should expressly require developers to report at initial rent-up and annually on the racial, ethnic, Section 8, and other protected characteristics of each project's occupants, so that the agency can ascertain whether a problem of discrimination or segregation exists.

These data already are required under HUD regulations (which the Treasury regulation makes binding on the tax credit program).¹⁷¹ The data are expressly required of the LIHTC projects that have Department of Agriculture or HUD assistance.¹⁷²

The data are essential. As social scientists working in this field have said, "data are key" for enforcement and monitoring of fair housing and civil rights requirements.¹⁷³

good-quality, accessible information systems about public expenditures are not frills; they are fundamental components of a monitoring system needed to ensure equity and protect civil rights requirements To determine whether these standards [to affirmatively further fair housing] are satisfied, we must ascertain who benefits from public programs. For this we need information on the characteristics of program beneficiaries, including data on the economic, demographic, disability, racial, and ethnic characteristics of families and individuals receiving assistance.¹⁷⁴

Indeed, the LIHTC program is almost unique among subsidized housing

171. Sponsors must maintain current data on the race and ethnicity of applicants and beneficiaries for HUD programs. *See supra* note 139.

Similar requirements are imposed, under Title VI, on most federal agencies. *See supra* note 139.

172. *See supra* note 139.

173. Anne B. Shlay & Charles E. King, *Beneficiaries of Federal Housing Programs: A Data Reconnaissance*, 6 HOUSING POLICY DEBATE 481, 486 (1995).

174. *Id.* at 481-83. "No data system is currently in place or being put into place that will permit any assessment of the racial characteristics of beneficiaries of programs administered by the Treasury Department through the IRS. Therefore, these programs cannot be monitored to ensure compliance with the Fair Housing Act." *Id.* at 520. Section 3608(a) requires the HUD Secretary and the Agriculture Secretary to collect, "not less than annually, data on the racial and ethnic characteristics of persons eligible for, assisted, or otherwise benefitting under each community development, housing assistance, and mortgage and loan insurance and guarantee program administered by such Secretary." 42 U.S.C. § 3608a(a) (1996).

programs in not requiring housing owners to collect and report such data.¹⁷⁵ This is so despite the fact that HUD regulations (which the Treasury regulation makes applicable to the tax credit program) require that all persons receiving assistance through any housing activities subject to EO 11063 "shall maintain data regarding the race, religion, national origin and sex of each applicant."¹⁷⁶

V. CONCLUSION

Housing discrimination and segregation impose immense costs on individuals and on society as a whole. Federal agencies that administer housing programs are required affirmatively to further non-discrimination and desegregation. The Treasury Department, which operates the largest contemporary subsidized housing program in the United States, has not acted effectively against discrimination and segregation. The suggestions in this article are advanced with the hope that the Treasury will satisfy its vital mandate.

175. LIHTC projects may be the only federally subsidized multifamily rental projects that do not require tenant certification and reporting on race and ethnicity. See Shlay & King, *supra* note 173, at 490, 493-96. Requiring such data collection would not significantly add to the burdens on LIHTC developers. In general, each LIHTC developer now is required to secure an annual income certification from each low-income tenant and documentation to support that certification. 26 C.F.R. § 1.42-5(c)(1)(iv) (1998).

176. 24 C.F.R. § 107.30 (1998); see also 24 C.F.R. § 1.6(b) (1998) (HUD's Title VI regulations require that "in general, recipients should have available for the department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs.") HUD collects such data for tenants of Public Housing Agencies, Indian Housing Authorities, Section 8 voucher and certificate holders, and privately owned multifamily housing assisted by HUD. Certain mortgage lenders are required to provide this kind of data on all mortgage loan applicants. 24 C.F.R. § 107.30(h) (1997). The Federal National Mortgage Association and Federal Home Loan Mortgage Corporation "must report to HUD . . . the racial, economic, gender, and first-time home-buyer characteristics associated with all loans that they purchased after January 1, 1993." Shlay & King, *supra* note 173, at 497-98, 510, 515.