

# PROPERTY COMPLIANCE REPORT

A MONTHLY PUBLICATION ON LOW-INCOME HOUSING TAX CREDIT COMPLIANCE

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## Fair Housing Act Compliance After the MOU: Rules of the Game Haven't Changed

By Susan S. Fauver, Esq. & Lisa A. Misher, Esq., Faegre & Benson LLP

Compliance with fair housing rules in low-income housing tax credit (LIHC) projects has received increased attention since August 2000 when three federal agencies—the U.S. departments of the Treasury (Treasury), Housing and Urban Development (HUD) and Justice (DOJ)—combined forces to author a Memorandum of Understanding (MOU) to promote compliance with the Fair Housing Act (Act).

The MOU is a signal that compliance with fair housing requirements in the LIHC program is a priority for the federal government. It is important to note, however, that although the MOU was a dramatic statement, it did not change the state of the law. In other words, compliance with the Fair Housing Act may be scrutinized more closely after the MOU, but requirements under the Act have not changed.

### MOU Basics

The federal government's strategy for enhancing fair housing compliance under the MOU is twofold: education and inter-agency information sharing. The MOU's focus is on technical assistance and training of all segments of the industry in order to make compliance a standard practice. HUD and the DOJ will provide training and technical assistance to the Internal Revenue Service (IRS) concerning civil rights and discrimination matters relating to the LIHC program. Likewise, the IRS will provide technical assistance and training to HUD and DOJ with respect to tax issues. The MOU further suggests that federal regulators educate the state and local housing finance agencies (HFAs), who in turn will provide local training on civil rights issues to LIHC industry members, including developers, property managers and investors.

In addition, the MOU provides that the agencies will coordinate notification procedures in order to increase compliance. HUD and DOJ will notify the appropriate state HFA if any of the following affect a LIHC property:

- (1) a charge by HUD for a violation of the Act;
- (2) a probable cause finding under a substantially equivalent fair housing state law or local ordinance by a state or local agency;
- (3) a lawsuit filed by the DOJ under the Act; or

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### INSIDE REPORT

#### Landlord Indicted for Supplying False Documents

By Tracy A. Fine, Editor

A federal grand jury returned a 15-count indictment on March 14, charging a landlord with obstructing justice and submitting false documents to federal officials in order to conceal his alleged failure to notify tenants of the presence of hazards associated with lead-based paint.

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- (4) a settlement agreement or consent decree entered into between HUD or the DOJ and the property owner.

The state HFAs will report this information to Treasury in accordance with tax credit reporting requirements. HUD and DOJ will give Treasury and the appropriate state HFA relevant information concerning the nature of the violation, any legal actions taken and proposed corrective actions. The agencies also agreed to work together in removing unlawful barriers to occupancy of LIHC properties by individuals holding Section 8 vouchers.

## The Fair Housing Act

**1. Applicability of Requirements.** The Fair Housing Act is the principal source of civil rights obligations imposed on LIHC projects. Compliance with the Act is required in order for a residential rental unit to be eligible for the LIHC program. The owner of a LIHC property is required to certify each year to the state HFA that all low-income units in the project are available for use by the general public as required by federal regulations. A unit is available for "use by the general public" if "the unit is rented in a manner consistent with housing policy governing nondiscrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development."

**2. Description of Requirements.** The Fair Housing Act makes it unlawful to discriminate on the basis of race, color, religion, sex, familial status, national origin or disability. Discrimination based on "familial status" refers to households with a child or children under 18, pregnant women, or a person in the process of securing legal custody of a child under 18. The words "disability" and "handicap" are used interchangeably and refer to any tenant (a) with physical or mental disabilities, (b) having a record of such a disability, or (c) regarded as having such a disability. Disability includes hearing problems, mobility and visual impairments, chronic alcoholism, chronic mental illness, AIDS and mental retardation. The Act does not, however, require property owners to rent housing to a person who is a direct threat to the health or safety of others or who currently uses illegal drugs.

In general, the Fair Housing Act makes it unlawful to do any of the following on the basis of a tenant's race, color, religion, sex, familial status, national origin or handicap: (a) refuse to rent housing; (b) set different terms, conditions or privileges for rental of housing; (c) provide different housing services or facilities; or (d) falsely deny that housing is available for inspection or rental.

It is also unlawful to advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status, or handicap. The LIHC may, however, be used for a project that targets special-needs populations, including the elderly, homeless or

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## Fair Housing Resource for LIHC Property Managers

The Corporation for Supportive Housing (CSH), which provides financial and technical assistance to non-profit organizations who operate supportive housing, has published a guide to the legal issues in supportive housing. Written by the California law firm Goldfarb & Lipman, the guide offers information about the myriad laws that govern McKinney Act and other forms of supportive housing. The publication defines supportive housing as "housing that offers support services on and off-site to homeless people and others with special needs, including those with mental illness, substance use and other chronic health and physically disabling conditions, in order to help them maintain decent and stable housing."

*Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing* provides an overview of the U.S. legal system and a detailed discussion of various laws related to supportive housing. These include federal housing statutes; U.S. Department of Housing and Urban Development (HUD) regulations; and fair housing laws such as the Fair Housing Act, Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, Fair Housing Executive

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## Fair Housing Resource

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Orders and local housing discrimination ordinances.

The guide answers questions about reserving housing for people with disabilities, economic discrimination, projects serving homeless people, discrimination based on source of income and restricting housing to certain groups. It also addresses such issues as the legal way to screen prospective tenants and the proper definition of "reasonable accommodation" in tenant selection.

In addition, the publication discusses a range of operating and management issues associated with supportive housing. Among these are community care licensing issues, reasonable accommodation during tenant occupancy, providing services to tenants, and clean and sober requirements.

Finally, the guide examines the Fair Housing Act's prohibitions on zoning laws. It explains what constitutes land use actions with discriminatory intent, land use actions with discriminatory effect and reasonable accommodation in land use approvals. Furthermore, it catalogues the requirements for land use approvals for supportive housing.

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disabled, so long as the project complies with applicable laws. In fact, the selection criteria under state LIHC qualified allocation plans must include "tenant populations with special housing needs."

In addition to the general prohibitions, the Fair Housing Act provides additional protections to persons with disabilities. The Act was amended in 1988 to make it unlawful for a property owner to refuse to permit, at the expense of a disabled person, reasonable modifications to the disabled person's dwelling or to a building's common use areas, if necessary for the disabled person to have full enjoyment of the housing.

However, if reasonable, a landlord may condition its permission on the tenant agreeing to restore the interior of the unit to the condition that existed before the modification, reasonable wear and tear excepted. Property owners also cannot refuse to make reasonable changes in rules, policies, practices or services if necessary for a disabled person to have an equal opportunity to use and enjoy the housing. For example, a building with a "no pets" policy must allow a visually impaired tenant to keep a guide dog.

The 1988 amendments also provide that it is unlawful to design and construct certain multifamily dwellings in a manner that makes them inaccessible to persons with disabilities. On March 6, 1991, HUD published final Fair Housing Accessibility Guidelines to provide builders and developers with technical guidance on how to comply with the accessibility requirements of the Fair Housing Act. In 1994, HUD published a supplement to the Guidelines containing questions and answers about the Guidelines.

The design specifications in the guidelines are recommended guidelines only. Builders and developers may depart from the guidelines, but they must demonstrate that their alternative designs meet the requirements of the Fair Housing Act. Adherence to the guidelines provides a safe harbor in HUD's administrative enforcement.

**3. Compliance with Requirements.** It is advisable for those in the LIHC industry to take affirmative steps to ensure compliance with Fair Housing Act requirements. All LIHC industry participants should contact their local HUD office and HFA to obtain information on training programs offered in connection with the MOU. Property owners and managers should train their staffs regarding applicable civil rights requirements, maintain and implement affirmative fair housing marketing plans, and advise applicants and residents of their fair housing rights. In particular, property owners and managers should make sure their staff receives training on the following issues: elderly preferences, unit occupancy requirements, alcohol and chemical dependency, and accessibility.

Until now, the focus of the federal government's compliance efforts under the LIHC program has been on rent and income requirements. In

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fact, some observers have noted that the LIHC program has operated "without effective regard to civil rights laws." (Florence Wagman Roisman, "Mandates Unsatisfied: The Low-Income Housing Tax Credit Program and the Civil Rights Act," *University of Miami Law Review*, July 1998.)

The goal of the MOU is to coordinate the different functions of Treasury, HUD, DOJ and the state agencies in an effort to enhance compliance with the Fair Housing Act and similar state and local fair housing laws. One element of achieving the MOU's goal of increased compliance is information sharing among government agencies. The second element, which is most important to LIHC participants, is training and education. The MOU did not change the requirements under the Fair Housing Act; however, because of increased federal scrutiny, an understanding of the requirements is more important than ever. ♦

*Susan S. Fauver, Esq. is a partner, and Lisa A. Misher, Esq. is an associate, in the real estate department at Faegre & Benson LLP. Both Ms. Fauver and Ms. Misher focus their practice on affordable housing and community development. They can be reached at Faegre & Benson LLP, 2200 Wells Fargo Center, 90 South 7th St., Minneapolis, MN 55402; by telephone at (800) 328-4393; by facsimile at (612) 336-3026; or via e-mail at sfauver@faegre.com and lmisher@faegre.com.*

# Landlord Indicted

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The indictment is the first criminal prosecution in the U.S. related to lead hazard warnings that are required under the Lead Hazard Reduction Act of 1992. The law requires landlords of pre-1978 residential properties to inform prospective tenants about known lead hazards.

Landlord David Nuyen owns and manages 15 low-income rental properties in the District of Columbia and Maryland. He had notice of actual lead-paint hazards at one of his apartment buildings. In September 1998, the U.S. Department of Housing and Urban Development (HUD) contacted Nuyen as part of a federal initiative to enforce the provision of the Lead Hazard Reduction Act that requires landlords to tell tenants, before they sign a lease, about the actual or potential hazards of lead-based paint. The law requires landlords to give tenants a pamphlet about lead hazards and how to minimize the dangers to children. It also directs landlords to document their compliance with the law by keeping tenants' signature on file, using a standard disclosure form.

The indictment charges that Nuyen gave HUD back-dated forms containing "false, fictitious and fraudulent statements," after he was unable to produce records demonstrating that he had complied

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