LIHC MONTHLY REPORT

A MONTHLY PUBLICATION OFFERING NEWS, OPINION, FEATURES AND COMMENTARY ON THE LOW-INCOME HOUSING TAX CREDIT INDUSTRY

September 2000, Volume XI, Issue IX, Published By Novogradac & Company LLP

Newly Released MOU Offers LIHC Industry Fair Housing Guidance

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The U.S. departments of the Treasury, Housing and Urban Development (HUD) and Justice (DOJ) entered into a Memorandum of Understanding (MOU) Aug. 11 to promote enhanced compliance with the Fair Housing Act (Act), 42 USC §3601 et seq., with respect to low-income housing tax credit (LIHC) properties. The MOU primarily focuses on technical assistance and training of all segments of the industry in order to make compliance a standard practice.

Treasury attorney Jack Malgeri stated the agencies' goals as follows:

"This agreement brings together the disparate functions of Treasury, HUD, Justice and the state agencies in a unified manner to enhance Fair Housing Act compliance. Beyond this operational streamlining, the MOU emphasizes a strong desire on the part of the federal government to work with syndicators, investors and developers to insure that tax credit properties are built and operated in a manner that conforms to the Fair Housing Act. A major component in the MOU is an educational and training effort to develop greater understanding among the major players in the program about the Fair Housing Act. Just as the housing industry understands and complies with income and rent requirements in the low-income housing tax credit program through a clear appreciation of the rules and regulations, we believe this agreement will develop a sound knowledge base that will foster greater self-regulation and compliance with the Fair Housing Act, and we want to work with the housing industry to make this happen. "

Background

The Act prohibits discrimination in housing because of race or color, national origin, religion, sex, familial status or disability. Compliance with the Act is required in order for a residential rental unit to be eligible for the LIHC.[1] Steve Rosenblatt is President of Spectrum Seminars, Inc., a company that provides trainings for state agencies, developers, architects and property managers, and performs compliance monitoring on behalf of state agencies with respect to fair housing and the LIHC. Based on his experience, Rosenblatt said he believes that the primary compliance issues relate to accessibility and elderly housing. For the most part, noncompliance, according to Rosenblatt, is unintentional, and arises as a result of a lack of understanding of the law. It is this problem that the MOU addresses by providing a framework for increased awareness throughout the LIHC industry with respect to fair housing.

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The MOU

1. Training and Technical Assistance. The MOU calls for HUD and the DOJ to provide training and technical assistance to the IRS concerning civil rights and discrimination matters relating to the LIHC program, such as accessibility and Section 8 vouchers. The IRS will also provide technical assistance and training to HUD and the DOJ with respect to the LIHC program.[2] The MOU provides for cooperation in identifying and removing unlawful barriers to occupancy by individuals holding Section 8 vouchers. HUD and Treasury will also cooperate in research concerning LIHC properties in general in order to identify compliance and other housing issues. On an annual basis, the agencies will review implementation of the MOU, and will hold meetings with other interested federal agencies to discuss current civil rights issues and methods to increase fair housing compliance.

HUD and the DOJ will make trainings available to state housing finance agencies, developers, property managers and syndicators, including training on inspecting for Act accessibility criteria. State housing finance agencies will be encouraged to invite HUD and the DOJ to provide training on civil rights issues at the annual national conference of the National Council of State Housing Agencies (NCSHA), a Washington, D.C.-based trade group that represents state housing finance agencies. State and local fair housing agencies will conduct similar trainings for the LIHC industry.

HUD is also developing a pilot program in one region to provide training and technical assistance to architects and others on the accessible design and construction requirements of the Act, and proposes expansion of this program to four regions in fiscal year 2001.

NCSHA Senior legislative and Policy Associate Jim Tassos believes that the MOU is "a very positive step in assuring compliance." Tassos added that he is "very pleased that the MOU contains such a strong focus on fair housing training, not only for the states, but for everyone in the industry."

HUD, the DOJ and the IRS will also cooperate in assisting the national associations of investment syndicators of LIHC properties to develop monitoring systems and promote compliance with the Act. Affordable Housing Investors Council President Paul Henley states, "The MOU is a great step forward. The investment community is proud to be a part of this initiative to insure that affordable housing is accessible to all low- and moderate income households."

Paul Woollard, Managing Director of the Tax Credit Investment Group at First Union Securities, said he supports the participation of the syndicators in the process since it will provide the agencies with feedback from those directly involved in the development of the LIHC properties. Jim Rieker, Executive Director of the Equity Fund of Nebraska, and President of the National Association of State and Local Equity Funds (NASLEF) asserts that fair housing compliance is "something we have to be very concerned about." He recommends the development of compliance checklists to assist participants in the industry in monitoring compliance with the

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Act. Lend Lease Real Estate Investments Principal Greg Judge commented that the MOU is particularly welcome for HOPE VI tax credit developments that are designed to create mixed-income communities.

2. Monitoring and Compliance. The MOU provides that the agencies will coordinate notification procedures in order to increase compliance. HUD and the DOJ will notify the appropriate state housing finance agency when any of the following has occurred in 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
4) a settlement agreement or consent decree entered into between HUD or the DOJ and the property owner.

State housing finance agencies will report this information to the IRS in accordance with the tax credit requirements.[3] The IRS will then send a letter notifying the property owners that final determinations of violations of the Act by HUD, a federal court or by a state or local fair housing agency, as well as a judgment enforcing the terms of a settlement agreement or consent decree, could result in the loss of tax credits.

HUD and the DOJ will provide the IRS and the appropriate state housing finance agency relevant information concerning the nature of the violation, any legal actions taken and proposed corrective actions. The MOU does not modify the agencies' obligations under the law and regulations. Novogradac & Company LLP Compliance Manager Jim Kroger, CPA, said that very few IRS Form 8823 noncompliance reports filed by state housing finance agencies relate to fair housing noncompliance.[4] The MOU notification procedures may result in increased filings of such reports. "The MOU is likely to generate a new level of awareness of the issues," Kroger said. Participants in the LIHC industry have concerns as to the practical implications of the potential increase in enforcement activities. The intent of the MOU, however, appears to be proactive, to increase compliance through education, and not primarily by enforcement.

Michael Levitt, Chairman of Michaels Development Company and Interstate Realty Management Company, a nationally recognized developer and property manager of LIHC properties, said he hopes that the MOU will promote consistency among the federal and state agencies in the interpretation and implementation of the Act as it applies to LIHC properties, as well as a greater understanding by the agencies of industry-specific issues. NASLEF's Rieker said he believes that the MOU should improve coordination of the application of the various federal rules and regulations to LIHC properties so that compliance or corrective measures do not adversely impact a project.

Conclusion

The MOU reflects the commitment of the Treasury, HUD and the DOJ to achieve a higher standard for compliance and accountability in the LIHC program with respect to fair housing, and to obtain the support and participation of each segment of the industry in this effort. The key to the achieving these goals is the education process outlined in the MOU. This process will require an investment of resources by each participant in the industry.

The MOU should be the beginning of a dialogue among the federal and state housing finance agencies and the LIHC industry on fair housing. It will be very interesting to see the results a few years down the road. ❖

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[1] Treas. Reg. §1.42-9 provides that a residential rental unit is not eligible for the LIHC if the unit is not for use by the general public. A unit is for use by the general public if the unit is rented in accordance with housing policy governing nondiscrimination, as evidenced by rules or regulations of HUD. Treas. Reg. §1.42-5(c) requires that the owner of an LIHC property certify each year to the state housing finance agency that all units in the project were for use by the general public.

[2] subject to the nondisclosure requirements of Section 6103 of the Code.

[3] See IRC § 42(m)(1)(B)(iii); Treas. Reg. §1.42-5(e), using Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance.

[4] Property Compliance Report, Novogradac & Company LLP, Sept. 1998.