NATIONAL LOW INCOME HOUSING COALITION

July 26, 2022

RE: Comments for FHFA Duty to Serve Listening Session: Preserving the Affordability of Low-Income Housing Tax Credit Properties – the Right of First Refusal and Qualified Contracts

The National Low Income Housing Coalition (NLIHC) welcomes the opportunity to submit comments to the Federal Housing Finance Agency (FHFA) about how Fannie Mae and Freddie Mac (i.e. the Enterprises) can further promote the preservation of Low-Income Housing Tax Credit (LIHTC) properties as part of their Duty to Serve obligations.

NLIHC is a national research and advocacy organization dedicated to achieving racially and socially equitable public policy that ensures people with the lowest incomes have quality homes that are accessible and affordable in communities of their choice. The Coalition's goals are to preserve existing federally assisted homes and housing resources, expand the supply of low-income housing, and establish housing stability as the primary purpose of federal low-income housing policy. NLIHC members include state and local affordable housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, faith-based organizations, public housing agencies, private developers and property owners, local and state government agencies, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry.

NLIHC has co-managed the National Housing Preservation Database (NHPD) with the Public and Affordable Housing Research Corporation (PAHRC) since 2012. The NHPD is the only de-duplicated address-level inventory of federally assisted rental housing in the U.S. Over 7,000 advocacy groups, local governments, government agencies, researchers, tenants, and affordable housing providers use the NHPD to identify, study, and preserve federally assisted rental housing. In recent years, NLIHC and PAHRC have produced several research reports using NHPD data to document emerging issues for LIHTC preservation.[i,ii]

<u>Why Does LIHTC Preservation Matter?</u>
The need is increasing for preservation resources to ensure the continued physical quality and affordability of the LIHTC stock. NLIHC and PAHRC's most recent estimates suggest that more than 100,000 LIHTC units could reach the end of their affordability restrictions by 2025.[iii] The qualified contract (QC) loophole is also an immediate threat to the continued affordability of LIHTC units in many states, as are growing legal challenges to nonprofit general partners' right of first refusal.

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Not all LIHTC properties face the same preservation risks. When considering investments in LIHTC properties, priority should be given to those that are at the highest risk of being lost from the affordable housing stock and would be the hardest to replace if they are lost. That requires further analysis of the risk factors associated with the loss of LIHTC units through both the QC process and the expiration of the extended affordability period.

A recent report by Freddie Mac finds that, after exiting the program and its affordability requirements, many LIHTC units experience only modest rent increases and continue to be lower-cost than comparable market-rate units. Former LIHTC units commonly remain affordable to households earning around 60% of the area median income (AMI), which is a typical maximum threshold permitted in the LIHTC program. However, as the authors indicate, the loss of affordability restrictions and conversion to market rate can result in substantial rent increases for deeply targeted LIHTC units, such as those targeted for households with incomes at 30% of AMI. Over half of all LIHTC households are extremely low-income and would likely struggle to absorb any rent increases without rental assistance.

When planning investments in LIHTC preservation, the Enterprises must consider not only the risk of loss from the subsidized stock and the difficulty of replacing units, but who is currently served by at-risk LIHTC properties.

Right of First Refusal

FHFA has rightly identified challenges to nonprofit general partners' right of first refusal as an emerging issue for LIHTC preservation. NLIHC has increasingly heard about this issue from its national network of state and local partners. While it is difficult to quantify the current scope of this issue, NLIHC strongly supports Freddie Mac and Fannie Mae's use of language in partnership agreements that unambiguously prevents ownership transfers to bad actors who have no commitment to affordable housing.

The Qualified Contract Loophole

The federal LIHTC statute contains a loophole permitting owners to submit a Qualified Contract (QC) after Year 14. If the state housing finance agency (HFA) is unable to find a buyer for the property at the QC price who will maintain the property as affordable for the extended use period, then the owner is permitted to phase out affordability restrictions over a period three years.

The qualified contract (QC) loophole is an acute concern for LIHTC preservation. While some states have taken measures to close this loophole, others have not, and some LIHTC owners are making strategic use of this provision to prematurely exit affordability requirements.

NLIHC and PAHRC recently conducted an historical comparison of HUD's LIHTC property database to estimate that over 100,000 units have been lost to the QC loophole since 1990.[iv] The National Council of State Housing Agencies (NCSHA) cites similar estimates.[v]

There is a clear need to close the QC loophole in the federal LIHTC statute. A provision for this, along with a revision of QC sale price formula, was recently included in the Build Back Better Act. However, short of a change to federal law, NLIHC believes there are at least two steps FHFA can take on its own to immediately curtail owners' use of the QC option:

- FHFA should direct or, at a minimum, encourage Fannie and Freddie to include riders in their loan agreements with LIHTC owners that stipulate they may not exercise the qualified contract option for the duration of the loan term.
- FHFA should direct Freddie Mac and Fannie Mae to require a waiver of the qualified contract option as a condition of receiving equity investments through any of its syndicators.

Conclusion

LIHTC properties are home to some of the lowest-income renters. Certain features of the LIHTC program, however, create inherent preservation risks that threaten the housing stability of these renters.

NLIHC strongly supports any further actions that FHFA and, by extension, Fannie Mae and Freddie Mac can take to support the preservation of LIHTC properties. NLIHC believes the actions outlined above would help the Enterprises better promote affordable housing preservation under the Duty to Serve program.

If there are any questions about these comments, please contact Andrew Aurand at aaurand@nlihc.org or 202.662.1530 x245.

Sincerely,

Diane Yentel

Diane Yentel
President and CEO, National Low Income Housing Coalition

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[i] Aurand, A., Stater, K., Emmanuel, D., and McElwain, K. (2018). Balancing priorities: Preservation and neighborhood opportunity in the Low-Income Housing Tax Credit Program Beyond Year 30. Retrieved from https://nlihc.org/sites/default/files/Balancing-Priorities.pdf.
[ii] Aurand, A., Stater, K., McElwain, K., and Emmanuel, D. (2021). Picture of preservation 2021. Retrieved from https://preservationdatabase.org/wp-content/uploads/2021/10/NHPD_2021Report.pdf.
[iii] *Ibid.*
[iv] *Ibid.*
[v] NCSHA. (2021). Closing the qualified contract loophole. Retrieved from https://www.ncsha.org/wp-content/uploads/Qualified-Contract-Background.pdf.