

May 15, 2012

Dr. Michael Stegman
Counselor to the Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Dr. Stegman:

We are writing, on behalf of the undersigned civil rights and fair housing organizations, to follow up on earlier correspondence with Michael Barr regarding the absence of fair housing guidance and regulations governing Department of the Treasury housing programs, particularly the Low Income Housing Tax Credit (LIHTC).¹ As we have noted, such regulations and guidance are necessary to achieve compliance with statutory mandates, including the Fair Housing Act's requirement that all federal agencies administer their programs and activities relating to housing and urban development "affirmatively to further" fair housing (AFFH). 42 USC § 3608 (d). We are writing again to explain in more detail why the Treasury Department is required to adopt regulations and other fair housing guidance. We hope this analysis will be helpful in informing Treasury's efforts to fully meet its civil rights obligations, and we would be happy to meet to explore these issues further.

The Fair Housing Act requires that federal agencies establish an "institutionalized method" to meet the fair housing obligations of integration and nondiscrimination, *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir.1970), and evaluate the effect of their programs in furthering those obligations, *NAACP v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987). Prompted by lawsuits over the years, the Department of Housing and Urban Development has responded to those mandates by formulating civil rights regulations applicable to project selection and site selection in its housing programs: as one respected commentator has noted, HUD's regulations "are not discretionary agency interpretations, but restatements of the clear holdings of the federal courts interpreting the duty to 'affirmatively further fair housing.'"² These regulations cover the basic elements of fair housing program administration – site selection, tenant selection, affirmative fair housing marketing, design and accessibility standards, and monitoring and enforcement procedures.³ There is nothing remotely similar governing LIHTC administration.

The responsibility to establish Fair Housing Act regulations is not limited to HUD. The Fair Housing Act explicitly extends AFFH obligations to all federal agencies involved in

¹ Letter to Asst. Sec. Michael Barr, *Re: Title VI, Section 504 and Title VIII regulations and guidance at the Department of Treasury and the IRS, with particular attention to the Low Income Housing Tax Credit* (Sept. 26, 2010), available at http://www.prrac.org/pdf/civil_rights_letter_to_Michael_Barr_10-26-10.pdf.

² See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 Vand. L. Rev. 1747, 1793 (2005).

³ In addition, HUD adopted project selection criteria applicable to its Section 8 New Construction and Substantial Rehabilitation programs, in which HUD provided subsidies to owners of new and rehabilitated rental properties (those programs no longer allocate new funds).

housing- and development-related programs, as does Executive Order 12892, 59 Fed. Reg. 2939 (Jan. 17, 1994), which clarifies the statutory duties placed on Treasury. Importantly, the scope of AFFH is not limited to programs receiving “federal financial assistance” (in contrast to Title VI of the 1964 Civil Rights Act). Rather, both the statute and the Executive Order make clear that it applies to all programs and activities “relating to housing and urban development” that are administered by federal agencies. We will address the Treasury Department’s responsibilities in more detail below.

The Treasury Department is Required to Affirmatively Further Fair Housing in All Housing-Related Programs and Activities

The “AFFH” provision of the Fair Housing Act, 42 USC § 3608(d), provides 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.

Additionally, Executive Order 12892 interprets these responsibilities as requiring all agencies with housing-related programs or activities to engage in oversight, enforcement, and rulemaking. The order provides that:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agencies having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of the Act...the phrase programs and activities shall include programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions). Exec. Order No. 12892 §§ 1-101,102.

While the “primary authority” for AFFH is vested in HUD, all agencies bear express responsibility for AFFH in the programs they operate, administer, or undertake. The Executive Order provides that the “head of each executive agency is responsible for ensuring” AFFH in his or her “programs relating to housing and urban development,” in addition to his or her obligation to cooperate with HUD. § 2-202. Specifically, each agency head “shall take appropriate steps to 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 and urban development shall comply with this order,” § 2-203; and “shall be responsible for enforcement of this order,” § 5-501.

Furthermore, the Executive Order’s AFFH oversight and enforcement duties are placed directly on all agencies and not contingent on action by HUD. The Order makes Treasury’s responsibilities in this respect clear, providing that:

The head of each executive agency shall take appropriate steps to 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 and urban development shall comply with this order, § 2-203; and

If any executive agency concludes that any person or entity (including any State or local public agency) applying for or participating in, or supervised or regulated under, a program or activity relating to housing and urban development has not complied with this order or any applicable rule, regulation, or procedure issued or adopted pursuant to this order, it shall endeavor to end and remedy such violation.... § 5-502.

The federal courts have confirmed that the AFFH obligation extends beyond HUD and is shared by all agencies with a role in housing and development. Treasury, like HUD, must take the affirmative measures required by the statute. *See Jorman v. Veterans Admin.*, 579 F. Supp. 1407 (N.D.Ill.1984) (stating that 3608 places a “virtually identical fair housing duty” on the VA as on HUD, and the agency’s “anti-discrimination efforts cannot alone meet its Section 3608(c) obligations [with regard to its home mortgage loan guaranty service] if its failure to consider its effects on neighborhood integration is itself a violation of that Section”); *Jones v. Office of Comptroller of the Currency*, 983 F. Supp. 197, 204 (D.D.C. 1997) (applying § 3608(d) and caselaw developed under 3608(e)(5) to the OCC); *Albany Apartments Tenants Assoc. v. Veneman*, No. Civ. 01-1976, 2003 WL 1571576 at *10-11 (D. Minn. 2003) (applying AFFH claim to Department of Agriculture program); see also *Otero v. New York City Hous. Auth.* 484 F.2d 1122, 1133 (2d Cir. 1973) (noting that § 3608(e)(5)’s AFFH integration duty extends through the Secretary of HUD to “other agencies administering federally-assisted housing programs,” in that case public housing authorities).

The broad language of § 3608(d) and the Executive Order – encompassing all agency “programs and activities *relating to* housing and urban development” (emphasis added) - reinforces this section’s applicability to the LIHTC program. As the federal government’s most significant financing program for the development and rehabilitation of affordable housing, LIHTC certainly falls within the scope of § 3608. This is fully consistent with judicial application to other federal agencies.

The Treasury Department Must Adopt Fair Housing Guidance and Regulations

Treasury’s failure to provide clear AFFH guidance gives the misleading impression to Treasury Department grantees that federal fair housing imperatives, while well-established in HUD programs, may be disregarded within the LIHTC context. The failure to provide civil rights oversight, and to ensure that the LIHTC program operates affirmatively to promote fair housing, is a serious violation of Treasury’s obligations under the Fair Housing Act and the Executive Order.

Because (as noted above) the substantive AFFH requirements apply across agencies, the Fair Housing Act caselaw addressing HUD's original failure to adopt fair housing regulations instructs Treasury as well. The foundational case *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970), directed HUD to formulate site selection standards, upon finding that HUD lacked procedures for assessing a project's impact on racial concentration. That decision held that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts."⁴ See also *NAACP v. HUD*, 817 F.2d 149, 155-57 (1st Cir. 1987) (holding that the agency must consider the effect of its actions and funding decisions "on the racial and socio-economic composition of the surrounding area," and holding HUD liable for its "failure, over time, to take seriously its minimal Title VIII obligation to evaluate alternative courses of action in light of their effect on open housing"); *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835 (N.D. Ohio 1989) (HUD liable for failure to AFFH where continued to provide funds despite awareness of discriminatory effects of housing authority's practices).

As interpreted by the courts, the Fair Housing Act requires that Treasury meet its AFFH obligations to advance the purposes of the Fair Housing Act and to foster "truly integrated and balanced living patterns," *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong. Rec. 3422 (statement of Sen. Mondale)). As an agency administering housing and development programs, Treasury has "more than simply a duty to refrain from discrimination;" rather the Act requires that housing programs "assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." *NAACP v. HUD*, 817 F.2d at 155; see also, e.g., *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 642 (D.R.I. 1991). Additionally, agencies administering housing programs are required to consider regional (not merely local) approaches to AFFH and integration. See *Thompson v. HUD*, 348 F.Supp.2d 398, 408 (D.Md. 2005).⁵

As the fair housing caselaw, statute, and executive order indicate, Treasury is required to act in accordance with its AFFH duties and implement an effective framework for civil rights compliance: in other words, meaningful guidance and enforcement as to where the housing is located, who lives there, how it is marketed, designed, and maintained, and what type of program oversight exists to ensure ongoing fair housing compliance. The current, minimalist IRS rule merely incorporates by reference HUD "nondiscrimination"

⁴ See Orfield, *Racial Integration and Community Revitalization* at 1772-73, discussing HUD's siting regulations as a "regulatory codification" of the decisions in *Shannon* and *Gautreaux v. Chicago Hous. Auth.*, 503 F. 2d 930 (7th Cir. 1974); Vernarelli, Michael, *Where Should HUD Locate Assisted Housing? The Evolution of Fair Housing Policy*, in HOUSING DESEGREGATION AND FEDERAL POLICY, John Goering, ed.; see also *Business Ass'n of University City v. Landrieu*, 660 F.2d 867, 868 (3d Cir. 1981) ("in light of *Shannon* and the subsequent passage by Congress of the Housing and Community Development Act of 1974 ... HUD has since promulgated regulations requiring its officials to consider, prior to the approval of a new low income housing project, the impact of the project on the concentration of racial and low income persons").

⁵ See also Florence Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake Forest L. Rev. 333 (2007); *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 932, 938-39 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976) (requiring metropolitan-area remedy for intentional perpetuation of segregation).

regulations, providing that units must be “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.” 26 C.F.R. § 1.42-9. This provision does not provide any reasonable guidance to state and local affordable housing providers about their AFFH obligations, other than narrowly stating the obvious – that they are not permitted to discriminate in *tenant* selection (ie., who lives there).

AFFH is not a discretionary obligation. *See Shannon v. HUD*, 436 F.2d at 819 (agency “discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing...and in favor of fair housing”); *NAACP v. HUD*, 817 F.2d at 158 (failure to meet AFFH duty reviewable under Administrative Procedures Act where “the court must decide whether, over time, HUD's pattern of activity reveals a failure to live up to its obligation”); *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637 (D.R.I.1991) (compliance with the Fair Housing Act’s AFFH requirement not discretionary); *Jaimes v. Toledo Metro Hous. Auth.*, 715 F. Supp. 835, 839 (N.D. Ohio 1989) (accord); *see also Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (upholding action against HEW where agency was “actively supplying segregated institutions with federal funds, contrary to the expressed purposes of Congress” in Title VI). While Treasury delays in implementing its AFFH obligations within the LIHTC program, those obligations are open to be shaped through judicial oversight and interpretation, as with other aspects of fair housing compliance (and without the benefit of Treasury’s expertise or national consistency). *See Inclusive Communities Project v. Tex. Dep’t of Hous. & Cmty. Affairs*, Docket No. 3:08–CV–0546–D, 2012 WL 953696 (N.D. Tex. Mar 20, 2012) (LIHTC allocations violated Fair Housing Act prohibition against disparate impact discrimination).

Local and state housing agencies receive no appropriate direction from Treasury as to what AFFH should entail in the LIHTC context. This vacuum creates claimed uncertainty regarding legal obligations and, due to the absence of AFFH guidance or monitoring, permits the widespread disregard of fair housing mandates in the LIHTC program, which has just led to more litigation. Fair Housing Act caselaw has long established that the AFFH duty binds state and local entities, and the Treasury Department needs to make this clear, and give state administrators of the program basic uniform rules to follow. *See, e.g., Otero*, 484 F.2d at 1133; *Reece v. Miami-Dade Cty.*, 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) (the AFFH requirement “imposes a binding obligation on the states”), *aff’d* 77 Fed. Appx. 506 (11th Cir. 2003); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 22, 73 (D. Mass. 2002) (“when viewed in the larger context of Title VIII, the legislative history, and the case law, there is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary [of HUD]”).

The need for LIHTC civil rights regulations was apparent, for example, in the first court decision addressing the intersection of the LIHTC program and the AFFH obligation, *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004), *cert. denied*, 861 A.2d 846 (N.J. 2004). That case held that the state housing credit agency indeed had a “duty to administer its housing

and financing programs in a manner affirmatively to further the policies of Title VIII.” 848 A.2d 1, 10. However, the state court also reasoned that the local agency should look to federal regulations to determine the content of that duty; and because “neither HUD nor the I.R.S. has expressly mandated that state agencies incorporate [HUD’s site selection regulations] into the LIHTC program,” the court interpreted the “absence of such a directive” as an indication that the site selection criteria need not inform the agency’s LIHTC plan. *Id.* at 14. In the absence of clear federal agency direction regarding the application of AFFH (and relevant HUD rules) to the LIHTC program, the court set its own state statutory priorities above the AFFH integration requirement, even while acknowledging the requirement was applicable. *Id.* at 15.

AFFH Regulations or Guidance Must Institutionalize Meaningful Standards

The New Jersey case is just one example illustrating how the Treasury regulation incorporating HUD “nondiscrimination” regulations, 26 C.F.R. § 1.42-9, is inadequate to fulfill Treasury’s Fair Housing Act obligations.⁶ The current regulation fails to account for the affirmative responsibilities – held to extend beyond mere non-discrimination – that bind all housing-related programs, and does not provide for an “institutionalized method” applying the those responsibilities in the LIHTC context. 26 C.F.R. § 1.42-9 fails to clarify the full scope of obligations that the Fair Housing Act attaches to the program, and does not provide for any fair housing accountability or oversight on Treasury’s part.

In contrast to HUD’s regulatory framework, Treasury’s does not account for basic fair housing program administration standards. These include guidelines for site selection, affirmative marketing,⁷ tenant selection, design and accessibility standards and other program incentives to promote racial integration.⁸ These are the minimum requirements for an effective AFFH regulation. In addition, it is important for Treasury to provide guidance on program aspects such as mechanisms to enforce the housing voucher discrimination rule,⁹ guidance on Qualified Allocation Plan design,¹⁰ and standards for

⁶ See Florence Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. Miami L. Rev. 1011, 1029-32 (1998).

⁷ Note that while the Internal Revenue Service’s guide to LIHTC noncompliance reporting contains a brief provision on marketing, it does not address affirmative outreach (unlike the HUD rule, 24 CFR § 200.610) and so fails to expand tenant choice or promote integration. See *Guide for Completing Form 8823: Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition* (2011) at 12-2.

⁸ Cf. HUD regulations at 24 CFR § 983.57 (site selection); 24 CFR § 200.610 (affirmative marketing); 24 CFR § 886.132 (tenant selection). While HUD’s regulations illustrate the scope of the AFFH mandate (and are a useful reference), Treasury has the opportunity to build on the experience and data that has emerged from the implementation of HUD’s rules, and could improve upon those rules in its own programs. See, e.g., Philip Tegeler et al., *Opportunity and Location in Federally Subsidized Housing: A New Look at HUD’s Site & Neighborhood Standards As Applied to the Low Income Housing Tax Credit* (Oct. 2011), available at <http://www.prrac.org/pdf/OpportunityandLocationOctober2011.pdf>.

⁹ In addition to addressing source-of-income (voucher) discrimination through individual enforcement procedures, the Internal Revenue Service should amend 26 C.F.R. § 1.42-9 to clarify that the requirement that “rental units be for use by the general public” prohibits voucher discrimination; see 26 U.S.C. § 42(h)(6)(B)(iv)(prohibiting refusal to lease because of status of the applicant as a voucher holder).

program reporting, monitoring, enforcement and oversight. These features are needed in order to provide for nondiscriminatory, integrative housing options—and to ensure those options are known and accessible to beneficiaries.

The results of the current absence of AFFH guidance is evident in communities across the country, and have been well documented.¹¹ As described here, Treasury’s persistent failure to set standards for and supervise the effects of its program runs counter to Congressional mandate. Rather than furthering fair housing, the LIHTC program reinforces the same segregative patterns the Fair Housing Act was intended to remedy.

Regulations Would Best Implement Treasury’s AFFH Obligations

The authorities discussed above require Treasury to meet its AFFH obligations through meaningful, institutionalized standards and oversight. Regulations, rather than sub-regulatory guidance, are the most effective way to satisfy these duties. HUD has responded to judicial mandate by adopting AFFH regulations, and Treasury should follow suit. In addition, Executive Order 12892 specifically directs that regulations be issued. These reflect informed determinations that regulations are the most effective administrative means of fulfilling the AFFH mandate.

The Executive Order provides that, following HUD’s issuance of coordinating regulations, agency heads have a specific obligation to themselves issue regulations: “the head of each executive agency shall publish proposed regulations providing for the administration of programs and activities relating to housing and urban development in a manner affirmatively to further fair housing, consistent with the Secretary of Housing and Urban Development’s regulations...As soon as practicable thereafter, each executive agency shall issue its final regulations.” §§ 4-401, 402. Despite HUD’s delay in acting upon its duty to “coordinate,”¹² the articulation of the need for agency-specific regulations remains, and HUD’s existing fair housing regulations already provide ample examples for the Department to follow.

As a practical matter, regulations are a preferable means of institutionalizing the AFFH requirements because of their legal clarity and weight. The notice and comment procedures that shape agency rulemaking would provide Treasury with fully-considered

¹⁰ See, e.g., *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program*, PRRAC & Lawyers’ Committee for Civil Rights Under Law (2008), available at <http://www.prrac.org/pdf/2008-Best-Practices-final.pdf>.

¹¹ See, e.g., *id.*; Casey Dawkins, *Exploring the Spatial Distribution of Low Income Housing Tax Credit Properties* (for HUD Office of Policy Development & Research) (February 2011), available at http://www.prrac.org/pdf/dawkins_LIHTC%20spatial-distribution_081111.pdf.

¹² While this section of the Executive Order directs that Treasury’s regulations be issued “within 180 days of the publication of final regulations by the Secretary of Housing and Urban Development,” Treasury’s substantive AFFH obligations are not contingent on action by HUD; this section of the Executive Order addresses the preferred *mode* of agencies’ AFFH compliance, that is, regulations rather than sub-regulatory guidance. The AFFH mandate is placed directly upon Treasury by Congress, and reinforced by the full set of provisions in the Executive Order.

regulations that would benefit from future deference by the courts. This would also provide greater, longer-term predictability for program participants.

Furthermore, the issuance of AFFH regulations is consonant with the responsibilities placed on the Secretary of the Treasury by the Internal Revenue Code, which governs the LIHTC program and states that the Secretary “shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section.” 26 U.S.C.A. § 42(n). Regulations are the appropriate measure to ensure that the LIHTC program is conducted in compliance with applicable civil rights laws, including AFFH.¹³

Thank you for the opportunity to present this analysis of Treasury’s AFFH obligations. We would welcome further discussion about this important issue.

Sincerely,



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Megan Haberle
Poverty & Race Research Action Council

Lawyers’ Committee for Civil Rights Under Law

NAACP Legal Defense and Educational Fund, Inc.

National Fair Housing Alliance

The Leadership Conference on Civil and Human Rights

cc: Assistant Secretary John Trasviña, U.S. Dept of Housing & Urban Development
Assistant Attorney General Thomas Perez, U.S. Department of Justice

¹³ See Petition for Rulemaking Involving 26 CFR § 1.42- 17 Qualified Allocation Plan, on behalf of Inclusive Communities Project (filed with the Commissioner of Internal Revenue, March 12, 2008).