

June 29, 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 appreciate the Department's continuing interest in hearing the views of advocates on some of the important civil rights issues involving Treasury Department housing programs. We are writing again today to express our concern over delays in the issuance of Title VI regulations governing the Low Income Housing Tax Credit (LIHTC). We have addressed this issue with the Department on several recent occasions, but we are concerned that if action is not taken soon, we may lose the opportunity to move this issue forward during the current term.

This letter addresses two discrete points: First, we will restate a point that we hope by now is obvious – that the LIHTC constitutes “federal financial assistance” for purposes of Title VI. Second, we will address the important benefits of protecting the civil rights of current and future residents of LIHTC developments.

Federal Financial Assistance

Federal agencies are required by Title VI of the Civil Rights Act of 1964 to adopt regulations barring discrimination by recipients of federal financial assistance. “Federal financial assistance” as defined by the Title VI is more than a direct grant or loan of money. It has long been established by the U.S. Supreme Court that non-monetary forms of assistance are also federal financial assistance. *See, e.g., U.S. Dept. of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986)*. The basic teaching of *Paralyzed Veterans* is that any determination of whether Section 504, Title VI and similar laws is triggered must start with the underlying programmatic statute. The obligation to comply with civil rights laws applicable to federal financial assistance is a “quid pro quo” for receipt of federal support. “An entity receives financial assistance when it receives a subsidy.” If the “statute extends something other than money, then the recipient is the entity that receives whatever thing of value is extended by the statute.” Department of Justice and other agency regulations emphasize this point. Federal financial assistance includes “[a]ny Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.” *See, e.g., 28 C.F.R. §42.102(c)* (Department of Justice Title VI rules).

The Low-Income Housing Tax Credit program distributes a limited supply of tax credits to the states based on population. State housing credit agencies are required to reserve those credits to specific projects based upon statutorily mandated obligations to provide a discrete and crucial form of assistance to low-income beneficiaries – low cost, rent restricted housing for a specific period of years. Credits must be allocated based on congressionally determined priorities. They are reserved to developers at no cost. They represent a substantial and quite tangible subsidy; credits obtained at no cost to the developer are sold to investors in a competitive market in

exchange for a significant capital contribution of cash. Low Income Housing Tax Credits represent a federal subsidy because they are deliberately designed to provide a “thing of value.”

The fact that awards of LIHTC eventually result in tax advantages to equity investors does not change this calculus. Indeed, one of the few courts to consider the issue of when and how tax benefits trigger Title VI and similar laws drew a careful distinction between tax benefits that provide a subsidy to an organization that has the characteristics of government approval via discrete public purposes and other aspects of the Internal Revenue Code that are designed merely to encourage select forms of conduct. *See, McGlotten v. Connally*, 338 F. Supp. 448 (D.C. Cir. 1972). To state once again the obvious, LIHTC are allocated to states and reserved to developers to provide a capital subsidy and to carry out the crucial public purpose of constructing low-cost, income restricted affordable housing.¹ The huge financial benefits distributed by the LIHTC program to states and to developers and owners clearly constitute federal financial assistance, and it would be inappropriate to exempt these recipients from the reach of Title VI.

The societal benefits of extending Title VI protections to the LIHTC program

The Low Income Housing Tax Credit program is the largest federal low income housing development program, with 1,539,619 units placed in service between 1995 and 2009.² The program generates over 100,000 housing units per year.³ Approximately 64% of LIHTC units are designed for families with children,⁴ and a substantial proportion of these families are non-white.

The adoption of Title VI regulations for the LIHTC program will protect millions of current residents from discrimination, but even more important, will ensure that new applicants to the program have equal access to program benefits, and expanded access to non-segregated communities and high performing schools. These rules would ensure that LIHTC residents and applicants have the same protections that HUD residents and applicants have – particularly in the areas of site selection, affirmative marketing, tenant selection, and language access.

A recent study of LIHTC housing in New York City found that overall, LIHTC family developments are zoned to lower performing elementary schools than other types of rental

¹ *McGlotten* involved the application of Title VI to racially segregated membership clubs with charitable status under Section 501(c) of the pre-1986 Internal Revenue Code. In finding that the charitable designation was form of federal financial assistance, the court distinguished the subsidy provided by Section 501(c) from accelerated depreciation provisions in the Internal Revenue Code that were intended to facilitate the construction of low-income housing under what was then 26 U.S.C. §167. Section 167 was repealed and replaced with the LIHTC program in the enactment of the Internal Revenue Code of 1986. The legislative history of Section 42 indicates that Congress viewed Section 167 as wasteful and inefficient because, among other reasons, there was no government oversight of the housing created through Section 167, it did not adequately target affordable units to low-income households, and it provided little meaningful rent regulation and affordability. As a replacement for Section 167, the LIHTC program created by Section 42 provides for limited benefits delivered through a carefully targeted and highly regulated federally administered program that provides a tangible subsidy of enormous monetary value for a specific public purpose. The distinction drawn by the *McGlotten* court between tax benefits that provide a subsidy and other tax advantages supports the conclusion that LIHTC are a form of federal financial assistance triggering Title VI and similar laws.

² See HUD Office of Policy Development & Research, *New Low Income Housing Tax Credit Data Available*, Table 2, at <http://www.huduser.org/portal/datasets/lihtc/topical9509.pdf>.

³ *Id.* at 7.

⁴ *Id.*, Table 2 (percentage of units with two or more bedrooms).

housing, including housing occupied by other low income families.⁵ We understand that these same patterns exist in other large metro areas, with wide inconsistencies in siting outcomes among states.⁶ Helping more low income children gain access to high performing, less segregated schools would be a huge benefit that would continue to return dividends over several generations.⁷ Civil rights rules for the LIHTC program would also guarantee that low income families of color are not unfairly disadvantaged by local policies and customs (such as local “residency preferences” and failure to do affirmative outreach to communities of color) that have the effect of excluding a disproportionate number of African American and Latino families from housing in higher opportunity communities.

The adoption of Title VI regulations for the Low Income Housing Tax Credit program is a step that is long overdue. These basic civil rights regulations are legally required, and they will bring tangible benefits to millions of low income families and children. We urge the Department to move quickly to implement these rules.

Respectfully submitted,

The Leadership Conference on Civil and Human Rights

NAACP Legal Defense and Educational Fund, Inc.

National Fair Housing Alliance

Lawyers’ Committee for Civil Rights Under Law

Poverty & Race Research Action Council

NAACP

National Council of La Raza

National Urban League

Bazon Center for Mental Health Law

Institute on Race & Poverty at the University of Minnesota Law School

Charles Hamilton Houston Institute for Race and Justice at Harvard Law School

⁵ See Ingrid Gould Ellen & Keren Mertens Horn, “Do Households With Housing Assistance Have Access to High Quality Public Schools? Evidence From New York City,” in *Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration* (October 2011), available at <http://prprac.org/pdf/HousingEducationReport-October2011.pdf>.

⁶ See Jill Khadduri, Larry Buron & Carissa Climaco, *Are States Using the Low Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* (Abt Associates, July 2006), available at http://www.prrac.org/pdf/LIHTC_report_2006.pdf.

⁷ On the benefits of racial and economically integrated schools, see generally the “Research Briefs” published by the National Coalition on School Diversity, available at www.school-diversity.org. See also Heather Schwartz, “Housing Policy is School Policy – Recent Research in Montgomery County,” in *Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration* (October 2011), available at <http://prprac.org/pdf/HousingEducationReport-October2011.pdf>.