

October 26, 2010

Michael S. Barr
Assistant Secretary for Financial Institutions, Domestic Finance
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

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

Dear Assistant Secretary Barr:

We are writing as representatives of a coalition of civil rights and fair housing advocates to express our concerns about the continuing absence of civil rights regulations governing Department of Treasury programs that fund the production of affordable housing, including the Low Income Housing Tax Credit program (LIHTC), the Capital Magnet Fund (CMF), and the so-called Section 1602 program of Payments in Lieu of Low-Income Housing Tax Credits.

Recipients of assistance under these programs, including state housing credit agencies and owners of assisted housing developments, are subject to the Fair Housing Act (also known as Title VIII) and civil rights laws that prohibit discrimination in housing programs and activities receiving federal financial assistance, including Title VI of the 1964 Civil Rights Act and Section 504 of the 1973 Rehabilitation Act. In the administration of the programs, the Department (responsible for the Section 1602 program), the Internal Revenue Service (responsible for administration of the LIHTC program), and the Community Development Financial Institutions Fund (CDFI) (responsible for CMF) must carry out the additional obligation to affirmatively further the purposes of the Fair Housing Act as mandated by 42 U.S.C. §3608(d).

The Department, the IRS, and CDFI maintain no Title VI rules and no rules implementing the duty to further fair housing. This letter outlines our concerns about issues of discrimination and racial segregation in the LIHTC, Section 1602, and CMF programs resulting from the lack of meaningful civil rights regulations. Because these issues have been brought to light in recent years by litigation, the letter briefly discusses the legal basis for the regulations and the necessary scope of such regulations. We would also like to request a meeting to present our concerns in more detail.

Discrimination and Segregation in Treasury Department Housing Programs.

As you know, the LIHTC program and the companion Section 1602 program remain the most significant sources of low-income housing production in the country. CMF is new with the enactment of Housing and Economic Recovery Act of 2008. The \$80 million in awards made earlier this month are required by statute to leverage 10 times that amount of assistance for housing and economic development activities (i.e., \$800 million). Consequently, CMF is expected to become another one of the most important national

resources for financing affordable housing. It is our expectation that a significant proportion of CMF leveraging will derive from allocations of LIHTC by state housing credit agencies.

There is a very long and well documented history of the use of Federal housing resources to create and perpetuate racial segregation in assisted housing. That same history is now repeated in the LIHTC program. Among the many consequences of these policies is the fact that a significant portion of LIHTC assisted housing is located in segregated areas of high poverty, isolated from good schools, access to jobs, and public services.¹ The combination of these conditions and the lack of Departmental leadership in issuing meaningful civil rights rules have led to litigation across the nation, including cases in South Dakota, New Jersey, and Connecticut. Most recently, a federal district court in Dallas ruled that a civil rights organization proved a *prima facie* case of deliberate acts of racial segregation and discrimination in the tax credit allocation practices of the Texas Department of Housing and Community Affairs.²

Federal Financial Assistance, Title VI and Section 504

Title VI and Section 504 explicitly direct all federal agencies to adopt regulations barring discrimination and segregation based on race and disability in programs of federal financial assistance (and an administrative complaint process to be followed in cases where discrimination is alleged).³ The Department of Justice is charged with the responsibility of coordinating agency compliance with this mandate by executive order.⁴ Coordinating regulations issued by the Department of Justice to be used by federal agencies outlaw exclusion, delay, and denial of participation in federally assisted activities based on race and disability. They prohibit both deliberate acts of discrimination and actions that have the effect of discrimination. The rules also prohibit actions such as funding and site selection practices that have a segregative purpose or effect. To our knowledge, neither the Department, the Service, nor CDFI have adopted

¹ Research documenting the extent of racial segregation and concentration of LIHTC units in high poverty locations is in, among other studies, *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, Inc., July 28, 2006) and *Assessment of the Economic and Social Characteristics of LIHTC Residents and Neighborhoods* (Abt Associates, Inc., February 28, 2000). For additional research, see, e.g., Callison, William, "Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit", 19 *S. Cal. J. Law & Social Justice* 213 (Spring 2010); Orfield, Myron, "Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit," 58 *Vand. L. Rev.* 1747 (Nov. 2005); Roisman, Florence, "Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws," 52 *Miami L. Rev.* 1011 (1998); *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program* (PRRAC and Lawyers Committee for Civil Rights, 2008) (www.prrac.org/LIHTC.php).

² *Inclusive Communities Project v. Texas Dept. of Housing and Community Affairs*, 2010 WL 3766714 (N.D. Tex., September 28, 2010).

³ See, 42 U.S.C. §200d-1 (Title VI); 29 U.S.C. §794 (Section 504).

⁴ Executive Order 12250 (Leadership and Coordination of Nondiscrimination Laws)

rules, policies, or procedures complying with the rulemaking mandate of Title VI and Section 504 for recipients of assistance under the programs they administer.⁵

There can be no argument that the Department’s housing programs are subject to Title VI and Section 504. The CMF authorizing statute says “For purposes of the application of Federal civil rights laws, all assistance provided using amounts in the Capital Magnet Fund shall be considered Federal financial assistance.”⁶ Section 1602 funds are a form of cash assistance supplied by the Department to state housing credit agencies, which in turn is awarded to owners of tax credit projects. LIHTC themselves are also federal financial assistance. The enabling statute, Section 42 of the Internal Revenue Code, allocates credits equal to a specified financial value (currently the lesser of \$2 million or \$1.75 multiplied by the state’s population) to state credit agencies within an annual housing credit ceiling. State agencies then grant credits to project owners who sell them to raise capital to pay for construction costs. Low Income Housing Tax Credits are a “thing of value... extended by the grant statute” and are thus governed by Title VI and Section 504.⁷

It is unclear to us why the Treasury Department and the IRS have delayed more than 40 years in the adoption of Title VI regulations, but there is no reason to delay further. All federal programs that constitute federal financial assistance that are administered by Treasury would fall under the Title VI and §504 obligation – including the Low Income Housing Tax Credit program.

Affirmatively Furthering Fair Housing and Title VIII regulations.

Under the Fair Housing Act, the duty to affirmatively further fair housing extends not just to HUD programs but to “programs and activities related to housing and urban development” undertaken by “all executive departments and agencies.” As interpreted by judicial decisions, the obligation to further fair housing requires federal agencies to assure that non-federal entities under their supervision do not engage in acts and omissions that result in or have the effect of discrimination or segregation. It means that federal agencies must take steps to understand the civil rights impact of funding and other

⁵ We are aware of rules codified in 31 C.F.R. Part 17, regarding compliance with Section 504 in the activities of the Treasury Department, as well as rules codified in 31 C.F.R. Part 28, regarding compliance with the gender discrimination requirements of Title IX in education programs receiving Treasury Department assistance. Our research has not identified any Section 504 recipient rules or Title VI rules.

⁶ 12 U.S.C. §4569(d).

⁷ *U.S. Dep’t. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, n. 11 (1986). The few courts that examine this issue within a tax context distinguish between deductions generally available to taxpayers, and tax benefits that provide direct subsidies in order to carry out regulated public purposes. *See, e.g., McGlotten v. Connally*, 338 F. Supp. 448 (D.C. D.C., 1972) (deduction for accelerated depreciation available to low-income housing project is not federal financial assistance). The deduction at issue in *McGlotten* was repealed in the Internal Revenue Code of 1986 in favor of the current scheme of allocating a specific dollar volume of housing tax credits to state agencies for reallocation to developers of LIHTC properties.

decisions. And it requires federal agencies to act affirmatively so that over time, conditions of segregation are dismantled and truly open housing markets are created.⁸

To date, the only step taken in any Departmental housing program related to the duty to further fair housing is the so-called “general public use” rule at work in the LIHTC program. The rule imposes penalties for acts of discrimination against individual renters of tax credit units.⁹ It fails to address the Department and the IRS obligation to take steps, and to require housing credit agencies to take steps to avoid racial segregation and promote integrated housing choices for low income families of color. To fully comply with the mandate to further fair housing, at a minimum, Title VIII regulations for the LIHTC, Section 1602, and CMF programs should address siting of family housing developments, advertising and tenant selection practices and affirmative marketing requirements (to recruit a diverse applicant pool to a development). We would be happy to provide detailed input to the Department on the necessary contours and location of such a regulation.

We note that the IRS received a petition for proposed rulemaking in March 2008 from the Inclusive Communities Project in Dallas (a member of our coalition), setting out regulations that could satisfy the Fair Housing Act regulatory mandate. To our knowledge, neither the IRS nor the Treasury Department has taken any action on this petition.

Next steps

The Department’s non-compliance with the rulemaking mandates of Title VI and Section 504, and its apparent disregard of the obligation to affirmatively further fair housing, require immediate attention. We would appreciate the opportunity to meet with you to discuss our concerns and to make further suggestions about the content of appropriate rules, and the procedures for implementing new rules.

Sincerely,

/s/

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⁸ See, e.g., *NAACP, Boston Chapter v. Sec’y of Housing and Urban Dev.*, 817 F.2d 149 (1 Cir. 1987). See also, Executive Order 12892 (Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing).

⁹ Pursuant to this obligation, in 2000, the Department of Treasury, DOJ, and HUD entered into a Memorandum of Understanding to coordinate enforcement activities involving individual complaints of discrimination under the Fair Housing Act.

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