

September 10, 2015

Secretary Jacob Lew
U.S. Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, DC 20220

Re: Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance, 80 Fed. Reg. 39977 (July 13, 2015).

Dear Secretary Lew,

The undersigned civil rights and fair housing organizations are pleased to submit our comments on the Treasury Department's long-awaited proposed regulation implementing Title VI of the Civil Rights Act of 1964. At its historic core, this legislation was conceived as a comprehensive (not partial or piecemeal) lever for equal treatment and opportunity across federal programs, ensuring that our government would be fully divested of discrimination.¹ Furthermore, federal agencies have a deep responsibility as the stewards of this crucial law to provide the backbone of Title VI implementation and enforcement. We welcome publication of Treasury's draft rule, but our support of it remains contingent because of our deep concern that the rule's Appendix omits the Low Income Housing Tax Credit (LIHTC) program, one of our most important federal housing programs.

The LIHTC program is the largest federal low income housing development program, with approximately 2.6 million housing units placed in service between 1987 and 2013.² The program has generated more than 110,000 housing units per year since 1995.³ Approximately 63% of LIHTC units are designed for families with children,⁴ and a substantial proportion of these families are non-white. It has particular significance as a source of federal financial assistance, with its primary function that of generating funds to finance housing access for vulnerable Americans (often, those historically susceptible to discrimination). Yet although LIHTC serves a key public purpose in generating affordable housing development subsidies, its recipients and administrators lack accountability or guidance in how to serve this purpose without discrimination. The continuing segregation and discrimination that will result from this lack of oversight will profoundly impact the life outcomes of families of all races.⁵ Given this, the rule's failure to include the program in its Appendix is in manifest disregard of the Treasury Department's non-discrimination responsibilities.

¹ See, e.g., 110 Cong. Rec. 6544 (Statement of Sen. Humphrey) (Congress passed Title VI to "insure the uniformity and permanence to the nondiscrimination policy" in all programs and activities involving Federal financial assistance, as the alternative to debating or litigating nondiscrimination in each program individually).

² See "About the LIHTC Database," available at www.huduser.org/portal/datasets/lihtc.html#about (accessed September 8, 2015).

³ Id.

⁴ See HUD's *National Low Income Housing Tax credit (LIHTC) database: Projects Placed in Service through 2013*, available at www.huduser.org/portal/datasets/lihtc/tables9513.pdf (using 2+ bedroom units as a proxy for "designed for families with children").

⁵ See generally, Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress toward Racial Equality* (2013).

Because Title VI is constructed to comprehensively bar government support of discrimination, its coverage spans any number of vehicles or designs to deliver such support without catering to technical exclusions. As set forth in the proposed rule itself (and established in the existing regulations of the Department of Justice and other agencies), “federal financial assistance” includes such variable sources of support as grants and loans of funds, property and interests in or use of property (including for reduced consideration intended to assist the recipient or in recognition of the public purpose to be served by the transfer), personnel details, and “[a]ny Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.” See Draft Rule at §22.3; see also, e.g., Department of Justice regulation implementing Title VI, 28 C.F.R. § 42.102(c). Agencies and courts charged with interpreting the statutory meaning of “federal financial assistance” have identified consistent and meaningful boundaries that encompass such variety: for example, distinguishing the government’s role as a provider of assistance and its role as a market participant, see, e.g., *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990)(procurement contracts at market value not considered federal financial assistance). Underscoring this principle, limited carve-outs to the definition are explicit in the statute.⁶ This body of interpretation allows for flexibility in the design of government assistance while still safeguarding against discrimination in its use (and adhering to the statute’s intended breadth).

In light of this body of authoritative administrative interpretation and caselaw, judicial analysis around tax credits unsurprisingly supports LIHTC’s inclusion as federal financial assistance. In *McGlotten v. Connally*, 338 F. Supp. 448 (D.C. Cir. 1972), the court held that “assistance provided through the tax system is within the scope of Title VI of the 1964 Civil Rights Act,” noting that “[d]istinctions as to the method of distribution of federal funds or their equivalent seem beside the point, as the regulations issued by the various agencies make apparent.”⁷ Tax programs, as per *McGlotten*, should be considered individually rather than categorically excluded. Assessing when and how tax benefits trigger Title VI and similar laws, the court in *McGlotten* carefully distinguished tax benefits that provide a subsidy to an organization that has the characteristics of government approval via discrete public purposes from other aspects of the Internal Revenue Code that are designed merely to encourage select forms of conduct.⁸

LIHTC serves the crucial public purpose of promoting and assisting the construction of low-cost, income restricted affordable housing, and allocates to states and reserves to developers a capital subsidy.⁹ The Low-Income Housing Tax Credit program distributes a limited supply of

⁶ Title VI states that it does not apply to “Federal financial assistance...extended by way of a contract of insurance or guaranty.” 42 U.S.C. § 2000d-4 (2006).

⁷ *McGlotten*, 338 F. Supp. At 461.

⁸ In other words, *McGlotten*’s assessment rested on two important factors: the degree of government involvement and regulation in connection with the tax benefit; and the extent to which the government has selected a particular type of entity as the vehicle for achieving a public policy. The charitable deduction at issue in *McGlotten*, for example, “operates in effect as a Government matching grant and is available only for the particular purposes and to the particular organizations outlined in the Code. We see no difference between the provision of Federal property ‘at a consideration which is reduced ... in recognition of the public interest to be served by such sale or lease to the recipient,’ and a tax deduction in the form of a matching grant provided for contributions to causes deemed worthy by the Internal Revenue Code.” *Id.* at 462,

⁹ *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 federal

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 guidelines 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. As such, Low Income Housing Tax Credits represent a federal subsidy because they are deliberately designed and targeted (as per the *McGlotten* analysis) to provide a “thing of value.” See *U.S. Dept. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 607 n.11 (1986)(“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”). The defining characteristics of the LIHTC program place it cleanly within the statutory meaning of “federal financial assistance.”

As housing researchers and civil rights organizations have documented, the LIHTC program remains segregated, particularly for family developments within metropolitan areas.¹⁰ Title VI nondiscrimination protection for the LIHTC program would protect millions of current residents from discrimination, but even more importantly, would ensure that new applicants to the program have equal access to program benefits, and expanded access to non-segregated communities and high performing schools. Omission of LIHTC from the Final Rule would be poor policy as well as a dereliction of administrative duty to implement Title VI. Although the draft Appendix is not exclusive, the failure to include LIHTC risks continuing and predictable civil rights violations. The significance of the LIHTC program, and the extent to which continuing segregation and discrimination within the program have been documented call for the explicit and immediate clarification that Title VI’s protections apply.

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 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.

¹⁰ See, e.g., Casey Dawkins, “The Spatial Pattern of Low Income Housing Tax Credit Properties: Implications for Fair Housing and Poverty Deconcentration Policies,” 79 *J. Am. Plan. Ass’n* 222 (2013); Ingrid Gould Ellen and Keren Mertens Horn, *Do Federally Assisted Households Have Access to High Performing Public Schools?* (PRRAC, November 2012), available at www.prrac.org/pdf/PRRACHousingLocation&Schools.pdf; Jill Khadduri, Larry Buron, and Carissa Climaco, *Are States Using the Low Income Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* (PRRAC and the National Fair Housing Alliance, 2007), available at www.prrac.org/pdf/LIHTC_report_2006.pdf. See also, “Annotated bibliography on the Low Income Housing Tax Credit,” available at www.prrac.org/pdf/LIHTC_2009-2014_bibliography.pdf.

In light of the above, we urge Treasury to revise the final Rule to include LIHTC among the important programs listed in the Appendix as Federal Financial Assistance.

Sincerely,

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