

May 5, 2009

Deputy Director of Policy and Programs
Community Development Financial Institutions Fund
U.S. Department of Treasury
601 13th Street, NW, Suite 200 South
Washington, DC 20005

Re: Capital Magnet Fund

Dear Madam or Sir:

The undersigned organizations and individuals submit this correspondence in response to the request for public comment published by the Community Development Financial Institutions Fund (CDFI Fund) concerning implementation of the Capital Magnet Fund, 74 Fed. Reg. 9869 (March 6, 2009). Expenditures from the Capital Magnet Fund may be used for the development, preservation, rehabilitation, or acquisition of affordable housing, and for economic development activities and community service facilities associated with affordable housing.

It is imperative that the CDFI Fund adopt civil rights standards for the Capital Magnet Fund to assure grantee and sub-grantee compliance with federal laws prohibiting discrimination in housing programs receiving federal financial assistance and to assure that the program complies with the obligation imposed on all federal housing programs to “affirmatively further” the purposes of the Fair Housing Act.

Without these standards, housing supported by the Capital Magnet Fund will reinforce widespread patterns of segregation, exclusion, and poverty concentration that already exist in assisted housing programs administered by the U.S. Department of Housing and Urban Development (HUD) and in the Low Income Housing Tax Credit (LIHTC) program administered by the Internal Revenue Service. The CDFI Fund presents an opportunity to move in a new direction, as required by federal civil rights laws.

1. General Civil Rights Obligations Applicable to the Capital Magnet Fund

The enabling statute for the Capital Magnet Fund states that, “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.” 12 U.S.C. §4569(d). The legal authorities regulating the civil rights conduct of recipients and sub-recipients of federal financial assistance include Executive Order 11063, Title VI of the 1964 Civil Rights Act, the Fair Housing Act (Title VIII), Title IX of the Education Amendments of 1972, Section 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1975. These authorities prohibit discrimination based on race, color, national origin, disability, age, family status, gender, and religion. They each direct Federal agencies to issue civil rights rules in connection with the programs of

federal financial assistance they administer.¹ Properly issued civil rights rules for housing developed through the CDFI fund should address the following matters:

- Prohibitions on delay, denial, and exclusion from assisted housing based on protected characteristics.
- Prohibitions on differential treatment in the terms, conditions, and privileges associated with housing.
- Assuring equal access through the provision of language assistance to individuals with limited English-speaking ability, and by providing people with disabilities with alternate forms of communication and reasonable modifications in the leasing practices of assisted housing providers.
- Prohibitions on segregation through site selection.
- Prohibitions on tenant selection policies that have the effect of excluding applicants based on race, national origin, disability or other protected characteristics.
- Prohibitions on policies that assign or have the effect of assigning people based on disability, race, national origin, family status and other impermissible factors to specific developments or to separate parts of a housing development.
- Standards addressing the responsibility to reverse conditions of discrimination that exist in individual housing programs and in the larger housing market by engaging in planning, self-evaluations, and corrective actions.
- Rules prohibiting discriminatory marketing, and requiring affirmative fair housing marketing.
- Non-discriminatory standards for accepting applications for housing, and creating and maintaining waiting lists.
- Criteria that require housing providers to address harassment directed based on race, national origin and other characteristics protected by civil rights laws.

¹ See, Executive Order 11063, §203; 42 U.S.C. §2000d-1 (Title VI), 20 U.S.C. §1682 (Title IX), 29 U.S.C. §794 (Section 504), 42 U.S.C. §6103(a)(4) (Age Discrimination Act). While our comments are primarily directed at civil rights considerations in housing assisted through the Capital Magnet Fund, it is also worth noting that the economic development activities and community services supported by the Fund are regulated not only by the foregoing authorities, but also by Title III of the Americans with Disabilities Act, governing disability discrimination in places of public accommodation, including day care centers, senior citizen centers, social service centers, and health care centers.

- Standards for assuring the proper level of architectural access for people with disabilities in new construction, rehabilitation, and preservation of assisted housing.

We urge you to adopt civil rights regulations incorporating these requirements as part of the implementation of the Capital Magnet Fund. Coordinating rules issued by the Department of Justice under Executive Order 12250 can be the basis for such rules, but they must be tailored to the particular civil rights conditions existing in assisted housing programs. Representatives of the organizations and individuals endorsing these comments would be happy to meet with you to discuss the issuance of civil rights rules and related matters.

2. The Duty to Affirmatively Further Fair Housing in Implementation of the Capital Magnet Fund.

The Fair Housing Act instructs Federal agencies to administer programs associated with housing and urban development “in a manner affirmatively to further the purposes of” Title VIII. The obligation to further fair housing applies to all federal agencies engaged in housing related activities, including agencies that are part of the Treasury Department.² It is a duty with the following features:

- Federal agencies must avoid policies that are facially neutral but have the effect of discrimination, or have the effect of creating or perpetuating segregation.
- Federal agencies must exercise oversight of grantees to assure that the grantees do not engage in policies or acts that discriminate or further segregation.
- Federal agencies and their grantees must gather information and assess the civil rights impact of funding decisions.
- Federal agencies and their grantees must take affirmative steps to assure that over time patterns of residential segregation are dismantled and truly open housing markets are established.³

The obligation to further fair housing has particular import for the issues on which the CDFI Fund seeks comment in implementing the Capital Magnet Fund. Those matters are discussed in the balance of this letter, in the order in which they appear and with the numerical references used in the notice soliciting comment.

3. Eligible Use of Funds, Question (b): Affordability, Targeting to Low-Income Persons, and Mixed Income Development.

The purpose of the Capital Magnet Fund is to leverage private capital to increase development of affordable housing. Programs that facilitate private sector investment in

² See, *Jones v. Office of Comptroller of the Currency*, 983 F. Supp. 197, 204 (D. D.C. 1997).

³ See, e.g., *NAACP, Boston Chapter v. Sec’y of Housing and Urban Dev.*, 817 F.2d 149 (1st Cir. 1987).

affordable housing are uniquely suited to activities that allow extremely low-income and very low-income families to live in mixed-income rental housing. Mixed-income rental housing is often located in areas that are characterized by lower levels of poverty, because market rate and moderate income dwelling units must be able to compete in the private housing market. In general, we believe that an approach similar to but not the same as that used in the LIHTC program for threshold levels of affordable units is an appropriate standard for achieving mixed-income development that is also “primarily” for extremely low- and very-low income participation; that is, at least 40% of the units should serve very low-income households at 50% of area median income (AMI) or at least 20% of the units should serve extremely low-income households at 30% of AMI. We urge you to adopt additional standards that favor mixed-income housing that offers the opportunity for extremely low- and very low-income families to live in racially and economically mixed housing developments and communities.

We also recommend the adoption of criteria that require housing providers to rent Capital Magnet Fund units to participants in the Section 8 Housing Choice Voucher (HCV) program. Section 8 vouchers are the single most important source of assistance promoting housing mobility and opportunity for extremely low- and very low-income families. Owners of housing supported by LIHTC are under an obligation to rent to HCV participants, and we believe the same standard should apply to housing developed using the Capital Magnet Fund.

4. Eligible Use of Funds, Questions (c) and (d): Preservation and Rehabilitation of Affordable Housing

There is a very long and well documented history of the use of Federal resources to create and perpetuate racial segregation in assisted housing.⁴ That same history is now repeated in the LIHTC program, which lacks meaningful civil rights standards, and which also lacks any standards for affirmatively furthering fair housing.⁵ Among the many consequences of these policies is the fact that a significant portion of assisted housing that is the subject of preservation and rehabilitation is located in areas of concentrated poverty, isolated from good schools, access to jobs, and public services. Definitions of “preservation” and “rehabilitation” in the Capital Magnet Fund must therefore include criteria that prioritize housing development in low poverty areas that are not primarily areas of minority concentration. When properties in segregated, high poverty locations are selected for funding, residents of the developments must be provided the resources to move to areas of high opportunity at their choice.⁶

⁴ The use of Federal housing assistance to create residential segregation, and the human injuries resulting from those policies are described in detail in *American Apartheid: Segregation and the Making of the Underclass*, by Douglas R. Massey & Nancy A. Denton (Harvard University Press, 1993), and numerous other scholarly accounts.

⁵ See, e.g. Myron Orfield, Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit, 58 *Vanderbilt Law Review* 1747 (2005).; see also *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).

⁶ For example, HUD’s public housing redevelopment regulations say that on-site replacement of demolished public housing may not exceed the greater of number of units needed to accommodate former

5. Geographic Diversity, Question (a)(5): Criteria of Distress

We are particularly concerned that in the framing of the questions about the geography of Capital Magnet Fund activities, you miss a key feature of the enabling statute. If the criteria concerning geographic diversity listed under that heading in the questions (a)(1) through (a)(4) of the request for comments are adopted, then housing developed with Capital Magnet Funds will be constructed only in census tracts with high levels of poverty, unemployment, blight, disinvestment, and racial segregation. This targeting of funds for low income housing development would be tantamount to intentional racial segregation by the Treasury Department – and should not be included in the program’s criteria. It is crucial that the CDFI Fund consider the priority that the statute also places on “projects that target extremely low-, very low- and low-income families in or outside a designated economic distress area.” 12 U.S.C. §4569(h)(2)(B)(iv) (emphasis added). Capital Magnet Funds must not be used to locate additional low-income families and children in highly distressed locations. To the extent these funds are used to create housing, they must be utilized to expand housing choice outside areas of distress. In higher poverty neighborhoods, CDFI funds should be used for economic development projects that improve services and facilities in these neighborhoods.

Without standards that properly balance housing-related revitalization with activities that expand housing choice, the Capital Magnet Fund will replicate patterns of segregation and isolation already existing in other housing programs. In doing so, it will violate civil rights laws, and the obligation to further fair housing.

6. Accountability

The Federal Register notice asks for comment on methods of monitoring uses of Capital Magnet Funds. None of the questions for which the CDFI Fund seeks comment address the responsibility to gather the information needed to assure compliance with the duty not to discriminate, the obligation to assure that recipients and grantees do not discriminate, and the responsibility to understand the civil rights impact of funding decisions. To carry out these duties, you must take the following actions, all of which are currently features of civil rights-related program requirements in assisted housing programs:

- Application mechanisms must be developed to determine whether a recipient or grantee is the subject of a current civil rights complaint or investigation. Those mechanisms must assure that Capital Magnet Funds are not awarded to organizations that discriminate or have a history of discrimination.
- The CDFI Fund must monitor the siting decisions made by recipients and grantees to ensure that housing activities supported by the Capital Magnet Fund

residents who wish to return, or half the number of demolished units. In all cases, public housing development must take place on sites that are suitable from a civil rights standpoint, it must not result in undue concentrations of poverty, it must be located near social, recreational, educational, and health care facilities, and it must not be near environmental hazards. *See* 24 C.F.R. 941.202.

do not create or perpetuate segregation, and to assure that financing is used to affirmatively expand housing choice in high opportunity locations.

- Owners of housing developed with Capital Magnet Funds must gather voluntarily provided information from families that apply for and reside in Capital Magnet Fund housing, including information such as race, color, national origin, family status, and disability. That information must be used by the CDFI Fund to monitor owner marketing, resident selection practices, and occupancy policies for civil rights compliance.

- Owners must be required to engage in self-evaluations of marketing, resident selection, and occupancy policies to determine if there are barriers to equal and meaningful access by the individuals protected by civil rights laws. Corrective action must be taken to revise any policies with a discriminatory effect. Procedures of this type are a feature of Section 504 and the Age Discrimination Act, and are also a requirement of Title VI with respect to people with limited English-speaking proficiency.

- Owners must also be required to assess compliance with the architectural access standards for people with disabilities, including new construction, and substantial rehabilitation, but also the duty to carry out accessibility modifications over time in acquired properties that are not rehabilitated.

- There must be mechanisms for ongoing civil rights monitoring by the CDFI Fund of grantees and recipients, including requirements for corrective action, and termination of assistance.

7. Conclusion

The obligation to assure compliance with civil rights laws, and the duty to affirmatively further fair housing are statutory requirements and may not be waived. We recognize that the Treasury Department currently lacks the regulatory and organizational capacity to carry out these responsibilities, but the implementation of the Capital Magnet Fund presents an opportunity to develop this capacity, perhaps in consultation with HUD and the Department of Justice. We are happy to serve as a resource if you need assistance along these lines.

Thank you for your consideration of our comments.

Sincerely yours,



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