

Recommended Practices for Compliance with Nondiscrimination and Equal Opportunity Statutes

Objective:

To develop recommended practices for ensuring compliance with nondiscrimination and equal opportunity statutes by recipients and subrecipients of the Community Development Financial Institutions Fund, U.S. Department of the Treasury (the “CDFI Fund”).

Background:

The Department of the Treasury (“Treasury”) issued a memorandum on January 8, 2016 (the “Memorandum”) regarding compliance with nondiscrimination and equal opportunity statutes, regulations, and executive orders, by recipients and subrecipients of federal financial assistance, tax credit allocations, and bond loan guarantees from the CDFI Fund.

The Memorandum states that “[o]rganizations that receive... tax credit allocations... from the Community Development Financial Institutions (CDFI) Fund must ensure they do not discriminate against people who want to participate in their programs” and that “[s]uch nondiscrimination and equal opportunity obligations are stated in the award recipients/subrecipients’... allocation agreements.” The CDFI Fund attached the Civil Rights Toolkit prepared by the Treasury’s Office of Civil Rights and Diversity (the “Toolkit”) to the Memorandum for guidance on how to comply with these obligations.

The Memorandum specifies that these requirements apply to all “recipients” and “subrecipients” and defines a recipient as a “non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program” and a subrecipient as “a non-Federal entity that receives a subaward from a recipient to carry out part of a Federal program.”

Neither the Allocation Agreement nor the NMTC statutes and regulations further define the term recipient or subrecipient. However, the term “subrecipient” as used in similar programs excludes the ultimate user of the Federal allocation or award proceeds. For example, the Assistance Agreements for the Capital Magnet Fund and the CDFI Fund Assistance Program both define a subrecipient as “an entity that . . . [r]eceives a subaward from you (the recipient) under this award; and [i]s accountable to you for the use of the Federal funds provided by the subaward.” In addition, Circular No. A-133¹ defines a subrecipient as “a non-Federal entity that expends Federal awards from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program.” The HOME Investment Partnerships

¹ Circular No. A-133 establishes audit standards among Federal agencies for the audit of States, local governments, and non-profit organizations expending Federal awards.

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Program defines a subrecipient as follows: “a public agency or nonprofit organization selected by the participating jurisdiction to administer all or some of the participating jurisdiction’s HOME programs to produce affordable housing, provide downpayment assistance, or provide tenant-based rental assistance. A public agency or nonprofit organization that receives HOME funds solely as a developer or owner of a housing project is not a subrecipient.” 24 CFR Section 92.2.

Allocatees and their subsidiaries (“Subsidiaries”) are recipients and subrecipients of NMTC allocations. However, we recommend that QALICBs should not be considered recipients or subrecipients since they neither receive an award directly from a Federal awarding agency nor receive a subaward from a recipient. Furthermore, the definition of a subrecipient as provided in similar programs extends only to the party that receives a subaward of the allocation and excludes the developer or owner that receives the funds from the subrecipient. Therefore, we recommend only Allocatees and their Subsidiaries follow the nondiscrimination and equal opportunity requirements described in the Memorandum.

As recipients and subrecipients of tax credit allocations, it is recommended that Allocatees and CDEs comply with Title VI (which prohibits discrimination based on race, color and national origin), Title IX (which prohibits discrimination based on sex in educational programs), the Rehabilitation Act (which prohibits discrimination based on disability) and the Age Discrimination Act (which prohibits discrimination based on age). Title VIII of the Civil Rights Act of 1968 may be applicable if the Allocatee or CDE provides financing for residential real estate. Title VIII prohibits discrimination based on race, color, national origin, religion, sex, familial status or disability in providing financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling or other financial assistance secured by residential real estate.

To date, the CDFI Fund and Treasury have not formally issued guidance specifically for Allocatees and CDEs to follow regarding how they should ensure their compliance with nondiscrimination and equal opportunity statutes, regulations, and executive orders. The following are recommended practices developed by the NMTC Working Group. The members of the NMTC Working Group are participants in the NMTC industry who work together to help resolve technical NMTC Program issues and provide recommendations to make the NMTC Program even more efficient in delivering benefits to qualified businesses located in low-income communities around the country. Our group includes over 60 organizations that are Allocatees, nonprofit and for-profit community development entities (“CDEs”), consultants, investors, accountants and lawyers.

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These recommended practices have not been approved by the CDFI Fund or Treasury and only serve as a potential method in ensuring compliance with nondiscrimination and equal opportunity statutes, regulations, and executive orders.

Recommended Practices:

NOTICE OF RIGHTS

- **Requirement:** Recipients and subrecipients must provide a notice of rights (the “Notice of Rights”) to the public about the protection against discrimination. The CDFI Fund provides the following two samples to use for these postings:
 - “This institution is an equal opportunity provider;” and
 - “In accordance with federal law and U.S. Department of the Treasury policy, this institution is prohibited from discriminating on the basis of race, color, national origin, sex, age, or disability. To file a complaint of discrimination, write to Department of Treasury, Office of Civil Rights and Diversity, 1500 Pennsylvania Avenue, NW, Washington, D.C. 20220 or call (202) 622-1160.”
- **Recommendation:** Allocatees and their subsidiaries should also consider if their state or local laws have broader nondiscrimination laws and incorporate those if applicable. For example, may city ordinances prohibit discrimination based on sexual orientation, gender identity, marital status or parental status. Accordingly, we recommend that the sample paragraph provided in the Memorandum be tailored to include all applicable categories.

This notice should be included on the Allocatee’s and its Subsidiaries’ web site, posted in a prominent place in the Allocatee’s and its Subsidiaries’ office and on all written materials that are distributed to the public that describe the Allocatee’s and its Subsidiaries’ NMTC program. In addition, if an Allocatee or subsidiary has a service or subcontract agreement with another entity for employees or services related to the NMTC program, this notice should also be included in those agreements.

If the Allocatee or Subsidiary conducts public meetings or invites the public to their offices, we also recommend including a statement in the Notice of Rights directing the public on how to request accommodations for persons with disabilities as discussed in more detail below. For example, the Notice of Rights could include a simple statement as follows: “To request an accommodation for a disability please contact us at [INSERT PHONE NUMBER] or [INSERT EMAIL ADDRESS].”

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NONDISCRIMINATION NOTICE

- **Requirement:** Recipients and subrecipients should include information on the requirements to provide equal opportunity to participate in Treasury Assisted Programs, physical accessibility, and meaningful access for Limited English Proficient Individuals, as well as complaint procedures and the rights of beneficiaries, in handbooks, manuals, pamphlets and other material which are ordinarily distributed to the public to describe the program and the requirements for participation by recipients and beneficiaries.
- **Recommendation:** Posting the Notice of Rights discussed above will satisfy this requirement.

NOTICE TO EMPLOYEES

- **Requirement:** Recipients and subrecipients that have employees should include information about its nondiscrimination policy in its regular training program.
- **Recommendation:** If the Allocatee or subsidiary hires employees directly, then this information should be included in any application and training materials.

REPORTS, DATA, AND RECORDS

- **Requirement:** The Toolkit provides that Treasury plans to monitor compliance with these nondiscrimination policies through pre- and post-award audits. Recipients will be required to collect demographic data showing the extent to which members of minority groups are beneficiaries of the recipient's programs and recipients must permit access to its records. The three (3) categories of data that the Toolkit includes are:
 - data on present/proposed membership by race, color and national origin on any planning or advisory body that is an integral part of the recipients programs or activities;
 - data regarding covered employment and use of bilingual employees serving beneficiaries unable to speak or understand English; and
 - sufficient data on existing or proposed facilities to determine whether the location has or will have the effect of unnecessarily denying access to any person on the basis of prohibited discrimination.

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- **Recommendation:** Recommended practices for Allocatees and their Subsidiaries to satisfy the data collection requirements include:
 - maintaining records on the race, color and national origin of the Allocatee’s Governing Board of Directors and/or Advisory Board;
 - maintaining records on whether there are any QALICBs that are unable to speak or understand English and any steps taken to serve these QALICBs; however, if the Allocatees or their Subsidiaries do not target these populations this may not be necessary; and
 - maintaining a posted nondiscrimination notice in a prominent place in the Allocatee’s and its Subsidiaries’ offices and maintain records on whether the Allocatee’s and its Subsidiaries’ offices are accessible to disabled persons.

WRITTEN LANGUAGE ASSISTANCE PLAN

- **Requirement:** Recipients and subrecipients of Federal financial assistance must address the language needs of Limited English Proficiency (“LEP”) individuals seeking to access the applicable programs. In order to develop a written language assistance plan, a recipient or subrecipient should first consider four (4) factors: (a) the number of LEP persons eligible to be served or encountered; (b) frequency of contact with LEP persons; (c) nature and importance of the program or activity to the LEP individuals; and (d) resources available including the cost of providing LEP services.

The Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons at 70 Fed. Reg. 6067 (the “LEP Guidance”) states that even recipients that serve LEP individuals on an unpredictable or infrequent basis should use the four factor balancing analysis to determine what to do if an LEP seeks services from their program. However, the LEP Guidance emphasizes that the plan does not have to be intricate. “It may be as simple as being prepared to use one of the commercially available telephonic interpretation services to obtain immediate interpreter services.” 70 Fed. Reg. 6070.

- **Recommendation:** As applied to Allocatees and their Subsidiaries, the nature of the NMTC program makes it unlikely that LEP individuals would be in direct contact with Allocatees or their Subsidiaries. Unless the Allocatees or their Subsidiaries target LEP individuals we do not think special additional measures are warranted at the Allocatee or Subsidiary level. However, due to the nature of the NMTC program, each Allocatee and its Subsidiaries would want to ensure that LEP individuals in low income communities are provided the same opportunity to participate. In light of these factors, we recommend that Allocatees and their Subsidiaries establish a simple written procedure for Allocatee

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and subsidiary personnel to access a commercially available telephonic interpretation services if an LEP individual contacts the Allocatee or subsidiary about the NMTC program. In addition, Allocatees and their Subsidiaries should keep track of the number of LEP individuals that contact them as part of their overall nondiscrimination record keeping described above.

COMMUNITY OUTREACH

- **Requirement:** The Memorandum recommends establishing best practices for outreach to the community at large to make sure that the program is offering equal opportunities for participation. They recommend: (a) targeted efforts; (b) partnering with like-minded organizations; (c) using ethnic media; (d) using spokespersons from the targeted community; and (e) participating and sponsoring community events.
- **Recommendation:** Unlike other federally funded programs, the NMTC program is primarily targeted to attract development in low income neighborhoods instead of providing direct services to the public in these neighborhoods. Allocatee's and their Subsidiaries' targets are businesses interested in development or operating businesses in the Allocatee's and their Subsidiaries' service areas. Allocatees and their Subsidiaries already conduct a number of outreach efforts regarding the NMTC program to attract QALICBs; therefore, it is likely that the existing community outreach efforts of most Allocatees and their Subsidiaries, as a practical matter, have the effect of substantively satisfying the intent of this requirement. However, one of the categories for compliance reviews will be whether the recipient conducts outreach "by making contact with racial/ethnic community organizations and/or leaders in service areas." After reviewing these categories and comparing them against the Allocatee's and their Subsidiaries' current outreach efforts, Allocatees and their Subsidiaries may consider adding additional direct community outreach efforts.

ACCOMMODATING INDIVIDUALS WITH DISABILITIES

- **Requirement:** Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." The Toolkit provides that in order to comply with this requirement the following steps should be taken: (a) the program should be offered in an accessible building; (b) information should be available in accessible format; (c) the organization should be ready to offer accommodations to allow participation regardless of disability; and (d) the organization should notify persons

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with a disability that accommodations are available and how to request an accommodation.

- **Recommendation:** In order to comply with these requirements, we recommend that:
 - any public meetings hosted by the Allocatee or its Subsidiaries regarding the NMTC program should be held in an accessible location;
 - information should be available in accessible formats (such as auxiliary aids for persons with hearing, speech or visual impairments);
 - Allocatees and their Subsidiaries should be ready to offer accommodations; and
 - Allocatees and their Subsidiaries should notify persons with a disability that accommodations are available and how to request an accommodation. As recommended above, Allocatees and their Subsidiaries should include in the Notice of Rights the contact information for any person requesting accommodations.

ENSURING SUBRECIPIENT COMPLIANCE

- **Requirement:** The Memorandum's final recommendation is that each recipient ensures that subrecipients comply with the nondiscrimination and equal opportunity requirements by entering into an Assurance Agreement with each subrecipient.
- **Recommendation:** We recommend that Allocatees use this agreement as a template for separate agreements with each of their Subsidiaries.