

Section 504 Protections Apply to ARRA-funded LIHTC Projects*

The Low-Income Housing Tax Credit (LIHTC) program is one of the federal government's primary methods for creating and maintaining affordable housing. However, the program has escaped compliance with Section 504 of the Rehabilitation Act, which only applies to programs receiving federal financial assistance. Section 504 provides disabled individuals with important protections by prohibiting discrimination and creating accessibility requirements. The LIHTC program has been exempted from compliance with Section 504 because the program provides tax credits and not direct financial assistance. However, the market for tax credits has declined with the economy, leading the federal government to offer direct funds to developers in exchange for unused credits through an LIHTC Exchange Program. Additionally, a Tax Credit Assistance Program (TCAP) will provide further financial assistance to help projects meet gaps in financing. Because TCAP and the Exchange Program will provide direct funding, any projects receiving funds through these programs must fully comply with the requirements of Section 504. This should spur development of affordable housing that will meet increased accessibility requirements for disabled persons.

Background

Low-Income Housing Tax Credit

By any measure, the Low-Income Housing Tax Credit program is among the federal government's largest program for creating and rehabilitating affordable housing for low-income people.¹ In 2007, over \$790 million in program credits produced nearly 75,000 units of affordable housing.² As of 2005, the program had produced a total of 1.382 million units of affordable housing.³ The program works by providing tax credits to developers and investors, on a one-for-one basis, for every dollar spent on affordable housing development. These credits are usually sold to investors in return for equity, which provides upfront capital for developers.⁴ This initial infusion of equity reduces the level of capital required through long-term loans, which reduces debt obligations and permits developers to charge rents within levels that are restricted by the LIHTC program.⁵

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¹NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS 1/64 (3d ed. 2004).

²NAT'L LOW INCOME HOUS. COAL., 2009 ADVOCATE'S GUIDE TO HOUSING AND COMMUNITY DEVELOPMENT POLICY 66 (2009).

³*Id.*

⁴NAT'L HOUS. LAW PROJECT, *supra* note 1, at 1/65.

⁵*Id.*

The LIHTC program provides states with tax credits based on a per-capita formula.⁶ Each state is then responsible for allocating the funds, which usually involves a competitive process where developers apply for credits with a state tax finance agency.⁷ The credits are awarded both for new developments and rehabilitation projects. Because the program utilizes tax credits, the program's subsidies persist every year and do not require annual appropriations. Despite its status as the largest federal housing program, the program is administered by the Internal Revenue Service (IRS), not the Department of Housing and Urban Development (HUD), because it operates through the tax code.

Section 504 of the Rehabilitation Act

Because LIHTC provides tax credits as opposed to direct subsidies, there has been some historical debate as to whether certain federal laws apply to the program, namely those laws that apply only to programs receiving any "federal financial assistance." One such law is Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled individuals and imposes accessibility standards on housing providers.⁸ The IRS has maintained that "federal financial assistance" does not include tax credits,⁹ rendering Section 504 inapplicable to the LIHTC program. Courts have shown sympathy to this argument, reasoning that favorable tax treatments are not the same as subsidies¹⁰ and that Congressional intent to provide more than preferential tax treatment should be

considered when defining the term.¹¹ This view has its critics, however, since the economic benefits of tax credits and exemptions are indistinguishable from the economic benefits produced by actual expenditures.¹² Nonetheless, the IRS view has persisted, leaving Section 504 provisions inapplicable to the LIHTC program.

Section 504 prohibits discrimination based on disability in any program, service or activity, and requires certain levels of accessibility.¹³ Section 504 applies to a smaller number of units than the Fair Housing Act since it does not apply to private owners but its requirements are stricter.¹⁴ For example, housing providers must not only allow reasonable modifications, as required by the Fair Housing Act, but also pay for them.¹⁵ The statute prohibits providers from offering housing that is unnecessarily different or separate, requiring that housing for disabled individuals be as integrated as appropriate.¹⁶ In order to ensure accessibility, Section 504 also mandates 5% of new building or substantial rehabilitation¹⁷ be accessible to those with mobility impairments, and that an additional 2% be accessible to persons with hearing or vision impairments.¹⁸ Further, the law requires not only accessibility, but also targeting, through affirmative outreach to the public.¹⁹ The law also includes certain planning and evaluation practices, to ensure that these requirements are met.²⁰

⁶*Id.*

⁷*Id.*

⁸Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (Westlaw June 10, 2009).

⁹While the IRS does not have specific Section 504 regulations for the LIHTC program, federal financial assistance is defined under the Single Audit Act, which "sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards," giving some idea as to how federal financial assistance should be interpreted by the agency. See 31 U.S.C.A. §7501 (a)(5). "Federal financial assistance" means "assistance that non-federal entities receive or administer in the form of grants, loans, loan guarantees, property, cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, or other assistance, but does not include amounts received as reimbursement for services rendered to individuals in accordance with guidance issued by the Director." It is worth noting that for purposes of waiving the ten-year holding period under LIHTC regulations, the IRS defines, at 26 C.F.R. §1.42-2(2)(c), "federally assisted building" as "any building which is substantially assisted, financed, or operated under section 8 of the United States Housing Act of 1937, section 221(d)(3) or 236 of the National Housing Act, or section 515 of the Housing Act of 1949, as such acts were in effect on October 22, 1986." This definition of "federally assisted building" should not be dispositive regarding what constitutes "federal financial assistance" under Section 504 of the Rehabilitation Act of 1973.

¹⁰See, e.g., *Bachman v. American Soc. of Clinical Psychologists*, 577 F. Supp. 1257, 1263-64 (D.C.N.J. 1983) ("not every item of economic value granted by the federal government counts as financial assistance within the meaning of section 504 of the Rehabilitation Act . . . [t]he term "assistance" connotes a transfer of government funds by way of subsidy, not merely an exemption from taxation").

¹¹See, e.g., *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1382 (10th Cir. 1990) ("in determining which programs are subject to the civil rights laws, courts should focus not on market value but on the intention of the government" to give a subsidy, as opposed to government intent to provide compensation" (quoting *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1210 (9th Cir.1984)).

¹²See, e.g., David A. Brennan, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167, 212 ("there is no logical (or legal) reason for treating the tax benefits . . . as anything other than equivalent to government grants or loans for purposes of interpreting relevant civil rights statutes"). For general analyses of the debate between proponents of expenditure analysis and constitutional analysis, see Linda Sugin, *Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 410 (1999); Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379 (1998).

¹³Dep't of Hous. and Urban Dev., Office of Fair Hous. and Equal Opportunity, Section 504 Frequently Asked Questions, <http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm>.

¹⁴*Id.*

¹⁵*Id.*

¹⁶24 C.F.R. § 8.4 (2009).

¹⁷24 C.F.R. § 8.23 (2009). "Substantial rehabilitation" for a multifamily rental project is defined as involving a project with fifteen or more units, with alterations costing more than 75% of the replacement cost of the project.

¹⁸24 C.F.R. §§ 8.22-8.23 (2009).

¹⁹24 C.F.R. § 8.6 (2009) ("The recipient shall take appropriate steps to ensure effective communication with applicants, beneficiaries, and members of the public . . . [and] shall adopt and implement procedures to ensure that interested persons (including persons with impaired vision or hearing) can obtain information concerning the existence and location of accessible services, activities, and facilities").

²⁰24 C.F.R. § 8.51 (2009).

The Exchange Program and the Tax Credit Assistance Program

Due to the recent financial crisis, the market for tax credits has dried up, reducing the effectiveness of the LIHTC program. In response, the federal government created the Exchange Program as part of the American Recovery and Reinvestment Act (ARRA) signed by President Obama on February 17, 2009.²¹ The Exchange Program was initially planned to offer direct grants in exchange for unused tax credits.²² On June 1, Sen. Barney Frank (D-MA) sent a letter to Secretary Timothy Geithner, requesting that states be allowed to make sub-awards in the form of loans as well as grants for greater flexibility in using state funds within the confines of current state requirements.²³ On July 9, 2008, the Treasury Department released guidance in the form of a "Frequently Asked Questions and Answers" fact sheet indicating that it would allow states to structure award funds as no-interest, non-repayable loans if necessary.²⁴ Because loans are generally considered federal financial assistance,²⁵ this policy change will not affect Section 504 compliance requirements.²⁶

The Exchange Program will provide state housing credit agencies funds equal to 85% of the value of states' unused low-income housing tax credits.²⁷ The funds will be allocated to housing credit agencies with sub-awards made in the form of grants or loans to qualified

low-income housing developments by these agencies.²⁸ Essentially, this means that developers who could not find investors to buy their credits will be able to turn them in for eighty-five cents on the dollar. Any funds not awarded to qualified projects by the end of 2010 will be returned to the federal government.²⁹

The government also appropriated \$2.25 billion in HOME funds to TCAP for LIHTC projects under Title XII of ARRA.³⁰ This program will facilitate the development of LIHTC projects by providing gap financing.³¹ ARRA allocated TCAP funds to state housing credit agencies, and the agencies will distribute the funds through a competitive process pursuant to the states' qualified allocation plans, which describe eligibility requirements and selection criteria.³² Projects that received or will receive tax credits between October 1, 2006, and September 30, 2009, are eligible to apply for TCAP funds, which must be used within three years of ARRA's enactment.³³ Additionally, ARRA instructs states to give priority to projects that are expected to be completed within three years of the law's enactment.³⁴

Section 504 Compliance and ARRA-Funded LIHTC Projects

TCAP funds qualify as federal financial assistance, which makes Section 504 applicable to developments that receive any funding through the program. Under Section 504's governing regulations, "[f]ederal financial assistance means any assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement, in the form of: (a) Funds..."³⁵ Since TCAP grants actual funds, the program clearly qualifies as financial assistance, requiring full compliance with Section 504. Further, the statute's language specifically prohibits the HUD secretary from waiving requirements related to fair housing and nondiscrimination.³⁶ HUD has confirmed that Section 504 of the Rehabilitation Act applies to all TCAP grants.³⁷

²⁸*Id.*

²⁹*Id.* at 364.

³⁰American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. XII, § 1201, 123 Stat. 115, 220-21 (2009) (under the heading "HOME Investment Partnerships Program").

³¹*Id.*

³²*Id.* at 220.

³³*Id.* Additionally, 75% of the HOME funds must be committed within one year and 75% spent within two years of the Act's enactment.

³⁴*Id.*

³⁵24 C.F.R. § 8.3 (2009).

³⁶American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. XII, § 1201, 123 Stat. 115, 221 (2009). ("the [HUD] Secretary may waive any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds except for . . . requirements related to fair housing, nondiscrimination . . .").

³⁷Implementation of the Tax Credit Assistance Program (TCAP), CPD-09-03 (May 4, 2009).

²¹American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. I, § 1602, 123 Stat 115, 362-64 (2009) ("Grants to States for Low-Income Housing Projects In Lieu of Low-Income Housing Credit Allocations for 2009").

²²*Id.* at 362.

²³Letter from Barney Frank, U.S. Senator, to Timothy Geithner, U.S. Sec'y of Treasury (June 1, 2009), available at <http://www.nlihc.org/doc/Ltr-Geithner-LIHTC-Exchange.pdf>.

²⁴Dept of Treasury, Section 1602: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009, Frequently Asked Questions and Answers (July 9, 2009), <http://www.treas.gov/recovery/docs/FAQs.pdf>; See also Joseph P. Poduska, *Treasury Department Changes Policy On Credit Exchange Program, Will Allow Funds to Be Provided as Loans*, [Current Developments] Hous. & Dev. Rep. (West) Vol. 37, No. CD-12, at 353 (June 15, 2009). However, no official guidance on this position has been issued as of the date of this printing.

²⁵See e.g. 31 U.S.C.A. § 7501 (a)(5); 24 C.F.R. § 8.3 (2009) ("Federal financial assistance means any assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement") (emphasis added).

²⁶*Id.*; Dept of Treasury, Section 1602: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009, Frequently Asked Questions and Answers (July 9, 2009), <http://www.treas.gov/recovery/docs/FAQs.pdf>. However, because "grants" are a specific type of federal assistance that require compliance with Davis-Bacon wage and standards and environmental reviews, project owners receiving funds in the form of loans will not have to comply with such requirements.

²⁷American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. I, § 1602, 123 Stat 115, 362-63 (2009). States may also award funds to projects without allocated tax credits if doing so will leverage the state increased funds for affordable housing ("a State housing credit agency may make subawards to finance qualified low-income buildings without an allocation only if it makes a determination that such use will increase the total funds available to the State to build and rehabilitate affordable housing").

The Exchange Program qualifies as federal financial assistance as well, since the program will award “grants... in lieu of low-income housing credit allocations.”³⁸ This should make developments receiving funds from the Exchange Program subject to Section 504 requirements. While several state tax credit agencies have issued notices that assume Exchange Program funds do not qualify as federal assistance and are not subject to Section 504,³⁹ the Treasury Department has acknowledged that Section 504 does in fact apply.⁴⁰

Housing advocates should work with state agencies to ensure that every project with TCAP or Exchange Program funding is fully compliant with Section 504.

Since most LIHTC projects were not required to comply with Section 504 at the time architectural plans were developed, these plans may have to be amended in order to comply with the law. Projects under construction at the time the owner applies for TCAP must also comply fully.⁴¹ Modifications which make plans compliant with Section 504 are costs eligible for TCAP funding.⁴² However, if compliance with Section 504 is not feasible or practical for any of these projects, they cannot receive assistance from TCAP funds.⁴³

³⁸American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. I, § 1602, 123 Stat 115, 362 (2009).

³⁹See, e.g., Georgia Department of Community Affairs, Georgia Tax Credit Assistance Program (TCAP) and Tax Credit Monetization Program (Exchange) Application Process and Minimum Documentation Submission Requirements (May 11, 2009) available at <http://www.dca.ga.gov/housing/housingdevelopment/programs/documents/Applicationprocessfinal512.pdf>. (“Treasury staff indicates that they are not applicable as exchanged funds will not be considered federal funds”); Washington State Housing Finance Commission, ARRA Tax Credit Program Guidelines for Washington State (May 14, 2009) available at http://www.wshfc.org/arra/ARRA_Final.pdf (“Treasury has not placed specific restrictions on the use of Exchange funds”); Memorandum from Wisconsin Housing & Economic Development Agency, 2009 American Recovery and Reinvestment Act (ARRA) (Mar. 10, 2009) available at http://www.wheda.com/root/uploadedFiles/Website/Wheda_Products/Regulations/ARRA2009memo.pdf (“We do not believe that the various federal funding requirements . . . apply to exchange funds but we have not received full guidance from the Treasury.”).

⁴⁰Dept of Treasury, Section 1602: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009, Frequently Asked Questions and Answers (July 9, 2009), <http://www.treas.gov/recovery/docs/FAQs.pdf>.

⁴¹U.S. Dep’t of Hous. And Urban Dev., TCAP Question and Answers: Section 504 of the Rehabilitation Act of 1973, <http://www.hud.gov/recovery/tcap-504-qa.pdf>.

⁴²Notice, *supra* note 37, at 9.

⁴³*Id.*

What this Means for Advocates and Agencies

Housing advocates should work with state agencies to ensure that every project with TCAP or Exchange Program funding is fully compliant with Section 504. This not only means complying with structural accessibility requirements but actually targeting disabled individuals and communicating that affected housing developments will be accessible to them.⁴⁴ This is particularly important since TCAP and Exchange Program funds will be sought for many projects that did not originally comply with Section 504 requirements. Because Section 504 requirements will only apply to a limited set of LIHTC projects, state housing finance agencies should flag these projects by providing lists⁴⁵ of affected projects that remain accessible to the public for the life of those projects. This is important for two reasons. In the short term, TCAP funds impose commitment and expenditure deadlines.⁴⁶ If these deadlines are not met, the federal government recaptures the funds. In the long term, lists of TCAP properties should be publicly available for the life of the project since these projects must remain compliant with Section 504 rules, unlike other LIHTC properties.

Conclusion

In the context of previous interpretations of “federal financial assistance,” which exempted LIHTC projects from compliance with Section 504 requirements, acceptance of TCAP or Exchange Program funds clearly requires compliance with the law’s increased disability protections while promoting affordable housing development, in general. This means providing the minimum number of units accessible to those with mobility and hearing or vision impairments, ensuring that accessible units are appropriately integrated, and actually targeting disabled persons, among other requirements. Since the funds must be used promptly, advocates should work with housing finance agencies to ensure that Section 504 requirements are fully met by LIHTC projects receiving any ARRA funds—both now and in the future. ■

⁴⁴24 C.F.R. § 8.6 (2009).

⁴⁵HUD maintains a list of LIHTC properties by state at <http://lihtc.huduser.org/>. Some state housing credit agencies also have website lists with the names and addresses of LIHTC properties within the state.

⁴⁶American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A., tit. XII, § 1201, 123 Stat. 115, 220 (2009).