

# Daily Journal

www.dailyjournal.com

WEDNESDAY, FEBRUARY 5, 2014

PERSPECTIVE

## Public works: avoid the pitfalls of Title VI

By Pat McCoy Smith

As I transition from in-house counsel at a large California public transit agency to private practice, it has become clear that many clients are unfamiliar with the federal government's recent efforts to require any entity — public or private — that receives federal financial assistance to comply with the requirements of Title VI of the Civil Rights Act of 1964. Title VI is proving to be a pitfall for the unwary, but one that can be negotiated successfully with proper planning and guidance.

In 2006, the Federal Transit Administration (FTA) Office of Civil Rights initiated a study to assess the impacts of transportation planning, investment and operations on minority and low-income populations to "assist" transit agencies to provide language assistance to persons with limited English proficiency (LEP). (Note: Federal regulations extend the nondiscrimination requirements to any program administered by the U.S. Department of Transportation (DOT), not just the FTA). Various FTA Title VI regulations have been developed to assess the impacts of transportation planning, investment and operations on minority and low-income populations, promote employment in transit construction projects by members of minority and low-income communities and assist transit agencies to provide language assistance to LEP individuals.

Title VI, Section 601 provides: "No persons in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

According to the DOT, equity in the provision of transit service consists of providing equal levels of service to minority and nonminority residents of the urbanized area. In order to assess Title VI issues, the entity



Associated Press

Passengers board a Bay Area Rapid Transit train in 2013 in Oakland.

receiving federal funds must analyze and demonstrate that the proposed program or action will distribute its impacts equitably, i.e., not have a disparate impact. The Title VI analysis must precede the decision to implement the program. As several transit agencies across the country have learned recently, failure to complete a Title VI analysis before initiating a program or action can result in a finding of noncompliance with federal funding regulations, resulting in the withdrawal of previously allocated federal funds.

In 2009, the Metropolitan Transit Authority of Harris County Texas (Houston Metro) and the San Francisco Bay Area Rapid Transit District (BART) learned the hard way of the impact of Title VI and its ramifications on transportation planning, both on the implementation of fare increases and on the initiation of new capital projects. The FTA released a final report on Houston Metro's failure to comply with federal civil rights laws. Specifically, the report found that Houston Metro had failed to prove that its November 2008 fare increase and its planned or implemented new services, including all of its light rail projects, were being implemented in accordance with the requirements of Title VI. The FTA

report concluded that Houston Metro had failed to provide any documentation demonstrating that it had conducted the required equity evaluation of these service improvements to determine whether the investments were made equitable in minority and nonminority communities. Shortly thereafter, in September 2009, a San Francisco Bay Area transit advocacy group, Public Advocates, filed a civil rights administrative complaint against BART with the FTA. Public Advocates' complaint challenged BART's right to initiate construction of the Oakland Airport Connector Project (OAC Project) without having first studied the OAC Project's potential negative effect on low-income and minority populations.

As a result of these complaints, Houston Metro and BART initiated the requisite processes to assess whether their respective projects did, in fact, impose disproportionately negative impacts on low-income and minority populations. Both agencies were required to stop work on their projects and begin to develop processes for establishing Title VI compliance. Based on BART's failure to conduct the required equity analysis for the OAC Project, in February of 2010, the FTA withdrew \$70 million in American Recovery and Reinvest-

ment Act funds from the OAC Project — making BART the first agency in the country to withstand such a penalty. Over the last several years, both agencies have successfully undertaken all of the steps necessary to develop fully compliant Title VI programs (recipients are required to submit Title VI Civil Rights Programs to the FTA every three years). Copies of the current Houston Metro and BART Title VI Programs can be viewed at [www.ridemetro.org/FY2012\\_Triennial](http://www.ridemetro.org/FY2012_Triennial) and [www.bart.gov/guide/titlevi](http://www.bart.gov/guide/titlevi), respectively.

The federal government's efforts to enforce the requirements of Title VI, although relatively recent, are here to stay. As demonstrated by transit agencies that have developed compliant Title VI programs, it is possible to master this new area of the law. However, many smaller public entities that accept federal financial assistance in any amount remain unaware of the potential ramifications of failing to develop and implement a compliant Title VI Program. This emerging area of the law is replete with pitfalls, and the process of developing a Title VI program may seem daunting at first. However, with the proper education and effective advice of counsel, this new area of the law can be mastered.

**Pat McCoy Smith** is a partner at *Dhillon & Smith LLP*. Her practice focuses on representing public agencies and private parties in complex public law and commercial transactions and litigation, including advice on matters related to Title VI requirements.



PAT MCCOY SMITH  
Dhillon & Smith LLP