To: All Owners and Managers  
From: Bob Conroy, Director of Asset Management  

In this issue:

I. Student Rule – Independent Student
II. Final Rule - Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs
III. New Utility Benchmarking Requirements - Requesting Public Comments
IV. 2017 Operating Cost Adjustment Factors (OCAFs) Published
V. Affirmatively Furthering Fair Housing Assessment Tool – Solicitation for Comment
VI. Final Rule – Improving the Previous Participation Reviews of Prospective MultiFamily Housing and Healthcare Programs Participants

I. Student Rule – Independent Student

On September 21, Multifamily Housing and Public and Indian Housing issued a joint Federal Register Notice on the “Student Rule,” which will positively impact tenants continuing their education by:

Clarifying the definition of “Independent Student.” HUD aligned the definition of “Independent Student” with the U.S. Department of Education’s definition of “Independent Student.” The definition of Independent Student was updated to include those who were an orphan, in foster care, or ward of court at the age of 13 (previous definition had age 18 and did not include “in foster care”). The new Independent Student definition also added those students who are or were emancipated or in legal guardianship; and added unaccompanied youths who are homeless or at risk of homelessness; and

Clarifying verification process for vulnerable populations. HUD also clarified what documentation is needed to support “vulnerable youth populations” that are independent of his or her parents (where the income of the parents is not relevant). Vulnerable youth populations include an orphan, in foster care, ward of the court, emancipated minor, unaccompanied homeless youth, and youth at risk of being homeless. This clarification indicated that for vulnerable youth populations: (1) the tax return requirement only applies to providing the student’s tax returns and not that of the student’s parents, and (2) a written certification is not required by the student’s parent. The previous requirements created barriers for vulnerable youth to receive assistance and
The Notice can be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2016-09-21/pdf/2016-22727.pdf

Attached are the revised LIHTC Self Certification Form and the Tenant Income Certification Form to reflect these changes. These revised forms will replace the current forms effective immediately.

II. Final Rule - Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs

HUD has issued its final rule regarding considerations for gender identity in “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs.” This final rule will be formally published in the Federal Register.

On February 3, 2012 HUD issued its Equal Access Rule, which defined the terms “sexual orientation” and “gender identity,” and required that HUD-assisted housing be made available to individuals and families regardless of actual or perceived sexual orientation, gender identity, or marital status. The 2012 rule did not address how transgender and gender nonconforming individuals should be accommodated in temporary, emergency shelters, and other buildings.

Then on November 20, 2015, HUD proposed a second Equal Access rule, entitled “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs.” In this proposed rule, HUD sought to add a new section to its regulations that would require owners, operators, and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by Office of Community Planning and Development (CPD) programs—to provide equal access to programs, benefits, services, and accommodations in accordance with an individual’s gender identity.

This final rule follows HUD’s November 2015 proposed rule and formalizes equal access for individuals in accordance with their gender identity in programs and shelter funded under programs administered by HUD’s Office of Community Planning and Development.

A copy of this rule is attached to this notice.

III. New Utility Benchmarking Requirements - Requesting Public Comments

Message from Diana Huot, Resolution Specialist-Asset Management, Multifamily Northeast Region-Manchester Field Office

“Dear Asset Management Colleagues:

Yesterday, Multifamily Housing published a Federal Register notice allowing for 60 days of public comments on new utility benchmarking requirements, which will impact both the HUD-assisted and FHA-insured portfolios. The complete notice can be viewed here: https://www.federalregister.gov/documents/2016/10/04/2016-23979/60-day-notice-of-proposed-information-collection-energy-benchmarking

It will likely be several months before the requirements are finalized and put into effect, but we want you all to be aware of the proposal now out for comment.

Key details are summarized below:
Under this initiative, certain providers of HUD-assisted housing will begin collecting and reporting additional information on their water and energy use, including benchmarking scores calculated through EPA’s ENERGY STAR Portfolio Manager software. Benchmarking will help property owners to make informed decisions, reduce operating costs and improve building performance over time.

The notice aligns with both the President’s Climate Action Plan as well as HUD’s commitment to creating energy and water-efficient housing. These efficiency investments pay such dividends as improving occupant comfort; stabilizing operating costs; alleviating taxpayer burden; preserving affordable housing; ensuring disaster resilience; and mitigating climate change.

Covered properties for this reporting requirement include:
- Section 202 Project Rental Assistance Contracts (PRAC)
- Section 811 PRAC and Project Rental Assistance contracts
- Section 202/162 Project Assistance Contracts
- Section 202 Senior Preservation Rental Assistance Contracts
- Section 8 Housing Assistance Payment contracts
- Multifamily Housing properties insured under Sections 223(a)(7), 223(f), 221(d)(3) 221(d)(4), 220, 231, 236, and 241(a).

Owners of covered properties are encouraged to voluntarily submit water and energy benchmarking data to HUD on an annual basis. HUD will require that owners submit benchmarking information on the following schedule, subject to revision:
- For HUD-assisted properties with a utility allowance, at the time of a triennial utility allowance baseline calculation;
- For HUD-assisted properties where there is no utility allowance, every third year at the time of financial statement submission;
- Prior to issuance of new FHA mortgage insurance under Sections 223(a)(7), 223(f), and 241(a);
- With a Capital Needs Assessment submission required by the Office of Asset Management and Portfolio Oversight in HUD’s Office of Multifamily Housing Programs on a 10-year cycle;
- With a Capital Needs Assessment submission required as part of any enforcement action.

Owners seeking a covered property transaction will be required to enter data into ENERGY STAR Portfolio Manager and electronically submit to HUD certain metrics created by the free web tool.

Only properties that have been in existence for at least 12 months and that include 21 housing units or more are eligible to receive an ENERGY STAR Score. Properties with less than 21 units are encouraged, though not required, to submit data on energy and water use intensities.

HUD has dedicated technical assistance resources to help owners collect, track, and analyze energy data. This includes building a website with tools (https://www.hudexchange.info/programs/utility-benchmarking), case studies, and links to federal resources.

The utility benchmarking requirement will apply when executing any covered transaction beginning 90 days after OMB approval of the PRA request, and not sooner than April 15, 2017. However, the first scheduled submission date for a majority of assisted-housing respondents is estimated to occur in FY 2019. Multifamily Housing will finalize the timing and requirements in a forthcoming Housing Notice that will be published after the information collection is approved.

Please note that training for HUD staff on this policy will occur after public comments are considered and the reporting requirements are finalized.
IV. 2017 Operating Cost Adjustment Factors (OCAFs) Published

The Operating Cost Adjustment Factors (OCAF) for 2017 were published in the October 5, 2016 Federal Register. These factors are used for adjusting or establishing Section 8 rents under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA), as amended, for projects assisted with Section 8 Housing Assistance Payments. The factors are effective February 11, 2017 and can be found at https://www.gpo.gov/fdsys/pkg/FR-2016-10-05/pdf/2016-24070.pdf

V. Affirmatively Furthering Fair Housing Assessment Tool – Solicitation for Comment

HUD has also issued a notice for public comment on the Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies (PHAs). Comments are due by October 20, 2016.

On July 16, 2015, HUD published the Affirmatively Furthering Fair Housing (AFFH) final rule to provide HUD program participants with a new process for planning for fair housing outcomes that will assist them in meeting their statutory obligation to affirmatively further fair housing. This process includes an assessment tool that must be used by program participants and is intended to evaluate fair housing in their jurisdictions, to identify barriers to fair housing choice and opportunity at the local and regional levels, and to set fair housing goals to overcome such barriers and advance fair housing choice. HUD committed to issue three assessment tools for its program participants covered by the AFFH final rule.

VI. Final Rule – Improving the Previous Participation Reviews of Prospective MultiFamily Housing and Healthcare Programs Participants

HUD has published a final rule which revises regulations for reviewing the previous participation in federal programs of certain participants seeking to take part in multifamily housing and healthcare programs administered by HUD’s Office of Housing. The final rule clarifies and simplifies the process by which HUD reviews the previous participation of participants that have decision-making authority over their projects as one component of HUD’s responsibility to assess financial and operational risk to the projects in these programs.

The final rule, together with an accompanying Processing Guide, clarifies which individuals and entities will undergo review, HUD’s purpose in conducting such review, and describe the review to be undertaken. By targeting more closely the individuals and actions that would be subject to prior participation review, HUD not only brings greater certainty and clarity to the process but provides HUD and program participants with flexibility as to the necessary previous participation review for entities and individuals that is not possible in a one-size fits all approach. Through this rule, HUD replaces the current previous participation regulations in their entirety. A copy of the Final Rule is attached to this newsletter.

Attachments:

- Final Rule – Equal Access IAW Individual’s Gender Identity
Please note that MaineHousing provides notices as a service to our partners. Notices are not intended to replace ongoing training and do not encompass all compliance and regulatory changes that may occur on the wide range of housing programs in which we work. MaineHousing recommends partners establish an ongoing training program for their staff.

MaineHousing does not discriminate on the basis of race, color, religion, sex, sexual orientation, national origin, ancestry, physical or mental disability, age, familial status or receipt of public assistance in the admission or access to or treatment in its programs and activities. In employment, MaineHousing does not discriminate on the basis of race, color, religion, sex, sexual orientation, national origin, ancestry, age, physical or mental disability or genetic information. MaineHousing will provide appropriate communication auxiliary aids and services upon sufficient notice. MaineHousing will also provide this document in alternative formats upon sufficient notice. MaineHousing has designated the following person responsible for coordinating compliance with applicable federal and state nondiscrimination requirements and addressing grievances: Louise Patenaude, Maine State Housing Authority, 353 Water Street, Augusta, Maine 04330-4633, Telephone Number 1-800-452-4668 (voice in state only), (207) 626-4600 (voice) or Maine Relay 711.
This collection of information is provided for by 19 CFR 10.224. CBP Form 450 is accessible at: http://forms.cbp.gov/pdf/CBP_Form_450.pdf.

Current Actions: This submission is being made to extend the expiration date and to revise the burden hours as a result of an increase in time estimated per response from 15 minutes to 2 hours. There are no changes to CBP Form 450 or to the data collected on this form.

Type of Review: Extension with a change to the burden hours.

Affected Public: Businesses.

Estimated Number of Respondents: 15.

Estimated Number of Responses per Respondent: 286.13.

Estimated Total Annual Responses: 4,292.

Estimated Time per Response: 2 hours.

Estimated Total Annual Barden Hours: 8,584.


Seth Renkema,
Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2016–24019 Filed 10–4–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5971–N–01]

Notice of Certain Operating Cost Adjustment Factors for 2017

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice establishes operating cost adjustment factors (OCAFs) for project-based rental assistance contracts issued under Section 8 of the United States Housing Act of 1937 and renewed under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) with an anniversary date on or after February 11, 2017. OCAFs are annual factors used primarily to adjust the rents for contracts renewed under section 515 or section 524 of MAHRA.

DATES: Effective Date: February 11, 2017.

FOR FURTHER INFORMATION CONTACT: Stan Houle, Program Analyst, Office of Asset Management and Portfolio Oversight, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; telephone number 202–402–2572 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. OCAFs

Section 514(e)(2) and section 524(c)(1) of MAHRA (42 U.S.C. 1437f note) require HUD to establish guidelines for the development of OCAFs for rent adjustments. Sections 524(a)(4)(C)(I), 524(b)(1)(A), and 524(b)(3)(A) of MAHRA, all of which prescribe the use of the OCAF in the calculation of renewal rents, contain similar language. HUD has therefore used a single methodology for establishing OCAFs, which vary from State to State.

MAHRA gives HUD broad discretion in setting OCAFs, referring, for example, in sections 524(a)(4)(C)(I), 524(b)(1)(A), 524(b)(3)(A) and 524(c)(1) simply to “an operating cost adjustment factor established by the Secretary.” The sole limitation to this grant of authority is a specific requirement in each of the foregoing provisions that application of an OCAF “shall not result in a negative adjustment.” Contract rents are adjusted by applying the OCAF to that portion of the rent attributable to operating expenses exclusive of debt service.

The OCAFs provided in this notice are applicable to eligible projects having a contract anniversary date of February 11, 2017 or after and were calculated using the same method as those published in HUD’s 2016 OCAF notice published on October 13, 2015 (79 FR 59502). Specifically, OCAFs are calculated as the sum of weighted average cost changes for wages, employee benefits, property taxes, insurance, supplies and equipment, fuel oil, electricity, natural gas, and water/sewer/trash using publicly available indices. The weights used in the OCAF calculations for each of the nine cost component groupings are set using current percentages attributable to each of the nine expense categories. These weights are calculated in the same manner as in the October 13, 2015, notice. Average expense proportions were calculated using three years of audited Annual Financial Statements from projects covered by OCAFs. The expenditure percentages for these nine categories have been found to be very stable over time, but using three years of data increases their stability.

The nine cost component weights were calculated at the state level, which is the lowest level of geographical aggregation with enough projects to permit statistical analysis. These data were not available for the Western Pacific Islands, so data for Hawaii were used as the best available indicator of OCAFs for these areas.

The best current price data sources for the nine cost categories were used in calculating annual change factors. State-level data for fuel oil, electricity, and natural gas from Department of Energy surveys are relatively current and continue to be used. Data on changes in employee benefits, insurance, property taxes, and water/sewer/trash costs are only available at the national level. The data sources for the nine cost indicators selected used were as follows:

• Labor Costs: First quarter, 2016 Bureau of Labor Statistics (BLS) ECI, Private Industry Wages and Salaries, All Workers (Series ID CU203000000000001) at the national level and Private Industry Benefits, All Workers (Series ID CU203000000000001) at the national level.

• Property Taxes: Census Quarterly Summary of State and Local Government Tax Revenue—Table 1 http://www2.census.gov/geos/qtax/2016/q1t1.xls. 12-month property taxes are computed as the total of four quarters of tax receipts for the period from April through March. Total 12-month taxes are then divided by the number of occupied housing units to arrive at average 12-month tax per housing unit. The number of occupied housing units is taken from the estimates program at the Bureau of the Census. http://www.census.gov/housing/hvs/data/histtab8.xls.


• Insurance: May 2015 to May 2016 Bureau of Labor Statistic (BLS) Consumer Price Index, Tenants and Household Insurance Index (Series ID CUUR00005SSEHD) at the national level.

• Fuel Oil: October 2015–March 2016 U.S. Weekly Heating Oil and Propane Prices report. Average weekly residential heating oil prices in cents per gallon excluding taxes for the period from October 5, 2015 through March 28, 2016 are compared to the average from October 13, 2014 through March 30, 2015. For the States with insufficient fuel oil consumption to have separate estimates, the relevant regional Petroleum Administration for Defense Districts (PADD) change between these two periods is used; if there is no regional PADD estimate, the U.S. change between these two periods is used. http://www.eia.gov/dnav/pet/
• Natural Gas: Energy Information Agency, Natural Gas, Residential Energy Price, 2015–2016 annual amounts in dollars per 1,000 cubic feet at the state level. Due to EIA data quality standards several states were missing data for one or two months in 2015; in these cases, data for these missing months were estimated using data from the surrounding months in 2015 and the relationship between that same month and the surrounding months in 2014. http://www.eia.gov/dnav/ng/ng_pri_sum_aEPG0 PRS DMcf a.htm.
• Water and Sewer: May 2015 to May 2016 Consumer Price Index, All Urban Consumers, Water and Sewer and Trash Collection Services (Series ID CUUR0000SEHG) at the national level. The sum of the nine cost component percentage weights equals 100 percent of operating costs for purposes of OCAF calculations. To calculate the OCAFs, state-level cost component weights developed from AFS data are multiplied by the selected inflation factors. For instance, if wages in Virginia comprised 50 percent of total operating cost expenses and increased by 4 percent from 2015 to 2016, the wage increase component of the Virginia OCAF for 2017 would be 2.0 percent (50% * 4%). This 2.0 percent would then be added to the increases for the other eight expense categories to calculate the 2016 OCAF for Virginia. For states where the OCAF is less than 1.0 percent, the OCAF is floored at 1. The OCAFs for 2017 are included as an Appendix to this Notice.

II. MAHRA OCAF Procedures
Sections 514 and 515 of MAHRA, as amended, created the Mark-to-Market program to reduce the cost of federal housing assistance, to enhance HUD’s administration of such assistance, and to ensure the continued affordability of units in certain multifamily housing projects. Section 524 of MAHRA authorizes renewal of Section 8 project-based assistance contracts for projects without restructuring plans under the Mark-to-Market program, including projects that are not eligible for a restructuring plan and those for which the owner does not request such a plan. Renewals must be at rents not exceeding comparable market rents except for certain projects. As an example, for Section 8 Moderate Rehabilitation projects, other than single room occupancy projects (SROs) under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 et seq.), that are eligible for renewal under section 524(b)(3) of MAHRA, the renewal rents are required to be set at the lesser of: (1) The existing rents under the expiring contract, as adjusted by the OCAF; (2) fair market rents (less any amounts allowed for tenant-purchased utilities); or (3) comparable market rents for the market area.

III. Findings and Certifications
Environmental Impact
This issuance sets forth rate determinations and related administrative requirements and procedures that do not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this notice is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Catalog of Federal Domestic Assistance Number
The Catalog of Federal Domestic Assistance Number for this program is 14.195.

Edward L. Golding,
Principal Deputy, Assistant Secretary for Housing.

Appendix
Operating Cost Adjustment Factors For 2017

<table>
<thead>
<tr>
<th>State</th>
<th>OCAF (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>2.1</td>
</tr>
<tr>
<td>Alaska</td>
<td>0.5</td>
</tr>
<tr>
<td>Arizona</td>
<td>2.1</td>
</tr>
<tr>
<td>Arkansas</td>
<td>2.3</td>
</tr>
<tr>
<td>California</td>
<td>2.2</td>
</tr>
<tr>
<td>Colorado</td>
<td>1.7</td>
</tr>
<tr>
<td>Connecticut</td>
<td>1.1</td>
</tr>
<tr>
<td>Delaware</td>
<td>1.7</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>2.0</td>
</tr>
<tr>
<td>Florida</td>
<td>2.0</td>
</tr>
<tr>
<td>Georgia</td>
<td>2.0</td>
</tr>
<tr>
<td>Hawaii</td>
<td>0.0</td>
</tr>
<tr>
<td>Idaho</td>
<td>2.3</td>
</tr>
<tr>
<td>Illinois</td>
<td>1.5</td>
</tr>
<tr>
<td>Indiana</td>
<td>2.0</td>
</tr>
<tr>
<td>Iowa</td>
<td>2.1</td>
</tr>
<tr>
<td>Kansas</td>
<td>2.0</td>
</tr>
<tr>
<td>Kentucky</td>
<td>1.9</td>
</tr>
<tr>
<td>Louisiana</td>
<td>1.8</td>
</tr>
<tr>
<td>Maine</td>
<td>1.4</td>
</tr>
<tr>
<td>Maryland</td>
<td>2.1</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>1.8</td>
</tr>
<tr>
<td>Michigan</td>
<td>1.7</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1.8</td>
</tr>
<tr>
<td>Mississippi</td>
<td>2.1</td>
</tr>
<tr>
<td>Missouri</td>
<td>2.2</td>
</tr>
<tr>
<td>Montana</td>
<td>2.1</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2.3</td>
</tr>
<tr>
<td>Nevada</td>
<td>2.2</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>1.8</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1.3</td>
</tr>
<tr>
<td>New Mexico</td>
<td>1.6</td>
</tr>
<tr>
<td>New York</td>
<td>0.4</td>
</tr>
<tr>
<td>North Carolina</td>
<td>2.0</td>
</tr>
<tr>
<td>North Dakota</td>
<td>2.4</td>
</tr>
<tr>
<td>Ohio</td>
<td>1.9</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>2.0</td>
</tr>
<tr>
<td>Oregon</td>
<td>2.2</td>
</tr>
<tr>
<td>Pacific Islands</td>
<td>0.0</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2.0</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>1.9</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>2.1</td>
</tr>
<tr>
<td>South Carolina</td>
<td>2.1</td>
</tr>
<tr>
<td>South Dakota</td>
<td>2.1</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2.0</td>
</tr>
<tr>
<td>Texas</td>
<td>2.0</td>
</tr>
<tr>
<td>Utah</td>
<td>2.2</td>
</tr>
<tr>
<td>Vermont</td>
<td>0.6</td>
</tr>
<tr>
<td>Virgin Islands</td>
<td>2.0</td>
</tr>
<tr>
<td>Virginia</td>
<td>2.0</td>
</tr>
<tr>
<td>Washington</td>
<td>2.2</td>
</tr>
<tr>
<td>West Virginia</td>
<td>2.6</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>1.8</td>
</tr>
<tr>
<td>Wyoming</td>
<td>2.2</td>
</tr>
</tbody>
</table>

US Average .......................... 1.9

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

Agency Information Collection Activities: Request for Comments

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of a renewal of a currently approved information collection (1028–0098).

SUMMARY: We (the U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This collection is scheduled to expire on January 31, 2017.

DATES: To ensure that your comments are considered, we must receive them on or before December 5, 2016.

ADDRESSES: You may submit comments on this information collection to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive MS 807, Reston,
AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: Through this final rule, HUD ensures equal access for individuals in accordance with their gender identity in programs and shelter funded under programs administered by HUD’s Office of Community Planning and Development (CPD). This rule builds upon HUD’s February 2012 final rule entitled “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity” (2012 Equal Access Rule), which aimed to ensure that HUD’s housing programs would be open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. The 2012 Equal Access Rule, however, did not address how transgender and gender non-conforming individuals should be accommodated in temporary, emergency shelters, and other buildings and facilities used for shelter, that have physical limitations or configurations that require and that are permitted to have shared sleeping quarters or shared bathing facilities. This final rule follows HUD’s November 2015 proposed rule, which addressed this issue and solicited public comment on measures to ensure that recipients and subrecipients of CPD funding—as well as owners, operators, and managers of shelters and other buildings and facilities and providers of services funded by CPD—grant equal access to
such facilities and services to individuals in accordance with an individual’s gender identity.

This rule amends HUD’s definition of “gender identity” to more clearly reflect the difference between actual and perceived gender identity and eliminates the prohibition on inquiries related to sexual orientation or gender identity, so that service providers can ensure compliance with this rule. The removal of the prohibition on inquiries related to sexual orientation or gender identity does not alter the requirement to make housing assisted by HUD and housing insured by the Federal Housing Administration (FHA) available without regard to actual or perceived sexual orientation or gender identity. Lastly, without changing the scope of the requirement to provide equal access without regard to sexual orientation, this rule makes a technical amendment to the definition of “sexual orientation,” which HUD adopted from the Office of Personnel Management’s (OPM) definition of the term in 2012, to conform to OPM’s current definition.

In order to ensure that individuals are aware of their rights to equal access, HUD is publishing elsewhere in this issue of the Federal Register for public comment, in accordance with the Paperwork Reduction Act of 1995, a document entitled “Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status” for owners or operators of CPD-funded shelters, housing, facilities, and other buildings to post on bulletin boards and in other public spaces where information is typically made available.

DATES: Effective: [Insert date 30 days from the date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC
SUPPLEMENTARY INFORMATION

I. Background

A. HUD’s Previous Efforts to Ensure Equal Access

On February 3, 2012, at 77 FR 5662, HUD issued its 2012 Equal Access Rule, which defined the terms “sexual orientation” and “gender identity,” and required that HUD-assisted housing, including all housing funded by CPD, and housing insured by FHA be made available to individuals and families without regard to actual or perceived sexual orientation, gender identity, or marital status. The 2012 Equal Access Rule also generally prohibited inquiries into sexual orientation or gender identity for the purpose of determining eligibility for, or availability of, such housing. In the 2012 Equal Access Rule, HUD declined to adopt a national policy on the placement of transgender persons in temporary, emergency shelters with shared sleeping quarters or shared bathing facilities, deciding instead to conduct research and monitor its programs to determine whether additional guidance or national policy was needed to ensure equal access for transgender and gender nonconforming persons.¹ HUD also decided to conduct a similar review to determine whether additional guidance was needed with regard to the prohibition on inquiries.

As a result of its review, HUD determined that the 2012 Equal Access Rule did not adequately address the significant barriers faced by transgender and gender nonconforming persons when accessing temporary, emergency shelters and other facilities with physical

¹Gender nonconforming persons are persons who do not follow other people’s ideas or stereotypes about how they should look or act based on their sex assigned at birth.
limitations or configurations that require and are permitted to have shared sleeping quarters or bathing facilities. Specifically, HUD found that transgender and gender nonconforming persons continue to experience significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations. For instance, at a listening session on lesbian, gay, bisexual, and transgender (LGBT) issues conducted with the U.S. Interagency Council on Homelessness, homeless service providers reported that transgender persons are often discriminatorily excluded from shelters or face dangerous conditions in the shelters that correspond to their sex assigned at birth. Some commenters reported that, if given the choice between a shelter designated for assigned birth sex or sleeping on the streets, many transgender shelter-seekers would choose the streets.

HUD also investigated individual cases where transgender persons were not provided equal access as required by the 2012 Equal Access Rule, or they faced unlawful discrimination under the Fair Housing Act. HUD also reviewed national research that revealed that lack of access to shelter for transgender and gender nonconforming persons, particularly those who were also homeless youths, was a pervasive problem and reviewed the efforts of other Federal agencies to provide equal access to transgender and gender nonconforming persons. HUD found that multiple agencies prohibit discrimination on the basis of sexual orientation and gender identity and also require that grant recipients treat transgender persons consistent with their gender identity. Specifically, HUD found guidance from other Federal agencies supporting the position that grant recipients could accommodate transgender individuals in accordance with their gender identity in Federal programs, including those program that funded single-sex facilities.

On February 20, 2015, CPD issued guidance, entitled “Appropriate Placement for
Transgender Persons in Single-Sex Emergency Shelters and Other Facilities” (CPD-15-02), which applied to the following CPD programs: Housing Opportunities for Persons With AIDS (HOPWA), Emergency Solutions Grants (ESG), and Continuum of Care (CoC). This guidance clarified that HUD expected recipients and subrecipients under these programs to base placement decisions on the gender with which a person identifies—and not on another person’s stereotype-based complaints—taking into consideration health and safety concerns and giving serious consideration to the transgender or gender nonconforming person’s own personal health and safety concerns. The guidance also outlined best practices for providers.

B. The November 2015 Proposed Rule

On November 20, 2015, at 80 FR 72642, following careful review of information about the treatment of transgender persons in temporary, emergency shelters, HUD proposed a second Equal Access rule, entitled “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs” (CPD Equal Access). In this rulemaking, HUD proposed to add a new section to its regulations in 24 CFR part 5 that would require recipients and subrecipients of assistance under CPD programs—as well as owners, operators, and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by CPD programs—to provide equal access to programs, benefits, services, and accommodations in accordance with an individual’s gender identity.

Specifically, the rule proposed to add to 24 CFR part 5 a new § 5.106, which would contain equal access provisions tailored to CPD programs. Section 5.106(a) proposed to identify the scope of its coverage as including recipients and subrecipients of assistance under the following CPD programs: HOME Investment Partnerships (HOME) (24 CFR part
92), Community Development Block Grant (CDBG) (24 CFR part 570), HOPWA (24 CFR part 574), ESG (24 CFR part 576), CoC (24 CFR part 578), as well as owners, operators, managers of shelters and other buildings and facilities and providers of services funded in whole or in part by any of these programs.

Section 5.106(b) proposed to require CPD recipients, subrecipients, owners, operators, managers, and providers to establish or amend, as necessary, and administer program admissions, occupancy, and operating policies and procedures, including policies and procedures to protect individuals’ privacy and security, so that equal access to programs, shelters, other buildings and facilities, benefits, services, and accommodations are provided to individuals in accordance with their gender identity. That section also proposed to require that such equal access be provided in a manner that affords equal access to the individual’s family.

Section 5.106(c) proposed to require that the placement and accommodation of individuals in facilities that are permitted to be single-sex must be made in accordance with the individual's gender identity. The proposed rule provided that, under narrow circumstances, a written case-by-case determination could be made as to whether an alternative accommodation is necessary to ensure health and safety. The proposed rule contained a prohibition for such a determination to be based solely on a person's actual or perceived gender identity or on complaints of other shelter residents when those complaints are based on actual or perceived gender identity. It also proposed to prohibit the denial of appropriate placement based on a perceived threat to health or safety that can be mitigated some other, less burdensome way (e.g., by providing the transgender shelter seeker the option to use single occupant bathing facilities). Lastly, the rule proposed that, to avoid
unwarranted denials of placement in accordance with an individual's gender identity, decisions to provide accommodations based on concern for the health and safety of the individual seeking accommodations should be based on the individual's own request to be otherwise accommodated.

Section 5.106(d) proposed to require that when a case-by-case determination based on health and safety is made under § 5.106(c), the entity providing the alternative accommodation must provide either (1) equivalent alternative accommodation, benefits, and services or (2) a referral to a comparable alternative program with availability that meets the needs of the individual.

Section 5.106(e) proposed to require recipients, subrecipients, or providers to keep records of compliance with paragraphs (b) and the case-by-case determinations under paragraph (c) of this section, including the facts, circumstances, and reasoning relied upon that lead to any alternative admission, accommodation, benefit, or service to an individual and the individual’s family; the facts and circumstances regarding the opportunities to access alternative accommodations provided to an individual and the individual’s family; and the outcomes regarding referral to an alternative program of an individual and the individual’s family.

In addition, the rule proposed to amend the definition of “gender identity” at § 5.100 to separate the definitions of “actual” and “perceived” gender identity. In brief, the rule proposed to replace HUD’s current definition, which mirrored the definition in the Matthew Shepard/James Byrd Hate Crimes Prevention Act of 2009 (Public Law 114-38, approved October 28, 2009) and instead adopt a definition that clarified the difference between actual and perceived gender identity.
Lastly, the proposed rule sought to remove the prohibition on inquiries provision at § 5.105(a)(2)(ii), which prohibited providers in most circumstances from asking individuals their sexual orientation or gender identity. HUD reasoned that the provision raised several legitimate questions about implementation, and its removal would allow temporary, emergency shelters or other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities to ask an individual’s gender identity for nondiscriminatory purposes, such as to determine the appropriate placement for the individual or the number of bedrooms to which a household is entitled.

C. Recent Developments in the Interpretation of Federal Law and Applicable Research

After HUD issued the November 2015 proposed rule, the Center for American Progress released a new study specifically focusing on discrimination experienced by transgender individuals seeking access to shelters, the Department of Justice (DOJ) and the Department of Education issued guidance for educators on providing equal access for transgender students in schools, and the Department of Health and Human Services issued a final rule to ensure equal access to health programs and activities administered by that Department or established under title I of the Affordable Care Act.

On January 7, 2016, the Center for American Progress released the results of a discrimination telephone test, carried out across four States, that measured the degree to which transgender homeless women can access a shelter in accordance with their gender identity, as well as the types of discrimination and mistreatment they face in the process.²

The study consisted of 100 phone calls to homeless shelters in four States, over 3 months, by testers who identified themselves as transgender women seeking access to both women’s shelters and general shelters. The study found that only 30 percent of the shelters contacted by the testers were willing to house the transgender women with other women, 13 percent offered to house the transgender women in isolation or with men, 21 percent refused service altogether, and another 21 percent were unsure or unclear as to whether they could house transgender women with other women. The survey results also found that women’s shelters were more likely to provide services consistent with an individual’s gender identity than were mixed gender shelters. During interactions on the phone with shelter employees, testers experienced the following: they were often referred to using the wrong gender or shelter employees made other statements to discredit their gender identity, shelter employees made references to the testers’ genitalia or to surgery as requirements for appropriate housing, and shelter employees stated that other residents would be made uncomfortable or unsafe by the tester. Of the shelters called, 27 percent had received HUD funds at some point.

In May 2016, DOJ and the Department of Education released guidance summarizing the legal obligations of schools regarding transgender students.3 The guidance specifically emphasizes that schools must “treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.” In sex-segregated activities and facilities, transgender students “must be allowed to participate in such activities and access such facilities consistent with their gender identity.” The guidance also requires schools to provide a safe environment for all students, including transgender students, and requires that schools treat students consistent with their gender identity regardless of records or

identification documents indicating a different sex.

Also in May 2016, the Department of Health and Human Services issued final regulations entitled “Nondiscrimination in Health Programs and Activities,” which implement section 1557 of the Affordable Care Act. Section 1557 prohibits discrimination in health programs and activities on the basis of sex, and the rule provides that “a covered entity shall treat individuals consistent with their gender identity, except that a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual’s sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.”

II. Changes Made at the Final Rule Stage

In response to public comment and upon further consideration by HUD of the issues presented in this rulemaking, HUD makes the following changes at this final rule stage:

In § 5.100, the proposed definition of “perceived gender identity” is modified so that the definition states that “perceived gender identity” means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, sex assigned at birth, or identification in documents. This change was made in response to public comments stating that transgender persons often face difficulty in being accommodated in accordance with their gender identity because it is difficult to obtain identity documents that accurately list their gender identity. The words “identified in documents” were added to the definition to make clear that the identification of gender or sex on an individual’s identity document may be different than a person’s actual gender identity.

The definition of “gender identity” in the final rule, which is unchanged from the proposed rule, makes clear that “gender identity” means the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person’s perceived gender identity. Reading these definitions together, “gender identity” is therefore determined regardless of the gender identified on an individual’s identity documents.

This rule also makes a technical amendment to the definition of “sexual orientation.” The 2012 Equal Access Rule defined “sexual orientation” as “homosexuality, heterosexuality, or bisexuality,” following a definition that OPM used in the context of the Federal workforce in its publication “Addressing Sexual Orientation in Federal Civilian Employment: A Guide to Employee Rights.” OPM’s publication was revised in June 2015, and HUD is amending its definition to conform to the new OPM definition, which is “sexual orientation means one’s emotional or physical attraction to the same and/or opposite sex.” (See https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf.) This change in definition does not change the coverage provided by the prior definition but is simply intended to use terminology that is up-to-date.

In § 5.105(a)(2), HUD adopts the proposal to eliminate the inquiries provision in § 5.105(a)(2)(ii). With the removal of § 5.105(a)(2)(ii), § 5.105(a)(2)(i) is redesignated as § 5.105(a)(2).

In § 5.106, HUD makes several changes. HUD has changed the heading of this section from “Providing access in accordance with the individual’s gender identity in community planning and development programs” to “Equal access in accordance with the individual’s gender identity in community planning and development programs.” Although
this is not a substantive change, the change appropriately emphasizes that the purpose of the rule is equal access in accordance with an individual’s gender identity in CPD programs generally. Equal access ensures that, when consideration of sex is prohibited or not relevant, individuals will not be discriminated against based on actual or perceived gender identity, and where legitimate consideration of sex or gender is appropriate, such as in a facility providing temporary, short term shelter that is not covered by the Fair Housing Act and which is legally permitted to operate as a single-sex facility, the individual’s own self-identified gender identity will govern.

Section 5.106(a) is revised at the final rule stage to clarify that § 5.106 applies to recipients and subrecipients of assistance from CPD, which include the specific programs identified at the proposed rule stage (HOME, CDBG, HOPWA, ESG, and CoC), as well as to the Housing Trust Fund program (with regulations at 24 CFR part 93) and the Rural Housing Stability Assistance Program (with regulations to be codified in 24 CFR part 579). As noted throughout the proposed rule, the rule was always intended to apply to recipients and subrecipients of CPD programs, as well as those who administer programs and services and provide temporary, emergency shelter funded by CPD programs, and HUD did not intend to

---

5 The Fair Housing Act prohibits discrimination in the sale, rental, making unavailable, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, and national origin, and thus prohibits making housing unavailable to a person because of that person’s sex. 42 U.S.C. 3601 et seq. The Fair Housing Act contains no exemptions that permit covered housing to be sex-segregated. See 42 U.S.C. 3603(b) (limited exemptions from Fair Housing Act coverage for sales of certain single family homes and for rooms or units in certain owner-occupied dwellings), and § 3607 (exemptions from Fair Housing Act coverage for private clubs and religious organizations).

6 Temporary, emergency shelters and other buildings and facilities that are not covered by the Fair Housing Act because they provide short-term, temporary accommodations may provide sex-segregated accommodations, which they sometimes do to protect the privacy and security of individuals when the buildings and facilities have physical limitations or configurations that require shared sleeping quarters or shared bathing facilities. For purposes of this rule, shared sleeping quarters or shared bathing facilities are those that are designed for simultaneous accommodation of multiple individuals in the same space. For example, a single-user bathing facility with a lock on the door is not designated for simultaneous occupancy by multiple individuals, so it is not a “shared bathing facility” for purposes of the Equal Access Rule or this rule.
exclude the new Housing Trust Fund and Rural Housing Stability Assistance programs from the list of CPD programs in this paragraph.

Section 5.106(b) addresses the admissions, occupancy, and operating policies and procedures of recipients, subrecipients, owners, operators, managers, and providers covered by this rule. Revised paragraph (b) adds that policies and procedures to protect health and safety, as well as privacy and security noted in the proposed rule, must be established, maintained, or amended, as necessary, and provides that all policies must be administered in a nondiscriminatory manner. HUD recognizes that in the temporary, emergency shelters covered by this rule, privacy, security, safety, and health concerns may arise as a result of the varied populations that reside in such facilities at any given time. The rule requires policies and procedures, if such policies and procedures have not already been updated, to reflect the obligation and to document the commitment of the provider to maintain a healthy and safe environment for all occupants and respect individual privacy without doing so in a way that is discriminatory or violates applicable Federal laws and regulations.

HUD also revises paragraph (b) to add a provision that the policies and procedures must ensure that individuals are not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual’s gender identity. This revision was made in response to public comment advising that transgender persons and gender nonconforming persons are often asked inappropriate, intrusive questions; asked to provide evidence about their physical anatomy; or asked for medical records relating to their gender identity or identification documents that record their gender identity. There are multiple reasons why this documentation is problematic and prohibited by this rule. Homeless persons encounter difficulties in maintaining their
identification documents, and individuals whose gender identities differ from sex assigned at birth experience varying levels of difficulty in updating gender markers on identification documents. These barriers make it likely that an individual seeking homeless services and whose gender identity differs from their sex assigned at birth will possess identification documents that do not reflect that individual’s gender identity, if they have identification documents at all. Further, gender identity is distinct from sex assigned at birth, is not associated with physical anatomy, and may not be indicated in medical records. For these reasons, HUD agrees with public commenters that it is important that transgender or gender nonconforming persons can self-identify their gender identity orally and not be asked intrusive questions or asked to provide documentary, physical, or medical evidence to prove their gender identity.

Lastly, revised paragraph (b) also requires that such revisions ensure that amendments to CPD programs policies and procedures continue to include the existing requirement in §5.105(a)(2) that individuals are provided equal access to housing in CPD programs without regard to actual or perceived gender identity. While this rule’s focus is on programs, owners, operators, and managers of shelters, buildings, and other facilities and providers of CPD-funded services that were not covered under HUD’s 2012 Equal Access Rule, housing under CPD programs has already been required to ensure equal access to individuals based on their gender identity. HUD adds this provision to clarify that, when amending CPD program policies and procedures, they should continue to reflect the existing 2012 Equal Access Rule requirement that housing be made available without regard to gender identity.

In §5.106(c), which addresses placement and accommodation in temporary, emergency shelters and other buildings and facilities with physical limitations or
configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities, HUD removes the proposed rule language that under narrow circumstances, a written case-by-case determination could be made on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety. Public commenters expressed concern that the exception could be inappropriately used to avoid compliance with the equal access requirement, and that this “exception” also targeted transgender individuals as a cause of concern with respect to health and safety. HUD was persuaded by the public commenters that the “exception” provision had the opposite effect than that intended by HUD. HUD’s intention in the inclusion of this language was to strive to ensure the health and safety of transgender individuals in temporary, emergency shelters and other buildings and facilities. It was not to indicate that the very presence of transgender individuals was a cause for health and safety concerns nor to indicate, by allowing alternative accommodation, that HUD’s only concern was the health and safety of transgender individuals and HUD was not concerned about any other occupants. HUD’s regulations for the ESG program and the implementing guidance, make clear that temporary, emergency shelters, and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities have had, and continue to have, a responsibility to create a safe environment for all occupants, particularly those of special populations (see 24 CFR 576.400(e)(3)(iii) for more information).

This final rule thus revises paragraph (c) of § 5.106 to provide that placement and accommodation of individuals shall be made in accordance with an individual’s gender identity, and it removes language that permits an exception to this rule where a provider
makes a written case-by-case determination on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety. There are various measures that HUD’s providers may take to fulfill their duty to create a safe environment for all, including transgender and gender nonconforming individuals, and to ensure that HUD-funded projects are free from discrimination. As preemptive steps, providers are strongly encouraged to post a notice of rights under this rule and under HUD’s 2012 Equal Access Rule on bulletin boards and in other public spaces where information is made available, to clearly establish expectations. In order to ensure that individuals are aware of their rights to equal access, HUD proposes to require owners and operators of CPD-funded shelters and facilities to post on bulletin boards and in other public spaces where information is typically made available a notice entitled “Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status for HUD’s Community Planning and Development Programs,” which HUD is publishing in today’s Federal Register for public comment, in accordance with the Paperwork Reduction Act of 1995. In addition, HUD Technical Assistance materials provide a sample antidiscrimination policy that providers may consider adopting to further clarify expectations to persons as they enter the project.7

Even with antidiscrimination policies clearly articulated, occupants may express concerns or engage in other behavior toward transgender or gender nonconforming persons. If some occupants initially present concerns about transgender or gender nonconforming occupants to project staff and managers, staff should treat those concerns as opportunities to educate and refocus the occupants. HUD recognizes that, even then, conflicts may persist and

---

complaints may escalate to verbal or physical harassment. In these situations, providers should have policies and procedures in place to support residents and staff in addressing and resolving conflicts that escalate to harassment. These policies should include specific behaviors that violate standards of respectful behavior, escalate corrective actions if an individual repeats the same violation of standards after educational opportunities are offered, and focus corrective actions on aggressors who violate project rules, not on the person targeted by the harassment. If an occupant continues to harass a transgender individual, the provider should consider requiring that the harassing occupant stay away from the transgender individual, making changes in sleeping arrangements without limiting the freedom of the transgender individual, or pursuing other interventions. When appropriate, providers may consider expelling harassing residents, or any staff or volunteer members who perpetuate discrimination. In no instance, however, should any steps taken to address harassment or discrimination involve expulsion of harassed occupants.

Revised paragraph (c) provides for post-admission accommodations, where after an individual has been admitted to a temporary, emergency shelter, or other building or facility with shared sleeping quarters or shared bathing facilities, the provider must take non-discriminatory steps that may be necessary and appropriate to address privacy concerns raised by all residents or occupants, and, as needed, update its admissions, occupancy, and operating policies and procedures. These provisions apply to all individuals, regardless of gender identity. If an individual requests certain accommodations because of privacy concerns, staff may offer those accommodations to that individual but may not require that the individual use the accommodations. For example, if available, staff may offer that occupant a room, floor, or bed that is close to staff workstations or access to rooms, floors, or
beds set aside for residents with increased vulnerability. At the request of an individual, providers may also offer use of a single-occupant bathroom or provide certain times during the day that a shared bathroom can be scheduled by any client with a request to use a private bathing facility. If feasible, providers can ensure that toilet and shower stalls have locking doors or, at a minimum, curtains to allow for modesty and privacy. For shower use, providers may consider implementing a schedule for all clients if communal showers are the only available type of shower. HUD stresses that all such accommodations should be offered only to fulfill the request of individuals seeking accommodations for themselves, should be available to clients based on a variety of factors that can increase one’s vulnerability, and should not be restricted for use only by transgender or gender nonconforming residents. In no case may a provider’s policies isolate or segregate transgender or gender nonconforming occupants.

This final rule removes from § 5.105(d) in the proposed rule the language relating to referrals, HUD has removed the provision from the proposed rule that permitted housing providers to make a written case-by-case determination that a transgender individual should receive an alternative accommodation for health and safety reasons. This does not preclude the possibility that any occupant may request a referral to an alternate project for health and safety reasons, and in such cases staff may provide a referral or offer clients a hotel or motel voucher.8

This final rule redesignates the recordkeeping requirements from § 5.106(e) to 5.106(d) and states that providers must document and maintain, for a period of 5 years, records of compliance with the requirements of this rule regarding establishing or amending

8 In the ESG program, a hotel or motel voucher may be offered only if there are no other accessible or appropriate emergency shelter beds available for that night.
policies and procedures. This rule also removes the more specific requirements related to case-by-case determinations and referrals.

To strengthen enforcement mechanisms for this rule, HUD is publishing in today’s Federal Register a notice for public comment, in accordance with the Paperwork Reduction Act of 1995, entitled “Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status for HUD’s Community Planning and Development Programs.” HUD proposes to require owners and operators of CPD-funded shelters and facilities to post this notice on bulletin boards and in other public spaces where information is typically made available.

III. Public Comments Submitted on Proposed Rule and HUD’s Responses

A. Overview of Public Comments

The public comment period for the November 20, 2015, proposed rule closed on January 19, 2016. As of the close of the comment period, HUD received approximately 184 public comments, in addition to a number of mass mailings, from a variety of commenters, including housing authorities, direct legal services providers, community development agencies, homeless shelters, healthcare providers, social workers, clergy, counselors, nonprofit social service providers, and LGBT advocacy organizations. The overwhelming majority of comments were supportive of the rule. Some commenters, while supporting the rule, suggested modifications, and a minority of the commenters opposed the rule. Commenters opposing the rule stated that it failed to balance the needs of all shelter occupants and lacks flexibility. All comments can be viewed at http://www.regulations.gov.

1. Commenters Supporting the Rule

Many commenters supporting the rule suggested no changes and offered a variety of
reasons why they supported the rule and why HUD should conclude the rulemaking as expeditiously as possible. Commenters stated that transgender persons, like all persons, need access to safe shelter and housing and that transgender persons are some of the most vulnerable members of society. Commenters stated that transgender individuals are disproportionately represented in the homeless population because of the frequent discrimination they face at home, in school, and on the job. Some cited a survey showing that one in five transgender or gender nonconforming individuals experienced homelessness at some point in their lives because of their transgender status. Commenters stated that transgender individuals were at greater overall risk of violence, murder, and homelessness-related death than people who are not transgender and may also experience mental and physical health problems because of the abuse they face.

Commenters stated that the rule would promote civil rights and expanded housing opportunity by addressing the effects of stigma on equal access to housing for transgender and gender nonconforming persons. Commenters supporting the rule frequently stated that the rule would eliminate major barriers to access to safe, temporary, emergency shelter and other facilities and programs for transgender and gender nonconforming persons, particularly vulnerable subgroups within the population that need access to such accommodations. Some commenters stated that the rule will yield other positive societal outcomes. Many commenters provided extensive data to support the rule, including a January 2016 study conducted by the Center for American Progress that found, among other things, that only 30 percent of shelters studied were willing to accommodate transgender women in accordance with their gender identity. The commenters stated that LGBT providers were twice as likely to be willing to provide a shelter-seeker with accommodations in accordance with the
individual’s gender identity; that women’s shelters were more likely than mixed-gender shelters to provide a shelter-seeker with accommodations in accordance with the individual’s gender identity; and that many shelters did not correctly classify shelter-seekers in accordance with the individual’s gender identity or stated that transgender or gender nonconforming individuals would have to submit to invasive medical examinations or inquiries, or demonstrate that they had undergone surgery, as a prerequisite to obtaining shelter.9

Other commenters supporting HUD’s rule stated that the rule is needed because the willingness to house transgender people in accordance with their gender identity currently varies, depending on State laws and shelter type, and HUD’s rule would provide some consistency. Commenters stated that because 32 States lack explicit gender identity protections in housing, HUD’s rule will help ensure equal access to shelters nationwide for transgender and gender nonconforming individuals. Commenters said that even in jurisdictions with express protections for transgender individuals, discriminatory practices still persist. Commenters stated that HUD’s rule is in step with recent Federal case law holding that discrimination on the basis of sexual orientation and gender identity constitutes unlawful discrimination on the “basis of sex,” in violation of Title VII of the Civil Rights Act and Title IX of the Education Amendments of 1972.

2. Comments Opposing the Rule

Commenters opposing the rule provided many reasons for their opposition but the primary reason concerned the safety of nontransgender individuals in a shelter. Commenters

stated that the rule should not open female, single-sex spaces to individuals who were born male, citing their fear that individuals could deliberately misrepresent their gender identities and compromise the privacy or safety of vulnerable women and children. Commenters stated that there is a risk of causing female survivors of male-perpetrated domestic or sexual violence, who are disproportionately represented in the homeless population and shelters, to feel unsafe. Commenters said the rule does not respect legitimate safety and privacy concerns of biological women, and that the rule treats women’s fear of being assaulted in a shelter as unreasonable “bigotry.” Commenters stated that the rule should require providers to create segregated facilities for transgender individuals, rather than placing individuals into male or female facilities that correspond to the individual’s gender identity. Commenters stated that transgender men are also vulnerable to assault in shelters. Several commenters opposing the rule cited to articles recounting the stories of individuals who had been raped in shelters. A commenter stated that it is untrue that transgender women can be safe only in a women’s shelter. Commenters stated that the rule must balance the various needs, perspectives, personal histories, and expectations of privacy of both transgender individuals and other shelter seekers. Commenters stated that the rule should provide equal consideration to the health and safety concerns of transgender and nontransgender individuals and guidelines on what constitutes threats to health and safety for transgender and nontransgender individuals.

3. Responses to Comments in Support and Opposition

HUD appreciates all of the comments offered in response to HUD’s proposed rule. Comments supporting the rule as well as comments opposing the rule gave HUD much to consider in the development of this final rule. While HUD is proceeding with this
rulemaking, HUD is making the changes highlighted in Section II of this preamble.

B. Significant Public Comments and HUD’s Responses

This section presents significant issues raised by commenters and HUD’s responses to these comments. The issues presented in this section highlight changes requested by commenters, and questions about or requests for clarifications about certain provisions of the rule.

Comment: Commenters stated that the rule exceeds HUD’s current statutory mandate because Congress has not given HUD the authority to prohibit discrimination based on gender identity. Commenters stated that the rule’s definitions of “gender identity” and “perceived gender identity” are overbroad and exceed HUD’s authority by creating a new protected class and that HUD failed to specify the basis for this prohibition of discrimination.

HUD Response: The rule creates additional program requirements to ensure equal access for transgender and gender nonconforming persons, in accordance with their gender identity, in shelters, buildings, facilities, and programs funded in whole or in part by CPD. The creation of such program requirements is well within the scope of HUD's authority. HUD's mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. This mission encompasses providing shelter for transgender and gender nonconforming persons, who have faced significant difficulty in obtaining access to shelters, and buildings and facilities that provide shelter. Excluding any eligible person from HUD-funded temporary, emergency shelters, buildings, facilities, housing, or programs because of that person's gender identity or nonconformance with gender stereotypes would contravene HUD’s responsibility under the Department of Housing and Urban Development Act to work to address "the needs and interests of the Nation's communities and of the people who live
and work in them." (See 42 U.S.C. 3531.) Congress has repeatedly charged HUD with serving the existing housing needs of all Americans.10

Congress has not only given HUD this broad mission but also given HUD broad authority to fulfill this mission and implement its responsibilities through rulemaking. Section 7(d) of the Department of Housing and Urban Development Act specifically states that the Secretary "may make such rules and regulations as may be necessary to carry out his functions, powers, and duties." Moreover, as discussed in the preamble to HUD’s 2012 Equal Access Rule and as discussed in greater detail in response to the following comment, HUD is charged with administering and enforcing the Fair Housing Act, which prohibits discrimination on the basis of protected characteristics, including sex. Discrimination because of gender identity is covered within the Fair Housing Act’s prohibition of sex discrimination. In 2010, HUD issued a memorandum recognizing that sex discrimination includes discrimination because of gender identity. In 2012, the Equal Employment Opportunity Commission (EEOC) reached the same conclusion with regard to gender identity claims, “clarifying that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition.”11 Following the EEOC’s decision, the U.S. Attorney General also concluded that:

the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. The most straightforward reading of Title VII is that discrimination “because of . . . sex”


includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex. 12

HUD reaffirms its view that discrimination based on gender identity is sex discrimination.

Comment: HUD received comments on sex discrimination under the Fair Housing Act and the proposed requirement that individuals be provided accommodations in accordance with their gender identity. A commenter stated that, while it is helpful that HUD already considers the Fair Housing Act’s provision against discrimination on the basis of sex to cover nonconforming gender expression, it would be helpful to make that protection explicit in the new rule.

HUD Response: HUD does not believe it is necessary to modify the proposed regulatory text as the commenter recommends. In § 5.100 of the proposed rule, HUD included a definition of “perceived gender identity” in order to differentiate between actual gender identity and perceived gender identity for purposes of this rule and the 2012 Equal Access Rule. Under that definition, perceived gender identity means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, or sex assigned to the individual at birth. In the final rule, the definition is amended to read as follows: Perceived gender identity means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, or sex assigned to the individual at birth or

identified in documents. Because the definition of perceived gender identity included in the proposed rule and adopted by this rule includes gender expression, § 5.105(a)(2) of the rule addresses the commenter’s concern that HUD-assisted or -insured housing shall be made available without regard to an individual’s gender expression. HUD does not believe any revision to the text of § 5.105(a)(2) is necessary to address this concern. Any suggested amendment to Fair Housing Act regulations is outside the scope of this rulemaking.

Comment: Some commenters stated that the rule should create similar equal access to housing policies for transgender or gender nonconforming persons in all emergency shelters and facilities. Another commenter stated that the Fair Housing Act does not prohibit discrimination based on gender identity in shelters. A commenter stated that the lack of a law prohibiting discrimination against transgender persons in shelters has not stopped rescue missions and other shelter providers from meeting the diverse needs of transgender persons in crisis.

HUD Response: While HUD appreciates that commenters want to have this rule apply to all emergency shelters, the scope of this rulemaking is limited to shelters, other buildings and facilities, and programs funded in whole or in part by CPD. CPD is the HUD office that funds various types of shelters. While HUD believes that all emergency shelters, including those temporary, emergency shelters that are not subject to the requirements of the Fair Housing Act and that HUD does not fund, should provide equal access in accordance with an individual’s gender identity, imposing those requirements on all emergency shelters is outside the scope of this rulemaking.

With respect to the commenter’s statement about the Fair Housing Act, HUD seeks to clarify that, contrary to the commenter’s stated view, the Fair Housing Act’s prohibition of
discrimination because of sex does include the prohibition of discrimination based on gender identity or nonconformance with gender stereotypes, which includes discrimination against an individual having a gender identity that does not conform to an individual’s sex assigned at birth. While HUD disagrees with the commenter’s broad statement that there is no law prohibiting discrimination based on gender identity in shelters, HUD agrees that it is beneficial for all shelters, including rescue missions, to continue to provide accommodation and services to transgender persons.

Comment: A commenter sought clarity regarding the application of the Fair Housing Act to shelters. The commenter asserted that the Fair Housing Act does not apply to homeless shelters because, in the commenter’s view, they are not “dwellings” covered under the Fair Housing Act. The commenter stated that the term “dwelling” is not well-defined in case law, that emergency shelters are not dwellings under the Act; and that the prohibitions of section 3604 of the Fair Housing Act do not apply to “free” shelters and similar facilities because, in the commenter’s view, such prohibitions only apply to housing that is for sale or rental. The commenter stated that, if HUD adopted a statement that the Fair Housing Act does not apply to homeless shelters, such adoption would “strengthen fair housing and mitigate confusion and misinterpretation among providers, fair-housing agencies, and shelter guests.”

HUD Response: The commenter misunderstands HUD’s statement about emergency shelters and the coverage of the Fair Housing Act. Contrary to the commenter’s assertion, HUD does not categorically exclude temporary, emergency shelters providing short-term housing accommodations from coverage under the Fair Housing Act. In fact, HUD’s established policy and regulations explicitly identify homeless shelters and other short-term
or transient housing as “dwellings” subject to the Act.\textsuperscript{13} The Act defines “dwelling” as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families” and includes vacant land.\textsuperscript{14} Thus, shelters generally are covered within the definition of dwelling, and many courts have held shelters and other short-term accommodations to be dwellings covered by the Fair Housing Act.\textsuperscript{15} However, some shelters may not qualify as a “dwelling” under the Fair Housing Act, and, therefore, HUD has endorsed the following multiple factor analysis for determining whether a shelter is a covered dwelling for purposes of the Fair Housing Act: (1) length of stay; (2) whether the rental rate for the unit will be calculated based on a daily, weekly, monthly, or yearly basis; (3) whether the terms and length of occupancy will be established through a lease or other written agreement; (4) what amenities will be included inside the unit, including kitchen facilities; (5) how the purpose of the property will be marketed to the public; (6) whether the resident possesses the right to return to the property; and (7) whether the resident has anywhere else to which to return.\textsuperscript{16}

\textsuperscript{13} See, e.g., Final Report of HUD Review of Model Building Codes, 65 FR 15740, 15746, 15747 (March 23, 2000) (“HUD specified as dwellings covered by the Act…such short-term housing as...homeless shelters.”). See also, e.g., 24 CFR 100.201 (the definition of “dwelling units” includes, e.g., sleeping accommodations in shelters intended for occupancy as a residence for homeless persons); Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines, 56 FR 9472, 9500 (March 6, 1991) (same); Implementation of the Fair Housing Amendments Act, 54 FR 3232, 3245 (January 23, 1989) (same).

\textsuperscript{14} 42 U.S.C. 3602(b).


\textsuperscript{16} See 65 FR at 15746.
purposes of the Fair Housing Act requires application of the multiple factors to its operation. No single factor is determinative. For instance, the absence of a rental fee or lease does not disqualify an accommodation from coverage under the Fair Housing Act.\textsuperscript{17} Further, contrary to the commenter’s view, section 3604 of the Fair Housing Act does not only apply to discriminatory conduct that involves a sale or rental. The Fair Housing Act has no such limitation. In addition to prohibitions against refusals “to sell or rent after making of a bona fide offer” and “to refuse to negotiate for the sale or rental,” section 3604(a) also prohibits “otherwise mak[ing] unavailable or deny[ing]” a dwelling to any person protected under the Fair Housing Act.\textsuperscript{18} HUD and courts have long made clear that a variety of conduct that does not involve sale or rental can make housing otherwise unavailable.\textsuperscript{19} Similarly, section 3604(b) is not limited to conduct involving a sale or rental, as it also prohibits discrimination in the “provision of services or facilities in connection” with a dwelling.\textsuperscript{20} HUD strongly disagrees that adopting a broad statement that the Fair Housing Act does not apply to homeless shelters would strengthen fair housing. HUD also emphasizes that this rule covers CPD-funded shelters and other buildings and facilities regardless of whether the facility qualifies as a dwelling under the Fair Housing Act.

\textbf{Comment:} Some commenters stated that the proposed rule is inconsistent with the Fair Housing Act, which forbids sex discrimination as to covered dwellings but not as to free, temporary, emergency shelters or other buildings or facilities, and which, therefore, evinces

\textsuperscript{17} See, e.g., \textit{Woods v. Foster}, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995) (homeless shelter did not charge rent).
\textsuperscript{18} 42 U.S.C. 3604(a).
\textsuperscript{19} See, e.g., \textit{Ojo v. Farmers Grp., Inc.}, 600 F.3d 1205, 1208 (9th Cir. 2010) (discriminatory pricing and denial of homeowners insurance violates 804(a) and (b)); \textit{Nationwide Mut. Ins. Co. v. Cisneros}, 52 F.3d 1351, 1357-58 (6th Cir. 1995) (same); \textit{Keith v. Volpe}, 858 F.2d 467, 482-484 (9th Cir. 1988) (municipal’s refusal to permit low-income housing violates 804(a)). See also, e.g., 24 C.F.R. 100.70(d)(4) (refusing to provide municipal services or property or hazard insurance because of protected class).
\textsuperscript{20} 42 U.S.C. 3604(b); see, e.g., 24 CFR 100.65(b)(2) (failing or delaying maintenance because of protected class).
the intent of Congress to permit single-sex housing in the latter case. Commenters expressed concern that the decision by Congress to allow single-sex facilities that do not qualify as dwellings would be unenforceable if this rule is implemented as proposed; for example, if a women’s shelter were required to admit a biological man based merely upon his assertion that he “identifies as” a woman, or if a men’s shelter were required to admit a biological woman based merely upon her assertion that she “identifies as” a man.

**HUD Response:** As previously stated, the rule is not inconsistent with the Fair Housing Act. While the Fair Housing Act includes nondiscrimination requirements applicable to dwellings covered by the Act, it does not prohibit HUD from establishing additional program requirements through rulemaking. Temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require shared sleeping quarters or bathing facilities and that do not qualify as dwellings under the Fair Housing Act may operate single-sex shelters unless doing so would violate some other Federal, State, or local law. Under this rule, such shelters or other buildings and facilities funded by programs administered by CPD must determine placement in such single-sex facilities in accordance with each applicant’s or occupant’s gender identity, regardless of sex assigned at birth or other factors. As noted in response to a prior comment, HUD’s establishment of programmatic requirements for temporary, emergency shelters and other buildings and facilities funded through HUD programs is well within HUD’s statutory authority and an important part of HUD’s mission in ensuring access to housing for all Americans. Contrary to the public comment that suggests what Congress’s intent was in

---

21 HUD provided similar guidance to recipients and subrecipients that place eligible persons in single-sex temporary, emergency shelters or other facilities receiving ESG, CoC, or HOPWA funds. See Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities, (Notice: CPD-15-02 (February 20, 2015)).
creating single-sex facilities, HUD does not opine on Congress’s intent behind permitting single-sex facilities, but does make clear in this rule that, for purposes of determining placement in a single-sex facility, placement should be made consistent with an individual’s gender identity. This rule does not attempt to interpret or define sex.

**Comment:** One commenter expressed concern that Congress would see no need to enact the Equality Act, a bill that would expressly forbid discrimination in housing on the basis of sexual orientation and gender identity, once HUD issued a rule prohibiting such discrimination.

**HUD Response:** While HUD appreciates the commenter’s desire to see Congress enact new legislation expanding antidiscrimination protections in housing, HUD does not believe the introduction of such legislation warrants delaying issuance of this important rule. Because many transgender persons are being denied access to temporary, emergency shelters and other building and facilities or are being placed and served in such shelters in accordance with their sex assigned at birth instead of in accordance with their gender identity, HUD believes it is necessary to issue this rule at this time to ensure that transgender and gender nonconforming persons are accorded equal access and are accommodated in accordance with their gender identity in programs, shelters, buildings, and facilities assisted by CPD. Given that this rulemaking applies only to providers that receive HUD funds and not more broadly, HUD does not believe that its rulemaking in this important area will impact any broader legislative action that Congress may choose to take.

**Comment:** Commenters stated that the rule is not based on sufficiently exhaustive research and data, such as interviews with people not in the LGBT community, and only presents one-sided research on the issue of gender identity. A commenter said that while the
rule notes that many transgender shelter-seekers would choose sleeping on the street rather than a shelter for their sex assigned at birth, HUD’s rule does not address whether biological women would choose to sleep on the streets if their only other option were to share sleeping and bathing spaces with anatomically biological males who self-identify as women. Commenters stated that, before HUD institutes this rule, HUD needs more research on what risks placing males in female-only facilities will pose to women, and HUD should continue to search for solutions for providing safe services for particularly vulnerable males and, if vulnerable males must be placed at a women’s shelter, female clients should be able to sleep, bathe, and use the toilet away from biological males.

HUD Response: As HUD program participants and the public are aware, HUD spent considerable time studying this issue. During the development of HUD’s 2012 Equal Access Rule, commenters requested HUD to address the issue of temporary, emergency shelters that contain shared sleeping quarters and shared bathing facilities. HUD, however, declined to address that issue in the 2012 Equal Access Rule because of the need to conduct further research and examination of the issue. During the time since the 2012 Equal Access Rule was issued, HUD monitored and reviewed its own programs, national research, and other Federal agency policy to determine if transgender individuals had sufficient access to temporary, emergency shelters or if additional guidance or a national policy was warranted. HUD considered the issue not only from the perspective of transgender persons and other gender nonconforming persons, but also from the perspective of individuals whose sex assigned at birth and whose gender identity are the same. HUD has learned through its review that all individuals, including transgender persons and other gender nonconforming persons, can be safely accommodated in shelters and other buildings and facilities in
accordance with their gender identity. Privacy concerns can be addressed through policy adjustments, such as the use of schedules that provide equal access to bathing facilities, and modifications to facilities, such as the use of privacy screens and, where feasible, the installation of single occupant restrooms and bathing facilities. Further, the 2016 Center for American Progress study cited in the Background section of this preamble revealed that shelters were willing to provide transgender women with appropriate shelter only 30 percent of the time. Given the 4-year examination of this issue prior to this rule and the recent evidence of continued and widespread practices that deny access or subject transgender individuals to unequal treatment, HUD is ready to address this matter in regulation and believes that this final rule sets the right approach.

Comment: Commenters stated that because the rule requires shelters and other programs and services to change their policies and procedures, oversight and accountability should be created or strengthened. Commenters stated that current lack of oversight within the shelter and emergency housing system threatens the lives of transgender, gender nonconforming, and intersex people; subjects them to violence and degradation without any accountability or protection; and violates their basic human rights and the equal protections that should be accorded them. Commenters stated that HUD should clarify, in the final rule or in another form, how HUD will monitor and enforce the CPD Equal Access Rule, including an amendment stating that without meaningful monitoring and enforcement as is done for protected groups under the Fair Housing Act, the promise of the rule may go unfulfilled. Other commenters stated that the system for filing complaints needs to be improved, and a complaint filing system needs to be incorporated at the local level, where marginalized transgender and gender nonconforming individuals seeking shelter have ready
access to advocates who can assist them. A commenter stated that no organization should receive Federal funds without standing proof of compliance.

HUD Response: HUD agrees that safety, respectful treatment, and equal access are critical issues for transgender and gender nonconforming individuals, as they are for everyone, and HUD’s regulations for the ESG program make it clear that all ESG-funded emergency shelters, including those with configurations that require shared sleeping quarters or shared bathing facilities, have had, and continue to have, a responsibility to create a safe environment for all occupants, particularly those of special populations (see 24 CFR 576.400(e)(3)(iii) for more information). Recipients, subrecipients, owners, operators, and managers of temporary, emergency shelters and other buildings and facilities and providers of services are expected to take the steps necessary to comply with this rule and maintain safe conditions for all shelter and facility residents and employees. When there is a threat to the safety of any resident, HUD expects recipients, subrecipients, and shelter or facility owners, operators, managers, and providers to take appropriate steps to address such threats. Such mitigating steps may include proactive measures to reduce risks such as increasing the shelter’s security personnel, making adjustments to a facility’s operating policies and schedules, and modifying shelter facilities to provide a single occupant bathing facility. HUD has heard from providers that adjusting a facility’s operating policies and schedules is usually sufficient and does not cost additional funds, and thus HUD encourages agencies to start with this modification. HUD also notes that, for additional modifications that are necessary, some funded facilities, such as those under the ESG program, can use ESG funds to modify the shelter facility or provide additional security.

HUD believes that by requiring equal access for transgender individuals and other
gender nonconforming persons in this regulation, HUD will be better able to monitor and
enforce actions required to ensure equal access in temporary, emergency and other CPD-
assisted buildings, facilities, and programs. Section 5.106(b) requires that recipients,
subrecipients, operators, managers, and providers of temporary, emergency shelters, other
buildings and facilities, programs, and services update their policies, if not already updated,
to comply with providing equal access, which HUD can review when monitoring its
recipients’, subrecipients’, and providers’ compliance with the new requirements established
by this final rule. In addition, § 5.106(d) requires that providers must document and maintain
records of compliance with the requirements in § 5.106(b) of this rule for a period of 5 years.

Transgender and other gender nonconforming persons are encouraged to file
complaints if they have been denied equal access to temporary, emergency shelters, other
buildings and facilities, programs, or services in accordance with their gender identity.
Individuals may file complaints of discrimination based on gender identity by calling 1-800-
669-9777 (toll-free) or online at http://portal.hud.gov/hudportal/HUD?src=/program_offices
/fair_housing_equal_opp/online-complaint. Persons who are deaf or hard of hearing or who
have speech impairments may file a complaint via TTY by calling the Federal Relay Service
at 1-800-877-8339 (toll-free).

Transgender and other gender nonconforming persons are encouraged to file
complaints with HUD’s CPD program office if they have been denied equal access to any
services, accommodations, or benefits under CPD programs. Whenever a recipient
(including subrecipients) of HUD funds fails or refuses to comply with program
requirements, whether in statute or regulation, such failure or refusal shall constitute a
violation of the requirements under the program in which the recipient is operating, and the
recipient is subject to all sanctions and penalties for violation of program requirements, as provided for under the applicable program. Sanctions may include the withholding of HUD assistance. In addition, HUD may pursue an enforcement action when the Fair Housing Act is implicated. A housing provider who is found to have violated the Fair Housing Act may be liable for actual damages, injunctive and other equitable relief, civil penalties, and attorney's fees. As previously discussed, along with this rule, HUD is publishing in today’s Federal Register for public comment a notice entitled “Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status for HUD’s Community Planning and Development Programs” that HUD proposes to require owners or operators of CPD-funded programs and facilities to post on bulletin boards and in other public spaces.

Comment: A commenter stated that the rule may place a significant burden upon the associational and religious liberty of beneficiaries and other stakeholders; for example, by requiring residents to share facilities with opposite-sex adults where their religions prohibit that.

HUD Response: The exclusion of an individual or family from CPD-funded shelter because the individual is transgender or the family has one or more transgender members is inconsistent with HUD's mission to ensure decent housing and a suitable living environment for all. It is equally inappropriate to isolate or ostracize individuals because their gender identity is not the same as their sex assigned at birth. It is incumbent on HUD to ensure that the regulations governing its housing programs make clear that such arbitrary exclusion, isolation, and ostracism will not be tolerated in HUD-assisted housing and shelters. Moreover, as noted in response to prior comments, in dwellings covered by the Fair Housing Act, exclusion or unequal treatment based on an individual’s gender identity or
nonconformance with gender stereotypes is discrimination because of sex and violates the Act. HUD would not tolerate denial of access, isolation, or ostracism on the basis of race, color, national origin, or disability relating to one shelter resident in order to accommodate the religious views of another shelter resident. The same is true with respect to the treatment of transgender and other gender nonconforming persons.

Faith-based organizations have long been involved in HUD's programs and provide many valuable services to low-income populations served by HUD. It is HUD's hope that faith-based organizations will continue to actively participate in HUD’s CPD programs and provide services to transgender persons in accordance with the requirements set in this rule.

Comment: A commenter stated that the rule does not reflect the reality of providing shelter to people in challenging environments and with limited resources. Commenters stated that HUD should consider the following: (1) providing additional resources to shelters to help them meet the privacy, health, and safety needs of clients; (2) examining what scope of client interview is permissible to enable staff to identify an attempted misuse of the proposed mandate without fear of legal challenge; (3) determining whether staff would be placed in an untenable position of pressure to accede to a request or demand contrary to their situational awareness and the reasonable concerns of other (often traumatized) shelter clients; (4) examining how a provider would gather timely and appropriate information that it believes is relevant to the actual situation but not necessarily a matter of health or safety; (5) determining whether the privacy concerns of other clients are legitimate criteria for placement; (6) examining how single-sex women shelter providers will reconcile differences between the Violence Against Women Act’s (VAWA) “due consideration” approach for single-sex housing and the mandate in this rule, and how shelter providers will be expected to
reconcile differences between the mandate of this regulation and the often conflicting regulations and guidance provided by other Federal, State and local housing agencies. A commenter said that the proposed rule will increase guesswork and the paperwork burden surrounding client placement and expressed concern about the legal repercussions to a provider for denying placement where there is a question as to “valid” gender identity.

**HUD Response:** HUD appreciates the items for consideration raised by the commenters and these were the very issues that HUD did, in fact, take into consideration before issuing this CPD Equal Access Rule, more than 4 years after the 2012 Equal Access Rule. In addition, before commencing this rulemaking, on February 20, 2015, CPD released Notice CPD–015–02, “Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities,” applicable to CPD’s HOPWA, ESG, and CoC programs. This notice provides that HUD expects recipients, subrecipients, and providers to accommodate individuals in accordance with the individual’s gender identity.\(^{22}\) HUD has had over 1 year of experience with this guidance in place and such experience further informed HUD in development of the final rule. There is no reason to assume that transgender persons pose risks to health or safety. Indeed, experience under this guidance has shown that transgender and other gender nonconforming persons can be and have been safely accommodated in accordance with their gender identity in single-sex facilities without the types of disruptions feared by the commenter.

In response to the commenter’s concern about the extent of questioning and investigation that shelter staff may perform prior to determining appropriate accommodations for transgender and other gender nonconforming persons, HUD has made modifications to

the proposed rule at this final rule stage. Specifically, in § 5.106(b) of this final rule, HUD makes clear that it is inappropriate to subject individuals seeking accommodations to unnecessary, intrusive questioning about their gender identity or to ask them to provide anatomical information or documentary, physical, or medical evidence of their gender identity. Examples of unnecessary, intrusive questioning would be asking about surgeries, anatomy, and any other topics that are not necessary for placing and serving a client in the facility. Consistent with the approach taken by other Federal agencies, HUD has determined that the most appropriate way for shelter staff to determine an individual’s gender identity for purposes of a placement decision is to rely on the individual’s self-identification of gender identity. As for the comment about how to “reconcile differences between the VAWA’s ‘due consideration’ approach to single-sex housing,” HUD reviewed DOJ’s guidance regarding the VAWA’s nondiscrimination provision and does not see a conflict that needs to be reconciled.

HUD recognizes that emergency shelters are not the ideal placement for anyone, and that is why HUD is encouraging communities to move individuals and families into permanent housing as quickly as possible. In the meantime, HUD recognizes that there are security risks in operating shelters, but the obligation to provide for safety and security is not new, and the denial of equal access cannot be justified based on unfounded concerns about safety or security. Under this final rule, policies and procedures for CPD programs covered by this rule will have to include, if appropriate, provisions on nondiscriminatory measures to ensure the health, safety, security, and privacy of all occupants and staff in accordance with applicable Federal laws and regulations. Further, under this rule, recipients, subrecipients, owners, operators, managers, and providers of shelters and other buildings and facilities with
physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants, and, as needed, update their admissions, occupancy, and operating policies and procedures. It would be appropriate for a recipient, subrecipient, owner, operator, manager, or provider to update its operating policies and procedures to reflect nondiscriminatory steps to address privacy concerns if providers repeatedly receive the same request from occupants that can be accommodated in the same manner. However, an update to their policies and procedures in order to address rare case-specific situations may not be necessary, although an exception to policies and procedures may be appropriate in such circumstances to avoid infringement on an individual’s privacy concern. HUD believes that this final rule clarifies compliance and greatly reduces responsibility of the staff to determine gender identity for the purposes of placement.

Comment: A commenter stated that the proposed paperwork and record retention requirements of the proposed rule distract from the prime objective of shelters, disincentivizes participation in HUD programs, and make meeting the overarching objective of ensuring access to shelter for all more costly and burdensome.

HUD Response: This final rule eliminates most of the provisions of the proposed rule that required recordkeeping requirements, and as a result HUD has removed most of the recordkeeping requirements in this final rule. The only recordkeeping requirement that remains is the requirement to maintain records of policies and procedures to ensure that equal access is provided, and individuals are accommodated, in accordance with their gender identity. This requirement will aid HUD in monitoring compliance with this rule and taking
enforcement action where needed.

Comment: Commenters expressed support for the rule’s definitions of gender identity and perceived gender identity. A commenter said the original definition of gender identity encouraged discrimination by implying or directly giving providers the ability to determine gender through discriminatory perceptions based on gender stereotypes. A commenter stated that “transgender women are women and transgender men are men.” Commenters stated that the rule’s separation of definitions of actual and perceived gender identity will help to ensure that LGBT individuals receive equal access to shelter, for example, by clarifying concepts that may be unfamiliar to grant recipients.

HUD Response: HUD appreciates the commenter’s support for the revised definition and agrees that it is important to differentiate between actual gender identity and perceived gender identity. As discussed earlier, the definition of “perceived gender identity” in this final rule includes a perception based on documents, to make clear that the identification of gender or sex on an individual’s identity document may be different than a person’s actual gender identity, and that the perceived gender identity of an individual based on information on the documents may not be the basis of discrimination against that individual.

Comment: Commenters stated that HUD’s rule should allow persons to determine gender identity and expression free from harassment and violence, whether actual or perceived gender. Commenters stated that they appreciated that the definition of “perceived gender identity” covers discrimination based on gender expression, and they urged HUD to include consistent clarifying language to this effect in both the preamble to the final rule and in training and technical assistance for grantees.

HUD Response: As HUD noted in a prior response, by incorporating gender
expression into the definition of perceived gender identity, the final rule requires recipients, subrecipients, and providers to make shelter available without regard to gender expression. HUD will take the commenter’s recommendations into account when developing training and technical assistance materials.

Comment: Commenters stated their belief that self-reported gender identity should be afforded a lesser status than binary biological sex, because gender is subjective, mutable, and theoretical, whereas biological sex is objective, immutable, and demonstrable. Commenters stated that research demonstrates a lack of scientific consensus as to transgender status or that gender fluidity is a mental illness. Commenters stated that the rule contravenes the Constitution’s recognition of a “fundamental, irreducible reproductive asymmetry” between women and men. Commenters stated that the rule should require the use of verifiable criteria, e.g., medical history, to establish the authenticity of a self-identified transgender individual. A commenter stated that the rule puts “staff in the position of adjudicating who is a (transgender) woman and who is not,” and that this is unfair to such staff and the populations they serve. A commenter stated that biological sex is relevant to decisions about single-sex housing and shared sleeping and bathing areas. Another commenter said HUD conflates the definitions of “sex,” and “gender,” and suggested that HUD define “sex” as the actual biological maleness or femaleness of a person and “gender” as the cultural sex-role, although the commenter stated that even this revision is still problematic because there are no universally agreed upon attributes for what constitutes particular roles.

Other commenters stated that sex is not “assigned” at birth, but is presented, observed, and recorded, and commenters recommended that the rule refer to the sex
“presented” at birth rather than the sex “assigned” at birth. This commenter also supported the view that “perceived” gender identity is problematic, as perception varies from individual to individual, and asked how a provider is expected to perceive somebody else’s identity. The commenter suggested that the rule state that perceived gender identity means the social sex-role the person is assumed to have an affinity for based on exhibited stereotyped behaviors commonly acknowledged to be associated with being either male or female and/or the actual biological sex of the person, but stated that there still needs to be some objective criteria for the definition to be of any real use, but using stereotyped behaviors in place of biological sex is problematic. A commenter said that the rule also does not define “transgender” or explain how a provider could distinguish between those who are sincere in their sex-role identity and those who are not. Further, the commenter said that because this rule enshrines expressions and characteristics as a legal sex category, it will negatively affect other laws concerning women’s rights, and the definition of “woman” should be based on biological sex.

**HUD Response:** HUD appreciates and has considered the suggested revisions to the definition of “gender identity” offered by commenters. However, HUD declines to make the suggested changes at this final rule stage. As HUD observed in the 2012 Equal Access Rule, the number of suggested revisions to the definition of “gender identity” highlights a range of differing views among commenters regarding the meaning of this term. Consequently, HUD was required to determine which definition makes the most sense in this context. As noted earlier in this preamble, in the 2012 Equal Access Rule, HUD based its definition on the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, on the basis that both this statute and HUD’s policy sought to protect LGBT individuals. Subsequently,
however, HUD evaluated its program recipient practices, reviewed research on
discrimination of transgender individuals in shelter settings, solicited input on the
experiences and concerns of both clients and providers, and reviewed its own guidance, as
well as several other Federal agencies’ gender-identity nondiscrimination policies. HUD
found helpful, for instance, that the DOJ’s guidance states that a program recipient “should
ask a transgender beneficiary which group or service the beneficiary wishes to join,” but may
not “ask questions about the beneficiary’s anatomy or medical history or make burdensome
demands for identity documents.” As noted in the proposed rule, HUD determined, in light
of its review, that it would be more effective for the specific purpose of ensuring equal access
to HUD programs to separate the definitions of actual and perceived gender identity and to
require that any gender identity determinations in the context of CPD programs be based on
an individual’s self-identification. That does not mean that staff workers conducting intake
procedures must account for perceived gender identity in determining placement. In fact, it
means that staff workers must not use perceived gender identity and must only place an
individual based on the individual’s actual gender identity, without additional questions
about anatomy, medical history, or identification documents. Transgender and gender
nonconforming persons must not be placed based on perceived gender identity when it is in
conflict with an individual’s self-identified gender identity. This approach is consistent with
current research, with HUD’s existing guidance, and with other Federal agency policy. This
approach does not require the provider to make any determination as to an individual’s
sincerity with respect to their gender.

In response to the comment with regard to this rule’s impact on a “legal sex
category,” this rule does not provide a definition of “woman” or “sex.” In this rule, HUD
notes that gender identity—and whether a person identifies with their sex assigned at birth or not—is a component of sex. As such, HUD believes it was important to recognize the role of gender identity in its 2012 Equal Access Rule and to provide further guidance on how individuals are treated based on gender identity in this rule. In view of its role in ensuring access to housing for all Americans, HUD could not countenance denying equal access to shelter on the basis of gender identity, just as it could not countenance such treatment for characteristics such as race, color, national origin, or disability. As previously noted, HUD does not believe it is appropriate to isolate, ostracize, or treat people differently because of the way others, such as other shelter residents or shelter employees, view them.

Given the comments requesting guidance on the efforts a provider may use to identify an individual’s gender identity, HUD revised the proposed rule, in this final rule, to provide clarity on this point. Specifically, HUD has included a provision in § 5.106(b) that makes clear that individuals may not be asked to answer intrusive questions, provide anatomical information, or provide documentary, physical, or medical evidence of the individual’s gender identity. HUD notes that documents such as identification documents may list an individual’s sex assigned at birth and not an individual’s gender identity. Thus, an identification card or other document is not dispositive of an individual’s gender identity. By including language that prohibits intrusive questioning or requests for anatomical information, documentation, or physical or medical evidence, HUD makes clear to providers, owners, operators, and managers that an individual’s self-identification of gender identity is sufficient evidence of the individual’s gender identity for purposes of making a decision regarding admission, placement, accommodation, placement, or services under this final rule. While documentation of gender identity may not be required for purposes of establishing an
individual’s gender identity or determining eligibility for a program, HUD recognizes that an individual may need to provide documentation of identity in order to apply for certain types of assistance, such as healthcare, Social Security benefits, or employment. In instances where the provider receives documentation and that documentation states a different gender marker than was identified by the individual as their gender identity, the provider must continue to serve the individual in accordance with their self-identified gender identity.

As previously stated, it is not uncommon for transgender persons to have identification documents that indicate the individual’s sex assigned at birth instead of the individual’s gender identity, so identity documents should not be viewed as evidence contesting an individual’s self-identification of gender identity.

**Comment:** A commenter stated that the rule recognizes that some people do not identify as either male or female and that such persons must be permitted to choose which option is most consistent with their gender when accessing single-sex shelters or other buildings or facilities or services. Commenters asked HUD to clarify how the rule applies to people who identify in nonbinary, gender-fluid, intersex, or gender nonconforming terms. Commenters stated that nonbinary individuals constitute a vulnerable subgroup within the transgender population, particularly because their identity may be less familiar to program staff, but they are nevertheless entitled to the same acceptance and respect for their gender identities as are others. A commenter said the medical community has widely recognized the importance of recognizing gender identities other than male or female, or nonbinary genders, and providing those with nonbinary genders equal access to services. Commenters stated that an individual whose gender identity is neither male nor female should have the right to state which program or facility is most consistent with their identity and asked HUD to
include language to this effect in the preamble to the final rule. The commenters also asked HUD to discuss in its training and technical assistance for grantees the rule’s application to persons who are gender nonconforming or who do not identify as male or female, in training and technical assistance for grantees. Commenters stated that the rule should expressly state that refusing service or access to individuals who are gender nonconforming or who do not identify as either male or female violates the proposed rule. Commenters stated that when only male or female accommodations are available, equal access requires that persons who do not identify as either male or female must be permitted to determine which option is most consistent with their gender identity. A commenter stated that HUD should amend its forms and databases to permit individuals to identify as something other than male or female and to instruct program staff that individuals must be permitted to self-identify their own gender. Another commenter said that the rule does not mention intersex persons or persons with a difference of sexual development (DSD) and, consistent with current trends in case law, coverage of the rule should be expanded to include persons with intersex conditions and DSD.

Another commenter said that while it understands that the proposed regulations are requiring nonbinary users to choose between facilities for the two majority genders, the commenter believes that, over the long term, single-sex systems are going to have to become integrated if they are to cost-effectively serve an expanding variety of gender identities. This commenter asked HUD to start conceptualizing a new system that can comfortably accommodate nonbinary users. A commenter said HUD should encourage recipients to undertake the following: the development and creation of all-gender spaces; the creation of policies, practices, and staffing structures that would allow programs and facilities to be
safely designated as all-gender; and the creation of practices and facility upgrades that afford all residents increased personal privacy.

HUD Response: HUD appreciates the comments regarding individuals who do not identify as either male or female and individuals who are nonbinary, gender-fluid, intersex, or gender nonconforming. While HUD did not reference each of these groups in its proposed rule or the regulatory text of this final rule, HUD’s use of terminology is not intended to exclude people because of the words they use to describe themselves. HUD recognizes that there is more work to do in this area to ensure that, to the greatest extent possible, all individuals are treated equally and appropriately accommodated in HUD-funded programs, shelters, services, and other facilities. In circumstances where an individual does not identify as male or female and such information is relevant to placement and accommodation, the individual should be asked the gender with which the individual most closely identifies. In these circumstances, the individual is in the best position to specify the more appropriate gender-based placement as well as the placement that is most likely to be the safest for the individual—either placement with males or placement with females.

While HUD appreciates the suggestions about future actions it may take to better accommodate everyone in shelters, HUD declines to address these comments in detail as these issues are beyond the scope of this rulemaking. HUD will consider these issues for future rulemaking. As the commenters suggest, HUD will also consider training and guidance for shelter providers, operators, and managers on best practices for dealing with individuals who do not identify as male or female and individuals who are nonbinary, intersex, or gender nonconforming. HUD agrees that individuals in these groups may be particularly vulnerable, and that training and technical assistance may be helpful in
addressing the needs of these populations of shelter residents.

Comment: A commenter stated that HUD should not follow the approach taken by DOJ in implementation of the Prison Rape Elimination Act because DOJ regulations included provisions allowing correctional agencies broad discretion to make “case-by-case” decisions regarding whether placement in a male or female facility would ensure the individual’s health and safety. The commenter stated that while DOJ explained in its rule’s preamble that “an agency may not simply assign the inmate to a facility based on genital status,” few, if any, State agencies are complying with this provision, with the result that agencies are maintaining their prior practices of automatically placing individuals exclusively based on their genital anatomy, even when nominally adopting policy language that mirrors the Federal rule. The commenter stated that such discretion is not appropriate or permissible under regulations implementing Federal nondiscrimination requirements. Another commenter stated that the most essential element of a successful nondiscrimination policy is the basic rule that housing must be based on a person’s self-identified gender, not on their sex assigned at birth. A commenter stated that placement should not be conditioned on whether a transgender person has undergone any medical treatment or been able to change the gender markers on their identification documents, or have to look a certain way. Another commenter stated, citing several examples in the United States and elsewhere, that shelters that have adopted a rule basing gender on self-identification, as opposed to sex assigned at birth, report uniform success in being able to serve and integrate transgender people into their programs and services.

HUD Response: HUD has never intended to give broad discretion to recipients and providers to make case-by-case decisions. The proposed rule required providers of
temporary, emergency shelter and services to document the specific facts, circumstances, and reasoning relied upon in any case-by-case determination that results in an alternative admission, accommodation, benefit, or service to an individual or their family.

To clarify that placement is to be made on the basis of an individual’s self-identification of gender, § 5.106(b) of this final rule includes a provision stating that individuals may not be subjected to intrusive questioning relating to their gender identity or asked to provide anatomical information, documentation, or physical or medical evidence of gender identity. Therefore, this final rule makes clear that placement in accordance with an individual’s gender identity cannot be conditioned on whether a transgender person has undergone medical treatment, has been able to change identification documents to reflect their gender identity, or has a certain appearance or gender expression.

Additionally, as discussed earlier in this preamble, in § 5.106(c) of this final rule, which addresses placement and accommodation in temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities, HUD removes the proposed rule language that, under narrow circumstances, a written case-by-case determination could be made on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety. In its place, HUD provides that placement and accommodation of individuals in shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities shall be made in accordance with an individual’s gender identity. Further, this revised paragraph (c) provides for post-admission accommodations, where, after an individual has been admitted to a shelter or other building and facilities, providers must
take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants. This provision for post-admission accommodations applies to all individuals, regardless of gender identity.

**Comment:** In contrast to the preceding comment, commenters stated that the requirements that an accommodation be permitted only in “narrow” or “rare” circumstances, and then only when “necessary” to ensure two specified interests—health and safety—is too circumscribed to adequately protect the interests of all residents. The commenter stated that an accommodation that furthers the interests in protecting the health and safety of residents should be allowed, for example, even if not, strictly speaking, “necessary,” and not only at the request of the person “claiming” to be transgender. Commenters stated that, even as to housing facilities that admit both men and women, residents should not be required to share with persons of the opposite sex those areas, such as sleeping and bathing areas, properly reserved to persons of one sex, for reasons of privacy.

**HUD Response:** As discussed above, this final rule notes that providers need to take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants. HUD stresses the use of the term “nondiscriminatory” in this provision. An example of a nondiscriminatory step to address privacy concerns would be accommodating a request of a domestic violence victim who has specific privacy concerns to bathe at specific, separate times from other shelter or facility occupants.

As HUD has noted, it has studied the issue for 4 years and determined, following the lead of other Federal agencies, that to ensure equal access, the general rule must be that individuals are accommodated in accordance with their gender identity. If HUD were to provide broader discretion, placement decisions would rely on more subjective factors that
might differ from provider to provider based on the views, beliefs, and unsubstantiated fears of individual shelter staff.

Comment: A commenter said the rule prohibits a determination from being based on complaints of other shelter residents when those complaints are based on actual or perceived gender identity, but HUD should provide guidelines to help providers distinguish complaints that are based on recognition of threat because of a client’s biological sex, as opposed to “gender identity.”

HUD Response: HUD agrees that the language referenced by the commenter could cause confusion. HUD, therefore, has removed the language and makes clear that in temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities, placements and accommodations shall be made in accordance with an individual’s gender identity. Once an individual is accommodated, providers shall take appropriate steps to address privacy concerns raised by all residents and occupants. By considering complaints, and taking appropriate action in response, a provider will minimize the risk of harassment occurring among occupants and between staff and occupants. Such actions must, however, be nondiscriminatory.

Comment: Commenters stated that the rule should clarify that shelters may give transgender people case-by-case alternative or modified accommodations only when they request them and not at the mandate of shelter staff and/or to accommodate the wishes, fears, or discomfort of others—and that such alternatives or modifications shall not be based on a

---

person’s actual or perceived gender identity. Commenters also stated that the rule should clarify that shelters shall provide accommodations requested by a transgender shelter-seeker, and only when those accommodations are reasonable and appropriate to protect the health, safety or privacy of that individual. Commenters stated that a person’s ability to request an alternative or modified placement should not be limited to “shared sleeping quarters or shared bathing facilities” and recommended that the provision for such accommodations be incorporated into paragraph (b) of § 5.106 (which is titled Equal Access in accordance with gender identity) rather than in separate paragraph (d) of § 5.106 (which is titled Referrals). A commenter said that many shelters find that, where possible, providing increased privacy for all residents is ideal; for example, private rooms and bathrooms and showers with locks. A commenter stated that the rule should mandate that shelters provide unisex bathrooms with individual showers.

Commenters stated that the rule should clarify that any alternative or modified placements must provide access to the same or substantially equivalent services, or a “comparable alternative program.” Commenters stated that HUD should clarify that shelters will be in noncompliance with the rule if they provide some services (e.g., hotel vouchers) but otherwise deny equivalent services, such as the same length of stay, other supportive services offered by the shelter, or services provided at the primary program site due to a lack of transportation. A commenter stated that a provider that refers an individual to another program should be required to confirm that the individual received shelter or services at that alternative program.

HUD Response: As previously discussed, this final rule removes the case-by-case determination language in the proposed rule and establishes that individuals in HUD-funded
shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities must be accommodated in accordance with their gender identity. This final rule makes clear that providers do not have the discretion to suggest that individuals may not be accommodated in shelters that match their gender identity because their gender identity differs from their sex assigned at birth. As a result, HUD has eliminated the referral provision that was in § 5.106 (d) of the proposed rule. Section 5.106(b) of this final rule broadly discusses how policies and procedures must ensure equal access to CPD programs based on gender identity.

As discussed earlier in this preamble, the revisions to this final rule do not preclude the existing possibility that any occupant may request a referral to an alternate project or that, in such cases, staff may provide a referral to another project or, where none is available and funding permits, offer clients a hotel or motel voucher. HUD appreciates the commenters’ concerns that a transgender individual who is provided an alternative accommodation at the individual’s request should be provided an accommodation that is comparable to the shelter within which the individual originally sought accommodation and agrees that when providers make referrals they should ensure that an opportunity to access equivalent alternative accommodations, benefits, and services is provided, or the requestor should receive a referral to a comparable alternative program with availability and equivalent accommodations, benefits, and services.

HUD is encouraged that many shelters are providing increased privacy for all residents, such as private rooms and bathrooms and showers with locks, and as discussed earlier in this preamble, HUD encourages this where feasible. This rule, however, does not
mandate this configuration. Mandatory configuration of shelters is beyond the scope of this rulemaking.

Comment: Other commenters stated that they oppose any exception to the requirement that shelter be provided based on gender identity to protect the health and safety of shelter employees or other people staying in the shelter, because such an exception is not necessary and will be used as pretext to deny shelter to transgender individuals. Commenters stated that under the proposed rule language, it is not clear whose health and safety the exception is intended to protect. A commenter stated that the very allowance of an exception reinforces the attitude that a person is a threat to others based solely on her or his status as a transgender individual. The commenter stated that if a shelter provider is concerned that a transgender individual’s behavior or conduct poses a threat to others’ health or safety, then the provider can and should address that in the same way that it addresses the problematic conduct of any other person staying in the shelter.

Another commenter stated that the exception, which is ambiguous, should be removed, because it is unclear from the preamble what kind of “health and safety” circumstances would (or should) ever justify denying shelter to a transgender individual in accordance with their gender identity. A commenter stated that the exception should apply only to the health and safety of the shelter seeker, meaning that only shelter seekers could make these requests for other accommodations for themselves. Other commenters stated that HUD should take special care to ensure that providers are not choosing these alternatives in order to circumvent the general prohibition on discrimination. A commenter stated that it would be very helpful for HUD to provide guidance in the form of specific examples of effective policy adjustments, as well as other ways shelter and housing providers can mitigate
actual or perceived threats to health or safety, in a less burdensome way. A commenter stated that guidance is needed to address what covered providers should do in scenarios where they lack financial resources to provide alternative accommodations or referrals, so as not to violate the rule.

**HUD Response:** HUD appreciates these comments and, as discussed previously, HUD has revised the rule to clarify that placement and accommodation must be made in accordance with an individual’s gender identity.

**Comment:** A commenter stated that the goals of this rule could conflict with the goals of “Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs,” a rule that seeks to offer expanded protections to victims of domestic violence, dating violence, sexual assault, and stalking within HUD-assisted and HUD-insured housing. The commenter suggested that HUD provide additional guidance to operating facilities with shared sleeping quarters on how to offer alternative accommodations to transgender individuals when there are residents that are sensitive to sharing facilities with the opposite sex due to their experiences with domestic violence.

**HUD Response:** HUD’s proposed rule implementing the housing protections of VAWA, which as the commenter noted would expand protections to victims of domestic violence, dating violence, sexual assault, and stalking in HUD-assisted and HUD-insured housing, does not conflict with this final rule. HUD’s proposed rule on VAWA would implement statutory requirements that: (1) prohibit housing providers under certain HUD programs (covered housing providers) from denying or terminating assistance or occupancy rights to individuals because they are or have been victims of domestic violence, dating violence, sexual assault, or stalking; (2) require covered housing providers to notify tenants
and applicants of their rights under VAWA, and detail what documentation covered housing providers may ask for; (3) require covered housing providers to create emergency transfer plans; and (4) provide for lease bifurcations. Nothing in HUD’s rule proposing to implement VAWA contradicts this rulemaking requiring that individuals be housed and receive services in accordance with their gender identity.

Further, as HUD explained in the CPD Equal Access proposed rule, VAWA imposed a new grant condition that prohibits discrimination by recipients of grants administered by DOJ, including grants to provide housing assistance for survivors of domestic violence. Although this provision relates to DOJ, and not to HUD, HUD noted that on April 9, 2014, DOJ’s published guidance entitled “Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013,” which addresses how a recipient of DOJ funds can operate a single-sex facility funded through VAWA and not discriminate on the basis of gender identity. The DOJ guidance states that recipients that operate sex-segregated or sex-specific programs should assign a beneficiary to the group or service that corresponds to the gender with which the beneficiary identifies, and may consider on a case-by-case basis whether a particular housing assignment would ensure the victim’s health and safety, but recipients may not make a determination about services for one beneficiary based on the complaints of another beneficiary when those complaints are based on gender identity. The guidance further states that, for the purpose of assigning a beneficiary to sex-segregated or sex-specific services, best practices dictate that the recipient should ask a transgender beneficiary which group or service the beneficiary wishes to join, but the recipient may not ask questions about the beneficiary’s anatomy or medical history or make burdensome demands for identity documents.
HUD’s rule requires that individuals be accommodated in accordance with their gender identity. It is beyond the scope of this rule to detail methods for best serving victims of domestic violence, dating violence, sexual assault, or stalking. However, as discussed earlier, this final rule requires that providers must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by all residents or occupants. HUD notes that both victims and perpetrators of domestic violence and other VAWA crimes include persons who are transgender or gender nonconforming individuals and persons who are not.

**Comment:** Commenters asked that HUD include other CPD programs that will be active in the near future, including the Housing Trust Fund and the Rural Housing Stability Assistance program, or provide an indicator that the list is nonexhaustive so the Secretary can add more CPD programs.

**HUD Response:** HUD’s intent was to cover all CPD programs, as noted in the preamble to the proposed rule. Therefore, HUD makes clear in § 5.106(a) that additional CPD programs, such as the Housing Trust Fund and Rural Housing Stability Assistance programs, are included.

**Comment:** Commenters stated that the rule should clarify that transgender persons have a right to housing and treatment consistent with their gender identity in all circumstances—in the preamble and training and technical assistance. Other commenters said it is essential that the rule address more directly the problem of violence, including the high rates of sexual assault, against LGBT and gender nonconforming persons in federally funded shelters.
HUD Response: HUD’s 2012 Equal Access Rule and this CPD Equal Access Rule explicitly acknowledge the higher rate of discrimination and acts of violence experienced by transgender persons and both rules address the issue that transgender individuals and other gender nonconforming persons must be able to participate in HUD programs on an equal basis as all other program participants. HUD guidance and training on its Equal Access rules cover these subjects.

Comment: The rule must address public and staff perceptions.

HUD Response: The final rule makes clear that transgender and other gender nonconforming individuals are to be admitted, placed, accommodated, and provided with services in accordance with their gender identity. Public and staff perceptions are not an appropriate basis for denial or limitation of access. Any additional rulemaking to address public and staff perceptions of transgender and gender nonconforming persons is beyond the scope of this rulemaking. HUD acknowledges, however, that such topics may be appropriate for training and technical assistance materials for shelter providers.

Comment: Commenters stated that HUD-funded programs should be required to create and implement written policies specifying how they will combat harassment, violence, and sexual assault and, in particular, how they will protect the health and safety of LGBT and gender nonconforming persons and others who are at increased risk of sexual violence. A commenter recommended that HUD require its recipients and subrecipients to create written policy and guidelines combating violence against persons marginalized due to their sexual orientation or gender identity and to require data collection to help monitor accountability. Commenters stated that HUD should provide guidance detailing necessary provisions of such policies and recommended best practices, for example, guidance or best practices pertaining
to the shelter-seeker’s own individualized safety assessment, through training and technical assistance for grantees. Commenters also stated that HUD should specify that the failure to create and implement such policies could result in noncompliance with the regulations and, thereby, jeopardize Federal funding and/or result in HUD taking action under its regulations. Another commenter stated that it is unclear who has the responsibility to establish and amend policies and procedures under the rule, so HUD should clarify that the covered recipients, subrecipients, owners, operators, managers, and providers must create, implement, and revise these policies and procedures as necessary. The commenter stated that HUD should identify in a subsequent notice the specific types of individuals and entities that have these duties within each housing program. The commenter also stated that HUD should provide sample policies and procedures, especially regarding privacy and security, so that covered individuals or entities that are unfamiliar with gender identity issues can have access to models in devising their own policies and procedures.

Commenters stated that the rule should mandate training for shelter staff as a prerequisite to receiving HUD funding. Another commenter stated that guidance from advocacy organizations suggests that ongoing resident training should be implemented in addition to current HUD-required staff training. A commenter stated that HUD should ensure that community organizations are made aware of the rule, once the rule is implemented, in order to better support their outreach work to transgender and gender nonconforming people in poverty.

Other commenters asked HUD to provide training on the requirement that recipients and subrecipients must treat transgender individuals respectfully by using an individual’s self-identified name and pronouns, regardless of whether they have been able to legally
change it.

HUD Response: HUD agrees with the commenters that successful implementation of this rule depends in no small part on guidance and training. HUD undertook intensive training efforts following publication of its 2012 Equal Access Rule and 2015 Notice CPD-15-02, and HUD intends to do the same for this CPD Equal Access Rule. With respect to commenters’ questions about the establishment of policies, § 5.106(b) of this final rule (and of the proposed rule) requires that the admissions, occupancy, and operating policies and procedures of recipients, subrecipients, owners, operators, managers, and providers (covered by this rule), including policies and procedures to protect privacy, health, safety, and security, shall be established or amended, as necessary, and administered in a nondiscriminatory manner so: (1) equal access to programs, shelters and other buildings and facilities, benefits, services, and accommodations is provided to an individual in accordance with the individual’s gender identity, and in a manner that affords equal access to the individual’s family; (2) an individual is placed, served, and accommodated in accordance with the individual’s gender identity; (3) an individual is not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual’s gender identity; and (4) consistent with § 5.105(a)(2), eligibility determinations are made and assisted housing is made available in CPD programs without regard to actual or perceived gender identity.

Comment: A commenter stated that the rule’s case-by-case analysis, training, and referral requirements will involve more time and resources than HUD estimates. The commenter stated that HUD should provide additional resources and tools to program grantees so that proper training can be conducted, particularly for small grantees with limited
resources.

**HUD Response:** As discussed earlier, this final rule eliminates the provision regarding a case-by-case analysis. As HUD noted in response to the preceding comment, HUD will undertake training and provide training and guidance to assist recipients and subrecipients under the CPD programs covered by this rule.

**Comment:** Commenters stated that they support the elimination of the inquiries prohibition provision for the following reasons: (1) the prohibition would likely cause confusion in the context of applying § 5.106, as it may be construed to prohibit any discussion of gender identity and (2) it appears to prohibit the routine and voluntary collection of demographic data regarding sexual orientation and gender identity for purposes of program evaluation—and, while an inquiry regarding sexual orientation or gender identity may constitute discrimination or be evidence of discrimination under the rule, inquiries for legitimate and nondiscriminatory purposes should be permitted. Commenters stated that they supported the removal of the prohibition to the extent that the final rule is clear that shelter and housing providers can only inquire about an applicant’s or resident’s sexual orientation and gender identity for lawful purposes; for example, to determine unit size and as part of the routine and voluntary collection of demographic data concerning sexual orientation and gender identity for program evaluation, so long as the data is collected and used for nondiscriminatory purposes in a nondiscriminatory fashion. A commenter stated, in support of removing the prohibition, and providing suggested language, that they urged HUD to require that specific protocols be put in place to protect the confidentiality of information about sexual orientation or transgender status.

**HUD Response:** HUD is committed to ensuring the safety and privacy of all
individuals, including transgender and gender nonconforming individuals, in CPD programs. In the proposed rule, HUD expressed its intent in proposing the removal of the inquiries prohibition. HUD emphasized that it would only permit recipients or subrecipients to inquire about a person’s sexual orientation or gender identity for lawful, nondiscriminatory purposes. In the final rule, to prohibit inappropriate inquiries related to gender identity, HUD included language in § 5.106(b) stating that it would be inappropriate to subject individuals to intrusive questioning or ask them to provide anatomical information or documentary, physical, or medical evidence of the individual’s gender identity. In addition, as noted previously in this preamble, CPD previously issued guidance, “Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities” (Notice CPD-15-02, Feb. 20, 2015), which outlines best practices for appropriate and inappropriate inquiries related to sex and provides guidance, and recommends staff training, on addressing safety or privacy concerns. HUD intends to issue further guidance in connection with the issuance of this final rule.

Comment: A commenter stated, citing recommended guidance and model policies, that Massachusetts prohibits gender-based inquiries only in cases where shelter guests are perceived as transgender, suggesting that implementation of the proposed rule would be possible without removing the prohibition.

HUD Response: As noted in HUD’s proposed rule, removal of the inquiries prohibition would allow temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities to ask the individual's gender identity, and it would permit inquiries of the individual's gender identity and sexual orientation to determine the number of
bedrooms to which a household is entitled. This is an inquiry that could be asked of all individuals, and not solely of those who are perceived to be transgender. Further, as HUD has stated, removal of the inquiries prohibition also reaffirms that HUD permits mechanisms for voluntary and anonymous reporting of sexual orientation or gender identity for compliance with data collection requirements of State and local governments or Federal assistance programs.

Comment: Commenters stated that the rule should expressly prohibit program staff from asking individuals questions about their anatomy, medical procedures, or medical history or making requests for identity documents or other documentation of gender as a precondition for being housed consistent with their gender identity,

HUD Response: Although the final rule removes the provision of § 5.105 that prohibited inquiries into an individual’s sexual orientation or gender identity for purposes of facilitating providers’ compliance with the requirement of § 5.106 that an individual is to be admitted, placed, accommodated, and provided services in accordance with the individual’s gender identity, HUD agrees with commenters that transgender and gender nonconforming individuals should not be required to answer invasive questions about their anatomy or medical history in order to be accommodated and provided services in CPD programs. To address this concern, HUD has revised § 5.106(b) to prohibit intrusive questions related to gender identity and prohibit requests for anatomical information and requests for documentary, physical, or medical evidence.

Comment: Commenters recommend that HUD emphasize in the preamble, and in training and technical assistance, the importance of protecting the privacy of information related to a shelter seeker’s sexual orientation and gender identity. A commenter stated that
transgender people in particular face serious risks of danger, including verbal harassment and physical assault, when their transgender status or gender identity is revealed without their consent. The commenter said that steps to keep a shelter seeker’s sexual orientation and/or gender identity confidential include, without limitation: (1) safeguarding all documents and electronic files, (2) containing this information and having conversations about these topics in private to prevent disclosure, (3) establishing explicit nondiscrimination provisions, (4) ensuring safe environments in programs and shelters, (5) implementing rigorous confidentiality safeguards, and (6) ensuring that shelter staff members receive appropriate training. The commenter said that successful implementation of these important requirements will facilitate the collection of much needed data, allowing HUD to better determine the populations its programs serve, their needs and consumer experiences, and their use of programs and facilities.

**HUD Response:** Many of CPD’s programs that govern temporary, emergency shelters and other buildings and facilities impose strict confidentiality requirements to ensure the privacy of individuals that are housed in these facilities. (See §§ 574.440, 576.500(x), 578.103(b) and (d)(2), and 578.23(c)(4)(i).) This final rule requires that privacy be considered in adopting admissions, occupancy, and operating policies and procedures in § 5.106(b) and provides that shelters and other buildings and facilities take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants in § 5.106(c). Further guidance will address privacy and confidentiality in data collection.

**Comment:** Commenters stated that HUD should clarify in the preamble to the final rule, and in training and technical assistance to its field staff, that inquiries that are used to...
limit the provision of shelters or housing, to harass an individual, or to further any other discriminatory purpose fall under the prohibition on discrimination. Commenters stated that, by contrast, HUD should state clearly in those areas that the routine and voluntary collection of demographic information from all clients or program participants is permissible, so long as it is collected and used in a nondiscriminatory fashion.

**HUD Response:** HUD appreciates the commenters raising this issue and will address this issue in guidance. HUD reiterates that conduct that violates the rule may also violate the Fair Housing Act if the facility is subject to the Fair Housing Act’s nondiscrimination requirements and the conduct is because of race, color, religion, national origin, familial status, sex, or disability.

**IV. Findings and Certifications**

**Regulatory Review – Executive Order 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made on whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. A determination was made that this final rule is a “significant regulatory action” as defined in section 3(f) of Executive Order 12866 (although not economically significant, as provided in section 3(f)(1) of that order).
This final rule is consistent with Administration policy in its direction that providers in all CPD programs must ensure that their policies and procedures to protect privacy, health, safety, and security are administered so that equal access is provided to HUD programs in accordance with an individual’s gender identity. This final rule also clarifies how temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities comply with the requirement that equal access be provided to programs, buildings, facilities, services, benefits, and accommodations in accordance with an individual’s gender identity. This clarification will benefit clients accessing CPD-funded programs, including those with temporary, emergency shelters and other buildings and facilities, by assuring that all clients receive equal access and will benefit the CPD-funded facilities by making compliance with HUD’s equal access requirements easier.

These requirements benefit all occupants by ensuring that providers understand that they need to be responsive to individual health, safety, security, and privacy concerns, while ensuring that they do not take any discriminatory steps to address these concerns. This final rule also amends the definition of gender identity and sexual orientation in § 5.100 to clarify the difference between actual and perceived gender identity, which is necessary to the adoption of § 5.106, and to reflect recent changes in the definition of sexual orientation that uses updated terminology but does not expand the coverage of the term. This final rule eliminates the prohibition on inquiries relating to sexual orientation or gender identity in § 5.105(a)(2)(ii). Both of these changes make it easier for recipients and subrecipients of CPD funding, as well as owners, operators, and managers of shelters, buildings, and other facilities, and providers of services funded by CPD programs to comply with the
requirements of both §§ 5.105(a)(2)(i) and 5.106.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Approximately 4,000 providers participating in the CPD programs covered by this rule are small organizations, but the rules requirement that organizations maintain records will be limited. Organizations are already required to maintain up-to-date policies and procedures in accordance with HUD guidance and regulations. The only change is that all CPD programs must now maintain records of prior policies and procedures for up to 5 years from when they make changes to comply with these requirements. HUD believes that these limited recordkeeping requirements on small organizations are reasonable to ensure equal access to CPD programs, facilities, services, benefits, and accommodations in accordance with an individual’s gender identity. Accordingly, for the foregoing reasons, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number. The information collection requirements for the CPD programs impacted by this rule—HOME, CDBG (State and entitlement), HOPWA, ESG, and CoC—have been approved by OMB and assigned OMB control numbers 2506-0171, 2506-0085, 2506-0077, 2506-0133, 2506-0089,
and 2506-0199. The information collection requirements for CPD’s Housing Trust Fund and
Rural Housing Stability Assistance programs will be included when those programs are
implemented.

**Environmental Impact**

This rule sets forth nondiscrimination standards. Accordingly, under 24 CFR
50.19(c)(3), this rule is categorically excluded from environmental review under the National

**Executive Order 13132, Federalism**

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing
any rule that has federalism implications if the rule either: (i) imposes substantial direct
compliance costs on State and local governments and is not required by statute or (ii)
preempts State law, unless the agency meets the consultation and funding requirements of
section 6 of the Executive order. This rule does not have federalism implications and would
not impose substantial direct compliance costs on State and local governments or preempt
State law within the meaning of the Executive order.

**Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538)
(UMRA) establishes requirements for Federal agencies to assess the effects of their
regulatory actions on State, local, and tribal governments and on the private sector. This rule
does not impose any Federal mandates on any State, local, or tribal governments, or on the
private sector, within the meaning of the UMRA.

**List of Subjects**

24 CFR Part 5
Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, and in accordance with HUD’s authority in 42 U.S.C. 3535(d), HUD amends 24 CFR part 5 as follows.

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

1. The authority citation for part 5 continues to read as follows:


2. In § 5.100, revise the definitions for “Gender identity” and “Sexual orientation” to read as follows:

§ 5.100 Definitions.

* * * * *

Gender identity means the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person’s perceived gender identity. Perceived gender identity means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender related characteristics, or sex assigned to the individual at birth or identified in documents.
Sexual orientation means one’s emotional or physical attraction to the same and/or opposite sex (e.g., homosexuality, heterosexuality, or bisexuality).

§ 5.105 [Amended]

3. In § 5.105, remove paragraph (a)(2)(ii) and the paragraph (a)(2)(i) heading and redesignate paragraph (a)(2)(i) as (a)(2).

4. Add § 5.106 to read as follows:

§ 5.106 Equal access in accordance with the individual’s gender identity in community planning and development programs.

(a) Applicability. This section applies to assistance provided under Community Planning and Development (CPD) programs, including assistance under the following CPD programs: HOME Investment Partnerships program (24 CFR part 92), Housing Trust Fund program (24 CFR part 93), Community Development Block Grant program (24 CFR part 570), Housing Opportunities for Persons With AIDS program (24 CFR part 574), Emergency Solutions Grants program (24 CFR part 576), Continuum of Care program (24 CFR part 578), or Rural Housing Stability Assistance Program (24 CFR part 579). The requirements of this section apply to recipients and subrecipients, as well as to owners, operators, and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by any CPD program.

(b) Equal access in accordance with gender identity. The admissions, occupancy, and operating policies and procedures of recipients, subrecipients, owners, operators, managers,
and providers identified in paragraph (a) of this section, including policies and procedures to protect privacy, health, safety, and security, shall be established or amended, as necessary, and administered in a nondiscriminatory manner to ensure that:

(1) Equal access to CPD programs, shelters, other buildings and facilities, benefits, services, and accommodations is provided to an individual in accordance with the individual’s gender identity, and in a manner that affords equal access to the individual’s family;

(2) An individual is placed, served, and accommodated in accordance with the gender identity of the individual;

(3) An individual is not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual’s gender identity; and

(4) Eligibility determinations are made and assisted housing is made available in CPD programs as required by § 5.105(a)(2).

(c) Placement and accommodation in temporary, emergency shelters and other buildings and facilities with shared sleeping quarters or shared bathing facilities—

Placement and accommodation. Placement and accommodation of an individual in temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities shall be made in accordance with the individual’s gender identity.

(2) Post-admission accommodations. A recipient, subrecipient, owner, operator, manager, or provider must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants and, as needed,
update its admissions, occupancy, and operating policies and procedures in accordance with paragraph (b) of this section.

(d) Documentation and record retention. Providers shall document and maintain records of compliance with the requirements in paragraph (b) of this section for a period of 5 years.

Dated: September 14, 2016

___________________________________
Julián Castro,
Secretary

[FR-5863-F-02]

[FR Doc. 2016-22589 Filed: 9/20/2016 8:45 am; Publication Date: 9/21/2016]
should address one or more of the following four points:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

1. Type of Information Collection: Extension, Without Change, of a Currently Approved Collection.
2. Title of the Form/Collection: Medical Certification for Disability Exceptions.
3. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: N–648; USCIS.
4. Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households. USCIS uses the Form N–648 to substantiate a claim for an exception to the requirements of section 648 to substantiate a claim for an
5. An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection N–648 is 17,302 and the estimated hour burden per response is 2 hours.
6. An estimate of the total public burden (in hours) associated with the collection: The estimated annual hour burden associated with this collection is 34,604 hours.
7. An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is $912,681.

Dated: September 14, 2016.

Samantha Deshommes,

[FR Doc. 2016–22519 Filed 9–19–16; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5173–N–09–B]


AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: This notice solicits public comment for a period of 30 days, consistent with the Paperwork Reduction Act of 1995 (PRA), on the Public Housing Agencies (PHA) Assessment Tool. On March 23, 2016, HUD solicited public comment for a period of 60 days on the PHA Assessment Tool. The 60-day notice commenced the notice and comment process required by the PRA in order to obtain approval from the Office of Management and Budget (OMB) for the information proposed to be collected by the PHA Assessment Tool. This 30-day notice takes into consideration the public comments received in response to the 60-day notice, and completes the public comment process required by the PRA. With the issuance of this notice, and following consideration of additional public comments received in response to this notice, HUD will seek approval from OMB of the PHA Assessment Tool and assignment of an OMB control number. In accordance with the PRA, the assessment tool will undergo this public comment process every 3 years to retain OMB approval. HUD is committed to issuing a separate Assessment Tool for Qualified PHAs (QPHAs) that choose to conduct and submit an individual AFH or for use by Qualified PHAs that collaborate among multiple QPHAs to conduct and submit a joint AFH. For this reason, this Assessment Tool will be for use by non-Qualified PHAs, and for collaborations among non-Qualified PHAs and QPHAs.

DATES: Comment Due Date: October 20, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the notice.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals who are deaf or hard of hearing and individuals with speech impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:
George D. Williams, Sr., Office of Fair
Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street SW., Room 5249, Washington, DC 20410; telephone number 866–234–2689 (toll-free). Individuals with hearing or speech impediments may access this number via TTY by calling the toll-free Federal Relay Service during working hours at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. The 60-Day Notice for the PHA Assessment Tool

On March 23, 2016, at 81 FR 15549, HUD published its 60-day notice, the first notice for public comment required by the PRA, to commence the process for approval of the PHA Assessment Tool. The PHA Assessment Tool was modeled on the Local Government Assessment Tool, approved by OMB on December 31, 2015, but with modifications to address the differing authority that PHAs have from local governments, and how fair housing planning may be undertaken by PHAs in a meaningful manner. As with the Local Government Assessment Tool, the Assessment Tool for PHA allows for collaboration with other PHAs. The 60-day public comment period ended on May 23, 2016, and HUD received 39 public comments. The following section, Section II, refers to submission requirements for Moving to Work (MTW) Public Housing Agencies. Section III highlights changes made to the PHA Assessment Tool in response to public comment received on the 60-day notice, and further consideration of issues by HUD, and Section IV provides guidance on the PHA region and regional analysis. Lastly, Section V responds to the significant issues raised by public commenters during the 60-day comment period, and Section IV provides HUD’s estimation of the burden hours associated with the PHA Assessment Tool, and further solicits issues for public comment, those required to be solicited by the PRA, and additional issues which HUD specifically solicits public comment.

II. Submission Requirements for Moving to Work (MTW) Public Housing Agencies

For MTW PHAs submitting an individual AFH, the first AFH shall be submitted no later than 270 calendar days prior to the start of: (A) For MTW PHAs whose service areas are located within the jurisdictional boundaries of a local government subject to the submission requirements outlined in § 5.160 of the AFFH rule, and are completing the AFH by themselves using the Assessment Tool for Public Housing Agencies, the program year that begins on or after January 1, 2019 for which the local government’s new consolidated plan is due as provided in 24 CFR 91.125(b)(2). (B) For MTW PHAs whose service areas are not located within the jurisdictional boundaries of a local government subject to the submission requirements outlined in § 5.160 of the AFFH rule, and are completing the AFH by themselves using the Assessment Tool for Public Housing Agencies, the fiscal year that begins on or after January 1, 2019 for which a new Annual MTW Plan is due as provided in the Moving To Work Standard Agreement (The Standard Agreement). The Standard Agreements are available at: www.hud.gov/mtw.

If either of the submission deadlines would result in the MTW PHA not having 9 calendar months with the final Assessment Tool for Public Housing Agencies, HUD will establish a new submission date for those MTW PHAs. MTW PHAs are encouraged to partner with their local governments and conduct a joint or regional AFH using the Assessment Tool for Local Governments and/or with a PHA, in which case the MTW PHA would follow the lead submitter’s submission date. HUD intends on providing additional guidance to MTW PHAs on how to incorporate actions and strategies into Annual MTW Plans that address AFH goals.

Second and Subsequent AFHs

(A) After the first AFH, subsequent AFHs shall be submitted no later than 195 calendar days prior to the start of the fiscal year that begins five years after the fiscal year for which the prior AFH applied. All MTW PHAs shall submit an AFH no less frequently than once every 5 years, or at such time agreed upon in writing by HUD and the MTW PHA. 24 CFR 5.160(d). Given that MTW PHAs submit annual MTW Plans, the MTW PHA should only submit an AFH prior to the fiscal year that is 5 years after the prior AFH submission.

III. Changes Made to the PHA Assessment Tool

The following highlights changes made to the Assessment Tool for Public Housing Agencies in response to public comment and further consideration of issues by HUD.

Qualified PHA (QPHA) Insert. HUD has added an insert for use by QPHAs that collaborate with non-qualified PHAs. This insert is meant to cover the analysis required for the QPHA’s service area. In addition to the QPHA insert, HUD is committed to creating a separate QPHA assessment tool. Contributing factors. HUD has added several contributing factors based on recommendations from the comments from the public. HUD has also made slight changes to the descriptions of some of the existing contributing factors in light of comments received. These include: Inaccessible public or private infrastructure; Involuntary displacement of survivors of domestic violence; Lack of local or regional cooperation; Lack of public and private investment in specific neighborhoods, including services or amenities; Laws, policies, regulatory barriers to providing housing and supportive services for persons with disabilities; Nuisance laws; Restrictions on landlords accepting vouchers; Siting selection policies, practices and decisions for publicly supported housing; Source of income discrimination. The following contributing factors were removed from the appendix as they were not listed in any of the AFH sections: Inaccessible buildings, sidewalks, pedestrian crossings, or other infrastructure; Lack of assistance for housing accessibility modifications; Lending discrimination; Local restrictions or requirements for landlords renting to voucher holders.

Disparities in Access to Opportunity. HUD has made changes to the structure of the questions in the Disparities in Access to Opportunity section, such as reducing the number of questions in the Disparities in Access to Opportunity section, making the use of the table that includes the opportunity indices optional, and removing portions of questions that referenced PHAs’ waiting lists. HUD no longer specifically calls out the protected class groups for which it is providing data in the questions themselves. Instead, the specific protected class groups will be called out in the instructions for the particular question. HUD has also limited these questions to the protected class groups for which HUD is providing data. Furthermore, HUD has made clear that the policy-related questions at the end of each subsection should be informed by community participation, any consultation with other relevant government agencies, and the PHA’s own local data and local knowledge. Disability and Access. HUD has added two new questions to the Disability and Access section of the Assessment Tool. These questions relate to the PHA’s interaction with individuals with disabilities.

Instructions. HUD has made clarifying changes to the instructions to the Assessment Tool, including with respect to the use of local data and local...
knowledge, additional examples of groups to consult during the community participation process, and additional clarifying instructions in the disparities in access to opportunity section based on the changes made to the questions in that section. In the instructions related to the Disparities in Access to Opportunity section of the Assessment Tool, regarding the HUD-provided data, HUD has also made clear that PHAs should only rely on the maps, rather than the opportunity index table; however, the table will still be provided should PHAs wish to make use of its contents. HUD has also included additional guidance in the instructions with respect to data sources that may be particularly relevant for assessing disability and access issues in the PHA’s service area and region. HUD has also provided general and question-by-question instructions for the QPHA insert.

Fair Housing Analysis of Rental Housing. HUD has clarified the analysis for this section that the analysis applies to PHAs that administer Section 8 Housing Choice Vouchers. This will reduce burden for public housing to only PHAs.

Enhancements for PHAs in the Data and Mapping Tool. While the AFFH Data and Mapping Tool will remain substantially similar in most respects for PHAs as currently provided for local governments, there are some specific enhancements that are planned. These include the addition of maps and tables specifically designed for PHAs as well as enhanced functionality for displaying information on the maps.

The enhanced functionality will allow a PHA to view the location of its own public housing developments and housing choice vouchers. Users will be able to identify individual PHAs and use the relevant maps to show the locations of the public housing developments and HCVs for that PHA, or to view all such HUD assisted units that are already currently provided in the tool (In the current Data and Mapping Tool, these are Maps 5 and 6. Map 5 shows the location of individual housing developments in four program categories (public housing, project-based section 8, Other HUD Multifamily (Section 202 and 811) and LIHTC). Map 6 shows the location of Housing Choice Vouchers by concentration).

PHAs and the public should be aware that program participants will not be required to begin conducting their assessments until the full array of online resources, including both the Data and Mapping Tool and the User Interface are complete and operational for PHAs.

To assist PHAs in their assessments, HUD will be adding two additional maps and two additional tables that are designed to assist with specific questions in the assessment tool. One map will show the percent of housing units that are occupied by renters (by census tract). This first map is based on existing maps in the CPD-Maps tool (https://egis.hud.gov/cpdmaps/). This map is being added for both local governments and for PHAs. A second map will show the locations of private rental housing that is affordable for very low-income families. This is intended to inform the analysis of the location, or lack thereof, of private affordable rental housing. Finally, two new tables will be provided showing tenant demographics for the PHA’s own assisted residents. Examples of these tables, showing the intended type and format of the information to be provided was included as part of the 60-Day PRA release.

IV. PHA Region

Please note that a regional analysis is required for all program participants. Under the AFFH rule, the region is larger than the jurisdiction. For PHAs, under the AFFH rule, the jurisdiction is the service area. Unlike local governments and States, PHAs, including QPHAs, have service areas that range from the size of a town to match the boundaries of a State. The region that PHAs will analyze under the AFFH rule thus depends on the service area. For purposes of conducting a regional analysis, HUD identifies the following potential approach regarding geographies as regions for PHAs:

<table>
<thead>
<tr>
<th>PHA jurisdiction/service area</th>
<th>PHA region</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within a CBSA .............</td>
<td>CBSA, County or Statistically Equivalent (e.g., Parish).</td>
</tr>
<tr>
<td>Outside of a CBSA and Smaller than a County or Statistically Equivalent (e.g., Parish).</td>
<td>All Contiguous Counties.</td>
</tr>
<tr>
<td>Outside of a CBSA and Boundaries Consistent with the County. State .........................</td>
<td>State and Areas that Extend into Another State or Broader Geographic Area.</td>
</tr>
</tbody>
</table>

A regional analysis is of particular importance for PHAs’ fair housing analyses because fair housing issues are often not constrained by service area boundaries. Additionally, PHAs may be limited by their available housing stock and, in order to afford full consideration of fair housing choice and access to opportunity for residents in the service area, a larger regional analysis is necessary. For example, one PHA may identify segregation as a fair housing issue because their housing stock, and therefore their residents, who are members of a particular protected class group, are located in only one part of the service area. The PHA therefore may identify the location and type of affordable housing as a contributing factor for this issue because the only affordable housing in the jurisdiction is located in that particular part of the City. For the PHA to understand the options for addressing this fair housing issue, the PHA must not only assess where other affordable housing is located in the region, but also consider the regional patterns of segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity and disproportionate housing needs, by protected class. In the context of public housing agencies, regional coordination can be especially important to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities. When considering a regional approach to addressing fair housing issues the PHA may consider Housing Choice Voucher portability and shared waiting lists; mobility counseling, increasing use of Small Area Fair Market Rents to set payment standards at the sub-market level; use of Project-Based Vouchers as siting mechanism in higher opportunity areas, including in conjunction with LIHTC; and use of expanded PHA jurisdictional authority to administer vouchers outside its boundaries. The public is invited to provide feedback on this proposed approach.

V. Public Comments on the PHA Assessment Tool and HUD’s Responses

General Comments

General comments offered by the commenters included the following:

The structure of the tool is not suitable for PHAs. A commenter stated that the assessment tool for PHAs too closely mimics the Assessment Tool for local jurisdictions in the burden that it will place on entities that must use it to complete their AFFHs. Another commenter stated that if a PHA partners with local housing PHAs across the State, ranging from very rural areas to urban areas, to administer day-to-day operations of the HCV program, the structure of the Assessment Tool is very complex and would require an analysis of the HCV program. Another commenter stated that the tool is a centralized directive that does not take
into account a community’s local needs or priorities in how the PHA or community wants to allocate its scarce resources. The commenter stated that PHAs have a mandate to continue meeting local needs but this forces them to prioritize fair housing activities. Another commenter stated that the tool ignores the real-world constraints under which entities operate. A commenter asked HUD to have PHAs identify and prioritize portions of the tool so that over a number of cycles, the entire tool could be completed. Another commenter stated that the tool should be a streamlined document that provides a broad overview of the AFH process to PHAs, illustrate their various options among the other tools, clarify that the AFH duty applies to Moving to Work Agencies, and do a quick walkthrough of the process of completing the PHA tool.

**HUD Response:** HUD appreciates the commenters’ views and input. HUD will continue to evaluate ways to reduce burden for PHAs while also providing guidance, technical assistance and training to support PHAs in affirmatively further fair housing under the Fair Housing Act and complying with other fair housing and civil rights requirements. As such, HUD has made revisions to the Publicly Supported Housing, Disparities in Access to Opportunity, and Disability and Access sections of the PHA Assessment Tool to guide PHAs in conducting a meaningful fair housing analysis while still being tailored to the operations and programmatic focus of PHAs and their respective service areas. HUD believes these revisions have eliminated duplicate analysis within the PHA tool.

**Terminology clarification.** Several comments focused on certain terms in the tool that commenters advised needed clarification. A commenter asked what is meant by “proximity to employment.” A commenter asked what is an “adequate supply” of accessible housing. A commenter stated that the word “siting” should only be used in reference to new developments, and not used to refer to existing developments. The commenter stated that therefore, the description of the contributing factor “Siting selection policies, practices, and decisions for publicly supported housing, including discretionary aspects of Qualified Allocation Plans and other programs” should not use “siting” to reference “acquisition with rehabilitation of previously unsubsidized housing.”

**HUD Response:** HUD thanks these commenters for requesting clarification. HUD’s AFFH Rule Guidebook, available at [https://www.hudexchange.info/resource/4866/affh-rule-guidebook/](https://www.hudexchange.info/resource/4866/affh-rule-guidebook/), may provide some clarification on terms commenters felt needed clarification. HUD also notes that past siting decisions may be contributing factors to a fair housing issue—and is included as part of the explanation of the contributing factor “Location and type of affordable housing.” HUD agrees with the commenter that the siting selection policies contributing factor is meant to focus on new developments, but also includes the consideration of how those policies might target the “acquisition and rehabilitation of previously unsubsidized housing” because it results in the creation of new affordable housing opportunities for which location should be considered. HUD notes that with regards to past siting decisions, the goal to overcome that contributing factor may not involve “re-siting” that development. In order to understand the fair housing issues affecting a community, it is important that past siting decisions be taken into consideration. While the past siting and zoning ordinances may have contributed to the concentration of Publicly Supported Housing in certain neighborhoods in a jurisdiction that are experiencing racial and ethnic concentration, the AFH rule outlines how PHAs may undertake a balanced approach in considering place-based investments and mobility to deconcentrate neighborhoods and help protected class group members that use PSH move into low-poverty and integrated neighborhoods of opportunity. HUD’s description of contributing factors in the appendix clarifies that existing publicly supported housing developments may be considered under the contributing factor “Location and type of affordable housing.”

**The tool is too burdensome.**

Commenters stated that the tool is too burdensome and PHAs do not have enough resources to complete an AFH. Commenters stated that PHAs will have to hire consultants because the assessment is too complex (which includes the analysis of the data and dissimilarity index) to be effectively completed by staff without specific statistical and mapping knowledge, and that it is hard to get a true estimate from a consultant at this point or figure out which consultant will provide high quality services. The commenters stated that this is an ineffective use of staff time. The commenters stated that resources that could be put into housing related tasks are being funneled into completing this tool. Another commenter stated that PHAs do not have the resources and run the risk of putting all of their energy and resources into doing the assessments, leaving nothing left to address the identified Fair Housing Issues. Another commenter asked that during the six weeks it will take to prepare the tool, how clients will be served, and what will happen if a PHA’s high performance status drops because of the time being spent on the AFH.

**HUD Response:** HUD is sympathetic to all program participants who have limited capacity to conduct an AFH, and will continue to evaluate ways to reduce burden for PHAs, and all program participants, while still ensuring a meaningful fair housing analysis is conducted such that goals that will result in a material, positive change can be established. While HUD encourages PHAs and QPHAs to partner with Local Governments to jointly share the workload associated with the AFH fair housing analysis and planning requirements, HUD proposes a streamlined set of QPHA questions for analysis of their service area independently and in collaboration with States, Local Governments and other PHAs in their vicinity whether they are within or outside of a CBSA. Moreover, HUD recognizes potential concerns program participants may experience due to devoting resources toward the AFH, and it is HUD’s priority to provide guidance, technical assistance, and training to PHAs and all program participants as they work to conduct their AFHs as well as providing as much help it can in allaying other worries as a result of completing the AFH.

**Funding is needed to complete the tool.** Commenters stated that PHAs need funding to complete their AFHs. Commenters stated that the AFH does not recognize the zero-sum nature of a PHA’s resource allocation, and that the President’s FY 2017 budget proposal did not request additional money for PHAs and other participating entities to complete their AFH tools. Another commenter stated that it will have to spend subsidy or Capital Fund Program (CFP) money to complete the tool and this will take away from being able to maintain properties. A commenter stated that if HUD cannot provide additional funding, HUD needs to find ways to provide additional resources to all that need to complete an AFH.

**HUD Response:** HUD understands that program participants have limited resources and will continue to try to reduce burden. In addition, HUD will continue to provide guidance, technical assistance, and training to all program participants to as they work to conduct their assessments of fair housing. Additionally, HUD will...
provide guidance, technical assistance, and training to assist PHAs, as well as other program participants, in compliance with their fair housing and civil rights obligations.

Allow waivers of the AFH if the PHA has insufficient funding or staff. A commenter suggested that without additional funding, HUD should accept waivers from PHAs to provide time to complete AFHs, especially those seeking to join efforts with neighboring PHAs and local governments.

HUD Response: Unfortunately, HUD cannot provide waivers for certain program participants with respect to the submission of an AFH. However, HUD has built in flexibility for program participants to collaborate to submit a joint or regional AFH, provided for at 24 CFR 5.156 of the AFFH Rule. Program participants may be able to adjust their program or fiscal years to align with other program participants in order to collaborate on an AFH.

Exempt small and qualified PHAs (QPHAs) from submitting an AFH. A commenter stated that QPHAs should be exempt because they lack funds and staff. Another commenter stated that slightly more than half of all PHAs manage fewer than 250 units and nearly 88 percent manage fewer than 500.

The commenter stated that small PHAs have become leaner over the years and do not have the capacity to undertake the requirements of an AFH. Another commenter stated that if HUD will not exempt small and qualified PHAs, HUD should offer a significantly streamlined and simplified AFH tool for use by agencies with 550 combined units or fewer that will be of some use to them as they analyze steps they can take to AFFH.

HUD Response: HUD recognizes the challenges small PHAs in undertaking the requirements of completing the Assessment of Fair Housing. In keeping with this, HUD has added an insert to the PHA and Local Government Assessment Tool that may be used by QPHAs that are conducting a joint AFH with other non-qualified PHAs and local governments. Use of this insert may reduce burden for the QPHA in completing an Assessment of Fair Housing. As HUD has stated previously, HUD will continue to evaluate ways to reduce burden for all program participants, including smaller PHAs and QPHAs in complying with fair housing and civil rights requirements. HUD also notes that it is committed to creating a separate QPHA tool.

Concerns with the use of local data. A commenter suggested local data that PHAs need to rely on may not exist, and cited as examples, education and school proficiency data that the commenter stated can be difficult to obtain because some PHAs serve in areas where students can attend schools in multiple jurisdictional regions across the entire metropolitan region, including outside the jurisdiction of the PHA. The commenter stated that HUD does not include protections for PHAs that claim they cannot compile or obtain local data. Another commenter stated that local data should be optional because the burden of collecting it is immense.

A commenter suggested that HUD’s Office of Policy Development and Research provide greater technical assistance to PHAs to help them complete the AFH, including training and webinars on data analysis, along with a cadre of experts who can assist PHAs in meeting this requirement.

HUD Response: HUD appreciates these comments. HUD notes that program participants need only use local data when it meets the criteria set forth in the AFFH rule at 24 CFR 5.152 and in the instructions to the Assessment Tool. HUD has also included clarification in the instructions to the Assessment Tool to make clear when local data must be used and HUD’s expectations with respect to the use of such data. Specifically, HUD states in the instructions that program participants must use reasonable judgment in deciding what supplemental information from among the numerous sources available would be most relevant to their analysis. HUD later explains in the instructions that where HUD has not provided data for a specific question in the Assessment Tool and program participants do not have local data or local knowledge that would assist in answering the question, PHAs should note this, rather than leaving the question blank.

Define the boundaries of a region. A commenter stated that when HUD finalizes the regional data, it should clearly define the boundaries of the regions so that PHAs know exactly the regional area that must be covered in their analyses and therefore the extent of the data necessary to answer the template questions.

HUD Response: HUD appreciates this comment and will work to ensure the final data provides these boundaries.

Burden estimates are too low. Commenters stated that since HUD is far too low due to the complexity of the AFH. A commenter stated that HUD’s Office of Policy Development and Research provide greater technical assistance to PHAs to help them complete the AFH, including training and webinars on data analysis, along with a cadre of experts who can assist PHAs in meeting this requirement.

HUD Response: HUD understands the concerns of these commenters, and will...
continue to evaluate ways to reduce burden for all program participants, including PHAs. In addition, HUD will also continue to provide guidance, technical assistance, and training as needed and appropriate, in an effort to build the capacity of program participants to undertake an Assessment of Fair Housing. In light of revisions being proposed for the AFH tools, HUD will continue to evaluate potential adjustments to burden estimates that are necessary for the applicable AFH Tools. 

Electronic submission will help eliminate burden. Commenters stated that electronic submission is the only answer to eliminate any potential burden to provide the information by the agency. The commenters stated that this analysis seems to address all the areas of concern with the quality of information being asked for the agency to provide, but that too much information being asked could be a potential setback as in reviewing the maps in the tools, information can be confusing and difficult to find the information being sought because the maps become hard to read.

**HUD Response:** HUD agrees with these commenters and is continuing to work to provide PHAs with an electronic submission mechanism. HUD will continue to provide guidance, technical assistance, and training as needed and appropriate, to aid program participants in understanding how to read the HUD-provided maps.

**Eliminate the local knowledge requirement.** Commenter stated that it is a costly burden to obtain local knowledge and data because the PHA’s service area covers most of the State. A commenter expressed concern about data availability or meaningfulness in rural areas. The commenter stated that the requirement to use local data here is burdensome. The commenter stated that there needs to be explicit instructions about what to do when there is no HUD provided data or no meaningful HUD provided data and local data or knowledge is not particularly useful.

**HUD Response:** HUD appreciates this commenter’s suggestion, however, HUD notes that local knowledge is critical information that can provide context and clarity for the HUD-provided data, to supplement the HUD-provided data, and illuminate fair housing issues affecting a jurisdiction or region.

However, HUD notes that the instructions to the Assessment Tool explain that where HUD has not provided data for a specific question in the Assessment Tool and program participants have local data or local knowledge that would assist in answering the question, PHAs should explain this, rather than leaving the question blank.

**The Housing Choice Voucher (HCV) program does not fit an AFH analysis.** Commenters stated that PHAs that primarily operate a voucher program, which promotes tenant choice and, under the HCV program, households ultimately choose their own housing, so many of the considerations of siting of future housing that could be addressed through a tool would not be germane. Another commenter stated that a PHA administering an HCV program can educate and provide information to voucher households about the characteristics of a neighborhood but that does not appear sufficient per the AFFH rule. The commenter stated that voucher households have the right to choose preferred rental housing unit despite information.

Other commenters stated that the HCV data is limited and does not allow AFH submitters to assess which PHAs have vouchers placed within a jurisdiction. Commenters stated that alternative data sets that include the number of vouchers by PHA is missing data for Moving to Work jurisdictions, which are often the larges PHAs in their region. Commenters stated that this data should be made available in the AFH data tool to permit a complete analysis of concentration patterns in the HCV program. The commenters stated that if a PHA jurisdiction contains a concentration of vouchers from other PHAs, this may be an important indicator of source of income discrimination in the other PHAs jurisdiction, and also that a PHA’s mobility program is inadequate or that the PHA is steering voucher holders to specific areas in violation of the Fair Housing Act and its obligation to AFFH.

**HUD Response:** HUD respectfully disagrees with the commenters’ assertion that the HCV program does not fit in the AFH analysis. HUD notes that program participants that are required to conduct and submit an AFH to HUD are specified by the AFFH rule at 24 CFR 5.154(b) and include PHAs receiving assistance under Sections 8 or 9 of the United States Housing Act of 1937. However, HUD will continue to evaluate different ways to portray data relating to the HCV program to assist PHAs in conducting a meaningful fair housing analysis. To operate the HCV program within a jurisdiction, PHAs undertake market analyses and rental reasonableness tests to understand the supply of available quality affordable housing units that are feasible for lease-up under standards PHAs may set within the overall jurisdiction or in smaller FMR areas or neighborhoods within the PHA’s jurisdiction.

**The AFH has no practical utility.** Commenters stated that the information asked by the PHA tool and required by the AFFH rule does not have practical utility and that it is not necessary to further the PHA’s mandate to affirmatively further fair housing. A commenter stated that as an agency where the affordable housing has been in place for many, many years and the lack of funding to develop in areas of opportunity, the collection of data is not needed. The commenter stated that the PHA already understands the lack of affordable housing in areas of opportunity and obstacles to develop in these areas; any data collection will just support this argument for the need to develop in these areas. Commenters stated that the AFH requires PHAs to set fair housing goals for activities that are out of their control. Commenters stated that it does not make sense to have an entity that does not have authority to achieve these goals conduct the analysis both because the entity would not have specialized knowledge of the field and because equitable considerations would stress that the entity responsible for achieving the goals should be the one conducting the analysis. Commenters stated that the AFH requires them to set goals outside of their scope of control, and they may misjudge the extent to which these goals is feasible since these goals may be in areas outside of their day-to-day experience.

Other commenters stated that the tool requires PHAs to analyze factors that may have been decided decades ago (like siting decisions) and make conclusions about impediments to fair housing (like zoning and permitting) that are out of their control.

Commenters stated that the following areas are outside of a PHA’s experience or control: School assignment policy (HCV programs will need to create tools to discover the schools voucher holders’ children attend to investigate, large agencies’ participant households sent their children to a large number of school districts), employment opportunities (PHAs may know where participants work but do not have knowledge of access to employment opportunities and do not influence where employers choose to locate or where skillsets match up), access to transportation (PHA’s have little to say in establishing or changing transit routes or schedules), geographic distribution of people with disabilities (PHAs exercise little or no control over neighborhoods PHAs acknowledge for the lack of data), whether Olmstead plans have been implemented (PHAs exercise little or no control over neighborhoods PHAs acknowledge for the lack of data).
influence over institutions where people with disability may be housed and lack
the expertise to evaluate appropriateness, and have no more
control over the contents of a plan than
any member of the public), and whether
people with disabilities have access to
public infrastructure (PHAs are in the
same position as other members of the
public when it comes to infrastructure
outside of their physical assets).

HUD Response: HUD respectfully
disagrees with these commenters. HUD
acknowledges that PHAs may already
understand the fair housing issues and
contributing factors affecting in their
service areas, and have limited control
over certain areas of analysis contained
in the AFH; however, those areas are
part of the community in which the
PHA is located and may have an affect
or impact on fair housing in the PHA’s
service area and region. In order to best
understand the fair housing issues
affecting the PHA’s service area and
region, PHAs must take a holistic
approach in analyzing their fair housing
landscapes in order to set appropriate
goals that will allow the PHA to take
meaningful actions that affirmatively
further fair housing, including
identifying policies and activities that
may or may not be within their control.
HUD also notes that the community
participation process that is part of
conducting an AFH may yield important
information from members of the
community about these issues for the
PHA to consider as it conducts its AFH.
HUD encourages PHAs to think
creatively in approaching goals. HUD
will provide some examples of goals
specifically for PHAs when it updates
the AFFH Rule Guidebook, and
will provide guidance, technical assistance,
and training to support all program
participants as they work to conduct
their AFHs.

The tool should facilitate a broad
range of approaches to affirmatively
furthering fair housing. Commenters
stated that the rule emphasizes the
importance of a balanced approach, but
does not allow for the assessment and
inclusion of community revitalization
efforts. The commenters stated that a
two-pronged approach that both
increases access to areas of opportunity
and improves neighborhood conditions
is best. The commenters stated that HUD
should honor the value and even
necessity of preservation of affordable
housing, wherever it is located, to
prevent displacement and further racial
and economic segregation in cities with
substantially tightening rental markets.
Other commenters stated that the lack of
preservation related questions and
guidance in the PHA tool suggests that
development in non-impacted areas is
simply a more legitimate goal than
preservation of existing housing that is
not within an “area of opportunity.”
The commenters stated that, for
example, the PHA tool does not have
questions directly assessing the
preference of residents to remain in
their own neighborhoods, even if
segregated, or that help a PHA
document that preservation and
rehabilitation is the most appropriate
way for the PHA to further fair housing
while also respecting the rights of
residents to remain in their homes and
communities. The commenters stated
that, in contrast, there is a
preponderance of questions related to
moving families away from the
communities where they live,
suggesting that HUD believes that
preservation cannot be an important
part of an acceptable strategy for
meeting fair housing obligations. The
commenters encouraged HUD to modify
the tool to include more questions about
preservation strategies and acknowledge
that moving residents to areas of
opportunity need not take precedence
over providing existing, underserved
communities with decent, safe, and
sanitary affordable housing and
improving neighborhood quality. The
commenters stated that questions could
include requests for information about
community reinvestment and site-
specific projects to restore deteriorated
housing, and the instructions should
also acknowledge that preservation is an
appropriate fair housing tool for PHAs.
Another commenter stated that HUD
should provide clearer directions in
each of the “additional information”
subsections to foster a more balanced
assessment pertinent to the fair housing
issue under consideration. The
commenter stated that positive assets
that should be listed include affordable
housing preservation organizations and
community-based development
organizations that have long worked
with residents to improve publicly
supported housing and/or community
living conditions. The commenter stated
that fair housing must include residents’
ability to choose to remain in
their homes and communities, even if
these are racially or economically
concentrated areas of poverty
(R/ECAPs).

A commenter stated that in Part V.D.,
questions for both the “Public Housing
Agency Program Analysis” and the
“Other Publicly Supported Housing
Programs,” ask PHAs to compare the
demographics of developments to the
demographics of the service area and
region. The commenter expressed
concern on how this will be interpreted
because sensitivity to the wishes of
existing residents must be paramount.
The commenter stated that PHAs should
describe the actions taken to determine
residents’ desire to move and the
resources (and in what amounts) that
have been used to improve the
neighborhood in which the public
supported housing development is
located. The commenter stated that the
“Additional Information” questions
should require PHAs to describe efforts
that have been made, are underway, or
are planned to preserve Project Based
Section 8 at risk of opting out of the
program or prepaying the mortgage and
exiting the program, or of other HUD
multi-family assisted developments
leaving the affordable housing stock due
to Federal Housing Administration
(FHA) mortgage maturity. The
commenter stated that PHAs should
describe efforts that are made,
underway, or planned to preserve Low
Income Housing Tax Credits (LIHTC)
developments, including at Year 15 and
beyond Year 30.

HUD Response: HUD appreciates the
commenters’ recommendations and will
consider adding questions on how to
evaluate tenant viewpoints on
relocation and mobility from
neighborhoods of concentration to more
integrated areas. This will include HCV
families and residents living in publicly
supported housing properties in
R/ECAPs and segregated neighborhoods.

HUD encourages a balanced approach
to fair housing planning, as it stated in
the preamble to the final AFFH rule,
which may include a variety of
strategies to affirmatively further fair
housing, as appropriate, depending on
local circumstances. HUD includes
questions and contributing factors in the
Assessment Tool that relate to both
place-based and mobility strategies in
order to assist program participants in
determining how to set goals that will
lead to the program participant
ultimately affirmatively furthering fair
housing. Conducting an analysis that
compares the demographics of the
residents of publicly supported housing
to the area in which it is located is
necessary for a fair housing analysis.
Specifically, for this Assessment Tool,
conducting a development-by-
development analysis and comparing
the demographics of developments to
the areas in which they are located is
critical when a PHA is conducting a fair
housing analysis of its jurisdiction.

Finally, HUD appreciates the
suggestions of commenters relating to
particular subjects that should be added
to the “Additional Information” questions.
HUD believes that these are
all important areas of analysis, and will
continue to consider whether they should be added to the questions, included in instructions, or provided for in guidance. HUD will consider questions on how to evaluate tenant viewpoints on relocation and mobility from neighborhoods of concentration to more integrated areas. HUD will also consider giving instructions in the PHA and Local Government Tools on community participation to solicit feedback on preservation of properties and resident relocation and mobility from R/ECAPs to more integrated neighborhoods of opportunity. These are issues PHAs may solicit feedback on in surveys, community participation meetings, through its State and to complete the AFH. The commenter stated that very rural towns and cities are not entitlement cities so there is no CDBG funding, and that many of these rural areas were hit hard in the recession and lost manufacturing jobs that are not coming back. The commenter stated that PHAs in these situations have limited resources and so do the communities, and that this time and money could be better spent addressing housing issues.

Commenters stated that the instructions to Section VI of the tool acknowledge that PHAs may not be able to control all of these factors. The commenters asked HUD not to burden PHAs with extensive data collection and goal development for factors they cannot control and instead focus on those they can control. A commenter expressed concern that HUD provided data is not detailed enough to assess fair housing issues between rural and urban areas throughout its State and to complete the AFH. Another commenter expressed concern that there are significant gaps in HUD-provided national data that will impede PHAs in adequately assessing and addressing the fair housing needs of people with disabilities. The commenters stated that HUD should provide Federal data from the Medicaid program and from its own data collection. The commenter stated that while there may not be “uniform” data concerning people with disabilities similar to the data concerning race and ethnicity (especially those persons with disabilities who live in institutions or group homes), consideration of major sources of information should still be considered in order to include their consideration in fair housing planning. Some commenters stated that much of the information requested through the tool exhibits practical utility but the significant data limitations (e.g. the ability to disaggregate ethnic groups, neighborhood level data, local data, etc.) preclude the ability to easily describe contextual factors that may demonstrate impacts to particular groups.

Several commenters stated that the HUD provided data is unwieldy and difficult to understand, and that, in some cases, it relies on complex social science indices whose meaning is largely unintelligible despite the guidance provided in their instructions and the AFFH Rule Guidebook. The commenters stated that the level of sophistication required to understand this information is at odds with the emphasis on public participation. Another commenter stated that the tool asks for data that does not exist and leaves agencies in danger of non-compliance when there is no way to comply.

HUD Response: HUD thanks these commenters for their views and recognizes that representatives of program participants may immediately feel overwhelmed; however, HUD will provide guidance, technical assistance, and training to assist program participants in building their capacity to analyze the data. As HUD has explained in an earlier response, it will continue to evaluate ways to reduce burden for program participants while still ensuring a meaningful fair housing analysis is conducted.

HUD also acknowledges the limits of the data it is providing to program participants, especially with respect to rural areas. HUD will continue to assess the feasibility of providing additional data sets that would assist program participants in conducting an analysis in rural areas. Similarly, HUD understands the limits of the data it is providing with respect to individuals with disabilities. HUD will also continue to assess the feasibility of providing additional data related to disability and access in the future. HUD will also continue to evaluate how it can provide that information fairly a manner as possible and will continue to provide guidance, technical assistance, and training as needed and appropriate, to assist program participants in their use of HUD-provided data to complete an Assessment of Fair Housing.

HUD already has the information sought through the AFH: HUD should provide the analysis. Commenters stated that the tool requests information HUD already has. The commenters stated that demographics concerning public housing property residents and voucher holders is submitted through HUD Form 50058; HUD has participants’ characteristics and the Census Bureau provides demographics of the jurisdiction’s population so HUD can make comparisons with the income eligible population itself; HUD already has the locations of public housing properties and addresses of voucher holders so it should prepopulate the AFH tool with this data.

HUD Response: HUD thanks these commenters for their views, however, HUD believes it is important for PHAs to do their analysis to better understand the fair housing issues in their regions and service areas. Understanding the historical context, including policies that may have led to such issues will provide context for how program participants may seek to resolve them. HUD also notes the importance of program participants engaging with their communities in order to best understand the fair housing issues and contributing factors affecting their geographic areas of analysis. Thus, HUD is providing data that includes the demographics of residents and locations for certain categories of publicly supported housing to assist PHAs in conducting their fair housing analysis. PHAs must use the HUD-provided data, along with local knowledge and local data (when such local data and local knowledge meet the criteria set forth in 24 CFR 5.512 and the instructions to the Assessment Tool) when assessing fair housing issues.

Maps and tables are not easily workable. Several commenters expressed concern about the functionality of the maps and tables. Commenters stated that dot density maps do not work at a high level for every variable and HUD should reevaluate the type of mapping thematics. A commenter requested that AFFH data and mapping tools have the capability to group data based on the selection of numerous counties to build sub-State areas. Another commenter expressed concern that HUD provided data is not detailed enough to assess fair housing issues between rural and urban areas throughout its State and to complete the AFH. The commenter stated that HUD should include the
with more than five people are not an appropriate proxy for families with children. Commenters stated that it is very difficult to use sample Maps 7 and 8 to answer subpart Question 2 in Disproportionate Housing Needs. The commenters stated that the dots are very clustered and cover most of the PHA service area so the various desegregations are impossible to decipher. Commenters stated that it is unclear from the data in tables 9–11 how a PHA can make the deductions required by the instructions for Disproportionate Housing Needs in Question 3, which seems to indicate that PHAs should read the data in the tables together to compare the needs of families with children for housing units with two, three, or more bedrooms with the available existing housing stock in each category of publicly supported housing. The commenters stated that HUD must provide guidance on how a PHA is to interpret data given in these tables to provide the requested analyses. Commenters stated that a color spectrum should be used to classify census geographies of note as dot density maps, as presented, have too much flexibility in visualization and could mislead some agencies and members of the public to false conclusions. The commenters stated that HUD should publish entire series of maps for each jurisdiction as a set of PDFs to easily share with the public, incorporate ACS data to ensure more up to date data for future submissions, and address limitations of non-disaggregated data to tell accurate story for existing and emerging groups.

HUD Response: HUD appreciates these suggestions from commenters relating to the usability of the data HUD is providing. HUD will continue to evaluate how to provide the data in the most user-friendly manner in order to help facilitate a meaningful fair housing analysis. HUD also appreciates the suggestion for disaggregating certain data, making tables and maps clearer and easier to understand or interpret, and adding additional protected class groups to the HUD-provided data. HUD will continue to consider these recommendations as it provides updates to the AFFH data and mapping tool. HUD also recognizes that the data has certain limitations, and will continue to assess how to best provide data for rural areas. HUD will also continue to provide guidance, technical assistance, and training as needed and appropriate, to assist program participants in building capacity to use the HUD-provided data when conducting an AFH.

HUD should provide additional data relating to persons with disability. Commenters recommended the following three part approach to data on people with disabilities: (1) HUD should provide PHAs with data readily available in the federal system, including data from Money Follows the Person and Medicaid home and community-based waiver programs and options, available from the Center for Medicare and Medicaid Services (CMS), data on people with disabilities living in nursing facilities and intermediate care facilities for individuals with developmental disabilities, available from CMS, and data on people with disabilities experiencing homelessness available in the HUD Homeless Management Information System and/or the HUD Homeless Assessment Report databases; (2) Where HUD-provided national data are unavailable, instead of HUD permitting PHAs to assert that “data and knowledge are unavailable” HUD should require PHAs to seek out and use local data and knowledge; (3) HUD should provide additional guidance to PHAs as to the types of local data and knowledge that are likely to be available and how to find these. Commenters also stated that all disability data should be provided by age group, and PHAs should be required to consider this distinction in their analyses. The commenters stated that due to the lack of nationally uniform data, the instructions to the Disability and Access analysis section should strongly encourage PHAs to solicit input from community stakeholders about sources of local data and local knowledge. The commenters stated that HUD should make suggestions of places that might have local data.

HUD Response: HUD appreciates the recommendations of these commenters and agrees that to the extent feasible, HUD should provide disability-related data to program participants and the public to better facilitate a meaningful fair housing analysis related to individuals with disabilities. HUD will continue to seek out data sources that are nationally uniform that can be provided in the AFFH data and mapping tool in the future. Additionally, HUD notes that program participants are required to use local data and local knowledge to complete their AFFH where that information meets the criteria set forth at 24 CFR 5.152 and in the instructions to the Assessment Tool, but no one indicates that the program participant does not have local data on local knowledge. HUD agrees that data from CMS databases may be particularly relevant.
for program participants to consider and would welcome program participants’ use of such data as they conduct their AFH. HUD notes that there are examples of sources of local data and local knowledge provided in the AFH Rule Guidebook, and would encourage program participants and the public to evaluate whether those data may be useful in completing the AFH.

Demographic data for Low Income Housing Tax Credit (LIHTC) developments is needed. Commenters stated that tax credit units are vital to community development. The commenters stated that more important than completing an AFH is helping more people and building more tax credit units for families to live in. Commenters stated that LIHTC data does not include data on race, ethnicity, and other demographic data by project, which is collected by HUD annually pursuant to Section 2002 of the Housing Economic Recovery Act, and that without this data, PHAs cannot conduct a full assessment of the concentration of subsidized units and the demographics of those tenants. One commenter stated that PHAs and their subsidiary nonprofits that are involved in the development and ownership of LIHTC developments have this data readily available, and their failure to include it should be a red flag.

Other commenters stated that the data provided on demographics of non-LIHTC assisted housing developments in Table 8 does not directly link to census tract demographics, creating an additional burden on submitters and undermining a key element of fair housing analysis.

**HUD Response:** HUD thanks the commenters for their input on LIHTC data. HUD acknowledges the limited availability of LIHTC data on tenant characteristics at the development level. HUD is continuing its efforts to collect and report on this data. However, HUD notes that there are substantial barriers to providing LIHTC tenant data at the developmental level, including both the completeness of the data coverage and ongoing privacy concerns with releasing tenant information for small projects, which make up a significant portion of the LIHTC inventory. For example, commenters should also be aware that information at the development-level will often not be available due to federal privacy requirements and the small project sizes in a large portion of the LIHTC inventory. HUD encourages program participants to use local data and local knowledge, when such information meets the criteria set forth at 24 CFR 5.152 and in the instructions to the Assessment Tool, to complete this portion of the analysis.

The Assessment Tool’s certification requirements create new legal liability for PHAs. Commenters expressed concern that the PHA Tool’s Certification requirements may create new legal liability for PHAs. The commenters stated that by signing the Certification, PHAs may expose themselves to audits by HUD for failure to further the goals they set or they may be subject to lawsuits from parties who believe they have been injured by the fair housing impediments that the PHA described. The commenters stated that liability is created not by actual failure of the PHA to perform under the ACC or other agreements with HUD, but by virtue of the fact that the Assessment Tool requires PHAs to certify that they will take actions that they have neither the legal authority nor resources to take. Other commenters stated that liability exists in detailed levels within the Assessment Tool itself, and stated, as an example, the tool, in asking PHAs to assess past goals, effectively requires PHAs to make a public admission of wrongdoing which may promote litigation. The commenters stated that this question and the broader emphasis on failures should be removed. Commenters encouraged HUD to create a safe harbor standard for PHAs that act in good faith in determining the most relevant one (or two or three) data sets or political boundaries for use in completing the tool. Another commenter stated that the tool is not an effective tool to encourage PHAs to be champions of fair housing. The commenter stated that the tool runs the risk of punishing PHAs for lacking resources and may unintentionally create a spirit of anomie towards the concepts of fair housing instead of encouraging PHAs to be champions of fair housing.

**HUD Response:** HUD understands the concerns raised by these commenters, however, HUD notes that the AFH is a planning document. In order to effectively engage in fair housing planning, it is important for program participants to evaluate the past and current state of fair housing in their communities in order to set meaningful goals to overcome contributing factors and related fair housing issues. HUD also notes that the Assessment Tool provides opportunities for PHAs to identify past goals, strategies, and actions in order to allow the program participant to reflect on past progress or setbacks with respect to fair housing. The purpose of this portion of the assessment is to allow program participants to readjust their approach and make changes to any goals they may not have been able to achieve. Failure to achieve a goal set in an AFH does not necessarily mean the program participant has not met its statutory obligation to affirmatively further fair housing.

**Consultation requirements.** Commenters had a variety of comments on the consultation requirements. Commenters stated that the tool should require PHAs to consult with and reach out to a wide variety of organizations, including those that represent people who are members of the Fair Housing Act’s protected classes because the regulations seek to have PHA plans informed by meaningful community participation. Other commenters stated that PHAs should be required to list all entities consulted and the dates consulted, so residents and advocates can assess if this was most appropriate. The commenters stated that a PHA should provide a written summary of the input offered through the consultation and attach this as an appendix to the Assessment Tool. Other commenters stated that the tool is intended to be a guide for PHAs, and therefore residents and community participants, it should include examples of the types of groups PHAs could consider reaching out to. A commenter suggested that Resident Advisory Boards, resident councils, groups representing HCV households, people on waiting lists, community groups, affordable housing advocacy organizations, and legal services offices. Another commenter stated that PHAs should describe how community participation was both provided for and encouraged, and should present a detailed list (with date and time of day) of specific participation activities for various components of the stakeholder community. Another commenter stated that PHAs should be required to list organizations that submitted written comments and/or delivered remarks at public hearings, so that residents and advocates will be able to assess whether the groups that participated represent a balance of opinions.

Commenters stated that PHAs should be required to address the following: How meetings and events were held at times and places conducive to optimal participation (ex: Meetings on evenings and weekends); how PHAs assessed language needs and provided for translation of notices and vital documents, as well as provided interpreters for meetings and public hearings; how far in advance notice of meetings and events was provided, and the form of notification (mailings, postings in common areas of properties, easily identified notices on the PHA’s...
home page. Listserv notices in newspapers oriented to neighborhoods where PHA properties are located and in appropriate language, notices in newsletters of organizations serving various populations, PSAs, provisions for LEP persons, provisions for people with visual, hearing, or other communications disabilities, social media; discussions with residents of public housing to determine whether residents want to remain in their homes and communities or relocate to areas that may offer other opportunities; summarize all local knowledge and comments and explained why they were accepted or why not, and included as an appendix; outreach to tenants beyond a Resident Advisory Board, particularly underserved populations such as HCV holders and single mothers: Many developments may not even have a Resident Advisory Board; and efforts to conduct outreach to residents of public housing, Section 8 HCV holders, and persons eligible to be served by the PHA, and to briefly describe how documents associated with the AFH, including the draft AFH, were provided to public housing tenants, voucher holders, and other interested parties. Another commenter stated that HUD should amend Question 2 on page one to require PHAs to provide a list of stakeholders working in the areas of public health, education, workforce development, environmental planning or transportation. A commenter stated that the accompanying instructions should reference 24 CFR 903.17 which requires, in part, that the PHA makes the draft AFH, including the draft AFH, available to the PHA’s waiting list may be provided as information about the AFH Rule Guidebook. HUD notes that information would have to meet the criteria set forth in 24 CFR 5.152 and the purposes of conducting the AFH, and HUD has removed language related to the AFH. Commenters stated that some data is available for individuals on the waiting list, but commenter questions the relevancy as those on the list may need to wait years and circumstances may change. HUD should clarify the purpose it feels this serves. Other commenters stated that applicants apply for housing based on their desire to live in a specific area for a number of reasons, and data collected from the waiting list may not give all the needed information to provide an accurate analysis for fair housing. Another commenter stated that PHAs do not have historic waiting list data (data beyond the record retention period). The commenter stated that PHAs have data on households on waiting lists that include household members, disability status, student status, race, and ethnicity, and that waiting list household data is self-reported and not verified by PHA staff. A commenter stated that a PHA operates with multiple waiting lists, and that PHAs do not treat waiting list data uniformly and have different amounts of information and may vary at different times. A commenter stated that it does not believe that analyzing individuals on the waiting list will yield useful information in fair housing planning because the demand for affordable and federally assisted housing far exceeds the supply, and families may be unable to move for reasons other than the PHAs action or inaction. Another commenter stated that certain types of tenant selection and waiting list management policies can have a discriminatory impact on persons in protected classes by making it more difficult for out-of-town families to gain admission by creating barriers to people with disabilities. A commenter stated that if the tool is going to seek information on waiting lists, it should ask: If the PHA requires in-person applications at the PHA office or if applications can be obtained by mail or online or at multiple locations; if applications only accepted online, if the PHA uses a first-come first-served waiting list, or a lottery to determine placement on the waitlist; if the PHA keeps the waitlist open for a long enough time to permit applicants from outside the service area to apply; if the PHA applies any local preferences for program admission, and, if so, to describe; and how the PHA makes information available to people with limited English proficiency, and what accommodations it makes for people with disabilities.

HUD Response: HUD understands the limitations with respect to the information PHAs may have regarding the demographics of those individuals or households on the PHA’s waiting list, and HUD has removed language related to this as a result of the commenters’ suggestions. However, HUD notes that this information would be considered local data and local knowledge for purposes of conducting the AFH, and that information would have to meet the criteria set forth in 24 CFR 5.152 and the instructions to the Assessment Tool in order for its use to be required. Further, HUD notes that information about the PHA’s waiting list may be provided as part of the community participation process. HUD appreciates the recommendations relating to information that should be sought with respect to waiting lists. While HUD is still requiring this analysis in parts of the Assessment Tool, HUD has reduced the number of questions that ask for analysis of the PHA’s waiting list. Specifically, HUD has removed the waiting list references in the policy questions in the Disparities in Access to Opportunity section.

HUD will continue to consider whether additional questions to the Assessment Tool would be beneficial for conducting a meaningful fair housing analysis of the PHA’s service area and region.
Suggestions for analyzing disparities in access to opportunity. Commenters offered several suggestions to the Disparities in Access to Opportunity section. With respect to Education, commenters stated that HUD should provide a clearer explanation of what the School Proficiency Index, stating that the AFFH data documentation fails to mention protected characteristics with respect to the School Proficiency index, so the relationship between it and the protected class status is left unclear. A commenter stated that HUD should define “attendance areas” and briefly explain how attendance areas are determined in the instructions, and that any explanation concerning the School Proficiency Index should differentiate between proximity to proficient schools and actual access to proficient schools. The commenter stated that the index has serious limitations since it is determined only by the performance of 4th grade students on state exams and, in some cases, in schools that are only within 1.5 miles of where individuals in protected groups are located. Another commenter stated that question iii(1)(a)(iii) should not be limited to prompting discussion about access to proficient schools by protected class members who are public housing residents, voucher tenants, and families members on the waiting lists for these programs for these programs, but instead should ask about those who still experience disparities in educational outcomes, such as graduation rates, test scores, and other performance measures. The commenter stated that instructions should specifically ask about disparities in educational outcomes for students who attend proficient schools.

With respect to employment, a commenter stated that the tool should ask PHAs to describe actions complying with Section 3 obligations and a description, if appropriate, of planned efforts to overcome underperformance. Another commenter stated that the job proximity index does not take into account the skill level needed for jobs or the jobs that are actually available so therefore individuals in a protected group may live in an area close to jobs, it does not necessarily mean that they have better access to job opportunities. The commenter stated that HUD should find a means by which to measure other forms of human capital, such as prior job experience, skills, or training.

With respect to transportation, a commenter stated that it is unclear how the low transportation cost and transit trips indices provide information on access to transportation by protected groups because of several factors including the absence of key maps (such as a map of residency patterns of protected groups overlaid by shading showing transportation access at the neighborhood level) and a lack of clarity on what the low transportation cost index measures. The commenter stated that the two variables from the instructions (low transportation cost index measures the “cost of transport and proximity to public transportation by neighborhood”) seem different from each other because it’s possible for individuals to have relatively low transportation costs (higher score) and no proximity to public transit (lower score), as when there is no public transit available and people drive short distances to work. The commenter asked that, in these situations, how one index score can measure two variables that can be very different from each other. The commenter stated that since the transit index scores only measures the frequency of transit use, these scores do not measure transportation access. Another commenter stated that in the transportation opportunities section, the language “connection between place of residence and opportunities” should be restored, since access to transit alone is not enough if it does not connect residents to opportunities.

With respect to access to low poverty neighborhoods, a commenter stated that there are limitations to the low poverty index because the calculation method compares national and tract-level data, making it unsuitable for judging the relative position of a tract in a city or region. The commenter stated that the instructions refer to a Question (1)(d)(iv) that does not exist. With respect to access to environmentally healthy neighborhoods, a commenter stated that this data is limited since it only covers air toxins, is outdated, and according to the EPA, is only valid for large geographic areas, like regions and States. Another commenter stated that in the access to environmentally healthy neighborhoods section, there should be a specific question about the access of families in PHA programs to environmentally healthy neighborhoods and whether they are disproportionately exposed to environmental hazards and undesirable land uses. PHAs should be required to discuss indicators of environmental health based on local data and knowledge because it is not burdensome to acquire. Another commenter stated that limiting the required analysis of environmental hazards to the air quality data provided by HUD renders the analysis incomplete and misleading, and participants must be required to analyze other indicators from local data. The commenter presented three specific examples within the State of Texas to illustrate this point. The commenter stated that vulnerability to the effects of a natural disaster should also be considered as part of the environmental hazards assessment.

HUD Response: HUD appreciates all of the suggestions related to the data on disparities in access to opportunity, and in response to these comments, HUD no longer requires that such indices be reviewed by PHAs, although they may choose to refer to the indices. HUD also recognizes that the data provided has certain limitations, which are explained in the instructions to the Assessment Tool, the AFFH Rule Guidebook, and the Data Documentation, available at https://www.hudexchange.info/resource/4848/affh-data-documentation/. HUD has rewritten the questions in the Disparities in Access to Opportunity Section to more specifically address the HUD provided data that will offer the most utility in conducting this analysis, specifically the HUD-provided maps. While the opportunity indices will still be available for PHAs to use, only the maps are now required to be analyzed to complete this analysis. Through using the maps, PHAs can see where areas of opportunity are for the various opportunity categories and how they relate to their residents by protected class groups (race/ethnicity, national origin, families with children).

Additionally, HUD has changed the policy related questions to emphasize that PHAs’ analysis will rely on community participation, any consultation with other relevant government agencies, and the PHA's own local data and local knowledge. HUD encourages program participants to use local data and local knowledge to supplement the HUD-provided data where such information meets the criteria set forth at 24 CFR 5.152 and in the instructions to the Assessment Tool. HUD will continue to evaluate whether it is feasible to provide additional or other data with respect to disparities in access to opportunity in manner that would be nationally uniform and facilitate a meaningful fair housing analysis.

With respect to the suggestion to include a question about educational outcomes for students who attend proficient schools, HUD believes that while this is an important analysis to undertake, it is beyond the scope of the Assessment of Fair Housing. HUD, however, encourages program participants who wish to include such information in their analysis to do so.
HUD has also re-phrased the question in the transportation section of the Disparities in Access to Opportunity section of the Assessment Tool raised by the commenters. That question now asks, “For the protected class group(s) H UD has provided data, describe how disparities in access to transportation relate to residential living patterns.” HUD also appreciates the commenters concerns about the environmental health index’s limitations. In order to provide for a more robust assessment relating to access to environmentally healthy neighborhoods without imposing additional burden on program participants, HUD has included additional contributing factors for consideration, such as “access to safe, affordable drinking water” and “access to sanitation services.” HUD encourages program participants to include other relevant environmental hazards in their analysis or in identifying contributing factors.

**Comments on Publicly Supported Housing.** Commenters stated that in the section on “Other Publicly Supported Housing Programs” there should be a question or data reporting opportunity that looks at the overall concentration of assisted housing in particular neighborhoods. Other commenters stated that the Publicly Supported Housing Analysis section emphasizes questions concerning the location and occupancy of publicly supported housing, with limited questions about access to opportunity by residents, and no questions about disproportionate housing needs specific to the context of publicly supported housing. Another commenter stated that this section should ask about access to community assets (including proficient schools, transportation, employment, social services, green space, job training, and community centers) by residents of public housing, such as amenities within and in close proximity to publicly supported housing developments. Another commenter stated that this section does not touch on issues such as access to supportive or other services by residents of publicly supported housing. The commenter stated that currently, PHAs would put this information in the “Additional Information” section but featuring such questions more prominently is likely to get the it thinking about the ways in which the PHA and other publicly supported housing in the PHA’s service area and region are themselves providing access to opportunity via promoting access to community assets and other necessary services.

Another commenter stated that under the Publicly Supported Housing Analysis, the tool should ask how many individuals are turned away from public housing because of prior evictions and how many of these prior evictions are due to non-payment of rent or other factors that are not indicative of relevant qualifications.

**HUD Response:** HUD appreciates these suggestions from commenters, and will consider improved ways to structure this section that will solicit the appropriate level of information from PHAs and is the least burdensome. Also, since PHAs must conduct an analysis of disparities in access to opportunity and disproportionate housing needs in prior sections of the Assessment Tool, HUD did not want to add duplication of effort to the publicly supported housing section. HUD also notes that information relating to prior evictions, non-payment of rent, or other qualifications relating to admissions and occupancy policies of PHAs are assessed through the contributing factor of "admissions and occupancy policies and procedures, including preferences in publicly supported housing.” HUD also notes that information relating to whether eligible individuals or households are able to access publicly supported housing could be obtained through the community participation process.

**Comments on Public Housing Agency Program.** A commenter stated that in the section on “Public Housing Agency Program Analysis”, PHAs should be asked whether tenants in RAD developments have been informed about their choice/mobility rights, and whether the PHA has offered tenants any assistance in making moves to lower-poverty areas. Another commenter stated that the location of project-based voucher developments should be analyzed separately from the location of tenant-based vouchers because of important fair housing issues related to site selection of PBVs. The commenter stated that the simplest approach would define the “PHA’s developments” to include developments where the PHA has project-based vouchers in addition to properties the PHA owns. The commenter stated that this can be incorporated in Part D(1)(b)(i) on pg. 9 of the tool and the explanation of Publicly Supported Housing Analysis beginning on page 27 should also include specific references to PBVs.

A commenter stated that PHAs should be asked to evaluate their programs in terms of addressing sexual harassment, related to domestic violence, and the location of senior and family housing developments and demographics of these developments. Another commenter stated that even though sexual orientation, gender identity, and marital status are not unequivocally covered by the Fair Housing Act, they are protected from discrimination in HUD’s Final Rule on Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, so PHAs should be required to analyze barriers to fair housing choice affecting these populations. A commenter stated that PHAs should be required to do an analysis of their policies and procedures regarding persons re-entering from the criminal justice system, to evaluate the condition and maintenance needs of its properties by geographic area and demographics of each property, and to analyze their homeownership programs as well as their rental programs.

**HUD Response:** HUD appreciates the recommendation regarding mobility and RAD, and will consider whether they are appropriate to the analysis, while also considering the level of burden in completing the AFH. HUD also appreciates these comments and agrees with the commenter that an assessment of a PHA’s programs in terms of addressing sexual harassment, related to domestic violence, and the location of senior and family housing, including the demographics of those developments is critical when conducting a fair housing analysis. HUD has added the contributing factors of “involuntary displacement of survivors of domestic violence,” “nuisance laws,” and “lack of safe, affordable housing options for survivors of domestic violence.” Additionally, HUD notes that some of the HUD-provided data includes the demographics of families with children and elderly households in certain types of assisted housing.

**Comments on Fair Housing Enforcement, Outreach Capacity and Resources Analysis.** In the section on “Fair Housing Enforcement, Outreach Capacity, and Resources Analysis.” the reporting of fair housing complaints and investigations should include any consent decrees, settlement agreements, or Voluntary Compliance Agreements that are still in effect. Another commenter stated that under Fair Housing compliance and infrastructure, include questions on enforcement of discrimination against victims of domestic violence under VAWA.

Another commenter stated that Question (c)(v) of the Fair Housing Analysis of Rental Housing subsection should acknowledge the risk of losing access to opportunity for other publicly supported housing residents besides HCV households. The commenter stated that this question should also include a prompt that acknowledges the risk of...
losing access to opportunity through unwanted displacement. The commenter stated that a third prompt should read, “Are at risk of losing affordable rental housing units, including a landlord’s choice to end participation in the Housing Choice Voucher program, or loss of affordability restrictions in other publicly supported housing programs (e.g., opting-out from a project-based Section 8 contract).” A commenter stated that HUD should require the PHA to briefly explain its efforts to comply with HUD’s LEP guidance and to otherwise provide meaningful access to LEP populations. The commenter stated that this section should include questions that ask the PHA to briefly explain its efforts to serve domestic violence and sexual assault survivors, including steps it has taken to comply with VAWA.

**HUD Response:** HUD thanks the commenters for these recommendations. HUD notes that the question relating to civil rights compliance does include consent decrees, settlement agreements, or voluntary compliance agreements that are still in effect. HUD declines to add enforcement against discrimination against victims of domestic violence under the Violence Against Women Act to this section, but notes that it has added certain contributing factors to prior sections of the Assessment Tool, as noted above. HUD has also added the contributing factor of “Lack of meaningful language access” to the publicly supported housing section of the Assessment Tool to allow PHAs to assess their efforts to comply with HUD’s LEP guidance and their efforts to provide meaningful access to LEP populations.

**Comments on disproportionate housing needs.** Commenters stated that the section on disproportionate housing needs should include data and analysis on the population of people experiencing homelessness that are currently un-housed. A commenter stated that specifically reference the commitments the US made during the Universal Periodic Review to invest further efforts in addressing the root causes of racial incidents and expand its capacity in reducing poverty in neighborhoods experiencing subpar services and amend laws that criminalize homelessness that are not in conformity with international human rights. Another commenter stated that under disproportionate housing needs the tool should ask for a description about laws that may impact victims of domestic violence. A commenter suggests that PHAs can use information regarding survivors that they are already required to report under federal and local laws, since VAWA mandates that PHAs are required to include address the housing needs of survivors in their planning documents. A commenter stated that when discussing affordability of housing units in the definitions section and throughout, it is important to clarify that it is not enough to have units that are affordable at 80% area median income or other moderate incomes.

**HUD Response:** HUD appreciates these comments. HUD has added the contributing factor “Access to public space for people experiencing homelessness” to the disproportionate housing needs section. HUD will continue to evaluate the feasibility of providing data on homelessness such that it will facilitate a meaningful fair housing analysis. As previously stated in this Notice, HUD has added three contributing factors relating to victims of domestic violence. HUD notes that certain data it is providing include demographic data based on income eligibility for certain HUD assisted housing, and those data are provided for 30%, 50%, and 80% AMI income levels.

**Comments on Instructions.** A few commenters stated that the instructions that accompany the tool are adequate, but other commenters stated that the instructions are not effective as there are over 2 pages of instructions per page of the tool and they are repetitive and internally inconsistent. The commenters offered, as an example, that HUD quotes regulatory language concerning the character of acceptable local data without providing guidance on the standards HUD will use to determine its statistical validity or an objective standard. The commenters stated that the instructions are also hard to navigate and it is time consuming. Commenters offered various wording changes for specific instructions, but many commenters stated that what would be most helpful is for HUD to provide examples.

Commenters stated that the instructions should offer examples of likely sources of local knowledge important to residents, such as university studies and experiences of advocacy organizations, service providers, school districts, and health departments. Commenters stated that the instructions should provide examples of local knowledge such as efforts to preserve publicly-supported housing, community-based revitalization efforts, public housing Section 18 demolition or disposition application proposals, RAD conversion opportunities, transit-oriented development plans, major redevelopment plans, comprehensive planning or zoning updates, source of income ordinance campaigns, and inclusive provision campaigns. Other commenters stated that the instructions should provide examples of real strategies that PHAs could employ to obtain the information necessary to answer the questions that require the use of local data and should draw connections between a specific opportunity indicator and the PHA where a particular indicator intersects with existing PHA operations. A commenter stated that would be most helpful is for HUD to provide a complete sample AFH to show the level of analysis required.

Another commenter stated that the instructions should provide clear guidance on how PHAs should read the tables with indices that are organized by protected group. A commenter stated that a shorter pamphlet that explains the difference between the tools and provides links to other sources of information would be useful.

**HUD Response:** HUD thanks the commenters for their feedback. HUD has provided additional clarifying language to the instructions with respect to the use of local data and local knowledge. HUD also understands the difficulty with the format of the Assessment Tool and the instructions coming at the end. HUD notes that it intends to provide PHAs, as it has done for Local Governments, with an online portal (User Interface) that will allow for electronic submissions and will provide the instructions for each question immediately before the question itself. HUD anticipates that this format will be more user-friendly for PHAs.

HUD declines to provide additional examples of local data and local knowledge in the instructions at this time, but notes that examples are provided in the AFFH Rule Guidebook. The AFFH Rule Guidebook also offers guidance relating to the community participation process and may be useful to PHAs in soliciting views relating to the issues commenters raised above. HUD also notes that it will continue to provide guidance, technical assistance, and training, as needed and appropriate with respect to the use of HUD-provided data in order to build capacity of PHAs so that they may conduct a meaningful fair housing analysis.

**QPHA Collaboration.** Commenters stated that, in reviewing the goal of the assessment tool, the collaborating organizations need current data to enable them to fairly assess the data and provide a good plan in addressing the need for housing in areas of opportunity. A commenter stated that it believes small agencies will find collaboration generally the most
acceptable way to fulfill their AFH responsibilities although still notes the complexity and lack of current information. Another commenter stated that it plans to collaborate with the local government in submitting its tool so the collaborating organizations can plan and implement a comprehensive approach to fair housing. The commenter stated that since the PHA has no jurisdiction over certain conditions in the municipality, such as transportation and education, in the absence of a partnership a PHA would be limited in its ability to conduct meaningful fair housing planning. Another commenter stated that it believes that most PHAs will collaborate with local governments because they are most likely to have had pre-existing relationships with PHAs. A commenter stated that it does not intend to submit a joint AFH, but that it will work with entities including the state Department of Housing and Community Development, local governments, and PHAs in the sharing of data resources and local knowledge. Another commenter stated that some of its PHA members would not be collaborating with other entities at all. The commenter stated that they are concerned about problems such as fear of free riders, the prospect of one entity slowing down the entire collaborative process, and the difficulty of collaborating in some rural areas where the entities may not be geographically proximate. Another commenter stated that it would take at least an additional 33 percent of the estimated time to complete an AFH for collaborative efforts. The commenter stated that HUD should account for the fact that if a PHA determines that it makes the most sense to complete the PHA tool on their own, they will still be expected to participate in their local jurisdiction’s AFH for aspects related to PHA-specific issues which adds to the administrative hours. HUD Response: HUD thanks the commenters for their views related to QPHA collaboration. HUD also appreciates the commenter sharing that it will work with entities including the state Department of Housing and Community Development, local governments, and PHAs despite not collaborating with another program participant. However, HUD maintains its position and encourages collaboration to the extent practicable. In fact, HUD has provided a sample agreement in the AFFH Guidebook that includes language stipulating what each entity will be responsible for, which may alleviate any confusion or lack of contributions within the collaboration.

Facilitating QPHA Collaboration. A commenter stated that HUD should do more to encourage PHAs to prepare joint AFHs by providing clearer guidance, incentives, and funding. The commenters stated that, in particular, HUD should clarify which PHAs should complete an AFH on their own and which PHAs should submit jointly with other neighboring PHAs or local government entities. The commenters stated that, for example, a PHA with less than 250 units who participates in a joint AFH might be eligible for additional technical assistance, time, and the ability to sync their PHA plan with neighboring PHAs to encourage cooperation and joint strategies. Another commenter stated that HUD staff would have to review and accept in a timely manner 3,153 PHAs’ AFHs and over 1,200 local jurisdictions’ AFHs, so having PHAs submit joint AFHs will assist HUD in reviewing them.

A commenter stated that increased data flexibility and integration across tables and maps would support individual and joint PHA analysis. Another commenter stated that it is the coordinating State agency for CPD formula HUD funding in the State and anticipates completing the AFH using the tool for States. The commenter stated that it is also a PHA and as a PHA it exceeds to the voucher limit noted in the rule for being a QPHA eligible for collaboration with the state. The commenter stated that in the event that the State would like to have its tool serve as a collaborative submission inclusive of itself as a PHA, it is not clear that this is possible. The definition of QPHA should be clarified to denote that states that are, themselves, PHAs are included as QPHAs regardless of voucher volume and are able to be collaboratively included in the state tool if the state desires in order to avoid a duplication of effort. A commenter stated that HUD should incentivize collaboration by providing more resources and more time to complete a full assessment when collaborating with other entities. Another commenter stated that the most important issue here is the divergence of questions between the PHA Assessment Tool and the Local Government Assessment Tool. The commenter stated that if there is a proposed collaboration between a PHA or PHAs and a local jurisdiction, it should be made clear that the cumulative questions in both AFHs should be applied to the collaboration, so that key information is not omitted based on which entity is the “lead.” The commenter stated that an easy way to accomplish this would be a new AFH collaborative tool that incorporates all of the questions and data in both the PHA and local jurisdiction tools. Another commenter stated that a new collaborative tool will be useful and suggests that HUD should make it clear that all questions from the PHA Assessment Tool and the Local Government Assessment Tool must be answered in a collaborative AFH, but also that each entity does not have to do a separate analysis when questions are duplicative.

HUD Response: HUD appreciates all of the commenters’ suggestions regarding how to best facilitate QPHA collaboration. HUD is not able to direct certain types of program participants to collaborate on an AFH, as the regulation, at 24 CFR 5.156, makes clear that such collaboration is entirely voluntary. HUD also clarifies that the use of the Assessment Tool for PHAs is meant for use by PHAs conducting and submitting an AFH alone or with other PHAs, including QPHAs. The Assessment Tool for Local Governments is intended for use by local governments conducting and submitting an AFH alone, or with other local governments, or with PHAs, including QPHAs. Finally, the Assessment Tool for States and Insular Areas is intended for use by States or Insular Areas conducting and submitting an AFH alone, with local QPHAs partnering with the State, with local governments that received a CDGB grant of $500,000 or less in the most recent fiscal year prior to the due date for the joint or regional AFH in a collaboration with the State, or with HOME consortia whose members collectively received less than $500,000 in CDBG funds or received no CDBG funding that partners with the State. HUD will continue to explore ways to facilitate meaningful collaborations among all types of program participants. The questions in each of those Assessment Tools are specifically designed to include the required analysis for each type of program participant, should that type of collaboration occur. HUD has also committed to issuing an Assessment Tool for QPHAs that choose to conduct and submit an AFH individually, or as part of a collaboration with other QPHAs.

At this time, HUD is not able to offer specific incentives to entities that choose to collaborate, but notes that doing so could provide for burden and cost reduction when completing an AFH. Additionally, collaboration could result in more robust goals to tackle the fair housing issues affecting the jurisdictions and regions of all program participants in the collaboration.
Specific Issues for Comment

1. Content of the Assessment Tool

1a. Does the structure of adding a specific focus on PHA programs better facilitate the fair housing analysis PHAs must conduct, or should these questions be combined with the “Other Publicly Supported Housing Programs” subsection, using the structure that was similar to the Local Government Assessment Tool?

Several commenters stated that the two new subsections in the tool would provide better data for accurately identifying fair housing need within the PHA’s county. The commenters stated that PHAs have the knowledge within their agencies to provide data on program operations, development, and assisted residents within their jurisdiction. The commenters also stated that information would definitely benefit the overall fair housing analysis. The commenters also stated that the tool should be as possible because it will be the working template and ultimate document that PHAs, residents, and advocates will be working with on a frequent, operational basis. The commenters stated that the assessment tool, along with detailed guidance, providing direction echoing the final rule would minimize the need for stakeholders to toggle between the final rule, guidance, and the tool. A commenter agreed with these commenters and stated that many of the questions should also be included in the local government tool.

A commenter stated that the tool does a good job focusing on all aspects of housing in a community, taking into account issues of segregation, concentrated areas of poverty, opportunity areas, transportation, health, education, disability services, and more. The commenter stated that while some items do not apply to its location and other items could be added, the tool overall is successfully arranged and allows for the input of local information, recognizing that not every community is the same. The commenter stated that assessment completed well and completely will be a meaningful document that PHAs can use to AFFH in their communities.

Another commenter expressed agreement with HUD’s decision to include separate subsections because these programs raise different fair housing issues. The commenter stated that a PHA has considerable discretion in public housing admissions while its role as administrator of the Section 8 program limits its ability to affect private owner’s rentals. The commenter stated that, although a PHA may urge voucher holders to see housing in areas of opportunity, it cannot ordinarily compel a private owner to rent to a voucher holder, so it is important to assess both of these programs separately from a fair housing planning perspective. Other commenters stated that there is significant overlap in the questions asked in these sections and HUD should revaluate both and consider condensing into one. One of the commenters stated that HUD must not add questions to the tool but should instead remove questions that are irrelevant to PHA’s authorities, jurisdictions, and capacities, and streamline the tool.

HUD Response: HUD appreciates these comments relating to whether the PHA’s program should be analyzed separately from other publicly supported housing programs included in the Assessment Tool. At this time, HUD has decided to keep these two subsections separate to best facilitate the analysis for PHAs with respect to their programs. Additionally, HUD notes that in order to set appropriate and meaningful fair housing goal, PHAs must assess issues over which they may not have control in order to fully understand what fair housing issues are present, what contributing factors are present, and how the PHA can best overcome them.

1b. Will conducting the new “Fair Housing Analysis of Rental Housing” for all PHAs result in a more robust analysis of fair housing in the PHA’s service area and region, even for PHAs that only administer public housing?

Commenters stated that a small PHA that has only an HCV program will not benefit from the tool and will not ultimately provide better services/opportunities for low-income families. A commenter stated that one of the most significant barriers to affirmatively furthering fair housing is the Fair Market Rent (FMR) system in which HUD’s FMR is defined as the dollar amount below which 40 percent of the standard-quality rental housing units are rented in an area. The commenter stated that by definition, this limits the areas where HCV participants can move and confines them to areas where there may be fewer standard-quality rental housing. Another commenter stated that for PHAs operating public housing only their properties are where they are and were sited with HUD approval. The commenter stated that until federal resources become available for the development of deeply affordable housing, a robust analysis will have no outcomes of interest. The commenter stated that PHAs may already have deep knowledge of the rental housing in their communities although a PHA may not meet HUD’s data standards or formats. The commenter stated that HUD already has knowledge of Federally supported assisted housing properties. A commenter agrees since PHAs that only administer public housing have only fixed units so the utility of doing an analysis of the surrounding rental market is negligible.

Other commenters stated that to better define and provide accurate information for a Fair Housing Analysis of Rental Housing in a PHA’s service area, there should be data collection for both public housing and HCV. The commenters stated that, in some cases, the PHA administers both programs with the HCV units outnumbering PH units, and HCVs can be used anywhere within the jurisdiction of the county and by analyzing both programs, the data will show where is a need to increase fair housing opportunities. The commenters stated that requiring PHAs that only administer public housing to complete this is consistent with other sections of the AFH that may not directly relate to public housing specifically, doing so is informative to the rest of the analysis and may further identify identification of contributing factors, and asking these PHAs to answer five additional questions is not an undue burden. Another commenter stated that the request to “describe how rental housing, including affordable rental housing in the service area and region, has changed over time” in this section should be removed since the utility gained is marginal. The commenter stated that change in affordable rental housing over time is not nearly as important as the current status of the market and location of rental housing, and the time spent answering this question will be excessive.

HUD Response: HUD appreciates these comments related to the fair housing analysis of rental housing subsection. HUD has decided that the section will apply only to PHAs that administer Section 8 Housing Choice Vouchers. HUD will continue to consider comments and suggestions for improving this section of the analysis that was intended to be tailored specifically to inform PHA program operations.

1c. Has HUD identified the most relevant contributing factors for PHAs for purposes of conducting a fair housing assessment and setting fair housing goals and priorities?

Several commenters affirmed that HUD had identified the relevant
contributing factors for PHAs. A commenter stated that it “firmly believes the new contributing factors added by HUD for the fair housing analysis are excellent.” Another commenter stated that these are the main questions that need to be answered as to why housing options can be limited for voucher holders and the need to expand housing options to low-income people.

A commenter recommended adding the following contributing factors to ensure PHAs consider the same major barriers to opportunity for people with disabilities as for other protected classes: Community opposition; Location and type of affordable housing; Occupancy codes and restrictions; Private discrimination; Access to financial services; Access to federally qualified health clinics and other healthcare settings often used by low-income individuals; Availability, type, frequency and reliability of public transportation; Lack of state, regional or other intergovernmental cooperation; Admissions and occupancy policies and procedures including preferences in publicly supported housing; Impediments to mobility; Lack of private investment in specific areas within the State; Lack of public investment in specific areas within the State including services and amenities; Siting selection policies, practices and decisions for publicly supported housing; Source of income discrimination; Access to schools that are accessible to students and parents with disabilities and proficient in educating students with disabilities in integrated classrooms; Access to employment opportunities; Access to low poverty areas; Access to environmentally healthy areas within the PHA. Another commenter expressed concern that the contributing factor in Section 7 regarding access to proficient schools for persons with disabilities will be interpreted to refer to segregated schools for individuals with disabilities, and suggests it be revised to read: Access to schools that are accessible to students and parents with disabilities and proficient in educating students with disabilities in integrated classrooms. The commenter stated that for each set of CFs, add “local governments or the state unwilling to promote source of income legislation, or poor enforcement where source of income ordinances exist.” The commenter further made the following recommendations: For the segregation and R/ECAPs, add: Impediments to mobility, impediments to portability, policies related to payment standards, FMR, and rent subsidies; for “Publicly Supported Housing” add: “past and present” to the site selection factor after asking for “policies, practices, and decisions,” and “displacement of residents due to economic pressures, causing landlords to exit the HCV or Section 8 Programs.” Another commenter stated that it believes the new contributing factors (such as restriction on landlords accepting vouchers, impediments to portability, policies related to payment standards, FMR, rent subsidies, etc.) in the Publicly Supported Housing section are appropriate because they are related to housing. The commenter stated that HUD should add “complexity of federal regulations” as a contributing factor since this one of the primary reasons that many landlords do not participate in the HCV program. The commenter stated that PHAs should be asked directly the extent to which they are contributing to segregation and concentration of poverty in the service area and region (in the initial CF section on page 3), even though PHAs are already required to do this to truthfully certify that they are eligible for federal funds. The commenter stated that HUD should require analysis of data and certain types of laws and policies that impact homeless and high need populations as part of the factors that contribute to segregation/integration, R/ECAPS, disparities in access to opportunity, and disproportionate housing needs because these laws and policies that criminalize homelessness and zoning or other regulatory laws facilitate segregation. The commenter further recommended the following: “Access to public space for people experiencing homelessness” should be added as a contributing factor; HUD should create a factor that mirrors “regulatory barriers to providing housing and supportive services for persons with disabilities” to address laws that restrict or allow provision of services to persons experiencing homelessness; add “nuisance laws”; add “reliance on eviction history to make acceptance decisions.”

A commenter stated that contributing factors should be modified so they are more closely tied to an analysis that is relevant for PHAs. The commenter stated that the reference to vouchers in the community opposition should be expanded to include opposition to proposed measures to prohibit source of income discrimination. The commenter stated that the description for “lack of regional cooperation” should reference any existing failure among PHAs within a region to cooperate in facilitating the portability of HCV holders who seek to relocate from the jurisdiction of one PHA to another, or the “impediments to mobility” and to “portability” should be included in the sections focusing on R/ECAPs, segregation, and disproportionate housing needs. The commenter further stated that the “location and type of affordable housing” description should reference the location of HCV households.

A commenter stated that impediments to portability should include reference to the fact that family members can be terminated from the voucher program upon moving to a new jurisdiction based on a member’s criminal history record. The commenter recommended that HUD should add, “policies related to payment standards, FMR, and rent subsidies” for both segregation and R/ECAPs. The commenter stated that the description of this contributing factor should include reference to PHA policies and practices regarding rent reasonableness determinations in the context of the Voucher program. The commenter requested that the “restrictions on landlords accepting vouchers” contributing factors should be re-named “Barriers imposed upon Landlords who wish to rent to Voucher holders.”

Another commenter expressed support for the addition of the three new contributing factors in disparities in access to opportunity. The commenter stated that low FMRs and payment standards in costly rental markets can prohibit mobility and portability so this should be reflected in the definitions of “impediments to portability and “policies related to payment standards, FMR, and rent subsidies.” The commenter made the following recommendations: That HUD add to the disparities in access to opportunity contributing factors—source of income discrimination, lack of job training programs, and lack of affordable childcare; HUD add to the disproportionate housing needs contributing factors—involuntary displacement of survivors of domestic violence, source of income discrimination, high housing costs on the private market, and policies related to payment standards, FMR and rent subsidies; for the disabilities and access section, add “failure to provide reasonable accommodations as a new contributing factor with its own description instead of just referenced in the “private discrimination” factor; add the following possible contributing factors to the Publicly Supported Housing Analysis section: (1) Lack of meaningful language access; (2) Discrimination against LGBT
individuals and families; (3) Lack of safe, affordable housing options for survivors of domestic violence; and (4) Displacement of residents due to economic pressures (existing contributing factor appearing in other analysis sections of the Draft PHA Tool).

The commenter stated that the description for the contributing factor “Land Use and Zoning laws” lists inclusionary zoning alongside policies which can be used to limit housing choice which is confusing, so it should read “lack of inclusionary zoning practices” instead.

Several commenters stated that the contributing factors analysis should be removed from the tool. The commenters stated that it is not possible to answer these questions with statistical validity on the relationship between possible contributing factors and the impact on fair housing issues. They said that this will result in highly speculative and subjective answers. Another commenter suggested leaving this for local governments instead of PHAs. The commenter stated that PHAs have no influence on local zoning or planning policies. A commenter stated that unless the PHA works in collaboration with a municipal or state partner, analyzing these factors may be of limited utility. Another commenter stated that the tool should only suggest contributing factors that are housing-related because other ones are outside of the PHA’s expertise.

**HUD Response:** HUD appreciates all of the commenters’ recommendations relating to contributing factors. HUD has added several new contributing factors, “lack of public and private investment in specific neighborhoods” (previously two separate factors, and includes access to sanitation services, among others), “nuisance laws,” “lack of meaningful language access,” “lack of access to opportunity due to high housing costs” and “lack of job training programs.” HUD has also included certain contributing factors that were previously listed in other sections of the Assessment Tool in the Disability and Access section. HUD has added to some of the existing descriptions of contributing factors, including language related to homelessness, domestic violence, environmental health (i.e., safe and clean drinking water) lack of source of income protections, and FMRs or other payment standards.

HUD again notes that in order to best understand the fair housing issues affecting the PHA’s service area and region, PHAs must take a holistic approach in analyzing their fair housing landscape in order to set appropriate goals that will allow the PHA to take meaningful actions that affirmatively further fair housing. This approach includes the identification of contributing factors that are creating, contributing to, perpetuating, or increasing the severity of one or more fair housing issues in the PHA’s service area and region. HUD acknowledges that PHAs may not be able to overcome all contributing factors due to their limited scope of operations and resources; however, PHAs must still have an understanding of those contributing factors in order to set goals for overcoming the related fair housing issues.

1. Does the reordering of the sections, so that Disability and Access comes before the analysis of Publicly Supported Housing better facilitate the PHA’s fair housing analysis?

A commenter stated that by reordering the sections so that Disability and Access comes before the analysis of Publicly Supported Housing, it will benefit HUD to show where this type of housing is needed and if the PHA’s provide sufficient housing options for the disabled population, but another commenter expressed a firm no to this question.

Another commenter stated that HUD needs to add additional questions to the Disability and Access section of the Tool to facilitate the PHA’s fair housing analysis. The commenter stated that HUD regulations at 24 CFR part 8 require programmatic access to HUD assisted housing and 24 CFR 8.25(c) requires PHAs to assess the need for accessible units. The commenter stated that HUD should add questions to ascertaining that the PHA has met the specific requirements of these sections, including asking related to whether data provided by HUD indicates that people with disabilities have equal access to PHA programs, whether the PHA completed a needs assessment and transition plan, whether the PHA has a written accommodation policy, whether the PHA makes its application process accessible, whether the PHA encourages participation by owners, whether PHAs provide a list of accessible units to families receiving a voucher when a family member has disabilities, and whether the PHA requires applicants who do not require the accessibility features of a unit to sign an agreement to move to a non-accessible unit when available.

Other commenters stated that under the Integration of Persons with Disabilities Living in Institutions and Other Segregated Setting section, HUD should include the following: under Question 1C(2), what is the experience of survivors of domestic violence, environmental health (i.e., safe and clean drinking water) lack of source of income protections, and FMRs or other payment standards.

**HUD Response:** HUD appreciates the recommendations of the commenters related to the Disability and Access section of the Assessment Tool. Currently, HUD has left the ordering of the sections unchanged, and the Disability and Access section will continue to precede the Publicly Supported Housing section of the analysis.

HUD has added two questions to the housing accessibility subsection of the Disability and Access section, which both relate to how PHAs and their staffs engage with persons with disabilities and how waiting list policies affect persons with disabilities, including preferences, program selection, placement determination, application method, length of time the application window is open, and the average wait list time.

2—Identifying PHA Service Areas

2a. HUD seeks comment on an efficient manner in which HUD could use to obtain information about each PHA’s service area without causing unnecessary burden.

A commenter stated that as long as the information in the AFFH Data and Mapping Tool is kept up-to-date and is accurately tracked, the commenter believes it can provide the information without too much stress on the agency, though it cannot speak for other agencies. The commenter stated that a reduction of funding has caused stress on agencies and possible staff agencies could cause unnecessary burdens to smaller authorities. Other commenters stated that regional analysis should be involving litigation”: Question C(2) should include a question about PHA compliance with the requirement to provide effective communication to persons who experience disabilities, and the question should read, “How do PHA personnel and building staff engage in effective communication with applicants and residents who experience disabilities?” The commenter stated that the accompanying instructions should ask the PHA to answer this question using any available local data or local knowledge, and that Question C(2) should include a question about wait list times for accessible units that are administered by the PHA, which should read as follows: Is there a wait list for units accessible to people with different types of disabilities? If so, describe the average wait times for each type of accessible unit.” The commenter stated that the accompanying instructions should ask the PHA to answer this question using any available local data or local knowledge.

**HUD Response:** HUD appreciates the recommendations of the commenters related to the Disability and Access section of the Assessment Tool.
optional for PHAs with large service areas operating in rural areas. One of the commenters stated that PHA operates in 29 counties, sometimes in non-contiguous areas, and that, in addition, through the Project Access Program which utilizes up to 140 of the commenter’s HCVs to assist persons with disabilities who are exiting institutions or avoiding re-institutionalization, the PHA operates outside of those 29 jurisdiction areas because individuals assisted with this program can locate outside of those areas but are generally transferred to and absorbed (“ported”) by the local PHA that does have jurisdiction for that area.

Another commenter sought guidance on how a PHA whose service area is most of the state should be analyzed—for the State as a whole or for jurisdictions in which it operates. A commenter stated that regional analyses are overly burdensome and irrelevant because PHAs do not exercise influence over these broad areas, and it is even more complex for agencies outside of a core based statistical area or CBSAs or regions that cross state borders. The commenter stated that the regional analysis should be removed.

A commenter stated that many PHAs operate in jurisdictions that are not equivalent to Metropolitan Statistical Areas (MSAs) and that are also not identical to city or county borders. The commenter stated that, instead, these service areas are defined by State statute and are based on a variety of factors in addition to political boundaries. The commenter stated that HUD should explicitly defer to PHAs’ selection of the most relevant dataset for their needs if HUD cannot provide all of the necessary data. A commenter stated that HUD field offices should facilitate collection of this data.

Another commenter stated that for agencies chartered by States, service areas correspond to jurisdictions and the alternative terminology HUD uses may be confusing. A commenter stated that HUD has indicated that it will require a single submission for agencies describing their jurisdiction. The commenter stated that it is surprising that HUD lacks a record of jurisdictions since HUD has conducted business with HAs since 1937, and these institutions may own properties subsidized by HUD and execute ACCs.

A commenter stated that HUD should use its own records to establish agencies’ jurisdictions and permit PHA’s to submit any necessary corrections to the jurisdictions on an exception basis, since requiring all agencies to submit this information will require almost 2 person years of time to complete, even though HUD has estimated that this task will consume 1 hour of administrative time.

Commenters stated that HUD should add a section titled “Service Area” and ask PHAs to describe its service area using readily identifiable indicators such as geographic boundaries and the census tracts that roughly approximate the geographic boundaries. The commenters stated that PHAs should also briefly explain how State law determines the size and scope of PHA service areas with a citation to relevant legal authority under State law. The commenters stated that since there is no uniform means by which PHA service areas are determined, stakeholders who are assessing the adequacy of a PHA’s AFH would benefit from an understanding of how a specific PHA’s area is defined.

Other commenters stated that HUD should ask PHAs for this information directly, separate and apart from the AFH in a uniform format that permits GIS mapping. The commenters stated that the data received through the AFH should be entered into a national database. The commenters also stated that a “service area” definition should also be requested in the AFH.

**HUD Response:** HUD appreciates all of the feedback it received related to how HUD could obtain information about each PHA’s service area. HUD notes that a regional analysis is required for a fair housing analysis, and therefore it cannot be made optional for PHAs. As noted above, HUD intends to provide data that PHAs will use to conduct their AFH. HUD acknowledges that PHAs’ service areas are determined by State legislation and their scope may vary. HUD does not currently have data for all PHAs’ service areas. In order to provide data to assist PHAs in conducting their AFH, HUD will need to obtain information about each PHA’s service area in order to provide relevant data to the PHA.

HUD will provide an online geospatial tool, either in the existing AFFH Data and Mapping Tool (AFFHT) or in a related online web portal that will provide PHAs the ability to select from a variety of geographic units, the one unit or combination of units that most closely fits their service area. Geographic units include the most commonly used administrative geographic units mapped by the U.S. Census Bureau. These may include geographic entities such as census tracts, incorporated places or minor civil divisions (collectively known to HUD as units of general local government), entire counties, the balance of counties after incorporated entities have been removed, entire states, or the balance of states after incorporated local government jurisdictions have been removed. In many cases, PHA service areas will be the same as local governments that are already identified in the AFFHT, while in others PHAs would have the ability to identify their unique service area borders using the online tool. Specific solicitation of comment: HUD seeks comment on an efficient manner in which HUD could use to obtain information about each PHA’s service area without causing unnecessary burden.

HUD intends to provide PHAs with additional guidance on how to analyze their service areas and regions, with respect to the scope of each at a later date. HUD is evaluating the feasibility of obtaining the geographic location of each PHA’s service area from the PHA directly, but notes that if it were to do so, would undergo the proper procedures for information collection under the Paperwork Reduction Act. HUD understands that each PHA covers a different geography and that each State’s law authorizes the PHAs’ operations differently. HUD will take this into account when obtaining the services areas of PHAs.

3. PHA Wait Lists

3a. HUD seeks comment on how fair housing issues may affect families on a PHA’s waiting list.

A commenter stated that most, if not all, housing authority developments exist in impacted areas so any waiting list applicant could be greatly impacted. Another commenter opposed the inclusion of data from families on the waiting list in completing the AFH since, as the commenter stated, this information has not been verified and is limited, which, according to the commenter makes it difficult to make assumptions about any relevant factors related to the AFH. The commenter stated that some data is available for individuals on the waiting list, but questioned the relevancy as those on the list may need to wait years and circumstances may change. The commenter stated that HUD should clarify the purpose it feels this serves. Another commenter stated that it does not believe that analyzing individuals on the waiting list will yield useful information in fair housing planning because the demand for affordable and federally assisted housing far exceeds the supply and families may be unable to move for reasons other than the PHAs action or inaction.
A commenter stated that certain types of tenant selection and waiting list management policies can have a discriminatory impact on persons in protected classes by making it more difficult for out of town families to gain admission or by creating barriers to people with disabilities.

**HUD Response:** HUD thanks the commenters for their feedback. HUD agrees that it is important to analyze waiting list policies in order to have a better understanding of their impact on fair housing. Therefore, HUD believes that an analysis of the PHA’s policies, practices, and procedures related to its application and waiting list process is necessary so that the PHA can set appropriate goals to ensure that these practices promote fair housing choice for all.

3b. Do PHAs have relevant information related to these families? To what extent do PHAs have information to inform answers to the questions related to families on PHA waiting lists?

Commenters stated that applicants apply for housing based on their desire to live in a specific area for a number of reasons, and data collected from the waiting list may not give all the needed information to provide an accurate analysis for fair housing. A commenter stated that PHAs do not have historic waiting list data (data beyond the record retention period).

A commenter stated that PHAs have data on households on waiting lists that include household members, disability status, student status, race, and ethnicity. Another commenter stated that a PHA program operates with multiple waiting lists. Other commenters stated that PHAs do not treat waiting list data uniformly and have different amounts of information and may verify at different times.

**HUD Response:** HUD appreciates the information provided by these commenters and has taken it into consideration.

3c. Is HUD asking the appropriate questions with regard to this population or are there alternative considerations PHAs should be asked to consider as part of the analysis?

Commenters stated that to consider alternative considerations in analyzing fair housing, a question may be needed as to where the applicant wants to live and if there is sufficient housing options in this area. Another commenter stated that any analysis should note that the waiting list household data is self-reported and not verified by PHA staff. Other commenters stated that HUD should ask if the PHA requires in-person applications at the PHA office or if applications can be obtained by mail or online at multiple locations. The commenters stated that HUD should ask the following questions: Are applications only accepted online? Does the PHA use a first-come first served waiting list, or a lottery to determine placement on the waiting list? Does the PHA keep the waiting list open for a long enough time to permit applicants from outside the service area to apply? Are there any local preferences for program admission, and if so, please list the preferences? Is there a local residency preference? How does the PHA make information available to people with limited English proficiency, and what accommodations it makes for people with disabilities?

**HUD Response:** HUD appreciates the feedback from these commenters. HUD notes that the contributing factor of “admissions and occupancy policies and procedures, including preferences in publicly supported housing,” includes many of the suggestions made by commenters above. HUD has also included a question relating to the waiting list with respect to persons with disabilities in the disability and access section of the Assessment Tool. In addition, HUD has removed references to waitlist analysis in the Disparities in Access to Opportunity Section.

**V. Overview of Information Collection**

Under the PRA, HUD is required to report the following:

**Title of Proposal:** PHA Assessment Tool for Public Housing Agencies.

**OMB Control Number, if applicable:** N/A.

**Description of the need for the information and proposed use:** The purpose of HUD’s Affirmatively Furthering Fair Housing (AFFH) final rule is to provide HUD program participants with a more effective approach to fair housing planning so that they are better able to meet their statutory duty to affirmatively further fair housing. In this regard, the final rule requires HUD program participants to conduct and submit an AFFH. In the AFFH, program participants must identify and evaluate fair housing issues, and factors significantly contributing to fair housing issues (contributing factors) in the program participant’s jurisdiction and region.

The PHA Assessment Tool is the standardized document designed to aid PHA program participants in conducting the required assessment of fair housing issues and contributing factors and priority and goal setting. The assessment tool asks a series of questions that program participants must respond to in carrying out an assessment of fair housing issues and contributing factors, and setting meaningful fair housing goals and priorities to overcome them.

Agency form numbers, if applicable: Not applicable.

Members of affected public: PHAs of which there are approximately 3,942.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: HUD has made a number of revisions to its burden estimate based on both public feedback received during the 60-Day public comment period as well as a number of key changes made by HUD in response to public comment.

The public reporting burden for the PHA Assessment Tool is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided in the following table:

<table>
<thead>
<tr>
<th>Type of respondent (lead entity or joint participant)</th>
<th>Number of respondents</th>
<th>Number of responses per respondent</th>
<th>Frequency of response</th>
<th>Estimated average time for requirement (in hours)</th>
<th>Estimated total burden (in hours)</th>
</tr>
</thead>
<tbody>
<tr>
<td>PHA Assessment Tool:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PHA as Lead Entity</td>
<td>814</td>
<td>1</td>
<td></td>
<td>240</td>
<td>195,360</td>
</tr>
<tr>
<td>PHA as Joint Participant</td>
<td>400</td>
<td>1</td>
<td></td>
<td>120</td>
<td>48,000</td>
</tr>
<tr>
<td>Subtotal</td>
<td><strong>1,214</strong></td>
<td></td>
<td></td>
<td></td>
<td>243,360</td>
</tr>
</tbody>
</table>


**Explanation of Revision in PHA Participation Estimates**

HUD is including the following information in the 30-Day PRA Notices for all three of the assessment tools that are currently undergoing public notice and comment. The information is intended to facilitate public review of HUD's burden estimates. HUD is revising its burden estimates for PHAs, including how many agencies will join with other entities (i.e. with State agencies, local governments, or with other PHAs), from the initial estimates included in the 60-Day PRA Notices for the three assessment tools. These revisions are based on several key changes and considerations:

1. HUD has added new option for QPHAs, to match the approach already presented in the State Assessment Tool as issued for the 60-Day PRA Notice, to facilitate joint partnerships with Local Governments or other PHAs using a streamlined “insert” assessment. Using this option, it is expected that the analysis of the QPHA’s region would be met by the overall AFH submission, provided the QPHA’s service area is within the jurisdictional and regional scope of the local government’s Assessment of Fair Housing, with the QPHA responsible for answering the specific questions for its own programs and service area included in the insert.

2. HUD’s commitment to issuing a separate assessment tool specifically for QPHAs that will be issued using a separate public notice and comment Paperwork Reduction Act process. This QPHA assessment tool would be available as an option for these agencies to submit an AFH rather than using one of the other assessment tools. HUD assumes that many QPHAs would take advantage of this option, particularly those QPHAs that may not be able to enter into a joint or regional collaboration with another partner. HUD is committing to working with QPHAs in the implementation of the AFFH Rule. This additional assessment tool to be developed by HUD with public input will be for use by QPHAs opting to submit an AFH on their own or with other QPHAs in a joint collaboration.

3. Public feedback received on all three assessment tools combined with refinements to the HUD burden estimate. Based on these considerations, HUD has refined the estimate of PHAs that would be likely to enter into joint collaborations with potential lead entities. In general, PHAs are estimated to be most likely to partner with a local government, next most likely to join with another PHA and least likely to join with a State agency. While all PHAs, regardless of size or location are able and encouraged to join with State agencies, for purposes of estimating burden hours, the PHAs that are assumed to be most likely to partner with States are QPHAs that are located outside of CBSAs. Under these assumptions, approximately one-third of QPHAs are estimated to use the QPHA template that will be developed by HUD specifically for their use (as lead entities and/or as joint participants), and approximately two-thirds are estimated to enter into joint partnerships using one of the QPHA streamlined assessment “insert” available under the three existing tools. These estimates are outlined in the following table:

<table>
<thead>
<tr>
<th>Type of respondent (lead entity or joint participant)</th>
<th>Number of respondents</th>
<th>Number of responses per respondent</th>
<th>Frequency of response</th>
<th>Estimated average time for requirement (in hours)</th>
<th>Estimated total burden (in hours)</th>
</tr>
</thead>
<tbody>
<tr>
<td>PHA Service Area Information ..................................................</td>
<td>3,942</td>
<td>1</td>
<td>Once per Assessment of Fair Housing cycle.</td>
<td>1</td>
<td>3,942</td>
</tr>
<tr>
<td>Total Burden ..........................................................</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>*** 247,302</td>
</tr>
</tbody>
</table>

* The total estimate of 400 PHAs opting to submit AFHs acting as joint participants with other PHAs using this PHA Assessment Tool, includes an estimated 300 QPHAs and 100 Non-QPHAs. The estimate of 300 QPHAs is based on the new addition of a streamlined QPHA “insert” that is intended to facilitate collaboration by these small agencies. The estimate of 100 Non-QPHAs in this category is based on the likelihood of such collaborations occurring primarily in larger metropolitan areas. The latter estimate does not significantly change the overall total estimate burden.

** The total estimate of 1,214 PHAs that are assumed to use the PHA Assessment Tool is a modest decrease from the estimate of 1,314 agencies included in the 60-Day PRA Notice estimate. This change is explained in greater detail below.

The total estimate of 247,302 burden hours is a decrease from the estimate of 319,302 burden hours that was included in the 60-Day PRA Notice that was published on March 23, 2016. The decrease in the estimate is solely attributable to a change in the estimated number of PHAs that will use this assessment tool as lead entities with individual submissions, rather than due to any revision in the estimated amount of time to complete an AFH using the assessment tool. The reasons for the change in the estimated number of PHAs that are assumed to use the PHA Assessment Tool is described in further detail below.

<table>
<thead>
<tr>
<th>PHA Assessment Tool:</th>
<th>QPHA outside CBSA</th>
<th>QPHA inside CBSA</th>
<th>PHA (non-Q)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>(PHA acting as lead entity) ........................................</td>
<td>..................</td>
<td>..................</td>
<td>814</td>
<td>814</td>
</tr>
<tr>
<td>Joint partner using PHA template ..................................</td>
<td>..................</td>
<td>300</td>
<td>100</td>
<td>400</td>
</tr>
<tr>
<td>Local Government Assessment Tool (# of PHA joint collaborations)</td>
<td>..................</td>
<td>900</td>
<td>200</td>
<td>1,100</td>
</tr>
<tr>
<td>State Assessment Tool (# of PHA joint collaborations) ..........</td>
<td>665</td>
<td>........................</td>
<td>........................</td>
<td>665</td>
</tr>
<tr>
<td>Subtotal ..........................................................</td>
<td>665</td>
<td>1,200</td>
<td>1,114</td>
<td>2,979</td>
</tr>
<tr>
<td>QPHA template ................................................................</td>
<td>358</td>
<td>605</td>
<td>........................</td>
<td>963</td>
</tr>
<tr>
<td>Total ........................................................................</td>
<td>*1,023</td>
<td>*1,805</td>
<td>..................</td>
<td>**3,942</td>
</tr>
</tbody>
</table>

* These totals (1,023 and 1,805 QPHAs) are the total number of QPHAs that are located inside and outside of CBSAs.

** The total of 3,942 represents all PHAs, not the sum of QPHAs (i.e. this is the total for this vertical column, not the horizontal row across).
In accordance with 5 CFR 1320.8(d)(1), HUD is specifically soliciting comment from members of the public and affected program participants on the Assessment Tool on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency’s estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

(5) Are there other ways in which HUD can further tailor this Assessment Tool for use by PHAs? If so, please provide specific recommendations for how particular questions may be reworded while still conducting a meaningful fair housing analysis, or questions that are not relevant for conducting a meaningful fair housing analysis, or other specific suggestions that will reduce burden for PHAs while still facilitating the required fair housing analysis.

(6) Whether HUD should include any other contributing factors or amend any of the descriptions of the contributing factors to more accurately assess fair housing issues affecting PHAs’ service areas and regions. If so, please provide any other factors that should be included or any additional language for the contributing factor description for which changes are recommended.

(7) Whether the inclusion of the “insert” for Qualified PHAs (QPHAs) will facilitate collaboration QPHAs and non-qualified PHAs, and whether these entities anticipate collaborating to conduct and submit a joint AFH. Please note any changes to these inserts that (a) would better facilitate collaboration; (b) provide for a more robust and meaningful fair housing analysis; and (c) encourage collaboration among these program participants that do not anticipate collaborating at this time.

(8) Whether HUD’s change to the structure and content of the questions in the Disparities in Access to Opportunity section with respect to the protected class groups that PHAs must analyze is sufficiently clear and will yield a meaningful fair housing analysis. Additionally, HUD specifically solicits comment on whether an appropriate fair housing analysis can and will be conducted if the other protected class groups are assessed only in the “Additional Information” question at the end of the section, as opposed to in each subsection and question in the larger Disparities in Access to Opportunity section. HUD also requests comment on whether it would be most efficient for PHAs to have the protected class groups specified in each question in this section. If so, please provide an explanation. Alternatively, HUD requests comment on whether each subsection within the Disparities in Access to Opportunity section should include an additional question related to disparities in access to the particular opportunity assessed based on all of the protected classes under the Fair Housing Act.

(9) What sources of local data or local knowledge do PHAs anticipate using with respect to their analysis? Please specify which sections of the Assessment Tool PHAs anticipate using local data and local knowledge. For example, what sources of local data or local knowledge, including information obtained through the community participation process and any consultation with other relevant governmental agencies, do PHAs anticipate using for the service area as compared to the region regarding disparities in access to opportunity? Are there any different sources of local data or local knowledge for the question on disparities in access to opportunity in the publicly supported housing section?

(10) Whether the instructions to the Assessment Tool provide sufficient detail to assist PHAs in responding to the questions in the Assessment Tool. If not, please provide specific recommendations of areas that would benefit from further clarity.

(11) How can HUD best facilitate the analysis PHAs must conduct with respect to disparities in access to opportunity? For example, are questions based on the overall service area and region of the various opportunity indicators the best way for PHAs to identify access to opportunity with respect to their residents, including voucher holders? With regards to disparities in access to opportunity, how might the PHA identify contributing factors and set goals for overcoming disparities in access to opportunity?

(12) What additional guidance would be useful to PHAs to assist in conducting the fair housing analysis in the Assessment Tool? In particular, which fair housing issues and contributing factors would benefit from additional guidance? For example, in the disparities in access to opportunity section, what guidance would PHAs benefit from?

(13) In the publicly supported housing section, there are several questions related to assisted housing programs that are not owned or operated by the PHA. Are these questions sufficiently clear, or would additional instructions beyond those that are provided be helpful to PHAs in answering these questions? Are there other or different questions that would facilitate the PHAs’ analyses of publicly supported housing, specifically for the other categories of publicly supported housing included in this Assessment Tool?

(14) There have been new questions added to the Disability and Access Analysis section, under “Housing Accessibility” (Questions 2(d) and 2(e)). Are these questions sufficiently clear, or would additional instructions beyond those that are provided be helpful to PHAs in answering these questions? Are there other or different questions that would facilitate the PHAs’ analyses of disability, specifically related to housing accessibility?

(15) Are there other ways HUD can clarify the questions in the Assessment Tool, for example, through the provision of additional instructions, or different instructions from those that have been provided? Additionally, are there other or different questions or instructions that would better assist State PHAs in conducting their fair housing analysis? Please specify whether a particular section, question, or set of instructions requires clarification. HUD encourages not only program participants but interested persons to submit comments regarding the information collection requirements in this proposal. Comments must be received by October 20, 2016 to www.regulations.gov as provided under the ADDRESSES section of this notice. Comments must refer to the proposal by name and docket number (FR–5173–N–09–A). HUD encourages interested parties to submit comment in response to these questions.

Dated: September 14, 2016.

Inez C. Downs,
Department Reports Management Officer,
Office of the Chief Information Officer.

[FR Doc. 2016–22594 Filed 9–19–16; 8:45 am]

BILLING CODE 4210–67–P
Retrospective Review – Improving the Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs Participants

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule revises HUD’s regulations for reviewing the previous participation in federal programs of certain participants seeking to take part in multifamily housing and healthcare programs administered by HUD’s Office of Housing. The final rule clarifies and simplifies the process by which HUD reviews the previous participation of participants that have decision-making authority over their projects as one component of HUD’s responsibility to assess financial and operational risk to the projects in these programs. The final rule, together with an accompanying Processing Guide, clarifies which individuals and entities will undergo review, HUD’s purpose in conducting such review, and describe the review to be undertaken. By targeting more closely the individuals and actions that would be subject to prior participation review, HUD not only brings greater certainty and clarity to the process but provides HUD and program participants with flexibility as to the necessary previous participation review for entities and individuals that is not possible in a one-size fits all approach. Through this rule, HUD replaces the current previous participation regulations in their entirety.

DATES: Effective Date: [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].
FOR FURTHER INFORMATION, CONTACT: Danielle Garcia, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 6148, Washington, DC 20410; telephone number 202-402-2768 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

HUD’s Previous Participation Review regulations, codified at 24 CFR part 200, subpart H (Subpart H regulations), set forth the HUD process, which applicants seeking to participate in HUD’s multifamily housing and healthcare programs must undergo to ensure, including providing a certification, that all principals of the applicant involved in a proposed HUD project have acted responsibly and have honored their legal, financial, and contractual obligations in their previous participation in HUD programs, as well as in certain programs administered by the U.S. Department of Agriculture, and in projects assisted or insured by state and local government housing finance agencies. HUD’s regulations governing the assessment of previous participation require applicants to complete a very detailed and lengthy certification form (HUD Form 2530)1.

The 2530 form requires disclosure of all principals to be involved in the proposed project, a list of projects in which those principals have previously participated or currently participate in, a detailed account of the principals’ involvement in the listed project(s), and assurances that the principals have upheld their responsibilities while participating in those programs. HUD’s Subpart H regulations govern not only the content of the certification submitted by applicants, but the types of parties that must certify, the process for submitting the certification, the

standards by which submissions are evaluated, and the delegations and duties of HUD officials involved in the evaluation of the certifications. The regulations also contain procedures by which applicants can appeal adverse determinations.

The Subpart H regulations, first established in 1980, with some updates over the years, were overdue for significant updating to reflect the deal structures and transaction practices taking place today that were not in place over 20 years ago. For example, the currently codified regulations pre-date the development of limited liability companies as an organizational entity. HUD recognized that the currently codified regulations have not kept step with contemporary organizational structures or transactional practices, and were both over-inclusive and under-inclusive of applicants that should undergo the previous participation review process, creating unnecessary burdens for participants and HUD alike. Further, participants in HUD’s multifamily housing and healthcare programs have long complained about the delays with the previous participation review process because of the overly detailed information required to be submitted. Complaints focused on the difficulties associated with obtaining information from all the limited partner investors in individual projects and in duplicating information for multiple levels of affiliates. Participants in HUD’s multifamily housing and healthcare programs also stated that the previous participation process requires participants to complete the Form 2530 for each project, regardless of the number of Forms 2530 each participant completed in the recent past, regardless of how many projects the participant is involved in each year, and regardless of whether the participant is a well-established, experienced institutional entity already familiar to HUD.

II. The Proposed Rule
On August 10, 2015, at 80 FR 47874, HUD published a proposed rule that is designed to comprehensively overhaul the Subpart H regulations. As described in the August 10, 2015, proposed rule, HUD made several efforts over the years to improve the process and minimize the time and collection burden it takes to undergo the previous participation review process, but none of the efforts achieved the success that HUD desired. Therefore on August 10, 2015, HUD submitted a rule for public comment that proposed to revise the Subpart H regulations in their entirety, replacing the current prior participation review process. The August 10, 2015, proposed rule noted that while the current regulations mandate that Form HUD 2530 be used, the proposed rule would shift the emphasis of the regulations from this specific form to the substance of what is being asked from whom. One of the goals of the August 10, 2015, proposed rule is to provide HUD and its program participants with greater flexibility by avoiding a one-size-fits-all approach, and allowing for HUD to seek information tailored to certain programs, expand electronic data practices for gathering information, and decrease the information collection imposed, generally across-the-board on all applicants regardless of the applicant entity and the program to which the applicant seeks to participate. The specific changes proposed by the August 10, 2015 rule can be found at 80 FR 47876 through 47877.

At the close of public comment period on October 9, 2015, HUD received 33 public comments. Overall the commenters were supportive and appreciative of HUD’s efforts to reform the regulations. Commenters stated that, in addition to reforms to the regulations and reforms to the review process, additional guidance and training materials were also needed. Several commenters stated, however, that the regulations were broad and vague and lacked the

---

3 See preamble to proposed rule at 47875 and 47876.
specificity that participants desired to bring clarity and certainty to the previous participation review process. The public comments and HUD’s responses to the public comments on the proposed rule are addressed in Section V of this preamble.

III. Supplemental Notice of Proposed Rulemaking

On May 17, 2016, at 81 FR 30495, HUD supplemented its August 10, 2015, proposed rule with a Supplemental Notice of Proposed Rulemaking (Supplemental Notice). To address commenters’ concerns about the need for more specificity in the proposed rule, HUD proposed through this supplemental document to use an approach that HUD has taken in certain of its other regulations and that is to supplement codified regulations with a document specifically referenced in the codified regulations that addresses the specific procedures (processing requirements) to be followed.4 When HUD has taken this approach, HUD commits to provide notice and opportunity for comment for any significant changes made to the document.

In the May 17, 2016, document, HUD proposed to issue with its final regulations a “Processing Guide for Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs’ Participants” (Processing Guide). This Processing Guide, to be posted on HUD’s website, will provide the details on procedures which commenters are seeking and which HUD proffered is more appropriate for a process guide than for regulatory text. As provided in the May 17, 2016, document, HUD advised that the Processing Guide will provide applicants for and participants in HUD’s multifamily housing and healthcare programs the detailed information desired on the previous participation review process, information about how “flags” are assigned.

---

4 See, for example, 24 CFR 207.254, pertaining to mortgage insurance premiums; 24 CFR 203.605, pertaining to tier ranking systems and methodology applicable to loss mitigation performance; 24 CFR 290.9, pertaining to setting rental rates for certain multifamily housing projects; 24 CFR 570.712(b) pertaining to setting a fee for the Section 108 Loan Guarantee Program; and 24 CFR part 902, pertaining to scoring notices for HUD’s Public Housing Assessment System.
and addressed, and elaborates on terms and information in Form 2530. HUD provided that the codified regulations would reference the Processing Guide and provide a 30-day advance notice and comment period for significant changes proposed to the Processing Guide. HUD reiterated that the Processing Guide offered an appropriate procedural approach for addressing the previous participation review process because it would give HUD the ability to make changes as may be needed or desired by HUD as well as program participants to address specific procedural circumstances that may arise in the previous participation process and to keep up-to-date with changes that may arise in the housing market. HUD noted that one of the longstanding complaints about HUD’s previous participation review process is that the process and the regulations that govern the process are very outdated and do not keep up with the times. HUD submitted that a lean set of regulations supplemented by a detailed processing guide that is subject to notice and comment for any significant changes is the best approach for this process and one that will endure successfully for some time.

The public comment period on the May 17, 2016, notice closed on June 16, 2016, and HUD received 11 comments. The commenters strongly supported this approach but some commenters stated that greater specificity was still necessary. The public comments and HUD’s responses to the public comments on the Supplemental Notice are addressed in Section V of this preamble.

IV. Changes Made at this Final Rule Stage

This section highlights the changes made to the proposed rule at this final rule stage.

---

5 Flags refer to an issue or issues in a prospective participant’s application for which further review is necessary.
• The final rule references the Processing Guide as a supplement to HUD’s regulations and provides for changes to the guide to be done through advance notice and opportunity for comment.

• The final rule reorganizes information relating to the evaluation of risk into a separate definition of risk.

• The final rule clarifies that Covered Projects include projects subject to continuing HUD requirements only if those requirements are made in connection with a program administered by HUD’s Office of Housing.

• The final rule revises terminology to clarify that Controlling Participants include both Specified Capacities and the individuals and entities that control the Specified Capacities.

• The final rule includes construction managers as Controlling Participants in hospital projects insured under section 242 of the National Housing Act.

• The final rule specifies that individuals or entities with the ability to direct the day-to-day operations of a Specified Capacity or a Covered Project are Controlling Participants.

• The final rule specifies that board members of a non-profit that do not otherwise control the day-to-day operations of the non-profit are not Controlling Participants.

• The final rule clarifies that a change in Controlling Participants is a Triggering Event if HUD consent is required for such change.

• The final rule provides more detail on when a Controlling Participant may be disapproved from participation in a Triggering Event on the basis of being restricted from doing business with other government agencies.

• The final rule specifies that reconsideration decisions shall not be rendered by the same individual who rendered the initial review.
The final rule specifies that Controlling Participants shall receive at least 7 business-days advance notice of a reconsideration.

The final rule eliminates the bid to purchase a Covered Project or mortgage note held by the Commissioner from the list of Triggering Events.

V. The Public Comments on the Proposed Rule and Supplemental Notice and HUD’s Responses

A. Comments on the Proposed Rule

1. General Comments on the Proposed Rule

Many commenters expressed support for HUD’s initiation of the proposed rule, which was designed to streamline and improve the previous participation process. One commenter stated: “This proposed rule is a step in the right direction to streamline a tedious process in HUD multifamily and healthcare programs.” Commenters also suggested changes that they thought would further improve this process. The following are the significant comments raised by the commenters.

Comment: The proposed rule is overly broad. Several commenters stated that the proposed regulations are overly broad and open to various interpretations by HUD. The commenters stated that the final rule should provide a comprehensive outline of the previous participation review requirements so that industry partners and HUD staff alike have a primary resource from which to identify the governing requirements and be detailed enough not to have to be dependent on additional guidance. Commenters stated that it is essential that the process be as transparent as possible. The commenters stated that because the proposed rule does not specify how HUD intends to determine whether Controlling Participants have control over the finances or operation of a Covered Project, this could actually increase the number of responses.
required by a program participant rather than reduce such processes. A commenter stated that
the proposed rule is so vague that HUD may violate the Administrative Procedures Act (APA) if
HUD neglects to provide the public a meaningful opportunity to review and comment on
forthcoming revisions. The commenters stated that before proceeding to a final rule, HUD must
solicit additional comment by re-issuing a revised proposed 2530 rule.

**HUD Response:** HUD understood the concerns made by these commenters about the
need for further elaboration on various aspects of the rule, and it was these concerns that
prompted HUD to issue the Supplemental Notice of Proposed Rulemaking through which HUD
proposed to supplement the previous participation regulations with a Processing Guide. The
Processing Guide would serve as a primary resource and provide the specificity for the
procedural requirements governing the previous participation review process. HUD solicited
public comment on this Processing Guide. As noted in Section IV, HUD is adopting the
Processing Guide as part of the final rule changes. With the Processing Guide, HUD believes it
has achieved the appropriate balance between specificity and flexibility. Comments on the
Processing Guide and HUD’s responses to these comments are provided in Section V.B. of this
preamble.

**Comment: Method of filing.** Several commenters asked whether a participant’s ability to
file would be done electronically or would paper forms have to be used.

**HUD Response:** The regulations do not require filing electronically or paper filing. Both
formats remain available, but HUD encourages electronic filing.

**Comment: Clarify that existing regulations are replaced in entirety.** A commenter asked
that HUD clarify that the new regulations replace the existing regulations in their entirety. The
commenter stated that while the proposed rule clearly stated this, it was not repeated in the regulatory text.

**HUD Response:** The regulatory text does not need to specify that it is superseding previous regulations. The final regulations will replace the existing regulations in their entirety, and the existing regulations will then no longer be contained in the Code of Federal Regulations.

**Comment:** Clarify whether a single purpose entity wholly owned by a public housing agency (PHA) is exempt from the previous participation process. A commenter stated that it was not clear from the proposed rule if any single purpose entity wholly owned by a public housing agency (PHA) is still excluded from previous participation. The commenter asked for HUD to clarify.

**HUD Response:** Yes, entities that are wholly owned by a PHA are considered public housing agencies. For the commenter’s reference, see HUD’s regulation at 24 CFR 5.100, which defines “Public Housing Agency” to include “or instrumentality of these entities.” Further, HUD’s Office of Public and Indian Housing (PIH) issued PIH Notice 2007-15,⁶ which defines “instrumentality” as “an entity related to the PHA whose assets, operations, and management are legally and effectively controlled by the PHA.” The notice further states that “For the Department’s purposes, an Instrumentality assumes the role of the PHA and is the PHA under the public housing requirements for purposes of implementing public housing development activities and programs.”

**Comment:** Address “flags” in regulatory text. A commenter stated that HUD, in the preamble to the proposed rule, is absolutely correct in stating that use of flags under the current...

---

system has created serious obstacles to participation in HUD programs, even when such flags are not indicative of real risk. The commenter stated that if HUD is going to continue its practice of issuing “2530 flags,” this policy should be clearly explained in the regulations. Other commenters similarly stated that, in many instances, program participants do not receive prior notice of flags; they do not know why they’ve been “flagged;” they do not know whether they can “appeal” the flags; and/or they don’t know how to get flags removed or “resolved.”

**HUD Response:** HUD agrees that prior dealings with “flags” have been frustrating for all parties. HUD, however, does not agree that the level of detail asked by the commenters is appropriate for regulations. The role of flags in the previous participation process is one of the reasons that HUD has proposed the Processing Guide. The Processing Guide is the better vehicle to address flags and HUD did in fact address flags in the Processing Guide, published for comment on May 17, 2016. HUD provides additional comments received on flags and HUD’s responses to these comments on Section V.B. of this preamble.

**Comment:** Have one 2530 form, not multiple forms. Commenters expressed opposition to HUD’s intention, as they stated was presented in the preamble to the proposed rule, to allow the development of multiple previous participation forms specifically tailored to particular HUD programs. The commenters stated that multiple forms will only further complicate a process that HUD itself recognizes is overly burdensome and time-consuming. The commenters also stated that the existing 2530 form at least provides applicants the following: (i) assurance that there is one consistent form for participation in all HUD programs, and (ii) guidance on what information must be provided and updated (in the Schedule A attached to the existing 2530 form) regarding prior participation in HUD projects (status of HUD loan, current Real Estate Assessment Center (REAC) score, etc.).
HUD Response: HUD is not proposing new previous participation forms at this time. In the preamble to the proposed rule, HUD simply noted that through the revised previous participation review process that HUD proposed in the August 10, 2015, rule, HUD may determine that 2530 forms more tailored to HUD-specific forms, rather than an across-the-board form, may be more appropriate, helpful, and facilitate the processing of a specific HUD transaction. For example, the structure of a Multifamily Housing transaction is vastly different from that of a Healthcare transaction or a Hospital transaction. It is not intuitive to fit a healthcare transaction’s operator into the 2530 form used for a Multifamily Housing transaction. HUD’s Office of Residential Care Facilities (ORCF) has advised that many submissions of the Form 2530 in connection with Healthcare transactions are completed incorrectly and do not yield adequate information to promptly process the healthcare transaction. For this reason, in its 2013 PRA information collection, ORCF developed as part of its consolidated certification, more targeted questions that are easier to understand and fit more easily with a Healthcare transaction. Since the existing regulations require the submission of the specific Form 2530, ORCF has been using both the current Form 2530, which does not reflect a healthcare transaction, and its improved Consolidated Certification. With these revised previous participation regulations, ORCF now has the ability, if it so chooses, to require only the more targeted and accurate disclosures and more complete certifications of the Consolidated Certification. Time will tell whether other programs, such as the Rental Assistance Demonstration program or the HUD Hospitals program, will consider submitting similarly tailored forms through the PRA process.

7 See ORCF’s notice announcing final approval of HUD’s Healthcare Facility documents published in the Federal Register on March 14, 2013, at 78 FR 16279. See especially page 16281, third column.
The 242 program is currently in the process of document reform and is not proposing a change from the 2530 form at this time, but may do so in the future.

Whether HUD chooses to develop 2530 forms tailored for specific HUD transactions, the public should keep in mind that changes to the existing 2530 form or development of new previous participation forms must undergo the notice and comment process (a minimum of 90 days) required by the Paperwork Reduction Act (PRA).

Comment: Exclude limited liability investors. Commenters stated that the final rule should clarify that limited liability corporate investor (“LLCI”) certification is no longer required of low-income housing tax credit (LIHTC) investors or any other passive investors. Another commenter stated that it supports expanding the exemption given to LIHTC investors to all passive investors in other tax credit programs, such as the New Markets Tax Credit.

HUD Response: HUD believes 24 CFR 200.216(c)(1) is clear that passive investors are not Controlling Participants, and are not required to undergo previous participation review. However, HUD reserves the right to perform appropriate due diligence review of investors, including reviewing their financial capacity and understanding the organizational structure of proposed entities.

2. Comments on the Proposed Rule Regulatory Text

Definitions (§ 202.212)

Comment: Define Key Principal. Commenters stated that the term “Key Principal” is a widely used term in the Active Partners Performance System (APPS) but is not included in the regulations, and should be.

HUD Response: The term “key principal” continues to be used for underwriting purposes. HUD believes that the term “key principal” has been confusing in past practice with
respect to previous participation review and has determined that the new terms Specified Capacity and Controlling Participant are more appropriate for previous participation review purposes. The APPS system will be updated to ensure consistency between the APPS system and the previous participation regulations.

Comment: Distinguish between applicant entities and those that control them.
Commenters stated that HUD should use separate terms for the applicant entities requiring approval and those individuals and entities that control them.

HUD Response: HUD has added the term “Specified Capacity” and revised the definition of “Controlling Participant” to include the listed “Specified Capacities” and those entities and individuals that control the Specified Capacities. In addition, the Processing Guide elaborates on specified capacity and provides a chart that shows the specified capacities for the listed programs. See the Processing Guide, published for comment on May 17, 2016, at 81 FR 30497.

Comment: Define Risk. Commenters stated that the proposed rule does not adequately define “risk” or how HUD will evaluate risk.

HUD Response: In response to these commenters, HUD proposed in the Supplemental Notice, published on May 17, 2016, to include a definition of “risk” in § 200.212, that would clarify that in order to determine whether a Controlling Participant’s participation in a project would constitute an unacceptable risk, the FHA Commissioner must determine whether the Controlling Participant could be expected to participate in the Covered Project (as defined in the August 10, 2015, proposed rule) in a manner consistent with furthering HUD’s purposes. The proposed definition of “risk” and comments received on this definition and HUD’s responses are addressed in Section V.B. below.
Comment: Clarify programs covered by previous participation review. A commenter stated that there appears to be in the rule an inconsistency in the definition of previous participation. The commenter stated that specifically in § 200.212 the term is described as participation in Federal programs only, but the first paragraph of the Background section in the preamble to the proposed rule suggests that participation in State and local government financed or assisted programs must also undergo the previous participation review process. Commenters stated that currently many participants disclose only their participation in HUD programs, which the commenters stated should be HUD's concern. The commenters further stated that the assessment of risk by HUD of State and local participation greatly delays the clearance process since it requires HUD staff to track down the appropriate State or local officials who may have absolutely no interest in the 2530 process and therefore may not be inclined to cooperate.

HUD Response: The definition of risk, as proposed in the Supplemental Notice, clarifies this issue. The commenters are correct that HUD’s primary concern is previous participation in HUD programs. Previous participation in HUD programs is most relevant to HUD and HUD regards the information received with regard to previous participation in HUD programs (as opposed to other Federal, State or local programs) to be the most complete and most reliable because the information should correspond with HUD’s records. However, previous participation in other Federal, State or local programs may also be relevant to the evaluation of risk, and therefore HUD reserves the right to request this information when it is relevant and can be gathered reliably. It is possible that such information may prove valuable when evaluating the risk of a flag in the context of a Controlling Participant’s performance relative to their overall portfolio, especially if participation in HUD programs is minor compared with participation in other programs.
In this final rule, the regulations have been revised to clarify that previous participation must include HUD programs but that the FHA Commissioner may request and consider previous participation in any Federal, State or local government program if the Commissioner determines that such information is reliably available and necessary in evaluating financial or operational risk. Further, the Commissioner may exclude any previous participation from the previous participation review process if the Commissioner determines that such information is not relevant or cannot be reliably gathered. This regulatory structure allows greater specificity to be set forth in forthcoming guidance and to evolve as housing programs and risks evolve. HUD notes that in order to request any such previous participation information, HUD must follow the PRA process for information collection. The form 2530 already requires limited disclosure of State and local housing programs; the form requires Schedule A disclosures to list “every project assisted … by … State and local government housing finance agencies…”

**Covered Projects (§ 200.214(d), (e))**

Comment: Covered projects subject to use restrictions should be limited to those administered by HUD’s Office of Housing. Commenters stated that the category established by § 200.214(d), relating to projects with affordability restrictions, should be limited to projects whose use restrictions are administered by HUD’s Office of Housing.

**HUD Response:** These regulations govern only projects administered by HUD’s Office of Housing. For clarity, HUD has accepted the commenters’ suggestion to revise the language and add the phrase “administered by HUD’s Office of Housing.”

Comment: Exclude project-based vouchers (PBVs) administered by HUD’s Office of Public and Indian Housing. Commenters asked that HUD exclude from previous participation review projects with project-based voucher contracts.
HUD Response: The proposed regulations exclude PBVs, and this final rule retains that exclusion. See the exclusion in § 200.214(e)(3) of projects authorized by “section 8(o)(13) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(13),” which pertains to PBVs.

Comment: Do not exclude PBVs. In contrast to the preceding comment, a commenter stated that projects participating in the Rental Assistance Demonstration (RAD) and receiving PBVs are not required to obtain previous participation clearance for a change in ownership or management agent but would be under the Project-Base Rental Assistance program administered by the HUD Office of Housing. Commenter suggested projects in the PBV program should be subject to previous participation review.

HUD Response: These regulations do not govern programs administered by the Office of Public and Indian Housing. There are several differences between the PBV and PBRA programs, which accomplish different policy goals and allow for various effects.

Controlling Participant (§ 200.216)

Many commenters stated that the definition of “Controlling Participant” in the proposed rule was too broad and needed further clarity and specificity. Commenters offered suggestions on how Controlling Participant should be defined. Their suggestions are as follows:

Comment: Limit and list specifically the individuals required to undergo previous participation review. Commenters stated that if HUD intends to include officers and directors, and individuals with authority to bind the entity as Controlling Participants, HUD should specify the parties required to file.

HUD Response: HUD submits that the more appropriate document for listing the entities and individuals that HUD determined are Controlling Participants is in the Processing Guide that HUD published on May 17, 2016. That list of entities that HUD determined are Controlling
Participants and those that HUD determined are not Controlling Participants can be found in the Guide at 81 FR 30498. HUD reminds the public that the Processing Guide is subject to advance notice and opportunity for comment for any substantive changes.

Comment: Replace “authority to bind” phrase (§ 200.216(b)). Commenters objected to proposed § 200.216(b) inclusion of individuals with the “ability to bind” such entity with respect to Triggering Events. Other commenters suggested replacing this phrase with the phrase “ability to direct the entity in entering into agreements.”

HUD response: HUD has revised this provision with the commenters’ suggested language.

Comment: Define “Influence.” Commenters stated that § 200.216(c)(2) introduces the new concept of “influence” but HUD has not previously defined or given any direction on what this term means. The commenters requested that HUD define or remove this term. Another commenter suggested using the language “the ability to direct day-to-day operations or policy of a Covered Project.”

HUD Response: HUD has revised § 200.216(c)(2) to be consistent with the terminology used elsewhere in the rule. HUD has also revised § 200.216(b) to focus on those with control over “day-to-day operations.”

Comment: How many “tiers” are included? Commenters asked how many “tiers” within a given entity may be deemed to include “Controlling Participants.”

HUD Response: HUD is interested in reviewing the previous participation of the entities and individuals in control of a project, no matter how many “tiers” of entities are structured in between. HUD expects Controlling Participants to include at least one natural person. However, HUD is not interested in receiving superfluous filings of several tiers of shell entities in an
entity’s organizational structure. Shell entities that do not exercise control are excluded from filing requirements. This difference is reflected in the regulations and further clarified in the Processing Guide.

Comment: Do not define control as a percentage of ownership. Commenters stated that the language in § 2001.216(c)(2) meant to allow for exclusions limiting the scope of the review is undermined by the language defining “control” in § 2001.216(b) as a certain percentage of ownership. Commenter suggested revisions to this section to separate the exclusion language and eliminate the reference to percentage ownership.

HUD Response: HUD agrees in part and has revised this language. HUD has revised this language so that percentage ownership does not “define” control. Because other commenters have asked for greater clarity, HUD has retained the 25 percent ownership as an indicator of control. Participants should expect to undergo previous participation review if they own 25 percent of a Specified Capacity or a Controlling Participant. However, HUD has further revised this section to limit this 25 percent threshold by inserting the phrase “unless otherwise determined by HUD.” In other words, although having a 25 percent interest creates a presumption that a person or entity exercises control, HUD may make a determination otherwise if given other evidence indicating that the person or entity that owns the 25 percent share does not actually exercise control. The Processing Guide provides further clarity on this matter. This is now consistent with the limitation in the revised § 2001.216(c)(2), excluding entities and individuals not exercising control.

Comment: Percentage of ownership is an outdated way to determine ownership. Similar to the immediately preceding comment, a commenter stated that the concept of 25 percent or more ownership is an outdated notion of how modern organizations are structured and
controlled. The commenters stated that investor entities have no rights to current control of entities, despite owning a majority of the interests. The commenters stated that HUD's focus should be not on who owns how much, but ultimately on who controls what (financially or operationally).

**HUD Response:** HUD agrees in part with the commenters. As HUD noted above, HUD has revised the regulations to separate percentage interest from the definition of control. However, except in the case of tax credit and other passive investors, HUD notes that in the majority of organizational structures, ownership of 25 percent or more of the ownership interests is a good indicator of control. Therefore, in response to other comments seeking greater clarity, HUD has retained this indicator but revised the language to indicate that HUD may make a determination that the person or entity does not exercise control, if there is a basis for such determination. Further, HUD notes that tax credit and passive investors are specifically excluded from review.

**Comment:** Exemption of PHA from definition of Controlling Participant is not appropriate. A commenter stated that the exclusion of PHAs in § 200.216(c)(4) is overly broad.

**HUD Response:** PHAs are public entities that are overseen by HUD. HUD has determined that HUD has other methods of monitoring PHAs and that previous participation review in unnecessary given HUD’s other oversight over PHAs.

**Comment:** Specify Controlling Participants for nonprofit entities, real estate investment trusts (REITs) and public companies. Commenters stated that the regulations should specifically identify who is subject to previous participation review for nonprofit corporations, REITs, and public companies. The commenters stated that there can be significant differences in how “control” is held in each of these types of corporations, and that these differences have been the
subject of much confusion over the years, by HUD staff and industry members alike. Another commenter stated that § 200.216(a)(7), which speaks to hospital Boards of Directors, leaves unclear how HUD intends to treat Boards of Directors in the non-hospital context, as the proposed rule is silent on this matter.

HUD Response: With respect to hospitals under the Section 242 program, it is reasonable for the regulations to specifically address members of the hospital’s board of directors because it is the typical structure for projects in the hospital program to have a nonprofit board of directors in a way that is not true for the variable organizational possibilities in other programs. However, HUD agrees with the commenters that confusion has arisen in recent years with regard to nonprofit entities, REITs and public companies. HUD agrees that the reference to hospital nonprofit entities without clarifying the approach for other nonprofit organizations may increase this confusion.

In response to these comments, HUD has revised the language to clarify that unless members of a nonprofit board of directors are exercising day-to-day control over a Specified Capacity or a Covered Project, they need not submit for previous participation review. HUD does not believe the same clarity can be achieved through regulation with respect to REITs or public companies, nor does HUD believe that any regulation can keep pace with the ever-changing corporate organizational conventions. Therefore, HUD clarifies in the Processing Guide the requirements for REITs and public companies. The Processing Guide allows HUD to adhere to the concept expressed in the regulations that those individuals and entities that exercise control over a Specified Capacity and Covered Project are subject to previous participation review.
Comment: Explicitly exclude certain entities. Commenters stated that the following should be explicitly excluded from review:

- Any passive investor (e.g., limited partner), regardless of whether the funding involves tax credits, provided that the entity is not on the General Service Administration’s (GSA) most recently published list of parties debarred, suspended or disqualified by federal agencies (the “GSA List”);

- Any publicly-traded corporation, REIT, or other entity that is listed on any exchange regularly reported in the Wall Street Journal, provided that such entity is not on the GSA List; and

- Any entity subject to regulatory oversight by the Securities Exchange Commission (SEC), the Federal Trade Commission (FTC), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC) and/or the Federal Reserve Board (FRB), provided that such entity is not on the GSA List.

- Directors of nonprofit boards, including PHA boards, who have no day-to-day responsibility or authority. Commenters stated that PHA and nonprofit boards typically consist of volunteers, and for PHAs, often at least one public housing resident.

HUD Response: These concerns have already been largely addressed by HUD’s exclusion of passive investors, publicly traded companies and nonprofit entities. Although HUD does not believe that its previous participation regulations should categorically exclude entities overseen by other Federal regulatory entities (whose oversight may not adequately account for HUD programs and whose standards for oversight may change), HUD is nevertheless open to further considering (on a case-by-case basis, or perhaps in future issuances on the previous
participation review process) that the review sought by the regulations is achieved through the oversight conducted by these other entities.

Comment: Require an entity’s attorneys to certify as to who the controlling participants of the entity are. A commenter suggested that in order to increase the efficiency and accuracy of HUD’s determination as to the individual who exercises operational or financial control over an entity, HUD should require the entity’s attorneys to certify as to who such individuals are.

HUD Response: Although HUD does not believe that this process is appropriate for regulation and HUD is not imposing this requirement at this time, an attorney certification may be a valuable tool for determining control and HUD is open to further discussions and consideration on this topic in the future.

Comment: Suggestions for limited liability companies (LLCs), limited partnerships (LPs), nonprofit entities, REITs and management companies. Commenters made several suggestions regarding LLCs, LPs, nonprofit entities, REITs and management companies that to some extent overlap with and to some extent vary from the comments summarized above. A commenter asserted that variations from standard ownership structures rarely occur and that the following individuals be identified for review: managing members of LLCs and the person with controlling stock in the LLC; the person with control of 51 percent or more general partner of a LP; the person who controls 51 percent or more of the parent entity of a REIT or the person who voted in public filings; and the individual or entity owning 51 percent or more of the management company. The commenter stated that nonprofit entities will likely “follow the same rules as LLCs or general partnerships,” but does not explain what this means or how to apply the rules for LLCs or general partnerships to a nonprofit corporation (that does not typically have owners, majority members or partners).
**HUD Response:** HUD appreciates the suggestions and the Processing Guide addresses these concerns. This comment also illustrates the difficulty that HUD faces with leaving only to regulations to address a changing lending market, and changing structures of lending/financial institutions. Although most organizational structures may align along certain conventions, variations are not infrequent. HUD needs regulations that are sufficiently flexible to be used in all scenarios – or at least all but those very few worthy of a waiver. This is not only impossible but, in fact, probable that if HUD sets up overly detailed regulations based on contemporary organizational structures, corporate practice will be able to easily side-step the rule. To illustrate, consider that no person owns 51 percent or more of a company and two business partners each owns 49 percent of a company and a third owns 2 percent. The question therefore arises as to whether no partner should be identified for previous participation review. HUD believes that the commenter does not mean to suggest that no one controls an entity if they do not own 51 percent of that entity. Indeed, the 25 percent ownership, long-established as a threshold for control for HUD’s purposes, has been side-stepped on a number of occasions by complicated organizational structures that appear to limit any individual’s control to 24 percent or less or obscure related interests. It is exactly for this reason that HUD believes the best place for this level of detail is in the Processing Guide, rather than in the regulations themselves, and again HUD reminds its prospective participants that the Guide will be subject to advance notice and public comment if substantive changes are made.

**Comment:** Clarify how HUD will determine control of finances or operational decisions. Commenters stated that in § 200.216(b), HUD did not clarify how it would determine whether an individual participating actually controls the financing or operational decisions of the participant. Another commenter stated that proposed § 200.216(a)(7) does not clarify how HUD proposes to
determine whether the hospital Board of Directors and its executive management have control
over the finances or operation of a Covered Project.

**HUD Response:** The Processing Guide addresses the commenters’ concerns. Again,
HUD anticipates that as corporate conventions evolve, who controls an organization may change.
HUD does not seek to lock onto the corporate structures of today but rather establish a
framework under which those who control a Covered Project receive adequate review.

Comment: Remove reference to general contractor. Commenters stated that, in §
200.216(a)(6), reference to management agents and general contractors lacks clarity.

**HUD Response:** The Processing Guide elaborates on these terms.

Comment: Provide Controlling Participant opportunity to appeal any adverse decision
against the Controlling Participant: Commenters stated that the final rule should allow the
Controlling Participant an opportunity to appear in person before the committee/officer to
present its documents/arguments. Another commenter stated that it is essential that Controlling
Participants have a right to appeal, and that HUD should inform the applicant of how to appeal in
its notice informing the participant of the disapproved, limited or conditional approval. The
commenter stated that the notice should include procedures for the appeal, identify to whom the
appeal should be directed, and specify the information to submit with the appeal. The commenter
further stated that HUD should also be required to acknowledge the appeal and make a
determination within 30 days of receipt, which is the same timeframe to file an appeal provided
for the Controlling Participant.

**HUD Response:** HUD does not believe an in-person appearance is necessary. Given the
changing nature of the workplace and increasing technology, HUD submits that it is not
necessary for everyone providing input on a reconsideration of a determination to be physically
in the same room. In addition, just as the changing nature of corporate structures may affect who a Controlling Participant is under future corporate conventions, it is not clear that one structure for seeking reconsideration of a HUD determination will be appropriate in perpetuity. As HUD offices and positions change, the person/persons responsible for reconsideration requests may also change. HUD agrees with the commenters that an opportunity for reconsideration is essential and has structured the final rule accordingly. The final regulations make clear that applicants will be given advance written notice of the reconsideration and an opportunity to submit supporting materials. This means that the matter will not be reconsidered prior to the date provided so that any arguments and materials provided by the participant can be considered. In response to these and similar comments, the final rule specifies that notice of reconsideration shall provide at least 7-days advance notice, which is meant to provide a meaningful opportunity for the submitter to provide supporting materials. HUD has also included in the Processing Guide that HUD will send the required notice of reconsideration no later than 30 days after receipt of the request for reconsideration.

**Triggering Events (§ 200.218)**

Comment: Avoid duplication of review. A commenter stated that in § 200.218(f), HUD provides only one opportunity to avoid duplication of review, under "sale of a HUD Held Mortgage" but urged HUD to consider other circumstances under which HUD might avoid duplicative review. The commenter stated that the industry feels there is significant duplicative review for "well-known established institutional entity already familiar to HUD." Identifying additional opportunities to avoid duplicative review would alleviate burden for industry partners and HUD staff alike.
**HUD Response:** HUD believes that the exclusion of non-controlling members and the other exclusions set forth in the Processing Guide help to reduce duplication of review. HUD is interested in continuing conversations with the industry to identify additional ways to reduce duplication and welcomes additional suggestions.

**Comment:** Do not make 2530 process applicable to note sale bidder. A commenter stated that § 200.218(e) makes the 2530 process applicable to a mortgage note sale bidder. The commenter stated that such entities are looking to purchase the note/operate the project outside of the HUD system and HUD risk factors in that instance appear to be irrelevant where HUD will no longer have involvement with the note or the asset. The commenter stated that in the event there may occur something like a housing assistance payment (HAP) assignment down the road, the clearance for that purpose can be handled at that time.

**HUD Response:** HUD agrees in part and has revised § 200.218 in response to this comment. HUD notes that note sale bidders and bidders in foreclosure sales have been and will continue to be vetted by HUD. However, note sale bidders have not been required to complete a full-previous participation submission as part of this vetting. In contrast, bidders at foreclosure sales or other forms of property disposition are often required to operate the projects with continued use restrictions administered by the Office of Housing and thus in many instances have been required to undergo previous participation review. Due in part to the variable circumstances surrounding such sales, and because the statutory and regulatory authorities governing note sales and property dispositions provide broad discretion for HUD to set the requirements for such sales, the requirements are set forth in instructions commonly referred to as the “Bidder Qualification Statement” or “bid kit.” HUD has revised the regulations to clarify that the requirements for note sales and property dispositions continue to remain governed by
their program requirements, including without limitation the requirements set forth in the Bidder Qualification Statement or other instructions. These documents may require some vetting of previous participation of applicants, but depending on the individual circumstances and the time pressures associated with such sales, the Bidder Qualification Statement or other instructions may dictate modifications to the process, including for example, a shortening of the period to request a reconsideration. The final regulations continue to allow HUD to require through the note sale and foreclosure sale bidder qualification requirements, appropriate vetting of bidders in accordance with the relevant statutory and regulatory authorities.

Comment: Limit application of funds to those administered by the Office of Housing. A commenter suggested limiting the language in § 200.218(b) relating to “[a]n application for funds provided by HUD, such as but not limited to supplemental loans or flexible subsidy loans” to such funds providing pursuant to a program administered by HUD’s Office of Housing. Another commenter similarly suggested limiting this triggering event to an application for funds in HUD multifamily programs.

HUD Response: It is HUD’s intention to limit these regulations to those programs administered by HUD’s Office of Housing, and this final rule reflects this limitation.

Previous Participation Review (§ 200.220)

Comment: Clarify scope of review. Commenters stated that HUD’s proposed rule indicates that the FHA Commissioner’s previous participation review “shall include previous financial and operational performance in federal programs that may indicate a financial or operating risk...” and that the Commissioner “shall consider financial stability; previous performance in accordance with [HUD requirements]; general business practices and other factors ....” The commenters stated that if HUD is truly committed to ensuring that the 2530
process does not become even more burdensome and overly inclusive the 2530 review should be limited to evaluating the Controlling Participant’s performance as it relates solely to the information required on the 2530 form for the Controlling Participant’s Covered Projects.

**HUD Response:** HUD agrees in part and the definition of risk that has been added at this final rule stage addresses these comments. However, regardless of the regulations, HUD is limited to collecting the information for which it has PRA approval. If HUD wishes to change the form 2530 or ask for additional information, it must complete the PRA process, including the requirement for public comment, for a new form.

**Comment:** Provide standards for disapproval. A commenter stated that the scope of review needs some specific details/clarification and that HUD should consider addressing standards for disapproval.

**HUD Response:** The standards for disapproval remain the same as they have always been: an unacceptable risk to HUD. In response to this comment and similar other comments, HUD has revised the language in § 200.220 and separated out a more focused definition of risk to clarify the scope of review.

**Comment:** Distinguish between prior ownership and current ownership. Commenters stated that organizations that purchase distressed HUD properties for the purpose of stabilizing and improving them have periodically gotten hung up by flags that relate to the actions and omissions of prior owners from whom the properties were purchased. Commenters stated that HUD needs to improve its systems for recognizing and distinguishing between issues related to prior ownership and issues of current owners.

**HUD Response:** HUD appreciates this comment and the commenter’s raising awareness on this issue. In response to these comments and comments received on the Processing Guide,
the Processing Guide has been revised to elaborate on these issues. HUD continues to work on standardizing asset management practice and improving all aspects of the previous participation review. HUD acknowledges that there has been inconsistency and unintended consequences in the past. However, flags are issued to ownership entities, not to properties. Flags are not to be issued to new owners for violations of a prior owner. If this has happened, it is in error and the owner should contact the appropriate HUD office to resolve the flag.

Comment: Define general business practices and other factors. A commenter stated that proposed § 200.220(a) (1) states that the Commissioner’s review shall consider undefined “general business practices and other factors” in determining whether a Controlling Participant is expected to operate a Covered Project in a manner consistent with HUD’s purposes. The commenter stated that this term needs to be defined.

HUD Response: As provided in response to similar comments, the final rule includes a more focused definition of risk and has eliminated this “general business practices” language. Further, HUD reiterates that any information HUD collects in connection with the previous participation review is subject to the PRA and the PRA process, giving the public an opportunity for comment.

Comment: Identify risk factors and define impermissible risk. A commenter stated that current regulations include a section titled "Content of Certifications" which indicates a portion of the risk elements that HUD will review, but that the proposed rule does not include this detail and is relatively silent on the exact nature of HUD's expectations regarding what constitutes Impermissible Risk.

HUD Response: HUD’s more focused definition of risk addresses the commenter’s concern.
Comment: Have the review include reviews of credit history. Commenters stated that the proposed rule would have authorized HUD to take into account “mortgage defaults, assignments, or foreclosures” [not limited to HUD direct loans or FHA-insured loans] and “instances of noncompliance with the regulations, programmatic or contractual requirements of HUD.” The commenters stated that recently some of its members have observed sales of HUD-assisted properties at prices that are above their own estimates of long-term economic viability, sometimes to investors with little experience in real estate or assisted property management, and that some of these same properties subsequently are found out of programmatic compliance due to insufficient funding for rehabilitation, maintenance, or deposits to replacement reserves. The commenters stated while they do not support deeper review of proposed transaction terms, they urge that HUD conduct consistent reviews on credit history and past programmatic compliance (when available) to better guard against purchasers with a record of default or failure to meet rehabilitation and maintenance requirements (if HUD is not otherwise conducting a Transfer of Physical Assets (TPA), assignment of the HAP contract, or other review).

HUD Response: These previous performance regulations address the disclosure of deficiencies in past performance; they are not the vehicle for highlighting the absence of sufficient relevant experience. Disclosure of overall experience and capacity is addressed in other elements of applications related to a particular triggering event. HUD continues to make improvements in its various application processes, and welcomes suggestions for further improvements in that respect.

Comment: Clarify “extent requested by HUD.” A commenter stated that the language in § 200.220(a)(3) "to the extent requested by HUD" is too broad and open-ended. HUD needs to clarify their requirements.
HUD Response: “To the extent requested by HUD” refers to the information requested on PRA-authorized forms, such as the Form 2530.

Comment: Clarify meaning of “limit” or “otherwise condition” approval. Commenters stated that in § 200.220(b)(1) HUD must clarify what it means to “limit” or “otherwise condition” approval for the Controlling Participant to continue to participate in a Covered Project. The commenters stated that such limits and/or conditional approvals should specify the time limits associated with each alternative. The commenters stated that in § 200.220(d)(1) HUD should define what it means to “condition” or “limit” approval and also specify the time period for such actions. The commenters stated that such time periods should be reasonably related to the rationale for such a determination, and clearly articulated by HUD.

HUD Response: The concept of conditional or limited approval is an accommodation on HUD’s part to provide a middle ground between disapproval and approval. Whereas current practice withholds approval until all “flags” are lifted, conditional approval is intended to clarify the path forward. HUD’s intention is to provide the conditions necessary for approval in such circumstances. The regulations cannot contemplate all potential scenarios for limited or conditional approval. The revised Processing Guide elaborates on this concept.

Comment: Provide timing for identification of a Controlling Participant when a Triggering Event occurs. Commenters stated that where proposed § 200.220(a)(3) requires that an applicant in connection with a Triggering Event “shall identify the Controlling Participants,” HUD should provide greater clarity regarding the timing of HUD’s determination and the basis for that determination. The commenters stated that it would be more efficient and provide greater predictability for applicants if HUD would clearly identify who, at a minimum, are the
“Controlling Participants” of a project, such as the general partner of a limited partnership and the managing member and managers of a limited liability company.

HUD Response: The Processing Guide addresses the commenters’ concerns.

Comment: Specify time for HUD to conclude previous participation review, and provide notification of conclusion of review. Commenters stated that at proposed § 200.220(b)(2) HUD does not specify the timeframe in which HUD shall provide notice of a previous participation determination. The commenters stated that HUD should provide such notice within 14 calendar days of reaching such a determination. The commenters further stated that the proposed rule does not specify which other parties, aside from the FHA-approved lender in the transaction, may receive notice of a previous participation determination from HUD. The commenters stated that presumably only those parties actually involved in the transaction at issue should be notified, and, if this is correct, HUD should clarify this in its rule. The commenters further stated that HUD should be mindful of concerns about privacy and disclosure of trade secrets as well as releases of information that may be pre-decisional and prejudicial, particularly because HUD’s determination may not necessarily be based on a complete record if the Controlling Participant has yet to appeal HUD’s decision and present additional evidence and HUD has not adequately weighed such additional material.

HUD Response: HUD is not aware of problems in providing notification to parties after a determination has been made and believes current practice is providing timely notice. However, it is difficult to determine how long it will take HUD to make a determination in any particular transaction because the facts of each transaction, and therefore the review necessary, vary so widely. HUD is mindful of privacy and other concerns and continues to be held bound by such limitations on its authority and practice. Except to the extent that HUD is an agency of
the Federal government and individuals’ expectations for privacy are limited among Federal government actors once information is disclosed to the federal government, HUD does not foresee sharing information on determinations with parties not involved with a transaction or their agents.

Comment: Clarify what is meant by “any federal program.” Commenters stated that the reference to "any federal program" should be clarified because it is unclear which programs HUD intends to cover. Commenters stated that currently, there is much confusion regarding HOME Investment Partnerships (HOME) program, the Community Development Block Grant (CDBG) program, LIHTC and other programs that may be essentially a pass-thru of Federal funds via a State or local jurisdiction. The commenters asked whether it is HUD's intent to review these properties as part of previous participation review and, if not, a clarification needs to be included.

A commenter stated that the reference to “federal programs” in the second sentence of § 200.220(a)(1) should be limited to the programs administered by HUD’s Multifamily Housing Office.

Another commenter stated that while previous performance in Federal programs is relevant for determination of risk, the proposed language allows for too detailed a review for the purposes of the regulations. The commenter specifically stated the language includes financial and operational performance in non-federal environments and general business practices. The commenter stated that § 200.220(a) should be changed as follows: “The Commissioner's review of a Controlling Participant's previous participation shall include previous financial and operational performance in federal programs that may indicate a financial or operating risk in approving the Controlling Participant's participation in the subject Triggering Event. The
Commissioner's review shall consider previous performance in accordance with HUD statutes, regulations and program requirements; and other factors that indicate that the Controlling Participant could not be expected to operate the project in a manner consistent with furthering the HUD's purposes.

**HUD Response:** All HUD and other Federal funding come from a single source – the taxpayer. To the extent HUD has the capacity and capability of ascertaining and reviewing an applicant’s previous stewardship of any Federal funds, HUD intends to do so. However, HUD is limited in two important ways: (1) such capabilities are currently limited; and (2) any additional information that HUD wishes to collect from applicants or other filers must complete the PRA process.

**Comment:** Clarify what it means to be “restricted from doing business.” Commenters stated that in § 200.220(c)(2)(i) HUD should clarify what it means to be “restricted” from doing business with any other department or agency of the federal government, because this term is undefined and could conceivably capture relatively minor limitations on a Controlling Participant’s activities. The commenter stated that this ambiguous basis for disapproval also fails to consider the nexus between the restriction and the relevant HUD programs.

**HUD Response:** HUD agrees and the final rule reflects this change.

**Comment:** Clarify what is a “record” of “significant risk.” A commenter stated that in § 200.220(c)(2)(ii) HUD should clarify what constitutes a “record” of “significant risk” that would form the basis for disapproval, and that otherwise the regulation would be at risk of being found void for vagueness.

**HUD Response:** To address these and similar comments, HUD has included a more focused definition of risk in the final rule.
Comment: Specify time for withholding previous participation determination.
Commenters stated that in § 200.220(d)(2) HUD should clarify how long it may temporarily withhold issuing a previous participation determination so as not to interfere with transactions or unnecessarily hinder the business decisions of prospective participants.

HUD Response: It is difficult to put a time limit on determinations because the facts of each transaction, and therefore the review necessary may vary so widely from one transaction to the next. HUD commits to reach a final decision as promptly as possible given the nature of the transaction and the documentation that HUD has received.

Comment: Clarify scope of expected remedial measures. A commenter stated that in § 200.220(d)(3) HUD should clarify the scope of expected remediation or remedial measures that Controlling Principals may be required to undertake. The commenter stated that the language in this section of “to the Commissioner’s satisfaction” is incredibly vague and open-ended and must be adequately defined. The commenter stated that if this phrase is not clarified Controlling Participants will not have adequate notice of the regulatory requirements they are expected to abide by.

HUD Response: The concept of remedial measures is an accommodation on HUD’s part to provide a middle ground between approval and disapproval. Any remedial measures must be targeted at reducing the risk posed by the subject Controlling Participant. The more focused definition of risk in the final rule and addresses the commenter’s concern and the Processing Guide elaborates on this concept.

Comment: Limit look back at prior performance to 10 years. Commenter stated that HUD should clarify that it is only reviewing Previous Participation for the past 10 years, which is the current requirement per the HUD 2530 Form. The commenters stated that HUD has not
specified how far back it will look when evaluating the previous participation record of Controlling Participants, and they stated that they saw no reason for HUD to depart from the ten (10) year period specified in the existing regulations.

**HUD Response:** The Processing Guide reflects that HUD is retaining the look-back period with respect to information gathering for 10 years. However, the Processing Guide notes that HUD reserves the right to review and consider a participant’s previous participation in a Federal project beyond the 10-year period when determining whether to approve participation in the project associated with an application. For example, as stated in the Processing Guide, Tier 1 flags reflect such a high degree of risk that HUD reserves the right to consider those violations, in the context of the Controlling Participant’s other participation, even beyond a 10-year period.

**Comment:** Clarify obligation of Controlling Participant to file HUD Form 2530. A commenter stated that HUD should clarify the obligation of a Controlling Participant to file the HUD form 2530 and reference the form in the regulations.

**HUD Response:** HUD has determined that it is inappropriate to reference a specific form in the regulations. As discussed earlier in this preamble, HUD wants to retain the flexibility to develop and authorize other forms, through the PRA process, if HUD determines another form or more tailored 2530 form is appropriate.

**Comment:** Rule expands not reduces scope of review. A commenter stated that § 200.220 expands HUD’s ability to increase the scope of the previous participation review by determining, on an ad hoc basis, what the HUD reviewer may deem a “significant risk” at any particular time. The commenter stated that the proposed rule does not clarify what “financial and operational performance” HUD would consider “a financial or operating risk.” The commenter stated that in order to avoid arbitrary or capricious determinations, HUD must provide more specific guidance
on what is to be reviewed and how HUD will determine what is considered a “financial or operating risk” or a “significant risk.” The commenter stated that in the preamble to the proposed rule, HUD sets forth examples of unacceptable risks, which include those currently existing in §200.230, such as: (1) mortgage defaults, assignments or foreclosures; (2) suspension or termination of payments under any HUD assistance contract; (3) significant work stoppages; and (4) instances of noncompliance with the regulations, programmatic or contractual requirements of HUD or a State or local government’s Housing Finance Agency in connection with an insured or assisted project. The commenter asked that the examples be incorporated into the regulatory text to provide additional clarity on the types of “significant risks” for which HUD will be reviewing.

**HUD Response:** HUD has addressed these concerns by including a more focused definition of risk in the final rule.

**Request for Reconsideration (§ 200.222)**

**Comment:** Identify who serves on Review Committee. Commenter stated that the proposed rule indicates that requests for reconsideration shall come before “… a review committee or reviewing officer....” Commenters stated that the final rule should identify the title(s) of the persons that may serve on the review committee or as a reviewing officer; require participation by the Deputy Assistant Secretary for Multifamily Housing (the “DAS”) or the designee of the DAS, and expressly exclude from the committee/reviewing officer any HUD employee or official that was involved in rendering the initial disapproval or limited/conditioned approval.

**HUD Response:** HUD does not agree that specific titles or positions should be identified in the regulations, nor does HUD believe that reconsiderations should necessarily rise to the level
of involvement by the DAS. Further, HUD does not believe that the individuals reviewing the initial applications should be wholly excluded from the reconsideration process, as they are the individuals in HUD with the greatest knowledge of the submission. However, HUD does agree that the submission should be reviewed and reconsidered by one individual. As a result, HUD has provided in the final rule that reconsideration decisions shall not be rendered by the same individual who rendered the initial decision.

Comment: Specify time frame for reconsideration review. Commenters stated that HUD should specify the timeframe in which the HUD review committee or reviewing officer shall schedule a review of any requests for reconsideration, because in the past there were no deadlines incumbent on HUD to resolve 2530 flags, which resulted in closing delays, delayed property improvements, and losses of tax credits and investment dollars in a number of cases. The commenters recommended that HUD schedule such a review no later than 14 calendar days following receipt of a request for reconsideration.

HUD Response: As HUD noted in response to a similar comment, formalizing one reconsideration structure in perpetuity in the regulations is not a beneficial approach. However, HUD has provided in the Processing Guide that HUD will send the required notice of reconsideration no later than 30 days after receipt of the request for reconsideration.

Comment: Impose time limit on review. Commenters stated that in the interest of ensuring that decisions do not languish and resolution of open matters is achieved in a timely fashion, HUD should impose an upper time limit during which the review committee or reviewing officer may affirm, modify or reverse the initial decision. Commenters stated that a reasonable time frame would be 30 days following receipt of the Controlling Participant’s submission of supplemental materials in support of reconsideration.
HUD Response: As HUD noted in response to a similar comment, it is difficult to put a
time limit on reviews because information from transaction to transaction varies so widely.

B. Comments on the Supplemental Notice of Proposed Rulemaking and Processing Guide

1. General Comments

Similar to comments that commenters made on the proposed rule, commenters
commended HUD for the additional changes proposed in the Supplemental Notice and
Processing Guide, but recommended further changes. A few commenters sought more specificity
and clarity. The signature issues raised by the commenters are as follows:

The Processing Guide provides or does not provide the specificity requested. Several
commenters supported HUD’s approach to supplement the updated previous participation
regulations with a guidance document. A commenter stated that the Processing Guide: (i)
includes details about the 2530 process; (ii) is referenced in the regulation; and (ii) is subject to
public comment for significant changes. The commenter stated that as a precedent for this
approach, HUD cites regulations that require publication in the Federal Register and a 30-day
comment period for proposed changes to multifamily mortgage insurance premiums (MIPs).
The commenter stated that it is familiar with this process, as well as HUD’s Multifamily
Accelerated Processing (MAP) guide, which provides detailed instructions to lenders about the
application, endorsement and closing processes for MAP loans. The commenter stated that, in
its previous comment letter on the proposed rule, the commenter stated that it asserted that
stakeholders must be able to find all 2530 policies in one place. The commenter stated that it
previously commented that a reasonable person should be able to find everything they need to
know about the previous participation review with minimal effort. The commenter stated that by
referring to the Processing Guide in the actual regulation and including a mandatory notice and comment period for significant changes, HUD has satisfied the commenter’s concerns.

In contrast to this commenter, a few commenters stated that the proposed Processing Guide needed additional detail and specificity. The commenters stated that the Processing Guide provide HUD too much discretion to identify Controlling Participants. The commenters stated that this lack of clarity adds complexity and significant time for both HUD staff and industry applicants in reviewing organization documents, evaluating the role of executive management positions and debating the issue of “control.” The commenters asked that HUD re-issue the proposed rule and Processing Guide for additional public comment. Another commenter similarly stated that because the proposed regulations and Processing Guide are interdependent policy documents, and HUD should re-issue the proposed rule concurrently with the Processing Guide and provide the public with an additional 60-day opportunity to comment on the complete set of policies and procedures in order to provide greater transparency and commitment to the regulatory process.

**HUD Response:** HUD agrees with the commenters that additional detail can be included in the Processing Guide and has revised the Processing Guide in response to the specific issues identified in the comments submitted. The remainder of this section details the specific issues raised and HUD’s responses. HUD declines to reissue the rule and Processing Guide for further public comment. However, HUD does not need to issue a formal call for public comment. HUD program participants are welcome at any time to propose changes to the rule, 2530 Form, and Processing Guide that they believe will improve the previous participation process and HUD will always consider such suggestions.
Convene a meeting with industry before issuance of the final rule and Processing Guide.

A commenter stated that it appreciated HUD tackling the 2530 process, but the commenter expressed concern with the discretion granted to HUD to make determinations and sought uniformity and standardization in implementing changes, especially with respect to the determination of who constitutes "controlling participants" and the placement and permanence of flags. The commenter urged HUD to convene a meeting as soon as possible with all interested parties to discuss concerns and further encouraged HUD to consider making additional revisions to the proposed regulations to address new concerns raised by comments to the Processing Guide. The commenter also cautioned HUD to ensure appropriate delegations of authority and coordination with the MAP Guide, RAD Notices, the APPS Guide and Closing Guide. The commenter urged HUD to consider how the revised Previous Participation policies and requirements will interact with existing HUD program requirements.

**HUD Response:** HUD agrees that uniformity and standardization are necessary in the implementation of these regulations and Processing Guide. To the extent such standardization can be assisted with greater clarity and specificity in the Processing Guide, HUD has attempted to revise the document accordingly. HUD has also coordinated revisions with policies in the MAP Guide and with HUD programs. HUD also agrees that implementation of the regulations and Processing Guide warrants meetings, discussions and trainings with both HUD staff and with interested outside parties. HUD notes that it has held numerous meetings over the past several years, as detailed in the Proposed Rule, seeking industry input. HUD has also participated in numerous conference panels and other discussions where industry concerns and opinions have been discussed. HUD does not believe that a meeting is necessary at this time to discuss additional comments to the regulations and Processing Guide. Interested parties have had
numerous and sufficient opportunities, including through this regulatory process, to voice their concerns and explain their comments.

**Appropriate comment period for changes to Processing Guide.** A few commenters stated that HUD should provide a minimum period of 60 days for public comment on significant changes to the Processing Guide. Another commenter stated that it supported HUD’s Processing Guide approach but that in the absence of a definition of what constitutes a “significant” change, HUD should err on the side of transparency and disclosure.

**HUD Response:** HUD maintains the minimum comment period of 30 days as proposed in the May 17, 2016, Supplemental Notice of Proposed Rulemaking. A 30-day minimum comment period is the typical minimum comment period that HUD uses in other regulations, such as the change in premiums as provided in 24 CFR 207.254. HUD emphasizes that 30 days is the minimum period, and HUD has the discretion to increase the comment period if it determines a longer period would be beneficial.

**Establish a streamlining process for higher volume participants.** A commenter encouraged HUD to adopt a process that would allow a participant with a higher volume of HUD transactions and who has a strong track record of compliance and performance to submit a single annual report.

**HUD Response:** HUD finds this idea interesting but does not have the systems infrastructure to appropriately implement this idea at this time. Further, HUD believes the changes being made through these final regulations and Processing Guide provide a significant reduction in burden and create significant challenges in implementation independent of the additional changes the commenter requests.
Provide specific guidance on HUD responsibility for review. A commenter stated that inconsistent application and interpretation of requirements between different HUD offices in the previous participation review process has long been a concern. The commenter stated that HUD should provide detailed and specific guidance on timing and locus of responsibility for review and approval of initial applications and appeals. Another commenter urged HUD to provide contact information for the HUD staff contacts who are involved in the previous participation approval and reconsideration processes.

**HUD Response:** HUD agrees that standardization and uniformity are a goal in implementation. To the extent such standardization can be assisted with greater clarity and specificity in the Processing Guide, HUD has attempted to revise the document accordingly. HUD notes that the Processing Guide includes tables stating the specific roles within HUD that have the responsibility for approving participants with flags, disapproval of participants and reconsideration. The Processing Guide has also been revised to include a link to a website with more specific contact information. HUD also notes that the Previous Participation review is only one, limited aspect of HUD review of applicants and transactions. Previous Participation review cannot substitute for underwriting and other HUD application reviews.

Update MAP Guide. A commenter requested that the MAP Guide be updated as soon as possible after the Previous Participation final rule is issued.

**HUD Response:** HUD believes the MAP Guide is consistent with these final regulations and Processing Guide. If commenters know of inconsistencies, they are always welcome to bring them to HUD’s attention.

Importance of training for HUD staff. A commenter stated that it recognizes that training for HUD staff on how to interpret and apply the new regulation and Processing Guide is
important, and the commenter offered assistance with providing the training. The commenter stated that it appreciated the extensive work HUD has undertaken to update this regulation and some of the appropriate flexibility that is to be incorporated in HUD’s administration of the previous participation review.

**HUD Response:** HUD fully agrees with the commenter and HUD staff will undergo training to ensure they properly implement the new regulations.

**B. Specific Comments**

**2530 Form**

Retain the current 2530 Form. A commenter stated that it understands that HUD is proposing to eliminate existing 2530 Form. The commenter urged HUD to retain the clarity and predictability that was intrinsic to the prior 2530 Form and instructions.

**HUD Response:** HUD did not propose and is not proposing to eliminate the 2530 Form. As HUD responded to a similar comment submitted on the proposed rule, HUD advised that, based on experience under the new regulations, HUD may propose alternative versions of the 2530 form more tailored to a specific HUD program. However, at this point in time, HUD is not proposing any alternative versions and HUD is not proposing elimination of the 2530 Form.

Exclude defaults that are beyond the participant’s control. A commenter stated that the Processing Guide directs participants to disclose on Schedule A defaults in housing projects participating in other Federal, State or local government program but should recognize that lenders and other parties are often required to “declare” technical defaults that are quickly corrected. The commenter also suggested that HUD should exclude defaults that were beyond the participant’s reasonable control.
HUD Response: HUD has revised the Processing Guide’s instructions on Schedule A to indicate that only defaults declared and remaining after applicable cure periods should be disclosed. HUD has also revised the Processing Guide to include considerable guidance as to when participation should be approved despite the presence of flags and lists the default being outside the participant’s control as a factor to be considered and documented.

Definitions

Support for definition of “Risk.” A commenter expressed support for the definition of “risk” and stated that, in its previous comment on the proposed rule, it requested that, “HUD should clearly explain in the rule what constitutes acceptable and unacceptable risks to a property’s finances and operations.” The commenter stated that HUD addressed its concerns by proposing a definition of risk in the regulatory text, and listing specific types of flags in the Processing Guide.

HUD Response: HUD is gratified that it was able to address the commenter’s concern.

Clarify definition of Covered Projects. Two commenters recommended that HUD revise the Processing Guide to expressly indicate whether “Covered Projects” include non “Subsidized Projects” with no HUD-insured/HUD-held loan or HUD subsidy, but with a HUD Use Agreement or similar document (e.g., deed) imposing HUD use restrictions. The commenters asked, for example, whether a project subject to an Interest Reduction Payment (IRP) decoupling Use Agreement (236(e)(2) Use Agreement), but where the IRP has already been exhausted, a “Covered Project” subject to 2530 review. The commenters also asked whether a project subject to an Emergency Low-Income Housing Preservation Act (ELIHPA) or Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA) Use Agreement, but with no HUD insured/held loan and no remaining HUD subsidy, is a “Covered Project.”


HUD Response: HUD has revised the Processing Guide to state more clearly that projects with Use Agreements administered by HUD’s Office of Housing are Covered Projects. As such, the examples the commenter lists would be Covered Projects.

Repeat definitions in Processing Guide. A commenter stated that it would be beneficial and remove any room for uncertainty, if a definition section were added to the Processing Guide. The commenter pointed to use of the terms “controlling stockholder” and “controlling shareholder” as undefined and ambiguous. The commenter further stated that it would benefit all interested parties if there were consistency between the MAP Guide and the previous participation regulations and the Processing Guide. The commenter stated that the MAP Guide draws the line at 10 percent ownership for corporations and stockholders, but the Processing Guide is silent on it and therefore creates ambiguity.

HUD Response: HUD believes that a definition sections would be largely duplicative and might not catch all the terms the commenter is looking for. HUD agrees that use of the terms “controlling stockholder” and “controlling stakeholder” was ambiguous and that coordination with the MAP Guide would be beneficial. HUD has revised the Processing Guide accordingly.

Define “significant changes.” A commenter stated that the Processing Guide contains numerous references to “significant changes,” a term which is not defined. The commenter stated that this term is ambiguous and should be clarified in a meaningful way.

HUD Response: “Significant changes” is a concept often used and sufficiently clear. For example, if HUD were to change what violations result in flags, that is a significant change. If HUD were to clarify the language describing the flag, without a substantive difference in the violation that is triggering the flag, that is not a significant change. If HUD were to change a
policy relating to who is considered to be a Controlling Participant, this would be a significant change. If HUD were to clarify the language describing who a Controlling Participant is, but not change whether or not such an individual or entity is considered to be a Controlling Participant, such change would not be significant. Individual determinations on specific transactions are not changes to the Processing Guide.

**Definition of “risk.”** A commenter noted that HUD stated its intention to provide a definition of “Risk” in 24 CFR 200.212, but HUD did not include the actual proposed regulatory definition for review or comment. With respect to the definition of “risk,” the commenter stated that there are no time restrictions set forth in HUD’s description of what constitutes risk and no consideration of whether such risks have been mitigated.

**HUD Response:** With respect to the commenter’s concern about the absence of proposed regulatory changes presented in a non-codified manner, it is important to note that an agency may propose regulatory text without setting out the regulatory text in the manner it would be codified provided the agency presents a sufficient description of the regulation to be issued.8 HUD provided a sufficient description of the proposed changes. With respect to the concerns regarding the substance of what constitutes “risk,” in response to this comment and others, HUD has revised the Processing Guide to specify what factors shall be considered in evaluating the risks posed by flags and clarifying when it is appropriate to approve or disapprove an applicant.

**Determining who is subject to Previous Participation Review**

---

8 “[T]he agency usually publishes the regulatory text of the proposal in full. The regulatory text sets out amendments to the standing body of law in the Code of Federal Regulations. If the amendments are not set out in full text, the agency must describe the proposed action in a narrative form.” See https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.
HUD retains broad discretion to determine who is subject to previous participation review. A commenter stated that the proposed regulations reserve to HUD the ability to unilaterally determine who is subject to review, which creates uncertainty in the review process. The commenter stated that it supports the effort to identify and restrict the participation of individuals with a record of poor performance, but is concerned about the broad discretion for HUD to add individuals subject to previous participation review. The commenter stated that since it is difficult for HUD to clarify how or when it might determine additional individuals to be subject to review, HUD should limit the identification of additional individuals (beyond those with specified roles) to individuals for whom there is some reason to believe represent a risk to HUD programs. Another commenter stated that HUD must specify in a meaningful way how it would unilaterally “determine” that an individual or entity does or does not exercise financial or operational control, otherwise the lack of specificity regarding HUD’s determinative process makes the regulation vulnerable to a void for vagueness claim and increases uncertainty.

HUD Response: HUD agrees in part and disagrees in part. HUD notes that the Processing Guide provides examples of every kind of entity that we can currently think of and who would be considered a Controlling Participant in such circumstance. HUD has also provided a specific list of exclusions of who HUD does not consider to be Controlling Participant. However, due to the volume of transaction that HUD oversees, it is unavoidable that HUD will not be able to list definitively every possible scenario. In fact, this is one problem with the current regulations which contemplate a number of scenarios, but not every possible scenario. For these unanticipated scenarios, HUD must be able to use discretion. Further, HUD notes that there are sometimes errors in the disclosure, whether advertent or inadvertent. Where HUD has reason to believe that an entity or individual other than those disclosed is actually
exercising control over the Covered Project, HUD’s oversight responsibilities require HUD to inquire about such entities and individuals. This is the essence of the regulations. It is not sufficient to structure a project in technical compliance of the anticipated scenarios that HUD lists in its guidance and shield controlling parties from appropriate review of their previous participation. Parties are unequivocally on notice – whoever actually controls a project is subject to Previous Participation Review.

However, HUD agrees great clarity where possible is beneficial. HUD has clarified in the Processing Guide that it is the lender’s (in FHA-insured transactions) and applicant’s responsibility the first instance to make the determination in accordance with HUD guidance of who is a Controlling Participant. HUD has also clarified that once HUD provides final approval for a Triggering Event, HUD will not re-open the question of who is a Controlling Participant. Finally, HUD has revised the Processing Guide to clarify some of the provisions that other comments indicated were ambiguous.

**Commencing the Previous Participation Review Process**

Incorporate guidance in the Processing Guide that instructs reviewing offices to commence previous participation with their review of the application for mortgage insurance. A commenter stated that requiring the reviewing office to initiate the previous participation review when the application is accepted will allow for any flags to be identified and mitigated simultaneously with the processing of the application for mortgage insurance.

**HUD Response:** HUD has revised the Processing Guide to indicate that previous participation review occur concurrent with the review of the application for mortgage insurance or other request for approval of a Triggering Event.

**Defining Controlling Participant**
Clarify meaning of construction manager. Three commenters stated that HUD should provide additional clarification and a definition regarding the title of construction manager.

**HUD Response:** As shown on the Processing Guide, “construction manager” is only a Controlling Participant for section 242 hospital transactions and it is a clearly known term in such transactions.

Make clear the controlling participants that have operational or policy control. Three commenters stated HUD should clarify whether the enumerated List of Controlling Participants in the Processing Guide is meant to define the participants that HUD is identifying as those HUD determines to have operational or policy control.

**HUD Response:** HUD has revised the text to clarify that the enumerated list are those entities and individuals considered to exercise financial or operational control in the stated circumstances.

Identify separate standards for determining Controlling Participants for public companies. A commenter stated that titles and roles of participants with control over a Covered Project can vary greatly between a publicly held company and a private company, and HUD should identify separate standards for determining Controlling Participants for publicly held companies, REITs and private corporations.

**HUD Response:** HUD notes that REITs are already separately listed. HUD has revised the language in the Processing Guide to be more specific and believes that for both public and private corporations, the officers and other equivalent executive management who are directly responsible to the board of directors and who have the ability to prevent or resolve violations or circumstances giving rise to flags related to the Covered Project are the appropriate submitters.

Lists of Controlling Participants
Suggested changes to List of Controlling Participants. Commenters submitted the following suggested changes to the list of Controlling Participants:

**Item 2** – “and other executive management” is far too broad and supplies HUD with too much discretion. Commenters stated that Item 2 needs to be refined to drill down to only the officers/individuals with decision-making and/or financial capacity.

**HUD Response:** HUD has revised this item to focus on officers and other equivalent executive management who are directly responsible to the board of directors and who have the ability to prevent or resolve violations or circumstances giving rise to flags related to the Covered Project.

**Item 7** – Executive Director of a nonprofit sponsor. HUD needs to specifically define when a Sponsor comes into play and when it does not.

**HUD Response:** HUD has deleted the word “Sponsor.” The Controlling Participant of a non-profit is the Executive Director or equivalent position.

**Item 10** – There is no definition supplied for Controlling Stockholder, and the industry should have the right to comment on such definition, as it relates directly to principals and reporting disclosure. One of the commenters stated that HUD needs to define or clarify that it adheres to the MAP Guide.

**HUD Response:** HUD has clarified this item.

**Item 14** – This language is way too broad. If an entity is an “excluded entity”, by definition it is not considered a Controlling Participant, so its officers, directors, or executive management team should be excluded as well (unless there is an indication of interest (IOI) with other identified Participants or the combined financial percent exceeds other stated requirements.)
HUD Response: HUD has revised this section to provide greater clarity.

Address inconsistency in Processing Guide on the applicable ownership percentage. A commenter stated that there appears to be some conflicting guidance between these two items, which span the “List of Controlling Participants” section (item 1) and the “List of Exclusions” section (item 7). The commenter stated that Item 1 appears to be implying that the applicable ownership percentage is to be calculated based upon that entity’s or individual’s effective ownership in the Specified Capacity whereas item 7 implies that the applicable ownership is based on the actual ownership on an entity by entity basis.

HUD Response: HUD has revised the text to clarify this discrepancy.

Provide notification when additions are made to list of controlling participants. Two commenters stated that portions of the Processing Guide indicate that any person or entity “determined by HUD to exercise day-to-day control over a Specified Capacity” is a Controlling Participant. The commenters stated that if HUD intends to reserve the right to expand the list, we recommend that HUD identify (a) how/when the proposed participant will receive notice of any additional parties that must be included as Controlling Participants, and (b) what standards HUD will apply for such purpose.

HUD Response: HUD has added additional specificity to this provision.

Supplement the list of controlling participants with examples. A commenter expressed support for HUD’s efforts to streamline and clarify the previous participation process by limiting 2530 approval requirements to those who have day-to-day financial or operational control of properties. The commenter stated that it was especially pleased that tax credit investors and passive participants are excluded from requirements to seek approval. The commenter
recommended that HUD provide additional guidance, and perhaps a few examples, to determine which for-profit and nonprofit board members must seek approval.

**HUD Response:** HUD has clarified the language regarding for-profit board of directors. Members of a non-profit’s board of directors do not need to file.

**Protect innocent fee managers from punitive measures.** A commenter stated that it recognized HUD’s interest in having management agents file for 2530 approval, but that it remained concerned that the Processing Guide offers no safe harbor to protect innocent, unrelated, third-party fee managers from being flagged or otherwise penalized for owners’ decisions outside of their control. The commenter stated that provided such managers did not participate in health or safety violations or financial impropriety, these fee managers can only affect the property operations to the extent the owner permits funds to be released. The commenter urged HUD to shield innocent fee managers who acted in good faith from punitive measures, so that capable managers are not discouraged from taking over troubled properties.

**HUD Response:** HUD notes that property managers do sometimes contribute to the violations relating to a covered project. However, HUD has revised the Processing Guide to indicate more clearly that HUD will not flag Controlling Participants who did not contribute to or fail to prevent, when in a position to do so, the violation giving rise to the flag.

**Clarify whether “ability to bind” will remain in the final rule.** A commenter asked whether “ability to bind” will remain as a threshold in the final rule.

**HUD Response:** A similar comment was submitted and HUD retains the concept but revises the language in the final rule to state the “ability to direct the entity in entering into agreements.”

**List of Exclusions from Controlling Participants**
Suggested changes to List of Exclusions. Commenters submitted the following suggested changes to the list of exclusions:

**Item 5** – HUD should not require “all of the officers of the entity to certify as to who have significant or insignificant involvement...”

**HUD Response**: HUD agrees that it may not be practical to have all officers certify and has revised the Processing Guide to provide an alternate standard.

**Item 7** – The language “less than 25 percent interest in an entity should be excluded” should be changed to read “less than 25 percent interest in a Specified Capacity should be excluded” to conform with Item 1 under List of Controlling Participants.

**HUD Response**: HUD agrees that the two items should be consistent but has revised Item 1 under the List of Controlling Participants to conform with this item.

**Item 10** – HUD has not clearly identified how they are determining who has financial or operational control. The commenters stated that this must be addressed under the List of Controlling Participants.

**HUD Response**: HUD has clarified the language in the List of Controlling Participants to be more specific.

Clarify why HUD used different definitions of Controlling Participant in the proposed rule and in the proposed Processing Guide. A commenter asked why HUD used different definitions of a “Controlling Participant” in the proposed regulations and the Processing Guide. The commenter asked whether these definitions could be made consistent. The commenter stated that alternatively, the definition and concept of a “Specified Capacity” could be added to the proposed regulations.
HUD Response: HUD has added the concept of “Specified Capacity” to the regulations and has made all definitions more consistent.

Clarify distinction between shell-entity and wholly-owned entity. A commenter noted that the list of exclusions includes wholly-owned entities and shell entities, but noted that they are the same.

HUD Response: HUD agrees that many wholly-owned entities are shell entities, but shell entities are not necessarily wholly-owned entities. HUD includes both listings for completeness and believes this listing will provide greater clarity.

Describe how HUD determines whether an identity of interest or other conflict of interest exists. A commenter stated that HUD should define in a meaningful way how it would unilaterally determine whether an identity of interest or conflict of interest exists.

HUD Response: HUD has corrected the typo in this section. HUD notes that this item clearly states that the program requirements, which have extensive identity of interest provisions, govern. It is only in the instances when the program in question fails to include identity of interest provisions would HUD need to make a determination on this issue.

The 25 percent ownership presents a complicated method of inclusion or exclusion. A commenter stated that some of HUD’s exclusions are very helpful (including tax credit investors, passive participants, minor officers, members of a board), but that others are complicated – such as the less than 25 percent ownership interest, particularly having to aggregate your percentage with others with whom you have an identity of interest or conflict of interest.

HUD Response: HUD thanks the commenter for the support. If the commenter has a simpler suggestion to replace the 25 percent ownership interest concept that adequately protects HUD’s interest, HUD encourages the commenter to make a suggestion.
Organizational Chart

Suggested Changes to Organizational Chart. Commenters submitted the following suggested changes to the organizational chart:

Item 2 – The commenters stated that it takes great exception to the requirement for provision of an Organization Chart that requires the disclosure of “all participants”. The commenters stated that shareholders, members and limited partners with no operational or policy control and/or those with minimum financial interest should not be required. The commenters stated that the required Organization Chart should be limited to Controlling Participants, and pass-through entities and shell entities that culminate in revealing a Controlling Participant. The commenters stated that Passive Participants and other excluded parties should not be required on the Organization Chart.

HUD Response: HUD notes that organizational charts are already required with the applications for Triggering Events. Further, HUD notes that the purpose of the organizational chart is to help HUD confirm that the appropriate individuals and entities are identified as Controlling Participants and they cannot serve this purpose if they only disclose those individuals already disclosed. However, HUD agrees that in some instances the identification of each ownership interest may be overly burdensome and has revised this requirement accordingly.

Item 6 – Individuals and entities that are not Controlling Participants should not be reviewed for limited denial of participation (LDP). The commenters stated that if there is no ability to control, this is not relative to assessing risk.

HUD Response: HUD agrees and has removed this requirement.

Item 7 – If a Director is not considered to be a Controlling Participant then the Director should not be required to be listed on the Organization Chart. The commenters stated
that this is specifically onerous for REITs or publicly held companies or any organization with a large investment pool, but is also an unnecessary burden for private corporations and nonprofit entities.

**HUD Response:** HUD has revised the requirements for entities in which the requirement may be overly burdensome.

The requirement for an organizational chart for all parties in all roles regardless of ownership percentages and decision-making capacities is onerous and prohibitive to the intent and spirit of the original rule. A commenter made a similar comment to that made by other commenters about the organizational charts, and largely focused on burden. The commenter stated that lenders go through significant due diligence during underwriting to determine the true and correct ownership structure(s), and they do this through reviewing ownership agreements, partnership documents, organizational charts and discussions with the borrower and their attorney.

**HUD Response:** If the applicant is already gathering the information needed for other portions of an application, it is difficult to understand why submitting this information into the APPS system for the purpose of previous participation review would be onerous. Further, as stated above, the purpose of the organizational chart is to make sure that the individuals and entities identified as Controlling Participants make sense. Finally, HUD has revised these provisions to clarify HUD’s intent and reduce the burden where appropriate.

**Eliminate all references to “all officers.”** A commenter suggested that HUD eliminate reference to “all officers” of a corporation throughout the Processing Guide and limit previous participation review and approval to only those officers who are in an executive managerial position and exercise financial or operational control over the borrower, owner, etc.
**HUD Response:** HUD has revised this provision to exclude the officers of wholly owned entities, tax credit investors and other investors that are not exercising day-to-day control, which HUD believes addresses the majority of situations that the commenter is referring to. HUD has further revised this section to indicate that HUD may accept an organizational chart without a full listing of an entity’s Board of Directors if HUD determines that such a listing would be unduly burdensome.

**Establish one clear criterion for determining when an officer must obtain previous participation approval.** A commenter stated it would be more efficient and provide greater predictability for applicants if HUD establishes one clear objective criterion for determining whether an officer must obtain previous participation approval.

**HUD Response:** HUD has clarified this requirement.

**The chart is helpful in demonstrating financial and operational control.** A commenter stated that the chart is very helpful in demonstrating who has financial and/or operational control over the property.

**HUD Response:** HUD agrees.

**It is unclear if HUD has authority to review any information requested by HUD regarding widely held interests without regard to the connection to the Covered Project.** A commenter stated that it is unclear whether HUD possesses the authority to review “all participants” beyond those defined as principals or Controlling Participants. The commenter stated that it is unclear if HUD has the authority to review “any information requested by HUD” regarding widely held interests without regard to the connection to the Covered Project.

**HUD Response:** HUD does not propose reviewing the previous participation of entities or individuals who are not Controlling Participants. HUD does not propose examining
information that is unrelated to a Covered Project. The information provided through the
organizational chart is meant to confirm the information presented to HUD identifying who the
Controlling Participants are – how can HUD know if applicants are submitting the entities in
control unless the full organizational structure is disclosed? That being said, HUD has revised
this section to eliminate undue burden and clarify these requirements.

**Filing the Previous Participation Certification**

Provide a separate section in the Processing Guide for Participant Disclosure. A commenter stated that it appreciated the detail and attention that HUD has put into this section of
the proposed Processing Guide, as these elements will be most helpful for applicants, but that the
commenter felt strongly that a separate section in the Processing Guide titled “Participation
Disclosure” should be included, immediately following the section on Organization Charts and
before the section on Filing of Previous Participation Certification. The commenter stated that
traditionally, the detail on which projects must be included as previous participation has been
cause for much confusion by applicants. The commenter stated that it greatly appreciated the
new detail and clarity on previous participation found in the proposed Processing Guide, but this
detail is buried in the instructions to the paper forms. The commenter stated that it assumes that
HUD intends this to apply to all filing methods, not just the paper HUD 2530, and as such, this
should receive separate treatment in the Processing Guide under a separate section header.

**HUD Response:** This has been clarified in Section C in the Processing Guide.

**Clarify the required certifications.** A commenter stated that the current previous
participation regulations include a section titled Content of Certifications. The commenter stated
that neither the proposed rule nor the proposed Processing Guide identify the specific nature of
the certifications that will be part of a previous participation submission.
span class="hl">HUD Response: </span>The certifications are stated on the form 2530. As HUD has indicated, HUD is not changing the certifications to the 2530 at this time. If HUD were to do so, it would put the form through the PRA process, including the necessary notice and comment period.

**Support for HUD’s provisions**. A commenter expressed its support for HUD’s provisions that allow participants to utilize either the electronic APPS or a paper alternative (currently known as the Form HUD-2530). The commenter expresses support that HUD only requires participants to list all projects that they have participated in over the previous 10-year period. The commenter noted that HUD reserves the right to review and consider a Participant's previous participation in a Federal project beyond the 10-year period when determining whether to approve participation in the project associated with an application. The commenter stated that in its previous comments on the proposed rule, it recommended limiting the timeframe covered in the review to a 10-year look-back period, consistent with instructions of the current Form HUD-2530.

**HUD Response**: HUD appreciates the support.

**Explain why HUD may review a participant’s previous participation beyond the 10-year period**. A commenter stated that HUD should meaningfully clarify the reasoning behind its reservation of rights to review and consider participant’s previous participation in a federal project beyond the 10-year certification period.

**HUD Response**: Only Tier 1 flags, which are permanent flags, would survive beyond the 10-year period. HUD believes these violations are so severe that they warrant permanent documentation in the record. However, HUD has clarified how HUD will evaluate the risk presented by these flags and when it is appropriate to approve a participant with these flags.

**Approval of Participants**
Clarify whether approval of participant is prohibited by any flag (i.e., historical flag) or only an active flag. A commenter stated that the opening paragraph of this section indicates that HUD intends to provide approval of a submission if applicants do not have flags and are able to make all the certifications. The commenter stated that HUD should clarify whether this applies to any historical flags or only to active flags.

**HUD Response:** Only active flags require review. However, HUD notes that an underlying issue may be “resolved” but the flag may be “active” until the time period indicated in the Processing Guide expires. Tier 1 flags remain active permanently. Tier 2 flags remain active until the time periods specified expire.

Require HUD to provide a participant with written approval or denial. Two commenters stated that the Processing Guide identifies the circumstances under which a 2530 submission will be approved. The commenters recommended that the Processing Guide also require HUD to, within 30 days of its receipt of the submission, provide the proposed Participant with (a) written evidence of HUD’s approval or denial of the submission (and the justification for any denial), or (b) a written statement identifying what additional information, if any, is required for HUD to complete its consideration of the submission.

**HUD Response:** HUD does not agree with the specific suggestions made by the commenter but agrees that greater detail regarding notice and documentation is needed and has revised the Processing Guide accordingly.

Provide notification of the duration of 2530 clearance. Two commenters recommended revising the Processing Guide to indicate how long a Controlling Participant’s 2530 clearance remains in effect – and what procedures, if any, a Participant can follow to extend the effective period of the clearance without making a whole new submission.
HUD Response: HUD believes the charts indicating the duration of the flags address the commenter's concerns.

Clarify approval of participants as it relates to various HUD offices. A commenter stated that it would be beneficial for HUD to include guidance in this section on the processing responsibilities of the approval process as it relates to Satellite Offices, Hub Offices and Headquarters.

HUD Response: HUD has provided a web address linking to the additional contact information requested.

Clarify how quickly HUD will issue approval. A commenter stated HUD should clarify how quickly it will issue approvals. The commenter suggested that HUD should commit to approving such submissions within 14 days of receipt. The commenter further stated that the fourth bullet point of this section should clarify how far back in time HUD will retain and judge participants’ flag history. The commenter stated that as currently worded, it appears HUD may hold and consider such flag history indefinitely.

HUD Response: HUD cannot commit to a response within 14 days. Only Tier 1 flags are permanent. The charts detailing the flags specifically list the duration of the flags.

Clarify what it means to limit or otherwise condition approval of the Controlling Participant to continue to participate in the Triggering Event. A commenter stated that HUD must clarify what it means to “limit” or “otherwise condition” approval for the Controlling Participant to continue to participate in the Triggering Event.

HUD Response: HUD has revised these provisions to provide greater clarity and specificity.
Clarify how a participant presents a significant risk to HUD. A commenter stated that HUD should clarify in a meaningful way how it determines that a participant presents a “significant risk” to HUD and also define what remedies and/or mitigation of outstanding violations will satisfy the criteria “to the FHA Commissioner’s satisfaction”.

**HUD Response:** HUD has added considerable detail to clarify what factors must be considered in evaluating the risks identified by flags.

**Flags**

**Comments on flags:** A commenter provided the following comments on flags:

**Who to flag.** Specifically stipulate that participants who are not Controlling Participants should not be flagged.

**HUD Response:** HUD has added greater detail on who should and should not be flagged.

**Tier 1** — The commenter stated that it takes exception with the notion of permanent flags outlined in the proposed Processing Guide. The commenter stated that HUD appears to advocate that individuals cannot rehabilitate and that one instance of past behavior is a permanent indicator of all future actions.

**HUD Response:** HUD believes that the violations resulting in Tier 1 flags are so serious that they warrant permanent consideration. However, HUD has added greater clarity regarding what factors to consider in evaluating this risk and has specified when it may be appropriate to approve a participant with a Tier 1 flag.

**Tier 2** — The commenter stated that in all instances where the reason includes the qualifier "repeated", HUD should clearly identify if the intent is concurrent repeated acts or a certain number within a given time frame.
HUD Response: HUD has clarified the definition of “Repeated” in the text immediately above that chart.

Tier 3 — Unacceptable Physical Condition — The commenter stated that this does not match the current policy in place at REAC. REAC should be prepared to issue a revised policy concurrent with the release of this proposed Processing Guide.

HUD Response: The Processing Guide is the revised policy.

Subject of flags must address HUD’s failure to abide by its own contractual, statutory or regulatory requirements. A commenter stated that no allowances are made for events of non-compliance that may be due to HUD failure to abide by its own contractual, statutory or regulatory requirements. The commenter stated that, for example, late payments of funds owed by HUD that result in late payment of loans should not be penalized and no flags should be placed. The commenter stated that similarly, flags for unsatisfactory management reviews should be removed because of HUD’s failure or inability to conduct or contract for management reviews within a 12-month period of the last unsatisfactory review due to conditions that are outside of the control of program participants.

HUD Response: The Processing Guide was updated to address situations outside of the controlling participant’s control. In addition, HUD has clarified situations where projects can be approved despite a Tier 3 flag.

Define “minor infractions” and clarify that flags may not be used to induce certain action. A commenter stated that in addition to the prohibition that flags shall not be placed for “minor infractions,” which should be defined, HUD should clarify that likewise flags may not be used by HUD punitively to induce a participant to undertake a desired action or to punish a participant for action(s) HUD deems undesirable.
**HUD Response:** The Processing Guide has been revised in accordance with this comment. The Processing Guide sets forth reasons that flags may be placed: punishment or inducement to take action are not among them. One example of a “minor infraction” would be a situation where a new participant to HUD accidentally took unauthorized distributions, but immediately repaid them upon realizing the mistake.

**Define “Repeated Offense.”** A commenter stated that HUD should define a “Repeated Offense” to be three or more occurrences within the most recent five (5) year period, otherwise participants’ distant past would cloud perceptions of recent performance, and recent performance arguably should be the most relevant criteria and of most interest to HUD.

**HUD Response:** HUD agrees that a time period should be specified here. The Processing Guide has been clarified to provide for a seven (7) year period.

**No flag should be permanent.** A commenter stated that HUD should recognize that in many instances, a default occurs due to circumstances beyond the Participant’s reasonable control. The commenter recommended that HUD expressly indicate that the imposition of any flag shall be based on the particular facts and circumstances relating to the subject project. The commenter stated, that for example, if a participant is able to demonstrate that a loan default occurred due to a downturn in the local market, and the participant undertook reasonable efforts to cure the default (e.g., seeking to increase occupancy and/or revenues, seeking to reduce expenses), the participant should not have a “permanent flag” or, for that matter, any Tier 2 or Tier 3 flag on its record. This commenter and two other commenters recommended that no flag should be “permanent.”
HUD Response: The Processing Guide has been updated to reflect situations outside of a participant’s control. HUD does want to maintain permanent flags on the Tier 1 events due to their severity but has clarified when approval is appropriate, even if a Tier 1 flag exists.

Expressly state that passive investors are not subject to 2530 flags. Two commenters stated that HUD should revise the Processing Guide to expressly indicate that investors/syndicators/passive investors who do not exercise day-to-day control should not be subject to 2530 flags based on the actions/inactions of other persons/entities.

HUD Response: The Processing Guide addresses this in exclusions three and four.

Enter Tier 1, 2, or 3 flags for only Controlling Participants that participate during the violation. Three commenters stated that HUD should indicate that flags will only be entered against Controlling Participants that exercise day-to-day control over the operations of the Covered Project during the period the default actually occurred and a proposed incoming participant will not be flagged based on a violation occurring prior to the participant’s participation in the Covered Project.

HUD Response: The Processing Guide has been updated to reflect this.

Eliminate automatic flag triggers. A commenter urged HUD to eliminate “automatic” flag triggers, such as those generated by a change in ownership that do not necessarily represent additional risk to HUD but inevitably create additional reporting burdens for owners.

Another commenter urged HUD to refrain from placing automatic system flags. The commenter stated that APPS generates unnecessary automatic flags, which the participant must then go to the trouble of having them removed. The commenter stated, for example, one member reported multiple problems with automatic flags after properties are refinanced and sold to a newly created entity. The commenter stated that according to one of its members, the participant
cannot file financial statements into HUD’s Financial Assessment Subsystem – Multifamily Housing (FASSUB) until an audit template is ready in the Integrated Real Estate Management System (iREMS).

**HUD Response:** The only automatic flag is for Failure to File Financial Statements. HUD staff has readily available access to determine whether the financial statements have been filed and can easily remove flags once the financial statements are filed in HUD’s system. Refinement of this process is outside the scope of the regulation. HUD will continue to review this system and determine whether additional changes would be feasible. HUD will explore alternative solutions to make sure AFS filings after ownership transfers happen in a timely manner, such as staff training and adding the item to the checklist of standard work on ownership transfers.

Expressly indicate that the imposition of any flag shall be based on the particular facts and circumstances relating to the subject project. Two commenters stated that HUD should recognize that in many instances, a default occurs due to circumstances beyond the participant’s reasonable control. The commenters recommended that HUD expressly indicate that the imposition of any flag shall be based on the particular facts and circumstances relating to the subject project, stating, for example, if a participant is able to demonstrate that a loan default occurred due to a downturn in the local market, or the occurrence of an uninsured or underinsured natural disaster (such as an earthquake) and the participant undertook reasonable efforts to cure the default (e.g., seeking to increase occupancy and/or revenues, seeking to reduce expenses), the Participant should not have a flag on its record.

**HUD Response:** The Processing Guide has been updated to address this.
Reconcile duration of Tier 1 flags with duration of 10-year look-back. A commenter urged HUD to reconcile the duration of these flags with the 10-year look back period. In other words, Tier I flags should not remain on a participant’s record longer than 10 years.

**HUD Response:** While a participant is not required to report participation beyond the 10-year period, HUD believes that Tier 1 violations are severe enough to warrant a permanent record. In response to concerns raised in the comments, HUD has clarified the factors that should be considered when evaluating Tier 1 flags and has explicitly provided for circumstances under which participants with Tier 1 flags may be approved.

Reduce duration of Tier 2 flags from 5 years to 3 years. A commenter urged HUD to reduce the timeframe for retaining Tier 2 flags from 5 years to 3 years, provided the cause of the flag is corrected. The commenter stated that it believes 3 years provides sufficient time for HUD to determine whether the problem that led to the flag has been addressed.

Two commenters similarly urged HUD to modify the inflexibility of the duration of Tier 2 Flags. The commenters stated that resolution of flags is an important tool for HUD when negotiating settlement of disputes between owners and HUD, which will be lost if HUD cannot settle a matter and lift a Tier 2 Flag. The commenters stated, for example, assertion of audit findings by the Office of Inspector General, or by FASS may be contested by the Owner, but will nevertheless result in a Tier 2 Flag. The commenters stated that in order to resolve the audit findings, without resorting to litigation by HUD or the Owner, HUD should be free to resolve the Flag issue and remove the flag, without waiting out the five-year period.

**HUD Response:** HUD does not believe that three years is a sufficient amount of time to indicate a complete resolution of the risk. The Processing Guide has been revised to provide explicitly considerations to evaluate whether approval is warranted despite the presence of flags.
Tier 3 flags should be removed when the underlying reason for the flag is cured or 3 years after placement, whichever is sooner. A commenter stated that a number of Tier 3 flags will be considered repeat violations and may occur over a period of years. The commenter strongly urged HUD to develop safeguards for innocent owners and third party management agents who take over troubled properties. The commenter stated that, as HUD is aware, it will take time to put the necessary resources, personnel and procedures in place to turn around such properties. The commenter stated that it serves the public interest to have the most capable owners and agents rise to meet these challenges, but in the absence of a safe harbor which protects the new owners and managers from being flagged as a result of their predecessors’ decisions, high-performing ownership and management teams may be deterred from assuming responsibility associated with these projects. The commenter requested that HUD add written safe-harbor policies to protect innocent owners and managers from flags as they are turning around troubled properties. Another commenter similarly stated that Tier 3 flags should be removed when the unauthorized distribution is repaid “or is otherwise resolved”, because not all alleged unauthorized distributions are indeed unauthorized payments and may be resolved via means other than repayment.

HUD Response: The Processing Guide has been revised in accordance with this comment.

An appropriate time frame for a Tier 3 flag is one year. A commenter stated that the maximum time frame that Tier 3 flags should remain active is one year.

HUD Response: HUD disagrees. Flags are a reflection of non-compliance with HUD obligations, which is considered serious. The Processing Guide has been updated to provide
additional guidance for situations in which Controlling Participants can be approved despite a flag.

**Disconnect between REAC policy and unacceptable physical condition for Tier 3.** Two commenters stated that the unacceptable physical condition for Tier 3 does not match the current policy in place at REAC. The commenters asked whether REAC would issue a revised policy concurrent with the release of this Processing Guide. Another commenter stated that placement of flags for unacceptable physical conditions departs from current policy guidance, which requires consecutive below-60 scores before flags are placed. The commenter stated that a look back period of 5 years is unduly harsh for conditions posing a temporary risk to the department, and that a two- or three-year period would be more appropriate.

**HUD Response:** HUD takes REAC scores very seriously. The Processing Guide is an update to HUD’s policy and future notices; guidance issued by REAC will follow. The Processing Guide has been revised to clarify that participants will be approved despite having initially scored between 30-59 at a property, on the condition they perform a 100 percent unit inspection and complete necessary repairs within 60 days. A subsequent score below 60 within the 5-year time period will merit a flag.

**Incorporate a routine process to release flags without the participant’s request.** A commenter stated that HUD has incorporated guidance on its protocol for placing flags on participants which is helpful, particularly with regard to the tiers and weighting of certain flags, but the commenter asked HUD to be cautious in adding many automatic flags on participants. The commenter also asked whether HUD could incorporate a routine process to release flags without the participant's request. The commenter stated that this would be particularly helpful at the Tier 3 level when events known to HUD occur and trigger a flag through no fault of the
borrower. The commenter stated, for example, when Section 8 PBRA payments have not been distributed as scheduled, it could potentially cause a borrower to miss mortgage payments.

**HUD Response:** While this is beyond the scope of the regulations or Processing Guide, HUD is working on a process to standardize the removal of flags, which process should not be predicated on a request from the Participant.

**Inability to see “critical findings” and the need for easier method for program participant to accept certain findings.** A commenter stated that, in the APPS system, the owner/agent can see flags, but not “critical findings.” The commenter recommended that HUD develop an easier method than program participants having to “Accept” every management and occupancy review (MOR) and REAC finding, specifically having to “Accept” them on each entity. It is repetitive and unnecessary to “Accept” each finding on the ownership entity, the management entity, and each corporate officer’s entity. The commenter reiterated that it seems like there should be an easier method.

**HUD Response:** The commenter is confused; “critical findings” in the APPS system mean that there are flags on the record. The system processing of “accepting” reviews is outside the scope of this final rule, but HUD will look into the feasibility of updating the system to simplify the submission process.

**Chart on Approval of Participants with Flags**

Include in the chart links to relevant HUD staff. A commenter stated that while HUD’s chart is helpful, further clarification is needed. The commenter stated that the chart uses HUD staff titles that correspond with the ongoing Multifamily for Tomorrow Transformation Initiative, but participants may or may not yet be familiar with this structure. The commenter recommended including links to contact information for each official noted, stating, for example,
that HUD should include links and/or additional charts that list each branch chief, production division director and asset management division director within the new multifamily field office structure.

**HUD Response:** HUD agrees that additional information would be helpful and will provide such information on its website. The Processing Guide has been revised to reflect this additional resource.

**Rejection of Participants**

**Support for notification requirement.** A commenter stated that it strongly supported HUD’s proposal that HUD staff will notify the participant, or lender, if applicable, in advance of the recommended decision. The commenter stated that this notification will allow an opportunity for the participant to provide additional arguments for HUD’s consideration to preserve processing efficiency and cut down on requests for reconsideration. Two other commenters recommended that the Processing Guide also indicate that HUD will identify in writing to the proposed participant, in reasonable detail: (a) the anticipated basis for the denial, and (b) what information, if any, is needed to resolve HUD’s concerns. Another commenter stated that HUD should specify how much advance notice participants and lenders shall receive before a recommendation for rejection is proposed. The commenter stated that meaningful notice periods must be provided for due process purposes.

**HUD Response:** The Processing Guide has been revised in accordance with this comment. HUD believes that it is quite strongly in compliance with any due process considerations.

**Reconsideration of a Rejection**
Stipulate that the HUD individual making the appeal decision is not the same HUD individual who initially rejected the Participant’s appeal. A commenter expressed support that participants have the right to request reconsideration of HUD’s decisions to reject participants. The commenter requested that the Processing Guide stipulate the individual (i.e., HUD staff) making the decision on the appeal must not be the same person who initially rejected the participant. The commenter stated that the contact information for the Director or Delegate should be provided.

HUD Response: The Processing Guide has been revised in accordance with this comment.

VI. Findings and Certifications

Regulatory Review – Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined not to be a “significant regulatory action” as defined in section 3(f) of Executive Order 12866, nor was it found to be an economically significant regulatory
action, as provided under section 3(f)(1) of the Executive Order.

This rule responds to the direction of Executive Order 13563 to reduce burden.

As discussed in this preamble, HUD stakeholders have long complained about the previous participation process, and HUD has offered measures over the past to improve this process. However, these measures were not successful in providing a significant overhaul of the previous participation review process sufficient to remedy the common complaints. HUD believes that this final rule and accompanying Processing Guide strikes the appropriate balance between allowing HUD to effectively assess the suitability of applicants to participate in HUD’s multifamily housing and healthcare programs, while interjecting sufficient flexibility into the process in order to remove a one-size-fits-all review process. Such a balance best allows HUD to make determinations of suitability in order to accurately access risk.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities.

As has been discussed in this preamble, this rule streamlines HUD’s previous participation review process, responding to longstanding complaints by HUD participants that this is an overly burdensome process. The changes made by this final rule allow HUD to better consider the differences of any applicant and tailor requested information to that applicant, including whether the applicant is a small entity. For these reasons, HUD has determined that this rule would not have a significant economic impact on a
substantial number of small entities.

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern, or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Federalism Impact

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempts state law within the meaning of the Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Paperwork Reduction Act
The information collection requirements contained in this rule have been submitted to and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned the following OMB control numbers – 2502-0118 and 2502-0605

List of Subjects in 24 CFR Part 200
Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Lead poisoning, Loan programs-housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

Accordingly, for the reasons stated in the preamble above, and in accordance with HUD’s authority under 42 U.S.C. 3535(d), HUD amends 24 CFR part 200 as follows

PART 200—INTRODUCTION TO FHA PROGRAMS

1. The authority citation for 24 CFR part 200 continues to read as follows:


2. Revise subpart H to read as follows:

Subpart H—Participation and Compliance Requirements
Sec.
200.210 Policy.
200.212 Definitions.
200.214 Covered Projects
200.216 Controlling Participants.
200.218 Triggering Events.
200.220 Previous Participation review.
§ 200.210 Policy.

(a) Regulations: It is HUD’s policy that, in accordance with the intent of the National Housing Act (12 U.S.C. 1701 et seq.), and with other applicable federal statutes, participants in HUD’s housing and healthcare programs be responsible individuals and organizations who will honor their legal, financial and contractual obligations. Accordingly, as provided in this subpart, HUD will review the prior participation of Controlling Participants, as defined in § 200.212 and § 200.216, as a prerequisite to participation in HUD’s multifamily housing and healthcare programs listed in § 200.214.

(b) Processing Guide. These regulations are supplemented by the Processing Guide for Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs’ Participants (Guide), which is found on HUD’s website at www.hud.gov. This Guide elaborates on the basic procedures involved in the previous participation review process. For any significant changes made to this Guide, HUD will provide advance notice and the opportunity to comment, providing a comment period of no less than 30 days.

§ 200.212 Definitions.

As used in this subpart:

Covered Project means a project in which the participation of a Controlling Participant is conditioned on Previous Participation review under this subpart, as further described in § 200.214.

Commissioner means the Assistant Secretary for Housing-Federal Housing Commissioner, or the Commissioner’s delegates and designees.
**Controlling Participant** means an individual or entity serving in a capacity for a Covered Project that makes the individual or entity subject to Previous Participation review under this subpart, as further described in § 200.216.

**Previous Participation** means a Controlling Participant’s previous participation in Covered Projects, and, if applicable, other federal, state and local housing programs, in accordance with the definition of Risk.

**Risk.** In order to determine whether a Controlling Participant’s participation in a project would constitute an unacceptable risk, the Commissioner must determine whether the Controlling Participant could be expected to participate in the Covered Project in a manner consistent with furthering the Department’s purposes. The Commissioner’s review of Previous Participation shall consider compliance with applicable statutes, regulations and program requirements. The Commissioner must consider the Controlling Participant’s previous financial and operational performance in Covered Projects that may indicate a financial or operating risk in approving the Controlling Participant’s participation in the subject Triggering Event. At the Commissioner’s discretion, as necessary to determine financial or operating risk and to the extent the Commissioner determines such information to be reliably available, the Commissioner may consider the Controlling Participant’s participation and performance in any federal, state or local government program. The Commissioner may exclude any Previous Participation the Commissioner determines to be of limited value, unreliable or irrelevant in evaluating risk and/or any Previous Participation in which the Controlling Participant did not exercise, actually or constructively, control. Any information collection in connection with review of Previous Participation must follow all applicable requirements for information collection.
Triggerring Event means an occurrence in connection with a Covered Project that subjects a Controlling Participant to Previous Participation review under this subpart, as further described in § 200.218.

§ 200.214 Covered Projects.

The following types of multifamily and healthcare projects are Covered Projects subject to the requirements of this subpart, provided however that single family projects are excluded from the definition of Covered Projects:

(a) FHA insured projects. A project financed or which is proposed to be financed with a mortgage insured under the National Housing Act, a project subject to a mortgage held by the Secretary under the National Housing Act, or a project acquired by the Secretary under the National Housing Act.

(b) Housing for the elderly or persons with disabilities. Housing for the elderly financed or to be financed with direct loans or capital advances under section 202 of the Housing Act of 1959, as amended; and housing for persons with disabilities under section 811 of the Cranston-Gonzalez National Affordable Housing Act.

(c) Risk Share projects. A project that is insured under section 542(b) or 542(c) of the Housing and Community Development Act of 1992(12 U.S.C. 17107 note).

(d) Projects subject to continuing HUD requirements. A project that is subject to a use agreement or any other affordability restrictions pursuant to a program administered by HUD’s Office of Housing.

(e) Subsidized Projects. Any project in which 20 percent or more of the units now receive or will receive a subsidy in the form of:
(1) Interest reduction payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1);
(2) Rental Assistance Payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1);
(3) Rent Supplement payments under section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); or
(4) Project-based housing assistance payment contracts under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) administered by HUD’s Office of Housing.

§ 200.216 Controlling Participant.

(a) Definition. Controlling Participants are those entities and individuals (i) serving as a Specified Capacity with respect to a Covered Project and (ii) the entities and individuals in control of the Specified Capacities. Each of the following capacities for a Covered Project is a “Specified Capacity:”

(1) An owner of a Covered Project;
(2) A borrower of a loan financing a Covered Project;
(3) A management agent;
(4) An operator (in connection with healthcare projects insured under the following section of the National Housing Act: section 232 (12 U.S.C. 1715w) and section 242 (12 U.S.C. 1715z-7));
(5) A master tenant (in connection with any multifamily housing project insured under the National Housing Act (12 U.S.C. 1701 et seq.) and in connection with certain healthcare projects insured under sections 232 or section 242 of the National Housing Act);
(6) A general contractor; and

(7) In connection with a hospital project insured under section 242 of the National Housing Act (12 U.S.C. 1715z-7), a construction manager;

(b) **Control of entities.** To the extent any Specified Capacity listed in paragraph (a) of this section is an entity, any individual(s) or entities determined by HUD to control the financial or operational decisions of such Specified Capacity shall also be considered Controlling Participants. Without limiting the foregoing and unless otherwise determined by HUD, the following individuals or entities shall be considered Controlling Participants:

(1) individuals or entities with the ability to direct the day-to-day operations of a Specified Capacity or a Covered Project;

(2) individuals or entities that own at least 25 percent of an entity that is a Specified Capacity;

(3) individuals or entities with the ability to direct the entity to enter into agreements relating to the Triggering Event that necessitates review of Previous Participation, including without limitation individuals or entities that own at least 25 percent of entities determined to control an entity that is a Specified Capacity; and

(4) in connection with a hospital project insured under section 242 of the National Housing Act (12 U.S.C. 1715z-7), members of a hospital Board of Directors (or similar body) and executive management (such as the Chief Executive Officer and Chief Financial Officer) that HUD determines to have control over the finances or operation of a Covered Project.

(c) **Exclusions from definition.** The following individuals or entities are not Controlling Participants for purposes of this subpart:
(1) Passive investors and investor entities with limited liability in Covered Projects benefiting from tax credits, including but not limited to low-income housing tax credits pursuant to section 42 of title 26 of the United States Code, whether such investors are syndicators, direct investors or investors in such syndicators and/or investors;

(2) Individuals or entities that do not exercise financial or operational control over the Covered Project, a Specified Capacity or another Controlling Participant;

(3) Unless determined by HUD to exercise day-to-day control over the operations or finances of a Specified Capacity or Covered Project, board members of a non-profit corporation who are not officers or otherwise part of the executive management teams of the non-profit;

(4) Mortgagees acting in their capacity as such; and

(5) Public housing agencies (PHAs).

§ 200.218 Triggering Events.

(a) Each of the following is a Triggering Event that may subject a Controlling Participant to Previous Participation review under § 200.220:

(1) An application for FHA mortgage insurance;

(2) An application for funds provided by HUD pursuant to a program administered by HUD’s Office of Housing, such as but not limited to supplemental loans;

(3) A request to change any Controlling Participant for which HUD consent is required with respect to a Covered Project; or

(4) A request for consent to an assignment of a housing assistance payment contract under section 8 of the United States Housing Act of 1937 or of another contract pursuant to which a Controlling Participant will receive funds in connection with a Covered Project.
(b) The Commissioner may also require a review of a potential owner’s Previous Participation in connection with a loan sale or other form of property disposition, including foreclosure sale. Notwithstanding anything contained in these regulations to the contrary, any such review shall be in accordance with the terms, conditions, provisions and other requirements set forth by the Commissioner in connection with such loan sale or property disposition which may differ, in whole or in part, from these regulations.

**§ 200.220 Previous Participation review.**

(a) Scope of review. (1) Upon the occurrence of a Triggering Event, as provided in § 200.218, the Commissioner shall review the Previous Participation of the relevant Controlling Participants in considering whether to approve the participation of the Controlling Participants in connection with the Triggering Event in accordance with the definition of Risk above.

(2) The Commissioner will not review Previous Participation for interests acquired by inheritance or by court decree.

(3) In connection with the submittal of an application for any Triggering Event, applicants shall identify the Controlling Participants and, to the extent requested by HUD, make available to HUD the Controlling Participant’s Previous Participation in Covered Projects.

(b) Results of review. (1) Based upon the review under paragraph (a) of this section, the Commissioner will approve, disapprove, limit, or otherwise condition the continued participation of the Controlling Participant in the Triggering Event, in accordance with paragraphs (c) and (d) of this section.

(2) The Commissioner shall provide notice of the determination to the Controlling Participant including the reasons for disapproval or limitation. The Commissioner may provide
notice of the determination to other parties as well, such the FHA-approved lender in the transaction.

(c) **Basis for disapproval.** (1) The Commissioner must disapprove a Controlling Participant if the Commissioner determines that the Controlling Participant is suspended, debarred or subject to other restriction pursuant to 2 CFR part 180 or 2 CFR part 2424;

(2) The Commissioner may disapprove a Controlling Participant if the Commissioner determines:

(i) The Controlling Participant is materially restricted, including voluntarily, from doing business with HUD (other than the restrictions listed in § 200.220(c)(1) above) or any other governmental department or agency if the Commissioner determines that such restriction demonstrates a significant risk to proceeding with the Triggering Event; or

(ii) The Controlling Participant’s record of Previous Participation reveals significant risk to proceeding with the Triggering Event.

(d) **Alternatives to disapproval.** In lieu of disapproval, the Commissioner may:

(1) Condition or limit the Controlling Participant’s participation;

(2) Temporarily withhold issuing a determination in order to gather more necessary information; or

(3) Require the Controlling Participant to remedy or mitigate outstanding violations of HUD requirements to the Commissioner’s satisfaction in order to participate in the Triggering Event.

§ 200.222 Request for reconsideration.
(a) Where participation in a Triggering Event has been disapproved, otherwise limited or conditioned because of Previous Participation review, the Controlling Participant may request reconsideration of such determination by a review committee or reviewing officer as established by the Commissioner. Reconsideration decisions shall not be rendered by the same individual who rendered the initial review.

(b) The Controlling Participant shall submit requests for such reconsideration in writing within 30 days of receipt of the Commissioner’s notice of the determination under § 200.220.

(c) The review committee or reviewing officer shall schedule a review of such requests for reconsideration. The Controlling Participant shall be provided written notification of such a review; such notice shall provide at least 7 business days advanced notice of the reconsideration. The Controlling Participant shall be provided the opportunity to submit such supporting materials as the Controlling Participant desires or as the review committee or reviewing officer requests.
(d) Before making its decision, the review committee or reviewing officer will analyze the reasons for the decision(s) for which reconsideration is being requested, as well as the documents and arguments presented by the Controlling Participant. The review committee or reviewing officer may affirm, modify, or reverse the initial decision. Upon making its decision, the review committee or reviewing officer will provide written notice of its determination to the Controlling Participant setting forth the reasons for the determination(s).

Date: October 4, 2016

/s/
Edward L. Golding,
Principal Deputy Assistant Secretary for Housing

Approved: October 5, 2016

/s/
Nani A. Coloretti, Deputy Secretary

[FR-5850-F-04]
Note: The following appendix will not appear in the CFR.

Appendix

Processing Guide for Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs’ Participants

Purpose

This Processing Guide (Guide) supplements HUD’s Previous Participation Review regulations in 24 CFR part 200, subpart H. The Guide defines Controlling Participants for previous participation review, new flag approval, and rejection guidance and flag protocols in federal programs of certain participants seeking to take part in multifamily housing and healthcare programs administered by HUD’s Office of Housing. The Guide aids in clarifying and simplifying the process by which HUD reviews previous participation of participants that have decision making authority over their projects as one component of HUD’s responsibility to assess financial and operational risk to projects in these programs.

Pursuant to 24 CFR part 200, subpart H, HUD will not make substantial changes to this Guide without providing a 30-day notice and an opportunity to comment to the public. However, HUD notes that many titles of HUD officials and other contact information are noted in this Guide for many purposes. By way of illustration and not limitation, HUD may update any reference to titles, email addresses, websites or other information regarding HUD officials in this Guide (whether such update is necessary because of changes to titles, responsibilities, personnel, reorganization or for any other reason) without providing notice and an opportunity for comment. HUD may make other non-substantial changes made to this Guide without notice and comment.

This Guide updates and clarifies previous procedures and supersedes outstanding policy and guidance concerning previous participation review found in previous Housing notices and in the following: Multifamily Accelerated Processing (MAP) Guide Handbook 4430.G, Multifamily Asset Management and Project Servicing Handbook 4350.1, Healthcare Mortgage Insurance Program Handbook 4232.1, and Mortgage Insurance for Hospitals 4615.1. HUD will incorporate elements of this Guide into these handbooks. In addition, the Guide supersedes the Previous Participation (HUD-2530) Handbook 4065.1.

Applicability of the Previous Participation Review:

This Guide applies to Covered Projects administered by the Office of Multifamily Housing and the Office of Healthcare Programs, as listed in HUD’s regulations in 24 CFR Part 200 subpart H:

a. FHA-Insured Projects. A project financed or proposed to be financed with a mortgage insured under the National Housing Act, a project subject to a mortgage held by the Secretary under the National Housing Act, or a project acquired by the Secretary under the National Housing Act; these may include projects that are insured under the following sections of the National Housing Act: sections 213, 220, 221(d)(3), 221(d)(4), 223(a)(7),
223(d), 223(e), 207/223(f), 232/223(f), 242/223(f), 231, 232, 232(i), 236, 241(a), 241(f) or 242;

b. **Housing for the elderly or persons with disabilities.** Non-insured projects that include Section 202 Direct Loans or Section 202 or Section 811 Capital Advances;

c. **Risk-share projects.** Projects that are insured under sections 542(b) or 542(c) of the Housing and Community Development Act of 1992;

d. **Projects subject to continuing HUD requirements:** Projects subject to a use agreement or any other affordability restrictions pursuant to a program administered by HUD’s Office of Housing; and

e. **Subsidized Projects.** Projects in which 20 percent or more of the units now receive or will receive a subsidy in the form of:

   - Interest reduction payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1);

   - Rental Assistance Payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1);

   - Rent Supplement payments under section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); or

   - Project-based rental assistance pursuant to housing assistance payment contracts under Section 8 of the Housing Act of 1937. This includes projects converting to PBRA assistance pursuant to the Rental Assistance Demonstration (RAD). This does not include project-based assistance provided under the Housing Choice Voucher program administered by HUD’s Office of Public and Indian Housing or project-based assistance provided under the McKinney Act, administered by HUD’s Office of Community Planning and Development.

For the Sections 223(a)(7), 223(f), 241(a), 232(i) and 223(d) programs Controlling Participants are only subject to Previous Participation review if they were not previously approved to participate in that project (provided they have not changed roles in the project without prior approval).

**Change in Controlling Participants:**

To the extent the program requirements (including without limitation any contractual documents) governing a Covered Project require HUD consent for a change in a Specified Capacity or other Controlling Participant, consent to such change is subject to Previous Participation review.
Waiver Authority

Program offices may waive any portion of this Guide that is not a regulatory requirement, subject to an appropriate justification, as required by HUD for all waivers. HUD expects waivers to be rare and in response to unique circumstances meeting the intent of HUD’s Previous Participation review regulations.

Program Requirements

The sections below outline who is subject to a Previous Participation review; the submission requirements and review procedures; considerations for approval and rejection; and the participant flagging process.

A. Controlling Participants for Previous Participation Review Purposes:

Submittal of Controlling Participants. Previous Participation review is required for Controlling Participants. In connection with each Triggering Event, Lenders in insured projects and entities serving in the Specified Capacities listed below in non-insured projects shall provide to HUD a list of all Controlling Participants. As stated throughout this Guide, HUD makes the ultimate determination of who is deemed to be a Controlling Participant. In reviewing the information submitted or if circumstances change prior to final HUD approval of a Triggering Event, HUD may determine that other individuals or entities are Controlling Participants necessary to review. However, HUD providing final approval of a Triggering Event confirms that all Controlling Participants with respect to that Triggering Event have been properly identified to HUD’s satisfaction. Unless HUD discovers that individuals or entities have not been properly disclosed in accordance with the organizational chart requirements listed in this Processing Guide, HUD shall not change a determination of whether or not an individual or entity is a Controlling Participant after providing final approval for a Triggering Event.

Controlling Participants are those entities and individuals (i) serving as a Specified Capacity with respect to a Covered Project and (ii) the entities and individuals in control of the Specified Capacities. At least one natural person must be identified as a Controlling Participant for each Specified Capacity. The chart below shows the Specified Capacities for the listed programs.

<table>
<thead>
<tr>
<th>Specified Capacities</th>
<th>Multifamily Housing</th>
<th>Office of Residential Care Facilities</th>
<th>Office of Hospital Facilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Borrower or Owner</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Management Agent</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Operator</td>
<td></td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>General Contractor</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
Controlling Participants. The entities serving as a Specified Capacity are Controlling Participants of the Covered Project for the programs listed. In addition, the individuals and entities determined by HUD to exercise financial or operational control over these entities are also Controlling Participants. Controlling Participants require Previous Participation review and must complete Previous Participation review submissions. Any individual or entity who exercises financial or operational control of a Specified Capacity is considered to be a Controlling Participant and required to complete a Previous Participation review submission, unless excluded below. Controlling Participants include both entities and natural persons. **If a Controlling Participant is an entity, the submission must include the people who exercise the day-to-day financial or operational control for that entity.** Notwithstanding the foregoing or anything else in this Guide, if HUD determines that an individual or entity does not actually exercise financial or operational control of a Covered Project or Specified Capacity, such individual or entity shall not be considered a Controlling Participant.

List of Controlling Participants: For purposes of Previous Participation review, unless excluded below or otherwise determined by HUD not to be a Controlling Participant, the following shall be considered to exercise financial or operational control over the listed entities and shall be considered Controlling Participants:

1. Entities and individuals owning, directly or indirectly, 25% or more of a Specified Capacity.

2. The controlling owners (entities and/or individuals) of the entity that controls the Specified Capacity, these include individuals or entities with the ability to direct the Specified Capacity to enter into agreements relating to the Triggering Event, including without limitation individuals or entities that own at least 25 percent of entities determined to control an entity that is a Specified Capacity.

3. Any officers and other equivalent executive management (including Executive Director and other similar capacities) of the Specified Capacity or Controlling Participant who are directly responsible to the board of directors (or equivalent oversight body) and who have the ability to prevent or resolve violations or circumstances giving rise to flags related to the Covered Project.

4. Managers or managing members of Limited Liability Companies (LLCs).

5. General partners of limited partnerships, including “administrative” general partners or other general partners if they exercise day-to-day control over the entity.

6. Partners in a general partnership.
7. Executive Director (or equivalent position) of a non-profit corporation.

8. With respect to non-profit Borrowers under the Section 242 program, the executive management (Chief Executive Officer, Chief Financial Officer, and Chief Operating Officer, or equivalents) of the Borrower and the members of the Board of Directors that HUD determines have control over the finances or operation of the hospital (typically the President, Vice President, Treasurer, and Chairman of the Finance Committee, or equivalents).

9. Members of a for-profit corporation’s Board of Directors who are also officers of the corporation.

10. Controlling stockholders of a corporation. A controlling stockholder is the holder of sufficient voting stock or shares in a corporation to prevail in any stockholders' motion. In most cases the controlling stockholder will be subject to the previous participation filing requirements of those owning at least 25% of a Specified Capacity or Controlling Participant. However, this listing is meant to trigger filing requirements for shareholders who may technically evade the 25% ownership filing requirement but exercise financial or operational control over the Specified Capacity.

11. Trustees of a trust.

12. For real estate investment trusts (REITs), the REIT itself, the chief executive officer (or equivalent position) and all company officers (except those officers determined by HUD not to exercise day-to-day control over the REIT, the Specified Capacity or the Covered Project) must file.

13. For insured projects, if applicable, the person (people) and/or entity (entities) to be listed on the Regulatory Agreement Non-Recourse Debt section.

14. Any other person or entity determined by HUD to exercise day-to-day, financial or operational control over a Specified Capacity. While it is unlikely, this may include any officers, directors or members of an executive management team who would otherwise not be required to make a submission (even of shell entities or other entities that may fall into the exclusions below), if such person is exercising control over the Specified Capacity. This listing is meant to capture those rare individuals who structure their participation so as to technically circumvent HUD requirements but who de facto exercise control over the Specified Capacity. HUD believes that the individuals and entities described in the list above accurately account for the Controlling Participants in the vast majority of cases and that invoking an additional submission through this catch-all listing should be rare.

If the applicant or Mortgagee has any reason to believe that any Controlling Participant is not of sound mind or body or is otherwise incapacitated, such information must be disclosed to HUD to review and determine whether another individual is acting as a Controlling Participant.
List of Exclusions: Except that any Specified Capacity is a Controlling Participant, and unless otherwise determined in writing by HUD in a specific transaction to exercise day-to-day control of a Covered Project or Specified Capacity, Controlling Participants do not include the following:

1. **Wholly-owned entities.** Any entity that is 100% owned or controlled by one individual or entity is excluded. Such entities are not exercising control; the individual or entity that wholly owns them is exercising control. An organizational chart may include one or more tiers of wholly-owned entities. All wholly-owned entities in all tiers are excluded.

2. **Shell entities.** Entities that do not take actions themselves but only serve as legal vehicles through which the partners, members or owners of such entity take actions are excluded. These entities are not exercising control; the partners, members or owners of such entities are controlling. The “middle tiers” of an organizational chart are often shell entities.

   For example, if a Borrower (“Borrower LLC”) has a managing member (“Managing Member”) that is a joint venture partnership of two entities (“Partner 1” and “Partner 2”) and day-to-day control of Managing Member is exercised by Partner 1, then Partner 1 is the Controlling Participant of the Borrower. In this example, neither Managing Member nor Partner 2 are actually exercising control and are excluded. If Partner 1 is itself a shell LLC, with three members, then the individual(s) or entity(ies) that exercise day-to-day control of Partner 1 would be the Controlling Participant(s). If day-to-day control of Partner 1 is exercised by Member A, then Partner 1 would be excluded and Member A would be the Controlling Participant. If the organizational chart reflects this arrangement and unless additional information or special circumstances warrant further inquiry, HUD will accept Member A’s certification that it is the Controlling Participant and will not require an examination of the various entities’ organizational documents to confirm that Managing Member and Partner 1 are excluded shell entities.

3. **Tax credit investors.** Syndicator and direct investor entities in Low-Income Housing Tax Credits, Historic Tax Credits, New Markets Tax Credits or other tax credits (if HUD determines such credits are substantially similar to the listed tax credits) are excluded unless such entities exercise day-to-day control or seek other involvement that would trigger the need for previous participation review. HUD may still require a so-called “LLCI certification,” an “Identification and Certification of Limited Liability Investor Entities,” “Passive Investor Certification” or any other such certification. Acceptable language for such certification is attached as an addendum to this Guide.

4. **Passive participants.** If an entity’s organizational documents specify which members, partners or owners are authorized to exercise day-to-day control of that entity, then any other members, partners or owners who are not authorized to exercise day-to-day control of an entity are excluded.

5. **Minor officers.** If HUD determines that an officer of a corporation or other entity does not have significant involvement in a Covered Project, such officers are excluded.
Typically, “significant involvement” means an ability to prevent or resolve violations or circumstances giving rise to flags related to the Covered Project.

In the event HUD requests an officer who has not provided a Previous Participation Review submission to provide a submission, HUD shall accept certification from the officer that (s)he has limited involvement in the Covered Project, does not exercise operational or financial control over the Covered Project and does not have the ability to prevent or resolve violations or circumstances giving rise to flags related to the Covered Project (as listed below in Section G, “Flags”).

6. Members of a Board of Directors. Members of a non-profit or for-profit corporation’s board of directors who do not exercise control over the corporation in another capacity (for example, as Executive Director or other manager or officer of the non-profit corporation) are excluded. This exclusion does not apply to the members of boards of directors of hospitals, the rule for which is specified in the Regulation and captured in #8 within the Listing of Controlling Participants above.

7. Less than 25% ownership interest. Unless exercising control through another capacity, members, partners, stakeholders and owners of entities with less than a 25% interest in an entity are excluded. This exclusion does not apply to any such member, partner, stakeholder or other owner of an entity (“Proposed Excluded Member”) who would have an interest greater than 25% if the combined percentages of all other members, partners, stakeholders or other owners (including beneficial interests in trusts) with whom the Proposed Excluded Member has an “Identity of Interest,” or a conflict of interest because of familial relation or common financial interest, exceeds 25%. Whether an Identity of Interest or conflict of interest exists is determined by HUD. If the program requirements of the applicable program in which the Covered Project is participating speak to Identify of Interest or conflict of interest, those program requirements control.

8. Nursing Homes and Assisted Living Facilities. With respect to projects under the Section 232 program, the nursing home administrator and equivalent positions in assisted living facilities are excluded.

9. Publicly Held Companies. For publicly held companies, the chief executive officer (or equivalent position), the controlling shareholder (if any), and other individual(s), if any, identified as having day-to-day control over a Specified Capacity or Covered Project, including any relevant project manager(s), must file but the publicly held company shall otherwise be treated as an individual without need for other individual shareholders to file certifications in their individual capacity or identify their social security or tax identification numbers.

10. Mortgagees. Mortgagees acting in their capacity as such are excluded.
11. **Public housing agencies.** Public housing agencies, whether in their capacity as owning and operating public housing or otherwise, are excluded. Public housing agencies are subject to different oversight and review by HUD’s Office of Public and Indian Housing.

12. **No Exercise of Financial or Operational Control.** Any individual or entity determined by HUD not to exercise financial or operational control of a Covered Project or Specified Capacity shall not be considered a Controlling Participant.

**B. Organization Charts:**

An organization chart must be submitted for each Specified Capacity and for any entity within the organization chart if requested by HUD. Organization charts are visual representations of the ownership structure of an organization. Organizational charts are already required for the underwriting purposes as a part of the application or request for most Triggering Events. This Guide clarifies that such organizational charts shall also be submitted with the Previous Participation review submissions for the purposes of Previous Participation review. If the application or request for a Triggering Event does not otherwise require submission of organizational charts, this Guide clarifies that such organizational charts are required for purposes of Previous Participation review. All organization charts submitted in connection with a Triggering Event are considered part of the application for HUD review and subject to the certifications stating that the application is true and complete. The organization chart must be clear enough so that a person unfamiliar with the Covered Project and the entities involved can understand the ownership and control structure. The organization chart must comply with the following guidelines:

1. Clearly show all tiers of the ownership structure, including the members or owners of the entities listed.

2. Show all participants, not just those who the Lender or Applicant considers to be principals or Controlling Participants. HUD may accept an organizational chart without a full listing of all participants if HUD determines that such a listing would be unduly burdensome.

3. Show percentages of ownership and role in the entity (e.g. Limited Partner, General Partner, Managing Member, Tax Credit Syndicator/Investor, etc.). The percentages must add to 100%. However, if there are more than 10 holders of an ownership interest in an entity, no one with less than a 10% interest must be individually disclosed. In that case, holders with less than a 10% ownership interest in the entity may be listed as a group by indicating the total percentage of ownership interests held by the group and the total number of members of the group (e.g., “8 members own portions of the remaining 12%”). For public companies, shareholders holding less than 10% interest can be grouped by indicating the aggregate percentage and identified as “widely held” (e.g., “80% of shares are widely held”). To the extent ownership interests are aggregated, the Applicant must provide any information requested by HUD regarding such interests.
4. List at least one natural person, not just entities; provided, however, tax credit investors and other investors that are not exercising day-to-day control are not required to list a natural person.

5. Provided that nothing in this Guide is meant to alter any underwriting requirements, for purposes of Previous Participation review, with respect to tax credit investors and other investors that are not exercising day-to-day control over a Specified Capacity or Controlling Participant, only the investor entity and its percentage ownership in the Specified Capacity need be shown; it is not necessary to show the members, partners or owners of the investor entity. HUD notes that additional information relating to investors may be required separately through underwriting review.

6. Each Specified Capacity must be shown on a separate organization chart (e.g. Borrower, Operator, Management Agent, Master Tenant, etc.).

7. With respect to each entity on the organization chart except wholly owned entities, tax credit investors and other investors that are not exercising day-to-day control, the executive management teams (for example, all senior officers such as CEO, CFO, President, Executive Director, etc., but not department heads or lower level management) and any members of a Board of Directors must be disclosed to HUD even if such individuals are not considered to be Controlling Participants and do not need to file Previous Participation review submissions. Such information must be updated if it changes prior to the Triggering Event. HUD may accept an organizational chart without a full listing of an entity’s Board of Directors if HUD determines that such a listing would be unduly burdensome.

C. Filing the Previous Participation Certification

(1) To fulfill the Previous Participation review requirements, applicable controlling participants must file a Previous Participation Certification. The Previous Participation review shall occur concurrently with the review of the application for mortgage insurance or other request for approval of a Triggering Event. Participants may utilize either the electronic Active Partners Performance System (APPS) or a paper alternative. Participants should not file both an APPS submission and a paper form. HUD strongly encourages participants to utilize the APPS system.

The following chart indicates which filing options are available for which programs.

<table>
<thead>
<tr>
<th>Filing Method</th>
<th>Multifamily Housing &amp; Grant Administration Projects</th>
<th>Office of Residential Care Facilities</th>
<th>Office of Hospital Facilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active Partners Performance System (APPS) Submission</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

OR
It is the participant’s responsibility to ensure that the filing is correct, complete and accurate. The participant should ensure compliance with the certifications is met. In rare instances, if there is a certification that the Controlling Participant cannot certify to, the participant must strikethrough that certification and provide a signed letter of explanation.

As part of the Previous Participation Certification, participants are only required to list all projects which they have participated in over the previous 10-year period. However, to the extent HUD has information that precedes the previous 10 years, HUD reserves the right to review and consider a participant’s Previous Participation in federal projects beyond the 10-year period when determining whether to approve participation in a Triggering Event. Controlling Participants must include all previous participation from the past 10 years in: (a) Covered Projects, (b) housing projects with current flags under the U.S. Department of Agriculture’s previous participation review system and (c) any other housing project participating in a federal, state or local or government program if during the Controlling Participant’s participation in the housing project (i) the housing project was foreclosed upon; (ii) the housing project was transferred by a deed in lieu of foreclosure; or (iii) an event of default, or similarly termed event, was declared and remained after any applicable notice and cure periods against the housing project or the Controlling Participant pursuant to the government program’s project documents.

---

### Active Partners Performance System (APPS) Submission Instructions

HUD has made several upgrades to the system to improve the applicant submission process. For example, HUD now allows for electronic signatures of APPS submissions, ability to upload submission packages, and has improved the baseline submission to allow for edits. HUD encourages participants to utilize the APPS system when filing the Previous Participation Certification as it saves a substantial amount of time and allows for faster review of submissions by HUD reviewers.

Here is a link to the APPS resources:


**For questions about the APPS system contact the Multifamily Housing Systems Help Desk by phone at (800) 767-7588 or Apps-F24p@hud.gov.**

| Step 1: System Registration | This step registers Controlling Participants in the APPS system. See the APPS Quick Tips for detailed instructions on the registration process: http://portal.hud.gov/hudportal/documents/huddoc?id=appsquicktips.pdf |

---

Consolidated Certifications are the following forms: HUD 90013-ORCF, Consolidated Certification-Borrower, HUD 90014-ORCF, Consolidated Certification-Principal of the Borrower, HUD 90015-ORCF, Consolidated Certification-Operator, HUD 90017-ORCF, Consolidated Certification-Management Agent, and HUD 90018-ORCF, Consolidated Certification-General Contractor.
Step 2: Create a Baseline  
This step establishes the organizational structure and previous participation of Controlling Participants. See Chapter 2 of the APPS Userguide for specific instructions and screen shots:  

Step 3: Create a Property Submission  
This step creates a submission for a Controlling Participant’s role in a specific project. See Chapter 3 of the APPS Userguide for specific instructions and screen shots:  

Step 4: Complete the Certification and Submit to HUD  
In this step Controlling Participants electronically certify to previous participation certifications and send the submission to HUD for review. See the discussions above regarding what projects must be included and if there is a certification the Controlling Participant cannot certify to. See also Chapter 7 of the APPS Userguide for specific instructions and screen shots:  

Step 5: Upload the Organization Chart with the Signature Pages  
The user uploads the Organization Chart and Signature Pages into the APPS system. See Section B for a description of what the organization chart must include.

<table>
<thead>
<tr>
<th>Form HUD-2530 Completion Instructions:^10</th>
</tr>
</thead>
<tbody>
<tr>
<td>It is the participant’s responsibility to assure that the Form HUD-2530 is correct, complete and accurate.</td>
</tr>
<tr>
<td>Form Section</td>
</tr>
<tr>
<td>---------------</td>
</tr>
<tr>
<td>Review certification language</td>
</tr>
<tr>
<td>Block 2</td>
</tr>
<tr>
<td>Block 7</td>
</tr>
<tr>
<td>Blocks 8 and 9</td>
</tr>
<tr>
<td>Block 10</td>
</tr>
<tr>
<td>Bottom of Page 1</td>
</tr>
<tr>
<td>Schedule A</td>
</tr>
</tbody>
</table>

10 Until further notice, if using the paper Form HUD-2530, use these instructions.
**Form HUD-2530 Completion Instructions**

*It is the participant’s responsibility to assure that the Form HUD-2530 is correct, complete and accurate.*

<table>
<thead>
<tr>
<th>Form Section</th>
<th>Instructions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Column 3 Principal Role</td>
<td>Principal roles must be included in Column 3</td>
</tr>
<tr>
<td>Column 4 Loan Status</td>
<td>The Status of the Loan must be listed in Column 4.</td>
</tr>
<tr>
<td></td>
<td>Note: This section is not applicable for General Contractors that did not have ownership interest in the project.</td>
</tr>
<tr>
<td>Column 5</td>
<td>Identify (check box) whether the project was ever in default during the participant’s participation in Column 5. If the “yes” box is checked a detailed explanation of the circumstances (including mitigating factors) must be provided.</td>
</tr>
<tr>
<td></td>
<td>Note: This section is not applicable for General Contractors that did not have ownership interest in the project.</td>
</tr>
<tr>
<td>Column 6</td>
<td>List the latest Management Review and Physical Inspection dates and scores in Column 6. If there are no scores, write “None.”</td>
</tr>
<tr>
<td></td>
<td>Note: This section is not applicable for General Contractors that did not have ownership interest in the project.</td>
</tr>
<tr>
<td>Business Partner Registration System (BPRS) Registration</td>
<td>Each Controlling Participant must be registered in the BPRS System. Here is a link: <a href="https://hudapps2.hud.gov/apps/part_reg/apps040.cfm">https://hudapps2.hud.gov/apps/part_reg/apps040.cfm</a></td>
</tr>
<tr>
<td>Organization Chart</td>
<td>Attach an organization chart. See Section B for a description of what the organization chart must include.</td>
</tr>
</tbody>
</table>

**Consolidated Certification Completion Instructions**

*It is the participant’s responsibility to assure that the Consolidated Certification is correct, complete and accurate.*

<table>
<thead>
<tr>
<th>Form Section</th>
<th>Instructions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Review certification language in the Consolidated Certification</td>
<td>The participant should assure that compliance with the certification is met.</td>
</tr>
<tr>
<td>Attachment 1</td>
<td>Participants with Previous Participation must complete Attachment 1 of the Consolidated Certification for projects participated in over the past 10 years. See discussion above regarding what projects must be included.</td>
</tr>
<tr>
<td>Business Partner Registration System (BPRS) Registration</td>
<td>Each Controlling Participant must be registered in the BPRS System. Here is a link: <a href="https://hudapps2.hud.gov/apps/part_reg/apps040.cfm">https://hudapps2.hud.gov/apps/part_reg/apps040.cfm</a></td>
</tr>
<tr>
<td>Organization Chart</td>
<td>Attach an organization chart with Social Security Numbers or Tax ID numbers for Controlling Participants. See Section B for a description of additional items the organization chart must include.</td>
</tr>
</tbody>
</table>

**D. Approval of Participants**
If there are no flags in the system and the applicant is able to make all the certifications or HUD has approved any reason as to why a certification cannot be made, the Previous Participation review is considered complete and the submission will be approved.

If there are current flags in the system, HUD staff will review:
- The comments in the system related to the flag.
- The lender or participant’s explanation of the flag and any mitigation of risk associated with the flag.
- Whether flags need to be resolved.
- The flag history in the system to assess patterns of misconduct and risk to the Department.

Based upon this review, including review of the certifications, HUD will determine whether or not the Controlling Participant poses an unacceptable Risk to the Covered Project, in accordance with the definition in 24 CFR 200.212, namely whether the Controlling Participant could be expected to participate in the Covered Project in a manner consistent with furthering the Department’s purposes. Based on this determination, HUD may approve, disapprove, limit or otherwise condition the continued participation of the Controlling Participant in the Triggering Event.

Disapproval is only appropriate in the relatively few cases where the risks present cannot be mitigated. HUD will disapprove a Controlling Participant if the Controlling Participant is suspended, debarred or subject to other restriction pursuant to 2 CFR part 180 or 2 CFR part 2424. HUD may disapprove a Controlling Participant if HUD determines: (i) The Controlling Participant is materially restricted, including voluntarily, from doing business with HUD (other than the restrictions listed above) or any other department or agency of the federal government if the Commissioner determines that such restriction demonstrates a significant risk to proceeding with the Triggering Event; or (ii) HUD determines that the Controlling Participant’s record of Previous Participation reveals significant risk to proceeding with the Triggering Event that cannot be adequately mitigated.

In lieu of disapproval, HUD may (1) condition or limit the Controlling Participant’s participation; (2) temporarily withhold issuing a determination in order to gather more necessary information; or (3) require the Controlling Participant to remedy or mitigate outstanding violations of HUD requirements to the Commissioner’s satisfaction in order to participate in the Triggering Event. A remedy or mitigation may include resolving any underlying issues that caused the existing flags or other measures that demonstrate to HUD’s satisfaction that the Controlling Participant could be expected to participate in the Covered Project in a manner consistent with furthering the Department’s purpose of supporting and providing decent, safe and affordable housing for the public.

In accordance with these provisions, if a HUD official approves a participant’s participation while a flag remains outstanding, the determining HUD official shall annotate the APPS system with a comment to the outstanding flag keeping a record of why approval is warranted and what, if any, conditions were imposed. The participant shall receive written notification of such determination and such explanatory comments. The purpose of this record is to prevent a
repetitive HUD review in the future. If the circumstances and risks related to a flag have been determined by HUD to be mitigated, such risks and circumstances shall also be deemed mitigated and approval shall be approved under similar conditions, if any, for future Triggering Events, unless additional violations are present, circumstances have changed or additional information has come to light.

| HUD Offices & Officials Responsible for Approval of Participants with Flags |
|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|
| Office of Multifamily Housing & Assisted Housing Oversight Division, 220, 221(d)(4), 223(a)(7), 223(f), 231, 241(a) Programs | Office of Residential Healthcare Facilities | Office of Hospital Facilities |
| Production | Asset Management |
| Participants with Tier 1 Flags | Director of Multifamily Housing Production (HQ) | Director, Office of Residential Care Facilities or Delegate | Director, Office of Hospital Facilities |
| Participants with Tier 2 Flags | Production Division Director | Asset Management Division Director | Supervisory Account Executive | Director, Office of Hospital Facilities |
| Participants with Tier 3 Flags | Branch Chief | Supervisory Account Executive | Director, Office of Hospital Facilities |

E. Disapproval of Participants:

If a recommendation for disapproval is proposed, HUD staff will notify the participant, and, in the case of an FHA-insured loan, the Lender, in advance of the recommendation, which notification shall include the basis for the anticipated disapproval and, if known, what information is needed to resolve HUD’s concerns. This notification will allow an opportunity for the participant to provide additional arguments for HUD’s consideration to preserve processing efficiency and cut down on requests for reconsideration.

| HUD Offices & Officials Responsible for Rejection of Participants with Flags |
|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|
| Office of Multifamily Housing & Assisted Housing Oversight Division, 220, 221(d)(4), 223(a)(7), 223(f), 231, 241(a) Programs | Office of Residential Healthcare Facilities | Office of Hospital Facilities |
Participants have the right to request a reconsideration of HUD decisions disapproving participants. The Controlling Participant shall submit requests for such reconsideration in writing within 30 days of receipt of HUD’s notice of disapproval. The review committee or reviewing officer shall schedule a review of such requests for reconsideration. The Controlling Participant shall be provided written notification of such a review at least 7 business days in advance of the reconsideration. The reconsideration shall not occur prior to the date provided to the Controlling Participant so that the Controlling Participant shall be provided the opportunity to submit such supporting materials as the Controlling Participant desires or as the review committee or reviewing officer requests. However, reconsideration need not be conducted through a formal meeting and the Controlling Participant may not necessarily have an opportunity to appear before the reviewing official in person.

Before making its decision, the review committee or reviewing officer will analyze the reasons for the decision(s) for which reconsideration is being requested, as well as the documents and arguments presented by the Controlling Participant. The review committee or reviewing officer may affirm, modify, or reverse the initial decision. Upon making its decision, the review committee or reviewing officer will provide written notice of its determination to the Controlling Participant setting forth the reasons for the determination(s). Reconsideration decisions shall not be rendered by the same individual who rendered the initial review. Please see the below table for the officials responsible for rendering reconsideration decisions applicable to each program area. The decision rendered by the officials below is final agency action.

<table>
<thead>
<tr>
<th>HUD Offices &amp; Officials Responsible for Reconsideration of a Rejection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office of Multifamily Housing &amp; Assisted Housing Oversight Division</td>
</tr>
<tr>
<td>Director, Office of Asset Management and Portfolio Oversight or Delegate</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

G. Flags

HUD utilizes flags in the APPS system as a way to assess risk associated with participants in Office of Multifamily Housing and Office of Healthcare Programs projects. A flag does not automatically exclude an applicant from participation in HUD’s programs; however, flags are considered risk factors that require appropriate mitigation, where possible. Flags are to
be a meaningful representation of risk, and therefore, they should not be placed for minor infractions that do not pose a risk to HUD. HUD will notify participants in writing when flags are placed.

1. Placement of Flags. When there is a violation or other circumstance warranting a flag in connection with a Covered Project, as listed in the charts below, HUD shall place a flag on all Controlling Participants who contributed to the violation or circumstance or failed to intervene appropriately but shall not place a flag on any Controlling Participant determined by HUD not to have contributed to the violation or circumstance (or if it is otherwise determined by HUD that placement of a flag on such Controlling Participant would be inappropriate). HUD shall not place any flags on Controlling Participants in connection with violations that occur prior to the Controlling Participant’s involvement in the Covered Project. HUD shall not place flags relating to ongoing violations on Controlling Participants who become involved with a Covered Project with HUD’s consent in order to mitigate or remedy the ongoing violation, provided that HUD may place flags on such a Controlling Participant related to new violations occurring after the Controlling Participant has become involved with the Covered Project.

For the Office of Multifamily Housing & Assisted Housing Oversight Division, Tier 1 and 2 manual flags must be reviewed by the Branch Chief prior to placement. For the Office of Healthcare Programs, all manual flags must be reviewed by the Director of Asset Management prior to placement. The Branch Chief and Director of Asset Management, respectively, shall ensure that their office’s Account Executive notifies the flagged participant of the flag placement and provides adequate comments in the APPS system detailing the reason for the flag.

For any flag, if the Branch Chief or Director of Asset Management has reason to believe that placement of the flag is inappropriate, the Branch Chief and/or Director of Asset Management may approve removal of the flag or no placement of the flag in the first place. For example, HUD is aware that currently, when an owner purchases a portfolio, HUD’s Financial Assessment of Multifamily Housing (FASS) system may have trouble accepting the financial statement submission of the new owner. In this circumstance, the system may perceive the new owner as having multiple failures to file financial statements because each property in the portfolio may be perceived as missing a financial statement. In this circumstance, the system may indicate that a Tier 2 flag would be appropriate, but obviously no flag is warranted. In this circumstance, the Account Executive shall not place a flag on the Controlling Participant’s record or shall remove any such unwarranted flag relating to such circumstance. The Branch Chiefs and Directors of Asset Management have authority to make similar determinations in other circumstances.

2. Tiers of Flags. HUD has developed three flag tiers, which reflect varying levels of risk to HUD. Tier 1 flags are elevated risk to HUD. HUD considers Tier 1 flags to be a significant long-term risk to HUD and warrant significant mitigation in new transactions. Tier 2 flags are considered an ongoing risk to HUD. For Tier 2 flags that have a resolution date (as listed in the chart below), flags will not be removed until the time period has expired even if the action has been resolved earlier. This is considered a risk factor in production and asset management transactions. Tier 3 flags are considered a single risk to HUD and will be removed when the reason for the flag is corrected.

Tier 1 Flags: Elevated Risk to the Department
Tier 1 flags warrant permanent consideration when reviewing Controlling Participants for their participation in Triggering Events. Except that HUD will disapprove a Controlling Participant if the Controlling Participant is currently suspended, debarred or subject to other restriction pursuant to 2 CFR part 180 or 2 CFR part 2424, participants with Tier 1 flags may still participate in a Triggering Event if the risk posed by the flag has been appropriately mitigated.

Tier 1 Flags:

<table>
<thead>
<tr>
<th>Flag Type</th>
<th>Reason</th>
<th>Duration of Flag</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mortgage Assignment/Conveyance of Title</td>
<td>Mortgagee assigned title or conveyed property to HUD</td>
<td>Permanent flag*</td>
</tr>
<tr>
<td>FHA Claim or Partial Payment of Claim</td>
<td>Claim payment by HUD</td>
<td>Permanent flag*</td>
</tr>
<tr>
<td>HUD Property Disposition</td>
<td>Foreclosure, loan sale, or other property disposition effort by HUD</td>
<td>Permanent flag*</td>
</tr>
<tr>
<td>Mortgagee in Possession (MIP)</td>
<td>HUD becomes the MIP</td>
<td>Permanent flag*</td>
</tr>
<tr>
<td>Deed in Lieu of Foreclosure</td>
<td>HUD receives a deed in lieu of foreclosure</td>
<td>Permanent flag*</td>
</tr>
<tr>
<td>Limited Denial of Participation (LDP)—Current or Past</td>
<td>Participant is currently or has previously been placed on the LDP list</td>
<td>Permanent flag</td>
</tr>
<tr>
<td>Suspension or Debarment—Current or Past</td>
<td>Participant is currently or has previously been placed on the Debarment list or the participant is or was temporarily suspended from participation in HUD programs</td>
<td>Permanent flag</td>
</tr>
<tr>
<td>Voluntary Abstention or Exclusion—Current or Past</td>
<td>Participant is currently or has previously been subject to a voluntary abstention from participation in HUD programs</td>
<td>Permanent flag</td>
</tr>
<tr>
<td>Conviction for fraud or embezzlement of funds</td>
<td>Participant has been convicted of fraud or embezzlement of funds</td>
<td>Permanent flag</td>
</tr>
</tbody>
</table>

Participants with Tier 1 flags may be approved if:

1. The participant is not currently suspended, debarred or subject to other restriction pursuant to 2 CFR part 180 or 2 CFR part 2424;
2. HUD determines that, because the participant has sufficiently improved operations and oversight to ensure that further violations will not occur or for other compelling reasons, the flag is not indicative of ongoing risk.

Questions that may be relevant to this analysis include:

- What has the participant done to mitigate the risk indicated by the flag?
- Is the flagged condition indicative of a current pattern of behavior? What has the participant done to change the underlying causes of the flagged condition or otherwise prevent the flagged condition from occurring again?
- Is the flagged condition limited in number and/or geography relative to the participant’s whole portfolio? Was the flagged condition an isolated event?
Has significant time passed since the condition was flagged?
Was the flagged condition caused by market or other forces outside the participant’s control?
How does the participant’s role in the flagged condition compare to his/her role in the Triggering Event and Covered Project for which they are currently seeking approval?

*Unless otherwise determined by HUD due to mitigating circumstances.

**Tier 2 Flags: Compliance Risk to the Department**

Tier 2 flags warrant consideration for an extended period of time when reviewing Controlling Participants for their participation in Triggering Events, even after the underlying reason for the flag is resolved. A “Repeated” Offense means that a Controlling Participant has had three or more instances of the violation in a seven-year period.

<table>
<thead>
<tr>
<th>Flag Type</th>
<th>Explanation</th>
<th>Duration of Flag</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repeated Failure to File Annual Financial Statements</td>
<td>Repeated Failure to File Annual Financial Statements (three or more occurrences in a seven-year period).</td>
<td>Retained until there have been five (5) years with no missed filings of Annual Financial Statements.</td>
</tr>
<tr>
<td>Default-Financial</td>
<td>60 days or more behind on loan payments</td>
<td>Retained for five (5) years after the placement date of the flag.</td>
</tr>
<tr>
<td>Unacceptable Physical Condition of a property</td>
<td>A property received a Real Estate Assessment Center (REAC) score below 30, two consecutive REAC scores below 60, Repeated REAC scores below 60, or other Repeated failures to maintain decent, safe and sanitary conditions</td>
<td>May be removed upon the completion of a five (5) year period in which the property receives no REAC score below 60.</td>
</tr>
<tr>
<td>Unauthorized Distributions</td>
<td>Repeated incidents of Unauthorized Distributions</td>
<td>Retained for five (5) years after the placement date of the flag.</td>
</tr>
<tr>
<td>Repeated Unresolved Audit Findings</td>
<td>Repeated Unresolved Audit Findings</td>
<td>Retained for five (5) years after the placement date of the flag provided that audit findings have been resolved.</td>
</tr>
<tr>
<td>Conversion to Unapproved Use</td>
<td>Project was converted to a use that is not permitted under the program obligations</td>
<td>Retained for five (5) years after the placement date of the flag.</td>
</tr>
<tr>
<td>Unauthorized Alteration to Facility</td>
<td>Project or part of the project completed a significant addition/alteration/ construction/licensure status without prior approval</td>
<td>Retained for five (5) years after the placement date of the flag.</td>
</tr>
<tr>
<td>Unauthorized Change in Participant</td>
<td>When a Transfer of Physical Assets (TPA), Change of Management Agent, Lessee or other change of Controlling Participant requiring HUD</td>
<td>Retained for five (5) years after the placement date of the flag.</td>
</tr>
<tr>
<td><strong>Consent is Completed Without Prior HUD Approval</strong></td>
<td>Retained for five (5) years after the placement date of the flag.</td>
<td></td>
</tr>
<tr>
<td>-----------------------------------------------------------</td>
<td>-----------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Unauthorized Secondary Financing</strong></td>
<td>When Secondary Financing is utilized without prior HUD approval.</td>
<td>Retained for five (5) years after the placement date of the flag.</td>
</tr>
<tr>
<td><strong>Miscellaneous Violation of Business Agreements</strong></td>
<td>Repeated violations of business agreements (e.g., breaking use agreement or affordability restrictions, repeated unacceptable management reviews, repeated failure to comply with an action plan, non-compliance with program requirements, non-responsive to HUD requests)</td>
<td>Retained for five (5) years after the placement date of the flag.</td>
</tr>
<tr>
<td><strong>Suspension/Termination of Payments</strong></td>
<td>When HUD suspends subsidy payments due to non-compliance with Program Obligations</td>
<td>Retained for five (5) years after the placement date of the flag.</td>
</tr>
<tr>
<td><strong>General Contractor Performance – Construction Compliance</strong></td>
<td>Material failure to build project in accordance with approved Plans and Specifications (During Construction Period)</td>
<td>Retained for five (5) years after the placement date of the flag provided that noncompliance has been cured to HUD’s satisfaction.</td>
</tr>
<tr>
<td><strong>General Contractor Performance – One Year Warranty</strong></td>
<td>Failure to correct material warranty issues identified in HUD’s Nine-Month and 12-Month Warranty Inspections (After Construction Period)</td>
<td>Retained for five (5) years after the placement date of the flag provided that noncompliance has been cured to HUD’s satisfaction.</td>
</tr>
</tbody>
</table>

**Participants with Tier 2 flags may be approved if:**

Participants with Tier 2 flags may be approved if HUD determines that, because the participant has sufficiently improved operations and oversight to ensure that further violations will not occur or for other compelling reasons, the flag is not indicative of ongoing risk.

Questions that may be relevant to this analysis include:

- Are the underlying conditions causing the flag resolved?
- What has the participant done to mitigate the risk indicated by the flag?
- Is the flagged condition indicative of a current pattern of behavior? What has the participant done to change the underlying causes of the flagged condition or otherwise prevent the flagged condition from occurring again?
- Is the flagged condition limited in number and/or geography relative to the participant’s whole portfolio? Was the flagged condition an isolated event?
- Has significant time passed since the condition was flagged?
- Was the flagged condition caused by market forces outside the participant’s control?
- How does the participant’s role in the flagged condition compare to his/her role in the Triggering Event and Covered Project for which they are currently seeking approval?
**Tier 3 Flags: Temporary Risk to the Department**

Tier 3 flags relate to a single and/or less serious incident of non-compliance and can be resolved and removed. Participants with Tier 3 flags shall be approved, subject to satisfaction of the conditions listed below prior to or at the closing of the Triggering Event transaction. In the case of FHA Insurance, any conditions not met by the issuance of the Firm Commitment shall be special conditions to the Firm Commitment.

<table>
<thead>
<tr>
<th>Flag Type</th>
<th>Reason</th>
<th>Duration of Flag</th>
<th>Approval Condition(s):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to File Financial Statements</td>
<td>Automatically Flagged when the Annual Financial Statements are overdue</td>
<td>Removed when the missing Annual Financial Statements are filed or five (5) years after the placement date of the flag, whichever is sooner</td>
<td>The Annual Financial Statement must be filed.</td>
</tr>
</tbody>
</table>
| Delinquent payments three or more times in the last year. | Flagged when borrower fails to make mortgage payment by the fifteenth of the month, three or more times in a given one-year period. | Removed when there is a one-year period of time in which borrower has made all mortgage payments by the fifteenth of each respective month, or five (5) years after the placement date of the flag, whichever is sooner. | • Delinquencies cured (no longer delinquent).  
• Explain the cause of the delinquencies.  
• Efforts and/or a plan acceptable to HUD to avoid future delinquencies must be put in place. |
| Unacceptable Physical Condition    | Most recent REAC score is below 60, and additional (does not need to be consecutive) REAC score(s) below 60 over the past seven years. | Removed when the most recent REAC score is above 59.                              | Certify that 100% of the units in the project with the low REAC score have been inspected and all physical deficiencies have been remedied. |
| Unsatisfactory Management Review   | Flagged when there is an Unsatisfactory Management Review               | Removed when there is a Satisfactory Management Review, or five (5) years after the placement date of the flag whichever is sooner | Provide evidence that a satisfactory response to the management review was provided to HUD or the Contract Administrator. |
| Unauthorized Distributions         | One incident of Unauthorized Distributions                              | Removed when the unauthorized distribution is repaid or otherwise resolved or five (5) years after the placement date of the flag whichever is sooner | Unauthorized distributions must be repaid.                                           |
| Material Unresolved Audit Findings | Material Unresolved Audit Findings                                      | Removed when the finding is resolved or five (5) years after the placement date of the flag whichever is sooner | Provide evidence that the audit finding was resolved in manner satisfactory to HUD. |
| Failure to Provide or Comply with Action Plan | Failure to provide or comply with a HUD required action plan and/or certification in a timely manner. | Removed when the action plan is received and in good standing or five (5) years after the placement date of the flag whichever is sooner. | Provide evidence that the Action Plan was approved by HUD and implementation has begun. |
3. **Flag Resolution and Removal of Flags.** Tier 1 flags are permanent and are not removed from the APPS system, except where indicated in the Tier 1 chart above that HUD determines removal is warranted due to mitigating circumstances. Tier 2 flags will be removed from the APPS system upon the completion of the conditions and time periods listed in the Tier 2 chart above. Tier 3 flags shall be removed from the APPS system upon the resolution of the violation giving rise to the flag. Participants shall be notified in writing when flags are resolved and/or removed and may request confirmation of flag resolution and/or removal if they do not receive such notification.

Notwithstanding anything else in this Guide, for any flag, if the Branch Chief or Director of Asset Management determines in writing that retention of the flag for the time periods listed above is inappropriate and unduly burdensome on the Controlling Participant or HUD, the Branch Chief and/or Director of Asset Management may waive this Guide’s requirements with respect to duration of the flag and approve the flag’s removal. In providing this determination, the Branch Chief or Director of Asset Management must consider any comments in the APPS system, including any comments indicating why the flag is warranted. If comment in the APPS system clearly describe that the flag is warranted and set out a justification for approval in forthcoming transactions despite the presence of the flag (as discussed in this Guide above), the flag may not be unduly burdensome and retention of the flag may be warranted. If, however, the Branch Chief or Director of Asset Management determines that retention of the flag is unwarranted or otherwise inappropriate and unduly burdensome on the Controlling Participant, the Branch Chief or Director of Asset Management shall indicate the basis for such determination and direct that the flag be removed.

**H. Significant Changes to the Guide**

HUD will not make any significant changes to the Guide without first offering advance notice and the opportunity for comment for a period of not less than 30 days.

**I. Technical Assistance**


Questions can be directed to:

<table>
<thead>
<tr>
<th>Office of Multifamily Housing &amp; Assisted Housing Oversight Division</th>
<th><a href="mailto:MF_PreviousParticipation@hud.gov">MF_PreviousParticipation@hud.gov</a></th>
</tr>
</thead>
</table>
| Office of Residential Healthcare Facilities                       | LeanThinking@hud.gov
|                                                                  | www.hud.gov/healthcare           |
| Office of Hospital Facilities                                     | Hospitals@hud.gov
|                                                                  | 1-877-HLTH-FHA                   |
|                                                                  | www.hud.gov/healthcare           |
Addendum: Identification and Certification of Limited Liability Investor Entities

The following certification is to be submitted as part of the FHA loan application from each entity which claims to be a limited liability investor.

Project Name:
FHA Project #:

I, [name of authorized signer], am authorized to certify on behalf of [name of investor entity] to each and every item stated below.

I certify that [name of investor entity] is:

a. Investing in [name of owner/mortgagor entity], which anticipates receiving [list applicable tax credits, e.g.: Low-Income Housing Tax Credits pursuant to Section 42 of the Internal Revenue Code];

b. A limited liability company, an investor corporation, an investor limited partnership, an investor limited liability limited partnership or other similar entity with limited liability; and

c. An investor with limited or no control over routine property operations or HUD regulatory and/or contract compliance, unless it should take control of the ownership entity or assume the operating responsibilities in the event of the default of the operating partner or upon specific events defined in the [name of owner/mortgagor entity]'s [operating agreement / partnership agreement / organizational documents].

I further certify that should any of the facts or circumstances that support the certifications above change or the entity for which this certification is made withdraws from participation in the owner/mortgagor, I will notify HUD immediately in writing, providing full disclosure and explanation of the change(s).

Signed: ____________________________ Date: __________________________

[Name of authorized signer]
[Title]
**TENANT INCOME SELF - CERTIFICATION**

Check all programs that apply:
- RLP
- LIHTC
- New Lease
- SHARP/Rehab
- FedHome

### PART I SECTION A – DEVELOPMENT DATA (To be completed by Manager)

1. Project Name: ____________________________
2. Project #: _____________________
   Building ID: _____________________
   (LIHTC)
3. Unit #: ____________________________
4. # Bedrooms: __________ SF _______
5. City/Town _______________________
   County: _______________________

### PART I SECTION B – RENT (Must be completed by Manager)

<table>
<thead>
<tr>
<th>Tenant Paid Rent $</th>
<th>Rental Assistance $</th>
<th>Other non-optional charges $</th>
</tr>
</thead>
<tbody>
<tr>
<td>Source of UA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gross Rent for Unit:</td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>

Gross rent includes tenant paid rent plus Utility Allowance & other non-optional charges. If a HOME unit, this amount must also include any Rental Assistance the tenant receives.

Household Meets the unit Income Restriction at:

- 60%
- 50%
- 40%
- 30%
- _____%

### SIGNATURES

DATE: __________________ Signature of Owner/Agent __________________ DATE: ____________________

### PART II SECTION A – HOUSEHOLD COMPOSITION (completed by head of household)

<table>
<thead>
<tr>
<th>Hshld Mbr #</th>
<th>Last Name</th>
<th>First Name &amp; Middle Initial</th>
<th>Sex</th>
<th>Relationship to Head of Household</th>
<th>Date of Birth (MM/DD/YYYY)</th>
<th>F/T Student (Y or N)</th>
<th>Last 4 Digits of SSN</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td>HEAD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### PART II SECTION B - ANNUAL INCOME - USE ANNUAL AMOUNTS (completed by head of household)

<table>
<thead>
<tr>
<th>Hshld Mbr #</th>
<th>(A) Employment or Wages</th>
<th>(B) Social Security/Pensions</th>
<th>(C) Public Assistance</th>
<th>(D) Other Income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTALS** $ $ $ $

### PART II SECTION C - INCOME FROM ASSETS (completed by head of household)

<table>
<thead>
<tr>
<th>Hshld Mbr #</th>
<th>(E) Type of Asset</th>
<th>Cash Value of Asset</th>
<th>(F) Annual Income from Asset</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTALS** $ $ $

**TOTAL INCOME:** $ 

**PART II SECTION D - STUDENT STATUS (LIHTC only) (completed by head of household)**

- ARE ALL OCCUPANTS FULL TIME STUDENTS? 
  - Yes
  - No

For the purpose of this form, a full-time student is defined as one who is or will be carrying a full-time subject load at an institution with a degree or certificate program (including school age children) or one who will/was carrying a full-time subject load during any portion of five months within the current calendar year.

*Student Explanation: 
- 1 TANF/assistance 
- 2 Job Training 
- 3 Single parent/dependent child 
- 4 Married/joint return 
- 5 The household consists of at least one student who was previously under foster care.

---

Revision 10/11/16  Page 1 of 4
Maine Housing (MH) requests the following information in order to comply with the Housing and Economic Recovery Act (HERA) of 2008, which requires all Low Income Housing Tax Credit (LIHTC) properties to collect and submit to the U.S. Department of Housing and Urban Development (HUD), certain demographic and economic information on tenants residing in LIHTC financed properties. Although MH would appreciate receiving this information, you may choose not to furnish it. You will not be discriminated against on the basis of this information, or on whether or not you choose to furnish it. If you do not wish to furnish this information, please check the box at the bottom of the page and initial.

### TENANT DEMOGRAPHIC PROFILE

<table>
<thead>
<tr>
<th>HH Mbr #</th>
<th>Last Name</th>
<th>First Name</th>
<th>Middle Initial</th>
<th>Race</th>
<th>Ethnicity</th>
<th>Disabled</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The Following Race Codes should be used:

1. White – A person having origins in any of the original people of Europe, the Middle East or North Africa.
2. Black/African American – A person having origins in any of the black racial groups of Africa. Terms such as “Haitian” or “Negro” apply to this category.
3. American Indian/Alaska Native – A person having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment.
4. Asian
   - 4a – Asian India
   - 4b – Chinese
   - 4c – Filipino
   - 4d – Japanese
5. Native Hawaiian/Other Pacific Islander
   - 5a – Native Hawaiian
   - 5b – Guamanian or Chamorro
   - 5c – Samoan
   - 5d – Other Pacific Islander
6. Other

The Following Ethnicity Codes should be used:

1. 24 or older
2. Veteran
3. Married
4. Have Dependents
5. Parents of the student are HUD income eligible and the student is income eligible.
6. Meets the US Department of Education’s definition of an Independent Student (refer to page 15 of the HUD Handbook 4350.3 glossary).
7. Persons already receiving Section 8 Assistance as of November 30, 2005 and are disabled (both parts of 7 must be met).
9. The individual is a student for whom a financial aid administrator makes a documented determination of independence by reason of other unusual circumstances per Docket No. FR-5969-N-01

Disability Status:

1. Yes
2. No
3. Declined to complete (Please initial below)

Resident/Applicant: I do not wish to furnish information regarding ethnicity, race and other household composition.

Under penalties of perjury, I/we certify that the information presented in this certification is true and accurate to the best of my/our knowledge. The undersigned further understands that providing false representations herein constitutes an act of fraud. False, misleading or incomplete information may result in the termination of the lease agreement. Upon request, the undersigned will provide third party documentation to support the amounts indicated.

**SIGNATURES**

**SIGNATURE OF TENANT** | **DATE** | **SIGNATURE OF TENANT** | **DATE**
--- | --- | --- | ---

**SIGNATURE OF TENANT** | **DATE** | **SIGNATURE OF TENANT** | **DATE**

Revision 10/11/16
INSTRUCTIONS FOR COMPLETING THE
TENANT INCOME SELF CERTIFICATION (ver. 6/16/2016)

This form was created with the intention that the owner/manager would meet with the resident to review it and explain that providing this information is a program requirement. The resident would then complete and sign the form in the presence of the owner/manager who would review the information and seek clarification and additional details if needed. Part I of the form is to be completed by the owner or its authorized representative. Part II is to be completed by the head of household and signed by the head of household and all household members 18 years of age or older. Please note that certain income sources may be excluded from annual income. HUD Handbook 4350.3 Chapter 5 should be consulted and the owner/manager should get clarification from the tenant if the type of income included in Part II B is unknown.

Part I Section A - Development Data – Completed by owner/agent

1. Project Name
2. Building ID
3. Unit #
4. # Bedrooms/SF
5. Address

Part I Section B - Rent– Must be completed by owner/agent

1. Move-in Date
2. Effective Date
3. Tenant Paid Rent
4. Rent Assistance
5. Utility Allowance
6. Source of UA
7. Other non-optional charges
8. Gross Rent for Unit

Signatures

It is recommended that the Tenant Income Certification be signed no earlier than 5 days prior to the effective date of the recertification. A representative of the Owner/Agent must sign as indicated.

Part II Section A - Household Composition- Completed by head of household

List all occupants of the unit. State each household member’s relationship to the head of household by using one of the following coded definitions:

H - Head of Household
A - Adult co-tenant
C - Child
L - Live-in caretaker
S - Spouse
O - Other family member
F - Foster child(ren)
N - None of the above

Indicate M for male and F for female. Enter the date of birth of each occupant and their student status as reported on their signed LIHTC Certification of Student Eligibility. Last four digits of Social Security Number: For each tenant enter the last four digits of the social security number or the last four digits of the alien registration number. If tenant does not have a SSN or alien registration number, enter “0000”.

If there are more than 7 occupants, use an additional sheet of paper to list the remaining household members and attach it to the certification.
**Part II Section B - Annual Income** - Completed by head of household

Enter the gross amount anticipated to be received for the twelve months from the effective date of the (re)certification. Complete a separate line for each income-earning member. List the respective household member number from Part II A.

| Column (A) | Enter the annual amount of wages, salaries, tips, commissions, bonuses and other income from employment; distributed profits and/or net income from a business. |
| Column (B) | Enter the annual amount of Social Security, Supplemental Security Income, pensions, military retirement, etc. |
| Column (C) | Enter the annual amount of income received from public assistance (i.e., TANF, general assistance, disability, etc.). |
| Column (D) | Enter the annual amount of alimony, child support, unemployment benefits or any other income regularly received by the household. |

Add the totals from columns (A) through (D), above. Enter this amount on the Totals line below.

**Part II Section C - Income from Assets** - Completed by head of household

List the gross amount anticipated to be received during the twelve months from the effective date of the certification. List the respective household member number from Part II and complete a separate line for each member.

| Column (E) | List the type of asset (i.e., checking account, savings account, etc.) |
| Column (F) | Enter the cash value of the respective asset. |

Column (F) Enter the anticipated annual income from the asset (i.e., savings account balance multiplied by the annual interest rate).

TOTALS Add the total of Column (A – D From Part II B) and Column (F from Part II C), respectively.

**Part II Section D - Student Status** - Completed by head of household

**Tax Credit**

If all household members are full time* students, check “yes”. If at least one household member is not a full time student, check “no”. If “yes” is checked, the appropriate exemption must be listed in the box to the right. If none of the exemptions apply, the household is ineligible to rent the unit.

**HOME**

If any household member is a full or part time student, check “yes”. If “yes” is checked, the appropriate exemption must be listed in the box below. If none of the exemptions apply, the household is ineligible to rent the unit.

*Full time is determined by the school the student attends.

**Part II Section E – Divesture of Assets** - Completed by head of household

Applicants and tenants must declare whether an asset has been disposed of for less than fair market value at each certification and recertification. Assets greater than $1,000 disposed of for less than fair market value during the two years preceding certification or recertification must be counted as an asset. If the tenant has indicated that assets have been disposed documentation and verification regarding the circumstances and amounts must obtained. If applicable the amounts must be included on Section IV.

**PART II Section F - SUPPLEMENTAL INFORMATION** - Completed by head of household

Complete this portion of the form at move-in and at recertification’s (only if household composition has changed from the previous year’s certification).

**Tenant Demographic Profile** Complete for each member of the household including minors. Use codes listed on supplemental form for Race, Ethnicity, and Disability Status.

**Resident/Applicant Initials** All tenants who wish not to furnish supplemental information should initial this section. Parent/Guardian may complete and initial for minor child(ren).

**Signatures**

Each household member age 18 or older must sign and date the Tenant Income Certification as Tenant. It is recommended that the Tenant Income Certification be signed no earlier than 5 days prior to the effective date of the recertification. A representative of the Owner/Agent must also sign as indicated.

*These instructions should not be considered a complete guide on tax credit compliance. The responsibility for compliance with federal program regulations lies with the owner of the building(s) for which the credit is allowable.*
**PART I – DEVELOPMENT DATA**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Certification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recertification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Move-in Date:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(MM/DD/YYYY)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Effective Date:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(MM/DD/YYYY)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hshold Income @ Move-in:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hshold Size @ Move-in:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current Hshold Size:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Project Name:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Project #:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Building ID:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(LIHTC)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Unit #:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. # Bedrooms:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SF</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. City/Town</td>
<td></td>
<td></td>
</tr>
<tr>
<td>County:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**PART II – HOUSEHOLD COMPOSITION**

<table>
<thead>
<tr>
<th>Mbr #</th>
<th>Last Name</th>
<th>First Name &amp; Middle Initial</th>
<th>Sex</th>
<th>Relationship to Head of Household</th>
<th>Date of Birth (MM/DD/YYYY)</th>
<th>F/T Student (Y or N)</th>
<th>Last 4 Digits of SSN</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>HEAD</td>
<td></td>
<td></td>
<td>HEAD</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**PART III. ANNUAL INCOME (USE ANNUAL AMOUNTS)**

<table>
<thead>
<tr>
<th>Mbr. #</th>
<th>Employment or Wages</th>
<th>Social Security/Pensions</th>
<th>Public Assistance</th>
<th>Other Income</th>
<th>(E) TOTAL INCOME: (add totals from (A) through (D), above)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$</td>
<td>$</td>
<td>$</td>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

**PART IV. INCOME FROM ASSETS**

<table>
<thead>
<tr>
<th>Mbr. #</th>
<th>Type of Asset</th>
<th>C/I</th>
<th>Cash Value of Asset</th>
<th>Annual Income from Asset</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**PART V. TOTAL ANNUAL HOUSEHOLD INCOME FROM ALL SOURCES**

- **TOTAL ANNUAL HOUSEHOLD INCOME FROM ALL SOURCES:** 
  Add (E) and (K)
  
- **LIHTC & RLP Only**
  Current Income Limit X 140% 
  $_________________ 
  Household Income exceeds 140% at recertification: 
  Yes  No

- **SHARP, NewLease & Rental Rehab, FedHome Only**
  Current Income exceeds 80% AMI at time of recertification or, if a Low Home unit, income exceeds 50% AMI but is below 80% AMI: 
  Yes  No  Low HOME unit between 50% & 80%
PART VI. RENT

<table>
<thead>
<tr>
<th>Tenant Paid Rent</th>
<th>$</th>
<th>Rental Assistance</th>
<th>$</th>
<th>Other non-optional charges</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utility Allowance:</td>
<td>$</td>
<td>For: Heat H/W Lights Cooking Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Source of UA:</td>
<td></td>
<td>HUD Local PHA Other</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

GROSS RENT FOR UNIT:
Gross rent includes tenant paid rent plus Utility Allowance & other non-optional charges. If a HOME unit, this amount must also include any Rental Assistance the tenant receives.

Unit Meets Rent Restriction at:

<table>
<thead>
<tr>
<th>$</th>
<th>60%</th>
<th>50%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>60%</td>
<td>50%</td>
</tr>
<tr>
<td></td>
<td>40%</td>
<td>30%</td>
</tr>
</tbody>
</table>

Maximum Rent Limit for this unit: $_______

PART VII. STUDENT STATUS (LIHTC only)

ARE ALL OCCUPANTS FULL TIME STUDENTS?

__________ yes ____________ no

For the purpose of this form, a full-time student is defined as one who is or will be carrying a full-time subject load at an institution with a degree or certificate program (including school age children) or one who will/was carrying a full-time subject load during any portion of five months within the current calendar year.

Enter 1-5

*Student Exception:
1. TANF/assistance
2. Job Training
3. Single parent/dependent child
4. Married/joint return
5. The household consists of at least one student who was previously under foster care.

STUDENT STATUS (HOME only)

ARE OCCUPANTS FULL OR PART TIME STUDENTS?

__________ yes ____________ no

*Student Exception:
1. 24 or older
2. Veteran
3. Married
4. Have Dependents
5. Parents of the student are HUD income eligible and the student is income eligible.
6. Meets the US Department of Education’s definition of an Independent Student (refer to page 13 of the HUD Handbook 4350.3 glossary).
7. Persons already receiving Section 8 Assistance as of November 30, 2005 and are disabled (both parts of 7 must be met).
9. The individual is a student for whom a financial aid administrator makes a documented determination of independence by reason of other unusual circumstances per Docket No. FR-5969-N-01.

PART VIII DIVESTITURE OF ASSETS (completed by head of household)

Has any household members disposed of any assets within the last 2 years for less than fair market value in excess of $1,000?

__________ yes* ____________ no

*If Yes, documentation regarding the disposed asset(s) has been obtained and, if applicable, included in Section IV.

PART IX SUPPLEMENTAL INFORMATION FORM (completed by head of household)

MaineHousing (MH) requests the following information in order to comply with the Housing and Economic Recovery Act (HERA) of 2008, which requires all Low Income Housing Tax Credit (LIHTC) properties to collect and submit to the U.S. Department of Housing and Urban Development (HUD), certain demographic and economic information on tenants residing in LIHTC financed properties. Although MH would appreciate receiving this information, you may choose not to furnish it. You will not be discriminated against on the basis of this information, or on whether or not you choose to furnish it. If you do not wish to furnish this information, please check the box at the bottom of the page and initial.

Enter both Ethnicity and Race codes for each household member (see below for codes).

TENANT DEMOGRAPHIC PROFILE

<table>
<thead>
<tr>
<th>HH Mbr #</th>
<th>Last Name</th>
<th>First Name</th>
<th>Middle Initial</th>
<th>Race</th>
<th>Ethnicity</th>
<th>Disabled</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The Following Race Codes should be used:
1 – White – A person having origins in any of the original people of Europe, the Middle East or North Africa.

Revised 10/11/16
1 – Black/African American – A person having origins in any of the black racial groups of Africa. Terms such as “Haitian” or “Negro” apply to this category.

2 – American Indian/Alaska Native – A person having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment.

3 – Asian
   3a - Asian India
   3b – Chinese
   3c – Filipino
   3d – Japanese

4 – Native Hawaiian/Other Pacific Islander
   4a – Native Hawaiian
   4b – Guamanian or Chamorro

5 – Other
   5a – Other Asian
   5b – Other Pacific Islander

6 – Did not respond. (Please initial below)

Note: Multiple racial categories may be indicated as such: 31 – American Indian/Alaska Native & White, 41 – Asian & White, etc.

The Following Ethnicity Codes should be used:

1 – Hispanic – A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. Terms such as “Latino” or “Spanish Origin” apply to this category.

2 – Not Hispanic – A person not of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.

3 – Declined to complete. (Please initial below)

Disability Status:

1 – Yes
   If any member of the household is disabled according to Fair Housing Act definition for handicap (disability):  
   • A physical or mental impairment which substantially limits one or more major life activities: a record of such an impairment; or being regarded as having such an impairment. For a definition of “physical or mental impairment and other terms used, please see 24 CFR 100.201, available at http://www.fairhousing.com/index.cfm?method=page.display&pageID=465.
   • “Handicap” does not include current, illegal use of or addiction to a controlled substance.
   • An individual shall not be considered to have a handicap solely because that individual is a transvestite.

2 – No

3 – Declined to complete (Please initial below)

Resident/Applicant: I do not wish to furnish information regarding ethnicity, race and other household composition.

(Initials) __________ __________ _________ __________ __________ __________ __________ (HH#) 1.                      2.                 3.                 4.                  5.                   6.                 7.

SIGNATURES

The information on this form will be used to determine maximum income eligibility. I/we have provided for each person(s) set forth in Part II acceptable verification of current anticipated annual income. I/we agree to notify the landlord immediately upon any member of the household moving out of the unit or any new member moving in. I/we agree to notify the landlord immediately upon any member becoming a full time student.

Under penalties of perjury, I/we certify that the information presented in this certification is true and accurate to the best of my/our knowledge. The undersigned further understands that providing false representations herein constitutes an act of fraud. False, misleading or incomplete information may result in the termination of the lease agreement.

<table>
<thead>
<tr>
<th>SIGNATURE OF LESSEE</th>
<th>DATE</th>
<th>SIGNATURE OF LESSEE</th>
<th>DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SIGNATURE OF LESSEE</th>
<th>DATE</th>
<th>SIGNATURE OF LESSEE</th>
<th>DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Based on the representations herein and upon the proofs and documentation required to be submitted, the individual(s) named in Part II of this Tenant Income Certification is/are eligible under the provisions of Section 42 of the Internal Revenue Code, as amended, and the Land Use Restriction Agreement (if applicable), to live in a unit in this Project.

<table>
<thead>
<tr>
<th>SIGNATURE OF OWNER/REPRESENTATIVE</th>
<th>DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
INSTRUCTIONS FOR COMPLETING THE
HOUSING TAX CREDIT PROGRAM
TENANT INCOME CERTIFICATION (ver. 6/16)

This form is to be completed by the owner or its authorized representative.

Part I - Development Data

Check the appropriate box for Initial Certification (move-in), Recertification (annual recertification), or Other. If Other, designate the purpose of the recertification (i.e., a unit transfer, a change in household composition, or other state-required recertification).

Move-in Date
Enter the date the tenant has or will take occupancy of the unit.

Effective Date
Enter the effective date of the certification. For move-in, this should be the move-in date. For annual recertification, this effective date should be no later than one year from the effective date of the previous (re)certification.

Hshold Income @ Move-in
Enter the Gross Annual Household Income at move-in.

Hshold Size @ Move-in
Enter the number of family members at the time of move-in.

Current Hshold Size
For recertifications, enter the current size of the household even if it is the same as move-in.

1. Project Name
Enter the name of the development

2. Building ID
Enter the Building Identification Number (BIN) assigned to the building (from IRS form 8609). Also enter the building address.

3. Unit #
Enter the unit number.

4. # Bedrooms/SF
Enter the number of bedrooms in the unit and the square footage of the unit.

5. County
Enter the county in which the building is located.

Part II - Household Composition

List all occupants of the unit. State each household member’s relationship to the head of household by using one of the following coded definitions:

H - Head of Household
S - Spouse
A - Adult co-tenant
O - Other family member
C - Child
F - Foster child(ren)
L - Live-in caretaker
N - None of the above

Indicate M for male and F for female. Enter the date of birth of each occupant and their student status. Last four digits of Social Security Number: For each tenant enter the last four digits of the social security number or the last four digits of the alien registration number. If tenant does not have a SSN or alien registration number, enter “0000”.

If there are more than 7 occupants, use an additional sheet of paper to list the remaining household members and attach it to the certification.

Part III - Annual Income

See HUD Handbook 4350.4 for complete instructions on verifying and calculating income, including acceptable forms of verification.

From the third party verification forms obtained from each income source, enter the gross amount anticipated to be received for the twelve months from the effective date of the (re)certification. Complete a separate line for each income-earning member. List the respective household member number from Part II.

Column (A)
Enter the annual amount of wages, salaries, tips, commissions, bonuses and other income from employment; distributed profits and/or net income from a business.

Column (B)
Enter the annual amount of Social Security, Supplemental Security Income, pensions, military retirement, etc.

Column (C)
Enter the annual amount of income received from public assistance (i.e., TANF, general assistance, disability, etc.).

Column (D)
Enter the annual amount of alimony, child support, unemployment benefits or any other income regularly received by the household.

Column (E)
Add the totals from columns (A) through (D), above. Enter this amount.
Part IV - Income from Assets

See HUD Handbook 4350.4 for complete instructions on verifying and calculating income from assets, including acceptable forms of verification.

From the third party verification forms obtained from each asset source, list the gross amount anticipated to be received during the twelve months from the effective date of the certification. List the respective household member number from Part II and complete a separate line for each member.

Column (F) List the type of asset (i.e., checking account, savings account, etc.)
Column (G) Enter C (for current, if the family currently owns or holds the asset), or I (for imputed, if the family has disposed of the asset for less than fair market value within two years of the effective date of (re)certification).
Column (H) Enter the cash value of the respective asset.
Column (I) Enter the anticipated annual income from the asset (i.e., savings account balance multiplied by the annual interest rate).

TOTALS Add the total of Column (H) and Column (I), respectively.

If the total in Column (H) is greater than $5,000 you must do an imputed calculation of asset income. Enter the Total Cash Value, multiply by .0006% and enter the amount in (J), Imputed Income.

Column (K) Enter the greater of the total in Column (I), or (J).

Part V - Total Annual Household Income from all sources

Total Annual Household Income From all Sources Enter the total of (E) and (K).
Maximum Income Limit per Family Size Enter the Maximum Income Limit for the household size.
Household Meets Income Restriction at Check the appropriate box for the income restriction that the household meets according to the unit income target specified by the set-aside(s) for the project.
Current Income Limit X 140% For recertifications only. Multiply the current Maximum Move-in Income Limit by 140% and enter the total. Below, indicate whether the household income exceeds that total. If the Gross Annual Income at recertification is greater than 140% of the current income limit, then the available unit rule must be followed.

Part VI - Rent

Tenant Paid Rent Enter the amount the tenant pays toward rent (not including rent assistance payments such as Section 8).
Rent Assistance Enter the amount of rent assistance, if any.
Utility Allowance Enter the utility allowance. If the owner pays all utilities, enter zero.
Other non-optional charges Enter the amount of non-optional charges, such as garage rent, storage lockers, charges for services provided by the development, etc.
Gross Rent for Unit Enter the total of Tenant Paid Rent plus Utility Allowance and other non-optional charges. If this is a HOME unit include Rental Assistance amount.
Maximum Rent Limit for this unit Enter the maximum allowable gross rent for the unit.
Unit Meets Rent Restriction at Check the appropriate rent restriction that the unit meets according to what is required by the set-aside(s) for the project.
Part VII - Student Status

Tax Credit
If all household members are full time* students, check “yes”. If at least one household member is not a full time student, check “no”.
If “yes” is checked, the appropriate exemption must be listed in the box to the right. If none of the exemptions apply, the household is ineligible to rent the unit.

HOME
If any household member is a full or part time student, check “yes”.
If “yes” is checked, the appropriate exemption must be listed in the box below. If none of the exemptions apply, the household is ineligible to rent the unit.

*Full time is determined by the school the student attends.

Part VIII - Divesture of Assets

Applicants and tenants must declare whether an asset has been disposed of for less than fair market value at each certification and recertification. Assets greater than $1,000 disposed of for less than fair market value during the two years preceding certification or recertification must be counted as an asset. If the tenant has indicated that assets have been disposed documentation and verification regarding the circumstances and amounts must obtained. If applicable the amounts must be included on Section IV.

PART IX - SUPPLEMENTAL INFORMATION

Complete this portion of the form at move-in and at recertification’s (only if household composition has changed from the previous year’s certification).

Tenant Demographic Profile Complete for each member of the household including minors. Use codes listed on supplemental form for Race, Ethnicity, and Disability Status.

Resident/Applicant Initials All tenants who wish not to furnish supplemental information should initial this section. Parent/Guardian may complete and initial for minor child(ren).

Signatures

After all verifications of income and/or assets have been received and calculated, each household member age 18 or older must sign and date the Tenant Income Certification. For move-in, it is recommended that the Tenant Income Certification be signed no earlier than 5 days prior to the effective date of the certification.

It is the responsibility of the owner or the owner’s representative to sign and date this document immediately following execution by the resident(s).

The responsibility of documenting and determining eligibility (including completing and signing the Tenant Income Certification form) and ensuring such documentation is kept in the tenant file is extremely important and should be conducted by someone well trained in tax credit compliance.

These instructions should not be considered a complete guide on tax credit compliance. The responsibility for compliance with federal program regulations lies with the owner of the building(s) for which the credit is allowable.