

Proposed Rules

Federal Register

Vol. 85, No. 9

Tuesday, January 14, 2020

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 91, 92, 570, 574, 576, 903, and 905

[Docket No. FR 6123–P–02]

RIN 2577–AA97

Affirmatively Furthering Fair Housing

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: HUD recognizes that its program participants have a duty to affirmatively further fair housing (AFFH), which HUD finds essential to the appropriate administration of its grant programs. Program participants must certify that they AFFH and maintain documentation to support that certification. This rule proposes changes to HUD's regulations regarding the reporting on program participants' actions to AFFH so that HUD can effectively evaluate participants' compliance with their AFFH obligations. This proposed rule would establish a uniform reporting process that respects the unique needs and difficulties faced by individual jurisdictions by assessing program participants on the concrete actions they take to AFFH and by leveraging objective metrics for fair housing choice to assist HUD's evaluation of such actions. The proposed regulation would revise the definition of AFFH, develop metrics to allow comparison of jurisdictions, and require jurisdictions to certify that they will AFFH by identifying concrete steps the jurisdiction will take over the next 5 years. Jurisdictions would need to report on their progress toward the commitments in their AFFH certification through the regular consolidated plan reporting and review processes. Public housing agencies would demonstrate their efforts to AFFH through their participation in the consolidated plan process.

DATES: *Comment Due Date:* March 16, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov. To receive consideration as public comments, comments must be submitted through one of two methods, specified below. All submissions must refer to the above docket number and title.

1. *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 website 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.

2. *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.

FOR FURTHER INFORMATION CONTACT: David Enzel, Deputy Assistant Secretary for Enforcement Programs, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street SW, Room 5204; telephone number 202–402–5557 (this is not a toll-free number). This number may be accessed via TTY by calling the toll-free Federal Relay Service during working hours at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. History

The Fair Housing Act prohibits discrimination in the provision of housing based on race, color, religion, sex, handicap, familial status, or national origin.¹ Section 808(e)(5) of the Fair Housing Act of 1968 (42 U.S.C. 3608(e)(5)) requires that the HUD

Secretary “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act].” In addition, recipients of HUD funding are required by other statutes to certify they will AFFH:

- *Housing and Community Development Act.* Jurisdictions directly receiving Community Development Block Grants must certify that they will AFFH (§ 104(b)(2), 42 U.S.C. 5304(b)(2)). Local governments receiving grants from a state must also certify they will AFFH (§ 106(d)(7)(B), 42 U.S.C. 5306(d)(7)(B)).

- *Cranston-Gonzalez National Affordable Housing Act.* States and local governments receiving certain grants must certify they will AFFH as part of their 5-year comprehensive housing affordability strategy identifying needs for affordable and supportive housing for the following 5 years (§ 105(b)(15), 42 U.S.C. 12705(b)(15)).

- *United States Housing Act of 1937.* Public housing agencies must include a certification they will AFFH as part of their annual plan (§ 5A(d)(16), 42 U.S.C. 1437c–1(d)(16)).

Recipients of HUD funding, therefore, are required to affirmatively further the Fair Housing Act's goal of promoting fair housing and equal opportunity. The Fair Housing Act and subsequent acts requiring certifications do not specify how HUD, or recipients of funding, are to AFFH, granting the Secretary broad discretion to define the precise scope of the AFFH obligation for HUD's program participants, including the AFFH certification.² Further, in *Inclusive Communities*, the Supreme Court warned that the Fair Housing Act “is not an instrument to force housing authorities to reorder their priorities”³ and is not meant to remedy mere

² See, e.g., *United States v. Winthrop Towers*, 628 F.2d 1028, 1036 (7th Cir. 1980) (“HUD has broad discretion ‘to choose between alternative methods of achieving the national housing objectives set forth in the several applicable statutes.’”) (quoting *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 819 (3d Cir. 1970)); see also *Nat'l Fair Hous. Alliance*, 330 F. Supp. 3d at 62 (D.D.C. Aug. 2018) (“HUD has ‘broad discretion to choose between alternative methods of achieving the national housing objectives set forth in the several applicable statutes,’ . . . and the Court may not substitute its judgment for HUD's in determining the best way of doing so.”) (quoting *Shannon* 436 F.2d at 819).

³ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522–23 (2015).

¹ See 42 U.S.C. 3604.

statistical imbalances in housing for protected class members.⁴

HUD satisfies its own AFFH obligations in various ways, including by imposing site and neighborhood standards for HUD-funded development,⁵ requiring affirmative marketing of housing units to promote integrated neighborhoods,⁶ and designing its programs to be consistent with its AFFH obligation. HUD also uses the disparate impact theory as a method of addressing violations of the Fair Housing Act where there is not clear evidence of intent to discriminate. HUD's grantee compliance monitoring advances the same goal—by requiring that grantees maintain records to support their AFFH certifications, HUD can use the information gathered to address violations of the Fair Housing Act that are not immediately apparent.

In 2015, HUD issued a final rule⁷ revising the AFFH reporting regulations for program participants. That rule required program participants to use a computer assessment tool to complete an Assessment of Fair Housing (AFH) by answering 92 questions on fair housing issues, priorities, and goals. Topics included segregation, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunities, and disproportionate housing needs. The rule contemplated separate assessment tools for public housing agencies (PHAs), States and Insular Areas, and local governments. HUD released a tool for local governments⁸ but never released a tool for States and Insular Areas, and the tool for PHAs never became operational.

II. Justification for Change

While the statutory obligation to AFFH has not changed, HUD has, over time, required program participants to document their efforts and plans to AFFH in several different ways. Since the issuance of the 2015 final rule, HUD has determined that the current regulations are overly burdensome to

both HUD and grantees and are ineffective in helping program participants meet their reporting obligations for multiple reasons. While some of the burdens are a result of the assessment tools themselves, the tools are closely tied to the regulatory language, which HUD believes is too prescriptive in outcomes for jurisdictions. Therefore, HUD believes it is necessary to revise the codified regulation, not just the assessment tools.

First, the AFH required significant resources from program participants, and its complexity and demands resulted in a high failure rate for jurisdictions to gain approval for their AFH in the first year of AFH submission. HUD became aware of significant deficiencies in the Local Government assessment tool that impeded completion and HUD acceptance of meaningful assessments by program participants. The number of questions, the open-ended nature of many questions, and the lack of prioritization between questions made the planning process both inflexible and difficult to complete.

On May 15, 2017, HUD issued a notice inviting public comments to assist HUD in identifying existing regulations that may be outdated, ineffective, or excessively burdensome.⁹ Many commenters specifically indicated that, as program participants, they found the rule's requirements to be (or likely to be) extremely resource-intensive and complicated, placing a strain on limited budgets. A representative of PHAs wrote that compliance with the “overly burdensome and impractical” rule¹⁰ would be expensive, with particular concern for PHAs with small housing portfolios, while other commenters stated that the rule did not provide enough consideration to the fact that jurisdictions are limited geographically in what they can do, even when a jurisdiction is in a regional partnership.

Of the 49 jurisdictions that were in the first group to submit an AFH between October 2016 and December 2017, 31 (63 percent) were either never accepted or were only accepted after HUD required revisions.¹¹ While

regional AFHs allowed program participants to pool knowledge and resources, the joint AFHs had the same defects as individual AFHs.¹² Program participants attempted to prepare successful AFHs by hiring outside consultants, redirecting resources that could have been used to support affordable housing directly.¹³

The sheer volume of data and variety of expertise required under the 2015 rule placed an undue burden on jurisdictions. While the assessment tool for PHAs was not finally implemented, under a published draft, PHAs would have been responsible for reporting on factors such as segregation levels and patterns dating back to 1990, community attitudes leading to observed patterns, and the presence or lack of private or public investment for the jurisdiction's protected classes.¹⁴ The tool would also require PHAs to analyze and consider data and policies beyond their jurisdictional control and typical subject-matter expertise. For example, the rule required identifying disparities in “. . . access to public transportation, quality schools and jobs . . . [and] environmental health hazards” and “programs, policies, or funding mechanisms that affect disparities” to such access.¹⁵ A commenter on the advance notice of proposed rulemaking on AFFH regulations issued in 2018 noted that this jurisdictional analysis was simply too complex to be effectively completed by staff without specific statistical and mapping knowledge, as housing providers generally have staff with skills that lie in providing affordable housing services, but not in providing complex statistical data analysis.¹⁶ The same is likely true for many smaller jurisdictions.

The 2015 rule also had public participation requirements that were similar to the consolidated plan citizen participation requirements, but it created a separate process for the AFH that duplicated the existing requirements for citizen participation and consultation with outside organizations that were already required for the consolidated plan. Jurisdictions were required to hold at least one public

⁴ See, e.g., *id.* at 2522 (“But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the [Fair Housing Act], FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.”)

⁵ See, e.g., 24 CFR 891.125; 983.57.

⁶ 24 CFR part 200, subpart M.

⁷ “Affirmatively Furthering Fair Housing; Final Rule,” published July 16, 2015, at 80 FR 42272.

⁸ “Affirmatively Furthering Fair Housing; Announcement of Renewal of Approval of the Assessment Tool for Local Governments,” published January 13, 2017, at 82 FR 4391; “Affirmatively Furthering Fair Housing Assessment Tool: Announcement of Final Approved Document,” published December 31, 2015, at 80 FR 81840.

⁹ “Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777,” published June 14, 2017, at 82 FR 22344.

¹⁰ See Lisa Stevens, Idaho Chapter of NAHRO letter to HUD Notice FR-6030-N-01 Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, available at <https://www.regulations.gov/document?D=HUD-2017-0029-0109>.

¹¹ “Affirmatively Furthering Fair Housing; Withdrawal of the Assessment Tool for Local Governments,” published May 23, 2018, at 83 FR 23922.

¹² *Id.*

¹³ *Id.*

¹⁴ PHA Assessment of Fair Housing Tool (<https://www.hudexchange.info/resources/documents/Assessment-of-Fair-Housing-Tool-For-Public-Housing-Agencies-2017-01.pdf>).

¹⁵ AFFH Rule, 80 FR at 42282.

¹⁶ Jim Hobbs, Housing Authority of Pikeville comment letter to FR-6123-A-01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements, p. 1, October 12, 2018, available at <https://www.regulations.gov/document?D=HUD-2018-0060-0150>.

hearing specifically on their proposed AFFH strategies prior to publishing the AFH for comment. According to some commenters, these AFFH-specific hearings created high additional costs for jurisdictions.¹⁷

Second, the administration of the rule was burdensome to HUD. While implementing the 2015 rule, HUD spent over \$3.5 million to provide technical assistance to the initial 49 jurisdictions. A workforce management plan, written by a contractor prior to the initial AFH submissions, estimated that HUD would need 538 full-time employees to conduct reviews of the AFHs submitted in 2019, given the increased number of jurisdictions originally scheduled to submit AFHs in 2019 (up to 682).¹⁸

Third, the 2015 rule's scope was particularly burdensome because HUD did not tailor the rule depending on the program participant, other than through creating broad categories. Every jurisdiction, regardless of their size, civil rights record, or current housing conditions, had to go through the same AFH process, without the flexibility to identify their locality's most relevant issues or to adapt their process to the unique conditions of the jurisdiction. Commenters expressed concerns that they lacked the capacity to analyze the several contributing factors prescribed by HUD and requested that HUD allow grantees flexibility in identifying issues and developing a course of action.¹⁹

Fourth, HUD determined that the 2015 rule focused too much on planning and process, and not enough on either the jurisdiction or HUD evaluating fair housing results. Jurisdictions were required to consider and provide extensive documentation for every question, regardless of whether the question or the expected answer advanced the jurisdiction's duty to AFFH or was relevant to the needs of the jurisdiction. This uniform, process-based approach discouraged innovation, allowed the process to substitute for

actual results, and made it difficult to evaluate and compare jurisdictions over time. Jurisdictions can advance fair housing in ways that HUD officials cannot predict because HUD lacks the extensive localized knowledge of State or local officials. The inherent nature of fitting jurisdictions into pre-determined categories and methods rather than evaluating jurisdictions based on results and achievements could discourage innovation and inhibit HUD's ability to evaluate a jurisdiction's improvement.

Finally, the completion of the AFH required grantees to use specific data sets and HUD-provided tools, including extensive mapping data, locally available data, and data from various interest groups. The goal behind the assessment tools was to assist in compiling this information, but the scope of the task of providing quality tools proved difficult for HUD, given the wide variety of circumstances to which they applied from jurisdiction to jurisdiction, and the absence of a discrete statutory objective. For local jurisdictions, the tool was difficult to learn and operate and did not include all factors that jurisdictions deemed relevant, such as low-income housing tax credit supported projects. For PHAs and states, no tools were ever provided because of the challenge in developing appropriate data sets for both relatively large and small geographies, *i.e.*, states and particular housing developments.

While the 2015 rule was not fully implemented, HUD determined that the results from the limited roll-out (summarized above) were sufficient to cease further implementation. HUD therefore concluded that a new approach was required.²⁰ On August 16, 2018, HUD published an Advance Notice of Proposed Rulemaking at 83 FR 40713, asking for the public's input on changes that would: (1) Minimize regulatory burden while more effectively aiding program participants to meet their legal obligations; (2) create a process that is focused primarily on accomplishing positive results, rather than on performing analysis of community characteristics; (3) provide for greater local control and innovation; (4) seek to encourage actions that increase fair housing choice, including through greater housing supply; and (5) more efficiently utilize HUD resources.

HUD received over 700 public comments in response. Many expressed support for the 2015 final rule and urged HUD to continue to implement its

requirements. These commenters cited the need for a way to enforce the AFFH requirement and cited the significant use of resources and public input that went into the creation of the 2015 rule. These commenters found the early results of the rule "promising" and believed that improving the tools would ease the burdens and improve the process.

However, a large number of commenters opposed the 2015 rule. Some objected to the idea entirely, citing concerns for local control of zoning. Others felt that the requirements of the rule were too onerous, specifically the level of public participation needed and the scope of data that program participants were required to address. Commenters asked that program participants and PHAs be given broader discretion in their planning. Multiple commenters suggested that instead of the 2015 rule's approach, HUD should find ways to use the AFFH process to provide incentives to increase housing supply and remove restrictive zoning regulations.

HUD has considered these comments and suggestions in the development of this proposed rule.

III. Goals of Proposed Rule

HUD seeks to further both the spirit and the letter of the Fair Housing Act. Housing discrimination still takes place, and many jurisdictions continue to allow known barriers to fair housing—such as burdensome governmental processes, the concentration of substandard housing stock in specific areas, or restrictions based on the source of a tenant's income—to exist.

HUD intends this regulation to promote and provide incentives for innovations in the areas of affordable housing supply, access to housing, and improved housing conditions. This is part of HUD's ongoing effort to improve regulations to allow and encourage innovative solutions to the housing problems facing America today. For example, there have been significant improvements in housing design and production products, as demonstrated in new designs for manufactured housing and reduced-size housing. Jurisdictions have also chosen to adopt changes in zoning laws that promote housing for the local workforce. Jurisdictions have amended historic preservation laws to permit redesign of buildings that are ill-suited for its community members with disabilities. Jurisdictions are promoting the provision of housing adjacent to transportation centers. As jurisdictions examine and discuss obstacles to fair housing, HUD anticipates such obstacles

¹⁷ See, e.g., Tiffany King, The Michigan State Housing Development Authority (MSHDA), comment letter to FR-6123-A-01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements, p. 1, October 16, 2018, available at <https://www.regulations.gov/document?D=HUD-2018-0060-0369>; Jennifer Eby comment letter to HUD Notice FR-6030-N-01 Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, p. 2, June 14, 2017, available at <https://www.regulations.gov/document?D=HUD-2017-0029-0222>.

¹⁸ AFFH Workforce Management Plan, April 29, 2016.

¹⁹ See, e.g., The City of Winston-Salem, NC comment letter to FR-6123-A-01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements, p. 2, October 16, 2018, available at <https://www.regulations.gov/document?D=HUD-2018-0060-0357>.

²⁰ Additional information was included in the Advance Notice of Proposed Rulemaking, "Affirmatively Furthering Fair Housing: Streamlining and Enhancements," published October 15, 2018, at 83 FR 40713.

can, in part, be addressed through innovative approaches to design and building codes and the elimination of unnecessary fees and other regulatory barriers. HUD will spotlight jurisdictions achieving such new solutions, but will not mandate or prescribe specific actions.

Therefore, HUD is proposing a new process to evaluate each jurisdiction's efforts to AFFH that not only allows HUD to enforce civil rights requirements effectively but also empowers individual jurisdictions to develop new approaches to AFFH and share with their peer jurisdictions what has worked and what has not. This approach will allow HUD to target its resources where they are most needed while enabling jurisdictions to measure their progress, understand their successes or failures, and continue to improve their efforts, without a mandate from HUD on exactly what steps to take. This approach would allow HUD to highlight best practices and create a repository of ideas by drawing out the diffuse knowledge about fair housing held by local actors and encouraging policy experimentation. HUD hopes to leverage this knowledge by studying the best housing opportunity results across the country and encouraging jurisdictions to adopt best practices.

This approach allows and provides incentives to local actors who know best the fair housing needs of their communities to take steps to further their particularized goals. As the Supreme Court stated in *Inclusive Communities*, while discussing the purpose of the Fair Housing Act, HUD should not “second-guess which of two reasonable approaches” should be taken or “force housing authorities to reorder their priorities” unnecessarily.²¹ The Fair Housing Act “does not decree a particular vision of urban development.”²² HUD aims to take this into account and allow for the flexibility and innovation necessary to best further fair housing nationwide, recognizing that fair housing is an especially difficult and complex policy area because of the competing considerations that go into promoting fair housing and other valid governmental priorities.

By proposing to reward jurisdictions that are performing well in their AFFH efforts and improving in ways that will benefit entire communities, HUD will provide incentives to both jurisdictions and the general public to find ways to help local jurisdictions improve their AFFH efforts. By increasing the number of people who benefit from an

expansion of fair and affordable housing, HUD expects that a larger share of the local community will be motivated to participate in local discussions on how to AFFH and what strategies are best suited for the locality. Such incentives may encourage citizens and local businesses to participate in important local housing debates when they otherwise may have sat on the sidelines. HUD believes that having buy-in from a broad range of citizens and businesses in a community will result in a stronger AFFH effort and help reduce housing discrimination.

HUD also recognizes that government policies, even when well-intentioned, can have negative results. This proposed policy of encouraging local experimentation is a recognition of the difficulties of crafting a top-down approach. HUD does not expect this proposed rule to be the final word on how recipients of HUD funding can AFFH. Rather, HUD anticipates that this will be the beginning of a flexible approach, consistent with constitutional mandates and statutory requirements, as HUD and jurisdictions gain additional evidence about what works and does not work to facilitate the advancement of fair housing.

IV. Summary of Proposed Rule

HUD believes that fair housing choice exists when a jurisdiction can foster the broad availability of affordable housing that is decent, safe, and sanitary and does so without housing discrimination. To that end, HUD is proposing to evaluate how program participants are carrying out their AFFH obligation as a threshold matter by using a series of data-based measures to determine whether a jurisdiction (1) is free of adjudicated fair housing claims; (2) has an adequate supply of affordable housing throughout the jurisdiction; and (3) has an adequate supply of quality affordable housing. Jurisdictions that score highly using these metrics (or through improvements over a 5-year cycle) would be eligible for various incentives in HUD programs. HUD would focus remedial resources and potential regulatory enforcement actions on the lowest performers.

All program participants included in the consolidated plan process would be required to examine their own circumstances to determine how best to address their AFFH performance. HUD is proposing to modify the regulatory requirements of jurisdictions' certifications that they will AFFH by requiring the jurisdictions to commit, in the certification, to taking specific steps to address obstacles to fair housing choice. As a result of HUD's proposal to

include these commitments as part of the consolidated plan, jurisdictions would consult with all relevant stakeholders to develop AFFH commitments tailored to the needs and situations of the jurisdiction. HUD expects that jurisdictions would then be able to share with others, through HUD and otherwise, what worked and what did not work, allowing jurisdictions to learn from one another as they develop new approaches. PHAs would be required to participate in the development of this certification through their participation in the consolidated plan process; this participation and their own accompanying AFFH certification would be how PHAs fulfill their AFFH responsibilities.

The previous AFFH process—which required lengthy submissions that averaged 204 pages but stretched as long as 832 pages²³—risked violating the organizational management maxim that if everything is a priority, nothing is a priority. In contrast, HUD believes that simplifying AFFH requirements would aid program participants in meeting their statutory civil rights obligations. It would also help HUD target its enforcement and technical assistance for jurisdictions receiving CDBG funds so that HUD's efforts are directed where they are needed most. This would allow jurisdictions to focus on their most important fair housing goals so that the jurisdiction could achieve more of their aims, instead of trying to execute too many goals to be successful. By having jurisdictions focus on fewer elements, it would be easier for the public to provide relevant information and feedback, better enabling jurisdictions to take those contributions from the public into consideration.

HUD welcomes comments on all aspects of the proposed rule and its potential impacts. However, there are areas where HUD is seeking very specific feedback on the proposal. These specific requests for comments are embedded in the preamble discussion.

A. Definition of Affirmatively Furthering Fair Housing

The current regulation defines AFFH as “taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically

²³ See December 23, 2016, AFH of the City of Philadelphia and the Philadelphia Housing Authority, available at <http://ohcdphila.org/wp-content/uploads/2017/01/afh-2016-for-web.pdf>.

²¹ *Inclusive Communities*, 135 S. Ct. at 2522.

²² *Id.* at 2523.

concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”²⁴

HUD proposes changing the definition of AFFH to “advancing fair housing choice within the program participant’s control or influence.” HUD is proposing a definition of “fair housing choice” to be allowing “individuals and families [to] have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to race, color, religion, sex, familial status, national origin, or disability.”²⁵ Fair housing choice would consist of three components:

(1) Protected choice, meaning the absence of discrimination.

(2) Actual choice, meaning not only that affordable housing options exist (as defined by the jurisdiction based on the needs and resources of that jurisdiction), but that the information and resources are available to enable informed choices. This is intended to encourage jurisdictions to provide public education about fair housing, the protected classes, and the resources available to protected class members to protect their right to fair housing.

(3) Quality choice, meaning that the available and affordable housing is decent, safe, and sanitary, and, for persons with disabilities, accessible as required under civil rights laws.

This revised definition of AFFH would avoid a federal government directive for local action that does not align with the statutory directive or that goes beyond the authority of subject jurisdictions. It would also alleviate the unintended consequences of discouraging the use of federal assistance in communities that need additional help instead of restrictions. It would provide a more tailored approach that would take into account local issues and concerns by allowing local jurisdictions to create custom approaches based on their unique circumstances.

In addition, the revised definition would make it clear that fair housing is based on fair housing choice. Fair housing involves combatting discrimination across all the classes protected by the Fair Housing Act: color, religion, sex, disability, familial

status, and national origin. Finally, the revised AFFH definition would emphasize that a jurisdiction can AFFH in a variety of ways, according to the needs and means of the local community.

The revised definition does not affect the responsibility of jurisdictions to comply with other relevant federal requirements and civil rights law.

B. AFFH Certifications

Each jurisdiction that submits a consolidated plan must submit a certification that it will AFFH. Currently, the certification consists of a statement that the jurisdiction will AFFH, but it does not specify the exact way the jurisdiction intends to AFFH. HUD is proposing to expand the certification so that the jurisdiction would commit to addressing at least three fair housing choice obstacles or goals over the next five years. By including AFFH planning as part of the consolidated plan process, HUD proposes to incorporate the public participation requirements of the consolidated plan, without imposing an additional burden on jurisdictions. PHAs, already required to participate in the consolidated plan process, would be required to certify, in every applicable annual plan, that they have consulted with the jurisdiction on how to satisfy their obligations to AFFH. This participation and certification would fulfill their AFFH responsibilities.

Each jurisdiction would be required to submit at least three measurable, concrete goals it plans on reaching in the upcoming years or obstacles to fair housing choice it plans to address, within its scope of influence, to increase fair housing choice. HUD would expect these submissions to provide a brief and direct explanation of how pursuing each goal or alleviating each obstacle would further fair housing choice in their jurisdiction. HUD would review these goals or obstacles for completeness and verify they use concrete and measurable standards, but HUD would not require that the goals cover specific areas or reach certain thresholds. Jurisdictions may consider additional data other than what was used for the comparison metrics in deciding what steps to take, but they would be required to provide a narrative justification for the decisions and goals. The certification would not have to address all fair housing obstacles or identify every effort the jurisdiction would take, but it should identify crucial or material efforts that the jurisdiction would reasonably expect to undertake over the next five years.

Question for Comment 1: Is three the appropriate number of goals a jurisdiction should submit? If not, what would be a more suitable number?

Would a higher number more appropriately hold jurisdictions accountable to AFFH without imposing an undue burden?

Question for Comment 2: How should HUD balance requiring overly prescriptive standards with ensuring integrity for data sources that support such goals?

The certification would be informed by the nature of the program participant, its geographic scope, its size, and its financial, technical and managerial resources. The goals or obstacles identified in the certification would not need to be based on any HUD-prescribed mode of analysis, such as examining a statistical analysis of housing patterns, using any specified data set, or reflecting original research or commissioned expert opinions, but they should reflect the practical experience and local insights of the program participant in conducting its ordinary housing-related operations, both with HUD funding and other programmatic efforts.

HUD recognizes that jurisdictions may find many ways to advance fair housing that HUD officials cannot predict. Developing approaches to AFFH is a particularly difficult policy area, because a jurisdiction must consider competing factors within the jurisdiction that affect how best to AFFH, and State or local officials have the localized knowledge to balance those considerations. Therefore, HUD is not proposing to require that jurisdictions carry out specific steps to AFFH. This approach would allow jurisdictions to act as they deem necessary to achieve their results while allowing HUD to avoid micromanaging localities, “decree[ing] a particular vision of urban development,”²⁶ or “second-guess[ing] which of two reasonable approaches” a jurisdiction should take.²⁷ It would preserve flexibility for jurisdictions to take action based on the needs, interests, and means of the local community, and respects the proper role and expertise of state and local authorities.

Question for Comment 3: What, if any, aspects of the proposed rule and other policies not in the proposed rule, would motivate jurisdictions to more meaningfully engage in the AFFH planning process and make progress on the goals of the local AFFH plan?

²⁴ 24 CFR 5.152.

²⁵ The Fair Housing Act uses the term “handicap.” See 42 U.S.C. 3604. However, the term “disability” is more commonly used and accepted today to refer to a physical or mental impairment that is protected under federal civil rights laws, the record of that impairment, or being perceived as having an impairment. Therefore, except when quoting from the Fair Housing Act, this preamble and proposed rule use the term “disability.”

²⁶ *Inclusive Communities*, 135 S. Ct. at 2522–23.

²⁷ *Id.* at 2512.

However, HUD anticipates that jurisdictions may look to common ways to increase fair housing choice in their jurisdictions. HUD proposes including a non-exhaustive list in the regulation of conditions that HUD considers to be common barriers to fair housing choice. HUD would consider a goal to take concrete steps toward alleviating or improving one of these listed conditions as a justified method of affirmatively furthering fair housing, and therefore jurisdictions would not need to include an explanation of why the jurisdiction is pursuing solutions to these barriers. While the proposed list would serve as a resource for jurisdictions in identifying potential obstacles or goals, HUD is not requiring jurisdictions to choose from these barriers when developing their certifications. HUD seeks input on what specific barriers may be categorized as “common” and thus should be included in the list.

HUD recognizes the broad sweep of the AFFH obligation, its nature which defies easy quantification, and its susceptibility to widely diverging but reasonable interpretations. In analyzing the statutory direction within the context of the Fair Housing Act and other applicable laws as a whole, HUD does not expect that program participants would be able to immediately and completely address each impediment which they identify. Further, the purpose of these goals would not be to bind the jurisdiction to a certain course of action. Rather, these goals would be intended to provide HUD with an explanation of how the jurisdictions plans to AFFH so that HUD can review the jurisdiction’s actions to determine whether, in HUD’s assessment, the jurisdiction is making a sufficient effort to AFFH.

Although not expressly included on HUD’s proposed examples of common barriers (because they are generally legitimate and widely vary), jurisdictions should feel free to examine their State or local zoning laws and may determine that modifying these provisions is how they can best AFFH. HUD anticipates that program participants may undertake these types of actions because commenters stated that, outside of market forces, there are a number of structural barriers that could reduce the availability of housing overall, keeping housing prices high. For instance, cities may have zoning laws that restrict the ability of owners to build higher-density housing, or they may have elaborate housing production processes that result in would-be developers not getting the best use out of their land. One commenter noted that parties who would like to build more

housing might face multiple layers of bureaucracy, each with their own interests and levels of expertise, such as city planning departments, citizen zoning boards, historical commissions, public hearings, state environmental review boards, and city rental licensing departments.²⁸

HUD considers changes to zoning laws to be a useful and appropriate tool to further fair housing choice. Jurisdictions are free to choose to undertake changes to zoning or land-use policies as one method of complying with the AFFH obligation; however, no jurisdiction may have their certification questioned because they do not choose to undertake zoning changes. HUD believes this is consistent with section 105(c)(1) of the Cranston-Gonzalez National Affordable Housing Act,²⁹ which prohibits HUD from disapproving consolidated plans because a jurisdiction adopts or continues zoning ordinances or land-use policies.

One commenter cited data that found that the “overall cost of housing in the United States is at least \$3.4 trillion higher than it would be absent zoning regulations” and US GDP is about \$2 trillion below its potential due to restrictive land-use regulations.³⁰ According to one study cited by a commenter, “regulation imposed by all levels of government (whether local, state or federal) accounts for 32.1 percent of the cost of an average multifamily development.”³¹ Numerous research studies provide supporting evidence of the commenters’ statements concerning the adverse impacts of restrictions on affordability and availability. A HUD report (2005) describes evidence from multiple studies indicating that regulating development increases the cost of housing. The estimated impact on prices varies by type of regulation studied and the context of the real estate market, and

²⁸ Salim Furth, Mercatus Center at George Mason University letter to ANPR FR–6123–A–01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements, October 16, 2018, p. 4, available at <https://www.regulations.gov/document?D=HUD-2018-0060-0026>.

²⁹ 42 U.S.C. 12705(c)(1).
³⁰ See Joshua Gottlieb comment letter to to FR–6123–A–01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements, October 16, 2018, available at <https://www.regulations.gov/document?D=HUD-2018-0060-0489>, citing Emrath, P. & Walter, C. Multifamily Cost of Regulation (2018), available at https://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=262391&subContentID=712894.

³¹ National Association of Home Builders comment letter to ANPR FR–6123–A–01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements, October 16, 2018, available at <https://www.regulations.gov/document?D=HUD-2018-0060-0489>, citing Emrath, P. & Walter, C. Multifamily Cost of Regulation (2018), available at https://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=262391&subContentID=712894.

ranges from 10 to 50 percent.³² A more extensive and critical review of published research (Quigley and Rosenthal, 2005) finds that “a number of credible papers seem to bear out theoretical expectations” that reducing the supply of developable land will raise housing prices.³³ Sophisticated empirical research in the last decade has produced more convincing evidence that there is a direct link between regulation and housing affordability (Gyourko and Molloy, 2015).³⁴ The impact of constraining development reaches beyond local housing and land markets. There is a macroeconomic cost of limiting housing production in the most productive cities. One study (Hsieh and Moretti, 2019) found that the misallocation of labor due to restrictive housing regulations lowered US economic growth by 36 percent from 1964 to 2009.³⁵ Jurisdictions may examine their State or local laws, regulations, and government structure and determine that modifying these structural barriers to affordable housing is how they can best AFFH.

Jurisdictions with high levels of deteriorated or low-quality housing may decide that they wish to focus on improving those measures. The jurisdiction could work to convince the local PHA to prioritize the rehabilitation of its units, or it could decide that the best way to spend flexible funds is to improve local housing conditions.

Question for Comment 4: Are there other factors, in addition to the ones listed in this proposed regulation, which are generally considered to be inherent barriers to fair housing?

Question for Comment 5: Should any of the factors listed as inherent barriers to fair housing be revised or removed? Should there be different inherent barriers for States than for other jurisdictions?

Question for Comment 6: What process should HUD undertake for updating the list in regulations, and how frequently should these updates occur?

³² U.S. Department of Housing and Urban Development, 2005 “Why Not In Our Community?, Removing Barriers to Affordable Housing, An Update to the Report of the Advisory Commission on Regulatory Barriers to Affordable Housing.”

³³ Quigley, John M., and Larry A. Rosenthal. 2005. “The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?” *Cityscape: A Journal of Policy Development and Research* 8 (1): 69–137.

³⁴ Gyourko, J. and Molloy, R., 2015. Regulation and housing supply. In *Handbook of regional and urban economics* (Vol. 5, pp. 1289–1337). Elsevier.

³⁵ Hsieh, Chang-Tai, and Enrico Moretti, 2019. “Housing Constraints and Spatial Misallocation.” *American Economic Journal: Macroeconomics* 11 (2): 1–39.

Finally, under the proposed rule, documentation used in the preparation of the AFFH certification would not need to be provided to HUD. However, such information would have to be retained and available for inspection by HUD according to the record retention requirements of the consolidated plan.

C. Comparison Metrics

To provide a way for jurisdictions to measure their progress in affirmatively furthering fair housing over time, and to allow HUD to verify that jurisdictions are taking actions and not just making plans, HUD is proposing a system that would use publicly available metrics to score and rank the CDBG-receiving jurisdictions that submit a consolidated plan that year. By using public data, HUD intends to create a “dashboard” that would allow jurisdictions to anticipate where they would rank and therefore plan ahead accordingly. This dashboard will further encourage engagement by allowing a jurisdiction to know exactly where it stands. These rankings would allow HUD to objectively determine a jurisdiction’s success in providing quality affordable housing without adjudicated adverse fair housing findings. This ranking system, while useful in helping HUD evaluating compliance with the jurisdiction’s requirement to AFFH, would not reflect a determination that the jurisdiction has complied with the Fair Housing Act.

The proposed rule recognizes that jurisdictions face different challenges including tight or slack housing supply, job growth or decline, and shifts in population growth or decline. These different indicators would influence jurisdictions’ choices in promoting fair housing choice. A jurisdiction with high job growth and a tight housing market would have different priorities and abilities than a jurisdiction with job declines and a very open housing market. Both would also be different from a jurisdiction with high job growth but a commensurate growth in the availability of housing that keeps housing prices more affordable.

HUD’s proposed regulation would compare jurisdictions receiving CDBG funds and submitting a consolidated plan with other similarly situated jurisdictions, taking into account the factors discussed above, to be developed for the final rule. HUD is also considering using different data sets for different categories of jurisdictions.

The regulatory text is intended to be a broad outline of the specific data measures included in the comparison metric. HUD plans to publish a notice for public comment identifying the

specific sources of data and the method for creating a jurisdiction’s metric score when this rule is finalized.

Question for Comment 7: What are the appropriate economic and population size/growth/decline market conditions categories of local CDBG-receiving jurisdictions that submit consolidated plans? Should there be different categories of States, as well? How many categories should there be?

Question for Comment 8: Given the intentions of HUD for specific types of data discussed more fully below, are there specific data that HUD should use for certain categories and not for others?

Question for Comment 9: What process should HUD undertake for updating the metrics, scoring, weighting, and other components, and how frequently should these updates occur?

1. Scope

Under the proposed rule, HUD would only determine and compare metrics for jurisdictions that submit consolidated plans because they receive CDBG funds. This would allow HUD to rely on the geographic boundaries used by the CDBG program and to focus its resources on the jurisdictions that are likely receiving the most funding from HUD.

Question for Comment 10: Should HUD also rank non-CDBG jurisdictions that still submit consolidated plans? What are the potential obstacles or problems with those rankings?

2. Data

To determine each jurisdiction’s success at furthering fair housing choice, HUD would develop a scoring system based on quantitative data generated by publicly available datasets, such as data from the United States Census Bureau, including the American Community Survey, the United States Post Office, and HUD-generated data. These data would seek to represent how well a jurisdiction is providing affordable, quality housing free of violations of the Fair Housing Act and related statutes. HUD would create the scoring system using data related to affordable housing availability, the jurisdiction’s housing quality, and adjudicated complaints of violations of the Fair Housing Act or related statutes. HUD would re-evaluate the data set periodically and adjust them through further notice and comment.

a. Lack of Adjudicated Fair Housing Violations

One of the key ways HUD would confirm that program participants fulfill their AFFH responsibilities would be to

reward only jurisdictions that are free of material civil rights violations. HUD recognizes that jurisdictions have multiple layers of civil rights enforcement, including state Attorneys General, Fair Housing Initiative Programs, the United States Department of Justice (“DOJ”), and HUD. HUD proposes to take all these methods of enforcement into account in determining a jurisdiction’s civil rights record.

HUD proposes to include a yes or no indicator of whether the jurisdiction has an adversely adjudicated fair housing complaint brought by or on behalf of HUD or by the DOJ against the jurisdiction in the previous 5 years. By limiting this indicator to adverse determinations following adjudication, HUD would protect jurisdictions by only penalizing them on this indicator after they have had an opportunity for a hearing and full finding of facts. Jurisdictions with any such adjudicated violations within the previous 5 years would not be eligible for any benefits otherwise available to high-performing jurisdictions.

Question for Comment 11: Are there other methods (aside from a yes or no indicator) for incorporating the complaints into the dashboard? Are there other data points HUD should include in this measure?

Question for Comment 12: HUD is concerned that taking into account adversely adjudicated civil rights cases that were not brought by HUD or DOJ will encourage jurisdictions to settle civil rights claims rather than risk an adverse ruling that would affect the jurisdiction’s standing with HUD. HUD seeks comment on whether, and if so how, it could take these cases into account without unduly influencing civil rights litigation.

Question for Comment 13: Are there circumstances in which a jurisdiction should not be held accountable for a negatively adjudicated complaint against a PHA? Are there ways to take adjudications against a PHA into account without penalizing the entire jurisdiction?

b. Affordable Housing

Fair housing choice requires not only the absence of discrimination but the existence of realistic housing options.³⁶ As stated by Senator Walter Mondale in support of the Fair Housing Act, protection against discrimination does not itself “overcome the economic

³⁶ See AFFH Rule Guidebook at 4, available at <https://www.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf>, quoting 24 CFR 5.152.

problem of those who could not afford to purchase the house of their choice.”³⁷ Ultimately, he continued, “the laws of supply and demand will take care of who moves into what house in which neighborhood.”³⁸ Members of protected classes often find their access to fair housing choice limited by economic factors brought on by a lack of affordable housing.

Affordable housing can advance the goal of providing members of protected classes with access to the neighborhoods of their choice. Some protected class members may want to stay in their neighborhood to maintain access to deep community support systems or proximity to their job. Others who want to leave their neighborhood would benefit from reduced housing costs that make it easier for them to move. Encouraging policies that increase overall access to affordable housing allows residents to gain from improvements to housing conditions in their own neighborhood while providing flexibility to jurisdictions on how to achieve that affordability.

Increasing the availability of affordable housing in a community would help low-income families. However, studies have demonstrated that single-parent households, elderly households, and households of color are more likely to be cost-burdened by housing.³⁹ Increasing overall affordability will, therefore, help members of protected classes maximize their ability to live where they choose. Having a supply of affordable housing that is sufficient to meet the needs of a jurisdiction’s population is crucial to enabling families to live throughout the jurisdiction and promoting fair housing for all protected classes, so HUD is proposing to include data in the comparison metrics to evaluate a jurisdiction based on its availability of affordable housing. To do this, HUD is considering using metrics such as housing prices, fair market rents, the burden housing costs place on very-low-to moderate-income families, the ability of tenants with housing choice vouchers to access housing throughout the jurisdiction, and the existence of excess housing choice voucher reserves showing a failure to fully take advantage of voucher funding available to the jurisdiction.

Question for Comment 14: Are there other data points HUD should use to

measure affordability as it relates to fair housing choice? If so, what considerations are needed in using this data to ensure an accurate measure?

Question for Comment 15: What data sources may enable HUD to measure the extent to which residents are living in neighborhoods of their choice, consistent with their means?

Question for Comment 16: With any of the data mentioned above, are there any factors, such as disparities in average income or job growth, for which HUD should control, to ensure that analysis of the data set is an accurate measure of access to fair and affordable housing?

Question for Comment 17: Another idea HUD is considering is ranking jurisdictions based on “by right” land use or the amount of additional burden local regulations place on the housing market by unduly increasing housing costs. Do such measures exist? How could HUD work to create one?

Question for Comment 18: Are there other measures that HUD could use or create to encourage the creation of additional housing that is affordable throughout a jurisdiction?

c. Housing Quality and Physical Conditions

Gains generated by widespread affordable housing are not meaningful unless that affordable housing is decent, safe, and sanitary. Without quality affordable housing, members of protected classes will face practical limitations in their housing choices.

Individuals living in poor quality housing experience an increase in chronic illness,⁴⁰ respiratory diseases,⁴¹ and injuries.⁴² Overcrowding can increase the transmissions of disease and psychological distress.⁴³ These negative effects can be particularly harmful and long-lasting to children.⁴⁴

⁴⁰ Evans, J., Hyndman, S., Stewart-Brown, S., Smith, D., & Petersen, S., An epidemiological study of the relative importance of damp housing in relation to adult health, *J Epidemiol Community Health*, pp. 677–686 (2000), available at <https://jech.bmj.com/content/54/9/677.long>.

⁴¹ Institute of Medicine. *Clearing the Air: Asthma and Indoor Air Exposures*. Washington, DC: National Academy Press; 2000.

⁴² Tinetti ME, Speechley M, & Ginter SF, Risk factors for falls among elderly persons living in the community. *N Engl J Med*. 1988; 319:1701–1707.

⁴³ Solari, Claudia D, and Robert D Mare, “Housing crowding effects on children’s wellbeing.” *Social science research* vol. 41,2 (2011): 464–76, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3805127/>.

⁴⁴ Coley, R.L., Leventhal, T., Lynch, A.D., & Kull, M. (2013). *Relations Between Housing Characteristics and the Well-Being of Low-Income Children and Adolescents*. *Developmental Psychology*. Vol 49(9). Pages 1775–1789, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3766502/>.

Dilapidated or abandoned housing stock may also foster crime.⁴⁵

Persistent health problems can also make it difficult for individuals to obtain and maintain employment, threatening their ability to maintain self-sufficiency. This can be particularly acute for individuals with physical disabilities and older adults, for whom deteriorating or inaccessible housing creates a much higher risk of injury.

HUD is considering using worst-case housing needs data, which documents lack of kitchen facilities and adequate plumbing and overcrowding, to determine how well a jurisdiction is encouraging a supply of housing that is of sufficient quality. HUD would also like to consider the prevalence of housing with lead-based paint hazards that cause health issues and the quality of housing in jurisdictions according to HUD REAC inspection scores.

Question for Comment 19: Are there other data points HUD should include to measure housing conditions as they relate to fair housing? If so, are there any additional considerations in using those data points necessary to ensure an accurate measure?

Question for Comment 20: With any of the data mentioned above, should there be additional considerations to ensure that the data set is an accurate measure?

3. Rewards and Other Compliance Incentives

HUD believes that the best way to further fair housing is to encourage collaboration and cooperation among all stakeholders within a jurisdiction, including government, PHAs, nonprofits, and private owners. This rule proposes to provide benefits to both jurisdictions and the entities within jurisdictions that, as demonstrated by comparison metrics, are successful with their AFFH efforts. In addition, this rule would empower HUD to concentrate its assistance and regulatory enforcement resources on the lowest AFFH performers.

a. Rewards

Within each category, HUD proposes to determine the jurisdictions that are outstanding AFFH performers, and grantees and applicants for funding located within those jurisdictions would be eligible for various benefits for the following 2 years. As more fully described below, HUD proposes that the benefits vary according to the program involved, but may include preference

⁴⁵ See, e.g., Freedman, Matthew, and Emily G. Owens. “Low-income housing development and crime.” *Journal of Urban Economics* 70.2–3 (2011): 115–131.

³⁷ Speech by Senator Mondale on floor of the Senate, February 20, 1968, 114 Cong. Rec. 3421–22, 3421.

³⁸ *Id.* at 3422.

³⁹ The State of the Nation’s Housing 2018, Joint Center for Housing Studies of Harvard University, 2018, 30–31.

points on Notices of Funding Availability (NOFAs) or eligibility to receive additional program funds due to reallocations of recaptured appropriated funds and other forms of regulatory relief.

Beginning with the second consolidated plan cycle after the effective date of the rule, HUD also proposes to determine which jurisdictions had the greatest improvement in their metrics over the past five years. The most improved jurisdictions would also be eligible for benefits given to outstanding AFFH performers (if not otherwise already an outstanding AFFH performer).

Question for Comment 21: How should HUD determine ranking of high and low AFFH performers? Should a baseline percentage be used (for example, the top 20 percent and bottom 20 percent), or should some other ranking be used (for example, a “natural break” in the distribution where there is a material distinction between jurisdictions)? If a percentage, what is the appropriate percentage, and why? Would it be appropriate to set a percentage and then allow the Secretary to deviate from that baseline when the data warrants it? What would be the effects of using each type of approach?

Question for Comment 22: Should there be two tiers of rewards for high performing jurisdictions, such as “outstanding” and “high pass,” where “outstanding” performers received regulatory relief and extra funding, while “high pass” performers received just one category of relief, such as extra funding? What would be the effects of such an approach?

Question for Comment 23: Should HUD reward improvement in a jurisdiction before the first 5-year cycle is complete? If so, how should HUD determine progress between consolidated plan submissions, and what possible benefits should be available?

HUD is interested in determining which jurisdictions are the most effective at meeting their AFFH obligations. HUD believes that, by identifying top performers, other similarly situated jurisdictions can learn from these top performers and may be able to replicate successful practices. By identifying such top performers, HUD would be able to reward and provide incentives to jurisdictions that make significant efforts to address housing discrimination. This jurisdiction-driven approach would also allow the top performers to serve as a model for HUD in designing future programs and fair housing efforts.

HUD is proposing to reward outstanding AFFH performers through advantages in grant competitions. While many funding programs are based on a statutory formula, there are numerous grant programs, including Choice Neighborhood Planning and Implementation Grants, Jobs-Plus, lead-based paint reduction programs, ROSS and FSS programs, and the Fair Housing Initiative Program, where it may be appropriate to award points in the competition to applicants that are within outstanding AFFH jurisdictions. In the development of each competitive NOFA, HUD proposes to consider whether it is appropriate to use the grant funding to provide a benefit to potential recipients in an outstanding AFFH jurisdiction.

In addition to potential NOFA bonuses, HUD would, in the development of future demonstration programs, consider whether the demonstration should prioritize participants in outstanding AFFH jurisdictions. Programs that may fall into this category include new designations of PHAs as Moving to Work (MTW) agencies, priorities for conversions of assistance under the Rental Assistance Demonstration (RAD) program, or selection for participation in mobility demonstrations.

HUD is also considering whether outstanding AFFH jurisdictions should be eligible for various forms of regulatory relief, either from the AFFH process itself or as part of the larger programmatic regulatory requirements. HUD is also open to seeking additional statutory flexibility to reward outstanding AFFH jurisdictions.

Question for Comment 24: Are there other rewards that HUD should consider for outstanding AFFH performers? Are there statutory or regulatory changes that HUD should pursue to increase the availability of such rewards?

Question for Comment 25: Are there specific forms of regulatory relief that HUD should consider for outstanding AFFH performers?

b. Compliance Incentives

If a jurisdiction falls in the bottom ranking, HUD proposes to consider the accuracy of the jurisdiction’s AFFH certification under 24 CFR 91.5. The jurisdiction would have the opportunity to respond in writing to provide additional information to demonstrate that they are affirmatively furthering fair housing to the best of their ability. This demonstration may include evidence that the jurisdiction has taken concrete and measurable steps for improvement, additional information about specific obstacles faced in achieving AFFH

goals, structural and systematic reasons for lack of movement in the comparison metrics, or other information the jurisdiction believes relevant.

If HUD, following existing procedures, were to determine that the additional information provided by the jurisdiction is sufficient, HUD proposes to accept the certification. However, if the additional information was deemed insufficient, HUD proposes to reject the AFFH certification of the jurisdiction and to follow the procedures under 24 CFR 91.500 to provide the jurisdiction with the specific steps the jurisdiction must follow for HUD to accept the certification. Such steps may include additional public participation requirements for the development of the next AFFH certification or specific remedies for deficiencies HUD has discovered as part of the review process. If a jurisdiction continues to be unable to provide adequate assurances that it will AFFH, HUD proposes that the grant may be withheld.

Question for Comment 26: Are there other remedies HUD should consider requiring of jurisdictions who are not improving in their comparison metrics?

Just as with outstanding or improved AFFH performers, HUD is also very interested in identifying which jurisdictions may need further assistance in meeting their AFFH obligations. HUD believes that a jurisdiction that is struggling to improve on the neutral metrics, or falls significantly below its peers, may be a jurisdiction that needs help in other areas of compliance, as well. Therefore, HUD proposes to use the identification of the lowest performers in AFFH to target its resources in many areas, such as grant administration and regulatory oversight, not just in civil rights enforcement.

HUD’s intent is not to punish pioneering jurisdictions for creative AFFH strategies that turn out not to be effective. HUD recognizes that sometimes unsuccessful efforts are just as important to learning as successful efforts. HUD would encourage jurisdictions to share lessons learned from unsuccessful efforts and successful efforts alike. HUD also expects that the annual report process would encourage jurisdictions to regularly consider whether their action plans are promoting change in the right direction and, if not, proposes to allow the jurisdictions a chance to recalibrate and change course. This would help create a cycle of accountability that allows jurisdictions to highlight successes, analyze failures, and course-correct, if necessary.

Question for Comment 27: HUD is seeking input on possible mechanisms for sharing information across jurisdictions regarding the success of efforts to AFFH, and the extent to which any such mechanisms should become requirements of the regulation.

4. Appeals

If a jurisdiction were to believe that an error, such as a failure to consider a relevant factor or a statistical anomaly, has resulted in the jurisdiction being improperly ranked, the jurisdiction would be able to respond to HUD by identifying the error and requesting a recalculation of the comparison metrics, or consideration of a factor which was not adequately accounted for in the comparison metrics. HUD would review the jurisdiction's response and, if HUD determines it necessary, recalculate the jurisdiction's ranking without impacting the rankings of others.

D. Annual Performance Reports and Amendments

HUD recognizes that AFFH efforts may take time to realize results, but jurisdictions are encouraged to still work to AFFH on a consistent basis throughout their consolidated plan cycles. In the years between 5-year plans, jurisdictions would need to submit, in their annual performance reports under 24 CFR 91.520, annual progress updates to the goals or obstacles they submitted in their most recent AFFH certification. HUD is also proposing to add an AFFH component to the annual performance review conducted by HUD. This review would not be intended to substitute HUD's judgment for the judgment of the jurisdiction. Instead, under HUD's rational basis review, HUD would accept performance reports under 24 CFR 92.520, where the steps taken are each rationally related to the goal and obstacles identified in the jurisdiction's AFFH certification. This language is intended to follow the judicial definition of rational basis review closely.⁴⁶

⁴⁶ See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) (Under the rational basis standard, the constitutional safeguard of equal protection “is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory determination will not be set aside if any statement of facts reasonably may be conceived to justify it.”); see also *James v. Strange*, 407 U.S. 128, 140–42 (1972) (holding that rational basis review under the Equal Protection Clause “imposes a requirement of some rationality in the nature of the class singled out” and that treating one class of debtors differently from another

HUD believes that this level of review would provide the proper level of oversight without undue interference. HUD recognizes that affirmatively furthering fair housing is a necessarily complicated area implicating various policy concerns. Unlike enforcement actions for discrimination, HUD is seeking only to confirm that jurisdictions are fulfilling their statutory duty and will trust, in the absence of evidence to the contrary, that a jurisdiction's preferred method of affirmatively furthering fair housing is a valid method of fulfilling its statutory duty. The Fair Housing Act does not mandate that jurisdictions be second-guessed for the reasonable choices they make. The Supreme Court in *Inclusive Communities* said that the Fair Housing Act is not a means of second-guessing the reasonable choices of jurisdictions.⁴⁷ A higher level of scrutiny would invite second-guessing. This level of scrutiny also encourages experimentation and prevents HUD from substituting its judgment for that of local jurisdictions. HUD recognizes that some jurisdictions will pioneer methods of advancing fair housing, which may not always succeed but nevertheless should not be punished for their ingenuity.

Jurisdictions would not be expected to address every goal or obstacle every year. However, under the proposed rule, HUD would expect that jurisdictions would, over the course of a 5-year period, follow through on all their commitments in their AFFH certification by taking some steps towards each of the goals in the AFFH certification.

Following the same procedures as amendments to the consolidated plan, jurisdictions would be able to amend or change their goals if they discover a material barrier to achieving the goal or a reason why that goal is no longer the best means to AFFH. HUD would review these reports for completion and to verify that jurisdictions used concrete and measurable standards. HUD would not make a qualitative assessment of such reports.

E. PHAs

This rule seeks to tailor AFFH requirements applicable to PHAs while still verifying that PHAs are fulfilling their AFFH obligations. PHAs are already required to participate in the development of the consolidated plan actively. This rule would emphasize this requirement and establish that a

without reason did not meet rational basis scrutiny).

⁴⁷ *Inclusive Communities*, 135 S. Ct. at 2522.

PHA is generally required to AFFH only in its programs and in the areas under its direct control, and to certify that it will AFFH. A PHA would not be required to submit a certification detailing AFFH goals and obstacles. However, a PHA would be required to certify that it has consulted with the local jurisdiction on AFFH and would AFFH in its programs and in areas under its direct control. If a PHA has been subject to a HUD letter of finding or an adjudicated negative finding in a complaint brought by HUD or DOJ, finding a violation of the Fair Housing Act in the last two years, then HUD proposes that the PHA must include with its certification an explanation of what steps the PHA has taken and is taking to resolve the violation.

Question for Comment 28: As discussed above concerning jurisdictions, HUD is concerned that taking into account adversely adjudicated civil rights cases which were not brought by HUD or DOJ will unduly encourage PHAs to settle civil rights claims rather than risk an adverse ruling affecting the PHA's standing with HUD. HUD seeks comment on whether, and if so how, it could take these cases into account without unduly influencing civil rights litigation.

Question for Comment 29: What should cooperation between PHAs and consolidated plan jurisdictions look like?

Question for Comment 30: How should this rule balance the need for PHA engagement and contribution to an area's AFFH requirements while not creating requirements that may be overly burdensome?

V. Findings and Certifications

Executive Orders 12866 and 13563, Regulatory Planning and Review

Pursuant to 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 Executive 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. HUD believes that this proposed rule would empower local jurisdictions to determine how to AFFH rather than mandating that jurisdictions act on specific policies, and thus create a regulatory process that empowers individual jurisdictions to act on local determinations of need and within local budgetary and resource constraints.

The proposed rule has been determined to be a “significant regulatory action,” as defined in section 3(f) of Executive Order 12866, but not economically significant. The docket file is available for public inspection online at www.regulations.gov.

Executive Order 13771, Regulatory Costs

Executive Order 13771, entitled “Reducing Regulation and Controlling Regulatory Costs,” was issued on January 30, 2017. This proposed rule is expected to be an E.O. 13771 deregulatory action. While the burden in creating a consolidated plan is expected to increase slightly as the jurisdiction prepares a Fair Housing Report, the overall burden on the jurisdiction is greatly lessened because the lengthy Assessment of Fair Housing (AFH), with its separate community engagement and reporting requirements, would be eliminated under this proposal. Jurisdictions would be able to determine their actions to AFFH based on their capacity and needs, allowing jurisdictions to avoid burdensome requirements beyond their abilities.

The previously approved information collections for the AFFH Local Government and PHA and Assessment Tools (2529–0054 and 2529–0055, respectively) had a total, combined 665,862 burden hours for all respondents. This was due to the extensive nature of the tools and the additional public meeting requirements to complete an AFH. HUD has already temporarily withdrawn the Local Government Assessment Tool, and this proposed rule would make that removal permanent. By fully incorporating the proposed AFFH process into the existing consolidated plan process, HUD expects that the AFFH process will result in only 10 hours per response, or a total of 12,660 total hours, a significant reduction from the previous process requirements.

The proposed rule significantly reduces the reporting burden for jurisdictions in the formulation of AFFH strategies, reducing costs by an estimated \$23.7 million per year. Under the proposed rule, HUD would measure jurisdictions’ progress toward their identified AFFH goals through publicly available data focused on the

availability and quality of affordable housing, reward high performing jurisdictions with unspecified incentives, and provide technical assistance to low performing jurisdictions. Qualitatively, if the metrics and incentives are effective in influencing jurisdictions’ behavior, availability, and quality of affordable housing options should increase as Federal and local resources are devoted to such activities.

Executive Order 12612, Federalism

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 the rule preempts state law, unless the agency meets the consultation and funding requirements of Section 6 of the Executive Order. This rule would 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.

Environmental Impact

This proposed rule is a policy document that sets out fair housing and nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act (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. The undersigned certifies that this rule would not have a significant economic impact on a substantial number of small entities.

This rule proposes to strengthen the way in which HUD and its program participants meet the requirement under the Fair Housing Act to take affirmative steps to further fair housing. The preamble identifies the statutes and executive orders that address this requirement and that place responsibility directly on certain HUD program participants, specifically, local governments, states, and PHAs, underscoring that the use of federal funds must promote housing choice and

open communities. Although local governments, states, and PHAs must affirmatively further fair housing independent of any regulatory requirement imposed by HUD, HUD recognizes its responsibility to provide leadership and direction in this area, while preserving local determination of fair housing needs and strategies.

This rule primarily focuses on establishing a regulatory framework by which program participants may more effectively report how they meet their statutory obligation to affirmatively further fair housing. This rule builds on the statutory requirements to affirmatively further fair housing in conjunction with the development of consolidated plans for state and local governments and PHA Plans for PHAs and, in doing so, provides for all program participants to comply with their statutory requirements in a cost-efficient and effective manner.

Jurisdictions submitting consolidated plans do so usually because they receive State or Entitlement CDBG funds. In order to be an entitlement jurisdiction, the jurisdiction must be a principal city of a metropolitan statistical area, be a metropolitan city with a population of at least 50,000, or be a qualified urban county with a population of at least 200,000. This rule would change the certification requirements for PHAs in their annual plans to require that PHAs certify they will participate in the development of the consolidated plan. This participation will naturally be shaped by the needs and resources of the PHA.

As discussed more fully in the “Executive Order 13771, Regulatory Costs” section, above, and in the proposed regulatory impact analysis (RIA), the rule proposes to reduce the administrative burden on program participants in preparing and submitting an AFFH certification to HUD as compared to the current AFH process. The proposed rule would do this by fully incorporating the AFFH process into the consolidated plan process and allowing jurisdictions to determine how to AFFH based on their unique combination of resources, economic situations, and local needs.

Nevertheless, HUD is sensitive to the fact that the uniform application of requirements on entities of differing sizes may place a disproportionate burden on small entities. HUD, therefore, is soliciting alternatives for compliance from small entities as to how these small entities might comply in a way less burdensome to them.

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 Office of Management and Budget (OMB) control number. The information collection requirements contained in this proposed rule have been approved by OMB under the Paperwork Reduction Act and assigned OMB control number 2506–0117 (Consolidated Plan, Annual Action Plan & Annual Performance Report). The collection requirement will be amended to reflect the altered burden contained in this proposed rule.

HUD anticipates that the impact of this rule on document preparation time is reduced from the burden that it may otherwise be because the rule integrates the AFFH requirements with the consolidated and PHA planning processes. Additionally, states, local governments, and PHAs are already required to prepare written AFFH plans, undertake activities to overcome identified barriers to fair housing choice, and maintain records of the activities and their impacts. The principal differences imposed by this proposed rule would be that the program participants are no longer required to create plans based on specified data but would instead be permitted to determine how to AFFH

based on their local needs and available resources. In addition, because the AFFH process is wholly incorporated into the existing consolidated and PHA planning processes, local governments, states, and PHAs would not have to establish additional AFFH procedures.

HUD published a notice on May 23, 2018, temporarily withdrawing the information collection in OMB Control Number 2529–0054, the Assessment Tool for Local Governments. This proposed rule makes that removal permanent, along with the removal of the Assessment Tool for PHAs, OMB Control Number 2529–0055.

The burden of the information collections in this proposed rule is estimated as follows:

Information collection	Number of responses		Total annual burden hours		Hourly cost *	Total Annual Cost	
	Current	New	Current	New		Current	New
Consolidated Plan for Localities and States	** 1,266	1,266	393,338	405,998	\$34	\$13,373,492	\$13,803,932
Assessment Tool for Local Governments ***	1,266	0	230,993	0	34	7,853,762	0
Assessment Tool for PHAs	3,942	0	247,302	0	34	8,408,268	0
Totals			871,633	405,998		29,635,522	13,803,932

* Estimates assume a blended hourly rate that is equivalent to a GS–12, Step 5, Federal Government Employee.

** Total localities of 1,266 includes 1,209 entitlements + 3 non-entitlements (Hawaii, Kauai, Maui), 4 Insular Areas (Guam, Mariana Islands, Samoa, Virgin Islands), and 50 states.

*** This tool was temporarily taken down on May 23, 2018, by notice published at 83 FR 23922.

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the information collection requirements in the proposed rule regarding:

(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) Whether the proposed collection of information enhances the quality, utility, and clarity of the information to be collected; and

(4) Whether the proposed information collection minimizes 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).

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Under the provisions of 5 CFR part 1320, OMB is required to make a

decision concerning this collection of information between 30 and 60 days after the publication date. Therefore, a comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of the publication. This time frame does not affect the deadline for comments to the agency on the proposed rule, however. Comments must refer to the proposed rule by name and docket number (FR–6123) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: 202–395–6947 and

Colette Pollard, HUD Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW, Room 2204, Washington, DC 20410

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <http://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 <http://www.regulations.gov> website 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.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (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 government, or on the private sector, within the meaning of the UMRA.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime,

Government contracts, Grant programs-housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 91

Aged; Grant programs-housing and community development; Homeless; Individuals with disabilities; Low and moderate income housing; Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure; Low and moderate income housing; Manufactured homes; Rent subsidies; Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure; American Samoa; Community development block grants; Grant programs-education; Grant programs-housing and community development; Guam; Indians; Loan programs-housing and community development; Low and moderate income housing; Northern Mariana Islands; Pacific Islands Trust Territory; Puerto Rico; Reporting and recordkeeping requirements; Student aid; Virgin Islands.

24 CFR Part 574

Community facilities; Grant programs-housing and community development; Grant programs-social programs; HIV/AIDS; Low and moderate income housing; Reporting and recordkeeping requirements.

24 CFR Part 576

Community facilities; Grant programs-housing and community development; Grant programs-social programs; Homeless; Reporting and recordkeeping requirements.

24 CFR Part 903

Administrative practice and procedure; Public housing; Reporting and recordkeeping requirements.

24 CFR Part 905

Grant programs-housing and community development; Public housing; Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to

amend 24 CFR parts 5, 91, 92, 570, 574, 576, 903, 905 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority citation for part 5, subpart A, continues to read as follows:

Authority: 29 U.S.C. 794, 42 U.S.C. 1437a, 1437c, 1437c-1(d), 1437d, 1437f, 1437n, 3535(d), and Sec. 327, Pub. L. 109-115, 119 Stat. 2936; 42 U.S.C. 3600-3620; 42 U.S.C. 5304(b); 42 U.S.C. 12101 *et seq.*; 42 U.S.C. 12704-12708; E.O. 11063, 27 FR 11527, 3 CFR, 1958-1963 Comp., p. 652; E.O. 12892, 59 FR 2939, 3 CFR, 1994 Comp., p. 849.

■ 2. Revise § 5.150 to read as follows:

§ 5.150 Obligation to Affirmatively Further Fair Housing.

(a)(1) Every recipient of HUD funding must affirmatively further fair housing by acting in a manner consistent with reducing obstacles within the participant's sphere of influence to providing fair housing choice. HUD may consider a failure to meet the duty to affirmatively further fair housing a violation of program requirements.

(2) *Fair housing choice* means, within a HUD program participant's sphere of influence, that individuals and families have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to race, color, religion, sex, familial status, national origin, or disability. Fair housing choice encompasses:

(i) Protected choice, which means access to housing without discrimination;

(ii) Actual choice, which means not only that affordable housing options exist, but that information and resources are available to enable informed choice; and

(iii) Quality choice, which means access to affordable housing options that are decent, safe, and sanitary, and, for persons with disabilities, access to accessible housing as required under civil rights laws.

(b) Affirmatively furthering fair housing requires an effort that is in addition to, and not a substitute for, compliance with the specific requirements of the Fair Housing Act.

(c) For the purposes of affirmatively furthering fair housing, HUD does not expect that recipients of funding will be able to immediately, completely, or to the satisfaction of all persons, address each impediment to fair housing choice, whether identified, known but not prioritized, or alleged by others. Nothing in this paragraph relieves jurisdictions of their obligations under other civil rights and fair housing statutes and regulations.

§ 5.151 through § 5.154 [Removed and Reserved]

■ 3. Remove § 5.151 through § 5.154.
 ■ 4. Add § 5.155 to read as follows:

§ 5.155 Jurisdictional risk analyses.

(a) *Purpose.* HUD will conduct an analysis and ranking of jurisdictions to determine which jurisdictions are especially succeeding at affirmatively furthering fair housing and which should be subject to an enhanced review and may need additional assistance to affirmatively further fair housing. This ranking is not a determination that the jurisdiction has complied with the Fair Housing Act.

(b) *Frequency.* HUD will conduct the analysis and ranking every year.

(c) *Method.* (1) HUD will, using publicly available data and databases, establish a base score for each jurisdiction regarding the extent to which there is an adequate supply of affordable and available quality housing for rent and for sale to support fair housing choice. The following are non-exclusive examples of the type of data for each jurisdiction:

(i) Median home value and contract rent.

(ii) Household cost burden.

(iii) Percentage of dwellings lacking complete plumbing or kitchen facilities.

(iv) Vacancy rates.

(v) Rates of lead-based paint poisoning.

(vi) Rates of subpar Public Housing conditions.

(vii) Availability of housing accepting housing choice vouchers throughout the jurisdiction.

(viii) The existence of excess housing choice voucher reserves.

(ix) Availability of housing accessible to persons with disabilities.

(2) HUD will initially establish and periodically evaluate the data used in paragraph (1) of this section through a **Federal Register** notice after opportunity for public comment.

(3) HUD will create a ranking score for each jurisdiction, using a method to be specified in a **Federal Register** notice after opportunity for public comment, ranking jurisdictions more favorably for high relative performance in the objective measures set forth in paragraph (c)(1) of this section. HUD will then rank the jurisdictions based on this score, divided into the following categories:

(i) Jurisdictions with population growth and tight housing markets.

(ii) Jurisdictions with population growth and loose housing markets.

(iii) Jurisdictions with population decline and tight housing markets.

(iv) Jurisdictions with population decline and loose housing markets.

(v) States with significant population growth.

(vi) States without significant population growth.

(d) *Results.* (1) After ranking the jurisdictions as described in paragraph (c)(3) of this section, HUD will designate the top ranking jurisdictions submitting a consolidated plan that year in each category as "outstanding AFFH performers" and the bottom ranking jurisdictions in each category as "low-ranking jurisdictions." Outstanding jurisdictions will, for the 24-month period following the approval of the jurisdiction's consolidated plan, be eligible for potential benefits, including additional points in funding competitions and eligibility for additional program funds due to reallocations of recaptured funds as may be provided in NOFAs. Low-ranking jurisdictions may have their AFFH certifications questioned under 24 CFR part 91.

(2) Beginning with the second submission of AFFH certifications under 24 CFR part 91 after [EFFECTIVE DATE OF FINAL RULE], HUD will determine how much each jurisdiction has improved according to the factors in paragraph (c) of this section. HUD will also designate as "outstanding AFFH performers" jurisdictions that have shown the most improvement since their last strategic plan submission. These jurisdictions will be eligible for the benefits of that designation for the 24-month period following the approval of the jurisdiction's consolidated plan.

(3)(i) No jurisdiction may be considered an outstanding AFFH performer if the jurisdiction or, for a local government, any PHA operating within the jurisdiction, has in the past five years been found by a court or administrative law judge in a case brought by or on behalf of HUD or by the United States Department of Justice to be in violation of civil rights law unless, at the time of the submission of the AFFH certification, the finding has been successfully appealed or otherwise set aside.

(ii) No jurisdiction may be considered an outstanding AFFH performer if HUD has disapproved the previous certification to affirmatively further fair housing submitted for a consolidated plan or declared an annual performance report unsatisfactory under 24 CFR 91.520(i)(2) in the previous 5 years.

(e) *Appeals.* (1) If a jurisdiction believes that an error has resulted in the jurisdiction being improperly designated a low-performing jurisdiction or not designated an outstanding AFFH performer, the jurisdiction may send a written

notification to HUD, identifying the error and requesting the recalculation of the comparison metrics or consideration of an additional factor.

(2) HUD will review the request within 45 business days and either recalculate the jurisdiction's ranking without affecting the rankings of other jurisdictions or send a written denial of the request to the jurisdiction explaining why the request was denied.

§ 5.156 through § 5.168 [Removed]

■ 5. Remove § 5.156 through § 5.168.

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 6. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

■ 7. In § 91.5 revise the undesignated introductory text to read as follows.

§ 91.5 Definitions.

The terms Affirmatively Furthering Fair Housing, elderly person, and HUD are defined in 24 CFR part 5.

* * * * *

■ 8. In § 91.100 revise paragraphs (a)(1), (c)(1), and (e) to read as follows:

§ 91.100 Consultation; local governments.

(a) * * *

(1) When preparing the consolidated plan, the jurisdiction shall consult with other public and private agencies that provide assisted housing, health services, and social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, homeless persons), community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws. When preparing the consolidated plan, the jurisdiction shall also consult with public and private organizations. Commencing with consolidated plans submitted on or after January 1, 2018, such consultations shall include broadband internet service providers, organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies.

* * * * *

(c) * * * (1) The jurisdiction shall consult with local PHAs operating in the jurisdiction regarding consideration of public housing needs, planned

programs and activities, strategies for affirmatively furthering fair housing, and proposed actions to affirmatively further fair housing in the consolidated plan. This consultation will help provide a better basis for the certification by the authorized official that the PHA Plan is consistent with the consolidated plan and the local government's description of its strategy for affirmatively furthering fair housing and the manner in which it will address the needs of public housing and, where necessary, the manner in which it will provide financial or other assistance to a troubled PHA to improve the PHA's operations and remove the designation of troubled, as well as obtaining PHA input on addressing fair housing issues in the Public Housing and Housing Choice Voucher programs.

* * * * *

(e) * * *

(1) The jurisdiction shall consult with community-based and regionally based organizations that represent protected class members, and organizations that enforce fair housing laws, such as State or local fair housing enforcement agencies (including participants in the Fair Housing Assistance Program (FHAP)), fair housing organizations and other nonprofit organizations that receive funding under the Fair Housing Initiative Program (FHIP), and other public and private fair housing service agencies, to the extent that such entities operate within its jurisdiction. This consultation will help provide a better basis for the jurisdiction's certification to affirmatively further fair housing and other portions of the consolidated plan concerning affirmatively furthering fair housing. Consultation must specifically seek input on how the goals identified in the jurisdiction's certification to affirmatively further fair housing will inform the priorities and objectives of the consolidated plan.

(2) This consultation must occur with any organizations that have relevant knowledge or data to inform the certification to affirmatively further fair housing and that are sufficiently independent and representative to provide meaningful feedback to a jurisdiction on the consolidated plan and its implementation.

■ 9. In § 91.105 revise paragraph (e)(1) to read as follows:

§ 91.105 Citizen participation plan; local governments.

* * * * *

(e) * * *

(1)(i) *Consolidated plan.* The citizen participation plan must provide for at least two public hearings per year to obtain residents' views and to respond

to proposals and questions, to be conducted at a minimum of two different stages of the program year. Together, the hearings must address housing and community development needs, development of proposed activities, proposed strategies and actions for affirmatively furthering fair housing, and a review of program performance.

(ii) *Minimum number of hearings.* To obtain the views of residents of the community on housing and community development needs, including priority nonhousing community development needs and affirmatively furthering fair housing, the citizen participation plan must provide that at least one of these hearings is held before the proposed consolidated plan is published for comment.

* * * * *

■ 10. In § 91.110 revise paragraph (a) to read as follows:

§ 91.110 Consultation; States.

(a) When preparing the consolidated plan, the State shall consult with public and private agencies that provide assisted housing (including any State housing agency administering public housing), health services, social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, and homeless persons), and State-based and regionally based organizations that represent protected class members and organizations that enforce fair housing laws during preparation of the consolidated plan.

(1) With respect to public housing or Housing Choice Voucher programs, the State shall consult with any housing agency administering public housing or the section 8 program on a Statewide basis, as well as all PHAs that certify consistency with the State's consolidated plan. State consultation with these entities may consider public housing needs, planned programs and activities, strategies for affirmatively furthering fair housing, and proposed actions to affirmatively further fair housing. This consultation helps provide a better basis for the certification by the authorized official that the PHA Plan is consistent with the consolidated plan and the State's description of its strategy for affirmatively furthering fair housing, and the manner in which the State will address the needs of public housing and, where applicable, the manner in which the State may provide financial or other assistance to a troubled PHA to improve its operations and remove such designation, as well as in obtaining PHA input on addressing fair housing issues

in public housing and the Housing Choice Voucher programs. This consultation also helps ensure that activities with regard to affirmatively furthering fair housing, local drug elimination, neighborhood improvement programs, and resident programs and services, funded under a PHA's program and those funded under a program covered by the consolidated plan, are fully coordinated to achieve comprehensive community development goals and affirmatively further fair housing. If a PHA is required to implement remedies under a Voluntary Compliance Agreement, the State should consult with the PHA and identify actions the State may take, if any, to assist the PHA in implementing the required remedies.

(2) The State shall consult with State-based and regionally based organizations that represent protected class members, and organizations that enforce fair housing laws, such as State fair housing enforcement agencies (including participants in the Fair Housing Assistance Program (FHAP)), fair housing organizations and other nonprofit organizations that receive funding under the Fair Housing Initiative Program (FHIP), and other public and private fair housing service agencies, to the extent such entities operate within the State. This consultation will help provide a better basis for the State's certification to affirmatively further fair housing, and other portions of the consolidated plan concerning affirmatively furthering fair housing. This consultation should occur with organizations that have the capacity to engage with data informing the certification to affirmatively further fair housing and be sufficiently independent and representative to provide meaningful feedback on the consolidated plan and its implementation. Consultation on the consolidated plan shall specifically seek input into how the goals identified in the jurisdiction's certification to affirmatively further fair housing inform the priorities and objectives of the consolidated plan. When preparing the consolidated plan, the State shall also consult with public and private organizations. Commencing with consolidated plans submitted on or after January 1, 2018, such consultations shall include broadband internet service providers, organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies.

* * * * *

■ 11. In § 91.115, revise the heading and introductory text of paragraph (b) and paragraphs (b)(3), (c), and (f) through (h) to read as follows:

§ 91.115 Citizen participation plan; States.

* * * * *

(b) *Development of the consolidated plan.* The citizen participation plan must include the following minimum requirements for the development of the consolidated plan:

* * * * *

(3)(i) The citizen participation plan must state how and when adequate advance notice of the hearing will be given to residents, with sufficient information published about the subject of the hearing to permit informed comment. (Publishing small print notices in the newspaper a few days before the hearing does not constitute adequate notice. Although HUD is not specifying the length of notice required, HUD would consider 2 weeks adequate.)

(ii) The citizen participation plan must provide that the hearing be held at a time and accessible location convenient to potential and actual beneficiaries, and with accommodation for persons with disabilities. The citizen participation plan must specify how it will meet these requirements.

(iii) The citizen participation plan must identify how the needs of non-English speaking residents will be met in the case of a public hearing where a significant number of non-English speaking residents can be reasonably expected to participate.

* * * * *

(c) *Amendments—(1) Criteria for amendment to consolidated plan.* The citizen participation plan must specify the criteria the State will use for determining what changes in the State's planned or actual activities constitute a substantial amendment to the consolidated plan. (See § 91.505.) The citizen participation plan must include, among the criteria for a consolidated plan, substantial amendment changes in the method of distribution of such funds.

(2) The citizen participation plan must provide residents and units of general local government with reasonable notice and an opportunity to comment on consolidated plan substantial amendments. The citizen participation plan must state how reasonable notice and an opportunity to comment will be given. The citizen participation plan must provide a period, of not less than 30 calendar days, to receive comments on the consolidated plan substantial amendment before the consolidated

plan substantial amendment is implemented.

(3) The citizen participation plan shall require the State to consider any comments or views of its residents and units of general local government received in writing, or orally at public hearings, if any, in preparing the substantial amendment of the consolidated plan. A summary of these comments or views, and a summary of any comments or views not accepted and the reasons why, shall be attached to the substantial amendment of the consolidated plan.

* * * * *

(f) *Availability to the public.* The citizen participation plan must provide that the consolidated plan as adopted, consolidated plan substantial amendments, and the performance report will be available to the public, including the availability of materials in a form accessible to persons with disabilities, upon request. The citizen participation plan must state how these documents will be available to the public.

(g) *Access to records.* The citizen participation plan must require the State to provide its residents, public agencies, and other interested parties with reasonable and timely access to information and records relating to the State's consolidated plan and use of assistance under the programs covered by this part during the preceding 5 years.

(h) *Complaints.* The citizen participation plan shall describe the State's appropriate and practicable procedures to handle complaints from its residents related to the consolidated plan, consolidated plan amendments, and the performance report. At a minimum, the citizen participation plan shall require that the State must provide a timely, substantive written response to every written resident complaint, within an established period of time (within 15 working days, where practicable, if the State is a CDBG grant recipient).

* * * * *

■ 12. In § 91.205 revise paragraph (b) to read as follows:

§ 91.205 Housing and homeless needs assessment.

* * * * *

(b) *Categories of persons affected.* (1) The plan shall estimate the number and type of families in need of housing assistance for:

- (i) Extremely low-income, low-income, moderate-income, and middle-income families;
- (ii) Renters and owners;
- (iii) Elderly persons;
- (iv) Single persons;

- (v) Large families;
- (vi) Public housing residents;
- (vii) Families on the public housing and Section 8 tenant-based waiting list;
- (viii) Persons with HIV/AIDS and their families;
- (ix) Victims of domestic violence, dating violence, sexual assault, and stalking;
- (x) Persons with disabilities; and
- (xi) Formerly homeless families and individuals who are receiving rapid re-housing assistance and are nearing the termination of that assistance.

(2) The description of housing needs shall include a concise summary of the cost burden and severe cost burden, overcrowding (especially for large families), and substandard housing conditions being experienced by extremely low-income, low-income, moderate-income, and middle-income renters and owners compared to the jurisdiction as a whole. (The jurisdiction must define in its consolidated plan the terms "standard condition" and "substandard condition but suitable for rehabilitation.")

* * * * *

§ 91.215 [Amended]

- 13. Amend § 91.215 by removing paragraph (a)(5).
- 14. In § 91.220 revise paragraph (k)(1) to read as follows:

§ 91.220 Action plan.

* * * * *

(k) * * *

(1) *Affirmatively furthering fair housing.* Actions it plans to take during the next year that further the commitments identified in the jurisdiction's certification to affirmatively further fair housing.

* * * * *

■ 15. In § 91.225 revise paragraph (a)(1) to read as follows:

§ 91.225 Certifications.

(a) * * *

(1) *Affirmatively furthering fair housing.* Each jurisdiction is required to submit a certification that it will affirmatively further fair housing by addressing at least three goals towards fair housing choice or obstacles to fair housing choice, identified by the jurisdiction, that the jurisdiction intends to achieve or ameliorate, respectively. The identified goals or obstacles must have concrete and measurable outcomes or changes.

(i) Jurisdictions must include with each goal or obstacle a brief description of how accomplishing the goal or ameliorating the obstacle affirmatively furthers fair housing in that jurisdiction, unless the obstacle is an obstacle to fair

housing choice identified from the following non-exhaustive list of obstacles which HUD considers to be inherent barriers to fair housing choice:

- (A) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable.
- (B) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities.
- (C) Concentration of substandard housing stock in a particular area.
- (D) Not in derogation of applicable federal law or regulations, inflexible or unduly rigorous design standards or other similar barriers which unreasonably increase the cost of the construction or rehabilitation of low-to-mid price housing or impede the development or implementation of innovative approaches to housing.
- (E) Lack of effective, timely, and cost-effective means for clearing title issues, if such are prevalent in the community.
- (F) Source of income restrictions on rental housing.

(G) administrative procedures which have the effect of restricting or otherwise materially impeding the approval of affordable housing development

(H) High rates of housing-related lead poisoning in housing.

(I) Artificial economic restrictions on the long-term creation of rental housing, such as certain types of rent control.

(J) Unduly prescriptive or burdensome building and rehabilitation codes.

(K) Arbitrary or excessive energy and water efficiency mandates.

(L) Unduly burdensome wetland or environmental regulations.

(M) Unnecessary manufactured-housing regulations and restrictions.

(N) Cumbersome or time-consuming construction or rehabilitation permitting and review procedures.

(O) Tax policies which discourage investment or reinvestment.

(P) Arbitrary or unnecessary labor requirements.

(ii) Jurisdictions should focus on goals or obstacles within their control or partial control. If, in addition to identifying obstacles within the jurisdiction's control or partial control, a jurisdiction identifies obstacles to fair housing choice not within its control or partial control, but which the jurisdiction determines deserve public or HUD scrutiny, the certification may also discuss those issues and include suggested solutions to address the obstacles.

(iii) The goals or obstacles included in the certification are to be determined by the jurisdiction, and the specific steps

for the jurisdiction to take are to be informed by the nature of the jurisdiction, its geographic scope, its size, and its financial, technical, and managerial resources, and taking into consideration relevant public comments. The contents of the certification need not be based on any HUD-prescribed specific analysis or data but should reflect the practical experience and local insights of the jurisdiction, including objective quantitative and qualitative data as the jurisdiction deems appropriate.

(iv) Following the procedures in § 91.500, HUD may question the accuracy of the certifications of low-ranking jurisdictions, as defined in 24 CFR 5.155(d)(1). Jurisdictions may be asked to amend their certifications to commit the jurisdiction to goals that have a rational basis toward favorably affecting the metrics in 24 CFR 5.155(c).

* * * * *

■ 16. Revise § 91.230 to read as follows:

§ 91.230 Monitoring.

The plan must describe the standards and procedures that the jurisdiction will use to monitor activities carried out in furtherance of the plan, including strategies and actions that address the fair housing issues and goals identified in the jurisdiction's certification to affirmatively further fair housing, and that the jurisdiction will use to ensure long-term compliance with requirements of the programs involved, including civil rights related program requirements, minority business outreach, and the comprehensive planning requirements.

■ 17. In § 91.235 revise paragraphs (c)(1) and (4) to read as follows:

§ 91.235 Special case; abbreviated consolidated plan.

* * * * *

(c) * * *

(1) *Assessment of needs, resources, and planned activities.* An abbreviated plan must contain sufficient information about needs, resources, and planned activities to address the needs to cover the type and amount of assistance anticipated to be funded by HUD. The plan must describe how the jurisdiction will affirmatively further fair housing in accordance with its certification to affirmatively further fair housing.

* * * * *

(4) *Submissions, certifications, amendments, and performance reports.* An Insular Area grantee that submits an abbreviated consolidated plan under this section must comply with the submission, certification, amendment, and performance report requirements of 24 CFR 570.440. This includes

certification that the grantee will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in the certification to affirmatively further fair housing.

* * * * *

■ 18. In § 91.305 revise paragraph (b) to read as follows:

§ 91.305 Housing and homeless needs assessment.

* * * * *

(b) *Categories of persons affected.* (1) The plan shall estimate the number and type of families in need of housing assistance for:

(i) Extremely low-income, low-income, moderate-income, and middle-income families;

(ii) Renters and owners;

(iii) Elderly persons;

(iv) Single persons;

(v) Large families;

(vi) Public housing residents;

(vii) Families on the public housing and Section 8 tenant-based waiting list;

(viii) Persons with HIV/AIDS and their families;

(ix) Victims of domestic violence, dating violence, sexual assault, and stalking;

(x) Persons with disabilities;

(xi) Formerly homeless families and individuals who are receiving rapid re-housing assistance and are nearing the termination of that assistance.

(2) The description of housing needs shall include a concise summary of the cost burden and severe cost burden, overcrowding (especially for large families), and substandard housing conditions being experienced by extremely low-income, low-income, moderate-income, and middle-income renters and owners compared to the state as a whole. (The state must define in its consolidated plan the terms "standard condition" and "substandard condition but suitable for rehabilitation.")

* * * * *

§ 91.315 [Amended]

■ 19. Amend § 91.315 by removing paragraph (a)(5).

■ 20. In § 91.320 revise paragraph (j)(1) to read as follows:

§ 91.320 Action plan.

* * * * *

(j) * * *

(1) *Affirmatively furthering fair housing.* Actions it plans to take during the next year that further the commitments in its certification to affirmatively further fair housing.

* * * * *

■ 21. In § 91.325 revise paragraph (a)(1) to read as follows:

§ 91.325 Certifications.

(a) * * *

(1) *Affirmatively furthering fair housing.* Each State is required to submit a certification that it will affirmatively further fair housing by addressing at least three goals towards fair housing choice or obstacles to fair housing choice, identified by the jurisdiction, that the jurisdiction intends to achieve or ameliorate, respectively. The identified goals or obstacles must have concrete and measurable outcomes or changes.

(i) States must include with each goal or obstacle a brief description of how accomplishing the goal or ameliorating the obstacle affirmatively furthers fair housing in that State, unless the obstacle is an obstacle to fair housing choice identified from the following non-exhaustive list of obstacles which HUD considers to be inherent barriers to fair housing choice:

(A) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable.

(B) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities.

(C) Concentration of substandard housing stock in a particular area.

(D) Not in derogation of applicable federal law or regulations, inflexible or unduly rigorous design standards or other similar barriers which unreasonably increase the cost of the construction or rehabilitation of low-to-mid price housing or impede the development or implementation of innovative approaches to housing.

(E) Lack of effective, timely, and cost-effective means for clearing title issues, if such are prevalent in the community.

(F) Source of income restrictions on rental housing.

(G) Regulatory provisions or other administrative practices that have the effect of restricting or otherwise materially impeding the approval of affordable housing development.

(H) High rates of housing-related lead poisoning in housing.

(I) Artificial economic restrictions on the long-term creation of rental housing, such as rent controls.

(J) Unduly prescriptive or burdensome building and rehabilitation codes.

(K) Arbitrary or excessive energy and water efficiency mandates.

(L) Unduly burdensome wetland or environmental regulations.

(M) Unnecessary manufactured-housing regulations and restrictions.

(N) Cumbersome or time-consuming construction or rehabilitation permitting and review procedures.

(O) Tax policies which discourage investment or reinvestment.

(P) Arbitrary or unnecessary labor requirements.

(ii) States should focus on goals or obstacles within their control or partial control. If, in addition to identifying obstacles within the State's control or partial control, a State identifies obstacles to fair housing choice not within its control or partial control, but which the State determines deserve public or HUD scrutiny, the certification may also discuss those issues and include suggested solutions to address the obstacles.

(iii) The goals or obstacles included in the certification are to be determined by the State, and the specific steps for the State to take are to be informed by the nature of the State, its geographic scope, its size, and its financial, technical, and managerial resources, taking into consideration relevant public comments. The contents of the certification need not be based on any HUD-prescribed specific mode of analysis or data but should reflect the practical experience and local insights of the State, including quantitative and qualitative data as the jurisdiction deems appropriate.

(iv) Following the procedures in § 91.500, HUD may question the accuracy of the certifications of low-ranking States, as defined in 24 CFR 5.155(d)(1). States may be asked to amend their certifications to commit the jurisdiction to goals that have a rational basis toward favorably affecting the metrics in 24 CFR 5.155(c).

* * * * *

■ 22. Revise § 91.415 to read as follows:

§ 91.415 Strategic plan.

Strategies and priority needs must be described in the consolidated plan, in accordance with the provisions of § 91.215, for the entire consortium. The consortium is not required to submit a nonhousing Community Development Plan; however, if the consortium includes CDBG entitlement communities, the consolidated plan must include the nonhousing Community Development Plans of the CDBG entitlement community members of the consortium. The consortium must set forth its priorities for allocating housing (including CDBG and ESG, where applicable) resources geographically within the consortium, describing how the consolidated plan will address the needs identified (in accordance with § 91.405), describing the reasons for the consortium's allocation priorities, and identifying any obstacles there are to addressing underserved needs.

■ 23. In § 91.420 revise paragraph (b) to read as follows:

§ 91.420 Action plan.

* * * * *

(b) *Description of resources and activities.* The action plan must describe the resources to be used and activities to be undertaken to pursue its strategic plan, including actions the consortium plans to take during the next year that further the commitments in the consortium's certification to affirmatively further fair housing. The consolidated plan must provide this description for all resources and activities within the entire consortium as a whole, as well as a description for each individual community that is a member of the consortium.

* * * * *

■ 24. In § 91.425 revise paragraph (a)(1) to read as follows:

§ 91.425 Certifications.

(a) * * *

(1) *General*—(i) *Affirmatively furthering fair housing.* Each consortium must certify that it will affirmatively further fair housing by addressing at least three goals towards fair housing choice or obstacles to fair housing choice, identified by the consortium, the consortium intends to achieve or ameliorate. The identified goals or obstacles must have concrete and measurable outcomes or changes.

(A) Consortia must include with each goal or obstacle a brief description of how accomplishing the goal or ameliorating the obstacle affirmatively furthers fair housing in the consortia's jurisdiction, unless the obstacle is an obstacle to fair housing choice identified from the following non-exhaustive list of obstacles which HUD considers to be inherent barriers to fair housing choice:

(1) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable.

(2) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities.

(3) Concentration of substandard housing stock in a particular area.

(4) Not in derogation of applicable federal law or regulations, inflexible or unduly rigorous design standards or other similar barriers which unreasonably increase the cost of the construction or rehabilitation of low-to-mid price housing or impede the development or implementation of innovative approaches to housing.

(5) Lack of effective, timely, and cost-effective means for clearing title issues, if such are prevalent in the community.

(6) Source of income restrictions on rental housing.

(7) Administrative procedures that have the effect of restricting or otherwise materially impeding the approval of affordable housing development.

(8) High rates of housing-related lead poisoning in housing.

(9) Artificial economic restrictions on the long-term creation of rental housing, such as rent controls.

(10) Unduly prescriptive or burdensome building and rehabilitation codes.

(11) Arbitrary or excessive energy and water efficiency mandates.

(12) Unduly burdensome wetland or environmental regulations.

(13) Unnecessary manufactured-housing regulations and restrictions.

(14) Cumbersome or time-consuming construction or rehabilitation permitting and review procedures.

(15) Tax policies which discourage investment or reinvestment.

(16) Arbitrary or unnecessary labor requirements.

(B) Consortia should focus on goals or obstacles within their control or partial control. If, in addition to identifying obstacles within the consortium's control or partial control, a consortium identifies obstacles to fair housing choice not within its control or partial control, but which the consortium determines deserve public or HUD scrutiny, the certification may also discuss those issues and include suggested solutions to address the obstacles.

(C) The goals or obstacles included in the certification are to be determined by the consortium, and the specific steps for the consortium to take are to be informed by the nature of the consortium, its geographic scope, its size, and its financial, technical, and managerial resources, taking into consideration relevant public comments. The contents of the certification need not be based on any HUD-prescribed specific mode of analysis or data but should reflect the practical experience and local insights of the consortium, including quantitative and qualitative data as the jurisdiction deems appropriate.

(D) Following the procedures in § 91.500, HUD may question the accuracy of the certifications of low-ranking consortia, as defined in 24 CFR 5.155(d)(1). Consortia may be asked to amend their certifications to commit the consortium to goals that have a rational basis toward favorably affecting the metrics in 24 CFR 5.155(c).

* * * * *

■ 25. In § 91.520, revise the introductory text in paragraphs (a) and (i) to read as follows:

§ 91.520 Performance reports.

(a) *General.* Each jurisdiction that has an approved consolidated plan shall annually review and report, in a form prescribed by HUD, on the progress it has made in carrying out its strategic plan and its action plan. The performance report must include a description of the resources made available, the investment of available resources, the geographic distribution and location of investments, the families and persons assisted (including the racial and ethnic status of persons assisted), actions taken pursuant to the jurisdiction's certification to affirmatively further fair housing and any measurable results of those actions, and other actions indicated in the strategic plan and the action plan. This performance report shall be submitted to HUD within 90 days after the close of the jurisdiction's program year.

* * * * *

(i) *Evaluation by HUD.* (1) HUD shall review the performance report and determine whether it is satisfactory. If a satisfactory report is not submitted in a timely manner, HUD may suspend funding until a satisfactory report is submitted, or may withdraw and reallocate funding if HUD determines, after notice and opportunity for a hearing, that the jurisdiction will not submit a satisfactory report.

(2) With the steps the jurisdiction has taken to affirmatively further fair housing, HUD will deem that portion of the performance report "satisfactory" if the steps the jurisdiction has taken are rationally related to the goals or obstacles identified in the jurisdiction's certification to affirmatively further fair housing.

* * * * *

■ 26. Amend § 91.525 paragraph (a) by redesignating paragraph (5) as paragraph (6) and adding a new paragraph (5) to read as follows:

§ 91.525 Performance review by HUD.

(a) * * *

(5) Extent to which the jurisdiction made progress towards the goals or obstacles identified in the jurisdiction's certification to affirmatively further fair housing; and

* * * * *

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 27. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 1701x and 4568.

■ 28. Revise § 92.104 to read as follows:

§ 92.104 Submission of a consolidated plan.

A jurisdiction that has not submitted a consolidated plan to HUD must submit to HUD, not later than 90 calendar days after providing notification under § 92.103, a consolidated plan in accordance with 24 CFR part 91.

■ 29. In § 92.508 revise paragraph (a)(7)(i)(C) to read as follows:

§ 92.508 Recordkeeping.

- (a) * * *
- (7) * * *
- (i) * * *

(C) Documentation of the actions the participating jurisdiction has taken to affirmatively further fair housing, including documentation related to the participating jurisdiction's certification to affirmatively further fair housing as described in 24 CFR part 91.

* * * * *

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 30. The authority citation for part 570 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x-1; 42 U.S.C. 3535(d) and 5301-5320.

■ 31. In § 570.3 revise the first sentence of the introductory text to read as follows:

§ 570.3 Definitions.

The terms Affirmatively Furthering Fair Housing, HUD, and Secretary are defined in 24 CFR part 5. * * *

* * * * *

§ 570.205 [Amended]

■ 32. Amend § 570.205 paragraph (a)(4) by removing paragraph (vii) and redesignating paragraph (viii) as (vii).

■ 33. In § 570.441 revise introductory text in paragraphs (b) and (3) to read as follows:

§ 570.441 Citizen participation—insular areas.

* * * * *

(b) *Citizen participation plan.* The insular area jurisdiction must develop and follow a detailed citizen participation plan and must make the plan public. The plan must be completed and available before the statement for assistance is submitted to HUD, and the jurisdiction must certify that it is following the plan. The plan must set forth the jurisdiction's policies and procedures for:

* * * * *

(3) Holding a minimum of two public hearings for the purpose of obtaining residents' views and formulating or responding to proposals and questions. Each public hearing must be conducted at a different stage of the CDBG program year. Together, the hearings must address affirmatively furthering fair housing, community development and housing needs, development of proposed activities, proposed strategies and actions furthering the commitments in the certification to affirmatively further fair housing, and a review of program performance. There must be reasonable notice of the hearings, and the hearings must be held at times and accessible locations convenient to potential or actual beneficiaries, with reasonable accommodations, including materials in accessible formats, for persons with disabilities. The jurisdiction must specify in its citizen participation plan how it will meet the requirement for hearings at times and accessible locations convenient to potential or actual beneficiaries;

* * * * *

■ 34. In § 570.487 revise paragraph (b) to read as follows:

§ 570.487 Other applicable laws and related program requirements.

* * * * *

(b) *Affirmatively furthering fair housing.* The Act requires the State to certify to the satisfaction of HUD that it will affirmatively further fair housing. The Act also requires each unit of general local government to certify that it will affirmatively further fair housing. The certification that the State will affirmatively further fair housing shall specifically require the State to assume the responsibility of fair housing planning by:

(1) Taking meaningful actions to further the goals identified in the jurisdiction's or State's Strategic plan under 24 CFR part 91; and

(2) Assuring that units of local government funded by the State comply with their certifications to affirmatively further fair housing.

* * * * *

■ 35. In § 570.490, revise paragraphs (a)(1) and (b) to read as follows:

§ 570.490 Recordkeeping requirements.

(a) * * * (1) The State shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the State's administration of CDBG funds under § 570.493. The content of records maintained by the State shall be as jointly agreed upon by HUD and the States and sufficient to enable HUD to make the determinations described at § 570.493. For fair housing

and equal opportunity purposes, and as applicable, such records shall include documentation related to the State's certification to affirmatively further fair housing, as described in 24 CFR part 91. The records shall also permit audit of the States in accordance with 24 CFR part 85.

* * * * *

(b) *Unit of general local government's record.* The State shall establish recordkeeping requirements for units of general local government receiving CDBG funds that are sufficient to facilitate reviews and audits of such units of general local government under §§ 570.492 and 570.493. For fair housing and equal opportunity purposes, and as applicable, such records shall include documentation related to the State's certification to affirmatively further fair housing under 24 CFR part 91.

* * * * *

■ 36. In § 570.506 revise paragraph (g)(1) to read as follows:

§ 570.506 Records to be maintained.

* * * * *

(g) * * *

(1) Documentation related to the recipient's certification to affirmatively further fair housing under 24 CFR part 91.

* * * * *

■ 37. In § 570.601 revise paragraph (a)(2) to read as follows:

§ 570.601 Public Law 88–352 and Public Law 90–284; affirmatively furthering fair housing; Executive Order 11063.

(a) * * *

(2) Public Law 90–284, which is the Fair Housing Act (42 U.S.C. 3601–3620). In accordance with the Fair Housing Act, the Secretary requires that grantees administer all programs and activities related to housing and urban development in a manner to affirmatively further the policies of the Fair Housing Act. Furthermore, in accordance with section 104(b)(2) of the Act, for each community receiving a grant under subpart D of this part, the certification that the grantee will affirmatively further fair housing shall specifically require the grantee to take meaningful actions to further the goals identified in the grantee's certification to affirmatively further fair housing under 24 CFR part 91.

* * * * *

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

■ 38. The authority citation for part 574 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 3535(d) and 5301–5320.

■ 39. In § 574.530 revise paragraph (b) to read as follows:

§ 574.530 Recordkeeping.

* * * * *

(b) Documentation related to the formula grantee's certification to affirmatively further fair housing under 24 CFR part 91.

* * * * *

PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM

■ 40. The authority citation for part 576 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 11371 *et seq.*, 42 U.S.C. 3535(d).

■ 41. In § 576.500 revise paragraph (s)(1)(ii) to read as follows:

§ 576.500 Recordkeeping and reporting requirements.

* * * * *

(s) * * *

(1) * * *

(ii) Documentation in regard to the recipient's certification that the recipient will affirmatively further fair housing.

* * * * *

PART 903—PUBLIC HOUSING AGENCY PLANS

■ 42. The authority citation for part 903 continues to read as follows:

Authority: 42 U.S.C. 1437c; 42 U.S.C. 1437c–1; Pub. L. 110–289; 42 U.S.C. 3535d.

■ 43. In § 903.7 revise paragraphs (o)(1) and (3) to read as follows:

§ 903.7 What information must a PHA provide in the Annual Plan?

* * * * *

(o) * * *

(1) The PHA must certify that it has consulted with the local jurisdiction on how to satisfy their obligations in common to affirmatively further fair housing, and that it will carry out its plan in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4), the Fair Housing Act (42 U.S.C. 3601–19), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*), and other applicable Federal civil right laws, and that it will affirmatively further fair housing in its programs and in areas under its direct control.

* * * * *

(3) If the PHA has been subject to an unresolved HUD letter of finding or a material finding of a civil rights

violation by a court or administrative law judge in an action brought by or on behalf of HUD or by the United States Department of Justice in the last two years that has not been successfully appealed or otherwise set aside at the time of the submission of the certification, then the PHA must include with its certification an explanation of what steps the PHA has taken and is taking to resolve the violation.

* * * * *

■ 44. Revise § 903.15 to read as follows:

§ 903.15 What is the relationship of the public housing agency plans to the Consolidated Plan and a PHA's Fair Housing Requirements?

A PHA is obligated to affirmatively further fair housing, as contemplated in § 903.7(o). All admission and occupancy policies for public housing and Section 8 tenant-based housing programs must comply with Fair Housing Act requirements and other civil rights laws and regulations and with a PHA's plans to affirmatively further fair housing. The PHA may not impose any specific income or racial quotas for any development or developments.

(a) *Nondiscrimination.* A PHA must carry out its PHA Plan in conformity with the nondiscrimination requirements in Federal civil rights laws, including title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Fair Housing Act. A PHA may not assign housing to persons in a particular section of a community or to a development or building based on race, color, religion, sex, disability, familial status, or national origin for purposes of segregating populations.

(b) *Affirmatively Furthering Fair Housing.* A PHA's policies should be designed in conformity with any applicable certification to affirmatively further fair housing as part of a consolidated plan under 24 CFR part 91 and the PHA's assessment of its fair housing needs.

(1) The Fair Housing Act provides that PHAs must certify that they will affirmatively further fair housing. PHAs must affirmatively further fair housing as detailed in § 903.7(o).

(2) Such affirmative steps may include, but are not limited to, marketing efforts, engagement with landlords to promote the acceptance of housing choice vouchers, use of nondiscriminatory tenant selection and assignment policies that lead to increased fair housing choice, additional applicant consultation and information, provision of additional supportive services and amenities to a

development (such as supportive services that enable an individual with a disability to transfer from an institutional setting into the community), and engagement in ongoing coordination with state and local aging and disability community and community-based organizations to provide additional community-based housing opportunities for individuals with disabilities and to connect such individuals with supportive services to enable an individual with a disability to transfer from an institutional setting into the community and facilitate the provision of such services at PHA properties.

(c) *Validity of certification.* (1) A PHA's certification under § 903.7(o) will be subject to challenge by HUD where it appears that a PHA fails to meet the requirements in 24 CFR 903.7(o).

(2) If HUD challenges the validity of a PHA's certification, HUD will do so in writing specifying the deficiencies, and will give the PHA an opportunity to respond to the particular challenge in writing. In responding to the specified deficiencies, a PHA must establish, as applicable, that it has complied with fair housing and civil rights laws and regulations, or has remedied violations of fair housing and civil rights laws and regulations, and has adopted policies and undertaken actions to affirmatively further fair housing, including, but not limited to, providing a full range of housing opportunities to applicants and tenants and taking affirmative steps as described in paragraph (d)(2) of this section in a nondiscriminatory manner. In responding to the PHA, HUD may accept the PHA's explanation and withdraw the challenge, undertake further investigation, or pursue other remedies available under law. HUD will seek to obtain voluntary corrective action consistent with the specified deficiencies. In determining whether a PHA has complied with its certification, HUD will review the PHA's circumstances relevant to the specified deficiencies, including characteristics of the population served by the PHA; characteristics of the PHA's existing housing stock; and decisions, plans, goals, priorities, strategies, and actions of the PHA, including those designed to affirmatively further fair housing.

■ 45. In § 903.23 revise paragraph (f) to read as follows:

§ 903.23 What is the process by which HUD reviews, approves, or disapproves an Annual Plan?

* * * * *

(f) *Recordkeeping.* PHAs must maintain records reflecting actions to

affirmatively further fair housing, as described in § 903.7(o).

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

■ 46. The authority citation for part 905 continues to read as follows:

Authority: 42 U.S.C. 1437g, 42 U.S.C. 1437z–2, 42 U.S.C. 1437z–7, and 3535(d).

■ 47. In § 905.308 revise paragraph (b)(1) to read as follows:

§ 905.308 Federal requirements applicable to all Capital Fund activities.

* * * * *

(b) * * *

(1) *Nondiscrimination and equal opportunity.* The PHA shall comply with all applicable nondiscrimination and equal opportunity requirements, including, but not limited to, the Department's generally applicable nondiscrimination and equal opportunity requirements at 24 CFR 5.105(a) and the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*), and its implementing regulations at 24 CFR parts 40 and 41. The PHA shall affirmatively further fair housing in its use of funds under this part, following the requirements at 24 CFR 903.7(o).

* * * * *

Dated: January 6, 2020.

Benjamin S. Carson, Sr.,

Secretary.

[FR Doc. 2020–00234 Filed 1–13–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–125710–18]

RIN 1545–BP07

Revised Applicability Dates for Regulations Under Section 382(h) Related to Built-in Gain and Loss

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Partial withdrawal of notice of proposed rulemaking; notice of proposed rulemaking.

SUMMARY: This document withdraws a portion of a notice of proposed rulemaking published in the Proposed Rules section of the **Federal Register** on September 10, 2019. That notice of proposed rulemaking contained proposed rules to provide guidance regarding the items of income and deduction that are included in the calculation of built-in gains and losses

under section 382 of the Internal Revenue Code (Code). If adopted, those proposed rules would apply to any ownership change occurring after the date the Treasury decision adopting those proposed rules as a final regulation is published in the **Federal Register**. This notice of proposed rulemaking would delay the applicability of those proposed rules and provide transition relief for eligible taxpayers. The proposed regulations in this notice of proposed rulemaking would affect corporations that experience an ownership change for purposes of section 382.

DATES: Written or electronic comments must be received by *March 16, 2020*. Written or electronic requests for a public hearing and outlines of topics to be discussed at the public hearing must be received by *March 16, 2020*.

ADDRESSES: Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG–125710–18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: Internal Revenue Service, CC:PA:LPD:PR (REG–125710–18), Room 5203, Post Office Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Jonathan R. Neuville at (202) 317–5363; concerning submissions of comments or requests for a public hearing, Regina L. Johnson at (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On September 10, 2019, the Treasury Department and the IRS published in the **Federal Register** (84 FR 47455) a notice of proposed rulemaking (REG–125710–18) proposing revisions to the rules in §§ 1.382–2 and 1.382–7 (September 2019 proposed regulations). These rules would affect the determination of net built-in gains and losses and recognized built-in gains and losses under section 382(h) that, in turn, affect the limitation under section 382 on net operating losses and disallowed business interest expense under section 163(j).